



During the COVID-19 global pandemic, businesses needed to react quickly to shutdown orders, quarantines and new safety requirements. Now, as federal, state and local governments begin to allow businesses to reopen, employers again need to adapt to a continuously changing landscape of executive orders, laws and safety requirements when bringing employees back to work and resuming operations. Here are some important considerations for employers preparing to return to work in our new normal.

DEVELOPING HEALTH AND SAFETY PROTOCOLS

Workplace Safety Protocols

Federal law requires employers to provide employees with a safe work environment. The Occupational Safety and Health Administration (OSHA) has provided guidance for employers to help them meet these obligations in response to the COVID-19 pandemic. To comply with OSHA's requirements for a safe workplace, employers should develop a written COVID-19 Safety and Health Program, which includes the following elements:

- ▶ Conducting a hazard and risk assessment;
- ▶ Developing a written infectious disease preparedness and response plan that includes: (i) a description of the potential sources of work-related COVID-19 transmission; and (ii) workplace controls (engineering and administrative controls and PPE)
- ▶ Designating a person(s) responsible for implementing the program; and,
- ▶ Implementing the program.

COVID-19 Safety and Health Programs should also address the specific requirements of state and local laws and executive orders or industry-specific requirements.

Protocols to Screen for Illness

Employers may be required or choose to implement protocols to screen employees and visitors for COVID-19 before permitting access to the worksite, including temperature testing or testing for the virus itself. Employers must implement screening protocols in a nondiscriminatory, safe and legally compliant manner. Important considerations for screening or testing for COVID-19 include:

- ▶ Designating a specific authorized individual(s) to screen for COVID-19;
- ▶ Training the designated individual(s);
- ▶ Providing personal protective equipment (PPE);
- ▶ Protecting sensitive medical information;
- ▶ Implementing a screening procedure that addresses privacy issues of those screened and compensation for time spent being screened or waiting for screening; and
- ▶ Planning the response if screening finds the employee or visitor has symptoms of COVID-19.

Guidance for Managers

Employers should create a protocol for managers to use during the workday to determine how to handle certain situations involving COVID-19, including:

- ▶ Detection of COVID-19 symptoms or disclosure of a COVID-19 diagnosis;

- ▶ Upholding social distancing requirement and preventing close contact;
- ▶ Responding to employees' report of travel or voluntary self-quarantine or isolation, or quarantine or isolation pursuant to a federal, state or local order; and
- ▶ Responding to an employee awaiting COVID-19 test results.

IMPLEMENTING LEAVE AND OTHER POLICIES AND CHANGING COMPENSATION AND WORK SCHEDULES

Federal or State Leave Requirements

For employers covered by the Families First Coronavirus Response Act (FFCRA), when an employee receives sick leave and/or family leave benefits provided under FFCRA, the employer will need to obtain and preserve documentation of such benefits to qualify for the tax credits available under FFCRA. Employers need to know what documentation is required or permitted under FFCRA.

In addition to providing sick leave and family leave benefits under FFCRA, employers may be required to offer employees leave benefits under state and local laws or ordinances, as well as their own leave policies. Employers should establish policies for documenting leave and ensuring compliance with laws and policies.

Work from Home Policies

The COVID-19 pandemic forced many employers quickly to permit and enable employees to work remotely. Even as businesses reopen, teleworking for some portion of the workforce may be here to stay. To the extent employers continue teleworking arrangements, employers should ensure compliance with wage-and-hour laws, including rest and meal break requirements and overtime pay, to reduce the risk of Fair Labor Standards Act (FLSA) or state wage-and-hour claims.

Compensation and Schedule Changes

The COVID-19 pandemic caused financial difficulties for many businesses. Employers may need to consider reductions in compensation and hours of work for employees. Before implementing any compensation or schedule changes, employers should consider:

- ▶ Whether the employee is exempt or nonexempt from overtime so that any such changes comply with FLSA and other state or local wage-and-hour laws,
- ▶ Whether the employee has an employment agreement or is covered by a collective bargaining agreement (CBA) that restricts the employer from implementing any changes;
- ▶ Whether any company policy relates to the proposed changes in compensation or hours of work;

- ▶ Conducting a discrimination analysis to avoid discrimination/disparate impact issues; and
- ▶ Providing written notice of any compensation or schedule changes consistent with applicable law or any applicable agreement, including a CBA.

