

# Preparing for Returns to Work and Workplace Reopenings: Considerations for Employers

*Hinckley Allen Labor & Employment*

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On April 16, 2020, President Trump announced the “Opening Up America Again” plan, the three-phased plan for state and local authorities to follow when reopening their economies. The plan provides guidelines. It is not an order so state governors retain the power to determine when to end lockdowns and stay-at-home orders. Some states have teamed up to work together to reopen. For example California, Oregon, and Washington have teamed up, as have Massachusetts, New York, New Jersey, Connecticut, Pennsylvania, Delaware, and Rhode Island. As governments begin planning for reopening, employers should do the same.

Hinckley Allen’s [Labor & Employment Group](#) is here to help employers plan for and navigate through the reopening/return-to-the workplace process. Below find a discussion of some of the areas employers should consider and plan for to ensure they are ready to reopen when states lift stay-at-home orders and nonessential business closures.

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### 1. Creating a Safe Workplace

As states begin to think about and plan for business reopenings, employers need to do the same. Hinckley Allen is carefully monitoring information released by local, state, and the federal governments to help employers create policies that comply with new guidance and regulations. Employers need to be proactive in establishing policies and procedures to have in place so they can reopen as quickly as possible when governors lift stay-at-home orders and nonessential business closures. Some areas to begin working on are:

- a. Developing and implementing appropriate workplace safety policies and practices including:
  - Social distancing policies
  - Protective equipment requirements and use
  - Testing, temperature checks, isolating, and contact tracing

- Sanitation policies and practices
- Travel policies
- Visitors, customer, and vendor policies
- Reconfiguring the physical workplace and strategies for adapting to layout changes
- Staggered shifts

b. Creating attendance and leave policies or update existing ones including:

- Personal sick leave and family medical leave policies
- Telework/remote work policies
- Disease preparedness and response plans
- Communications plans
- Timekeeping policies/procedures (e.g., time clock in and out)

## **2. Determining When to Reopen/Return to the Workplace**

The White House [released guidance](#) to assist employers and state and local governments in making decisions regarding reopening during the pandemic.

The guidance indicates that all employers should develop and implement policies in accordance with federal, state, and local regulations, and industry best practices regarding:

- Social distancing and protective equipment;
- Temperature checks;
- Sanitation;
- Use and disinfection of common and high-traffic areas;
- Business travel;
- Symptom monitoring and employee return-to-work protocols;
- Contact tracing.

If an employer operates in a state/region that has satisfied certain “gating” criteria, the guidance then indicates employers can begin to bring back employees in the following phased approach while adhering to the above-described practices.

### Phase 1

- Continue to encourage telework, whenever possible and feasible with business operations.
- If possible, return to work in phases.
- Close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols.
- Minimize nonessential travel and adhere to CDC guidelines regarding isolation following travel.
- Strongly consider special accommodations for personnel who are members of a vulnerable population.

### Phase 2

- Continue to encourage telework, whenever possible and feasible with business operations.
- Close common areas where personnel are likely to congregate and interact, or enforce moderate social distancing protocols.
- Strongly consider special accommodations for personnel who are members of a vulnerable population.

### Phase 3

- Resume unrestricted staffing of worksites.

In addition, the Occupational Safety and Health Administration (OSHA) has created general, high-level [guidance](#) for all employers on preparing workplaces and evaluating COVID-19 exposure risks, in addition to industry-specific guidance for retail workers, construction workforces, manufacturing industry workforces, and package delivery workforces.

When reopening/having employers return to the workplace, employers should take into account the above guidelines and any updated guidance from the Centers for Disease Control and Prevention (CDC), as well as guidance from state and local governments.

### **3. Ensuring Workplace Privacy**

If an employer plans to implement a temperature check policy, it must consider applicable data privacy statutes that may impose requirements for maintaining the security of the information collected. State statutes often impose requirements for maintaining the security of such data and potential penalties for failure to do so. Employers should take steps to limit access to information collected to a need-to-know basis and limit its use for management purposes. Additionally, security measures should be put in place to ensure there is not inadvertent disclosure to third parties or other employees. Employers also must be careful to properly maintain records of COVID-19 diagnostic tests and antibody testing. These records should be treated similar to all other medical records.

### **4. Implementing Family First Coronavirus Response Act (FFCRA) Leave and Other New Leave Programs**

Whether an employer is rehiring employees, bringing employees back from furloughs, or otherwise having employees return to the workplace, it needs to be cognizant of the new FFCRA leave benefits and state-specific expanded leave benefits. Employees of covered employers will be entitled to FFCRA leave benefits, for [qualifying reason](#) through December 21, 2020.

