

MAY 6, 2020 | PUBLICATION

Client Alert: Considerations for Employers for Returning to Work During COVID-19

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As many businesses begin to resume their activity levels with the loosening of shelter-in-place orders, this Client Alert addresses employment-related issues clients should be mindful of, including: preparing for employees' return to work, recalling employees from a furlough or rehiring after layoffs, and HR best practices for operating in the COVID-19 era.

Preparing for Return to Work

Employers should consider the following in preparing to return their employees to the workplace.

- **Workspace Layout** – Assess the level of risk present at various worksites and the extent to which employees can be exposed to COVID-19 by co-workers, customers, guests, and the general public. Take appropriate preventative measures prior to resuming operations, such as staggering employees' return to work dates or implementing multiple shifts to limit the number of people in the workplace, rearranging the physical workspace to assist with social distancing, and limiting the number of people in common areas.
- **CDC Guidelines** – Monitor and ensure compliance with applicable CDC guidelines regarding reducing transmission of COVID-19 among employees (for example, social distancing and cleaning/disinfection protocols).
- **State and Local Requirements** – Review and implement applicable state and local COVID-19 orders and guidance. Many of these orders are continuously evolving. Employers should regularly monitor the status of these orders and adapt their operations to ensure continuing compliance.
- **OSHA Safety and PPE Requirements** – Employers have a duty under OSHA to protect employees from exposure to the virus that causes COVID-19 as well as a general duty to provide a workplace free from recognized hazards. Employers should review and implement OSHA's COVID-19 guidance regarding the use of personal protective equipment ("PPE"). Per OSHA's guidance, employers may be required to provide employees with PPE (and train employees regarding the use of PPE) depending on the level of risk associated with the employee's position.
- **FFCRA Policy and Request Forms** – Employers with fewer than 500 employees should be prepared to provide paid leave to eligible employees under the Families First Coronavirus Response Act ("FFCRA") with limited exceptions. Employers should consider implementing an FFCRA Leave Policy to ensure

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compliance and consistency. Additionally, employers are required under the FFCRA (and to obtain the corresponding tax credit) to collect specific information about an employee's request for leave. Accordingly, before returning their workforces, employers should develop standard FFCRA request forms that will capture the required information.

- **Identifying Employees with Return to Work Challenges** – To determine which employees may have issues with returning to work due to childcare, transportation, and/or medical issues, employers should utilize the EEOC's approved questionnaire, which can be located within Section III(A)(2) of the EEOC's pandemic flu guidance. Additionally, the EEOC has approved employers asking employees in advance of the date of return to identify any reasonable accommodations they will need when they return.
- **Employee Infection/Exposure Plan** – With a return to operations, employers will need a plan to address employees who test positive for COVID-19 or are in close proximity to someone else who is infected. Such a plan should address how the employer will handle notice to its workforce, quarantine requirements for infected employees and exposed co-workers, and cleaning/sanitation protocols or temporary closures in the event of an infection/exposure.
- **Update Existing Policies** – Employers should consider updating applicable policies and procedures—such as sick leave/PTO policies, attendance policies, and work-from-home policies—prior to returning their workforce to ensure such policies are appropriate for the COVID-19 era.

Recalling Employees

Employers should be mindful of the following when recalling their employees.

- **Return to Work/Furlough Recall Letter** – Employers should utilize a standard return-to-work or furlough recall letter. At a minimum, the letter should provide advance notice of the return date, request that employees with issues about returning to work notify the employer in writing as soon as possible, identify that the employer has work available for the employee (to preclude employee's continued eligibility for unemployment), and provide a contact person for questions/concerns.
- **Selecting Employees to Recall** – Employers must ensure that they select employees to return to work in a nondiscriminatory fashion. Return to work decisions must be made without regard to race, color, religion, age, disability, or any other protected class. Employers must also not retaliate against employees for having requested or taken protected leave.
- **Reducing Compensation/Hours** – Employers must also ensure that any reductions in compensation or hours do not cause an employee to lose their exempt status or breach applicable employment contracts.
- **Rehiring** – If re-hiring employees who were previously terminated or laid off, employers must complete a new onboarding process, including preparing a new employment agreement, new restrictive covenant agreement (i.e., non-compete, non-solicit, confidentiality), signing a new handbook acknowledgment, and completing a new I-9 (or Section 3 of the original I-9 if within three years of the initial verification). It is particularly important to have re-hired employees sign new restrictive covenant agreements, as the employee's prior post-termination restrictive covenants will have begun to run down upon the employee's prior termination and will eventually lapse without a new agreement. If employees need to re-sign restrictive covenant agreements, employers should consider updating their form agreement to ensure compliance with recent developments in the law (for example, the federal Defend Trade Secrets Act).
- **Background Checks** – Some employers may be required to run new background checks on returning employees. If using an outside vendor to do so, employers must comply with numerous documentation requirements and other requirements under the federal Fair Credit Reporting Act and applicable state law. Among other requirements, the Fair Credit Reporting Act requires that employees

be provided a very specific disclosure in a document containing no other information (i.e., state law notices, waivers, releases, etc.).

