Returning to Work After COVID-19
FAQs for Employers

As employers nationwide prepare for the gradual return of employees furloughed or laid off as a result of the pandemic, we have received numerous questions about the practicalities, legalities, and novel issues employers are considering. Below are answers to a number of frequently asked questions. Of course, these are general responses that should not be construed as legal advice, and we encourage you to consult counsel to formulate and implement your return-to-work plans.

Workplace Safety

Medical Testing

May an employer require medical testing before employees return to work?

Employers are allowed to take steps to determine whether employees entering the workplace have COVID-19. Under the federal Americans with Disabilities Act, and many analogous state laws, an employer can require medical testing as long as it is "job related and consistent with business necessity." The Equal Employment Opportunity Commission has indicated that an individual with coronavirus will pose a direct threat to co-workers (and, depending on the job, possibly others), and says that the employer can screen for COVID-19.

With this in mind, employers should ensure that their tests would reliably detect COVID-19 or symptoms associated with COVID-19. The most common test involves temperature checks, which the EEOC has authorized.

Employers may also ask employees whether they have been exposed, or have had contact with others who have been exposed, or have experienced symptoms associated with the virus. This last part can be a challenge, as the list of common symptoms is constantly evolving, and different people manifest the illness differently. Employers should stay abreast of the latest medical information from reliable sources, such as the Centers for Disease Control and Prevention. The CDC's guidance identifies the following common symptoms that may appear: fever, cough, shortness of breath/difficulty breathing, muscle pain, headache, sore throat, or new loss of taste or smell.

The EEOC has also said that employers can test specifically for COVID-19 or for COVID-19 antibodies. However, the tests should be reliable. Again, employers should keep up with the latest medical information from reliable sources.

Finally, the ADA requires that all medical information about an applicant, offeree, or employee -- including temperature logs or results of COVID-19 tests -- be kept confidential, and separate from the employee's regular personnel file.

Do employers have to pay employees for their time spent getting tested?

If the employer is requiring the testing, the time spent getting tested should be compensated.

What testing can be done in-house?

As a general matter, employers should have a medical professional conduct any medical tests, such as the clinical diagnostic tests currently approved for use. These tests require a laboratory to analyze and issue findings. On the other hand, some testing -- including temperature testing -- can be done in-house and by the employer. Employers can also ask employees to self-report symptoms and possible exposure.

Even for testing that can be done in-house and by someone who is not a medical professional, employers should avoid having the testing conducted by the employee's manager.

What if an employee reports that another employee "looks" sick? What steps can be taken?

As with any report by a coworker about a colleague's appearance or behavior, employers should take steps to investigate and validate any concerns before taking action. If the concern is validated (either by the sick employee's admission or by other observations), the employer can and should send the sick employee home and require follow up by a medical professional.

Is a consent form needed before screening employees?

Before medically screening employees, it is always advisable to obtain their prior written consent. If the screening is for temperature and not COVID-19, the consent should also include an acknowledgment that the test is not a diagnostic test and should direct employees to consult with their medical providers if they become concerned about any symptoms.

Some state laws may provide additional requirements. For example, in California, employers covered by the California Consumer Privacy Act may need to provide a disclosure at the time of collection. The disclosure should describe the information being collected (*e.g.*, body temperature) and the purpose(s) for which the information will be used (to maintain a safe work environment). Employers can provide this through a general notice to all employees or by posting a disclosure at the site where temperatures are being taken. California employers, and possibly employers in other states, also have to comply with any state statutes, such as the Confidentiality Medical Information Act, that prevent an employer from using medical information without an authorization, unless there is a specific exception. Such considerations need to be reviewed with employment counsel for compliance.

If an employer does not test, is there a risk of negligence claims?

This will largely depend on applicable state or local laws, including workers' compensation laws. Generally, a workplace injury or illness that results from employer negligence will be covered by workers' compensation. Pre-access screening can generally be an effective way for an employer to demonstrate that it is taking reasonable precautions to protect the health and safety of other employees and third parties. Other effective means include encouraging handwashing, face-coverings and social distancing at the workplace.

What if an employee objects to being screened because of religious beliefs?

If an employee has a religious objection to having her temperature taken or being required to be tested for COVID-19, the employer should engage in the interactive process to determine whether it can accommodate the objection without creating an undue hardship or posing a direct threat to other employees in the workplace. The EEOC has said that an employer is not required to provide accommodations that would create a threat to the health and safety of other workers or the public.

