

# Returning to Work Amid COVID-19: An Overview of Issues

As we begin to resume normal activities across the country, businesses face numerous challenges related to workplace safety and workforce management. As they confront these challenges, employers will need to consider questions novel to operating in a pandemic, as well as issues inherent to human resources in ordinary times. This checklist is intended to highlight many of the key considerations for employers as they navigate through this unprecedented time.

## Workplace Safety

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- ✓ Review guidelines issued by the Center for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and any applicable state and local authorities on reducing exposure to COVID-19 in the workplace and implement the recommended engineering controls, administrative controls, safe work practices and personal protective equipment (PPE) where practicable.
  - Resources from the CDC and OSHA include:
    - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
    - <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>
    - <https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim>
    - <https://www.osha.gov/Publications/OSHA3990.pdf>
  - The CDC states that employers should follow the White House's Guidelines for Opening Up America Again, which can be found [here](#).
- ✓ Review and comply with any applicable state and local laws, executive orders and ordinances.
- ✓ Implement a COVID-19 preparedness, response and control plan that, among other things, identifies the control measures, safe work practices and PPE to be implemented to eliminate or reduce exposures to COVID-19.
- ✓ Assess whether employees should be required to wear face coverings or PPE in the workplace. Consider whether the business must pay the cost of the face coverings.
- ✓ Establish a workplace policy requiring compliance with any workplace safety standards, being sure to take into account any accommodations needed for disabilities, pregnancy or sincerely held religious beliefs.
- ✓ Consider a waiver agreement for employees who voluntarily elect to return to the workplace rather than continuing to work remotely.

## Employee Screening Procedures

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- ✓ Determine whether to implement employee screening procedures for COVID-19 before employees enter the workplace, such as medical inquiries, temperature screenings or diagnostic testing (which determines whether a person is currently infected with the virus and therefore contagious).
  - Medical inquiries should be limited to questions about whether employees are experiencing known symptoms of COVID-19, such as fever, chills, cough, shortness of breath or sore throat.
  - Monitor guidance by the Equal Employment Opportunity Commission (EEOC), which currently states that such screening measures are acceptable during the COVID-19 pandemic, but eventually will revert to prohibiting such tests under the Americans with Disabilities Act (ADA) unless job-related and consistent with medical necessity.
  - Check any applicable state and local laws to determine whether there are any prohibitions on the use of temperature screenings or diagnostic testing.
  - Familiarize yourself with state privacy laws (such as the Illinois Personal Information Privacy Act and the California Consumer Privacy Act) and biometric information laws (such as the Illinois Biometric Information Protection Act), which may apply depending on the device used, what information is gathered, and whether and how information is stored and transmitted.
  - Ensure that any diagnostic tests are accurate and reliable, that data gathered is as limited as possible and that it is maintained in a secure fashion.
- ✓ Maintain the confidentiality of all information collected in screening employees, consistent with applicable laws such as the ADA.
- ✓ Determine if a release form is needed or desired from employees for temperature screenings and/or diagnostic testing. If so, ensure the release complies with any applicable state privacy laws regarding personal information, including biometric information.

## COVID-19 Response Protocol

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- ✓ As part of the business's COVID-19 preparedness, response and control plan, develop a protocol for responding to employees who exhibit symptoms of illness or have confirmed cases of COVID-19 that addresses:
  - Instructing the impacted employees to remain at home until they are recovered and be specific as to when they may return to work (based on current public health guidance);
  - Implementing a contact tracing system to determine who worked closely with the impacted employees during the 14 days prior to the onset of symptoms, including customers and vendors; and
  - When appropriate, instructing employees who worked closely with the impacted employees during the 14 days prior to the onset of symptoms to stay home.

- ✓ Do not disclose the identity of an impacted employee to other employees or any third party without the impacted employee's express written consent. When informing contacts that they may have been exposed to an individual with COVID-19, do not identify the individual who may have exposed them.
- ✓ Record any confirmed COVID-19 cases, document the response and determine whether the case needs to be reported to OSHA or any other federal, state or local public health departments or entities.
- ✓ Consider appropriate responses to when employees raise concerns about COVID-19 protections in the workplace. Beware of potential whistleblower issues.

