Articles + Publications | September 24, 2020

Navigating Adapted Operations Advisory Series: Part Three – Bringing Employees Back to the Workplace

WRITTEN BY

Richard Gerakitis | Emily E. Schifter | Kristalyn Lee | Moses M. Tincher | Andrew Henson | Susan K. Lessack | Lee E. Tankle

Who Needs to Know

Employers who are reopening (or have already reopened) by bringing employees back to their workplaces.

Why It Matters

Bringing a workforce back to the workplace, whether from teleworking, furlough or layoff status, is an exercise with many moving parts. Employers need to follow a reasoned strategy to address COVID-19-related risks and other considerations associated with recalling some or all of a workforce to develop a sensible back-to-work protocol.

Troutman Pepper is issuing a series of client advisories, Navigating Adapted Operations, to help businesses design workplace operations adapted to the challenges of sustaining business efforts during and after the COVID-19 pandemic. This series addresses how businesses can reopen, recover or control workplaces in the face of operational changes that could last even longer than first planned. In Part One of the advisory series, we examined phased approach considerations for workplaces, creating and implementing a COVID-19 response plan, and employee benefits concerns for a returning workforce. In Part Two of the advisory series, we examined insurance coverages and the Paycheck Protection Program (PPP).

We invite your questions and feedback on every topic and also ones you may want addressed, but are not covered thus far. Our aim is to provide a comprehensive review of matters that will enable employers to make informed decisions about the overlap and interplay of health/safety, risk management, financial challenges and workplace oversight. At the conclusion of the series, we will share a dynamic outline of the categories examined that clients may adopt to navigate their own adapted operations.

Wage and Hour Issues

Navigating wage and hour issues pre-pandemic was complex enough. Today, however, the COVID-19 pandemic presents novel wage and hour issues for employers to consider due to significant changes in the workplace, ranging from remote work to temperature screenings. In addition to complying with federal requirements under the Fair Labor Standards Act (FLSA), employers must be aware of varying state and local wage and hour requirements.

FLSA Timekeeping and Classification Obligations

With employees teleworking or returning to the workplace, employers must remember their obligations to:

©2025 Troutman Pepper Locke

- Maintain accurate records of all hours worked, such as through a timekeeping system, for remote and on-site non-exempt staff to follow;
- Pay employees for all hours worked, including overtime;
- Properly classify employees as exempt or non-exempt from overtime and minimum wage requirements; and
- Comply with miscellaneous state and local wage and hour requirements, such as reimbursing business expenses, providing accurate wage statements, and providing timely meal and rest breaks.

Wage and Hour Considerations for Remote Work

Remote working arrangements have become part of the "new normal," adding another layer of difficulty to managing already complex wage and hour issues, particularly concerning the following questions:

- How can an employer ensure that employees accurately record all time worked, including the potential for off-the-clock work or missed punches?
- Is there a consistent practice in place to review employee time records for potential wage and hour violations, such as late or missed meal periods?
- Is management mandating compliance with and consistently enforcing all wage and hour policies, such as disciplining employees for repeat violations?
- Are employees reimbursed for reasonable expenses incurred from telework (e.g., cell phone bills, internet, or remote home setup) if required by applicable state or local law or existing employer policy?

Wage and Hour Concerns Arising from Return to the Workplace

Some employers have opened up their offices to returning employees (sometimes on a voluntary basis). Returning to the office presents its own set of wage and hour issues, and employers must:

- Ensure employees are properly compensated for time spent on COVID-19 screening prior to or during shifts, including temperature testing and completing screening questionnaires.
- Be aware of the possible obligation to provide reporting time pay when an employee reporting to work is sent home because he/she exhibits symptoms of COVID-19 or otherwise fails to pass requisite screening.
- Consider whether altering an employee's job duties, schedule, or pay could affect an employee's exempt status under the FLSA or state law.
- Include certain non-discretionary bonuses, such as bonuses for attendance or safety, in the employee's regular rate of pay.
- Ensure individuals classified as independent contractors are properly classified as contractors.

Cautiously Handle Pay Adjustments

Employers should also realize that the FLSA and some state laws govern reductions in pay, whether implemented on a short-term basis or as a permanent cost-saving measure. Employers who wish to impose pay cuts for exempt employees should take special care and consult with legal counsel to avoid inadvertently causing these employees to lose their exempt status due to a reduction.

It is easy for wage and hour compliance to fall through the cracks—especially during this pandemic, where employers are primarily focused on keeping their workforces safe—but employers should remain vigilant given the

significant risks of non-compliance. Class and collective actions alleging violations of state and federal wage and hour laws are costly and common across all industries. Employers can avoid wage and hour pitfalls by encouraging open communication, conducting training for management and employees, maintaining and enforcing compliant policies and practices, and perhaps most importantly, having legal counsel conduct an attorney-client privileged review of a business's wage and hour practices.

