



Morgan Lewis

REOPENING THE WORKPLACE

PRACTICAL CONSIDERATIONS FOR EMPLOYERS

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April 29, 2020

Introduction

- **Decision Tree For Returning to Work**
 - Analysis of Federal, State, and Local orders to determine Conservative, Moderate, or Aggressive approach
 - Geographical approach for operations based on varying requirements/restrictions
- **Key Actions For Return**
 - Social Distancing, Safety Measures, Enforcement/Accommodations, COVID-19 Monitoring
- **Additional Considerations For Return**
 - Impact of Childcare Availability and Public Transportation
 - Returning Employees From Furlough
 - CBA/Union Considerations
 - OSHA Preparedness
 - Travel, Leave/Wellness, and Pandemic/Business Continuity Policies
- **Litigation Risks With Return**

Phase I Return

(Based on Applicable Federal/State/Local Orders)

Conservative

- Maintain remote working for all but essential personnel
- Establish social distancing and safety measures for return of more personnel in Phase II

Moderate

- Maintain remote working for as many other employees as possible
- Conduct phased return of non-remote workers based on priority of personnel with social distancing and safety measures in place

Aggressive

- Return to full operations with social distancing and safety measures in place
- As much as possible, conduct phased return based on priority of personnel

Geographical Approach to Social Distancing/Safety

(Based on Applicable Federal/State/Local Orders)

National/Int'l

- Apply uniform standard for social distancing and safety measures for all operations based on most restrictive locations (e.g., NY, NJ, CA, Italy, Singapore)

Regional

- Apply regional standard for social distancing and safety measures for regions based on most restrictive locations within a region (e.g., Northeast US based on NY and NJ requirements)

Local

- Apply location specific standards based on social distancing and safety measure requirements currently in place or that are implemented in Phase I return

Pros/Cons to Geographical Approach

National/Int'l

- Pro – Allows you to design one policy that applies everywhere
- Pro – Ensures best argument against safety and/or other claims
- Con – Imposes greater burden than may be required in many regions/locations

Regional

- Pro – Allows you to avoid unnecessary burden in regions with low risk and lesser requirements
- Pro – Still complying with most restrictive requirements within a region
- Con – Burden of developing and applying varying standards
- Con – Employee confusion and/or disputes with unions on varying standards

Local

- Pro – Allows you to avoid unnecessary burden in locations with low risk and lesser requirements
- Con – Burden of developing and applying many varying local standards (i.e., state, county, city)
- Con – Unnecessary because of overlap in requirements across locations
- Con – Employee confusion and/or disputes with unions on varying standards

Preparation for Phase I Return

Step 1

If essential business now, are existing procedures sufficient for broader return to work in all locations?

Step 2

If non-essential now or anticipate broader return to work, decide on geographic approach to social distancing/safety measures

Step 3

Consult federal/state/local existing orders for essential (public facing and non-public facing) businesses to design new policies/procedures now

Step 4

Develop and roll-out social distancing/safety measures and deploy staff to implement workplace changes

Step 5

Develop policy/plan for enforcement of new requirements

Step 6

Develop policy/plan for accommodations, considerations for most vulnerable employees, and COVID monitoring

Key Actions for Reopening

Social Distancing

- **Physical workspace modifications** (e.g., separating desks, modifying open floor plans, closing common areas)
- **Limiting in-person interactions and physical contact** (e.g., no non-essential travel, no in-person meetings)
- **Training employees** on social distancing policies and protocols, including where to go with complaints
- **Update employee schedules** (e.g., staggered scheduling, telework for less essential personnel)

Key Actions for Reopening, cont'd.

Safety Measures

- **Create infectious control procedures** (e.g., require frequent hand washing, limit sharing of equipment)
- **Regular screening protocols** for employees, customers/visitors (e.g., symptom, temp screening)
- **PPE procedures** (e.g., require workers and visitors to wear face coverings)
- **Workplace sanitization procedures** (e.g., provide hand sanitizer, require frequent sanitization of high-touch areas)
- **Follow current/updated guidelines** of local DOH, reopening orders, CDC, and OSHA for maintaining a clean and safe workplace

Key Actions for Reopening, cont'd.

Enforcement/Accommodations

- **Develop/update accommodations policy** for vulnerable employees including alternative work arrangements
- **Develop policy for employees who fear returning to work or refuse to return to work**
- **Develop PPE enforcement policy** including discipline for those who refuse to wear face covering
- **Update/develop complaint procedures and training** on enforcement/discipline/accommodations

Key Actions for Reopening, cont'd.