## Recall and Rehire of Employees and Managing the Workforce

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- ✓ Determine whether any individuals who were furloughed or laid off will be recalled or rehired.
  - Businesses that received a loan from the federal CARES Act's Paycheck Protection Program (PPP) should consider if rehires/recalls are needed to maximize their potential for loan forgiveness by getting their full-time employee equivalency number as close to what it had been during the applicable look back period.
- ✓ Use non-discriminatory criteria (such as essential positions, past performance, tenure, seniority, etc.) to determine which individuals will be recalled to work or rehired. In selecting which employees will be recalled or rehired, employers **should not** use age, disability or any other protected category in their selection criteria, despite the fact that the CDC has stated individuals over 65 and those with preexisting conditions are at higher risk of COVID-19.
- ✓ Notify individuals of any recall or rehire in writing, and with as much notice as possible.
- ✓ Document in writing any refusal of any individual to return to work.
- ✓ Notify applicable state unemployment agencies of any recalls or rehires of employees.
- ✓ Complete new hire paperwork (including immigration and tax forms) for recalled and rehired employees where required.
- ✓ For employees remaining on furlough, communicate with the employees about any changes to their employee benefits and the anticipated end of the furlough.
- ✓ Consider alternative work options for individuals with extenuating health or family circumstances that the business would like to recall, rehire or have return to the workplace
- ✓ Engage in discussions with any individuals who state they are unable or unwilling to report to work.
  - ✓ For employees with underlying health conditions, comply with reasonable accommodation requirements under the ADA, which requires that employers extend reasonable accommodations to employees with disabilities that impact their ability to perform the essential functions of their jobs, and similar state and local laws.
  - ✓ For employees with caregiving responsibilities, comply with the requirements of the Families First Coronavirus Response Act (FFCRA), if applicable, and any applicable state or local laws, including state and local return-to-work orders that may require employers to provide accommodations to employees due to childcare obligations.

- ✓ Consider appropriate responses to employees who fail to follow instructions because of fear of COVID-19 (e.g., refusal to report to work, travel or interact with colleagues).
- ✓ Notify employees in writing of any changes or reductions to pay prior to implementation.
  - ✓ Where an employment agreement requires written consent to modify the terms of the agreement, be sure to obtain written consent from the employee before reducing his or her pay.
  - ✓ Provide advanced notice of any pay changes as may be required under state or local law.
  - ✓ Ensure all non-exempt employees continue to meet minimum wage requirements, and all exempt employees continue to meet applicable salary requirements.
- ✓ Consider whether there will be any changes to employees' schedules, such as staggered schedules, alternating schedules or reduced schedules, to minimize the number of employees in the workplace at any given time.
  - ✓ Be sure to comply with any state or local laws requiring notification of schedule changes.
  - ✓ Be aware of limitations on reducing salaries of exempt employees who perform any work in a workweek.
  - ✓ Consider the impact reduced schedules may have on employee benefits. Many benefit plans determine eligibility based on average hours worked in a defined period.
- ✓ Consider the implications of off-duty activity laws on the business's ability to limit employees' personal travel and other outside-of-work activities.
- ✓ Consider requesting that employees avoid any unnecessary travel, cancel or postpone nonessential meetings or gatherings, and limit outdoor activities.

## Terminations

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- ✓ Use non-discriminatory criteria (such as elimination of positions, past performance, tenure, seniority, etc.) for making any termination decisions. Consider conducting a disparate impact analysis for any terminations that impact more than a few employees.
- ✓ Consider whether employment terminations trigger notice obligations under the federal Worker Adjustment and Retraining Notification (WARN) Act and/or any similar state or local laws.
- ✓ Comply with any applicable state-law requirements regarding the contents of termination letters and the timing of final pay. Some states require payment of final pay on the date of termination.
- ✓ If severance will be offered in exchange for release agreements, review release agreements for compliance with applicable federal, state and local laws and assess whether the agreements must comply with the Older Worker Benefit Protection Act (OWBPA) (i.e. when two or more employees age 40 or older are being separated at the same time).
- ✓ Comply with COBRA and unemployment notification requirements for any terminated employees.