Personal Protective Equipment (PPE) and Industry-Specific Guidelines

What PPE should employers require employees to wear?

The PPE recommended for employers may vary by industry, and more specifically by job tasks. The Occupational Safety and Health Administration (OSHA) has issued Guidance on Preparing Workplaces for COVID-19. OSHA identifies four risk categories for worker exposure: (1) Very High (examples include health care workers and morgue workers who have been in contact with known or suspected sources of COVID-19); (2) High (examples include health care delivery and support staff, and medical transport workers); (3) Medium (frequent and close contact, like grocery store workers); and (4) Lower Risk. OSHA believes that most workers will fall into the Low and Medium risk categories. OSHA's guidance also provides recommended types of controls for each level of exposure.

In this Guidance, OSHA provides the following general recommendations regarding PPE, though the industry and job tasks may dictate the type of PPE that is appropriate. According to OSHA, "Employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs. The types of PPE required during a COVID-19 outbreak will be based on the risk of being infected . . . while working and job tasks that may lead to exposure."

The Centers for Disease Control and Prevention has recommended that the general public use cloth face coverings. Additionally, the CDC has provided guidance for critical infrastructure workers who may have been exposed to COVID-19 but remain asymptomatic. With respect to these employees, the CDC says, "The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages."

If employers require their employees to wear N-95 masks, either to meet OSHA requirements or as a matter of company policy, OSHA mandates that the employer implement a written Respiratory Protection Program that includes certain elements, such as medical evaluation and fit testing. If employers merely permit their employees to voluntarily wear N-95 masks, OSHA does not require a written Respiratory Protection Program, but does require providing the wearer with the information contained in Appendix D of the OSHA respiratory standard and ensuring that the mask itself does not present a hazard (*i.e.*, the employee can work safely in the mask).

If non-health-care employers require or allow employees to wear face coverings that are not N-95s where the purpose is clearly to shield others, no OSHA standards apply. Nevertheless, some training may be recommended regarding the use, purpose, and limitations of the face covering.

Employers also may have to consider PPE-related reasonable accommodations for employees with disabilities.

Is guidance available that relates to specific industries?

Yes. OSHA provides guidance for specific industry areas, including the following:

- Health care
- Emergency response and public safety
- Postmortem care
- Laboratories
- Airline operations
- Retail operations
- Border protection and transportation security
- Correctional facility operations
- Solid waste and wastewater management

- Environmental (*i.e.*, janitorial) services
- In-home repair services
- Solid waste and wastewater management
- Meat processing and packing

Your specific industry or a regulatory agency associated with your industry may also issue guidance related to COVID-19, as well as state and local health departments.

Cleaning and Other Safety Measures

Has the CDC or OSHA released any guidance on cleaning?

Yes. With respect to preventive measures, the Occupational Safety and Health Administration has made general recommendations related to cleaning in its Guidance on Preparing Workplaces for COVID-19 (quoted with minor edits):

Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency-approved disinfectant labels with claims against emerging viral pathogens. Products with EPA-approved emerging viral pathogens claims are expected to be effective against SARS-CoV-2 based on data for harder to kill viruses. Follow the manufacturer's instructions for use of all cleaning and disinfection products (e.g., concentration, application method and contact time, [personal protective equipment]).

The Centers for Disease Control and Prevention provides more specific guidance (quoted verbatim):

- Wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
  - Additional personal protective equipment (PPE) might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
  - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area.
- Wash **your hands often** with soap and water for 20 seconds.
  - Always wash immediately after removing gloves and after contact with a person who is sick.
  - Hand sanitizer: If soap and water are not available and hands are not visibly dirty, an alcohol-based hand sanitizer that contains at least 60% alcohol may be used. However, if hands are visibly dirty, always wash hands with soap and water.
- **Additional key times to wash hands** include:
  - After blowing one's nose, coughing, or sneezing.
  - After using the restroom.
  - Before eating or preparing food.
  - After contact with animals or pets.
  - Before and after providing routine care for another person who needs assistance (e.g., a child).

The CDC has also provided guidance for employers on how to clean when someone is sick (quoted verbatim, and current as of April 27, 2020):

- **Close off areas** used by the person who is sick.
- **Open outside doors and windows** to increase air circulation in the area. **Wait 24 hours** before you clean or disinfect. If 24 hours is not feasible, wait as long as possible.
- Clean and disinfect **all areas used by the person who is sick**, such as offices, bathrooms, common areas, shared electronic equipment like tablets, touch screens, keyboards, remote controls, and ATM machines.
- If **more than 7 days** since the person who is sick visited or used the facility, additional cleaning and disinfection is not necessary.
    - Continue routine cleaning and disinfection.