COVID Monitoring

- **Establish procedure to address workplace exposure** (e.g., separate and send home workers who appear to have symptoms consistent with COVID-19, clean and disinfect workplace)
- **Develop procedures for contact tracing/notification** of known exposure consistent with ADA or state law

Additional Considerations for Reopening, cont'd.

Childcare and Public Transportation

- Consider impact from lack of childcare availability
- Consider alternatives to public transportation or stipends for parking to limit need for public transportation

Additional Considerations for Reopening, cont'd.

Returning Employees from Furlough

- Evaluate state laws on preference for furloughed employees
- Review furlough notices to determine promises and expectations for return
- Consider impact of timing of return and any salary reductions for wage/hour impact
- Consider impact on health and welfare benefits and vacation time
- If employer participated in Paycheck Protection Program, consider who to return based on forgiveness of loan considerations
- Furloughed employees may need to reenroll or update benefit information and consider any impact on 401(k)
- Employees responsible for premium payments during furlough may be obligated to repay, but there are complications due to state deduction restrictions

Additional Considerations for Reopening, cont'd.

Wage and Hour/Compensation Plans

- Compensable time for wait time for symptom/temp screening, temperature taking at home, building ingress/egress, and continuous workday issues
- Reporting time and/or predictive scheduling obligations when announcing/adjusting schedules and sending employees home from work
- Potential inclusion of additional incentive pay in regular rate
- Preserving exemptions, including of remote workers whose duties have been modified or exempt workers covering nonexempt work resulting from lack of hourly workers
- Expense reimbursement for masks/safety equipment and internet/cell phone for teleworking employees
- Evaluate effect of shutdown periods on existing bonus/incentive plans

Additional Considerations for Reopening, cont'd.

Procedures For Walkouts/Strikes

- Communications plan (to allay reasonable fears)
- Productive dialogue to ensure work coverage
- Potential replacement workers

CBA/Bargaining Obligations re: Union Workforces

- Recall sequencing is biggest topic
- New no-strike provisions may be appropriate
- Negotiating potential additional demands (e.g., availability bonus)

Additional Considerations for Reopening, cont'd.

OSHA Preparedness

- Anticipate increased employee safety complaints and OSHA activity (e.g., onsite inspections and informal complaint letters)
- OSHA will ask for employers' written pandemic response plan (if any), pandemic response training records, and PPE hazard assessment
- Respond to informal letters with steps taken to protect employees from COVID-19 including supporting documents (receipts for masks/gloves; sanitation procedures, training records on social distancing policies, etc.)
- Evaluate OSHA safety procedures and preparedness for dealing with citations, OSHA inspections, etc.
- Healthcare industry, emergency responder organizations, and correctional institutions will be held to stricter standards with increased enforcement on injury and illness recordkeeping for COVID-19

Additional Considerations for Reopening, cont'd.

Travel Policy

- Revise/implement new travel policy consistent with federal/state/local requirements (e.g., what will be considered essential travel?)
- Procedures for monitoring travel and quarantine procedures for return from travel
- Consider monitoring personal/vacation travel

Additional Considerations for Reopening, cont'd.

Leave/Wellness Policies

- Consider leave entitlements for employees remaining home and unable to work remotely as well as updates to policies going forward, including ensuring continued compliance with applicable and recently enacted sick-leave laws
- Evaluate existing Wellness and EAP programs for COVID-19 specific issues

Pandemic/Business Continuity Policies/Plans

- Review and revise current pandemic response plans in order to respond to another potential outbreak of the virus
- Develop management/HR succession in the event that any leadership team is sidelined
- Consider whether to require vaccination once a vaccine is developed

Potential Legal Claims

- **Workplace Safety/Nuisance Claims** (litigation for alleged violation of safety/health standards or state laws requiring safe workplaces and related whistleblower/retaliation complaints)
- **Workers' Comp or Tort Claims** (including whether WC laws will be exclusive remedy, possible wrongful death claims and third party liability claims from visitors, customers, employees' family members, etc.)
- **Failure to Accommodate Claims** (Is fear of coronavirus a disability? Is the provision of private transportation a reasonable accommodation?)
- **Wage and Hour Claims** (e.g., reimbursable expenses; overtime/meal breaks when working from home; being "on-call"; time waiting for medical screens and temperature checks; wage reduction claims)
- **Claims Arising Under Local, State, and Federal Leave Laws**

Potential Legal Claims, cont'd.

