

RETURN TO WORK RESOURCE GUIDE



Selecting which employees get called back first.

Employers will need to have a legitimate, non-discriminatory reason for choosing which employees to rehire or return to work. These reasons could include factors such as seniority, operational needs or documented past performance issues. Employers should document their decision-making process now, before deciding who will be invited to return to work. By working now to document the factors used to determine who will be rehired, an employer will protect itself from potential claims asserting that they “made up” reasons after the fact to cover up a discriminatory basis for failing to rehire an employee.

We are “ramping back up” and having employees again report to the worksite. However, some employees are saying they want to continue to work from home because they are scared to be in a work environment. Do we have to let them work from home?

Generally, you are not required to allow employees to work from home. Even the DOL regulations to the FFCRA state that telework does not have to be provided unless an employer agrees to allow or permits it. If you otherwise have work for the employee to perform at the worksite, just being “scared” to come back to work would generally not be a qualifying reason under EPSL.

However, if the employee is in a “vulnerable” category, they might be eligible for EPSL depending on the specifics of the situation and whether they have been advised by a health care provider or are subject to a specific quarantine or isolation order because of their vulnerability. In addition, anxiety or similar issues could raise potential Americans with Disabilities Act (ADA) issues and necessitate discussion of reasonable accommodation through the interactive process, including consideration of accommodations such as working from home (or additional leave time for an employee who may have already exhausted their EPSL).

When we rehire an employee, do we have to report the hire to a specific state employment agency?

Yes. Federal law requires employers to report newly hired employees to the National Directory of New Hires, which includes

rehired employees who have been separated from employment for at least 60 days. State laws also have new hire and rehire reporting requirements.

What is the time period in which we must report rehiring an employee?

Typically, 20 days from the date of hire, but some states have time periods as short as seven days.

If we try to rehire an individual or bring an employee back to work from a furlough or temporary layoff who is receiving unemployment and the employee refuses to return to work, what should we do?

You may find that robust unemployment benefits for some workers create a disincentive for employees to return to work. Most states have waived the requirement that an employee who is on unemployment search for employment. Employers with essential business operations have also been faced with an increasing reluctance to work by employees who have concerns over the possibility of contracting the virus at work.

Where an employer has available work for an employee, states may deny unemployment benefits if the employee refuses to work without good cause. The Department of Labor recently issued guidance related to the CARES Act unemployment provisions noting that “quitting work without good cause to obtain additional benefits may be considered fraud.”

The guidance states that if an individual obtains benefits through fraudulent measures, the employee or individual will be: (1) ineligible to receive any future unemployment compensation benefit payments; (2) responsible to pay back the benefits obtained because of the fraud; and (3) subject to criminal sanction and prosecution. You should report any cases of suspected fraud to your state unemployment agency. All states maintain a fraud hotline that employers can call or other means of reporting including via online, email or mail. States typically have active fraud investigations units that will follow up on suspected cases of fraud.

Of course, there may be situations where an employee’s decision not to return to work will be considered good cause. If an employee refuses to return to work due to child care or other

COVID-19 related issues, for example, they may be eligible for benefits under the Pandemic Unemployment Assistance program offered through the Federal CARES Act. The Federal CARES Act expands eligibility to many who, in the past, have not qualified for unemployment benefits, including, but not limited to, those with primary caregiving responsibilities for children who are unable to attend school or child care due to COVID-19, those who have been diagnosed with COVID-19, those with a household member who has been diagnosed with COVID-19, and those providing care to a family or household member with COVID-19.

After shelter-in-place orders are lifted, how should we decide when to reopen?

The Centers for Disease Controls and Prevention (CDC) just released guidance to assist employers in making decisions regarding reopening during the COVID-19 pandemic. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take. According to the CDC guidance, you should consider three questions when deciding whether to reopen:

Are you in a community no longer requiring significant mitigation?

Will you be able to limit non-essential employees to those from the local geographic area?

Do you have protective measures for employees at higher risk (e.g. teleworking, tasks that minimize contact)?

You should only consider reopening if you can answer “yes” to each of the three questions. Even if you can satisfy the three preliminary questions, you should only reopen if recommended safety actions are in place. The CDC’s recommended safety actions include:

- ▶ Promoting healthy hygiene practices;
- ▶ Intensifying cleaning, disinfection (e.g., small static groups, no large events);
- ▶ Canceling non-essential travel, and encouraging alternative commuting and telework;
- ▶ Spacing out seating (more than 6 feet) and staggering gathering times;
- ▶ Restricting use of any shared items and spaces; and
- ▶ Training all staff in above safety-actions.
- ▶ The CDC also recommends that you only reopen after you have implemented safeguards for the ongoing monitoring of employees, including:
 - ▶ Encouraging employees who are sick to stay home;
 - ▶ Establishing routine, daily employee health checks;
 - ▶ Monitoring absenteeism and having flexible time off policies;

- ▶ Having an action plan if a staff member gets COVID-19;
- ▶ Creating and testing emergency communication channels for employees; and
- ▶ Establishing communication with state and local health authorities.

