



LEGAL CONSIDERATIONS FOR EMPLOYERS PLANNING TO RETURN TO WORK

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As the State of Illinois inches closer to new phases of Governor Pritzker's Restore Illinois plan, many employers are seeking guidance regarding potential legal issues arising from re-opening storefronts or office spaces, re-hiring employees, and the like. Each workplace is unique, each state has its own laws, and each employer should consult with legal counsel regarding the parameters by to safely and legally operate their facilities. The State of Illinois has published a toolkit for businesses which we discuss in our article entitled: **Illinois Publishes Business Toolkit For Phase 3 Re-Opening**. Below is a general overview of issues employers should be evaluating.

Workplace Safety

Employers re-opening storefronts or office space need to consider workplace safety first and foremost. Employers may face liability under OSHA regulations for actions taken during and after the COVID-19 Pandemic. Although OSHA standards do not specifically address COVID-19, the Occupational Safety and Health Act sets forth a general duty to provide a place of employment free from recognized hazards (29 U.S.C. § 654(a)(1)), and many of its requirements address preventative measures like standards for Personal Protective Equipment (PPE) (*see, e.g.*, 29 C.F.R. 1910 and 29 C.F.R. 1910.134).

While each work space is unique, all employers should at a minimum develop a safety plan, including protocols to maximize social distancing among employees, customers and visitors in physical work spaces. Examples may include staggering work schedules, modifying and/or closing common office spaces like reception areas and lunchrooms, limiting travel, restricting non-employee visitors, and increasing distances between work areas such as cubicles or desks. Flexible worksites (*e.g.*, telework) and flexible work house may be implemented, physical spaces

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between employees and customers may be imposed, and signs, tape marks, or other visual cues such as decals or colored tape on the floor may be used to indicate appropriate distances among individuals present. Business practices may also be adjusted to limit employee exposure to customers, such as delivering services remotely (phone, video, or web), providing drive-through service or curbside pickup, and delivery options, where feasible. The CDC has issued guidelines for social distancing best practices [here](#).

Written cleaning and sanitizing procedures should also be formulated, along with developing work space health requirements, such as recommending ways for employees to practice good hygiene, and providing supplies to support those practices (sanitizer, PPE, *etc.*) Employers should identify who will be trained on cleaning procedures and how cleaning will be tracked. Employers should also give consideration to ramifications if employees violate or refuse to follow workplace safety policies. OSHA has prepared a comprehensive guide covering procedures to follow regarding workplace cleaning, as has the CDC .

Screening Employees and the ADA

As previously discussed [here](#), employers may screen employees (along with vendors, customer, and other visitors) entering the workplace for COVID-19 consistent with the ADA, which requires the scanning be job-related and consistent with business necessity. Screenings can include COVID-19 tests, as we discussed [here](#), temperature checks, and screening questions. Employers may also require a medical examination if the employee is showing symptoms, while also requiring employees to wear **protective gear** (for example, masks and gloves, subject to any required disability or religious accommodations). Please keep in mind that non-exempt employees must be paid for all time spent as part of a screening process. An employer may only bar an employee from the workplace if the employee poses a significant risk of substantial harm to himself and others that cannot be reduced or eliminated by reasonable accommodations.

Employers must maintain any COVID-related information gathered about an employee's health separately from the employee's general employment file and must treat it as a confidential medical record. Employers must also be very careful not to disclose the names of workers who may be infected when providing information to the workforce about the spread of the virus.

Re-Hiring / Re-Staffing Employees

For employees who were laid off, all re-hiring procedures should be followed (including compliance with union contracts, where applicable). For all returning employees, including those who may have been furloughed, consideration must be given to any changes in the terms and conditions of employment (like pay rates, job duties, work schedules, *etc.*). Employers may be required to provide proper notice of such changes, while also determining whether these changes impact the exempt vs. non-exempt status of employees, other federal, state and local wage and hour considerations, and/or existing employment contractual terms. Any decisions made altering employment terms must also be made in a non-discriminatory manner to avoid directly or indirectly adversely affecting a protected group. Employment decisions must be made for reasons that are not based on a protected class, and employers should carefully document their selection and decision making process. Consideration must also be paid to any changes made in cost-cutting measures, including as to benefits, which may require



amending and/or changing any plans, workplace policies, or employee handbooks.