Should special safety rules be developed for corporate events or meetings?

Until further information is available about the safety of doing so, employers may want to postpone non-essential corporate meetings and events, or conduct them remotely using video or telephone conferencing. Once in-person meetings resume, employers should ensure that the venue is complying with applicable COVID-19 guidelines (and make that part of the contract with the venue), and attendees should be encouraged to follow social distancing guidelines.

Leaves of Absence

What leave are employers required to provide to employees who are unable to work for reasons related to COVID-19?

Depending on the circumstances, employers may be required to provide COVID-19-related leave in accordance with the Family and Medical Leave Act and the Families First Coronavirus Response Act, as well as any applicable state or local laws.

The FMLA entitles eligible employees of employers with 50 or more employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. To be eligible, the employee has to have worked for the employer for at least 12 months (the 12 months do not have to be consecutive), and have worked at least 1,250 hours for the employer during the 12-month period immediately before the leave would begin. An eligible employee with COVID-19, or who is caring for a spouse, parent, or child with COVID-19, would be able to take FMLA leave, provided that the employee had FMLA leave available.

Additionally, the recently enacted FFCRA requires employers with 1-499 employees to provide expanded paid FMLA leave and/or emergency paid sick leave to employees. The expanded FMLA leave, which applies only to absences related to care of a son or daughter whose school or child care facility is closed, or whose child care provider is not available because of COVID-19, is available to employees who have worked for the employer for at least 30 calendar days. The paid sick leave is available to all employees, regardless of length of employment, for that same reason, as well as five other specified COVID-19-related reasons.

States and localities have also passed various laws that may require employers to provide paid or unpaid leave for reasons related to COVID-19.

What if an employee has a family member who is sick, but the employee is not caring for the family member?

An employee in these circumstances is not entitled to FMLA leave or FFCRA leave. However, leave may be available under state or local law, or under the terms of an employer leave policy.

What if an employee brings a doctor's note saying that she is at risk if she returns to the workplace?

If the healthcare provider recommends that the employee self-quarantine *and* if the employee cannot telework, then the first two weeks of leave would be covered under the Emergency Paid Sick Leave Act provisions of the FFCRA (assuming the employer was covered by the FFCRA and the employee was eligible). After the first two weeks -- or if the FFCRA does not apply for some other reason -- the employee could be eligible for traditional FMLA unpaid leave based on a serious health condition. Additionally, if the condition that puts the employee at risk is a "disability" within the meaning of the Americans with Disabilities Act or other disability protection law, an employer might be required to provide unpaid leave or allow the employee to telework as a reasonable accommodation.

Can the employee use paid sick time even if the employee is not sick? What about vacation?

Where an employer offers paid sick or vacation leave, the use of such leave usually depends on the terms of the employer's policy and any applicable state or local laws. In most cases, it's up to the employer to determine whether an employee can use paid time off. Some states, however, have passed laws requiring paid sick time generally or in relation to COVID-19.

Does the employer need to replenish vacation/PTO upon the employee's return to work?

It depends on the terms of the employer's vacation/PTO program and, if applicable, state or local law. It also depends on whether the employee was terminated, furloughed or laid off, or placed on a leave of absence. Some state and local laws require restoration of PTO for employees who were laid off and reinstated within a certain time period.

May the employer require a doctor's note before returning an employee to work, or if the employee "looks sick"?

Yes to both. According to the EEOC, an employer can require an employee returning to work to provide a doctor's note demonstrating that the employee is fit for duty and/or is not positive for COVID-19. The requirement should apply to all similarly situated employees. Employers are also permitted to screen employees for symptoms of COVID-19 (see Medical Testing section, above). Unless based on a self-report from the individual's employee or the symptoms of an individual employee, the screening should be required for all similarly situated employees. It is legal to require individual employees to be subject to a medical test when they report, or appear to have, symptoms of COVID-19.

Accommodations and the Interactive Process

Do employers have to accommodate employees with COVID-19?

Whether COVID-19 would qualify as an ADA-protected disability depends on the severity and duration of the condition for the particular individual. Because the condition causes no symptoms for some individuals and only flu-like symptoms for others, it is not clear whether the condition would be considered a "disability" *per se*. Nonetheless, the ADA (and the Rehabilitation Act of 1973 for federal contractors) still applies during the pandemic and may require an employer to provide reasonable accommodations to employees with severe or long-term cases of COVID-19, as well as employees who have other medical conditions that qualify as "disabilities" (such as diabetes, asthma, or an immune disorder) and make them vulnerable to contracting COVID-19 or becoming severely ill in the event of a COVID-19 exposure.

