

Best Workplace Practices Beyond COVID-19: Planning for the Employee's Return to Work

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SpencerFane

Three-Part Webinar Series

Best Workplace Practices Beyond COVID-19:

Planning for the Employee's Return to Work

Friday, May 1 | 12:00pm - 1:15pm CT

Managing Employees in the New Normal

Tuesday, May 5 | 12:00pm - 1:15pm CT

Strategies for Handling Future Challenges

Thursday, May 7 | 12:00pm - 1:15pm CT



If you are in-house counsel or a human resources professional and would like to attend, please email info@spencerfane.com.

Overview

- Planning to Return Employees to the Workplace
- Safety Precautions for the Return to the Workplace
- Addressing Specific Employee Concerns Regarding Returning to the Workplace

Initial Considerations for Returning to the Workplace

- Understand federal, state, and local guidelines
- Determine who will return to the office
- Determine when you want employees to return
- Communicating the message regarding the return to the workplace

Understand Guidelines/Assess Business Needs

- Issues to look for in federal, state, and local guidelines that may impact the number of employees you return to work:
 - Limitations on number of employees or people (based on capacity)
 - Limitations on any individual in the workplace
 - Social distancing requirements
- Assess business needs
 - **Operational needs** + **social distancing guidelines**, either from the CDC and OSHA or state requirements, like those issued by the State's Governor and the City's Mayor

Who Will You Call Back to the Workplace

- No one (continue to WFH)
- All employees v. limited number of employees
- Employees that volunteer v. employees the employer selects
- All full-time employees
- All employees that cannot perform work remotely

Who Will You Call Back to the Workplace

Operational Concerns?

- The answer is highly dependent on your type of business
 - **Manufacturing:** production needs, like a food co-packer or logistics warehouse, may dictate a specified number of employees for product flow
 - *Essential employees first:*
 - Line employees might be the first employees brought back, to optimize increasing demand while simultaneously familiarizing them with new social distancing protocols
 - Then, those same line employees instantly become the company’s “ambassadors” for making new social distancing protocols work as additional workers return

Who Will You Call Back to the Workplace

Operational Concerns?

- The answer is highly dependent on your type of business
 - Retail:** Reorganizing the store and prepping for customers to return is the priority since demand is very low right now
 - *Essential supervisors first:*
 - They are clearly the company's “ambassadors” for new social distancing protocols as additional workers return
 - They are also empowered to enforce accountability and adherence to the new protocols as their subordinates return to work

Who Will You Call Back to the Workplace

Operational Concerns?

- The answer is highly dependent on your type of business
 - **Service:** Consider Staging or Staggering Employees' Return to Work
 - *Essential employees first:*
 - Long-term or incumbent employees who are considered indispensable to the company
 - They can set the tone for how social distancing protocols work in the *New Normal*
 - They can also give confidence to more reluctant employees about holding one another accountable for following the new protocols
 - *Benefits of Staging*
 - “Eases” employees back into a structured environment
 - Helps alleviate stress from other employees who are remaining at home that the new guidelines are effective
 - Consider soliciting “volunteers” to come back first

Who Will You Call Back to the Workplace

- Should we call back employees that have had COVID-19 or been exposed to COVID-19?
- What about only recalling employees that are “not vulnerable?”
 - Potential age discrimination
 - Potential disability discrimination
 - Potential pregnancy discrimination
- What to do if you know that the employee is a “vulnerable” employee?

Who Will You Call Back to the Workplace

- After you have identified who you intend to ask to return to the office, if you will not return all employees:
 - Work with counsel to conduct a disparate impact analysis;
 - Determine how you are going to characterize other employees' status (e.g., work from home status, furlough); and
 - If you have received PPP funds, consider if your return to work plan creates a risk of reducing the loan forgiveness amount.