Employers should also be prepared to address employee concerns about returning to work because they fear getting COVID-19, while also remaining cognizant that any employee raising safety issues will likely be considered to be exercising protected conduct under, among other things, the National Labor Relations Act, and the anti-retaliation provision of OSHA. Accommodations may need to be made for those in high-risk categories. Further, employers should be prepared to address requests by employees to telecommute or otherwise work from home, including whether those requests will be permitted. Employers will need to engage in an interactive process for an employee with a documented disability who makes such request.

Complying with New COVID-19 Laws

Employers must also continue to be mindful of compliance with new COVID-19 laws, including paid leave under the Families First Coronavirus Response Act (FFCRA). The FFCRA requires employers with fewer than 500 employees to provide up to 80 hours of paid sick leave related to COVID-19. It further amended the Family Medical Leave Act to allow eligible employees to take up to 10 weeks of job-protected leave to care for a child younger than 18 whose school is closed or whose childcare provider is unavailable. Employees will continue to be eligible for these benefits, and employers should be particularly mindful of whether schools will be re-opening for in-person instruction come fall. We have discussed FFCRA in depth in our article entitled: **Update: Congress Passes Emergency Paid Sick Leave & FMLA Changes Applicable to Many Employers** and subsequent Department of Labor guidance, most recently, here: **Update: DOL Issues FFCRA FAQs 80-93**.

Recipients of Paycheck Protection Program (PPP) Loans also need to maintain required levels of headcounts and payroll standards to ensure compliance with the loan terms, including as it related to forgiveness. If your business received a PPP loan, remember that employers have until June 30, 2020 to restore full-time employment and salary levels for changes made between February 15 and April 26, 2020. A full discussion of the PPP can be found here: **Update: PPP Loan Bible: Compilation of Critical Documents**.

Workers' Compensation and Civil Suits

Ordinarily, employees who are injured or become ill due to a condition at their workplace must bring their claims through the relevant state workers' compensation system. Generally, for an illness to be compensable, the employee must have contracted it in the course and scope of employment and the injury must be related to work performed. Any business whose employees may encounter COVID-19 in the scope of their employment should evaluate whether they have proper workers' compensation insurance coverage, including policy limits covering diseases. Many employees are attempting to bypass the workers' compensation system and instead pursue a civil lawsuit (*e.g.*, recently publicized claims filed against Walmart by a deceased employee). While the viability of these civil suits is unclear, this simply puts greater emphasis on the need for employers to adhere to guidance from OSHA, the CDC, and other state and local agencies to protect employees from COVID-19 exposure.



Employee Compensation and Unemployment Considerations

Employers should also be prepared to answer questions that recalled employees may have as to the effect of resuming full or part-time work on unemployment or partial unemployment benefits. For example, employees returning to work on a part time basis are eligible for \$600 per week under the CARES Act. **See:** In general, employees who refuse to take available work may forfeit their entitlement to further unemployment benefits. Employers are encouraged to notify the unemployment agency if employees refuse to return without good cause

Employment Policies and Practices

Because of the myriad of changes occurring in the workplace, all employers should also review and update all applicable employment policies (*e.g.*, employee handbooks), including those covering workplace safety, vacation or paid time off, work hours, remote work, accommodation procedures, and privacy. These policies should also reflect any changes under the law, for example the new leave requirements found in the FFCRA.

Civil Rights Issues

Employers should expressly communicate to their workforces that fear of the COVID-19 Pandemic should not be misdirected against individuals because of a protected characteristic such as national origin or race. Employers may also consider redistributing anti-discrimination and anti-harassment policies, along with training for management and supervisory staff relative to responding to comments about COVID-19 and employees who may have been affected.

Implementing Response and Communication Plan

Last, it is important to identify a team of individuals and a point of contact responsible for implementing a response plan and any workplace changes, including a point person (or persons) for employees to contact with any questions or concerns. Employers must remain flexible and be ready to modify or amend business practices as needed, for example, so that they will be able to adjust to various stages of the re-opening plan. Employers should also prepare for how to communicate with employees to address changes, answer any questions employees have, and deal with employee anxiety. Providing good, open communication, well in advance of any expected return to the workplace, will enable employees to prepare themselves for the commute, the workplace and any related changes at home.