

BEYOND THE CURVE: Back-to-Business Checklist

HIRING/RECALLING CONSIDERATIONS

- Review local, county, and state government ordinances to determine whether such ordinances will impact your process

- Determine dates employees will be brought back to work
 - Consider whether it will be done in stages
 - Plan whether transition back to work will be staggered (e.g., employee ramps up from 20 hours to 40 hours per week over a certain time period)
 - Determine impact on unemployment benefits

- Prepare protocol for identifying who will be brought back to work
 - Consider objective, non-discriminatory criteria such as skill set, education, and/or tenure
 - Be aware of negligence claims if employees are brought back too soon or into unsafe work conditions
 - Consider voluntary call-backs (employee option to return during first round, etc.)

- Have a protocol in place for company response to employees who ask to not come back to work temporarily due to continued concerns over COVID-19 (e.g., the employee is in a high-risk category, requests for accommodation, etc.)

- Analyze the impact of recalling and re-hiring employees using any loan proceeds obtained through federal government or other government benefits

- Consider pay equity issues when rehiring workers; work with legal counsel if pay adjustments may be warranted to provide attorney-client privilege

- If you are a federal contractor or subcontractor, ensure you are retaining documents for your rehiring process and that you include the rehires in your applicant flow log for later adverse impact analyses

- Consider staggered return-to-work issues:
 - Maintain remote work or intermittent remote work
 - Encourage use of conference calls or video meetings
 - Small, static groups

- Staggered schedules
 - Swing shifts
 - Consider predictive scheduling requirements
 - Consider non-discrimination on basis of FFCRA and related leaves
 - Consider non-discrimination and non-retaliation in return to work determinations
 - Requests for accommodation
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- Determine any high-level changes to operations that will need to be communicated to employees upon return
 - Change in business hours
 - Travel freeze or limitations
 - Changes to bonus programs
 - Across-the-board compensation reductions or freezes
 - Amendments to vacation and fringe benefit programs

DEVELOPING COVID-19 REPORTING PROCESS

- Prepare memorandum updating employees on most recent workplace guidance from CDC, OSHA, WHO, and state and local governmental agencies

- Prepare memorandum to employees confirming how to report if employee has: (1) tested positive for or been diagnosed with COVID-19; or (2) lives with someone who, in the past 14 days, has been diagnosed or tested positive for COVID-19 or displayed symptoms; or (3) has come into direct contact in the past 14 days with someone who has tested positive or been diagnosed with COVID-19

- Designate a point person at each worksite/department to handle employee concerns and ensure compliance

- Create and implement decision-making matrices to address key decisions such as closure, travel, positive case response, who should be consulted and who is final decision-maker

- Evaluate the need for strategy and response committees with clear roles and responsibilities that include members from key functions and key locations

- Consider preparing infectious disease preparedness and response plan

- Develop a written plan of action to implement if a worker becomes sick with COVID-19

- Review or adopt telework policy and evaluate workforce to determine which jobs can be performed remotely via telework and which cannot.
- Train employees regarding new policies and procedures
 - Safety measures
 - Social distancing mandates
 - Cleaning mandates
 - Symptom monitoring
 - Privacy issues

WORKPLACE SAFETY OPERATIONAL CONSIDERATIONS

- Order and distribute PPE to employees
 - Review state law to determine if any PPE, such as face masks/coverings, are required to be provided by employers
 - Review state law to determine whether employees must be reimbursed for any such expense
- Identify need and process to distribute face coverings to customers and third parties who enter facilities
- Post COVID-19 social distancing protocol on entry/exits and in breakrooms
- Install hand sanitizer dispensaries across worksites
- Prepare protocol and process for general cleaning of facilities and in response to situation where company is notified of an employee or customer who has been at a worksite has been diagnosed with COVID-19
- Install proper signage or floor markings for social distancing
- Install containers for “clean” and “dirty” writing utensils
- Consider announcements at regular intervals reminding employees to sanitize common touch points in work area
- Prepare protocol for taking temperature of employees
 - Review state law to determine if temperature or health assessments of employees are required
 - Provide required state notices (if applicable) if temperature of employees will be taken

