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Practical guidance for an ever-changing world

FAQ: Planning for Safe Employee Re-Entry

Employers eagerly await guidance from federal, state and local authorities about how to safely re-open their offices. In the meantime, many are wisely using this time to plan ahead for re-entry. Davis & Gilbert attorneys [Jessica Golden Cortes](#), [Gary Kibel](#) and [Gabrielle White](#) discuss some key considerations employers should take into account in planning for re-entry, from a legal, logistical, health, privacy and employee morale perspective.

Q: When should the office re-open?

A: This will primarily depend on when federal, state and local authorities permit. Many companies, however, will not return employees to the office immediately upon the lifting of stay-at-home orders. Consider a waiting period after restrictions are lifted to enable employees to plan for re-entry, including planning for childcare and eldercare, as well as transportation to work. This will additionally allow companies to watch trends as businesses re-open, hopefully lowering the risk of potential infection of their employee populations.

Q: Should employees come back to the office all at once?

A: This will likely depend on guidance from federal, state and local authorities, which we anticipate may place restrictions on the percentage or number of employees permitted in the office at one time, particularly upon initial return. Consider a phased return of employees.

Q: How should an employer decide who comes back to the office first?

A: In an initial return phase, consider focusing on essential employees who cannot readily work remotely, and those who may volunteer to come in. Ideally, employers should not pressure employees to return if they are not ready or able to do so, and make clear that their decision will not impact the status of their employment.

Employers will also have to consider requests for reasonable accommodation to remain at home if employees are more susceptible to contracting COVID-19, as determined by the Centers for Disease

What Employers Can Do Right Now

Assemble a team to create a back-to-work protocol and to implement in-office changes to best protect the safety and health of employees physically returning to the workplace.

Keep a close watch on federal, state and local guidance to inform and update the protocol.

Liaise with landlords, where applicable, to ensure compliance with building requirements in communal spaces.

Control's (CDC) guidance. Employees with minor children may also have limited options for caregiving, particularly with schools and many childcare facilities closed for the remainder of the school year and into summer.

Q: Should returning employees resume a full-time, in-office schedule?

A: This will depend primarily on employer need once federal, state and local restrictions are lifted. From health, safety and employee morale perspectives, however, if feasible, consider a part-time in-office return, combined with a continued part-time, remote-work arrangement.

This can be accomplished by implementing employee "teams" who come to the office on different days or weeks, with each team being comprised of members from each department. This ensures that members from each department are in the office on a given day for work continuity purposes, keeps total in-office volume reduced for social-distancing consideration, and also permits that, in the event someone becomes ill, someone with their skillset will remain available to perform the particular job function.

Q: What measures should companies take to prepare their physical workspace for the return of employees?

A: Employers can immediately start to:

- >> Deep clean the office.
- >> Stock up on masks, wipes and hand sanitizer to distribute.
- >> Consider initially closing or limiting use of office common spaces, including pantries and conference rooms. If these need to be used, limit access to enable social distancing.
- >> Use wipes to touch communal items or wipe them down immediately after use and wash hands.
- >> Limit bathroom capacity (depending on size of overall bathroom) and install no-touch mechanisms to enable opening of bathroom door without touching it, and sensor faucets and toilets.
- >> Consider one-way walk signs throughout office and signage reminding employees of return to work social distancing rules.
- >> Consider reorganizing seating arrangements to permit social distancing and/or installing partitions that can be easily disinfected between employee seating locations.



Q: Can employers take temperatures of employees before they enter the office? Can they ask health-related questions?

A: Typically, no; this would be impermissible under the Americans with Disabilities Act. However, the Equal Employment Opportunity Commission (EEOC) has confirmed that, during the pandemic, employers may take temperatures prior to office entry and ask COVID-19 related health questions due to the direct threat that the pandemic poses to employee health and safety.

The [EEOC's pandemic preparedness guidance](#) confirms this.

Q: Can employers require employees to take COVID-19 tests as a prerequisite to returning to the physical workplace?

