

Coronavirus and COVID-19 Issues for Employers 3.0: Getting Back to Work

**James J. McDonald, Jr.
Fisher & Phillips LLP
Irvine, California**



What We Will Cover

- When can we bring our employees back to the workplace?
- May we invite only our best employees to return?
- May employees refuse to return to work out of fear of contracting the Coronavirus?
- What if employees would rather stay on unemployment?
- May we allow employees to continue working from home?
- Will we need to onboard returning employees again?
- May we monitor the health of employees who return to work?
- May we require employees to wear masks at work?

What We Will Cover

- May we pay bonuses to employees who return to work?
- May we reduce the pay of employees we call back?
- Will the federal Emergency Paid Sick Leave and Extended Paid FMLA Leave laws remain in effect?
- Will state paid sick leave for food supply chain employees remain in effect?
- New CDC guidelines for critical infrastructure workers who have been exposed to a person with COVID-19
- What will employees sue us for after they return to work?

When can we bring our employees back to the workplace?

- On Friday, May 8, certain “low risk” businesses will be allowed to open, such as some retail, manufacturing and logistics businesses.
- Retail businesses will include clothing stores, bookstores, sporting goods stores and florists, “with modifications.”
- Offices and dine-in restaurants – not yet.
- Stricter local orders are permissible.

When can we bring our employees back to the workplace?

- If you are in an industry that is part of the “essential critical infrastructure” your employees already are allowed to come to work.
- Otherwise, follow state and local orders.
 - Are they constitutional?
 - Are they enforceable?
 - Consider public relations aspect.
 - Potential for liability to employees and/or customers.

When can we bring our employees back to the workplace?

“Essential Critical Infrastructure” sectors may remain open to the public for business:

- Hospitals, clinics and doctors’ offices (including dentists, chiropractors, physical and occupational therapists)
- Psychologists and therapists
- Manufacturers and distributors of pharmaceuticals and medical supplies
- Police, fire and EMS
- Most public works employees
- Plumbers, electricians, exterminators
- Agriculture and food processors
- Grocery and food stores

When can we bring our employees back to the workplace?

“Critical Infrastructure Sectors” (continued):

- Electric, gas and petroleum workers
- Transportation and logistics (trucking, warehouse, mass transit, railroad, shipping, aviation)
- Private & public postal services
- Auto repair and maintenance
- Taxi & delivery drivers (including Uber & Lyft)
- Cable and internet providers
- Radio, television and media services
- Data center, service center and communications center employees
- IT workers supporting Critical Infrastructure Sectors

When can we bring our employees back to the workplace?

“Critical Infrastructure Sectors” (continued):

- Private security
- Construction workers
- Businesses in the building materials supply chain
- Retail stores that provide auto supplies, consumer electronics, hardware and home repair, home appliances and pet supplies
- E-commerce businesses
- Pharmacies
- Residential and commercial real estate

When can we bring our employees back to the workplace?

“Critical Infrastructure Sectors” (continued):

- Law and accounting firms that assist clients with compliance
- Laundry and dry cleaning
- Rental car companies
- Schools, daycare, and colleges and universities (for distance learning only)
- Manufacturing of materials and products for medical supply chains, transportation, energy, communications, food and agriculture, chemicals, nuclear facilities and the defense industrial base
- Banking, financial and insurance services

May we invite only our best employees back to the workplace?

It depends on how you define “the best.”

- You must not discriminate based on age, disability, workers’ comp. history, etc.
- You need not recall employees based on seniority, however.
- You must have a non-discriminatory, objectively-measurable basis for deciding whom to call back:
 - Productivity
 - Experience
 - Performance reviews
 - Skills or cross-training

May we invite only our best employees back to the workplace?

Be careful about “eliminating a position.”

- You must really eliminate a position and not re-fill it.
- If you are only eliminating an employee in order to operate more efficiently you must go through the objective analysis.
- Use extreme care in terminating employees who are on medical or workers’ comp. leaves; the better approach might be to leave them on leave and evaluate your need when they are ready to return.

May employees refuse to return to work out of fear of contracting the Coronavirus?

- Generally, no.
- OSHA law permits employees to refuse to work only where there is an imminent threat of death or serious injury.
- Employees over age 65 or with serious health conditions might meet this standard, particularly if they must interact with members of the public (e.g., health care or hospitality).
- If an employee cites a serious health condition as the reason for not wanting to return to work, pursue an interactive process to determine if working from home might be feasible or whether employee should be excused from returning to work now.

What if employees would rather stay on unemployment?