- Determine whether third-party access to facility will be limited
- Close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols
- Circulate policy to employees about reporting positive COVID-19 or suspected COVID-19 cases and the workplace protocol in the event of a positive or suspected case
 - Require COVID-19-positive employees to remain home until cleared by a medical provider
 - Identify employees or individuals that worked in close proximity (within six feet) with employee for a prolonged period of time (10 or more minutes)
 - Include period of time employees should be sent home
 - Require notification of customers/vendors/building
 - Provide isolation/quarantine requirements
 - Notification to workforce, if appropriate (consider privacy concerns noted below)
 - Notification to government agencies or OSHA (rarely the case, but possible)
 - Special precautions for workers 65 or older
- Implement Screening protocol
 - Implement daily health/risk screenings to confirm the health and exposure of employees and anyone entering the work site. This could include screening measures at home and at the workplace
 - Questionnaire
 - Temperature checks
 - Symptom checks
 - COVID-19 testing
 - Vaccine (when available)
 - Reminder to obtain only necessary information (no underlying or unrelated illness information, etc.)
 - Establish protocol for maintaining records of health/risk screening results
 - Provide employees with CCPA notice or notice generally about screening protocols, retention of records screening result records, etc.
 - Wage and hour considerations (pay for screen time, reporting time pay)
 - Protocol for employees not passing
 - Establish training and PPE requirements and protocol for any employers conducting temperature or health screening
 - Determine logistically how temperature screening will be conducted
 - Determine how employees will stand more than six feet apart during temperature screening and waiting lines related to same
- Consider reporting obligations for positive employees
 - Co-workers
 - Customers/vendors
 - Government agencies

- Implement OSHA Workspace Considerations
 - If shared workspace, discuss infection control management, cleaning responsibilities, etc.
 - Alternate every other desk or workstation
 - Space out seating
 - Create distance to the extent possible
 - Mark six-foot spacing on floor with tape or chalk for employees working assembly lines, for example
 - Install plexiglass partitions where possible
 - Add foot-push openings for doors (to avoid touching knobs)
 - Restrict sharing of headsets and other objects near mouth and nose
 - Restrict sharing of utensils, glasses, etc.
 - Work with facility management to increase air exchanges in rooms
 - Install partitions between receptionists and others that may directly interact with the employees
 - Separate employees who work in adjacent cubicle spaces
 - Remove every other chair in break areas and lunchrooms
 - Add partitions to tables where employees congregate during breaks
 - Require employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic
 - Consult with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users
 - Utilize HVAC contractors to increase the number of air changes in your workplace
 - Provide hand sanitizer stations outside each restroom and each door that is commonly touched or used
 - Upgrade your teleconference equipment to allow for more teleconferences
 - If possible, arrange for pick-up and drop-off delivery of packages to be done outside
- Consider rules regarding vending/food service food trucks, meal delivery, dry cleaning pick-up, shoe shine services, etc., to limit the number of visitors in the workplace
- To the extent vendor services are not discontinued, consider implementing protocols for onsite visitors (including, as appropriate, temperature screenings)

- With respect to visitors, ensure the reception area allows for adequate social distancing and aim to decrease the amount of time any individual spends in waiting areas
- Implement rules regarding spaces where employees congregate in large numbers such as limiting the number of employees that can be in such spaces at the same time (e.g., in breakrooms, check-in area/time clocks, elevators, conference rooms)
- Implement cleaning and sanitizing protocols
 - Develop protocol for routine cleaning and disinfection procedures using CDC guidance
 - Frequency of cleaning of workstations, common areas and high traffic areas
 - Increased sanitizing stations and handwashing stations
 - Inventory and restocking requirements
 - Disposal of PPE in accordance with WHO/CDC/OSHA guidelines
 - Consult cleaning providers to confirm practices and increase frequency
 - Make wipes, sanitizer and other cleaning products available in the workplace
 - Develop protocol to address deep cleaning and disinfection after a potential or confirmed exposure
 - Evaluate if the increased use of industrial cleaning products implicates OSHA's Hazard Communication standard (29 CFR 1910.1200) and distribution of the manufacturer's Safety Data Sheet (SDS)
 - Provide written communication and notices regarding cleaning and sanitizing protocols to employees and other visitors to the worksite