PPP Considerations for Employees' Return to Work

- The PPP's *primary purpose* is to encourage companies to retain employees during this critical time so their employees can forgo both the state unemployment compensation and the \$600 per week allowance granted by the CARES Act.
- Companies should keep the following considerations in mind with respect to the PPP's loan forgiveness mechanism as they return and rehire employees to work

How PPP's Loan Forgiveness Works

ONCE EMPLOYEES RETURN TO WORK...

- **June 30, 2020** is the deadline to rehire/restore to full employment the salary level changes made between *February 15, 2020* and *April 26, 2020*.
 - This is the **#1** prerequisite for maximizing the full extent of the PPP's loan forgiveness

So, *be thoughtful* about the timing and impact of returning your employees to work since those decisions directly impact your PPP debt levels.

How PPP's Loan Forgiveness Works

Be Careful!

- If the business reduces the number of employees during the PPP's 8 week time window beginning with the date the loan funded, any eligibility for loan forgiveness will be reduced by any full-time employee headcount changes the company makes
- If the business decreases salaries and wages by more than 25% for any employee who makes less than \$100,000, annualized for 2019, the loan forgiveness capacity will also be reduced by the same amount

When Do You Want Employees to Return

- Everyone returns to the workplace at once as normal
- Everyone returns to the workplace at once on modified schedules
 - Teams
 - Shift schedules
- Employees return in phases

Communicating the Return to the Workspace

- **General Message:**
 - Develop a clear and concise message to employees that outlines the general return to the workplace plan
 - Deliver the message with sufficient advance warning so that employees can make any necessary arrangements to be able to return to work
 - Explain the new expectations of employees (e.g. social distancing, taking temperatures)
 - Educate employees on the FFCRA leave that may be available and how to request it
 - Inform employees who have concerns about returning to work to contact a specific point person

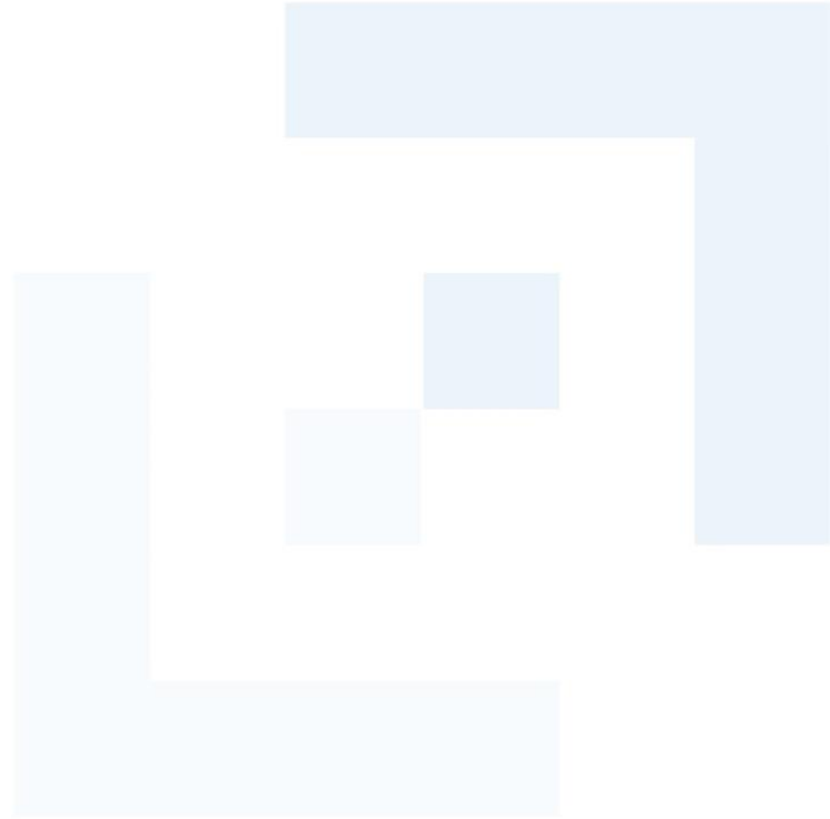
Communicating the Return to the Workspace

