

# Morgan Lewis

## LAWFLASH

# REOPENING THE WORKPLACE: A PRELIMINARY GUIDE FOR EMPLOYERS

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As jurisdictions contemplate lifting pandemic-related workplace restrictions, employers must start considering how best to cope with a vast array of issues, including restarting or expanding operations, reintegrating remote-working or furloughed employees, implementing new state and local orders/requirements, and protecting the safety of employees and customers. Employers who proactively plan for these challenges will be best positioned to adapt to the “new normal.”

This guide highlights key considerations employers should begin analyzing regarding how to reopen or expand operations, and offers practical implementation steps they can take. This guide is focused on what can be done now with the understanding that guidance on when and how workplaces can reopen or expand will rely in large part on jurisdiction-specific local orders and guidance.

Separate from “how” to reopen or expand currently ongoing operations, we know employers are craving guidance on “who” can come to work, particularly with respect to personnel with preexisting or underlying health conditions and/or who are otherwise more vulnerable to coronavirus (COVID-19) infection complications. Although a one-size-fits-all approach may be easy to administer, given the nuance involved in these decisions as well as varying guidance across jurisdictions, we are not advising employers to implement broad policies that may have the effect of keeping everyone in a certain protected category at home. Rather, employers should be sensitive to employee requests and should look at who can return to work on an individualized basis with careful consideration given to accommodation concerns.

While some considerations will be specific to certain employers or industries, many COVID-19 issues affect all businesses. Morgan Lewis has prepared more in-depth guidance on many of these topics that are freely available to employers on our [Coronavirus COVID-19 Resource Page](#).

## KEY CONSIDERATIONS FOR HOW TO REOPEN/EXPAND CURRENT OPERATIONS

A myriad of conditions will need to be in place for reopening. Employers should think about and plan for what processes and procedures they must (and/or can) develop and implement in order to accomplish the

successful and efficient reopening of their businesses. For example:

- Reopening will be jurisdiction-specific, subject to compliance with all **state and local directives** as well as any **industry-specific requirements**. Morgan Lewis has closely tracked all workplace closure orders and created a survey summarizing these materials. We continue to track developments relating to reopening initiatives, and can provide additional jurisdiction-specific guidance based on individual locations/industries. Employers should note that all of the items covered in this guidance may be subject to additional regulations that may limit steps employers can take when reopening or conversely may require employers to take specific actions. This guidance is intended to be informational only and employers should not rely on any of the suggestions included here in contravention of an applicable requirement concerning reopening.
- Employers should develop **social distancing plans** or refine and update currently existing plans. Many state and local orders currently require essential businesses to have written social distancing plans in place, and we can expect the same will be true as authorities allow other businesses to reopen. Even if not legally required, these plans will help protect employees, reassure employees who fear returning to work, and may reduce employer liability upon reopening. Social distancing plans must be industry- and employer-specific, and must address the unique needs and circumstances of each business (including different kinds of worksites/operations). Four key factors for consideration include the following:
  - Physical workspace modifications, such as
    - separating desks and work stations;
    - modifying open floor plans by, for example, adding partitions;
    - making only certain workstations available (i.e., every other or every third workstation, or every other cubicle area);
    - closing or modifying common/conference rooms and break rooms/cafeterias;
    - modifying high-touch surfaces, such as replacing latch-based doorknobs or handles with doors that can be easily pushed open or closed; and
    - displaying markings or signs reminding customers and employees
      - to maintain social distancing in areas where people congregate;
      - to avoid touching surfaces unnecessarily;
      - to wash your hands properly and regularly;
      - to wear a face covering where social distancing is not possible or unlikely to be effective.
  - Limiting in-person interactions and physical contact, potentially including
    - holding fewer in-person meetings and using increased conference calls or video conferences;
    - limiting the size of in-person gatherings/social events (e.g., less than five people);
    - instructing employees not to use other employees' workspaces or equipment;
    - developing or revising a crowd control plan that changes security processes and procedures, such as setting a maximum number of employees and members of the public on company premises;
    - establishing ongoing restrictions regarding travel, including to client/customer meetings and events, or for meetings/conferences; and
    - setting staggered or spaced meal schedules.
  - Training employees on social distancing policies and protocols, including where to go if there are questions or complaints, with the following factors in mind:
    - Management may need additional training to understand its responsibility for enforcing these policies at the local level
    - Individuals should be designated as responsible contacts for overseeing and ensuring

- › › implementation
  - › Employers should consider how to track compliance and consistently discipline employees for failure to follow protocols.
- › Updates to employee scheduling
  - › Employers should consider ways of reducing the number of employees present at the workplace. Possible options include staggered shifts, alternating teams, and/or continued telework.
  - › Predictive scheduling obligations under preexisting law will likely restart at some future date and employers should not rely on pre-pandemic schedules to meet future estimates of employee hours.
- › Employers should discuss implementing regular **screening protocols** for employees, customers/clients, or other workplace visitors. Key considerations may include the following:
  - › Whether to conduct temperature screens or other symptom checks and training personnel on how to appropriately conduct screening and maintain medical/private information collected through screening
  - › Potential compensability of screening time
    - › reviewing the screening location (i.e., on employer-specific premises or in a shared office location); and
    - › potential complications of telling clients/customers not to enter company locations if they do not pass the screening.
- › Employers should consider whether they will require **personal protective equipment** (PPE). Key considerations include the following:
  - › Whether to make the wearing of masks mandatory, and if so, whether the employer will provide them or reimburse for them
  - › Whether gloves are necessary for any areas/duties (i.e., taking/giving money to customers)
  - › Whether additional PPE, if any, is required for employees in higher-risk positions.
- › **Cleaning and disinfecting** may require additional steps (including reviewing and renegotiating contracts with vendors that provide these services), such as:
  - › Extra cleaning and disinfecting, including attention to employee common use areas, and items handled by customers; and
  - › Making cleaning supplies/hand sanitizer available to employees (and customers/visitors).
- › Employers should develop a **safety communication plan** for returning employees that:
  - › Explains safety protocols (what measures the company is taking and what precautions employees should take), and where to report any issues
  - › References any benefits or perks the company is making available (plus a potential reminder about employee assistance programs); and
  - › Potentially establishes an employee safety committee to satisfy safety planning obligations in certain jurisdictions and provide a clear line of communication with employees.
  - › Note: These safety plans may take on particular importance given likely increase in OSHA investigations and issues as workplaces reopen in mass.

