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## Your Doors Are Open, Now What? Top 10 Tips for Employers

This article summarizes the top 10 tips for employers when navigating this uncharted territory.

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Never before has a nation been so eager to return to their commutes and cubicles. As states across the nation begin reopening their workplaces, employers face a host of new practical and legal considerations. This article summarizes the top 10 tips for employers when navigating this uncharted territory.

**1. Implement a Policy:** Develop and disseminate a clear “Return to Work” policy addressing issues like workplace safety, testing, telecommuting and altered schedules, if any. The policy should designate a representative to receive COVID-19 related complaints and concerns, including reporting symptoms, a positive test or close contact with an infected person. Like other employment policies, it should communicate expectations while maintaining flexibility and discretion. Remember to apply the policies and practices consistently.

**2. Address Employees Unable or Unwilling to Return:** Some employees may be unable to return to work for a myriad of reasons, including their actual (or perceived) heightened susceptibility to the effects of COVID-19 or anxiety-related issues. These employees may wind up disclosing previously unknown medical conditions, which may implicate your obligations under the Americans with Disabilities Act and state and local laws. Additionally, workers may be unwilling to risk exposure due to fears about transmitting the disease to a member of their household who may be more vulnerable.

**3. Decide Whether To Test or Not:** Certain industries may require frequent testing of their workforce.

Others, which may reopen well before widespread testing is available, may opt to take employees' temperatures as a screening tool. Employers should proceed cautiously to protect the confidentiality of employees' medical information, especially if the affected employee will be sent home. The same concerns apply when informing coworkers of possible exposure. It is also important to ensure that all employees are treated in the same manner. For example, it is probably unlawful to test older or pregnant workers more frequently than others, even with noble intentions to protect them.

**4. Comply With Paid Sick Leave Laws:** Many employers were able to switch employees to telework and were therefore able to avoid navigating the federal and New York paid sick leave laws. As employees return to the workplace, these issues will inevitably pop up. Bear in mind that both the federal and New York paid sick leave laws apply, and each require paid sick leave in addition to any paid time off under employers' policies. The federal law (the Families First Coronavirus Response Act) also provides paid leave to certain employees who are unable to work due to school closures or child care being unavailable. Whether this includes summer camp closure is still unclear.

**5. Foster a Safe Work Environment:** Employers are well aware of their obligation to provide a safe work environment, but additional, specific safety measures should be taken now. Employers need to develop a plan regarding how they will keep not only their employees—but also others with whom they conduct business—safe,

including providing personal protective equipment as may be required to ensure the safety of employees and individuals when they visit the employers' place of business. For example, employers should ensure that workers are able to maintain social distancing by spacing out workstations, and perhaps closing common areas such as break rooms. Staggered and flexible schedules may be utilized to both minimize the number of people in the office at the same time and permit workers to commute during less crowded times. Thorough and frequent sanitizing is necessary. Buffet lunches in conference rooms should be suspended. Shared workspaces should be avoided.

**6. Follow Guidelines:** The Equal Employment Opportunity Commission has issued guidance about COVID-19 testing and temperature checks, which should be consulted. The Center for Disease Control, as well as some states and cities, have also issued employer guidance. Adding to the list of guidelines to follow are certain industry-specific guidelines which have both been issued and are forthcoming. Following the applicable guidelines should be a solid defense to inevitable lawsuits.

**7. Be Aware of Potential Wage and Hour Issues:** Certain additional time spent by non-exempt employees related to safety measures and social distancing may be compensable. Some examples include longer than usual waiting times for entering buildings and elevators, donning and doffing personal protective equipment, testing, washing hands, and cleaning workstations or equipment. Employers should also be mindful of schedules when non-exempt employees telework by making sure they do not work unauthorized overtime hours.

**8. Avoid Discrimination Claims:** When recalling laid off or furloughed workers, employers should carefully review their selections for a disparate impact to avoid claims of discrimination by those who are asked

not to return. When applying any medical test criteria or sending employees home, it is important to do so uniformly. For instance, employers should resist paternalistic notions of protecting certain more vulnerable members of their workforces, like older employees, those with underlying health conditions, or pregnant employees. Other concerns to watch are unconscious bias against Asian employees and working parents with school-aged children who may be perceived as "distracted," or even receive less favorable or visible assignments.

**9. Adapt to the New Normal:** Certain changes post-COVID-19 are likely to be permanent, such as less frequent and different kinds of intra-office communication, as some continue to telecommute, at least somewhat, and workplaces may operate with a fraction of their staff at the work site at the same time. Industries may devise entirely new ways of doing business; for instance, retailers may continue a robust curbside pick-up service. These changes will undoubtedly have an effect on the way people perform their jobs as well as on corporate culture.

**10. Prepare for Future Closures:** Employees should be informed that the workplace may need to shut down on a moment's notice. This means employees need to be able to telecommute (where possible) and should maintain their ability to do so. Businesses that cannot operate during a physical shutdown should have plans in place regarding treatment of their workers, including whether it must provide paid leave or can continue to provide medical benefits.



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