

Compliance Checklist: Managing COVID-19 Return-to-Work Issues

An Employer's Guide to Post-Shutdown Challenges

By Squire Patton Boggs partners [Laura Lawless](#) and [Dan Pasternak](#)

As states begin the process of gradually lifting COVID-19-related “stay-at-home” orders, employers face the unprecedented challenge of restarting their businesses after prolonged closure or after suddenly adopting a remote-working protocol. Here, we aim to identify the key employment issues that should be addressed with your employment and labor counsel and the new employment policies and practices that should be adopted as business operations resume and the country emerges from the COVID-19 global pandemic.

Work Environment	
Employers must prepare the workplace for employees' safe return.	
	Because workplaces may not have been thoroughly cleaned while idle, employers should arrange deep cleaning to neutralize the coronavirus. Source alcohol-based hand sanitizer, wipes and cleaning supplies for ongoing cleaning of offices and communal workspaces.
	Contact key vendors to ensure office, janitorial, custodial, mechanical, engineering, security and parking services are available.
	Source personal protective equipment (PPE) before employees' return and develop a training protocol explaining when and how PPE is to be used, cleaned and re-used.
	Staff, hospitality and security personnel should be trained on restricted access to the premises to limit virus exposure.
	Determine whether to begin (or continue) medical testing or symptom screening, such as fever testing, or more invasive measures, such as antibody testing or nasal swab testing. If implementing more invasive testing procedures, consider the types of written consents required to test employees to avoid claims of assault/battery or invasion of privacy – whether the test is job-related and consistent with business necessity under the Americans with Disabilities Act, whether the method of testing implicates the Genetic Information Non-Discrimination Act and whether terminating or disciplining employees for refusing to participate in testing runs afoul of state public policy.
	Physical modifications: Evaluate whether and how to implement infection mitigation protocols, such as relocating workstations for social distancing, installing Plexiglas dividers to reduce the spread of contamination and enhancing air filtration. Consider temporarily limiting access to employee break, locker and conference rooms and other shared spaces. If downsizing office space, ensure lactation and/or wellness rooms are available and comply with requirements for disability access, such as clear turning space and sufficiently wide paths of access in hallways, doorways and offices. Add signage reminding employees to maintain social distancing guidelines, to frequently wash hands and to engage in other CDC-recommended best practices for the industry.

Employee Scheduling	
	Assess whether work shifts can be staggered to promote social distancing, particularly where employees share workspaces.
	Consider phased reinstatement using non-discriminatory criteria (such as ability to effectively continue teleworking) to select who is returned first, and ensure Affordable Care Act (ACA) compliance.
Returning Employees from Furlough	
If furloughed employees are being recalled, employers should consider the following:	
	Comply with federal and state law regarding partial workweek payments for salaried, exempt employees if they return mid-week.
	Resume benefits suspended during furlough.
	If you provided employee benefits during furlough subject to an employee repayment obligation, recoup deferred premiums in a manner consistent with minimum wage and salary basis requirements.
	Ensure your policy regarding accrual of leave during furlough is consistent with other leave of absence policies.
	Address requests for use of time off (both statutory entitlement and policy-based) following return from furlough.
	Address continued accrual or deferral of seniority during furlough.
Converting Furloughs to Layoffs	
If economic pressures force you to convert a furlough to a permanent layoff, consider the following:	
	Is Worker Adjustment and Retraining Notification Act (WARN Act) or state mini-WARN Act notice required? If so, determine the employees, representatives and government officials who must be notified.
	Are COBRA or state mini-COBRA obligations triggered by the layoff?
	Do selected employees have conversion rights with regard to other insured benefits?
	Compute paid time off (PTO) benefits and determine deadlines for final wage payments, including PTO where applicable.
	Are grants or customer contracts impacted by the termination of key employees?
	Review employment and collective bargaining agreements (CBAs) for prerequisites to termination, severance eligibility, accelerated equity vesting and incentive compensation payments.
	Review selection criteria to avoid disparate impact on protected classes.
	Evaluate whether to offer severance to terminees, either per existing severance plans or in consideration for releases and waivers of claims.
	Comply with state law regarding forms of notice of termination.
	Review whether the number of terminations decreases the percentage of plan participants enough to constitute a partial termination of a qualified retirement plan.
	Prepare for questions regarding unemployment eligibility and applications.
	Reassess ACA coverage and reporting obligations.

Leaves of Absence

	Amend existing paid sick leave and Family and Medical Leave Act (FMLA) policies to comply with the Families First Coronavirus Response Act (FFCRA) or adopt a temporary FFCRA policy through December 31, 2020, if applicable.
	Ensure external FMLA claims-processing vendors understand your FFCRA coverage and will administer claims.
	Review all state and municipal paid sick and unpaid leave laws — both those predating and those adopted in response to COVID-19 — and ensure policies meet or exceed such requirements.
	Train on non-FFCRA FMLA leave requests and ensure managers and human resources professionals understand what triggers notice of a covered serious health condition and deadlines for providing notices of FMLA eligibility.
	Review non-FMLA medical/personal leave of absence policies to determine availability of time off for COVID-19 issues, including for child care for workers ineligible for FFCRA leave.
	Train on leaves as potential ADA accommodations, including reviewing past precedent for permitting time off, the burdens (if any) associated with doing so and the circumstances under which leaves were granted and for how long.
	Designate personnel responsible for coordinating requests for temporary sick, FMLA/FFCRA, short-term disability, workers' compensation and ADA leaves of absence to ensure all types of leaves have been considered and employees' rights are fully protected.
	Plan and prepare for disciplinary measures for employees who are proven to fraudulently request leave, including falsifying reasons for leave or doctoring medical forms.

