



LABOR & EMPLOYMENT CLIENT ALERT

How to Reopen Your Business in 12 Steps (Coronavirus and the Law)

We're several months into the COVID-19 pandemic and demand is mounting to reopen workplaces. No modern employer has faced quite this situation, so you're not alone. Rates of infection, hospitalization, and deaths vary from place to place, so there is no one size fits all solution.

Credit unions should prepare for both employees and members returning to the premises. You'll want peace of mind from knowing you made every effort to re-open correctly focusing on the health and safety of your workers and customers. These steps take into account [federal laws and guidance](#), but as point 1 below describes, state orders must be considered as well.

We've provided a resource guide at the end of this alert to show how several states are approaching reopening.

1. [SURVEY THE LEGAL LANDSCAPE IN YOUR STATE AND LOCALITY.](#)

Check what your local and state governments are saying. If you're located near a state border, survey what your neighboring state is doing too. Each state and each locality is taking a different angle.

Kentucky Governor Andy Beshear recently unveiled "[10 Rules to Reopening](#)," which includes guidance on masks and temperature checks in the workplace, social distancing, and teleworking.

Litigation undoubtedly will arise from employment decisions made during the pandemic. You will want to be able to testify that you followed all laws—not just federal workplace safety and Equal Employment Opportunity (EEO) laws, but applicable state and local laws, executive orders, and regulations, too.

These documents—local and state orders, health department and Centers for Disease Control (CDC) guidance—may become important evidence in these future lawsuits, but they could cut either way. If you've complied, you could argue you've created a safe workplace; if not, an employee could argue the opposite.

2. [DECIDE WHICH WORKPLACE POLICIES AND FORMS TO PUT IN PLACE.](#)

Leave Policies

By April 1, 2020, employers should have updated their leave policies to reflect [the changes required by the Families First Coronavirus Response Act \(FFCRA\)](#) related to Emergency Paid Sick Leave (EPSL) and Expanded Family and Medical Leave (EFMLA).

If you want FFCRA's payroll tax credits, have employees fill out a form verifying the circumstances of their leave. Documentation is necessary because why an employee takes leave (e.g., to care for a child out of school or a parent with COVID-19, or because they have COVID-19 themselves) affects the amount of tax credits earned.

The IRS puts the [burden on employers](#) to track and verify it all. You might want to chat with counsel about FFCRA and tax credits, especially if you've taken advantage of the [Payroll Protection Program](#).

Telework Policies

Consider an infectious disease policy and a telework policy. Implement an Americans with Disabilities Act (ADA) medical questionnaire customized to address COVID-19 issues in light of recent [guidance from the Equal Opportunity Commission \(EEOC\)](#).

Return to Work Policies

Talk to counsel about a "return to work" policy that addresses, to start, what employees should do if they find themselves symptomatic or exposed at home or at work. A return to work policy should also address the nuts and bolts of re-opening: masks (required or suggested), physical distancing requirements, strictures with respect to in-person meetings and visitors, deliveries, travel by employees on company time, and safe use of conference rooms, lunch and break rooms, restrooms, and other common areas.

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Adopt a form notice for telling employees when there is an exposure in the workplace.

Employee Benefits

If you are changing benefits (i.e., a 401(k) or health plan), get professional guidance first. [We are tracking issues](#) you'll want to consider.

"Employers need to review their employee benefit plans and policies, as well as the plan's service provider contracts, to determine how employment decisions will affect employee benefit programs," [say Woods Rogers' tax and employee benefits lawyers Neil Birkhoff and Josh Wykle.](#)

3. [EDUCATE YOUR WORKFORCE BEFORE THEY RETURN.](#)

Be clear about your safety expectations and changes to the employment relationship.

Make sure your employees are working with the latest information about [how COVID-19 spreads](#) and [its symptoms](#). State health departments have been a wonderful source for easy to understand guides. Guidance from the [Virginia Department of Health \(pdf\)](#) and neighboring [Tennessee](#) are helpful.

Consider putting together a recall notice telling your employees when they can return. Include in the notice references to new policies you have adopted (see 2 above). Finally, remind workers that employment is "at will" (when it is).

The Department of Labor (DOL) has a [Q&A](#) about the intersection of COVID-19 and the Fair Labor Standards Act (FLSA) you may find helpful.

4. [REDUCE RISK OF A DISCRIMINATION LAWSUIT.](#)

After taking stock of the state and local landscape, your policies are in place and you are ready to call workers back. But which workers? Remain aware of federal EEO laws, and the potential your decision might disparately impact a protected class of workers.