What workplace safety concerns should I anticipate when employees return?

In addition to the Occupational Safety and Health Administration (OSHA) requirements that applied to your workplace previously, you should expect additional employee concerns related to the coronavirus to continue for some time. This may vary depending on the location and the level of community transmission still active.

Employees, and their family members, are likely to be anxious about returning to the public, including the workplace. There likely will be a need to follow some of the CDC and OSHA Guidelines, depending on the determined level of risk at the workplace and guidance from local, state, and federal authorities. This includes social distancing, frequent handwashing, cleaning and disinfecting work areas, adjusting the workplace to separate employees (including split-shifts, staggered breaks, and altering work stations), and appropriate personal protective equipment (PPE).

You may still need to monitor employee health, including asking about symptoms and taking temperatures, in the near future. Some of the newer safety practices put into place at the outset of the pandemic – prior to the shelter-in-place orders or the ongoing practices by essential businesses – may need to continue until the virus has been more completely controlled through robust testing and contact tracing capabilities, vaccines, and other treatments.

You should also plan on training employees and demonstrating the new safety measures in place to protect them from further spread of the virus. The more employees understand about what safety measures are being taken, and why, the more likely there is to be employee buy-in, and the less likely that employees may make complaints to OSHA or other third parties regarding perceived risk in the workplace. To be clear, employee complaints about perceived safety issues should be taken seriously and investigated, and you should not take any retaliatory action against employees who make such claims in good faith.

In addition to offering training to your workforce, make it a habit to check in with employees as often as possible to ensure they are comfortable with their work environment and the changes associated with returning to the workplace.



Establishing protocols to be immediately executed upon discovery that the business has been exposed to a probable or confirmed case of COVID-19.

If an employer has confirmed an exposure or confirmed case of COVID-19, The infected employee should be sent home until released by their medical provider or local health provider. You should send home all employees who worked closely with that employee to ensure the infection does not spread. Before the infected employee departs, ask them to identify all individuals who worked in close proximity (within six feet) for a prolonged period of time (10 minutes or more to 30 minutes or more) with them during the 48-hour period before the onset of symptoms to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of confidentiality laws. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary. The CDC provides that the employees who worked closely to the infected worker should be instructed to proceed based on the CDC [Public Health Recommendations for Community-Related Exposure](#). This includes staying home until 14 days after last exposure, maintaining social distance from others, and self-monitoring for symptoms (i.e., fever, cough, or shortness of breath).

How long should the employees who worked near the employee stay at home? Those employees should first consult and follow the advice of their healthcare providers or public health department regarding the length of time to stay at home. The CDC recommends that those who have had close contact for a prolonged period of time with an infected person should remain at home for 14 days after last exposure. If they develop symptoms, they should remain home for at least seven days from the initial onset of the symptoms, three days without a fever (achieved without medication), and improvement in respiratory symptoms (e.g., cough, shortness of breath).

The CDC has released relaxed guidelines for critical infrastructure workers, as previously defined by the [Cybersecurity and Infrastructure Security Agency](#), who have been potentially exposed to COVID-19. Under the relaxed guidelines, critical infrastructure workers potentially exposed to COVID-19 may continue to work following exposure provided they remain symptom-free and employers implement additional precautions to protect the employee and the community:

For Employers:

- ▶ Measure the employee's temperature and assess symptoms prior to permitting the worker resuming work, ideally, before they enter the facility.
- ▶ Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

For Employees:

- ▶ Self-monitor under the supervision of their employer's occupational health program.
- ▶ Wear a face mask at all times while in the workplace for 14 days after last exposure.
- ▶ Maintain a six-foot distance from others and otherwise observe social distancing in the workplace as work duties permit.
- ▶ Critical infrastructure employees who become sick during the work day should continue to be sent home immediately. You should notify those who had contact with the ill employee while the employee had symptoms, and two days prior to the symptoms appearing. You should then implement additional precautions for those employees as described above.
- ▶ The CDC also provides the following recommendations for most non-healthcare businesses that have suspected or confirmed COVID-19 cases:
 - ▶ It is recommended to close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.
 - ▶ Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill persons, focusing especially on frequently touched surfaces.
 - ▶ To clean and disinfect:
 - ▶ If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: "cleaning" will remove some germs, but "disinfection" is also necessary).
 - ▶ For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
 - ▶ Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer's instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
 - ▶ Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
 - ▶ Gloves and gowns should be compatible with the disinfectant products being used.
 - ▶ Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer's instructions regarding other protective measures recommended on the product labeling.