Should an employer revise its job descriptions to address whether physical presence in the workplace is an essential job function?

It is always a good idea to be reviewing and revising job descriptions for accuracy. However, an employer who permits employees to work remotely because of COVID-19 is not required to eliminate workplace presence as an essential function after the COVID-19 crisis has ended. (Nonetheless, if the work can be performed remotely and there is no compelling reason to require physical presence in the workplace, employers should consider allowing remote work as a reasonable accommodation in appropriate cases.)

Should employers make special accommodations for older employees who do not have COVID-19?

There is no requirement under the ADA or the Rehabilitation Act for employers to make reasonable accommodations based on age. However, if an employer is concerned that older workers may be more adversely affected in the event of a COVID-19 exposure, it can consider making some accommodations on a voluntary basis. Indeed, the better practice would be for an employer to make accommodations for anyone who is particularly vulnerable to COVID-19. In that way, the employer need not develop policies that target only older workers.

Benefits

If an employee is only working part time, what happens to their benefits?

It depends on what the plan documents provide. As with any benefits question, the first place to look is the plan documents when it comes to when, how, and to whom benefits are to be paid. Some plans allow for coverage for part-time employees, or for employees on a specifically defined leave of absence (this could be paid or unpaid leave, leave for a specific period of time or a specially designed type of leave under the plan terms). The particular plan or benefit will also spell out when coverage ends. For example, health plans often end coverage on the last day of active employment, the end of the pay period, or the end of the month, or upon other conditions defined in the plan. You may need to consider whether plan amendments are necessary to keep your plan documents in compliance.

Are any severance or group life insurance plans implicated for employees who do not return to work?

Here again, the plan documents provide the starting point, since these types of plans are often triggered by the termination of the employment relationship. Also, paying severance to terminated employees when there is no plan in place could create an unintended ERISA severance plan. Similarly, employees who lose life insurance coverage may have conversion rights, which the employer is obligated to ensure that a timely conversion notice is sent to provide the individual an opportunity to continue coverage (if applicable). If timely notice is not provided and there is a lapse in coverage, the employer may find itself liable later on for self-insuring any death claims. Careful consideration is warranted here because there is not a one-size-fits-all approach.

What if the benefit plan documents do not provide for coverage of benefits due to COVID-19 issues when employees do not meet eligibility requirements?

The employer should examine its plan documents in detail and seek additional help. Employers who continue to cover individuals who are not eligible for benefits under the plan terms are not in operational compliance with their plan documents, and that non-compliance could be a breach of their fiduciary duty. In addition, where insured health plans are considered, a change in coverage without an agreement from the health insurer would technically be a breach of contract with the health insurer. Even if the health insurer agrees to a change in coverage, the employer needs to be aware of the implications of that change. For example, will the change in coverage cause an impermissible discrimination issue? To change coverage under any particular benefit plan, an employer first needs to confirm that the proposed change does not create any discrimination or other coverage issues. Then the employer would need to amend the plan document to specifically provide eligibility to the intended group.

Is COBRA implicated?

COBRA is implicated for those employees who elect coverage, if the employees lose coverage due to termination of employment or a reduction of hours below the number of hours required for eligibility for a COBRA-qualifying event. Coverage for health, dental, medical flexible spending accounts, and EAPs may continue for employees who have a COBRA right to elect coverage. There are also various and nuanced risks associated with subsidizing COBRA premiums, and potential liability for members of the control group that sponsors the plan. Employees can still be required to pay their share of premiums during a leave of absence, and this payment can occur via pre-payment, or continuation of payment as the employee paid while actively employed (*i.e.*, weekly, biweekly or monthly). The amounts paid can be billed to the employee, or the employer can pay the entire premium during the leave of absence and recoup the employee portion when the employee returns to work.

What do we do about the new retirement plan distribution and loan options authorized under the CARES Act?

The employer will need to amend the plan to provide the newly available relief. Also, the plan administrator will need an employee's certification that the employee satisfies the conditions to be eligible for waiver of the 10 percent tax on distributions up to $100,000 before age 59 ½. The employer must set up repayment schedules over three years and refer to any outstanding loans the plan has to determine whether there has been any impact as a result of a termination or an unpaid leave.