Generally, an employee's fear of returning to the workplace will not require that an employer allow the employee to work from home. However, if an employee is particularly vulnerable to COVID-19, depending on the specifics of the situation, the employee may be eligible for paid sick leave under the FFCRA or other leave policies or programs. Anxiety or similar conditions may also raise potential American with Disabilities (ADA) issues and, as such, will necessitate a discussion of reasonable accommodation. Moreover, employers need to be aware that choosing not to rehire or choosing not to bring an employee back from furlough because that employee may be eligible for FFCRA or other leave could be viewed as discriminatory and retaliatory behavior. Employers should not discriminate against employees based on knowledge of an employee's request or potential request for leave.

### **5. Addressing Wage and Hour Issues**

Due to revenue decreases or a stop of day-to-day operations due to stay-at-home orders, many employers had to make the difficult decision to reduce employee pay, reduce hours, terminate employees, and/or furlough employees. As employers bring employees back to work, employers need to be sure to comply with applicable wage and hour laws. Additionally, employers should review any employment contracts and collective bargaining agreements that may be implicated.

#### **a. Nonexempt Employees**

Nonexempt employees are entitled to overtime under the Fair Labor Standards Act and applicable state laws. They can be paid a salary or on an hourly basis. An employer is free to change the rate of pay to the original level and/or increase hours. Additionally, employers need to make sure wage notices comply with state and local laws.

Employers will have to examine whether time taken for any new screening or other procedures may be considered compensable.

#### b. Exempt Employees

Exempt employees are not entitled to overtime under either the Fair Labor Standards Act or applicable state laws. If employers intend to bring exempt employees back to work on a reduced schedule or with reduced pay, they need to keep the following in mind. An employer can prospectively reduce an exempt employee's salary due to economic circumstances. When doing so, however, the employer must be careful to maintain the employee's exempt status. This means ensuring the employee's salary meets the federal (\$684/week; \$35,568 when annualized) and state minimum applicable salary levels. Employers should avoid repeatedly changing an exempt employee's salary.

Additionally, exempt employees must generally be paid the same amount for each pay period in which they perform some work. This requirement can have implications for the timing of any furloughs for exempt employees that occur mid-workweek or any plans to implement reduced work schedules.

### **6. Assessing Unemployment Issues**

Employers who rehire employees need to be cognizant of reporting requirements. If an employer rehires an employee, the employer may have to report the new hires to various state agencies. Employer will need to look to the specific applicable state laws to determine how long it has to make such a report.

Some employers may face reluctance from employees to return to work. Where an employer has available work, the state may deny unemployment benefits to the employee if the employee refuses to work without good cause. The CARES Act unemployment provision provides that "quitting work without good cause to obtain additional benefits may be considered fraud." Further, the guidance states that if an individual obtains benefits through fraudulent measures, the employee or individual will be: (1) ineligible to receive any future unemployment compensation benefit payments; (2) responsible to pay back the benefits obtained because of fraud; and (3) subject to criminal sanctions and prosecution. Employers should report cases of suspected fraud to their state unemployment agency.

### **7. Evaluating Litigation Risks**

In addition to the potential retaliation issues involving individuals who take FFCRA leave and other COVID-19-related leave issues discussed above, employers should keep in mind some other potential areas for future litigation.

As employers reopen, a number of open questions remain. For instance, how will COVID-19 be treated under various workers' compensation schemes? Employees may seek to recover damages by filing workers' compensation claims to the extent they can link their exposure to their workplace. However, because recovery is generally capped by statute, plaintiffs' lawyers may also file suits claiming intent or willfulness in an effort to recover higher damages. Additionally, plaintiffs' lawyers may attempt to bring tort, negligence, or wrongful death claims. Generally, the burden is on employees to establish their injury or illness was directly caused by their duties. During the pandemic, some states are considering shifting the burden for cases involving COVID-19. Employers should monitor their state policies, laws, and regulations for updates.

Employers should also be aware of potential tort claims from customers, vendors, and/or workplace visitors. To protect against such claims, employers should ensure they can demonstrate that they are following CDC and OSHA guidance. Employers should document all efforts they take, including trainings, postings, and changed procedures, etc.

contact any member of our *Labor & Employment group* for assistance.

Disclaimer:

*This summary does not include or address every provision of the “Opening Up America Again” plan, which should be read in its entirety.*

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