- ▶ Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
- ▶ Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- ▶ If you require gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

Staggering employee start and stop times when practicable to prevent gatherings of large groups.

In recognition of the CDC's social distancing guidelines, the following staggered hour procedures will be in effect until further notice.

Company will vary the start and end working hours in a manner that works best for employees, fulfilling the core working hours within a work-day (e.g. 8 hours) while recognizing that we must continue to be diligent in preventing large gatherings of employees in the office at any one time

The employer reserves the right to implement core hours during which all employees must be present at work (e.g. 11am – 3pm) as conditions permit.

Providing an enough space for employees to maintain social distancing while on breaks or mealtimes (including seating to avoid employees facing one another).

During hours of operation, employees will refrain from interacting with other employees in close proximity, to the extent possible. Employees should be aware of social distancing protocols at all times while on any work premises. This would include remote worksites and client sites where two or more people are in attendance.

Staggering employee break times.

Employees will be allowed some flexibility in scheduling their break time to avoid any unnecessary contact. For assistance, please contact your manager or supervisor.

Conducting meetings and trainings virtually and, if a meeting must be held in person, limiting it to the fewest employees possible, not to exceed 10.

The following guidelines should be considered when conducting

meeting either online or in-person.

- ▶ Use Meetings Strategically
- ▶ When a team is dispersed in many locations, the dept./ manager typically cannot call a meeting at a moment's notice. Think through the meetings that are upcoming, what can be postponed, cancelled, or done virtually. Plan your meetings ahead of time and plan them carefully. While sharing information is important, don't let this be the sole purpose of your meetings. Organize strategic meetings to focus time together on activities that move the team forward, such as decision making, collaboration, and connection.
- ▶ It is possible that leader, manager, and/or employee availability will be more limited than usual due to COVID-19 workforce planning, so keep this in mind when evaluating the necessity and urgency of meetings.
- ▶ Consider practicing remote meetings, particularly with employees who do not generally work remotely. Urge patience of attendees, as employees unfamiliar with the platform and audio/video settings may have questions.
- ▶ Arranging, Facilitating, & Participating in Meetings
- ▶ Fully remote meetings tend to be easier to manage than blended on-site and virtual meetings. Consider which approach makes the most sense when designing a meeting.
- ▶ If multiple people are required to be in attendance in one location, practice social distancing of at least 6 feet between each person.

BEST PRACTICES:

- ▶ Add a Zoom, GoToMeeting or other option to all meetings proactively.
- ▶ Add a secondary host that can start the meeting in the event the host is running late or their availability has changed.
- ▶ Determine what information should be shared with participants in advance of the meeting, provide an agenda, and determine how decisions and follow-up will be communicate to those absent.
- ▶ Encourage participants to log in early and test their audio/video settings.
- ▶ Encourage participants to use their webcam to increase interpersonal communication and support those who rely on lipreading.
- ▶ Encourage participants to mute themselves to reduce background noise when they are not speaking. The host(s) can also mute participants.
- ▶ Announce who is in the room (if an on-site option is also available) and be clear about when the meeting has ended. Make sure to continuously check in with those who are remote to make sure they are included (e.g., "Does anyone online have



any questions/comments?”).

- ▶ For meetings where participation is essential, consider using the “raise hand” feature to help manage who will speak when. It can be difficult even with video to tell when someone is about to finish speaking, or is waiting to speak.
- ▶ Using Video
- ▶ When using video, be thoughtful about where you are participating from and the setup. For instance, what can individuals can see behind you, what noises might they hear from household members and pets, is ample lighting available, etc. If your background isn't something you want people to see, use your screensaver or other alternative screen feature.

Providing employees with regular access to handwashing with soap, hand sanitizer, and disinfectant wipes.

