
April 30, 2020
DEVELOPING A RETURN TO WORK PLAN:

- Who
- When
- How
The first step in developing a RTW plan is deciding who should be involved in developing the plan.
Who should be on the planning team?
WHO

- Human Resources, facilities, PR, Govt relations
- Legal
- Facilities
- Larger Business Entities
  - PR
  - Government Relations
CALLING EMPLOYEES BACK
• Texas is starting to open back up
  – Using a phased approach
  – Industry specific
WHEN

Government clearance isn’t the only factor you should consider when determining when you should reopen and/or return everyone back to their normal workspace.
• So before we talk about **HOW** to reopen,

• **A business needs to evaluate WHETHER** to reopen.
Putting Things In Sequence

• Sales and Marketing: Will we have sufficient customers/business to support 100% reopening? If not, 50%, or some other percentage?

• Facilities: Will we have sufficient cleaning supplies/disinfectant and PPE to provide for the safety of employees, customers and visitors?
Putting Things In Sequence

• Real Estate: Do we have sufficient space to provide for appropriate social distancing?
• Public Relations: How will we communicate in the event of an exposure? In the event we become a cluster?
CALLING EMPLOYEES BACK
Who do you call first?
• Review and comply with your handbook/policies/cba.
• Call back “low risk” first?
• But this invites possible age and disability and pregnancy discrimination claims by those not recalled.
Possible Defenses

• But, perhaps being at a high risk of infection is a “reasonable factor other than age.”

• And perhaps returning a worker with a compromised immune system poses a “direct threat” to their own health and safety.

• But beware...
FAQ # 11 from the EEOC Webinar

- May an employer exclude from the workplace an employee who is 65 years old or older and who does not have COVID-19, or symptoms associated with this disease, solely because the CDC has identified this age group as being at a higher risk of severe illness if they contract COVID-19? The answer is no. The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave. One way to show that an action was based on age would be if the employer did not take similar actions against comparable workers who are under the age of 40.
Who Do You Call First?

- Recall by seniority?
- Recall by “merit?”
- Consider using objective measurements of merit, such as written evaluations.
- Consider an A/C privileged disparate impact analysis.
“Workers should have the right to refuse to go to work if they believe it’s unsafe. No worker should put himself or their family in danger of contracting this deadly virus, especially when we have the know-how right now to keep every worker safe.”

Richard Trumka, April 22, 2020
“I Don’t Feel Safe!”

• Some employees may resist a return to work – “I don’t feel comfortable returning to work.”

• How should we respond?
“I Don’t Feel Safe!”

• Suggested initial response:  “We are operating a safe workplace. We are operating in accordance with state and local safety and health guidelines. There currently is no recognized health or safety hazard in our workplace.”
“I Don’t Feel Safe!”

• In general, we want people to be comfortable at work.

• Uncomfortable workers are distracted, less efficient, and possibly unsafe.
“I Don’t Feel Safe!”

What if an employee refuses to return to work?
If you offer work, and the employee refuses:

• You do not have to pay them.
• You do not have to let them take PTO or vacation.
• They may be eligible for state or local mandatory sick leave.
• They are not qualified for FFCRA EPSL (unless they otherwise meet one of the six reasons for qualification).
• This should disqualify them from unemployment.
What about a concerted refusal to return to work?
What about a concerted refusal to return to work?

- May be protected, concerted activity protected by section 7 of the National Labor Relations Act.
- Avoid the temptation to discipline the workers.
- Secure replacement workers.
But my workforce isn’t unionized, so I don’t need to worry about all of this, right?
What about a concerted refusal to return to work?

Wrong!

• The NLRA protects **employees**.

• The NLRB exists to protect the rights of private-sector employees under the NLRA to join together, with or without a union, to improve their wages and working conditions.
“Yes!”

What about employees who accept offers to work?
What if you offer work and they actually accept?

• For those returning after a break in service, plans should address:
  - Background checks;
  - Drug tests;
  - I-9 compliance;
  - W-4, benefits forms, other new hire forms;
  - Waiting periods for benefits.

• Develop training and orientation programs for returning workers.
Are returning employees immediately eligible for FFCRA EPSL?
“Yes!”

Yes, no waiting period for eligibility.
"Yes!"

- Are returning employees immediately eligible for FFCRA EFMLA?
- An employee must be on the employer’s payroll for 30 consecutive calendar days before any EFMLA leave begins, right?
Yes!

29 CFR 826.30(b)(1)(ii): “An employee is considered to have been employed by an Employer for at least 30 calendar days if: ... (ii) the Employee was laid off or otherwise terminated by the Employer on or before December 31, 2020, provided that the Employee has been on the Employer’s payroll for thirty or more of the sixty calendar days prior to the date the Employee was laid off or otherwise terminated.”
EXPOSED OR POSITIVE EMPLOYEES
Do You Have An Exposure Control Plan?

• Include protocols for:
  – Sending employees home;
  – Instituting contact tracing to identify other employees;
  – Cleaning the workplace;
  – Recordkeeping;
Do You Have An Exposure Control Plan?

• Include protocols for:
  - Reporting to health agencies (only required in a very few jurisdictions);
  - Responding to complaints;
  - Dealing with “perceived positives” (as opposed to confirmed diagnosis);
  - Reporting to OSHA.
MAINTAINING A SAFE PLACE TO WORK AND VISIT
Screening Workers

• Develop a health screening protocol for workers.

• Two components:
  – Temperature checks or thermal imaging
  – Health screening interviews/questionnaires/employee attestations.
Health Screening Protocol - Issues

- Check temperature at home, or once workers arrive at the premises.
- Consider privacy and recordkeeping issues.
- Pay for time spent waiting to be checked.
- Health questionnaires - content, recordkeeping, privacy.
- What about actual testing of employees?
“... because an individual with the virus will pose a direct threat to the health of others... an employer may choose to administer COVID-19 testing to employees before they enter the workplace ...

... employers should ensure that the tests are accurate and reliable.”
So what is accurate and reliable?
Accurate and Reliable?

• Two basic types of tests:

**DNA/RNA.** Whether someone has been infected with the virus. Generally seen to be reliable.

**Antibody.** Whether an individual has developed antibodies to the virus (suggesting exposure). General medical consensus seems to be too little is known about what that actually means.
Who should be tested?
Testing – Bigger Question

• Test everybody before they return to work on Monday a.m.
• Anyone who shows infection gets sent home for fourteen days.
• Everyone else comes to work.
• Employee claims that they become infected at work.
• How do we know exactly where and when the worker became infected?
Safe Workplace

Subject to investigation and evaluation by the workers’ compensation insurance carrier.
Safe Workplace

Do employers need a face mask policy?
Yes:

- Accommodation for persons who claim inability to wear coverings.
  - Deaf employees.
  - Employees with beards for religious purposes.
- Who provides the coverings?
- Dress code – nothing offensive, no sports team logos, etc.
- Will employees be disciplined for failure to comply?
WE’VE NEVER DONE THIS BEFORE!

We have never had such a large segment of our economy shut down, and then subject to re-opening in a time of such uncertainty!
WE’VE NEVER DONE THIS BEFORE! SO . . .

– Be Kind
– Be Flexible
– Be Aware
– Be Vigilant