- This is not a good reason not to return to work.
- Employees should be offered recall in writing and advised if they decline the offer or fail to show up as scheduled their employment status will be terminated.
- Employees who do not return to work should be terminated and issued COBRA notices.
- Terminated employees should be eligible for re-hire but they should be required to re-apply when you have the need.
- Notify the EDD when you terminate employees for failing to return to work.

May we allow employees to continue working from home?

- You might be required to do so, as we return to normal in stages.
- When it is no longer required, you will need to make a decision whether to allow it.
- Some employees might be more productive working at home and homeworking will require less office space.
- If there is not a significant net benefit to your organization you should not allow it because it will be virtually impossible to deny working at home as a reasonable accommodation.
- If you allow employees to work from home you should have a formal remote work policy.

What your remote work policy should say

- Employees must keep an accurate record of time worked.
- No overtime unless expressly approved in advance.
- Employees must take compliant meal and rest breaks.
- If data security is important, employees should be issued company computers and not allowed to work remotely on personal computers.
- Employees should be required to work a prescribed schedule and should not be distracted by child- or elder-care issues while working.
- Employees must create a specific work space (and send photos); injuries occurring away from that work space are not the employer's responsibility.

What your remote work policy should say

- Employees may be required to come to their usual workplace as needed (if feasible).
- Employees must follow all usual work policies and procedures in the Employee Handbook, including policy against harassment, IT policy, social media policy, etc.
- Employees unable to work remotely due to illness or family-care obligations must notify supervisor as required for a workplace absence.
- Employees who use their personal cell phones and internet must be given a stipend for business use.

Will we need to onboard returning employees again?

Not unless you formally terminated them.

- Your letter inviting them back should state that another on-boarding will not be required and that all policies and agreements in effect on the date of furlough will remain in effect when employees return to work.
- No need to re-enroll in benefits unless benefits were terminated.
- No need to complete another I-9.
- If employees were paid their accrued vacation/PTO upon furlough they will need to start accruing again but you may waive the waiting period.
- Accrued paid sick leave balance will carry forward.

May we monitor the health of employees who return to work?

Yes.

- You may take temperatures of employees when they start work.
 - This should be done in private and records must be maintained confidentially.
 - Non-exempt employees must clock in before testing.
 - You must issue a CCPA notice if you are covered by CCPA.
- You may require employees to complete a COVID-19 symptom checklist before each shift.
 - You can ask about the following symptoms: fever, cough, shortness of breath, chills, repeated shaking with chills, sore throat, loss of smell or taste, headaches and muscle pain.
- You may require employees to be tested for COVID-19.
 - You must pay the cost, if any.

May we require employees to wear masks at work?

Yes.

- State and local orders may require masks for customer-facing employee, or for all employees.
- You must engage in an interactive process to determine if there is a reasonable accommodation for employees who cannot wear masks on account of a medical condition (you may require a medical certification).
- If you require masks you must pay for them.

May we pay bonuses to employees who return to work?

Yes, but it can be complicated.

- Given current generous unemployment benefits, an incentive might be necessary to get employees back to work.
- For non-exempt employees, any bonus must be included in the employee's "regular rate" for calculating overtime.
- A bonus simply for returning to work would affect the regular rate in the workweek the employee returned.
- If you require the employee to remain employed for a specific period to qualify for the bonus, the bonus would be spread over the workweeks covered for calculating the regular rate.
- Divide bonus by 40 for each workweek it covers.

May we reduce the pay of employees we call back?

Yes.

- Reduction must be announced in advance of the workweek in which the reduction applies.
- Reduction of exempt employee salaries cannot go below the current minimum salary threshold, however (\$54,080 in California).
- Reduction of non-exempt employees' pay must not go below the applicable minimum wage.
- Reductions must be consistent to avoid discrimination claims.

Will the new federal paid sick leave and temporary paid FMLA laws remain in effect?

Yes, until December 31, 2020.

- Federal paid sick leave is in addition to paid sick leave under employer policy.
- Not available to employees on furlough; employees must be actively employed.

The new federal paid sick leave

Up to 80 hours of paid sick leave at employee's "regular rate" for:

- Employee who must comply with a requirement or recommendation to quarantine due to exposure to, or symptoms of, COVID-19. (Does not include state or local "stay-at-home" orders.)
- Employee who is advised by a health care provider to self-quarantine due to concerns relating to COVID-19.
- Employee who is experiencing symptoms of COVID-19 and is seeking a diagnosis.

The new federal paid sick leave

Up to 80 hours of paid sick leave at **2/3** of employee's "regular rate" for:

- Employee who must care for a person who is subject to a federal, state or local quarantine order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Employee who must care for child because the child's school or daycare provider is closed due to concerns related to COVID-19.