- **Labor Claims** (e.g., violations of collective bargaining agreements, failure to negotiate actions taken in response to the virus, failure to abide by collective bargaining provisions relating to recall rights)
- **Furlough and Layoff Claims** (e.g., failure to provide WARN notice, failure to pay timely final payments, or failure to provide timely termination/benefit eligibility notices)
- **Invasion-of-Privacy Claims** (e.g., disclosure of confidential medical information; disclosure of confidential customer information by employees to family members or otherwise during remote working periods, etc.)
- **Discrimination and Retaliation Claims** (e.g., claims challenging process or decision-making for furloughs, layoffs, salary reductions, etc.; claims relating to employees' actual or perceived disabilities, etc.)

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[SHOW ME THE MASKS: SUPPLYING FACE COVERINGS AND RESPIRATORS TO ESSENTIAL EMPLOYEES>](#)

ATTEND – UPCOMING WEBINAR ON MAY 5:

[REOPENING THE WORKPLACE: STRATEGIES AND TIPS FOR UNIONIZED EMPLOYERS>](#)

WATCH – RELATED VIDEO:

[CAL/OSHA INSPECTIONS: MANAGING THE PROCESS TO POSITION THE COMPANY FOR SUCCESS>](#)

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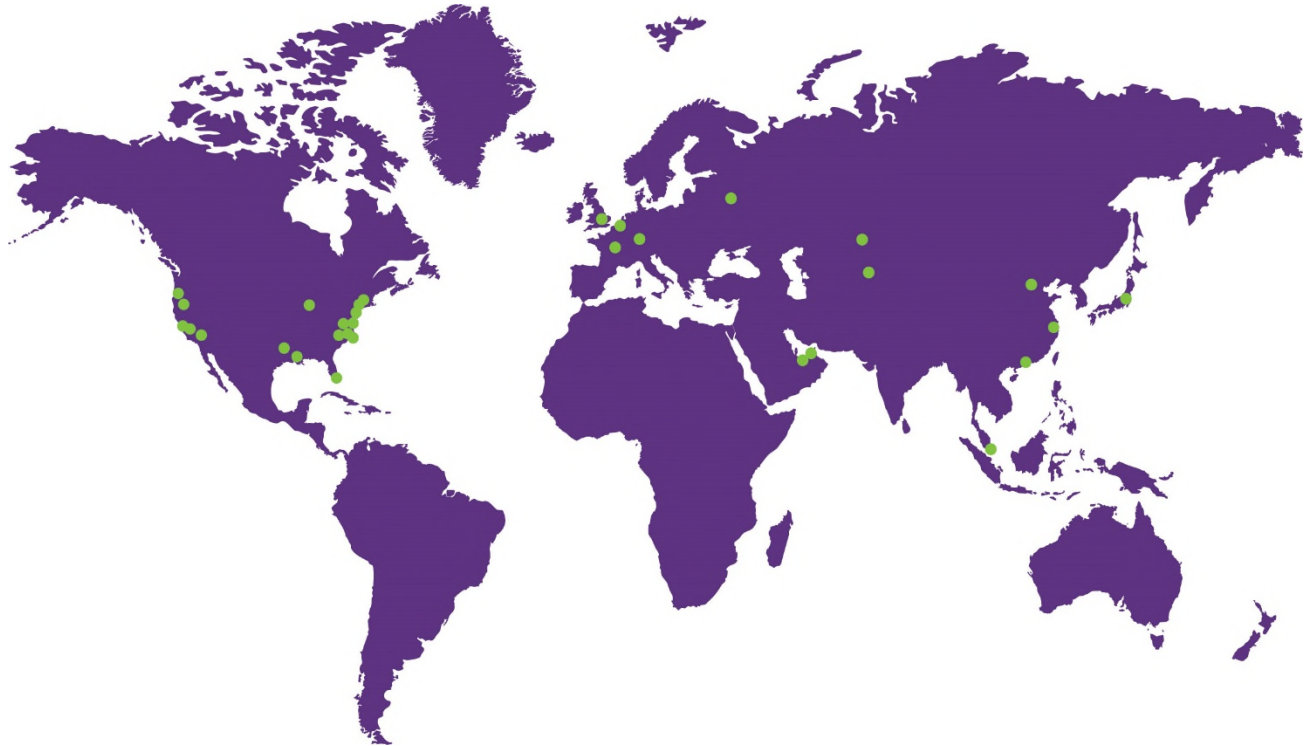
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