RETURNING TO IN-PERSON OPERATIONS

Return to Work Certification

For employees who return to work from furlough, layoff or self-quarantine due to COVID-19, employers should, and may be required to, request that employees state whether, within the prior 14 days, they were diagnosed with COVID-19, experienced symptoms of COVID-19, came in close contact with someone who was diagnosed with or experienced symptoms of COVID-19 or engaged in any travel. Employers should consider implementing a return to work certification to identify these circumstances.

Return to Work Survey

Some employers may wish to conduct a voluntary return to work survey to plan for employees safely returning to work in-person and to understand ongoing challenges that employees may face as they return to work.

Because employers must comply with anti-discrimination laws, employers who implement such voluntary surveys (which may involve child care needs, health concerns, status of any COVID-19 diagnosis or symptoms, or work commute) must be careful about how such information is stored and used and who has access to it.

Employee/Contractor Reporting of Circumstances Form

To help maintain a healthy and safe workplace, employees who report to work in-person or contractors who enter the workplace must know to whom they should report if they are diagnosed with COVID-19 or experience symptoms of COVID-19 before, during or after work, and what situations and symptoms to look out for regarding COVID-19. Employers should consider making available to employees and contractors a form to self-monitor for symptoms or report a diagnosis of COVID-19.

RECALLING EMPLOYEES OR IMPLEMENTING FURLOUGHS AND LAYOFFS

Recalling Employees from Furlough or Layoff

Employers should prepare a notification for recalling employees, which should include:

- ▶ The return time and date;
- ▶ Any changes to work schedule, duties or reporting relationship;
- ▶ Any impact on benefits;
- ▶ Any changes in compensation;
- ▶ Confirmation of the employee's at-will status;
- ▶ COVID-19 self-monitoring and reporting requirements;
- ▶ Information regarding workplace safety and health; and
- ▶ Any other term or condition of employment originally addressed in the furlough notice.

Employers should conduct a nondiscriminatory analysis when recalls are done selectively (similar as they would in a reduction in force) and (if applicable) review the CBA.

Implementing Furloughs or Layoffs

Employers should consider whether furloughs or layoffs trigger WARN Act obligations. Under the federal WARN Act, an employer is required to provide employees 60 days' notice of plant closing or mass layoff, as those terms are defined in the act. Many states or cities enacted plant-closing or mass layoff laws with additional reporting requirements or different thresholds for triggering notice to employees. The failure to comply with applicable notice requirements carries significant financial penalties.

CHECKLISTS

When reopening worksites, important steps and considerations to keep in mind include but are not limited to:

Employee Benefits and Executive Compensation

- ▶ Ensure continued compliance with COBRA; however, employers should note recent regulations issued April 29, 2020 tolling the timing rules under COBRA with respect to providing notice, electing coverage and paying required premiums from March 1, 2020 through the date that is 60 days after the federally declared National Emergency ends. Employers should continue to provide COBRA notices in accordance with past practices and track those employees who are eligible to elect COBRA subject to the extended election period;
- ▶ Allow employees to recomplete deferral elections under 401(k) 403(b), 457(b) retirement and cafeteria plans, as necessary based on status of employee and terms of plan documents;
- ▶ Examine non-elective retirement plans (i.e., defined benefit pension plans, money purchase plans and profit sharing plans) with respect to the counting of hours of service for vesting and benefit accruals during the 2020 plan year to address furlough or layoff issues; and
- ▶ Nonqualified deferred compensation plans (409A and 457(f)) would have elective deferrals and/or employer contributions resume (with limited ability to change elections or contributions mid-year).

Immigration

- ▶ Partially reCompleting all I-9 forms for new hires during the closure period;
- ▶ Allowing employees with E-Verify Tentative Nonconfirmations back to work until SSA and USCIS offices reopen;
- ▶ Determine whether worksites have been altered for H-1B workers;
- ▶ Prepare for potential site visits from USCIS;
- ▶ Determine under what circumstances remote work/international work policies will continue;
- ▶ Determine obligations when entering into a government contract; and
- ▶ Maintaining continuity of immigration status of foreign national employees.

ABOUT DUANE MORRIS

Duane Morris is ready to help you prepare your workplace for the ever-changing COVID-19 landscape. As states reopen their economies and put into place new safety requirements, employers need to balance business interests, legal requirements and the health of their employees. Duane Morris has developed checklists, policies and forms that employers can use to navigate the complex issues and challenges presented by the pandemic. Whether an employer needs advice on issues relating to employment, benefits, immigration, labor or all of the above, Duane Morris attorneys are carefully monitoring and analyzing the latest COVID-19 developments.

FOR MORE INFORMATION, PLEASE CONTACT:

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