- Individualized message:
 - Specifics regarding the individual's expected return date
 - Specifics regarding the individual's schedule
 - Any new expectations for the employee's specific workspace (e.g. change in the physical space)
 - Incorporate any specific safety measurements necessary for the individual's position

Communicating the Return to the Workspace

- Be prepared to provide information regarding:
 - “Vulnerable” employees who do not want to work in the office
 - Other employees who want to continue to work remotely
 - Emergency FMLA
 - Paid Sick Leave
 - Use of PTO/Vacation/Sick Time
 - Unemployment benefits

Safety Precautions



Safety Precautions—Developing a Plan

- Importance of complying with CDC and state or local guidelines
- CDC and state guidelines, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- Texas guidelines: <https://www.dshs.state.tx.us/coronavirus/opentexas.aspx#protocols>
- Missouri: Show Me Strong Recovery Plan – Guidance and Frequently Asked Questions. Note: local jurisdictions like Kansas City, St. Louis allowed more restrictive policies
- First, develop a workplace preparedness plan for return. Consider appointing COVID coordinator.
- As part of plan, consider communicating with employees by virtual meeting, telephone conference, email, or similar procedure to hear their questions, concerns & input. A questionnaire to employees may be helpful.

Safety Precautions

- Assess whether worker exposure to COVID-19 is high or very high risk (e.g., medical providers), medium risk (most workplaces) or low risk.
- Consider the sources by which employees can be potentially exposed: Only by other employees? By the public? By vendors or suppliers? By travelers?
- Develop a plan for structuring the work force, minimizing contact with potential sources, enforcing safety protocols, and ensuring a safe workplace

Safety Precautions

- **Prepare to implement basic infection prevention measures, including:**
 - Require employees (and others) to wash or sanitize hands before or immediately upon entering facility
 - Frequent, thorough hand-washing. May need to provide additional or temporary washing and hand sanitizer stations.
 - Encourage respiratory etiquette, covering coughs & sneezes
 - Provide employees (and customers) with tissues and trash bins for easy disposal—employees must immediately wash or sanitize hands
- Discourage or prohibit common use of computers, desks, phones, equipment
- Minimize circulation of papers & other “hard” items among employees

Safety Precautions

- Limit, prohibit, or disable use of common rooms such as breakrooms, lunch rooms. Extra temporary break facilities? Enforce limits on number of persons in common rooms, and maintain social distancing.
- All activities must maintain social distancing at least 6 feet away, avoiding lines for shift change, time clocks, etc.
- If employer has lunch facilities, consider providing only individually packed lunches. Strictly limit the number of people who handle food.
- Encourage or require use of masks, especially if employees work near each other, or do not have separate offices. Gloves or other PPE as appropriate.
- Consider requiring visitors to wear masks, and if necessary, provide masks
- Develop plan for safe handling and disposal or cleaning of masks.

Safety Precautions

- **Regular, thorough housekeeping procedures**, routine cleaning and disinfecting of surfaces, equipment, and other parts of work environment
 - See the new CDC/EPA guidance for cleaning and disinfecting workplaces: www.epa.gov/coronavirus/guidance-cleaning-and-disinfecting-public-spaces-workplaces-businesses-schools-and-homes
 - Frequently touched non-porous surfaces, e.g., doorknobs, light switches, hard surfaces, bathroom surfaces, printers, copiers. Two steps: (1) Clean with soap & water, (2) disinfect with approved disinfectant, or diluted bleach (1/3 cup to 1 gallon water).
 - Porous surfaces (couches, fabric chairs, rugs) are harder to disinfect. Consider removing or taking out of service temporarily.
 - Have each employee clean & disinfect his/her work station, if feasible