Extended Teleworking

	Determine whether customer demands and essential job functions permit extended teleworking by employees without child care and whether doing so obviates FFCRA leave requests.
	Consider whether the business will grant requests to telework due to employee concerns regarding infection risk factors, whether as a disability accommodation, to assuage employee fears or simply as a matter of employee convenience or preference.
	Evaluate whether teleworking is required or recommended as a safety precaution for uniquely vulnerable segments of the workforce, such as those who have pre-existing respiratory or autoimmune disorders, chronic conditions or immunosuppressing conditions (or are taking immunosuppressing medications) or who are older or pregnant.
	Assess accuracy of paper timekeeping records or ability to implement electronic timekeeping systems for nonexempt remote workers, and retrain on the importance of recording all hours worked and avoiding off-the-clock work.
	Train extended teleworkers on how to reduce risks of "home workplace" injuries and to promptly report potential workers' compensation claims.
	Consider implementing ergonomic assessments of home workstations to avoid repetitive strain injuries and evaluations of home lighting to prevent eyestrain injuries.
	Source home office equipment needed as reasonable accommodations by employees with disabilities.
	Review state income tax laws affecting telecommuters working across state lines.
	Develop strategies for maintaining teamwork, accountability and communication.

	Collaborate with information technology (IT) and data security specialists to protect intellectual property, confidential and proprietary information and company trade secrets, incorporating enhanced information security training to prevent data corruption and breaches from unapproved devices and software and phishing scams.
Compensation	
	Adjust attendance-based incentive compensation plans to account for COVID-19 absences, assessing whether state law permits unilateral modifications to incentive compensation plans.
	Assess whether bonus plans based on company performance and/or individual contributions should be adjusted due to COVID-19 circumstances.
	Assess whether productivity quotas or sales commission plans should be amended, heeding state law restrictions.
	If implementing pay cuts, review state law regarding prior notice. Some states require up to 30 days' notice, and many require state-specific forms of notice, before reducing pay.
	If an employer has implemented hazard pay, shift differentials, retention or discretionary bonuses to incentivize working during the pandemic, include the additional compensation in nonexempt employees' regular rate of pay pursuant to the Fair Labor Standards Act, state wage payment laws and, where applicable, FFCRA wage replacement calculations.
	If employees were provided pay advances or permitted to accrue negative PTO or vacation balances, assess how to recoup them, noting state-specific limitations on pay deductions without advanced written authorization.
	Assess whether employees who "volunteered" for additional work, such as sewing face masks or researching the availability of PPE, should be compensated.
	Assess availability and appropriateness of work-sharing programs to minimize employment loss.
Contract Issues	
	Although most U.S. employers employ employees "at will," some have written contracts that permit executives to terminate them for "good reason," such as salary reduction or modification of responsibilities. Review employment agreements to ensure amendments do not trigger "good reason" clauses, or obtain consents in advance in a manner consistent with contractual provisions governing subsequent modification.
	Review employment contracts for <i>force majeure</i> clauses or whether, due to changed circumstances, an argument may exist that performance is impossible.
	Employers that are parties to restrictive covenant agreements (e.g., noncompetition, customer and/or employee non-solicitation and non-disclosure) should assess whether changed circumstances resulting from the pandemic impact their scope, including whether the employer's legitimate protectable interests have changed.
Labor/Union Issues	
Employers with employees represented by a labor union should be mindful of the following:	
	An employer ordinarily must offer to bargain with its employees' collective bargaining representative before changing wages, hours or other terms and conditions of employment.
	Employers that are party to a CBA containing a grievance arbitration procedure should assess the impact of the pandemic on the timeliness of those grievances.

	Employers must not take adverse action against union-represented and unrepresented employees for engaging in collective action regarding workplace concerns, such as health and safety, pursuant to the National Labor Relations Act.
Health & Safety	
	Determine if additional measures are needed to reduce workplace exposure to pathogens, following recommendations from the Occupational Safety and Health Administration (OSHA) and state equivalents, which obligate employers to provide workplaces free from recognized harm that are causing or are likely to cause death or serious physical harm.
	Comply with OSHA's Interim Enforcement Response Plan for reporting COVID-19 in the workplace.
	Remind employees of Employee Assistance Program (EAP) providers and services.
	Assess vulnerable populations in the workforce and implement measures to enhance safety precautions.
	Review privacy protocols under HIPAA and state privacy laws.
Policies and Procedures	
	If temperature testing of employees and visitors is implemented, use equipment with reasonable reliability for temperature gauging and ensure proper collection and maintenance of documentation, paying attention to confidentiality and ADA compliance.
	Consider suspending nonessential business travel and obtaining waivers from employees who elect to travel.
	Revise FMLA policies to address FFCRA benefits (if applicable).
	Review or implement a remote-working/teleworking policy, accounting for ADA reasonable accommodation.
	Review attendance and PTO policies, being mindful of likely use for COVID-19 reasons.
	Update job descriptions, including designating essential duties that cannot be performed remotely.
	Update business expense reimbursement policies to address expenses of remote work and cleaning PPE, paying attention to state-specific requirements for timeliness of reimbursement.
	Update information technology (IT) and data security policies and ensure employees receive training regarding COVID-19-related phishing schemes.
Documentation	
Maintain COVID-19 related documentation, including of:	
	cleaning/sanitizing procedures and logs of cleaning activities;
	contracts with external cleaning agencies and records of frequency of visits;
	dates of confirmed positive COVID-19 diagnoses, suspected positives and providing of potential exposure;
	temperature-testing and employer-initiated isolations;
	FFCRA paid leave documentation, including information to apply for tax credits; and
	daily headcount for FFCRA coverage and Paycheck Protection Program forgiveness under the CARES Act.