

COVID-19 Alert: Re-Call of Employees to the Worksite

Post-Quarantine Workplace: A Return-to-Work Guide

By: Matthew L. Mitchell
April 27, 2020



Practical Considerations Related to the Re-Call of Employees to the Worksite.

Although many regions of the United States remain challenged by COVID-19 infection surges, federal and local political authorities are facing extreme pressure to re-open aspects of the economy. As has been widely reported, many jurisdictions have affected, or are contemplating, an easing of shelter-in-place and business closure orders.

With the successful development of COVID-19 therapeutic and vaccine options many months away, the relaxation of government business closure orders notwithstanding, a stark reality remains for employers: *A return to normal business operations, in any short-term scenario, is unlikely.*

In the coming weeks, as employers continue to navigate unprecedented economic challenges, employers will face very difficult decisions concerning the re-opening of worksite locations and the re-calling of employees. The following identifies common themes and subjects that may help employers resolve these decisions.

GENERAL CONSIDERATIONS

As a threshold, we recommend that employers approach decisions regarding worksite re-openings and employee re-call through the following lenses:

- **Be Deliberative** – Businesses are under incredible pressure to maximize limited business opportunities through rapid re-establishment of pre-COVID-19 operations standards. We counsel that employers respond to these pressures with a degree of caution and deliberation. An employer should not open its worksite locations without a comprehensive plan that addresses the specifics of the employer’s operational requirements, facilities, and workforces in light of COVID-19 risks.
- **Establish Employee Trust** – In order to succeed in these most challenging of economic environments, employers will need their team members to be fully engaged and productive. This outcome may only be achieved if employees *trust* that management has an effective plan to address business and safety uncertainties. Many employees may be returning from furloughs, may be recovering from illness, or may be part of workforces that have been significantly reduced. As such, many employees that are asked to return to work locations may retain fears and other “trust deficits” that may affect engagement. We recommend transparent and open communications to ensure that employees recognize that management strategies are consistent with employee interests.
- **Understand the Compliance Landscape** – The government response to COVID-19 has resulted in a web of new federal and local regulatory restrictions, safety regulations, and business relief programs. In developing worksite re-opening and employee re-call strategies, management must be conversant with these varying legal standards.

- **Adopt Common Sense Strategies** – COVID-19 response guidelines from federal and local governments have been, at times, imprecise, variable, and contradictory. As such, we expect that, to a certain extent, employers may be on their own with respect to establishing the timing and details of the re-opening of their worksites. On subjects that lack clear government guidance, we recommend employers adopt, and clearly document, approaches that are grounded in common sense.

SPECIFIC SUBJECTS THAT MUST BE ADDRESSED BEFORE EFFECTING RE-OPENING STRATEGIES

Although each employer will be required to develop and execute on return-to-work strategies that are individualized to the employer's specific circumstances, there are common considerations that every employer will be required to examine. Several of those considerations are outlined below.

WORKSITE PREPARATION

Employers have a fundamental obligation to provide a safe work environment. As such, employers must have a plan to ensure that their physical work spaces are safe for employees.

The Federal Occupational Safety Administration ("OSHA") has issued [guidelines related to preparing workplaces for COVID-19](#).

Every employer should familiarize themselves with these recommendations, and the recommendations of other local government health departments.

In addition to these guidelines, employers should develop return-to-work plans that address the following worksite safety concerns:

- **General Employee Re-Call Standards.** In determining a return to work strategy, employers might consider:
 - [Phased Return to the Workplace](#). Employers might consider case-by-case employee call-back strategies, that phase employee returns based on business demands, risk categories, or operational requirements. For example, subject to anti-discrimination laws, employers may consider first re-calling those employees who have had no symptoms of COVID-19 during their furlough/layoff or remote working assignments. Employers may also consider maintaining remote working assignments for those employees who provide job functions that do not require in-office attendance.
 - [Return to Work Fitness Certifications](#). Employers should consider strategies that ensure employees are fit to return to the workplace, without risk to others. This might take the form of requiring that employees provide treating physician health certifications, or adopting temperature readings or other in-office health testing practices. The Equal Employment Opportunity Commission ("EEOC") has published [guidelines that specifically address legally permissible employee health certification standards](#).
- **Employee Re-Call Standards that Relate to Employees that Report Illness.** The Centers for Disease Control ("CDC") has adopted very specific [standards related to the return of workers who have reported COVID-19 infections](#) or who have reported symptoms consistent with COVID-19, including recommended wait times for returning such employees into work environments. Employers should familiarize themselves with these, and other local government health department standards, and incorporate those standards into office re-opening protocols.
- **Worksite Assessment and Office Re-Configuration.** Employers should conduct a full assessment of the physical elements of their work spaces to identify the most appropriate strategies to create the safest environment possible. Considerations for such an assessment might include:

