

Return to Work: Preparing for the Future Amid COVID-19

Companies planning to reopen offices face numerous challenges, including how to handle employee illness, privacy rights, and more.

Companies preparing for a return to work amid the ongoing COVID-19 pandemic face a number of important HR and employment issues, including complying with federal, state, and local regulations; meeting industry-specific requirements; and adopting a return-to-work plan. Such plans can vary significantly, and each approach carries its own set of legal issues and challenges. NVCA and Latham & Watkins recently conducted a webcast, [Return to Work: Preparing for the Future Amid COVID-19](#), to explore these issues. Below are the key takeaways.

Top 10 Employment and Insurance Considerations

1. Illness among workers and third parties

Employers planning a resumption of in-office business operations say handling illness among employees and third parties is their greatest concern. The Centers for Disease Control and Prevention (CDC) offers helpful guidelines for reducing the potential for workplace exposure to illness. Some local officials are adopting the [CDC's guidelines](#) as requirements. California's Division of Occupational Safety and Health (Cal/OSHA), for example, requires employers to determine if COVID-19 is a workplace hazard in their workspace, and if it is, to amend their existing Illness and Injury Prevention Plan to implement infection control measures, including those recommended by the CDC.

2. Compliance with mandated protocols and development of policies

Employers should refer to CDC guidelines and develop policies in their return-to-work plan that cover social distancing, personal protective devices and sanitation, and employee temperature checks or wellness certifications. Additionally, state and local governments have enacted gubernatorial and county health officer orders, legislation, ordinances, and agency pronouncements and regulations, all of which should be taken into consideration by employers based on their jurisdiction.

3. Worker recall processes

How and when to recall employees will depend on a number of factors, including local health officer orders (*e.g.*, occupancy restrictions and social distancing guidelines) and the nature of the workplace (*e.g.*, high-rise office buildings, open workspaces, communal space).

4. Incident response following a COVID-19 diagnosis

Companies should follow CDC and local health authority guidance and develop a plan for sending home the infected employee for a required quarantine period; notifying those who came in close contact with the employee (on an anonymous basis) that they may have been exposed and potentially requiring their own testing and quarantine period; and closing the affected space for cleaning.

5. Compliance with federal and local laws governing employee rights

Employers should remain compliant with employee medical privacy rights. While employees' COVID-19-related health information may not constitute "protected health information" for purposes of HIPAA if employers are acting in their capacity as an employer rather than through their employee group health plans, employers still need to be mindful of state and federal laws and regulations governing the privacy and security of employee medical information. When implementing COVID-19 testing programs, employers should ensure that the collection, use, and disclosure of such information complies with such laws and regulations, and that employees are properly notified of how such information will be used and disclosed. A number of employers are considering using automated contact tracing to enable them to track outbreaks and limit the spread of the virus. Some states prohibit GPS surveillance of employees without consent, and therefore specific permission may be required for Bluetooth-enabled GPS contact tracing.

6. Sick leave, family care leave, and parental leave for reasons related to COVID-19

It is important for companies to understand employee rights under the emergency amendments to the Family and Medical Leave Act (FMLA). Employees of companies with less than 500 employees may have rights to partially paid leave due to:

- Their own illness or evaluation for COVID-19
- The illness of a household member who has COVID-19
- School closures or lack of childcare arrangements

These regulations are complex, and employers should consult with counsel.

7. Resistance to returning to the office

A number of companies have surveyed their employees and report significant resistance to the idea of returning to the office in the near term. While employers can require their employees to return to work in the office, they should consider the following:

- The Americans with Disabilities Act and similar local laws may require accommodation of employees whose medical providers support they should continue working from home.
- Refusing an employee's request to work from home due to a family member with medical conditions that puts them at greater risk of COVID-19 could lead to a claim of discrimination based upon association with a person who has disabilities.

8. Resistance to working from home

Some companies report employee resistance to working from home, or to company announcements that extend the period that employees are expected to work from home. Employers can and must require employees to adhere to all company policies designed to ensure compliance with applicable laws,

including staying home, wearing a face covering, and social distancing. However, as some companies extend their work-from-home directives even when local authorities allow them to reopen their offices, interesting and novel issues are cropping up, such as requests for employer assistance with home office equipment. Some jurisdictions already require employers to reimburse employees for, or provide a stipend designed to cover the cost of, employees' home internet and phone connections and personal cell phones for business use. Also, employers may be required to accommodate requests for equipment necessary for employees to do their jobs from home without incurring repetitive-stress or ergonomics-related injuries.

