

## ALERTS

## RESUMING BUSINESS DURING THE COVID-19 PANDEMIC: GUIDANCE FOR EMPLOYERS

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For more information please contact a member of our Employment and Labor COVID-19 response team or any other member of our Employment and Labor Group.

After the flurry of layoffs, stay-at-home orders, furloughs, and considerable new government regulation, many employers are now looking at planning for the eventual resumption of “regular” business. Such planning requires balancing productivity and workplace efficiency with health concerns and legal compliance. The following guidance provides insight into issues employers should consider before bringing employees back to work and do’s and don’ts when employees are back.

### DECIDING WHETHER TO REOPEN OR RESUME “NORMAL” OPERATIONS

- When can businesses that are not an “essential business” under state or local stay-at-home orders bring employees back to work?

Before an employer takes any steps to reopen its business or makes any hiring decisions, it should review the applicable city, county, and/or state stay-at-home orders to determine if reopening is possible and what conditions and precautions employers should take when doing so. Many government authorities are lifting stay-at-home orders in phases and requiring businesses to take certain precautions when resuming operations. For a summary of North Carolina Governor Roy Cooper’s proposed plan, see <http://www.mvpublicaffairs.com/2020/04/covid-19-nc-path-forward-to-easing-restrictions/>. For state-by-state order, see <https://web.csg.org/covid19/state-reopen-plans>.

- What are the risks of opening too soon?

Employers who decide to re-open need to be ready to comply with the new normal of OSHA and CDC safety precautions, including social distancing, masks and protective barriers for employees dealing with the public, sanitizing procedures, and a rapid response plan when an employee presents with symptoms of COVID-19. Bringing employees back to work before the employer has safety precautions in place not only can violate the OSHA general duty clause, it can put employees and customers at risk. That means potential increased workers compensation claims, potential liability to customers, and more employee downtime.

For companies covered by the leave provisions in the Families First Coronavirus Response Act, resuming business operations and bringing employees back to work also means that some of those employees may be eligible for paid leave. Employers should have procedures in place not only to provide the leave and collect

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necessary documentation to claim the payroll tax credit, but also to cover the work that will need to be reassigned when leave is taken. Employers also need to consider the shifting employee numbers in determining whether the FFCRA applies at all. Because whether an employer is covered by the FFCRA is affected by layoffs and furloughs, employers should be mindful of the number of active employees on the date for which the employee requests leave. For example, if an employer laid off 50 employees on March 5, 2020, thus reducing its workforce from 520 employees to 470 employees, any employee for whom the employer had work and requested covered leave beginning on or after April 1, 2020 would be eligible under the FFCRA. But if that employer brings back enough employees to put the workforce over 499 employees, any employees seeking leave after that point are no longer eligible for FFCRA leave, unless and until the employee count slips below 500 again.

For more information regarding the leave requirements under the FFCRA, see our previous guidance available here: [news-room-1229.html](#).

Employers should also be mindful of state and local paid leave laws, which may apply in addition to federal mandates.

## WORKFORCE REINSTATEMENT

- What steps should an employer take when reintegrating its workforce?

*Make business-related decisions about which employees to return to work and when.* Upon the resumption of business, many employers will likely rehire or return to work much of their labor force, but perhaps not all at once. In some locations, social distancing and safe workplace practices will dictate certain limits on the pace of resuming business activities. For other businesses, the desire to ramp up slowly as business increases will be important to sustain the viability of the business. As employers decide which employees to bring back first, employers must avoid any discriminatory practices based on protected characteristics (such as age, disability, national origin, etc.) and practices that may be viewed as retaliatory. Thus, when determining who should return to work or who should return to work first, employers should not – outside of a request for an accommodation under applicable disability discrimination law – consider whether someone is more vulnerable to the effects of COVID-19. For example, it would be inappropriate to return younger employees to work before returning older employees because of their age (unless the older worker requested the delay as an accommodation). Likewise, employers should avoid the appearance of retaliating against workers who chose to exercise protected rights, such as taking FFCRA leave to care for a child whose school or daycare is closed because of the pandemic. To control against possible discrimination or retaliation claims, an employer should base its rehiring decisions on legitimate, nondiscriminatory business reasons, such as need, seniority, job skills, performance prior to the layoff or furlough, and compliance with company policies. Employers should check personnel files, performance reviews, and discipline records to make sure that their records support the decisions made. Employers with unionized workforces need to comply with the requirements of collective bargaining agreements.