Safety Precautions

- Limit visitors and access to facility, if possible, and record all visitors for potential contact tracing
- Prompt identification and isolation of potentially infected persons
- Encourage employees to self-monitor for COVID-19 symptoms
- Require workers to stay home if sick
- Require employees to report promptly if they are feeling sick or experiencing any potential COVID-19 symptoms
- Have flexible leave policies so you don't discourage employees from safe practices because they are worried about pay or attendance issues

Safety Precautions

- **Screening of employees before commencing work**
 - Per EEOC guidelines, employer may ask employees if they have COVID symptoms, including fever, chills, shortness of breath, cough, loss of smell or taste, or sore throat
 - Employer may take temperatures of current employees, and of applicants after a conditional job offer (no-touch thermometers)
- May administer COVID-19 tests, but make sure they are reliable
- May send home employees with symptoms
- May require doctor's note to return, but consider flexibility because of medical system overload
- Importance of training the person(s) who makes these determinations/tests

Safety Precautions

- **Must maintain confidentiality of screening records in separate files, which the employer always must do for medical records**
 - This includes records of an employee’s statement that he/she has the disease or symptoms, and any notes or documentation of questioning E’s
 - Includes any logs of temperatures taken
 - Follow the general rule of minimizing information to supervisors or others, only what they need to know, e.g., “John cannot work today” or “will be off for several days”

Safety Precautions

- **What if employee appears to have symptoms or reports illness?**
 - Should immediately isolate and send employee home
 - Clean and disinfect work area
- What about return? Rely on CDC or state health guidelines, for example:
 - Texas guidelines: if employee has tested positive or has COVID-19 symptoms (even if not tested), cannot return until either (a) at least 72 hours have passed since recovery, has improvement in respiratory symptoms, and at least 7 days since symptoms first appeared; OR (b) employee has medical provider's note clearing to return
 - Texas guidelines: Do not allow employee with known close contact to a person with COVID-19 to return until end of 14-day self-quarantine

Special Precautions—Retail

- **Retail:** Dedicate certain times to vulnerable customers, or deliver purchased products to vehicles to reduce need to enter store
 - Monitor items touched by customers and clean or disinfect after leaving store
 - Larger employers: Assign certain employees (with PPE) to cleaning functions
 - Contactless payment, i.e., only customer handles credit card, or at least minimize contact during payment
 - Hand sanitizer, disinfecting wipes, soap & water readily available
 - Place readily visible signs to remind customers of safe practices
 - May be occupancy limits, e.g., Missouri has formula for 25% (less than 10,000 sq. ft.) and 10% (greater than 10,000 sq. ft.)

Special Precautions—Restaurants

- **Restaurants:** Place tables at least 6 feet away, and limit the number of patrons per table. Alternate tables, and use booths with dividers if you can.
 - Do not allow waiting customers to congregate
 - Use disposable menus, new for each patron, and only single-use condiments
 - Either discontinue buffet serving, or have only employees serve buffet
 - Clean and disinfect the area used for dining (table, booth) after each customer, and any other items that come in contact with customers
 - Contactless payment, or at least minimize contact during payment
 - Hand sanitizer, disinfecting wipes, soap & water readily available
 - Place readily visible signs to remind customers of safe practices
 - Masks advisable, e.g., “strongly encouraged” by Missouri guidelines

Special Precautions—Theaters & Audiences

- **Movie Theaters (and Similar Facilities with Audiences):**
 - Ensure proper spacing between patrons in theater. Seat no more than a specified number of people next to each other, for example, two or more from same household, or two who are together but not same household
 - Maintain at least six feet (two or three seats) between each patron or group. Alternate rows so every other row is empty
 - Rules for food service similar to restaurants, e.g., single-use condiments, contactless payment, don't allow congregation or lines without distancing
 - Disinfect seats and all touched surfaces between screenings
 - Hand sanitizer, disinfecting wipes, soap & water readily available
 - Place readily visible signs to remind customers of safe practices