Onboarding Returning Employees

As cities and states around the country continue to re-open, many employers are in a position to either re-hire or recall employees furloughed or laid off due to the pandemic. By welcoming employees back to work, employers can use the onboarding process as an opportunity to introduce new policies and practices, reemphasize pre-existing policies, obtain any updated information, and conduct additional employee screenings.

How Employee Furlough or Layoff Time Lengths Affect Return to Work

In determining the appropriate onboarding processes, employers should assess whether the employee had a reasonable expectation of continued employment before the leave, furlough, layoff, or other break in employment. For example, did the employee expect to return to work within a specific timeframe, or was the employee not provided any anticipated return date? Depending on the particular jurisdiction and circumstances preceding the break in employment, employers may need to onboard returning employees as new hires.

Employers should provide advance notice to employees regarding their returns to work. Doing so will allow both the employer and employee to best prepare for reopening and returning to the workplace, especially in light of the changes caused by COVID-19. Employers should reasonably anticipate employee concerns or requests, including (1) accommodations for "high risk" employees; (2) modified work schedules; (3) delayed return due to concern about workplace safety; and (4) leave to care for children or other family members for COVID-19-related reasons. By providing advance notice, employers can address employee issues and concerns before reopening in an attempt to minimize disruptions to operations.

Steps to Include in Onboarding Returning Staff

Regardless of whether an employee is being onboarded as a new hire, employers should consider incorporating the following steps into the onboarding process to address any significant changes in the workplace in response to COVID-19:

- Roll out new policies and training or require refresher training on established policies. For example, employers may require employees to undergo training on new COVID-19 practices and procedures (e.g., such as social distancing, mask wearing, self-monitoring, and temperature screenings) or may seek to re-emphasize their attendance policies by redistributing copies of pre-existing policies.
- Consider how to minimize in-person contact during onboarding, such as arranging for online review of documents.
- Provide information to employees on benefit changes, such as if an employee is transitioning from COBRA, and consider what authorization is required to recover any outstanding premiums. For further information, see "COVID-19 Resource Guide for Human Resources Professionals: Employee Benefits Considerations for Reopening in 2020."
- Conduct supplemental background checks or drug testing in compliance with state and local restrictions or

requirements.

- Obtain any updated employee personal information (e.g., changes in addresses, phone numbers, emergency contacts).

When implementing changes in unionized environments, employers must ensure compliance with any collective bargaining agreements. To avoid an unfair labor practice charge, either consider how a change is permitted under the agreement or be prepared to bargain with the union over the change you are imposing.

Employee Leave Issues

Employers continue to face questions about when and to what extent leave must be provided to employees under federal, state, and local law.

Earlier this year, President Trump signed into law the Families First Coronavirus Response Act (FFCRA), which requires employers of a certain size (less than 500 when a request for leave is made) to provide employees with paid sick leave (under the EPSLA) and/or expanded family and medical leave (under the EFMLEA) for specified COVID-19-related reasons. Since then, FFCRA regulations have been (a) partially vacated by a federal district court and (b) revised by the Department of Labor (DOL). All the while, the DOL has answered over 100 frequently asked questions regarding the scope and implementation of the FFCRA. While the DOL has answered many questions, other questions will surely arise in the future. It is critical for employers to stay up to date on FFCRA requirements and consult with legal counsel when issues arise.

In addition, employers still need to comply with their obligations under the existing Family and Medical Leave Act (FMLA), which provides qualified employees (with one year of service) with up to 12 work weeks of unpaid job-protected leave for a number of reasons, including a serious health condition or to care for a spouse, child, or parent with a serious health condition. The number of weeks of FMLA leave to which an employee may be entitled will depend on how much expanded family and medical leave the employee has taken under the FFCRA (and vice versa).

State and Local Leave Laws

In addition to the FFCRA and FMLA, a growing number of cities and states across the country have enacted, and continue to modify, their own mandated leave laws for COVID-19-related reasons. For example, the Governor of California recently signed a bill into law that provides COVID-19 paid sick leave to every California employee who is not otherwise covered by the FFCRA. New York adopted similar legislation earlier this year. Employers should also be aware of state laws and city ordinances providing employees with mandatory paid sick leave that could be used for COVID-19-related reasons (even though the ordinances are not specifically focused on COVID-19).

Child Care Considerations

Reopening day care sites and schools has been a mix of on-site and virtual learning that varies significantly by locale and changes sometimes on a daily basis. Consequently, employers must examine a wide variety of potential options to manage leave and accommodation requests that likely will not subside until sometime next year.