WAGE AND HOUR CONSIDERATIONS

- Prepare reinstatement memorandum to employees returning from furlough
- Prepare any necessary new or amended pay plans for employees whose rate of pay may have changed
- Provide notice to employees regarding any changes in pay
- If bonus programs or plans have been suspended, amended, or resumed, provide notice to employees
- If bonuses or one-time payments are made, be mindful of the period covered by the bonus, their effect on the regular rate, and whether they must be accounted in overtime calculations
- If loans were made to employees or if benefits were paid on employees' behalf, document the repayment process and ensure that non-exempt employees do not have their pay reduced below federal and state minimum wage
- If employees had their pay rates changed (or if they were re-classified from exempt to non-exempt), consider when and how to return them to their previous pay rates and classifications

- Be mindful of the state and federal minimum salary thresholds when adjusting exempt employee salaries so they do not fall below the state or federal minimum thresholds

GENERAL H.R. COMPLIANCE CONSIDERATIONS

- Ensure handbook contains updated accommodation policies based on EEOC and state government guidance on COVID-19 issues
 - Review guidance from OSHA and state OSHA agencies to ensure guidance is being followed
- Develop policy as to whether telecommuting/remote work will be permitted and under what circumstances
- Minimize non-essential business travel and adhere to CDC guidelines regarding isolation following travel
- Strongly consider special accommodations for workers who are members of a vulnerable population when an accommodation is requested
- Update schedules to stagger meals and breaks to minimize large groups congregating
- Update handbook policies on:
 - o FFCRA policy/documentation
 - o Paid Sick Leave and Emergency FMLA policies (if applicable)
 - o Leaves of absence including sick leave and state/local PSL requirements
 - o Benefits
 - o Furlough
 - o Reinstatement of pay
 - o Bonuses
 - o Attendance
 - o Vacation/Paid Time Off
 - o Remote work
 - o Work hours, including start/stop time, breaks, lunch times, flexible hours, and staggered work hours
 - o Timekeeping including clock in/out procedures
 - o Travel policies including business and personal travel
 - o Information technology and usage
 - o Paystubs and pay codes may need to be updated and adjusted to reflect line item for EPSL or EFMLA
- Ensure all employment posters and notices are current – including new FFCRA poster
- Develop a tracking and return process for company property and equipment that was provided temporarily to facilitate remote work/telecommuting

- Develop key messages and talking points to be utilized for a number of different scenarios that may occur, including return to work, response to positive COVID-19 cases, reduced operations, temporary closure, accommodation requests, etc.
- Provide clear messaging and training to employees and management about reporting illness or concerns to the designated point person
- Establish clear protocol for how failure to report illness will be handled (discipline, etc.) and communicate the protocol to employees and management
- Establish protocol on how to handle COVID-19 related harassment, discrimination, or retaliation claims
- Train managers on revised policies and protocols and preventing COVID-19 related harassment, discrimination and retaliation; advise them of individual supervisor liability under FFCRA
- If employees were furloughed and being called back to work, provide a “Welcome Back” communication outlining key employment points
- If employees were terminated and are now being re-hired, prepare new hire packets containing:
 - Acknowledgment of employee handbook (return from furlough vs. rehire)
 - Acknowledgement of arbitration agreement (return from furlough vs. rehire)
 - New Form I-9 (not if rehired within three years from date previously completed)
 - Or, take the opportunity to self-audit the existing form
 - Conduct pre-employment screening such as COVID-19 screening, drug testing, criminal background, credit check and post-offer/pre-employment physical exam (return from furlough vs. rehire)
- Document reinstatement of accrued, unused paid sick leave if required under state or local sick leave law
- Update personnel files as necessary
- Obtain personal email and cell phone for enhanced communication channels

WORKPLACE PRIVACY CONSIDERATIONS

- Develop protocol for taking temperatures
 - Have a protocol in place for reporting results and taking any necessary steps based on the results
 - Provide written notice to employees and patrons
 - Have all employees sign and return consent form
 - Have process in place for retaining documents related to temperature checks
 - To the extent testing results suggest or confirm a positive diagnosis for COVID-19 and lead to a decision to send an employee home, you should maintain a record of the testing results and treat the record as an employment medical record