Temporary paid FMLA leave

- All employers with fewer than 500 employees are covered.
- Employee must have only worked for employer for 30 days prior to taking leave.
- Eligible employees may take up to 12 weeks of paid, job-protected leave to care for the employee's child if the child's school or daycare provider is closed due to COVID-19.
- No other adult is available to care for child, and parent is unable to telework and care for the child.

Temporary expansion of FMLA

- First 14 days are unpaid but employee can use accrued leave including PTO, vacation or sick leave, or federal paid sick leave.
- Leave is paid at 2/3 of employee's regular rate.
- Secretary of Labor may exempt employers of fewer than 50 employees where the viability of the business as a going concern is jeopardized. *This is a self-exemption; no application need be filed with DOL.*
- Health care employers may decide to be exempt.

Temporary expansion of FMLA

Leave application requirements:

- Dates of requested leave.
- A statement of the COVID-19 related reason for the leave.
- “Written support” for the qualifying reason.
- A statement that the employee is unable to work or telework due to the qualifying reason.
- For leave on account of quarantine, name of government entity ordering quarantine.
- Where health care professional advises self-quarantine, name of health care professional.

Temporary expansion of FMLA

Leave application requirements:

- For leave to care for children whose school or daycare is closed:
 - Name of child.
 - Name of school or daycare.
 - Statement that no other person will be providing care for the child during the period for which the employee is requesting leave.
 - If child is older than 14 and needs care during daylight hours, a statement that special circumstances exist that require the employee to provide care.

Both paid sick leave and temporary expansion of FMLA:

- Became effective April 1, 2020.
- Both leaves are job-protected.
- Both laws sunset on December 31, 2020.
- Both carry payroll tax credits for employers for paid sick leave provided.

Both paid sick leave and temporary expansion of FMLA:

Maximum pay/tax credits:

- Caps of \$511 per day and \$5,110 total for paid sick leave for own COVID-19 condition.
 - Max. \$63.88/hour or \$132,860/year.
- Caps of \$200 per day and \$2,000 total for paid sick leave to care for relative with COVID-19 condition or to care for children out of school.
 - Max \$37.50/hour or \$78,000/year.
- Caps of \$200 per day and \$10,000 total for extended FMLA to care for children out of school.
 - Max. \$37.50/hour or \$78,000/year.

State-required paid sick leave for food supply chain workers

- Governor's Executive Order N-51-20 provides two weeks of supplemental paid sick leave for food supply chain workers.
- Only applies to food industry employers that have 500 or more employees in the U.S.
- Applies to agriculture, food processing, restaurants, grocery stores, and “persons who deliver for a food facility.”
- Applies to “gig economy” workers (e.g., Uber, Lyft, Doordash, etc.).

State-required paid sick leave for food supply chain workers

Who qualifies?

- Worker is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- Worker is advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Worker is prohibited from working due to health concerns related to the transmission of COVID-19.

State-required paid sick leave for food supply chain workers

What leave is required?

- Up to 80 hours paid leave for full-time employees.
- Maximum of \$511 per day and \$5,110 total.
- Part-time employees are eligible based on the number of hours worked.
- Paid leave is in addition to other paid leave provided by the employer.
- No state government reimbursement or tax credit.
- Handwashing breaks must be provided every 30 minutes or as otherwise needed.
- Non-retaliation provisions.
- In effect as long as statewide “stay-at-home” order is in effect.

New CDC guidelines for critical infrastructure workers who have been exposed to a person with COVID-19

- Former CDC guidelines said such employees must be sent home for 14 days of quarantine.
- New guidelines say that such employees who remain asymptomatic may continue working provided:
 - They have their temperature taken and a symptom check each day before starting work;
 - They should be required to self-monitor and report to the employer any coronavirus symptoms;
 - They should wear a mask while in the workplace for 14 days from last exposure;
 - They should practice social distancing in the workplace; and
 - Work areas, break areas and restrooms should be cleaned and disinfected regularly.

What will employees sue us for after they return to work?

- Discrimination in furlough/recall.
- Unpaid wages and missed meal and rest breaks while working at home.
- Failure to reimburse for business use of personal cell phone, computer and internet service.
- Failure to provide reasonable accommodations.
- Whistleblowing for complaining internally or to OSHA about unsafe working conditions.
- Invasion of privacy due to disclosure of medical information.
- Workers' compensation claims for contracting COVID-19; potential "serious and willful" claims for intentional or reckless conduct.

James J. McDonald, Jr.

(949) 851-2424

jmcdonald@fisherphillips.com

Fisher & Phillips LLP

www.fisherphillips.com