What impact will any changes to the employees' hours have on any Affordable Care Act or other benefit plan testing that will occur?

The ACA can come into play if an employee is placed on a "leave of absence" but is still considered to be full time. This could trigger the ACA employer mandate penalty of $2,000 per full-time employee if the employer does not provide coverage to at least 95 percent of full-time employees. Part of the inquiry involves a review of what

measurement period has been chosen for determining full time status (i.e., monthly or look-back). Also, if the employee has pre-tax contributions under a cafeteria plan (including flexible spending accounts), it is important to review how a leave or termination/rehire may affect those contributions. Of course, there are numerous special rules and exceptions that may apply to this ACA analysis, and employers should consult with their benefits counsel to determine their obligations.

With respect to retirement plans and testing, 401(k) plans may have been partially terminated, based on how many people were laid off. Employers should review employee census data and plan documents to determine whether a partial termination occurred and consult with benefits counsel regarding next steps.

What other benefits-related considerations should be kept in mind as employees return?

- If any plan participants ceased participation during time away from work, the plan must distribute new Summary Plan Descriptions (SPDs), even if the employee was rehired within 30 days.
- Check whether plan documents have the Break-In-Service rules that apply and what effect those rules may have.
- 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.
- If any benefits have been added or changed in some new way to address the pandemic (e.g. adding telehealth benefits), the employer should review the plan document with legal counsel to determine whether another amendment or a summary of material modifications is required.

Workers' Compensation

If an employee gets COVID-19 at work, can he or she file a workers' compensation claim?

Employees may file claims if they believe they contracted COVID-19 at work, although that does not mean it is a compensable claim. Although workers' compensation varies by state, generally it will be difficult to prove work-relatedness because occupational disease burdens usually exclude diseases to which the general public is exposed. However, many employees travel for work or work in positions with heightened risks of exposure (for example, health care or emergency responders). Under current law, the increased "risk" even with these jobs is not generally sufficient to determine compensability. At least nine states have or are considering changes to their workers' compensation laws as a result of the new coronavirus. Most of these changes provide presumptions that a COVID-19 illness is a compensable workers' compensation illness for health care workers and safety professionals (firefighters, first responders, police officers, etc.). In other words, those employees whose "front-line" job duties expose them to a greater risk of COVID-19 would receive the benefit of the presumption in those states based on these legislative adjustments.

The states that have taken steps to address this issue include Alaska, California, Illinois, Louisiana, Massachusetts, Minnesota, Pennsylvania, South Carolina, and Washington.

More information is available here (https://www.constangy.com/newsroom-newsletters-961).

Wage/Hour

Must employees be compensated for their time spent taking COVID-related precautions?

Under the federal Fair Labor Standards Act, employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's worksite. However, some states and collective bargaining agreements, may require "reporting time pay" when employees show up to work but are not put to work, or are furnished with less than their usual or scheduled day's work.

Are employers required to pay employees for time spent in health screenings before they begin work?

It is not entirely clear whether time spent by employees in job-required health screenings is compensable under the FLSA. However, the U.S. Department of Labor has issued a regulation that seems to indicate that this time is compensable:

> *[29 C.F.R.] § 785.43 Medical attention.*
>
> *Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.*
>
> *Unless and until the Department of Labor issues further guidance on health screenings and employee temperature checks in the context of COVID-19, the safest course for employers is to treat the time as compensable.*
>
> *More generally, time spent in activities that are preliminary or "postliminary" to an employee's principal work activity are generally not compensable. However, if the activities are "integral and indispensable" to the employee's principal work activity, the activities are compensable. According to the U.S. Supreme Court in a 2014 decision, "An activity is ... integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." In that decision, the Supreme Court said that mandatory security screening at the end of the employees' shift was "postliminary" to the employees' principal duties and was not compensable time under the FLSA.*

In considering whether time is compensable, key considerations may be the specific activities performed by employees, along with whether the employer is requiring the screening or whether it is mandated by another third party, such as a government agency. Employers may see further guidance from the U.S. Department of Labor and state agencies in coming weeks as more employers are required, encouraged, or electing, to conduct employee screenings related to COVID-19. In the meantime, again, employers should assume that time spent in screenings is compensable under the FLSA.

It is important to remember that many states have more liberal standards than the FLSA, so employers should review any applicable state wage and hour laws that may apply. For example, the California Supreme Court recently held that time spent in employer security screenings at the end of a shift is compensable under California law.

