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# Returning to Work in the COVID-19 Era

*presented by*

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- Employers must follow state and local plans for re-opening and ensure they can comply with restrictions/requirements when deciding when to have employees return to work
- MA has adopted a 4-phase re-opening plan with restrictions, capacity limitations
  - **May 18:** essential businesses, manufacturing, construction
  - **May 25:** lab space, office space (non-Boston), hair, pet grooming, car washes, retail (remote fulfillment, curbside pickup)
  - **June 1:** office space (Boston)
  - **Phase 2 (TBD):** retail, restaurants, lodging, nail salons, day spas
  - **Phase 3 (TBD):** bars, casinos, gyms/fitness studios, museums, other businesses
  - **Phase 4 (TBD):** nightclubs, large venues
  - Businesses must develop written COVID-19 Control Plan in order to reopen, must post compliance attestation poster and signs/posters with rules for social distancing, hygiene protocols, cleaning, and disinfecting

- CDC, OSHA offering guidance, but each state/locality is putting its own rules in place that employers must follow
  
- Social Distancing
  - Employers will need to implement social distancing plans
    - MA requirements
      - All persons at least 6 feet apart
      - Employers may need to establish social distancing protocols
      - Employer must post new signage to promote social distancing
  - Social distancing methods
    - Limiting face-to-face meetings
    - Staggered work shifts
    - Less restrictive telecommuting rules
    - Alternating days or weeks employees at the workplace

## ■ PPE

- Specific to industry
- Employers will likely need to require/provide face masks or coverings in workplace
  - But may be need to accommodate employees (e.g., disability, religion)

## ■ Hygiene Protocols

- Provide handwashing capabilities (MA requirement)
- Ensure frequent handwashing and adequate supplies
- Provide hand sanitizer where soap, running water not immediately available
- Provide tissues and trash receptacles

## ■ Engineering Controls

- Improving air filtration, ventilation
- Installing physical barriers (e.g., clear plastic sneeze guards)

## ■ Identifying/Isolating Sick Employees

- Encourage employees to self-monitor for symptoms
- Instruct employees displaying COVID-19 symptoms to not report to work
- Establish plan for when employee is ill at work (i.e., immediate isolation)
- Establish plan for returning infected employees to work
- Special issues:
  - COVID-19-related questionnaires or certifications may be OK if drafted properly
  - Temperature checks, testing are allowed but require numerous considerations (i.e. is everyone being tested, who is testing, is time compensable, consent required?)
  - Fitness-for-duty or return-to-work certifications are generally OK if required of all employees, but be flexible

## ■ Limiting Exposure to Others

- Review and revise policies regarding visitors
- Consider how to deal with staffing agencies, contractors, vendors
- Consider prohibiting nonessential travel
- Consider limiting in-person meetings
- Consider special protections for employees in public-facing positions

## ■ Cleaning/Disinfecting

- Implement regular sanitation/disinfection of high touch areas, common surfaces
- Establish and maintain cleaning protocols, including when employee becomes ill with COVID-19

- Employers with more than 10 employees must undertake reasonable investigation to determine if COVID-19 cases are work-related
- Cases must be recorded on OSHA log and Incident Report form if:
  - Case is “confirmed” as defined by CDC
  - Case is “work-related”
  - Case meets recording criteria (i.e., results in death, days away from work, restrict work or transfer, medical treatment or loss of consciousness)
- OSHA will assess employer efforts based on:
  - Reasonableness of investigation into work-relatedness
  - Evidence available to employer
  - Reasonably available evidence that illness was contracted at work
- Summary of recordable incidents on log reported on annual basis

- Employers must decide who returns when
  - Must be done in a non-discriminatory manner
    - Do not adopt rules banning “high-risk” employees from returning to workplace
    - Disparate treatment vs. disparate impact
- Employers must develop a return-to-work plan for:
  - Employees with COVID-19 or COVID-19 symptoms
  - Employees with pre-existing medical conditions
  - Pregnant employees
  - Employees 65 or older
  - Employees without childcare, elder care
  - Non “high risk” employees who fear infection



- Employees whose disabilities put them at high risk of COVID-19 may require accommodation
  - Employers must provide reasonable accommodation unless doing so poses undue hardship
  - Employers must engage in interactive process with disabled employees
  - Employers can still ask for medical documentation if disability not obvious or already known, but current situation demands flexibility
  - Telework, leave of absence may be reasonable accommodations
  
- Employees may need accommodations in response to COVID-19-related work rules due to disability or religion (ex., face coverings)

- Pregnancy is not a disability, but pregnant workers may be entitled to accommodations under state law (MA)
- No statutory obligation to accommodate older workers, but compliance with CDC guidance/state orders may require it
- Remember leave laws when dealing with employees with child care concerns
- No obligation to accommodate non-disabled employees fearful of return to work, but:
  - Labor law provides protections for employees who refuse to work in unsafe or unhealthy conditions
  - OSHA permits employees to refuse to perform work where there is “imminent danger”