- ▶ We encourage employees and others to avoid exposure and practice good hygiene. We all employees to do the following:
- ▶ Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer.
- ▶ Avoid touching your eyes, nose, and mouth with unwashed hands.
- ▶ Avoid close contact with others, especially those who are sick.
- ▶ Refrain from shaking hands with others for the time being.
- ▶ Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- ▶ Clean and disinfect frequently touched objects and surfaces.
- ▶ Perhaps the most important message you can give to employees: stay home when you are sick.
- ▶ As an employer, we will be doing the following:
- ▶ Ensure that employees have ample facilities to wash their hands, including tepid water and soap, and provide alcohol-based hand rubs containing at least 60% alcohol where hand-washing is not available.
- ▶ Accelerate your third-party cleaning/custodial schedules.
- ▶ Evaluate your remote work capacities and policies (see later section on Remote Work for more information). Teleconference or use other remote work tools in lieu of meeting in person if available.
- ▶ Limit worksite access to only essential workers, if possible.
- ▶ Consider staggering employee starting and departing times, along with lunch and break periods, to minimize overcrowding in common areas such as elevators, break rooms, etc.
- ▶ Have a single point of contact for employees for all concerns

that arise relating to health and safety, and encourage workers to report any safety and health concerns.

- ▶ Discourage workers from using other workers' phones, desks, or other work tools and equipment.
- ▶ Regularly clean and disinfect surfaces, equipment, and other elements of the work environment.

What policies may be impacted or need to be changed due to the COVID-19 pandemic?

You will need to implement measures to ensure the health and safety of your employees but may also need to change other policies and practices to accommodate the new normal. A thorough analysis of existing policies should be undertaken to include adjustments made for recent legislation. Some of the policies may include:

- ▶ Attendance;
- ▶ Vacation/Paid Time Off;
- ▶ Remote work;
- ▶ Work hours, including start/stop time, breaks, lunch times, flexible hours, and staggered work hours;
- ▶ Timekeeping including clock in/out procedures;
- ▶ Leave policies including sick leave;
- ▶ Travel policies including business and personal travel; and
- ▶ Information technology and usage.

In addition, you may need to work closely with your IT/IS team as many of your changes in policies and the new local, state and federal laws may impact your HRIS system.

When returning employees to work, can we or should we issue new policies and handbooks?

Employers who are not otherwise limited by a collective bargaining agreement are certainly permitted to issue new policies or handbooks when returning employees to work. And many may decide this is a good opportunity to update policies, procedures and handbooks.

There are some issues to consider, however. If you modified policies by reducing benefits such as PTO, vacation, or holiday pay and you are uncertain whether or when you will return the benefits to pre-COVID-19 days, it may be more practical to wait to update and finalize your policies at a later date. If you intend to maintain the modified policies for a significant length of time, issuing a new handbook may be in order. If you made no changes but have not done a thorough review of your handbook in recent years, this may be an excellent time to update and re-issue your handbook to all returning employees and those who stayed

working.

We lowered the pay rates for our hourly non-exempt employees because of the financial strain caused by COVID-19. Can we increase their pay back to the original levels

Yes. For your hourly non-exempt employees, you are free to change their rate of pay back to the original level. However, if any of these individuals have contracts or employment agreements, you will want to make sure that you amend or update the agreements to reflect the correct level of pay. Also be sure any wage payment notices are compliant with state and local law. Other unanticipated consequences include impact on your retirement or other plans that base benefits on compensation.

We changed our salaried, exempt employee's salaries. When can I change it back?

We generally recommend keeping an exempt employee at their "new" salary level for a quarter or even longer.

We changed the classification of our salaried, exempt employees to non-exempt. Can and should we change them back?

We do not recommend making repeated changes from exempt to non-exempt and back in rapid succession. If you have kept the change from exempt to non-exempt in place for at least a quarter (our rule of thumb), before you change an employee back to exempt, we recommend that you evaluate the economic circumstances of the company so that you are confident that you can keep the change back to exempt in place. When you communicate any such decision, the basis of the change should be improved economic circumstances of the company. Finally, you will want to consider whether they were appropriately classified as exempt in the first place.

Can we give the salaried exempt employee a bonus to catch them up for lost pay?

You can give employees a bonus to reward them. The Fair Labor Standards Act (FLSA) permits additional payments above and beyond the salary of an employee. However, you will want to avoid any indication that this bonus is really the employee's pay that was held back, which can have a multitude of implications. You should carefully consider any announcement of intentions, qualifying terms, and the bonus payments.

We are bringing a salaried exempt employee back from furlough, but only for 20-30 hours per week. Should we adjust their salary to reflect the reduced schedule?

You can adjust salaries due to economic circumstances. However, we do not generally recommend reducing salaries to match a reduced workload, as you risk losing the salary basis (a requirement for the most common exemptions). That does not mean, however, that an employee whose salary is reduced cannot

have a reduced workload – this is permissible.