Safety Precautions: Work (Re)arrangements

- **Administrative changes:** Back to your original RTW plan: Which employees can work effectively from home? Which employees can only do their work in the workplace?
 - Can you schedule hours, start times, days, or shifts to reduce the number of employees onsite at any given time?
 - Discourage employees from needlessly fraternizing with or approaching each other, during work or non-work time (not a popular one . . .)
 - Discourage employees from congregating before or after work: Arrive on time, leave promptly when your work is done
 - Make sure employees understand that maintaining 6-foot distance from others, limits on group gatherings, and similar distancing rules apply to breaks, before & after work, as well as work time

Safety Precautions: Work (Re)arrangements

- Avoid in-person meetings and replace with virtual meetings, videoconferences, or telephone conferences, if possible
- Restructure conference rooms and meeting rooms to minimize number of persons who can be present, and ensure social distancing
- If you must have in-person meetings: small groups of as few as possible, maintain distancing, require masks
- Record persons who attend in-person meetings, to help with contact tracing if needed

Safety Precautions: Work (Re)arrangements

- **Engineering/Physical Changes:** Separate all work stations by at least 6 feet, if possible
 - Barriers between work stations, customer stations, and similar places
 - Alternating work stations (every other station) if possible
 - Require masks & PPE for employees who must work close to each other
 - Improve ventilation rates & use high-efficiency air filters, if possible
 - Install “no-touch” common surfaces, such as trash cans, door openers, lights, and bathroom fixtures

Safety Precautions—Importance of Training

- **Importance of training & information to supervisors and employees**
 - Train virtually or comply with the limitations on group meetings
 - Train on appropriate cleaning and disinfection, hand-cleaning, respiratory etiquette, distancing, limits on common usage & other protocols
 - Train on recognition of symptoms & need to self-monitor and report
 - Train your COVID coordinator and/or persons who make health-related inquiries, take temperatures, or other determinations
 - Post notices reminding employees (and customers & others) of safe practices and safety-mandated limitations
 - Use markings on floor and signs to maintain social distancing

Specific Employee Concerns Regarding the Return to the Workplace

Fearful Employees Reluctant to Returning to Work

Communication is key: engage in a dialogue with employees about their fears

1. Their safety is your priority
2. The company's procedures are consistent with federal and state guidelines
3. Remind employees of a shared responsibility for everyone to operate in the *New Normal*
 - These first steps can allay their fears.
 - If they don't, engage with them *one-on-one* to hear any legitimate concerns they still have.
 - If someone's unwilling to be convinced the company incorporated sufficient measures to keep them safe, there might not be *any* scenario that will satisfy them.

Fearful Employees Reluctant to Returning to Work

If such fearful employees refuse to come to work, what are the options:

- Review potential for continued WFH status
- Confirm no eligibility for EFMLA or PSL
- PTO/Vacation
- Unpaid leave of absence/furlough
- If receiving PPP funds, a paid leave of absence?
- Application of normal attendance policies

Reluctant Employees who Earn Money on Unemployment

- Workers in more than half of the U.S. will receive, on average, more in unemployment compensation benefits than they did from their regular pay.
- **Remind** these employees of the following:
 - The federal government’s unemployment benefits *expire July 31, 2020*.
 - So they risk enhanced short term benefits *versus* painful long-term loss, especially if the job pool is still highly reduced when they try to find another job
 - Once the company notifies the relevant state agencies the company has reinstated their old job, *their eligibility for continued benefits* from both the state and the federal government *automatically ends*.
 - For instance, according to the Texas Workforce Commission, employees **are not eligible** for unemployment if **they refuse to return to work**, since part of the ongoing eligibility requirements for Texas Unemployment Insurance is ‘being available for work; be willing and able to work all the days and hours required for the type of work you are seeking.’