*Decide where employees will work.* If teleworking has been effective for your business, it makes sense to continue allowing some or all of those employees to continue teleworking for now. If the company needs employees to be physically present, bring employees back to the office or plant in a manner that minimizes

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close interaction. Employers should also continue to limit unnecessary travel. For more information on limiting employees' travel, see our previous guidance available here: [news-room-1229.html](#).

*Assess if changes in compensation and benefits are needed to keep the business operating until revenues resume.* You may consider reducing salary or hourly wages or modifying vacation and PTO policies (for example to stop future accrual of PTO for remainder of year). Carefully review existing contracts and policies before doing so, and never deprive an employee of earned pay or PTO unless expressly permitted by law.

*Assess the ability of the company to provide PPE.* CDC guidance encourages the use of personal protective equipment, including masks, to reduce the spread of COVID-19. Healthcare providers and other businesses that deal directly with the public should equip their employees with PPE in accordance with available CDC, OSHA, and other regulatory guidance. If you need to provide masks, barriers, or other PPE, consider whether and when it will be readily available before bringing employees back. If your business is not required to provide employees with PPE, consider the feasibility of providing it anyway to reduce risk.

*Set a timetable.* Keep in mind that if you have an SBA Paycheck Protection Program loan, you will need to have your workforce numbers and salaries back to your average "normal" by June 30, 2020 to avoid reductions in forgiveness.

- Can an employer temporarily reduce the work hours, the hourly wage, or the salary compensation of its employees?

Subject to minimum wage laws, the FLSA, and other relevant state or local restrictions, an employer can likely reduce the hourly wage or salary of its workers. However, there are certain restrictions upon employers when doing so. Most notably, employers should provide advance notice of any reduction in pay. Also, FLSA-exempt employees who have their salary reduced below the salary basis threshold will lose their exemption. Employers should also consider that a reduction in hours of certain employees may affect their eligibility for certain benefits. Employers should carefully review any contracts with employees and payroll policies to ensure that the reduction in pay is permissible.

## WORKPLACE SAFETY AND HEALTH – TESTING AND SCREENING

The Equal Employment Opportunity Commission recently issued guidance addressing an employer's right to take and record employees' temperatures, administer official COVID-19 tests to employees, and screen employees for the presence of COVID-19 symptoms.

- Can employers test employees for COVID-19?

According to the EEOC, any business where employees work within proximity to one another may administer COVID-19 tests to its employees. These tests are administered to detect the presence of the virus and provide either a "positive" or "negative" result. Employers should use caution when administering the COVID-19 test and should follow the guidance issued by the Federal Drug Administration and the CDC regarding the safe and accurate administration of tests.

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It is recommended that, if possible, employers hire health care professionals, such as a certified nurse, to administer the COVID-19 test. Whoever administers the test should be equipped with the proper Personal Protective Equipment pursuant to CDC guidance.

- Can employers screen employees for COVID-19 symptoms?

The EEOC has advised that employers may screen employees for COVID-19 symptoms and measure employees' body temperatures. Employers may ask employees about symptoms associated with COVID-19 such as fever, chills, shortness of breath, sore throat, nausea, or loss of smell and taste. The CDC has recommended that any individual administering a temperature test is equipped with proper PPE.

When administering any test or inquiring about COVID-19 symptoms, employers should not engage in disparate treatment of employees based upon protected characteristics simply because those characteristics are high risk for COVID-19. For example, employers cannot screen pregnant employees and those over sixty-five years of age because those individuals are higher risk. Instead, employers should either screen all employees or employees in the same category (e.g., employees whose jobs put them in close proximity to others) for COVID-19.

- What if an employee has COVID-19 symptoms?

If an employee is experiencing COVID-19 symptoms, the EEOC has advised that employers may:

- Require the employee to return home for the appropriate quarantine period as recommended by the CDC.
- Withdraw an offer or delay the start of an individual who has tested positive for COVID-19.
- Request a doctor's note, or other documentation, that confirms an employee can safely return to work.
- Share general information about an employee who has exhibited symptoms such as where the employee was in the office (the floor they work on, what rooms they were in), when the employee was last at work, or the details of the employee's COVID-19 testing process (when tested and the results). An employer may not share the employee's name or any other personal identifying information.

For CDC guidance on reopening and maintaining a safe workplace:

<https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>

## REASONABLE ACCOMMODATIONS FOR EMPLOYEES

The Americans with Disabilities Act is still in full effect, despite challenges in its application during the COVID-19 pandemic. Employees returning to work under current conditions may prompt additional requests for workplace accommodations.

- Are employers required to provide reasonable accommodations during the COVID-19 pandemic?