- All other information should only be retained as long as necessary to manage risk during the COVID-19 crisis and should be permanently deleted once it is no longer needed
 - Check local, state and federal laws regarding privacy considerations for collecting information (e.g., HIPAA, CCPA, etc.)
- Develop protocol for maintaining confidentiality of employee information (positive tests, experiencing symptoms, doctor's notes)
 - If appropriate, obtain disclosure consent from employee that tests positive or has a suspected COVID-19 case

PERSONAL INJURY CLAIM CONSIDERATIONS

- Develop lawsuit avoidance best practices:
 - Follow CDC Interim Guidance for Businesses, including best practices for social distancing
 - Follow CDC's Public Health Recommendations for Community Exposure
 - Ensure that employees are provided and properly wearing all required PPE
 - Be mindful of CDC guidance for essential business employing critical workers
 - Continue and promote workplace education regarding safeguards
 - Share information with employees, if permitted
 - Keep up safe workplace practices
 - Be prepared to demonstrate compliance with CDC and OSHA guidance, as it applies to both employees and third parties
- If a lawsuit is filed, immediately notify counsel and insurance carriers and gather all critical documents
 - If claim is received, immediately notify counsel and all insurers who may provide coverage for such a claim, including general liability, workers' compensation, and premises liability insurers
 - Gather all documents and witnesses that would demonstrate the company's COVID-19 response plan and measures, representing the company's commitment to employee safety during the pandemic

PAID SICK LEAVE (EPSL) AND EMERGENCY FMLA (EFMLA)

- Prepare tracking system for each employee's use of leave, including the duration and reasons for the leave
- Consider interplay between these two laws and any state or local paid sick leave laws and how to track accordingly
- Be aware of continued eligibility for FFCRA benefits through December 31, 2020

- Eligible for EFMLA if on payroll for 30 or more of 60 calendar days prior to furlough or layoff
- Note employee count for purposes of EPSL/EFMLA (500+) is at time leave is requested
- Be aware that employees are limited to 80 total hours of EPSL, regardless of employer (e.g., hired by new employer) (Note: employee may be entitled to remaining balance if some EPSL used while at former employer)
- Consider how to handle employees hesitant to return to work
 - Employees who have medical conditions that put them at high risk or who those who have mental conditions such as anxiety or similar conditions may be entitled to a reasonable accommodation under ADA/FEHA protections
 - Working from home is a reasonable accommodation only if all the essential functions of the employee's job can be performed at home
 - Pregnant women must be accommodated in the same way as others similar in their inability to work, and therefore may also be entitled to work from home.
- Be cautious of considering FFCRA requests when determining which employees to bring back
- Ensure you maintain proper documentation
 - Maintain specific documentation for each qualifying reason
 - Have employees sign leave request forms

LEAVES OF ABSENCE/ACCOMMODATION REQUESTS

- Provide employee leave of absence request form or request for accommodation form
- Have clear policy and protocol on documentation required for leaves of absence and requests for accommodations
- Consider whether there are other leaves that should be considered and potentially run concurrently (e.g., FMLA, state laws)

REMOTE WORK CONSIDERATIONS

- Ensure there is the proper infrastructure and implementation for any longer-term remote work plans you decide to implement
- Create and circulate a comprehensive remote work policy regarding expectations, reimbursement, etc.
- Create and test emergency communication channels for employees (personal email, cell phone numbers, etc.)
- Reimburse for business expenses during telework

- Consider requests to continue remote work after temporary plan has ended

TRADE SECRETS, NON-COMPETITION, AND DUTY OF LOYALTY ISSUES

- Ensure that employees who have been let go have returned all confidential information
- Determine whether employees who have been let go are working for competitors
- Have a protocol in place for remote workers to return all confidential information to company systems, devices, and accounts and then ensure that they have not retained materials on their personal devices and accounts
- Be proactive about educating new employees to purge themselves of materials from former employers
- Determine whether furloughed employees should sign new restrictive covenant agreements when they return as a condition of restarting and whether their restrictive covenant time periods started to run while they were furloughed