## FFCRA and Other Leave Considerations

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- ✓ Understand that some employees may be eligible for leave under the FFCRA, the Family and Medical Leave Act (FMLA), the ADA, the Pregnancy Discrimination Act (PDA) or state or local laws when they are ill, have a disability, are pregnant, need to care for a sick family member or need to care for a child whose school or place of care is closed.
  - ✓ The Emergency Paid Sick Leave Act (EPSLA) under the FFCRA requires employers with fewer than 500 employees to provide up to 80 hours of EPSLA leave to employees who are unable to work or telework, through December 31, for the following reasons:
    1. An employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
    2. An employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
    3. An employee is experiencing the symptoms of COVID-19 and seeking a medical diagnosis;
    4. An employee is caring for an individual who is subject to an order described in number 1 above or has been advised to self-quarantine, as described in number 2 above;
    5. An employee is caring for a son or daughter because such son's or daughter's school or place of care has been closed, or such son's or daughter's care provider is unavailable due to COVID-19; or
    6. An employee is experiencing any other "substantially similar condition" specified by the secretary of the U.S. Department of Health and Human Services in consultation with the secretaries of the U.S. Department of the Treasury and the Department of Labor.
      - Employees who take EPSLA leave for their own care (reasons 1, 2 and 3 above) must be paid at their regular rate of pay, up to a maximum of \$511 per day (not to exceed \$5,110 in the aggregate). Employees who take EPSLA leave to care for another person (reasons 4 and 5 above) or reasons to be determined by future regulations (reason 6 above) must be paid at two-thirds of their regular rate of pay, up to a maximum of \$200 per day (\$2,000 in the aggregate).
  - ✓ The Emergency Family and Medical Leave Expansion Act (EFMLEA) under the FFCRA requires employers with fewer than 500 employees to provide up to 12 weeks of EFMLEA leave to eligible employees who are unable to work or telework, through December 31, due to the need to care for a child, if the child's school or place of child care has been closed or is unavailable due to a public health emergency related to COVID-19.
    - The first ten days of EMFLEA leave is unpaid, although an employee may use EPSLA leave or other accrued leave during that period. After the initial ten-day period, employees must be paid at two-thirds of their regular rate of pay, up to a maximum of \$200 per day and \$10,000 in the aggregate over the total leave.
    - An employee is eligible for EMFLEA leave if he or she has been employed by the employer for thirty days and has not exhausted all available FMLA leave.
    - An employee may take a total of only twelve workweeks of FMLA leave and EFMLEA leave in a 12 month period.

## Update Employee Handbooks and Policies

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- ✓ Conduct a thorough review of current employee handbooks, policies, and procedures to determine whether they should be revised or added to, given new issues that have arisen due to the pandemic. Employers should have policies that address:
  - Leave under the FFCRA (if applicable);
  - Whether employees may be required to use any accrued unused vacation or PTO in the event of a furlough and whether employees will be paid out any accrued unused vacation or PTO in the event of a furlough;
  - The extent to which employees will be reimbursed for home office expenses, which may be required under applicable state or local law; and
  - Infectious disease preparedness and response, remote work, furloughs, layoffs and pay reductions.
- ✓ Brainstorm about other policy revisions that would have served your organization well during the pandemic, and make appropriate adjustments going forward.

## Templates Available

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Katten has COVID-19 related policies, forms and other documents available that can be tailored to specific business needs. These include:

- COVID-19 Preparedness, Response and Control Plan for Reentry
- Infectious Disease Control Policy – General
- Infectious Disease Control Policy – COVID-19
- Workplace Safety Policy
- High Risk Factors Information & Acknowledgment
- Advice to Employers Regarding Self-Screening
- COVID-19 Employee Self-Screening Questionnaire
- COVID-19 Testing Consent Form
- COVID-19 Response Plan for Confirmed Case in Workplace
- Interview with COVID-19 Impacted Employee
- Employee Consent to Disclosure of Confidential Information
- Notice of Possible Exposure
- COVID-19 Posting Outside Elevator Bank
- Cleaning and Disinfection for COVID-19
- Notice of Shutdown to Clean Facilities
- Vendor Notification and Acknowledgment
- Discontinuing Self-Quarantine/Isolation and Acknowledgment
- Notice of Furlough/Layoff
- Verification of ADA Accommodation
- Remote Work Policy
- Memo to Employees for Ongoing Work at Home
- Employee Waiver – Access to Office
- Separation Agreements and Informational Disclosures
- WARN Notice to Employees, Government Agencies
- FFCRA Notice and Approval Forms
- Expense Reimbursement Policy

