

## Recommended Steps to Bring Employees Back to the Workplace

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May 4, 2020

With federal and state governments' contemplation of plans to reopen the economy, employers should begin considering necessary and recommended steps to bring employees back to the workplace, and legal issues raised by doing so.

### ***Governmental Guidance and Directives***

Federal, state, and local governments are expected to continue and even expand health, safety and social distancing protocols and requirements for reopening/restarting operations. Employers looking to reopen must consider whether the states and local governments in which they operate have any restrictions for the reopening workplace. Employers should examine the following questions:

- What are the eligibility criteria for reopening (for example, based on geographical location or industry type)?
- To what extent can the workplace be open (for example, the entire operation or just certain departments)?
- How many employees can return to the workplace?
- What protocols must be followed in the reopened workplace?

Employers should stay current on the guidance, as well as any rules and regulations, by public health and administrative agencies. These include the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the U.S. Department of Labor, as well as equivalent state and local agencies.

### ***Workplace Preparations for Reopening***

#### **TIMING**

There is no one-size-fits-all answer as to when employers can or should reopen. Reopening, however, should be done gradually (e.g. in phases), as recommended by the White House in its Guidelines for Opening Up America Again. Many factors need to be taken into consideration in deciding when to recall employees back to work, including not only governmental guidance and the status of COVID-19 spread in the community, but also employers' level of preparedness.

Employers should consult with experienced employment counsel to consider and decide upon the following questions:

- Which groups of employees should return to in-person work, when and why?
- How can the physical worksite be assessed for exposure risk and reconfigured and access limited to ensure compliance with governmental guidelines and social distancing protocols?
- What is the plan for pre-opening cleaning and disinfection of the workplace?

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- What kinds of protective personal equipment are needed for the employees when the workplace is opened?
- Are there sufficient supplies of protective covering and cleaning materials to protect workers from exposure, ensure compliance with hand washing and hygiene etiquette guidelines, and keep the workplace properly cleaned and disinfected?
- What training and policies and procedures regarding screening, safety, benefits or workplace conduct, need to be implemented or modified?
- Is there a communication system in place to effectively explain and train returning employees about safety protocols, new policies and procedures, as well as any changes in benefits and schedule?

## COMMUNICATION

Effective communication is essential to ensure a smooth transition from workplace closure to reopening. Communication about health and safety requirements, as well as employee rights and obligations, should be regular, clear, consistent, and accessible.

- Employers should communicate on a regular basis with employees about the steps taken to protect employee the health and safety and ensure business continuity. Continuous communication not only ensures that the message will be registered with employees, but also demonstrates the employer's commitment to ensure a safe and sustainable working environment and ease employees' anxiety.
- Messages should be delivered clearly and consistently. Communication should be prepared in a language and format that is easily understandable. Employees will have many questions and concerns. For consistency, those should be directed to a specific individual or group of individuals who have been trained about the policies, practices, and procedures. Employers should establish a system that encourages employees to raise questions and concerns while providing a prompt and effective response.
- Finally, communication needs to be accessible. During the transition period, employers need to be flexible and creative in delivering messages. Besides the traditional delivery methods (e.g., workplace posting), employers should utilize other channels and materials such as webinar, text messages, video, and digital displays of notice.

## PAY AND BENEFITS

The COVID-19 pandemic has substantially impacted the economy and workforce demand. Reopening businesses may find themselves in the position of reducing the pay and hours of returning employees.

An employer looking to reduce employee pay must take into consideration the following issues:

- If there is an employment contract or a collective bargaining agreement that governs, the employer needs to make sure to follow its terms.
- For non-exempt employees, employers must ensure that reduced pay does not go below the minimum wage.
- For exempt employees, the employer should avoid making haphazard adjustments of salary that could result in the loss of the exempt status. While the employer can reduce the employee's salary during a business or economic slowdown in reflection of a shortened workweek, the reduction must not be based on day-to-day or week-to-week

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fluctuations. Additionally, each employee whose salary is reduced must continue to receive the required minimum salary and meet all other requirements for the exemption.

- Employers should be mindful that reduction of employees' hours may affect the employees' eligibility to participate in the employer-provided benefit plan.
- Finally, employers who have received or are seeking assistance from federal, state, and local governments must be mindful of the effect pay reduction has on the employers' ability to receive such assistance.

Employers should be aware of the job-protected and/or paid leave benefits available to employees through legislation enacted by federal, state, and local governments because of COVID-19. Policies may need to be updated to reflect these new laws. Specifically:

- The Family First Coronavirus Response Act (FFCRA), amended by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), requires employers to provide job-protected and/or paid leave to employees who need time away from work for COVID-19 reasons.
- Some states have adopted or have existing emergency paid sick or family and medical leave laws allowing employees to take time off work for reasons related to public health emergencies and specifically to the COVID-19 pandemic.