UNEMPLOYMENT COMPENSATION

- Be mindful of any reporting obligations under state and federal law
 - Federal law requires employers to report newly hired employees to the National Directory of New Hires, which includes rehired employees who have been separated from employment for at least 60 days. State laws also have new hire and rehire reporting requirements
 - Employers are encouraged, and in some states required, to report those employees who fail to return to work. State unemployment agencies may review the cited reasons and determine whether good cause exists for the refusal on a case-by-case basis
- If employees cannot return to work full time, consider potential availability of other state programs, such as workshare programs

IMMIGRATION CONSIDERATIONS

- Conduct standard I-9 review when any employees are physically present at worksite
- Review all I-9's completed remotely
 - Relaxed requirements will remain in effect for a period of 60 days from the announcement date (March 20, 2020), or three business days after the end of the National Emergency declaration, whichever comes first

- I-9's completed through remote verification require in-person examination of required documents mandated within three business days of resumption of normal operations
- Be aware of I-9 considerations for rehiring laid-off employees
 - If within three years of original I-9 completion, you may either complete a new Form I-9 or complete Section 3 of the current version of Form I-9
 - If you choose to complete new I-9s, you should complete new I-9s for all laid-off employees
- New I-9s do not need to be completed for furloughed employees who have a reasonable expectation of continuing employment if the documents they presented to show employment authorization are still valid
- Be prepared for ICE enforcement
 - If previously served a Notice of Inspection (NOIs) for I-9 documentation, monitor DHS and ICE websites for additional updates regarding when the extensions will be terminated
- Be aware that E-Verify extended the time to allow employees to resolve Tentative Non-confirmations due to closures of Social Security offices and DHS offices
- Temporary Visa Considerations
 - Document maintenance of status
 - Material changes to work visas, such as reductions in pay, change in hours, change in work location, and/or change in job duties, may require an amended petition
 - For employees who are stuck abroad, be aware of travel restrictions and consular closures

LABOR ISSUES FOR NON-UNION EMPLOYERS

- Develop a lawful response to union organizing tactics and employee protected concerted activity
- Identify and train statutory supervisors to recognize the early warning signs of union activity
- Reinforce open-door policies and communication vehicles
- Develop a lawful strategy for responding to workplace demands for premium pay, PPE, and paid leaves of absence
- Develop a positive employee relations program tailored to the unique aspects of your organizational culture
- Update workplace rules for compliance with the latest NLRB guidelines

LABOR ISSUES FOR UNIONIZED EMPLOYERS

- Analyze CBA for no-strike and no picketing language in anticipation of protected concerted activities
- Consult CBA for method of recalling employees
 - Consider seniority, layoff, and recall provisions
 - Analyze any break in seniority rules
- Consider termination of any temporarily enhanced benefits
 - Expect union to bargain for benefits to remain in place
- Explore options for reopening CBA to pursue mid-term concessions
 - Meet customer demands, service hours, etc.
 - Revise Management Rights language
 - Evaluate strength of no-strike language
 - Consider revisions to layoff and recall
 - Propose *Force Majeure* clause
- Conduct labor relations audit of CBA, policies, and negotiations strategy
- Conduct supervisory training sessions to ensure consistent enforcement of standards, grievance processing, etc.
- Develop new systems to meet with union in view of remaining social distancing and shelter-in-place orders

BENEFITS / TAXES

- Ensure COVID-19 diagnostics/testing and related items and services are being provided without cost-sharing
- Ensure COVID-19 providers are being reimbursed according to negotiated or published rates
- Stay abreast of new preventive services and vaccines as they qualify for free coverage

- Ensure a Summary of Material Modifications is provided, or the Summary Plan Description updated and distributed, to communicate COVID-19 mandated coverages and other material plan changes

- Determine if plan documents must be amended and when amendments must be made

- Determine when active health coverage ends for furloughed employees (i.e., when a reduction of hours results in a loss of coverage)
 - Look at plan documents and length of furlough
 - Be mindful of ACA employer mandates. If applicable, employer adoption of Look-Back