## **PROTOCOLS FOR TRACKING AND REPORTING COVID-19 TESTS**

- › Employers should consider whether to conduct COVID-19 tests and if so, what type of test to conduct (i.e., blood, saliva, or nasal swab). Although additional government guidance on the types of permissible tests likely will be forthcoming, employers intending to implement COVID-19 testing should consider what type of test they will run, who will conduct the tests, how these personnel will be trained, who will

- › be tested, how often tests will be done, and how test results will be maintained.
- › Employers considering serology (antibody) tests should be sure to consult counsel in advance as the US Food and Drug Administration (FDA) recently stated that most serology tests are considered “high complexity” tests under the Clinical Laboratory Improvement Amendments, which means these tests can only be performed in properly certified laboratories.
- › Employers implementing testing should develop protocols for monitoring test results regarding employees, as well as contractors, and workplace visitors. The protocols should also include identifying contacts and sharing such information as appropriate with public health authorities, employees, and workplace guests and customers. Employers should take a consistent approach regarding requiring return to work and fitness-for-duty certifications and should monitor guidance from the Centers for Disease Control and Prevention and local public health authorities regarding reporting and contact tracing.

**Further practical issues** employers should consider include the following:

- › Reinstating security/IT access, reactivating credit cards, badges, etc.
- › Ensuring recovery of any files or equipment/hardware employees took home to assist them in working remotely
- › Reimbursing employees for business expenses

## **TELEWORK**

Employers should expect that for a wide variety of reasons, employees may request to continue teleworking even as workplaces reopen. Employers should consider impacts on management, communication, and staffing as certain operations are on site while other employees (or entire teams) continue to telework, perhaps permanently. Additionally, employers should ensure their HR teams are prepared to respond to requests for reasonable accommodations/flexible work arrangements that would have been denied before the COVID-19 pandemic.

## **COMPREHENSIVE REVIEW OF EXISTING POLICIES**

Businesses have had to navigate mostly uncharted waters as they began to realize the breadth and effect of the COVID-19 pandemic. With the collective experience gained over the last several weeks, reopening the workplace should trigger a comprehensive review of policies/CBA provisions, especially in light of recent federal, state, and local legislation. Some factors to consider include:

- › Leave
  - › Employers should consider how to address leave entitlements for employees 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.
  - › Employers may consider monitoring employees’ personal/vacation travel as a safety measure.
- › Furlough
  - › Employers should consider how to bring employees back from furlough, including notification, phased rehiring, and potential new hires.
  - › Although employers may take advantage of the current instability to target new hires for key positions, employers should be aware of new laws that require giving priority to furloughed or part-time employees and potential HR or union concerns if a company engages in aggressive outside

- › › hiring before bringing back furloughed workers.
- › Benefits
  - › Furloughed employees may need to reenroll or update benefit/commuter information and consider any impact on 401(k) programs.
  - › Employees responsible for premium payments during furlough may be obligated to repay the amount the employer advanced for this purpose, but there are potential complications due to state deduction restrictions.
- › Wage and Hour/Compensation plans
  - › Employers should calculate the effect of shutdown periods on existing bonus/incentive plans.
  - › Businesses should review wage and hour issues in light of such factors as continuous workday, reporting time and show up pay, and split shifts, etc.
  - › Employers should review whether any pay equity issues exist and whether new hires can be used to offset that problem.

## **PANDEMIC PREPAREDNESS AND BUSINESS CONTINUITY PLANS**

In light of their COVID-19 experiences, companies should review and revise their current pandemic response plans in order to respond to another potential outbreak of the virus.

- › These plans should address:
  - › what lessons have been learned and what new processes and procedures should be put in place to prepare for a potential recurrence;
  - › management and HR succession in the event any leadership team is sidelined;
  - › updates to public relations messaging regarding crisis management issues and having a plan in place in the event of another outbreak in the workplace or other potential disruption, such as hurricanes, earthquakes, terrorist attacks, or new viral/bacterial outbreaks; and
  - › whether to require vaccination once a vaccine is developed, including partial workforce vaccinations if vaccines are not widely available or cost-effective (and related ER issues).

## **CONCLUSION**

We expect there to be numerous orders and guidance issued by various jurisdictions nationwide as they begin to lift prior workplace restrictions and issue new restrictions governing workplace reopenings. This guidance reflects our current thinking regarding key issues that employers should begin considering now to minimize difficulties as they reopen or expand current operations. Morgan Lewis has advised employers on numerous issues regarding compliance with certain local or industry COVID-19 requirements and will continue to monitor closely COVID-19 developments and publish regular guidance, including jurisdiction- and industry-specific guidance as new developments occur.

## **CORONAVIRUS COVID-19 TASK FORCE**

For our clients, we have formed a multidisciplinary **Coronavirus COVID-19 Task Force** to help guide you through the broad scope of legal issues brought on by this public health challenge. We also have launched a [resource page](#) to help keep you on top of developments as they unfold. If you would like to receive a daily digest of all new updates to the page, please [subscribe](#) now to receive our COVID-19 alerts.

## **CONTACTS**

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

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