- **Terminations** – Employers may decide to terminate some employees rather than returning them to the workplace. When doing so, employers should ensure that they do so in a nondiscriminatory manner and that they carefully review and comply with any requirements in an employment agreement (such as providing notice of termination, payment of PTO, or payment of required severance). Employers with more than 100 employees should also consider if such terminations require advance notice under the WARN Act.
- **Employee Objections to Returning to Work** – Employers should consult with counsel upon receiving an employee's refusal to return to work or objection to any aspect of their working conditions. Such objections may be protected under various laws, including OSHA, the NLRA, the FFCRA, and the ADA. Employers should also expect employees to request reasonable accommodations under the ADA. The EEOC has confirmed that employers must still participate in the interactive process in response to a request for accommodation. Employers should have standard forms to document the accommodation(s) requested and to obtain medical certification.
- **Benefits Issues** – For employees who were furloughed and not terminated, it is important to confirm, if they are benefits eligible, whether re-enrollment in their benefit plans is necessary. For most welfare plans (health, dental, and vision), re-enrollment will not be necessary, but if it is, the employee usually has only 30 days to re-enroll. If the employer paid the employee share of health insurance premiums during furlough, the employer can work with employees to institute additional payroll deductions for the employee premiums that were covered during furlough (these can be done on a pre-tax basis). For 401(k) plans, the employees' deferral elections should resume without further action on their part, so they must change their elections if they would like to have a different election be applied to the compensation that they receive after they resume working.

For employees who were terminated and are being re-hired, they will need to be re-enrolled in benefits as a new hire, unless the plan has re-hire provisions that apply. However, the employer may want to look at waiving any normal waiting periods for re-hires who have been recently terminated. The employer will need to look at the plan to determine if this is necessary. On the 401(k) plan, the employee would need to make a new election if he or she wants to defer compensation, or, if the plan has automatic enrollment, those provisions would normally apply to a re-hired employee.

Employers should also review their plans to determine if the plans were operated differently from the normal terms of the plans (for example, allowing employees to continue active participation in a health plan during leave when they would normally lose eligibility). If there was a difference in operations, even if it was temporary, employers should adopt an amendment to their plans to document the different operations.

Operating During the Pandemic

Below are major considerations for safely operating during the COVID-19 pandemic.

- **Employee Health Questionnaires** – Consider requiring employees to complete a health questionnaire before beginning each workday/work shift to identify employees who might be at risk and in need of self-quarantine, a telework arrangement, or leave under the FFCRA. Employers in some industries (restaurants, for example) may be *required* to implement medical questionnaires. Further, to allow for exposure tracking in case of an infection, employers should consider having employees keep a log of the other employees they were in close contact with on a daily basis.
- **Temperature Checks** – As of the date of this Client Alert, the EEOC has approved of the use of temperature checks during the COVID-19 pandemic. Remember, though, that some employees with

COVID-19 might not have a fever. Accordingly, employers utilizing temperature checks should also consider utilizing an employee health questionnaire (discussed above). To maintain confidentiality, the temperature check should be performed in a private space by someone other than the employee's direct supervisor. Employers likely would be required to provide PPE to individuals performing temperature checks under OSHA's COVID-19 guidance. Employers should compensate employees for the time spent waiting for and undergoing the temperature check. As always, keep all employee health information confidential and in a file separate from the employee's personnel file.

- **Testing** – As of the date of this Client Alert, the EEOC has approved of employee COVID-19 testing during the pandemic. The implementation of COVID-19 testing in the workplace involves numerous legal and operational issues. Employers seeking to implement mandatory COVID-19 testing should consult with counsel.
- **Paid Leave under the FFCRA** – Employers with fewer than 500 employees are required to provide paid leave to eligible employees under the Families First Coronavirus Response Act ("FFCRA") with limited exceptions. Some employees recalled to work may now be eligible for paid leave under the FFCRA. Employers should be familiar with the reasons for leave, how employees on leave are to be compensated, and documentation requirements. Consult Shumaker's FFCRA Client Alert for details regarding paid leave under the FFCRA.
- **Drug/Alcohol Testing** – Some employers may wish to require returning employees to undergo new drug and alcohol testing. If doing so, employers must comply with their drug testing policy and implement testing in a nondiscriminatory fashion by requiring all returning employees to undergo testing.

Careful attention to the issues discussed above will be crucial during this delicate time. Given the novelty of conducting business during and in the wake of a pandemic, not to mention the employee protections available under pre-existing and newly passed legislation, we anticipate there will be an increase in lawsuits against employers arising from various return-to-work issues. For this reason, employers should be extra vigilant as they return their employees to the workplace. Employers should not ignore issues raised by employees and should consult with counsel upon receipt of any demand letters or legal complaints. As always, please reach out to us with any questions.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource & Return-to-Work Guide at shumaker.com. To receive the latest news and updates regarding COVID-19 straight to your inbox, sign up [here](#).