Finally, the compensability of this time may be addressed in a collective bargaining agreement.

Are employers required to pay employees for time they spend donning and doffing COVID-19 protective gear before they begin work?

Regarding donning and doffing, the Supreme Court has said that time employees spend donning and doffing specialized protective gear is compensable time under the FLSA, as is time spent (for example) walking to and from the worksite while the protective gear is on. Presumably this rule would apply to the donning and doffing of COVID-19-protective gear. Employers should also consider state or local wage-hour laws, as well as their collective bargaining agreements, as applicable.

What expenses should be reimbursed upon return to work?

Under the Fair Labor Standards Act, employers must reimburse employees for business expenses that reduce the employee's earnings below the FLSA minimum wage, including overtime compensation. If the state has a higher minimum wage than the FLSA minimum wage, then failure to reimburse expenses that reduce the employee's earnings below the higher applicable minimum wage could violate the state wage-and-hour law. Further, an employer may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

Some states, like California, require reimbursement of all reasonable business-related expenses. California employers may use a stipend or lump sum to reimburse employees for business expenses, as long as the stipend results in *full* reimbursement. Consequently, it is advisable for California employers to institute policies that allow employees to seek reimbursement for any business-related expenses incurred over and above the stipend. Finally, when using the lump sum method, employers should consult with counsel to evaluate the implications for calculation of taxes and the regular rate.

Other Return-To-Work Issues

What if an employee refuses to return to work?

Generalized fear is not a sufficient reason to refuse to return to work, and employers are not required to allow employees to work from home. However, the refusal may be based on a qualifying reason for COVID-19-related paid sick leave (*e.g.*, the employee is subject to sheltering orders or has child-care responsibilities). In addition, OSHA may protect an employee who has a good-faith belief that the workplace is unsafe. Employees with anxiety may have ADA-protected disabilities (as may employees who have safety concerns based on an underlying medical condition), which would require the employer to engage in the interactive process, with work from home or medical leave as possible reasonable accommodations. Communicating with employees to understand their reasons for refusing to return to the workplace (and documenting those communications) is crucial to the reinstatement process. As part of their overall "return-to-work" plan, employers may want to develop a uniform (per state location) communication to employees that will allow them to identify any employees who are legally entitled to continue teleworking.

For employees who are at higher risk because of medical conditions or because of their age, can an employer refuse to let them return to work, or delay their returns?

Such refusals or delays could lead to claims of age or disability discrimination. A better practice would be to talk with these employees about whether they prefer to perform their jobs remotely, or to delay their return-to-work dates. The decision whether to do this should be the employee's, not the employer's.

Can an employer use "return to work" as an excuse to terminate "problem" employees?

No. While this may seem like an ideal time to be selective in determining which employees are chosen to return to work from furlough or a layoff, this unusual situation does not provide an opportunity for employers to retaliate against, or discriminate against such workers in the context of a general "return to work." This rule applies equally to termination decisions about current employees that are made at the time of a general, company-wide, or phased, "return to work." The decision not to bring back a furloughed or laid-off worker, or a decision to terminate a current worker, should be based on legitimate, non-discriminatory reasons to avoid claims of discrimination and retaliation. Particular scrutiny should be paid to termination decisions that relate to employees who challenged company actions or policies in responding to the COVID-19 crisis. Such terminations may run afoul of the Occupational Safety and Health Act, or state whistleblower laws, or public policy.

How should attendance issues be addressed? What if the employee is quarantining in another city or state which is not "open" yet? Can the employer require them to come into work?

Fairness is a helpful benchmark for employers to use when dealing generally with attendance issues. Some employees will have particular and protected needs regarding attendance relating to child care, care for family members, and self-care resulting from government mandates or specific COVID-19 health issues. These protections include the federal Families First Coronavirus Response Act (which applies to private sector employers with fewer than 500 employees and almost all public employers) and individual state laws regarding care for children during the remaining declared emergencies. A fair, measured and reasonable approach is advised to avoid retaliation claims. Regarding employees in areas that are still under quarantine, employers should comply with the laws that apply to those employees. For example, an employee living in a location with a strict travel restriction should not be required to travel to an employer's headquarters, whether or not it is located in an area that has or does not have similar travel restrictions.

Should employers develop written policies and training protocols for those returning to the office?