Ask your workforce for volunteers to return to work or call back everyone at the same time if you can. You might avoid a claim that you chose those who will and won't return to the exclusion of a protected class.

In any event, be aware of the protected class make-up of workers called back from furlough, teleworking, some leave of absence, or some similar scenario caused by the pandemic. A well-intentioned callback of only younger workers who may be generally less susceptible to complications from COVID-19, could lead to an Age Discrimination in Employment Act (ADEA) claim. Older

workers left at home may assert they were disparately impacted by remaining on unpaid leave for a longer time. Conduct an EEO impact analysis before finalizing recall decisions. Work with an attorney to ensure the analysis is attorney-client privileged.

Even if you have a teleworking policy in place, be wary of decisions that might disparately impact a protected class that lacks a fast internet connection at home. A study from the Pew Research Center [reports](#) racial minorities and older adults are less likely to have broadband service at home.

5. [BE PREPARED FOR WORKERS TO "CALL IN" AFRAID.](#)

Once you have a list of volunteers and you have called back everyone, there may be some employees who tell you they are afraid to return to the workplace. You can empathize, but absent a health condition that renders them more susceptible to COVID-19, fear is not of itself a valid reason for an employee to go AWOL. If a worker (or their health care provider) tells you they have a medical condition and it puts them at higher risk for severe illness from COVID-19, or if you know they have such a condition, you should review your responsibility to accommodate them under the ADA, the Pregnancy Discrimination Act or similar state laws.

You'll face questions of leave under FFCRA. ([See our summary of the FFCRA.](#)) Woods Rogers' tax and employee benefits attorney [Darryl Whitesell notes](#), "an employee who takes paid leave under the EPSLA or EFMLA is entitled to continued coverage under the employer's group health plan and on the same terms as if the employee did not take the paid leave."

The EEOC has [updated pandemic guidance](#) developed in 2009 when H1N1 was spreading and issued current [guidance tailored specifically to the COVID-19's pandemic](#). This guidance provides an overview of what you can and can't say, ask and do in relation to federal EEO standards.

6. [KNOW THE MEDICAL CONDITIONS THAT MIGHT QUALIFY FOR COVID-19 ACCOMMODATIONS.](#)

An employee may bring up a medical condition and ask for a change of some sort (they are not required to use the words "reasonable accommodation" or even mention "ADA", so you should be on alert). Ask [follow-up questions](#) or for medical documentation to determine if the condition is protected by the ADA, and if teleworking, or some other accommodation, would be reasonable under the circumstances. Look at the [CDC's guidance](#). Use the ADA questionnaire you adopted during step 2.



Keep in mind if you have provided teleworking opportunities to non-disabled or non-pregnant employees, you could face a disparate treatment or impact claim if you do not provide similar accommodations for disabled or pregnant employees.

Remember mental health issues like depression or anxiety could be exacerbated by a return to the workplace amid the pandemic. Also beware of issues that could arise from an employee's immune-deficient status, for example from recent chemotherapy treatments.

If you're aware previously a worker has a medical condition that places them at higher risk of severe illness from COVID-19, you should bring it up even if they do not and engage in an interactive discussion about potential options.

Remember that your obligation under the ADA is to provide a "reasonable" accommodation, not necessarily the "best" accommodation, or one the employee prefers.

7. CONSIDER WHAT TO DO IF TELEWORKING WON'T WORK.

If you have engaged with your employee and determined teleworking would create an undue hardship, consider alternative accommodations. Some options are additional or enhanced "Personal Protective Equipment" (such as protective gowns, masks, gloves, or other gear), or enhanced protective measures (like barriers that separate or increase the distance between employees with disabilities, workers, and the public).

Reduce or eliminate the employee's "marginal" functions in favor of those essential to their position. For example, you have an immune-deficient employee whose essential function takes place in the back office but who also covers the front desk during a co-worker's lunch resulting in increased public contact. You should consider eliminating the front desk duty for the time being. Document this decision.

8. HANDLE EMPLOYEE HEALTH DATA PROPERLY.

You'll handle more employee health data than ever before if you start taking employee temperatures and asking about symptoms. The EEOC has [updated its guidance](#) on employee privacy a few times during the pandemic.