9. Employee relocations

Companies are seeing an increase in employee relocations — often unilateral — both within and outside the United States. These can raise unexpected tax issues, including both payroll tax issues and revenue attribution issues. Notably, companies extending out office closures can expect an increasing number of employee relocations. In addition to tax issues, these relocations may create internal pay disparities, as employees who were hired in areas with a high cost of living relocate to areas with a lower cost of living.

10. Insurance considerations

Insurance is an essential risk-management and hedging asset. Premiums are costly, so it behooves companies to utilize the asset fully. Understanding the scope of protection can inform company strategies on how aggressively to return to work, and with what level of precautions. Return-to-work issues are likely to impact the following areas of coverage:

- **Worker's compensation insurance:** Workplace-acquired illnesses are often compensable through the worker's compensation system, without any showing that the employer did anything wrong. Worker's Compensation Insurance is required in every state, and the insurance typically reimburses employers for most or all defense costs, medical costs, and lost wages incurred as a result of worker's compensation claims. However, insurance is often subject to deductibles, and if the deductibles apply on a per-worker basis, they can add up very quickly and leave the employer with a hefty liability. Companies should consult their broker and understand the below points for all states in which they have meaningful operations:
 - How worker's compensation costs are allocated between the employer and insurer
 - Whether the employer's exposure for deductibles is subject to an aggregate cap
 - Whether the total available coverage limits are subject to a hard cap
- **Employment practices liability (EPL) coverage:** Employers face a variety of workplace liabilities that could emerge as employees return (or don't return) to work, including (without limit) discrimination claims on the basis of disability, age, race, ethnicity, and other protected categories or suspect practices, and privacy claims on the basis of improper collection of or dissemination of health or other private information. Companies should provide their insurer with prompt or immediate notice of a claim or of factual circumstances likely to give rise to a claim. Many commercial package insurance policies include EPL coverage. If a company does not have EPL coverage, it should request a broker to provide a quote to add it now, or to add it at renewal.
- **Comprehensive general liability (CGL) and excess/umbrella liability coverage:** Employers face the risk that employees may contract COVID-19 at work and then spread it in their community. Unlike employees (who generally would be barred from pursuing tort claims outside the worker's

compensation system), infected third parties (e.g., family members, friends, members of the community) potentially could bring civil lawsuits for money damages based on allegations that negligent workplace safety practices resulted in community spread. Such lawsuits likely would be covered under a company's liability policies, unless the policy contains a broad virus exclusion. It is important for companies to understand the scope of available coverage and whether there is a virus exclusion, and to provide prompt notice to their insurer of any claims or threats of claims.

- **Cyber coverage:** Remote work has been facilitated at breakneck speed, possibly with insufficient attention to electronic security. As a result, cybercriminals worldwide are aggressively seeking to exploit security breaches. Many first- and third-party policies may contain some form of cyber coverage, but often with gaps in coverage and low limits, and coverage can vary widely depending on the policy specifics and the issuing company. Companies should look to enhance cybersecurity and work with their broker to understand their coverage, and press the broker to try to identify insurers that will provide broader coverage and higher available limits. Companies that are breached should:
 - Immediately notify management and their technology department to mitigate harm
 - Promptly notify their broker of a potential claim and cooperate with the insurer's investigation
 - Contact a coverage attorney to understand their coverage before committing to any factual statements of what happened
- **Directors and officers (D&O) coverage:** D&O policies nearly always exclude claims "for bodily injury," but some exclude claims "in any way relating to bodily injury." Companies should immediately contact counsel if they have any concerns about stock price drop claims or any claims against the company or its officers and directors (e.g., due to failure to respond to COVID-19-related issues promptly, to reopen properly, or to reopen when allowed).

Companies will need to determine if and when they should, or must, provide notice of an actual or potential claim. If a claim is definitively made, then the policy generally will require the company to give notice to the insurer "promptly," "as soon as practicable," or the like (and in any event before the end of the policy period and any applicable extended reporting period). Failure to do so could result in a loss of defense costs incurred prior to notice or even a complete forfeiture of coverage. Other situations may involve facts suggesting the potential for a claim at some point in the future (e.g., a company learns that an employee with a large family has tested positive, but has no information about whether any of the employee's relatives have tested positive). In such situations, the policy may permit the company to provide a "notice of circumstances" to lock in coverage under that policy with respect to any subsequent claims that arise out of the reported circumstances. In all events, it is advisable to confer with a broker or counsel to determine if and when such a notice should be made.

- **Renewal strategy:** Finally, companies should consider starting their insurance renewals early, as the current market is "hard" and may grow increasingly more difficult in the coming weeks and months. Companies should speak with their broker about bolstering the type or amount of their current coverage.

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