- Measurement Method to determine full-time status may extend active employee coverage
- Determine if other laws such as FMLA or USERRA or state laws impact coverage
 - Ensure you have carrier approval for active coverage continuation, or if self-insured, stop loss provider approval, before extending coverage beyond current plan terms
 - If coverage is being extended, provide guidance to COBRA administrator
 - Ensure leave policies and administrative practices are followed
 - Ensure persons on unpaid FMLA leave receive at least as generous benefits as provided to non-FMLA employees on unpaid leave
 - Follow or create standard processes for collecting employee premiums and collecting missed payments
- Determine when active health coverage begins for rehired employees
- Look at plan documents and length of termination
 - Be mindful of ACA employer mandates. Application of break-in-services rules may require reinstatement
 - Determine if other laws such as FMLA, USERRA or state laws require reinstatement
- Determine when Section 125 rules permit election changes
- Change in employment status (unpaid leave)
 - School closure; new daycare providers with new costs
- Consider opportunities in CARES Act, IRS Notice 2020-15, and IRS Notice 2019-45 to provide additional employer benefits
- Tax-free repayment of student loans in 2020
 - Expanded list of preventive care, qualifying expenses, and telehealth that can be provided by a HDHP without jeopardizing HSA eligibility
- Be mindful of 401(k) plan implications
- If employer match is suspended, ensure employee notice is provided (special requirements for safe harbor plans)
 - If there has been high participant turnover, determine if a partial plan termination has occurred requiring full vesting for impacted participants
 - Consider permissive adoption of COVID-19 in-service distribution
 - Determine if additional notices must be provided
 - Be aware of deadlines to adopt amendments
 - Coordinate with 401(k) record-keepers regarding administration and taxation related to:
 - COVID-19 distributions

- Loan repayment suspensions
- 2020 Required Minimum Distribution suspension

- Redistribute Summary Plan Descriptions for persons who lose coverage under ERISA-governed plans between termination and rehire

- Make sure you are aware of and comply with FFCRA and CARES tax credit documentation requirements
 - BBSI will file all FFCRA tax credits on your behalf.
 - Substantiate and maintain employee requests for qualified sick and family leave.
 - Retain eligibility substantiations, documentation showing how qualified wages and health plan expenses were determined for at least 4 years.

USERRA/MILITARY LEAVE

- Evaluate if any laid off or furloughed employees are service members
- If so, determine whether the service members are entitled to reemployment
 - Comply with “prompt” reemployment obligations. “Prompt” means as soon as practicable under the circumstances of each case. Absent unusual circumstances, you are generally expected to reemploy returning service members almost immediately (as set forth below) if they have been absent for 30 days or less. If they have been absent for more than 30 days, then reemployment must occur within two weeks of the employee’s application for reemployment
 - Follow accrued seniority rules, as if continuously employed. This applies to all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed

 - Provide training or retraining and other accommodations if applicable (such as in the case of a long period of absence or a service-connected disability)

 - Be aware of special protection against discharge, except for cause. This protection extends for 180 days following periods of service of 31 to 180 days, or for a year following periods of service of 181 days or more.
 - Such protection does not insulate service members from application of the “escalator principle.” In other words, returning service members are not entitled to preferential treatment if the escalator principle would otherwise place them in a position that has been eliminated as part of a legitimate reduction in force, provided that they would have faced the same consequences had they remained continuously employed

COMMUNICATIONS TO EMPLOYEES AND THIRD PARTIES

- Communicate Return-to-Work Plan and Timeline to employees
 - Ensure employees understand the company has a solid plan in place to maintain a safe workplace and a healthy workforce
 - Consider the communication to employees in advance of their return to work, e.g. virtual town hall or webinars, and while at work
 - Key points will include date(s) to reopen/scale up operations, proactive measures to ensure a safe workplace, new protocols, pre-screening, job expectations, hours, etc.
 - Keep signage, procedures, and messaging simple
 - Have signage posted at all points of entry and key locations to effectively share and remind employees of the new requirements

- Communicate Return-to-Work Plan and Timeline to customers, suppliers, contractors, vendors and on-site visitors
 - Establish and communicate clear protocol for access to the workplace as well as new rules that impact them
 - Review and amend agreements with vendors, suppliers, cleaning services, etc. as appropriate to ensure they will agree to comply with local, state, and federal law
 - Consider if proactive outreach and periodic updates to community VIPs or the local health department would be helpful as the workforce returns