- Employers may screen job applicants for COVID-19 symptoms after conditional job offer, as long as it does so for all entering employees in the same job
- Employers can delay start dates for applicants with COVID-19 or COVID-19 symptoms
- Employers can withdraw offers to applicants who cannot start because of COVID-19 or COVID-19 symptoms
- Employer cannot refuse to hire employees over age 65 or pregnant women because they are “high risk”
- Employer cannot refuse to hire employees of Asian ancestry or nationality because of COVID-19-related fears

- In unionized workplaces, need to look to CBA before making changes to terms and conditions of employment
  - Bargaining with union may be required
  - Even if permitted, may require bargaining over impact of decisions
  
- Pandemic presents organization opportunity for labor unions
  
- Increased risk of unfair labor practice charges
  - Union and non-employees can engage in protected concerted activity
  - Actions taken in response to employee workplace activities related to COVID-19, including related to issues of employee health and safety, can result in unfair labor practice charges
  - Employers must proceed cautiously

- Personal injury claims by employees who contract COVID-19 are possible, but it is difficult for employees to prevail
  - Workers' compensation may bar claim
  - Difficult to prove workplace exposure
  - Compliance with CDC/OSHA guidance and state and local orders makes negligence difficult to prove



# COVID-19: Health and WFH Security

- Asking employees to stay home:
  - CDC recommended if sick/suspected sick
  - CDC recommended if exposure (e.g., travel)
  - Make sure complying with wage/hour requirements
  - Avoid discriminatory requests
- Informing other employees
  - Get permission
  - Otherwise, notify but avoid identification as much as possible

- Medical Inquiries (e.g., have you been coughing, have a fever, traveled outside the U.S.?)
  - Be careful of ADA – don't ask more than needed
  - Do not ask about underlying risks (disabilities, age)
- Medical Evaluations (e.g., temperature checks)
  - In addition to ADA – privacy torts
  - Weigh business necessity
- Communicating Employee Health-Related Information
  - Employers (generally) not subject to HIPAA on employee fitness to work issues
  - State-specific requirements may apply



- HIPAA Privacy Rule applies to “covered entities” but is “relaxed” in certain circumstances
- Even if HIPAA does apply, various exceptions applicable here
  - Treatment (patient or another)
  - Public Health – agencies and persons at risk
  - Family members, friends, relatives
  - Prevent a serious and imminent threat
- Enforcement is being relaxed in some respects
- Continue to safeguard information
- Only disclose “minimum necessary”

- VPN security
- Use of unsecured devices or connections
- Beware of the cost of “free” programs
  - Conference call lines
  - File sharing or storage (e.g., Dropbox)
- Physical file storage at home
- Use of personal email accounts
- Phishing and ransomware
- Other COVID-19 related scams

- Review and update anti-malware, intrusion prevention programs and systems
- Patch software
- Ensure firewalls in place
- Enhance system monitoring for abnormal activity
- Use dual-factor authentication
- Refresher training/reminders



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# COVID-19 and Leave

- Existing frameworks cover some but not all circumstances
  - MA and other state/local Paid Sick Leave
  - FMLA
- March 18 – Families First Coronavirus Relief Act (FFCRA) signed into law
  - New paid leave benefit for COVID-related issues
  - Employer pays but can receive tax credit

## **Paid Sick Leave**

- 2 weeks/80 hours
- Employee:
  - contracted, is receiving treatment or seeking testing
  - subject to quarantine order
  - is caring for family member with COVID or subject to quarantine
- 100% of pay up to \$511/day for first two; 2/3 of pay up to \$200/day for latter
- ALL employees

## **Expanded FMLA**

- 12 weeks – first 2 weeks can be unpaid
- Employee needs to care for child whose school, care provider is closed or unavailable
- 2/3 of pay up to \$200/day
- Employees worked 30 days or more

- FFCRA applies only to employers with <500
- Can also exempt “health care providers” and “emergency responders”
  - Expansive definition
- Smaller employers (<50) can seek exemption
- Government agencies can opt-in

- FFCRA is *on top of* existing leaves
  - Example – COVID-19 infected employee – 2 weeks FFCRA, 1 week MA sick leave
  - Exception: Expanded FMLA and FMLA count against each other
- For Sick Leave – cannot require employees to take vacation, sick, etc. first.
- Expanded FMLA – can require employees to take applicable paid leave to cover remainder of full pay after first 2 weeks.
- MA PFMLA coming into effect in January – none of these leaves will count against



- Quarantine Order
  - Broadly defined – shelter in place, stay at home, etc.
  - Must be work available for employee to perform. Business closed because of order = no leave
- Child Care Provider
  - Also broadly defined – nanny, relative
  - Employee must be only one able to care for child
- Intermittent leave – available only if WFH and sick, or by agreement if expanded FMLA leave
- Documentation – in addition to name, dates of leave, certifying statement of need
  - Sick leave – name of doctor, government agency issuing order
  - Name of child, name of childcare provider/school

- Returning employees can still satisfy the 30 day threshold for FFCRA Expanded FMLA leave if as of March 1, 2020 they had been working for 30 days or more.
- MA Sick Leave – need to reinstate any unused upon return within 4 months; must reinstate within 12 months if 10 hours or more.
- Be conscious of potential retaliation claims



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