Whether employers must provide childcare-related leave depends on a host of factors. For example, under the FFCRA, key considerations include whether the school provides an option for in-person learning—and if yes, did the employee choose to keep his/her child at home for remote learning? The DOL has clearly stated that employees are not eligible for FFCRA leave if in-person instruction is also available. From a pure workplace management and employee morale perspective, companies should evaluate providing on-site or nearby daycare options for working parents.

Navigating Federal, State, and Local Reopening Guidance

In recent months, regulatory, and legislative bodies at all levels of government have enacted COVID-19 rules and guidelines applicable to businesses, and employers will need to determine which sets of rules they must follow. While most state and local governments have published non-binding "best practices," an increasing number of localities have enacted mandatory COVID-19 rules. In addition, federal OSHA regulations also cover employers, and these federal regulatory requirements vary widely by industry.

Virginia became the first state to adopt enforceable COVID-19 workplace safety rules for all its employers. However, it is unlikely to be the last state to do so. Oregon recently announced it intends to adopt its own mandatory rules effective no later than October 1 and other states may follow suit.

In certain instances, the regulatory guidance has lacked consistency across the relevant regulatory bodies, resulting in confusion. In a notable example, the CDC shortened its recommended isolation period for persons known or suspected to be infected with COVID-19 from 72 hours to 24 hours after recovery of symptoms. However, Virginia's COVID-19 rules required employers to adopt a return-to-work policy and identified a safe harbor symptom-based strategy providing for a 72-hour recovery period. Thankfully, the Virginia Department of Labor and Industry (DOLI) recently published guidance, which stated that DOLI would consider the CDC's 24-hour guidance to be compliant with the Virginia regulation.

Testing and Contact Tracing

While contact tracing is predominantly a responsibility of the CDC and local health departments, employers need to pay attention to local laws imposing such obligations. Employers are encouraged to cooperate with the CDC and local health departments in their efforts to conduct contact tracing.

Testing is an important and complex issue for employers to consider. There are two common types of testing: COVID-19 testing (diagnostic) to detect the presence of the disease itself, and COVID-19 antibody testing. While governmental guidance at all levels has encouraged employers to use COVID-19 (diagnostic) testing, the same cannot be said for antibody testing. The EEOC has determined that employers may violate the ADA by requiring employees to undergo antibody testing.

COVID-19 testing is one of two options for employers to consider in adopting a policy or strategy for determining whether employees are deemed safe to return to work after recovering from COVID-19. The alternative is a symptom-based strategy. Per current CDC guidance, a person may be deemed safe to return to work when (1) 24 hours have passed since recovery of symptoms without fever-reducing medication; (2) 10 days have elapsed since symptoms first appeared; and (3) other symptoms of COVID-19 are improving.

©2025 Troutman Pepper Locke

In deciding whether to require employees to undergo COVID-19 testing before returning to work, employers should bear in mind the availability of testing and the processing time involved. Employers should also consider the number of tests that may be required. For example, the Virginia rules provide a safe harbor return-to-work policy, which requires two tests from specimens collected at least 24 hours apart. Moreover, many state and local laws may require the employer to cover the costs of an employee's COVID-19 testing, if the test is required as a condition of continuation of employment.

Handling a Positive Employee Test

Discovering an employee has tested positive for COVID-19 is a scenario that presents some of the most urgent challenges for employers. While the specific legal requirements and business considerations will vary by industry, employer size, and location, they will commonly include the following:

- The employee must be excluded from the place of employment until cleared to return to work (although teleworking and remote work may be possible).
- State or local laws may require rapid notification upon discovery of a COVID-19 positive employee who occupied the place of employment within the preceding 14-day period. For example, Virginia requires that within 24 hours of discovery, employers must notify all potentially exposed employees, the Virginia Department of Health, and a number of additional parties. Employers must make these notifications while keeping the identity of the infected employee confidential.
- The areas the infected employee accessed or worked in must be cleaned and disinfected prior to allowing other employees access to those areas.
- The employer may be required to provide paid or unpaid leave under FFCRA or other applicable federal and/or local law. The employer may also want to alert its workers' compensation insurance carrier of the presence of a potential claim.
- An employer should stay in contact with an infected employee and, at the appropriate time, advise the employee of the employer's return-to-work policy. Having a return-to-work policy in place is mandated under Virginia's new COVID-19 regulations and may be required under state and local laws of other jurisdictions as the pandemic continues.

As the COVID-19 pandemic continues to challenge business operations throughout the country, employers must remain vigilant while they bring their employees back to the workplace. Please consult with a Troutman Pepper Employment Law attorney for any COVID-19-related issues. Please visit the Troutman Pepper COVID-19 Resource Center for COVID-19-related news and developments.

In **Part Four** of the **Navigating Adapted Operations Advisory Series**, we will examine issues related to **expanded teleworking** and **workforce restructuring.**

RELATED INDUSTRIES + PRACTICES

- Labor + Employment

©2025 Troutman Pepper Locke