

COVID-19 and Returning to Work: For Employers, It's Not Too Soon to Plan a Comeback

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Although the U.S. is still in the thick of the COVID-19 crisis, this is exactly when employers who are deemed “non-essential” should be developing a careful, considered plan to bring their workforces back. Employers face a multitude of challenges in the planning process, including: (1) determining when and who comes back; (2) parting ways with employees with whom the business can no longer support or need; (3) sidestepping lawsuits that could otherwise arise after employee terminations; and (4) balancing employees’ legitimate concerns for themselves and their families’ with an increasingly imperative need to get your business up and running again.

This post briefly addresses issues employers should consider when bringing employees back. For a deeper dive of the issues covered in this post and more, check out a [recording](#) of Kelley Drye's **Part 1: Getting Back To Work: Preparations and Considerations for Employers** webinar, and register for **Part 2: Getting Back To Work: When the Rubber Hits the Road**. Part 2 is scheduled for April 30, 2020 at 12:30 PM ET, [click here to register](#).

When to Come Back

Go slow, and let “safety first” be the controlling consideration for employers when bringing employees back to work. This principle has the virtue of being altruistic, but leading with a “go slow, safety first” attitude also puts an employer in the position to avoid serious missteps in the future. For example, bringing back employees too early or all at once can lead to a COVID-19 office outbreak, which will set employers back even further than they are now. While some workplace transmission will likely continue to be unavoidable given the nature of COVID-19, employers can maximize the chances of a comeback success story by considering a few fundamental questions:

- **Consider a phased approach.** Being able to interact face-to-face is fundamental to the culture of most businesses, and for good reason. Ironically, COVID-19 doesn't care about your workplace culture and would prefer to see your employees never see one another again. To balance workplace needs with an unforgiving virus, employers should consider bringing employees back in small groups or “waves,” to minimize the risk of infection. As we are now all too painfully aware, COVID-19 likes close quarters, so employers should take care to literally give employees space when planning how employees should return to the office. This could include alternating when employees can come in, redesigning open floor plans temporarily to allow employees to spread out and have more space, or installing partitions between workspaces—or all of these things.
- **Consider temperature checks.** As we have written about [here](#), the S. Equal Opportunity Employment Commission—normally not a fan of workplace medical testing—has risen to the crisis

by specifically authorizing temperature checks at work. Three points are important here.

First, if you do implement temperature checks, be careful not to obtain more information than is necessary. You don't need an employee's entire medical history; rather the goal is to determine whether the employee is symptomatic or at risk of infecting others and is healthy to return to work. Just get the facts, and only the ones that are necessary to make that determination.

Second, remember that "employee privacy" is still a concept. An employer must keep all medical information (yes, including employees' temperatures) confidential, and screening should be conducted in a separate room, or at least in a screened-off area, away from other employees. This also makes good sense from an employee relations perspective: the last thing you want is a line of employees watching John, who is also in line, get told that he has to go home for 14 days to self-quarantine.

Third, remember that a temperature check reveals someone's temperature, not the presence of a virus. Don't let your supervisors or HR professionals "play doctor." If an employee has an elevated temperature, immediately send them home and tell them to seek a medical diagnosis. If you're an employer with fewer than 500 employees, an employee will also get two weeks of Families First Coronavirus Response Act paid leave for that reason, the costs of which will ultimately come back to you as a tax credit.

- **Consider waiting.** Particularly when states (we won't use names like "Georgia") are opening up at a time in which many experts believe it is too early, employers should take caution in opening their offices at a time when the outbreak is still at an all-time high. Just because you *can* re-open, does not mean you *should*. Obviously, this is a business-specific choice. Just remember that short-term economic gains can easily be lost if, longer-term, renewed COVID-19 transmissions puts half of your workforce in quarantine.
- **What about viral testing?** On April 23, 2020, the [EEOC clarified](#) that employers are permitted to require employees to test negative for COVID-19 before returning to work. But remember: COVID-19 testing remains widely unavailable. As a result, it is very likely impractical for employers to require employees to obtain a negative COVID-19 test result to come back to work. In addition, while anti-body testing may become more widely available, it is not 100% foolproof, so employers who may be able to obtain anti-body testing for their employees should be careful in relying on this type of testing as a method to bring workers back.

Who Comes Back First?

Employers must rely upon neutral factors in deciding who to bring back first (as they should with every employment decision). In fact, employers should be focused on one thing—business needs. Employers should figure out which employees need to be in the office more than others. Those employees should be selected to come back first. After that, selection criteria can be further broken down by other neutral factors such as skills, knowledge, and experience.

Employers should also develop a considered, detailed, and neutral decision making process in deciding which employees come back first, and to document those rationales, which becomes critical when an employer is second-guessed later. Be wary of seemingly arbitrary decisions about who to bring back when considering the same positions and offices. For example, if Mary (an admin) was diagnosed with COVID-19 on March 1 and has had no symptoms for months, yet, is not chosen to come back, while her co-worker (also an admin) is allowed to come back, this scenario creates a risk that Mary will think you're refusing to bring her back for an unlawful, non-COVID-related reason

(race? sex?). On the other hand, if Mary was sick last week, her employer has a concrete, objective reason to tell her to stay at home for now. So avoid irrational bias: make employment decisions based on objective, provable rationales.

Can Employers Terminate Employees They No Longer Need?

The short answer: yes, because terminating an employee for any non-discriminatory or non-retaliatory reason is lawful. However, let's face the facts: terminations are "adverse employment actions" that could be unlawful—or could be alleged to be unlawful—unless the employer can demonstrate an objective, legitimate business reason for its decisions.

We recommend that employers review *existing* documentation to justify termination decisions. If Manager Moe wants to bring back Fred and Harry but not Sally, make sure there is written documentation as to why. Look to performance reviews, communications, or any other *contemporaneous* documentation to objectively justify termination decisions.

How Do Employers Evaluate Permanent Work From Home Requests and Are Business Models Fundamentally Changing?

The employment world as we know it has radically changed, maybe forever in some ways. Some employers, for example, are already examining whether office space—once a "given"—is really needed. And many employers will face requests from employees to continue to work from home. Can employers have a remote workforce? Does that even work?

Ultimately, it depends on your business needs. If the answer to that question is a resounding "no" (i.e., employees must be in the office), an employer can, and should, refuse a request to work from home if the request is being made for reasons that are not related to medical needs or workplace safety. Mere convenience or preference is not a justification. We certainly recognize that good employee relations demands that employers be sensitive to the reasonable fears and continuing concerns of employees, but in the end: (1) make your workplace safe to return to; (2) communicate very transparently about all you've done to ensure the safety of your employees and their families, and, having done that; (3) run your business and get back to work.

Final Thoughts

There is no "one size fits all" approach to bringing back employees. Employers should focus on safety and minimizing legal risk—but those two main considerations will mean different things depending on your workforce, your operations and your business needs. The usual tagline at the end of legal blogs couldn't be more appropriate here: consider consulting employment law counsel, as an ounce of prevention is worth a pound of cure (pun intended).