## Additional Resources

Katten	
Katten COVID-19 Resource Center	<a href="https://katten.com/coronavirus-covid-19-resource-center">https://katten.com/coronavirus-covid-19-resource-center</a>
Katten Financial Markets and Funds Resource Center	<a href="https://katten.com/financial-markets-regulation-covid-19-resource-center">https://katten.com/financial-markets-regulation-covid-19-resource-center</a>
Katten Real Estate COVID-19 Resource Center	<a href="https://katten.com/real-estate-covid-19-resource-center">https://katten.com/real-estate-covid-19-resource-center</a>

CDC	
Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019	<a href="https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html">https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html</a>
General Business FAQs	<a href="https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html">https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html</a>
Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission	<a href="https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf">https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf</a>
Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19	<a href="https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf">https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf</a>
Interim Recommendations for US Community Facilities with Suspected Confirmed Coronavirus Disease 2019	<a href="https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html">https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html</a>
Cleaning and Disinfecting Your Facility	<a href="https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html">https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html</a>
Guidance for Cleaning and Disinfecting	<a href="https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf">https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf</a>

OSHA	
Guidance on Preparing Workplaces for COVID-19	<a href="https://www.osha.gov/Publications/OSHA3990.pdf">https://www.osha.gov/Publications/OSHA3990.pdf</a>
Protecting Workers During a Pandemic	<a href="https://www.osha.gov/Publications/OSHAFS-3747.pdf">https://www.osha.gov/Publications/OSHAFS-3747.pdf</a>
Safety and Health Topics: COVID-19 Control and Prevention	<a href="https://www.osha.gov/SLTC/covid-19/controlprevention.html">https://www.osha.gov/SLTC/covid-19/controlprevention.html</a>
Safety and Health Topics: COVID-19 Standards	<a href="https://www.osha.gov/SLTC/covid-19/standards.html">https://www.osha.gov/SLTC/covid-19/standards.html</a>
Safety and Health Topics: COVID-19 Hazard Recognition	<a href="https://www.osha.gov/SLTC/covid-19/hazardrecognition.html">https://www.osha.gov/SLTC/covid-19/hazardrecognition.html</a>
Safety and Health Topics: COVID-19 Additional Resources	<a href="https://www.osha.gov/SLTC/covid-19/additional_resources.html">https://www.osha.gov/SLTC/covid-19/additional_resources.html</a>

Enforcement Guidance for Recording Cases of COVID-19	<a href="https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19">https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19</a>
Interim Enforcement Response Plan for COVID-19	<a href="https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19">https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19</a>

Department of Labor	
FFCRA Questions and Answers	<a href="https://www.dol.gov/agencies/whd/pandemic/ffcra-questions">https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</a>
FFCRA Employer Paid Leave Requirements	<a href="https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employer_Paid_Leave_Requirements.pdf">https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employer_Paid_Leave_Requirements.pdf</a>
FFCRA Employee Paid Leave Rights	<a href="https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employee_Paid_Leave_Rights.pdf">https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employee_Paid_Leave_Rights.pdf</a>
FFCRA Informational Poster	<a href="https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf">https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf</a>

White House	
Guidelines for Opening Up America Again	<a href="https://www.whitehouse.gov/openingamerica/">https://www.whitehouse.gov/openingamerica/</a>

EEOC	
Pandemic Preparedness in the Workplace and the ADA	<a href="https://www.eeoc.gov/facts/pandemic_flu.html">https://www.eeoc.gov/facts/pandemic_flu.html</a>
What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws	<a href="https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws">https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws</a>

EPA	
List of Recommended Disinfectants for Use for COVID-19	<a href="https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2">https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2</a>

FDA	
FAQs on Testing for SARS-CoV-2 (COVID-19)	<a href="https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2">https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2</a>



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For more information contact Katten's [Employment Litigation and Counseling](#) practice or any of the following:

## Contact



### **Julie L. Gottshall**

*Partner*

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Chicago  
+1.312.902.5645  
[julie.gottshall@katten.com](mailto:julie.gottshall@katten.com)



### **Michelle A. Gyves**

*Partner*

---

New York  
+1.212.940.6585  
[michelle.gyves@katten.com](mailto:michelle.gyves@katten.com)



### **Stacey McKee Knight**

*Partner*

---

Los Angeles – Century City  
+1.310.788.4406  
[stacey.knight@katten.com](mailto:stacey.knight@katten.com)



### **Michael A. Gaston-Bell**

*Special Counsel*

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Dallas  
+1.214.765.3660  
[michael.gaston-bell@katten.com](mailto:michael.gaston-bell@katten.com)

[www.katten.com](http://www.katten.com)

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

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