## LAYOFF VS. FURLOUGH

Layoff (also known as reduction-in-force or downsizing), is the permanent termination of employees as part of a plan by the employer to reduce payroll costs or headcount in response to business need. On the other hand, furlough generally refers to a temporary suspension of employment for a specified time period, during which employees do not receive wages. Unlike a layoff, a furlough is not a separation from employment. A furlough allows an employer to retain employees with institutional knowledge and experience that may ease the costly and timely process of rehiring and retraining personnel when economic conditions improve.

Because the employment relationship remains intact between employers and furloughed employees, recalling furlough employees can be less complicated than rehiring laid-off employees. For example, depending on the employer's policies and plans, a furloughed employee may be eligible for continuation of employer-provided benefits. On the other hand, laid-off employees likely lose their benefit eligibility. Employers rehiring laid-off employees should consider whether the rehired employees would be able to retain their benefits as if they had not left the company. Nonetheless, whether recalling furloughed employees or rehiring laid-off employees, employers must keep in mind their legal obligations, such as those under anti-discrimination laws and collective bargaining agreements (for employers with a union-represented workforce).

## ***A Non-Discriminatory Reopening***

Employers must always be conscious of their obligation to prevent workplace discrimination and harassment. Some considerations for employers to take into account:

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- The criteria for selecting returning employees should not be based on protected characteristics. For example, an employer may not set, as a criterion to return to the workplace, that the employee is under 65 years old simply because individuals who are 65 or older have been identified as being at higher risk of severe illness from COVID-19. Similarly, an employer cannot categorically exclude all pregnant employees from returning to the workplace.
- Employers should ensure that their policies/practices are applied in a non-discriminatory manner and do not have a discriminatory impact on members of protected classes.
- Employers should take steps to address possible harassment and discrimination against coworkers. Employers should continuously remind all employees that it is against anti-discrimination laws to otherwise discriminate against coworkers based on their protected characteristics such as race, national origin, age, or sex. Employers should always have a system that would encourage employees to report discrimination and harassment concerns. Employers should train supervisors and managers about their roles in being alert of, stopping, and reporting any harassment or other discrimination. Finally, as always, all reports of discrimination and harassment must be addressed promptly and seriously.
- While employers may make inquiries and take screening measures to prevent the spread of COVID-19 in the workplace (e.g., daily temperature checking of employees) as advised by public health officials, employers should be cautious in not over-acting in a manner that may cross into unlawful disability-related inquiries.

## **A Safe Reopening**

Employers looking to reopen the workplace need to plan and implement safety policies and practices to prevent employee exposure and curtail the transmission of the virus.

- Before reopening, employers should prepare their worksites by:
  - Cleaning and disinfecting the surfaces, equipment, and other elements of the work environment before the employees return;
  - Implementing engineering controls to reduce exposure of airborne hazards, which may include installing high-efficiency air filters, increasing ventilation rates, and installing physical barriers;
  - Ensuring there are sufficient cleaning and disinfecting supplies; and
  - Reconfiguring the worksite and scheduling to allow employees to practice social distancing, and to utilize masks and gloves if available.
- Employers should establish and update their workplace safety policies and take measures to protect employees from exposure, to prevent the spread of, COVID-19, such as:
  - Screening employees before the workday begins, via daily temperature and symptom checking, as well as screening third parties who visit the worksite;
  - Requiring employees to report COVID-19 symptoms and contact with potentially infectious individuals;
  - Promoting handwashing, hygiene routines, respiratory etiquette, and protective behaviors;

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- Designing and training employees on procedures to identify, report, and isolate potential sources of infection at the worksite;
- Ensuring an effective mechanism for reporting and investigating workplace safety concerns, as well as protecting employees who speak out against unsafe conditions from retaliation;
- Providing, training, and encouraging (or requiring) the use of face cover and protective clothing and equipment to reduce the spread of respiratory secretions;
- Monitoring public health communications and guidelines regarding COVID-19 and ensuring that employees are well-informed;
- Maintaining housekeeping practices of regularly cleaning and disinfecting the workplace.

### ***A Sensible Reopening***

The fluidity of the situation requires that employers be sensible in the process of reopening the workplace. The ultimate goal is to have a safe, healthy, and productive workplace, and quick reactions to issues arising during this difficult time can be counterproductive.

- Employers should keep in mind employees' concerns about pay, leave, safety, health, and other issues caused by the COVID-19 pandemic.
- Employers should make sure that employees are informed of their expectations, especially information regarding safety measures, working hours, compensation, and benefits.
- Employers should also be flexible in addressing employees' concerns, such as having to stay at home to care for ill family members or children whose schools are closed.
- Certain requirements can also be relaxed because of the difficulty caused by the COVID-19 pandemic, such as having a doctor's note before an employee can take sick leave or be provided with an accommodation.

This is part of a series of our **COVID-19 alerts** providing clients with practical advice on measures they can take to navigate through these troubled times. Please contact the authors or your Miller Canfield attorney with further questions.

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*