A few things to remember when reducing salaries: (1) make sure the salary still meets the federal (\$684) and any applicable state minimum salary levels; (2) communicate the reason for the change (e.g., "We are able to bring you back, but we cannot afford to bring you back at the same pay rate you had previously..."); and (3) do not repeatedly change the salary levels – exempt employees should not regularly have their salary levels adjusted.

Prohibiting non-essential visitors from entering the premises.

The health and safety of our patients, visitors, employees, and our communities remain a top priority. Therefore, in line with the latest guidelines issued by the CDC related to COVID-19, we have revised our visiting policy. Effective this date:

- ▶ Prohibit entry into the facility for non-essential visitors.
- ▶ Interview approved visitors about their current health condition and recent travel history.
- ▶ Using soap and water or within available supplies, hand sanitizer at point of entry to the facility.

Ensure employees are made aware of these required procedures by communicating them in their native or preferred language and in English (or otherwise by a method allowing them to understand).

You should strive to provide employees up to date information in their primary language whenever possible.

Require all clients/customers to wear masks on premises and deny entry to individuals not wearing masks.

The health and safety of our patients, visitors, employees, and our communities remain a top priority. Therefore, in line with the latest guidelines issued by the CDC related to COVID-19, we will require that all customers and visitors will be required to wear a mask or face covering before entering the premises

How do we handle benefits waiting periods for employees returning to work?

Plan documents generally can require employees to satisfy waiting periods unless there is an exception. One common exception is when workers are rehired. When an individual is rehired, they may fill out a new I-9 and W-4 and generally make benefit and cafeteria plan selections in the same manner as a new employee. However, rehires may regain employer-sponsored coverage(s) more quickly



than a new hire depending on: 1) plan document terms; 2) the length of time between separation from service and rehire; and 3) whether the employer is an applicable large employer subject to ACA employer mandates.

For non-health benefits, rehires are generally subject to the same waiting periods as a new employee, unless the plan specifically indicates otherwise. Note, however, if a rehire previously exercised a conversion right – for example, converted a life or AD&D policy during their separation period – the insurance carrier and plan documents will need to be consulted for specific guidance on reinstating coverage through the employer.

Under the ACA, rehired full-time employees may trigger Code §4980H liabilities if not offered coverage within a specified period after returning to work. An applicable large employer using look-back measurement periods must determine if a returning full-time employee is considered 1) a continuing employee – who must be offered coverage no later than the first day of the calendar month following resumption of services; or 2) a terminated and rehired employee – who may be offered coverage the first month following three full calendar months of employment.

If you have adopted the Break-in-Service method, you must treat an employee who has had LESS than a 13 consecutive week break-in-service as a continuing employee and may treat an employee who has had a 13+ consecutive week break-in-service as a new employee. Educational organizations may apply a 26-week standard instead of 13. If you choose, you may treat an employee as terminated for absences shorter than 13 weeks by using the Rule of Parity. Under the Rule of Parity, the employee may be treated as a new hire if the separation from employment was at least four weeks long *and* exceeds the number of weeks of employment immediately preceding the period in which no services were performed. More complex plan specific rules apply to variable hour employees.

Finally, rehires who timely elected and continuously maintained COBRA coverage during their separation from service generally do not have to satisfy eligibility waiting periods if they are eligible for benefits again.

Are there additional plan or benefits considerations we should consider when employees return to work?

- ▶ The plan must automatically distribute new Summary Plan Descriptions (SPDs) to anyone who ceases to be a participant covered under a plan. Technically, then, even if the participant was rehired within 30 days, the plan must automatically distribute a new SPD if they lost coverage under a plan between termination and rehire.
- ▶ The health plan summary plan description(s) or the COBRA election materials should clearly state if failure to elect or pay

for COBRA would create a gap in health coverage for qualified rehires.

- ▶ If the Break-In-Service rules apply to your plan, ensure the break is based on consecutive weeks. If the break is not based on consecutive weeks, additional analysis must be performed for persons with intermittent separations.
- ▶ If an employee retired, started participating in a retiree-only health plan, and is subsequently rehired, the rehired retiree is likely required to reenroll in the active employee plan.

What do we need to consider for temporary visa holders?

Visa categories such as H-1B, E-1, E-3, E-3, TN, L-1, O-1, and H-2Bs have a 60-day grace period for a loss of status. The grace period means that foreign nationals will not be considered “out of status” for almost two months following their unemployment. This will give foreign nationals the opportunity to look for other employment or apply for a visa change of status, which might be useful if you take the correct actions to refile, transfer, or amend existing visa petitions.

Employers and people on temporary visas must be extra diligent in documenting clear maintenance of status.

Source credit: CDC, W.H.O., Fisher Phillips, LLP, HR Workplace Services, Inc.