As businesses transition back to normal operations, communication with employees is a critical component. Employers may want to consider having written policies addressing the various issues surrounding COVID-19. At a minimum, employers covered by the Families First Coronavirus Response Act must post the Employee Rights poster (found here), where other notices to employees are posted. Other state or local laws may require additional notices. For example, California's COVID-19 Supplemental Paid Sick Leave Executive Order, signed on April 16, 2020, requires that notice of this new supplemental paid sick leave be provided (https://www.dir.ca.gov/dlse/COVID-19-Food-Sector-Workers-poster.pdf).

In addition, employers may want to consider the following:

- Reviewing any existing policies that were changed formally or in practice as a result of COVID-19, such as remote work policies, and revising as needed.
- If the employer is covered by the Families First Coronavirus Response Act, revising sick leave and FMLA policies to address the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act.
- Adopting policies on reporting COVID-19 exposures or symptoms.
- If applicable, drafting policies on temperature checks or COVID-19 testing.

- Amending any policies related to workplace cleaning or other sanitation issues.

- Addressing any safety-related concerns that employees may have, including identifying the appropriate company officials with whom to raise such concerns.

- Providing written guidance on best practices for hygiene and social distancing, and stating the employer's expectations in this regard.

- Reviewing policies such as attendance, working hours, timekeeping, paid time off, and travel, and revising as necessary.

- Creating FAQs for managers and front line supervisors on how to respond to COVID-19-related issues and questions that they may encounter.

- Assessing whether the Company should create protocols regarding vendors, visitors, or other non-employees who may be present at the worksite.

That having been said, not every practice or procedure needs to be in writing, and if an employer's processes are still in flux, it may not be practicable to draft or revise a written policy only to have to change it again in short order.

In regard to training, employers should give managers and supervisors the necessary tools to handle the circumstances they may encounter on a day-to-day basis, including employees who report feeling ill, employees who may be afraid to report to the worksite, or employees who may refuse to leave the workplace if directed to do so. If employers are requiring social distancing in the workplace, supervisors and managers should be trained on how best to enforce those guidelines. FFCRA-covered employers should train managers and supervisors on how to recognize requests for leave under either the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act and remind managers of the no-retaliation provisions contained in the laws.

Should employers prepare a plan for possible future "spikes" in COVID-19 in their area?

Taking proactive steps now and planning for the possibility of later spikes of COVID-19 can lead to less business disruption in the future. Use this time to assess what worked and what did not work for the business during the shutdown that is now ending. There may be policies the company wants to adopt or processes to follow should future shutdowns be necessary. Even if the employer's area of the country does not see another spike in COVID-19 cases requiring the same level of shutdown as currently exists, the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act are in effect through December 31, 2020. Thus, FFCRA-covered employers could continue to see requests for paid leave under those laws through the end of the year.

What happens if the company develops written guidelines, and high-level managers ignore those guidelines?

Correct and compliant written guidelines can go a long way in "inoculating" an employer against liability, but only if they are followed. It may be helpful to conduct training for all management that provides the rationales for the guidelines.

In some situations, having established internal guidelines which are deliberately violated by high-level managers can be worse for the company than if the company had none, since the company is likely to be held responsible for the actions of these individuals and their actions are more easily proven to be willful. If the company develops written guidelines and those guidelines are deliberately violated, robust and immediate action against those violations may, in some circumstances, shield the company from some forms of liability.

How should employers approach performance evaluations for work during the COVID-19 time period?

The difficulty here is how to be evenhanded while dealing with a host of job situations faced by employees during the COVID-19 period. For example, how should an employer compare the productivity of a worker who was looking after a child as a result of a mandated school closure, with an employee that had no such obligations? How should the employer compare the performance of one employee whose particular project/work assignment was easily performed at home, with another employee whose work was far more difficult under the constraints imposed by the COVID-19 period? These are difficult questions to answer in the context of performance reviews.

One approach might be to limit the scope of evaluations for the COVID-19 period to general questions about the employee's good-faith efforts to work under difficult circumstances. It may also be possible to evaluate the productivity from a purely objective, production-based basis (*i.e.*, how many reports were completed on a weekly basis), although this would still have to make allowances for employees who had caregiving responsibilities or other issues while they were working remotely. Another approach would be to subjectively evaluate each employee's productivity against a standard of reasonableness of that employee's particular circumstances. Using the more "individualized" approach is much less likely to result in performance reviews that are challenged on the basis of being unfair.

Of course, employers can also consider suspending performance assessments for the period of the quarantine or shelter-in-place orders, or excluding that period from performance evaluations.

