

Considerations for Nonprofit Employers Beginning to Re-Open

By Lee Cotugno, Esq.¹

Executive Summary

- Employers face both legal and practical questions as the country gradually emerges from coronavirus related shutdowns.
- Employers should provide ongoing, written communication with employees about new protocols and systems implemented to protect their health.
- Employers may conduct temperature checks onsite if properly trained personnel conduct the checks, with proper, standardized protocols in place.
- Small employers can consider alternatives to onsite temperature checks, such as employee self-certifications.
- Under guidance from the Center for Disease Control (“CDC”), employers should not require a doctor’s note from employees who miss work because of coronavirus related symptoms.
- Some employees may be concerned about returning to work because of risks of exposure to the disease. Employers should work closely with these employees to address their concerns and evaluate opportunities for accommodating the employees’ needs.
- If an employer takes a staggered approach to re-establishing its workforce, the approach should be based on the work to be done, not the characteristics of employees potentially returning to work.
- Federal, state, and local guidance is constantly evolving, so employers should regularly check the agency websites for updates.
- The organization should consider nontraditional ways for employees to work at the organization, such as state workshare programs.

Introduction

As the country emerges from the shutdown resulting from COVID-19 pandemic, planning will be essential to ensure workplace safety and to avoid legal complications.

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To assist in this effort, guidance has been offered by federal and state governments, as well as by the private sector. Rules and guidance established by governmental entities, in particular an organization's home state and locality, should be carefully reviewed and followed to ensure legal compliance.

In addition to the legal and regulatory dimensions, many of the issues that arise involve matters of more practical concern. The legal and business communities have begun a robust discussion of the areas of uncertainty employers will face as they restart their operations. Below are some of the top questions and answers that have been recently raised and provided by professionals in both law and business.

1. What do I tell employees as we begin to reopen?

Communicate with employees in writing, welcoming them back, thanking them for their patience, and letting them know what steps you are taking to ensure their safety.

These communications can include guidance on the following topics:

- The organization's commitment to following state and local guidance on reopening,
- The organization's risk management measures to minimize exposure to the COVID-19 virus (such as checking employee temperatures, discussed below),
- Protocol for the use of masks, hand sanitizers and social distancing measures,
- Staggered employment schedules (discussed below),
- Accommodations for special circumstances (discussed below), and
- Efforts taken to disinfect the workplace.

2. Can (or should) temperature checks of employees be conducted?

General Principles

Conducting temperature checks of employees has been a popular and controversial topic. While the Equal Employment Opportunity Commission (EEOC) has stated that doing so is permitted because of the pandemic, caution is still advised.

Whoever conducts the temperature checks should be trained and provided with protective clothing (at least gloves). Additionally, the right type of thermometer should be used. The organization should designate a specific location for doing the temperature checks. A protocol also should be established to maintain social distancing.

Depending on the number of employees involved and how long it takes to do the temperature checks, the time spent may have to be compensated. There is some uncertainty on the issue of whether keeping a record of the employee's temperature information would violate the employee's privacy. In any case, the results of the checks should be kept confidential.

Alternatives to Temperature Checks

An alternative approach, especially with a small number of employees, is to have the employees take their own temperature each morning and self-certify.

Employees should be instructed in writing that if he/she has a sufficiently high temperature (the Center for Disease Control (“CDC”) advises that a COVID-19 fever can be a temperature of 100.4 degrees or higher), they should stay at home and contact their health care provider.

Check the [CDC Guidance](#) and [Frequently Asked Questions](#) to determine when employees sent home can return. In general, return to work can occur when the employee has had no fever for at least 3 days without taking medication to reduce the fever, respiratory symptoms have improved for at least 3 days, **and** at least 10 days have passed since the symptoms began. An employee can be allowed to return to work earlier if a doctor confirms in writing that the employee did not have COVID-19 and releases the employee to return to work.