A: Yes, employers can probably impose this prerequisite; however, it may not be practical given the availability of the test, and the potential exposure employees may be subjected to in order to get tested.

In the alternative, consider asking employees to certify prior to returning that they, to their knowledge:

1. Do not have COVID-19;
2. Haven't been exposed to COVID-19 in the 14-day period prior to return to the office; and
3. Do not have anyone in their home who has or has been exposed to COVID-19 in the prior 14-day period.

Q: What steps should employers take to secure employee health information that may be collected?

A: A company's information security practices need to be revisited due to the new information being collected and the manner in which it is being collected. For example, if temperatures are recorded at the reception desk by a company employee, there needs to be a system and process to ensure such information is properly recorded, access is strictly limited to those with a need to know and the information is stored in a secure system.

Employees collecting such information may not be accustomed to collecting this type of confidential information and must be trained on proper handling procedures, including using password protected systems to store any such data that may be maintained. Employers should only collect the data they need and should establish a document retention policy.



Q: For California employers, does the new California Consumer Privacy Act (CCPA) apply to the collection of this employee health information data?

A: While employee data is carved out from most CCPA compliance obligations until January 2021, there are some obligations that continue to apply to companies subject to the CCPA (as described in our [prior alert](#)).

Companies subject to the CCPA must disclose the categories of personal information to be collected and the purpose for which the data is being collected or used at or before the point of collection. This can be accomplished in the employer return to work protocol discussed further below.

Q: Would a company conducting temperature checks or asking COVID-related health questions of employees prior to office entry trigger Health Insurance Portability and Accountability Act (HIPAA) protections?

A: Generally, no. HIPAA imposes obligations on certain information held by covered entities (such as health plans, healthcare providers and healthcare clearinghouses) and their business associates. Most employers outside of the health care industry are not covered entities under HIPAA. However, companies may have access to information protected by HIPAA, especially if they sponsor self-insured health plans.

Generally, a temperature check or COVID-related health questions would not be information subject to HIPAA unless the employer receives the information in connection with the administration of its group health plan. Nevertheless, the use and disclosure of such information may be subject to other privacy requirements, as noted above.

Q: Does HIPAA apply if a third party conducts the temperature check or asks COVID-related health questions on behalf of the employer?

A: It is less straightforward if a third party is conducting the screening. In that case, the answer will depend on the facts and circumstances. If the third party or person conducting the check is a covered entity, such as a medical professional, HIPAA is more likely to apply to the extent that they are deemed to be providing healthcare services as defined under section 1861(s) of the Social Security Act. Without further guidance, a medical professional taking employees' temperatures may be considered to be the provision of healthcare services. Generally, if HIPAA applies, the covered entity could not disclose any protected information to the employer. However, certain exceptions may apply, such as if the individuals provide authorization for the disclosure, provided such authorization satisfies HIPAA's standards.



Q: What is the best way for employers to help employees understand and abide by the new return-to-work procedures?

A: Employers can:

- >> Develop a detailed and written protocol summarizing back-to-work procedures.
- >> Hold a company-wide or team-wide virtual meeting to review the procedures.
- >> Have employees sign an acknowledgment confirming they carefully reviewed, understand and will comply with the procedure(s), expressly including an acknowledgment that they understand the employer reserves the right to temperature check and ask relevant COVID-19 related health questions.
- >> Have a protocol that also includes a procedure for employees to report violations, and to report if an employee believes that another colleague is unwell. Designate a coordinator and/or task force to be the recipient of those concerns. This coordinator should also be in regular touch with the building landlord to ensure compliance with building requirements for common spaces, such as wearing masks and limiting elevator capacity.

For More Information

Please contact the attorneys listed below or the D&G attorney with whom you have regular contact.

Jessica Golden Cortes

*Partner,
Labor & Employment*

212.468.4866

jcortes@dglaw.com

Gary A. Kibel

*Partner, Digital Media,
Technology & Privacy*

212.468.4866

gkibel@dglaw.com

Gabrielle White

*Associate,
Benefits & Compensation*

212.468.4962

gwhite@dglaw.com