In April, the EEOC approved workplace temperature readings. You may send home any employee with a fever (over 100.4) or who exhibits other signs of COVID-19. You

should document interactions related to your employees' medical conditions in a confidential medical file (not in the standard personnel file) for future reference. If you choose to keep a log of temperatures or symptoms—perhaps for shift workers—it too goes in the medical file. But ensure the information recorded is specific to that employee. Don't commingle employee health data.

Pay attention to [CDC guidance](#) as the list of symptoms continues to grow.

9. REVIEW CONFIDENTIALITY RULES AND KNOW WHEN YOU CAN RELEASE EMPLOYEE HEALTH DATA.

You shouldn't give in to co-worker or union demands for private health information about your employees. There are only a few [exceptions](#) to the confidentiality rules under the ADA. You can:

- Tell supervisors and managers about necessary restrictions on work duties and about necessary accommodations.
- Tell first aid and safety personnel if the employee's disability might require emergency treatment.
- Give information to government officials investigating compliance with the ADA. For instance, if you have received a request for the employee's medical file from an EEOC investigator, you are allowed to turn over that information.
- Give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws.
- Use the information for insurance purposes.

10. MAKE YOUR EMPLOYEES AS SAFE AS POSSIBLE.

Employers are worried about lawsuits from employees or even the public claiming they were negligent in reopening and caused someone to contract COVID-19. It bears repeating: review guidance from [CDC](#), [OSHA](#), and other state and local authorities.

For employees who interact with the public, add plastic screens and mark a line six feet from your employee. Place a sign nearby instructing the public not to cross it. You should also consider staggering shifts or alternating on-site and telework shifts to reduce your employees' time in public.

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In non-public-facing workplaces, you should re-arrange your workspaces to keep employees distant from one another.

Some who are contagious do not have a fever and some are apparently asymptomatic altogether, so no matter how good your screening measures are, it is just as or more important to distribute PPE, enact rules about hand-washing, set up sanitizing stations, and implement social distancing measures in the workplace.

11. HANDLE EMPLOYEE WORKERS' COMPENSATION CLAIMS THAT THEY CAUGHT COVID-19 AT WORK.

In the past, employees who made worker's compensation claims alleging they contracted an infectious disease at work have failed because it is difficult to prove infection happened at work and not someplace else. However, this may change depending on a state's legislative revisions to its worker's compensation laws in response to COVID-19.

[Read our client alert](#) on Workers' Compensation and stay tuned as this issue continues to develop.

12. SET A PLAN FOR WHEN AN EMPLOYEE TESTS POSITIVE.

Earlier in April, we outlined a [number of steps](#) you should take if your employee tests positive, which start with being in immediate contact with your state's department of health.

In addition to those steps, we also suggest sending non-essential workers home. You don't need to send CIWs home but they should start to self-monitor and follow other Department of Defense guidelines. You should have addressed the differences between CIWs and non-CIWs in your workplace policies to memorialize the reason you are treating them differently.

Keep all of your workers calm by communicating as much as possible, making sure your workplace is clean and arranged with social distancing in mind, and actively sending sick workers home.

RESOURCE GUIDE: COVID-19 RESPONSE IN KENTUCKY AND NEARBY STATES

District of Columbia

Washington, D.C.'s mayor has not issued a re-opening plan as of May 11, 2020. The District is under a stay-at-home order until Friday, May 15.

Kentucky

Kentucky Governor Andy Beshear published "[10 Rules to Reopening.](#)"

Maryland

Maryland's Governor, Larry Hogan, issued Maryland's [Roadmap to Recovery](#) plan in April.

North Carolina

North Carolina's "[Staying Ahead of the Curve](#)" reopening is structured in phases and began on May 8.

Tennessee

Tennessee Gov. Bill Lee's Economic Recovery Group (ERG) issued the "[Tennessee Pledge](#)", a plan for re-opening Tennessee safely, with input from public and private leaders.

Virginia

Virginia Governor Ralph Northam announced [Phase 1 of Virginia's plan \(pdf\)](#) to begin on May 15.

West Virginia

West Virginia's plan, known as "[The Comeback](#)", is underway.

The attorneys at Woods Rogers are continuously updating our legal blog with topics relating to the COVID-19 coronavirus outbreak. You can find these articles at woodsrogers.com/covid19.

Woods Rogers has created a Pandemic Response Group of attorneys who are available to answer any specific questions or concerns about your obligations or potential liabilities in a range of different practice areas, such as contract law, labor & employment, construction law, cybersecurity, tax, employee benefits, and commercial litigation. We stand willing and able to assist you during these difficult times.

This alert is not intended to be legal advice and does not constitute a lawyer/client relationship.