- Worksite Access and Safety Protocols. Employers might consider the following safety protocols, in light of specific elements of the employer's workspace and business: screening procedures for employees and visitors; staggered work times; social distancing protocols that cap group meeting sizes; centralizing trash and recycling receptacles, and arranging for frequent disposal; requiring employees to wear Personal Protective Equipment, or accommodating employees who choose to do so.
- Worksite Re-Configuration. Employers should carefully evaluate office floorplans, particularly open office floor plans, and consider re-configuration of offices and furniture arrangements to promote social distancing. Such strategies might include: installing shields between workstations; creating separate egress and ingress portals; placing limits on mid-day breaks outside the office; removing common food and beverage stations, such as coffee makers and water coolers; or re-orienting workstations. In addition, employers might consider limiting access to common areas and conference rooms, and enforcing strict limits on the number of employees that may use such spaces.
- Environment, Housekeeping, and Disinfectant Strategies. Employers should adopt strategies to maximize hygiene and cleanliness of the worksite, including plans for: maintaining adequate stock of sanitation products; and arranging for more frequent office cleanings. Employers are also prudent to coordinate with building management to ensure that indoor environmental systems are optimized to ensure employee safety, including that air quality systems are cleaned and upgraded.

CHANGE MANAGEMENT

Employers should take steps to facilitate employee transitions back into work spaces, and to promote trust between employees and management.

As employees re-enter work spaces, employers should focus on managing actual and perceived changes to employee experiences. Specifically, employers should take steps to establish the "new normal" of the work environment, and effect clear employee communications that:

- Announce protocols related to office visitors and use of conference rooms and other common areas;
- Establish clear social distancing and housekeeping standards;
- Explain office re-configurations;
- Implement training programs that permit employees to familiarize themselves with new office protocols; and
- Engage employees as "partners" in change processes, including communications and surveys that invite employees to participate in certain decision-making related to worksite protocols.

GOVERNMENT RELIEF OPPORTUNITIES AND EMPLOYMENT LAW COMPLIANCE CONSIDERATIONS

Employers should consider federal and state government relief programs that may be available to assist employers maintain business continuity during transition periods related to the re-opening of worksites. Those programs include, among others: federal government subsidized Paycheck Protection Program, Emergency Disaster, and Main Street loans; employee retention tax credits and social security tax deferrals; and "workshare" **unemployment insurance programs** offered by some states (programs that allow employers to assign employees to reduced hours, while permitting those employees to collect unemployment benefits to supplement their lower wages).

Employers should also remain informed of federal and local safety standards and guidelines that regulate worksites, including guidelines published by the CDC, OSHA, and the Federal

Department of Labor.

In addition, employers must recognize and understand new employment law compliance standards that relate specifically to the COVID-19 context. These compliance standards include:

- **Disability Discrimination Standards.** Employers should expect returning workers to be fearful and concerned about COVID-19 infections from co-workers. This concern and fear may manifest itself in harassment of employees who are perceived to be health risks – including those employees who may have been infected with COVID-19, or who may have cared for those who have been infected. To avoid such harassment, and to avoid any resulting discrimination claims, employers should consider specific employee trainings that address facts and protocols related to working during COVID-19 outbreak periods.
- **Whistleblower Protections.** If an employee believes that their working conditions are unsafe – because of potential exposure to COVID-19 or any other reason – that employee may raise such concerns directly with the employer or to government agencies. The OSHA Whistleblower Protection Program, among other whistleblower laws, prohibits employers from taking adverse employment action against employees who raise concerns about hazards or violations of workplace safety laws, including specifically those related to COVID-19.
- **Reasonable Accommodation.** In connection with re-opening workspaces, employers may experience an increase in accommodation requests from employees with underlying ADA-qualifying physical or mental health conditions that may be complicated by COVID-19. If an employee's job is unable to be performed remotely, and the employee has a disability that makes them more susceptible to complications from COVID-19, the employer should provide the employee with *reasonable* job accommodations that are responsive to the employee's needs, unless doing so would cause an undue hardship. In addition, employers should be open to implementing short-term job accommodations that, in ordinary times, might fall outside the "reasonable" standard, such as: teleworking; temporary job restructuring; temporary job transfers; and modification to work schedules.
- **Adverse Impact Discrimination.** In selecting employees for return to work from furlough, employers should ensure that selection criteria are based on legitimate business considerations, and not on discriminatory factors. Employers should avoid selection criteria that take into consideration the furloughed employee's "protected status" – the employee's race, gender, national origin, religion, age, disability, etc. . . In addition, employers should avoid outcomes that *appear* to single out certain protected classes. For example, selection criteria that results in the exclusion of older workers or pregnant employees from furlough re-call lists may appear to be based on discriminatory factors, even if they are not, and give rise to claims of discrimination.

We believe employers are going to be under the microscope as employees are returned to job locations. We anticipate an increase in employee disputes, as both employers and employees try to navigate the pressures that the COVID-19 outbreak is creating. This summary only touches some of the concepts that are implicated by the re-opening of worksites and the re-calling of employees in the COVID-19 context. There are many other considerations.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please feel free to reach out to your Morse contact, or to speak with [Matt Mitchell](#) directly, should you have any questions.

[Go to our full COVID-19 Resource Collection.](#)