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In accordance with the EEOC's guidance, if an employee requests a reasonable accommodation, an employer must weigh the costs of the accommodation with the employer's current budget. If the accommodation imposes an undue financial hardship, meaning significant difficulty or expense, the employer may be entitled to deny the accommodation. The EEOC has advised that an employer can consider financial strains created by COVID-19 when determining whether an accommodation poses an undue financial hardship.

The EEOC has recommended some low-cost accommodations such as:

- One-way aisles
- Plexiglass, tables, or other barriers to ensure the minimally required distance between individuals
- Temporary job restructuring of marginal duties
- Telework
- Modified work schedules
- Rearranging shift assignments

Pursuant to the ADA, employers are still entitled to request documentation of an employee's disability if an employee requests a reasonable accommodation.

The EEOC has advised that if an urgent accommodation is requested, employers can shorten, or even forgo, the required conversations under the ADA and temporarily grant the request under an expedited schedule. This will not foreclose a future decision to provide a different accommodation. Employers may consider imposing end dates on temporary accommodations. The EEOC has also recommended that employers ask employees with known disabilities to request accommodations before work resumes. This will help employers make any necessary accommodations and engage in an interactive process with the employee ahead of time.

## GENERAL TIPS

Employers should proceed cautiously at this time and should rely on experts when navigating complex legal or medical issues. Some other general tips are as follows:

- Stay current with guidance posted by the CDC and EEOC as well as federal, local, and state authorities.
- If a business has locations across multiple jurisdictions, be aware of the differences in the stay-at-home orders and other relevant mandates amongst those localities.
- Litigation is likely. Involve an attorney early to mitigate risk.
- Continue to follow social distancing guidelines, hand washing requirements, sanitizing regimens, and other recommendations set forth by the CDC.
- Document any steps taken to comply with the EEOC, the CDC, OSHA, and other regulations or government orders. Record any policies or procedures implemented and the relevant dates.
- In the face of uncertainty, proceed cautiously and conservatively. Follow the most restrictive reading of the relevant order.

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- Be flexible and, if possible, allow employees to return to work voluntarily and when they feel they can do so safely.
- For more employer guidance on legal issues related to COVID-19 visit [news-room-1229.html](https://www.mooreandvanallen.com/newsroom/1229.html).

## FURTHER GUIDANCE

*EEOC Coronavirus and COVID-19:* <https://www.eeoc.gov/coronavirus/>

*EEOC Pandemic Guidance:* [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

*EEOC What You Should Know About the ADA, the Rehabilitation Act, and COVID-19:* [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

*CDC Interim Guidance for Businesses and Employers:* <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

*CDC Guidance for Coronavirus 2019 Information for Travelers:* <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

*OSHA COVID-19 General Guidance:* <https://www.osha.gov/SLTC/covid-19/>

*OSHA Guidance on Preparing Workplaces for COVID-19:* <https://www.osha.gov/Publications/OSHA3990.pdf>

### Moore & Van Allen Employment and Labor team

*Rachael Coe* [rachaelcoe@mvalaw.com](mailto:rachaelcoe@mvalaw.com), 704.331.3655  
*Brandon Gaskins* [brandongaskins@mvalaw.com](mailto:brandongaskins@mvalaw.com), 843.579.7038  
*Tony Lathrop* [tonylathrop@mvalaw.com](mailto:tonylathrop@mvalaw.com), 704.331.3596  
*Clinton Magill* [clintonmagill@mvalaw.com](mailto:clintonmagill@mvalaw.com), 843.579.7073  
*Karin McGinnis* [karinmcginnis@mvalaw.com](mailto:karinmcginnis@mvalaw.com), 704.331.1078  
*Sarah Negus* [sarahnegus@mvalaw.com](mailto:sarahnegus@mvalaw.com), 704.331.3667  
*Emily Pera* [emilypera@mvalaw.com](mailto:emilypera@mvalaw.com), 704.331.3787  
*Paul Peralta* [paulperalta@mvalaw.com](mailto:paulperalta@mvalaw.com), 704.331.1024  
*Randy Phillips* [randyphillips@mvalaw.com](mailto:randyphillips@mvalaw.com), 704.331.1048  
*Russ Sizemore* [russ Sizemore@mvalaw.com](mailto:russ Sizemore@mvalaw.com), 704.331.1022  
*John Zaloom* [johnzaloom@mvalaw.com](mailto:johnzaloom@mvalaw.com), 919.286.8182

*These informational materials are current as of May 1, 2020 and are not intended, and should not be taken, as legal advice on any set of facts or circumstances. You should contact any member of the Moore & Van Allen Employment and Labor team for advice on specific legal problems.*