

Key Considerations for Developing Your Return to Work Plan

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With discussions of return to work swirling around, and every state in the nation now opening to some extent, is your company ready for employees and customers to return? Here are some considerations in deciding to reopen.

First, develop a written document that details the policies and procedures for all employees, with additional guidelines for those dealing with clients or customers. It should also include procedures for clients or customers. The document needs to give due consideration to the federal and state guidance for safe opening. Both the Centers for Disease Control and Prevention and the Florida Department of Health have issued such guidance.

As a "living" document, it should be reviewed and edited from time to time to assure that it is still accurate. The reality of actual operations will undoubtedly lead to some adjustments. For instance, the initial plan may have called for a physical barrier between temperature screeners and employees entering the business, but it's later determined that face shields are more suitable. The written plan should reflect that change. It's also a good idea to keep notes as to when and why a change has been made. Lawyers appreciate written records indicating that a decision was well thought-out and reasonable. The goal of the plan is not perfection, as the law does not require perfection, only reasonableness.

When putting the document together, keep in mind that the best plan will fall apart if sufficient personal protective supplies aren't available. Take, for example, a plan that requires a booth to be wiped with sanitizing wipes after every customer's use. It also mandates that employees wear gloves when wiping. If the company is unable obtain

an adequate supply of wipes and gloves, then the plan needs to be reconsidered, as well as the actual feasibility of reopening. Additionally, consideration needs to be given to physical space to avoid overly crowded workspaces. Staggered work schedules and temporary workspaces are among the possible solutions. However, if there is no safe way to return to work, then returning to work is legally not viable.

Congress is currently weighing the possibility of COVID-19 liability protections. In the meantime, the first response to employee COVID-19 claims will be workers' compensation immunity. Next will be commercial general liability ("CGL") insurance; however, CGLs usually have an exclusion for employee-related claims. Workers compensation also excludes general liability claims. Both policies should be carefully reviewed for exclusion of claims arising from viruses (and bacteria).

Retaliation against employees who raise concerns about workplace safety is prohibited by the Occupational Safety and Health Act of 1970, which is administered by the Occupational Safety and Health Administration. Part of the reopening plan should therefore include a method to receive, consider and implement (or discard) employee recommendations regarding safety. It's also important to remember that employees returning to the workplace may have legitimate and well-founded concerns for their safety. While fear alone is not sufficient to place an employee in a protected class, business morale suggests that it be handled sensitively. In some instances, depending on the specifics of the employee concern and perhaps a corresponding employee request, the context in which it is made, how the request is handled (or poorly handled) and the request that is made, the situation may implicate the protections of the American with Disabilities Act, the Family Medical Leave Act and/or the CARES Act.

Beyond employees, reopening plans must also take into account customer safety. Many Americans remain uncertain about spending time in public spaces, so it's vital to communicate and demonstrate a commitment to customer safety. Physical customer safety concerns, such as spacing out tables, marking where to stand in line, or having employees wear personal protective equipment, are obvious considerations. Training employees and ensuring they adhere to protocols is just as important. If employees aren't trained to wear a mask, customers may perceive that the store is unsafe and opt to shop somewhere else, hurting the bottom line. Legally, it is the perception that tends to attract customer claims as well.

As an additional step, customers could be required to sign a waiver or a release of liability. Understand that these are not boilerplate documents. To be effective, they must be custom tailored to the situation in which they are to be used. And, with respect to children, they are exceedingly difficult to draft in such a way as to make them reasonably effective.

Every business has unique considerations and circumstances for reopening, but these are some of the general items to keep in mind as your company returns to work.

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