3. Should a doctor’s note be required before allowing employees who have been ill to return to work?

At this time, no. The CDC is asking employers not to require doctor’s notes because of the burden the pandemic has placed on the healthcare community. As a practical matter, it may be difficult for an employee to actually obtain a doctor’s note. Requiring employees to go to a doctor’s office or clinic (where exposure to COVID-19 may be higher) could lead to more employees becoming infected.

4. What if employees are afraid to return to work or believe that they cannot return to work at this time?

Once state and local rules allow companies to open, employers can require that employees return to work.

Some employees may refuse to return to work, due to concerns about exposure. Before terminating an employee who refuses to return, other approaches should be considered. For example, an organization could stagger the number of employees who return, increasing the number of employees each week until the organization returns to a regular work force. This would give those employees who have a particular concern about returning to work more time to see that the pandemic has ebbed. Telecommuting also may be an effective alternative.

Employees also should be kept apprised about the Emergency Paid Sick Leave and Emergency Paid Family Leave provided under the CARES Act. This is especially important because employees’ fears may be related not just to their own personal health but also to the fact that they have had to care for their children with schools being closed. Employees caring for other relatives also may have the right to take paid or unpaid leave under pre-existing FMLA and similar state laws or the organization’s own PTO or vacation policies.

Keep in mind that an employee may have an underlying medical condition that, combined with fear or anxiety about returning to work, might be considered a disability or medical condition requiring compliance with the Americans with Disabilities Act or comparable state law. If that is the case, the interactive process set forth in the Act should be followed, and a reasonable accommodation provided. Even if the fear or anxiety does not rise to the level of a covered disability or medical condition, taking the time to engage the employee about what his/her real concerns are, and attempting to work out a practical solution, may still be the most effective approach.

5. If return to work is staggered, how does an employer decide who comes back to work first?

First, prioritize what type of work has to be done at the outset as you re-open and how many employees are required. Memorialize this process in a memorandum that explains who was involved in making the decision, what the decision was based on, and anticipated future action.

Do not make assumptions about what type of employees should return first. For example, for financial reasons, it may be tempting to refrain from calling back high wage employees, but that could mean that you are engaging in age discriminating against older workers (40 and above) who are more likely to be high earners. Instead, have a legitimate reason for who you bring back, document the reason, and stick to it.

It usually makes sense to underestimate the number of employees that you need at first. It is easier to expand than to have to lay off employees again.

Other Steps to Take

1. Keep track of updates to federal, state and local guidance. The CDC regularly updates its [Frequently Asked Questions](#). Depending on where the organization is located, state or local regulations may permit only certain types of establishments to re-open. Even if the organization can re-open, state and local rules may place restrictions on how the organization can operate (for example, there may be limits on how many employees the organization can have at any one time in a location).
2. Have hand sanitizers and masks available, and caution employees about maintaining social distancing, not gathering in groups, avoiding crowded lunchrooms, restaurants and similar locations, avoiding crowds on public transportation and similar activities.
3. Avoid in-person meetings and non-essential travel. Use conference calls and on-line conferencing, even within the workplace.
4. If the organization learns that an employee has been diagnosed with the COVID-19 virus, let other employees know (in writing, without identifying the employee so diagnosed), ask all employees to notify a designated organization representative (such as the Human Resources director) if they have flu-like symptoms (such as a fever, coughing, or chills) and advise that, if they do, they should immediately contact their own doctor. Employees with such symptoms should be told not to return to work until cleared by their doctor.
5. If the organization has not done so already, the organization should look into nontraditional ways for employees to work at the organization, even if the hours of work are reduced. Many states have workshare programs where employees, who are working reduced hours, can still obtain unemployment insurance. The United States Department of Labor recently issued [new guidance in an opinion letter](#), UIPL 21-20.

Concluding Thoughts

This is a time for patience, compassion and understanding. The pandemic and the resulting closures have challenged fundamental beliefs about human life, the role of government, our vulnerability as individuals and as a society, and personal freedom. There will be disagreements, often strongly expressed, about what has been done and what should be done. But those disagreements need not lead to division. Acknowledge the concerns of your employees and staff. Treat all with respect. Remember the story of the Good Samaritan.

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