“The 600 Unemployment Booster Shot, State by State,” *New York Times*, April 23, 2020
“Re-Opening Texas Leaves Workers with Tough Decisions,” NBC5 DFW, April 28, 2020

Employees Who Do Not Have Childcare

- This is a real problem that many employees will face.
- Paid Sick Leave and Emergency FMLA under the FFCRA is still available—we anticipate a significant uptick in use of PSL and EFMLA.
- PSL to take care of children without school or daycare due to COVID 19:
 - 80 hours full-time (prorated for those working under 40 hours a week); and
 - Paid at 2/3 normal wage/salary for this purpose.
- EFMLA:
 - Total of 12 weeks (with other FMLA);
 - First 10 days unpaid; and
 - Remaining time paid at 2/3 of normal wage/salary.

Employees Who Do Not Have Childcare

- Employers should try to be as flexible as possible:
 - Continue to allow remote work if possible
 - Flexible schedules
 - Agree to allow employees to use PSL and EFMLA intermittently when possible (not legally required)
- Do not forget that if an employer takes the tax credit for the PSL or EFMLA, those same payroll expenses cannot be counted as payroll expenses for PPP funds—no double dipping!

COVID-19 and the ADA

- **Question:** Does COVID-19 itself qualify as an accepted medical condition for purposes of the ADA?
- **Answer:** It depends. People who are asymptomatic or who recover from COVID-19 after a period of self-quarantine might not be.
 - *Why?* Under those circumstances, the transitory nature of the illness and the limited impact on any major life activities probably do not qualify
 - *But* people who are hospitalized due to an escalation of the disease on their bodies, i.e., being placed on a ventilator, experiencing neurological or circulatory problems, may very well qualify as protected individuals under the ADA, especially where those problems continue once they return to work.

COVID-19 and the ADA

- **What Must Companies Do?**
- The obligation to engage in the *interactive process* with these individuals *is paramount*.
- For example, a police officer who was hospitalized for 30 days with COVID-19 may now be protected by the ADA once he returned to work, based on his diagnosis and the lasting effects of the illness.

COVID-19 and the ADA

- **Question:** How do companies address employees who are already working with a reasonable accommodation under the ADA?
- **Answer:** The EEOC guidance authorizes companies to re-engage with employees currently using a reasonable accommodation to determine any need they might have for additional or heightened accommodations once they return to work.

COVID-19 and the ADA

- **Undue Hardships**

- Remember, any alternatives or additions for those employees will continue to be viewed under the *undue hardship* analysis.
- The pandemic may have changed the answer for alternative or additional accommodations and they impose an undue hardship
- For instance, if an employee requires frequent breaks to use the restroom under a current accommodation. Under normal circumstances, the case for an undue hardship is slim if not negligible.
- However, *with social distancing*, frequent employee breaks might create a risk and interfere with the company's ability to control human interaction. Under that scenario, a reasonable accommodation might change to allow the employee to work from home or work under a different setting until the pandemic has subsided.

COVID-19 and the ADA

- **Question:** Are employees who possess characteristics that are more susceptible to COVID-19 automatically protected by the ADA?
- **Answer:** The answer is probably no.
 - Older employees, pregnant employees, along with others—those with hypertension, diabetes, lung disease, asthma—still have to medically qualify for ADA protection.
 - Since the employer may not have prior knowledge of these conditions, employees must self-disclose that they have heightened concerns. Companies must handle these concerns on a *case by case* basis, consistent with local, state and federal guidelines.
 - *A good rule of thumb:* use the interactive process with these individuals to tailor a reasonable solution to address those concerns consistent with undue hardship principles but do not make assumptions about their ability or desire to work

Conclusion

- Take-Aways
 - Understand your state and local requirements
 - Plan for the return (do not wing this)
 - Do not make assumptions about the vulnerable or “high risk” populations
 - Communicate with employees frequently and clearly
 - Do not assume “common sense” in this situation—there is no such thing
 - Be flexible when possible
- Join us for the second part of our discussion regarding the return to the workplace “Managing in the New Normal” on May 5, 2020!

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