Finally, consideration should be given to the fact that employees' overall mental and emotional responses to COVID-19 will vary. Employees may blame performance inadequacies on elevated anxiety levels. This situation should be handled delicately, and could even implicate the Americans with Disabilities Act in some cases.

What should employers consider when reinstating employees who were on temporary furlough?

The logistics for reinstating employees on temporary furlough (generally, employees whose work schedules were reduced or temporarily stopped, but who remained on payroll) will vary, depending on the industry, the size of the affected workforce, and the operations of the business. Other considerations include the type and length of the furlough, and the manner in which employees will be reinstated. Careful planning and communications will be crucial, given the uncertainty, unease, and confusion engendered by this extraordinary situation. Many of the issues addressed above must be considered when reinstating employees from a furlough, particularly the following:

- **Workplace safety**. If the employees are returning to a facility, employers should review applicable workplace safety protocols, including any applicable regulations issued by the federal and state Occupational Safety and Health Administrations, local ordinances and orders (such as shelter-at-home orders), and the latest guidance from the Centers for Disease Control and Prevention. It may make sense to develop written instructions about applicable safety protocols and the consequences for failing to follow them, to request that employees acknowledge in writing their understanding of those protocols, and to provide training. In addition, employers will want to consider whether and how to implement testing and temperature-taking measures.

- **Determining who will be reinstated and when.** If employees will be brought back to work in stages rather than *en masse*, avoid criteria that may indicate bias against workers in legally protected categories -- or that would have an adverse impact on employees in protected categories even if there is no actual bias. Employers can consider making return to work voluntary, or staging returns by department or other functional unit, or by geographical location.

- **Notice to employees**. The labor needs for some businesses may be uncertain for a while, so it is crucial to keep open the lines of communication with employees. Be sure to comply with any company policy or provision in a collective bargaining agreement regarding the amount of notice that the company must give to an employee returning from furlough. Also, if there is any negative change in the reinstated employees' wages or benefits, most state wage and hour laws require that advance written notice be given to the employees.

- **Vacations and leaves**. If the furlough occurred in a jurisdiction that requires the employer to pay unused, accrued vacation at the time the employee is furloughed, the employee's vacation or PTO banks will be at zero and will again start to accrue upon reinstatement. If no such payout has been made, the reinstated employee is likely to have available vacation or PTO. Employers should check their company's policies, as well as state or local laws. In addition, they should keep in mind that a host of paid sick leave laws exist, many of which have been enacted in recent weeks. Thus, for example, employers doing business in the City of Los Angeles must determine whether and how to comply with the federal Families First Coronavirus Response Act, the California Executive Order mandating supplemental paid sick leave to food-sector employees, and the City of Los Angeles' supplemental paid sick leave ordinance, in addition to federal and California leave laws.

- **Employee benefits.** Review company's plan documents, and follow them. The plans should detail what happens when an employee returns from a leave of absence (employee benefit plans typically view furloughs as unpaid leaves of absence). Generally speaking, health plans will note whether coverage continues during a leave of absence, and for how long. They will also note whether an employee must satisfy any waiting period required by the plan when returning from a leave of absence. A determination also must be made for those employees whose health insurance benefits were continued during a paid furlough without the employee's having paid his or her share of the premiums. A reasonable approach must be taken in determining how employees are to repay their premium portions while avoiding violations of any state laws that prohibit improper deductions from wages. Employers who must satisfy Affordable Care Act requirements should be aware of the ACA's leave-of-absence and rehire rules, which treat coverage options differently depending on how long the leave of absence or layoff lasted. With respect to retirement plans, employers should review the break-in-service rules to determine whether a break in service has occurred, and, if so, whether that break in service causes any disruption to an immediate return to plan participation upon reinstatement. Generally speaking, a short leave of absence period may not interfere with an immediate return to participation in the plan; however, vesting and other considerations may come into play.

- **Addressing refusals to return to work.** Generalized fear is not a sufficient reason to refuse to return to work, and employers are not required to allow employees to work from home. However, the refusal may be based on a qualifying reason for COVID-19-related paid sick leave (*e.g.*, the employee is subject to sheltering orders or has child-care responsibilities). In addition, OSHA laws may protect an employee who has a good-faith belief that the workplace is unsafe. Employees with anxiety may have ADA-protected disabilities (as may employees who have safety concerns based on an underlying medical condition), which would require the employer to engage in the interactive process, with work from home or medical leave as possible reasonable accommodations. Communicating with employees to understand their reasons for refusing to return to the workplace (and documenting those communications) is crucial to the reinstatement process.