



Returning to Work After the Pause:

Reopening Considerations
for New York Employers



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The COVID-19 pandemic has presented unique and unprecedented challenges for businesses everywhere, especially here in New York State. As federal, state and local governments start to ease stay-at-home orders and reopen the economy in the coming weeks, New York State employers are grappling with how they can plan, communicate and transition their employees back into the workplace. With evolving guidelines and policies aimed at maintaining the health of both employees and companies, employers are asking themselves the daunting question, “What should we do?” Fortunately, Bond is here to assist in navigating these uncharted waters and challenging times.

When the pandemic started to shutter New York State businesses, Bond formed the [COVID-19 Recovery for Business](#) practice group, a new firmwide, multidisciplinary group that has closely monitored, in real time, the critical federal, state and local developments that have been impacting New York State businesses. This dedicated practice group has worked tirelessly to understand how the pandemic has affected, and will continue to affect, businesses of all shapes and sizes in all industries. We are fully prepared to advise our clients as we enter into the “new normal.”

Reopening businesses will bring a host of novel legal, operational and workforce issues. To that end, we are currently engaged in helping our clients create tailored return-to-work plans that incorporate critical guidance and best practices. For example, we are prepared to assist you with:

- Advising on proactive steps that may be taken at each phase of reopening;
- Drafting risk mitigation, workplace safety and other applicable policies critical to reopening;
- Unpacking and simplifying the tax law amendments designed to ease tax compliance burdens and expand some tax benefits;
- Reviewing and analyzing contracts to assess both potential liability and recovery related to nonperformance, force majeure clauses and termination;
- Assisting with implementation of OSHA guidelines, new and old, to promote workplace safety;
- Advocating to the federal, state and local governments about reopening your business or organization, including directly contacting the Empire State Development Corporation; and
- Advising on all aspects of business and employment law compliance.

While there is no one-size-fits-all approach to facing these unprecedented challenges, this guidance document outlines a number of issues and actions that employers should consider in planning a resumption of in-person workplace operations. As with all COVID-19-related guidance, employers should continue to monitor the developments, including from federal, state and local officials as well as public health authorities, and consult with counsel for specific guidance tailored to the particulars of their situation.

If you have questions about this publication, please contact any [attorney](#) in our [COVID-19 Recovery for Business](#) practice.

Preliminary Risk Assessment

Any plan to reopen should begin with a preliminary assessment of the potential risks to employees, vendors, contractors, customers or visitors. In performing this analysis, employers should, at a minimum, ask the following questions:

I. Business Risk Assessment

- What limitations, precautions and requirements are established by federal, state and local executive orders / guidance for your business and operations?
- Given how your business operates, who in your business (employees, vendors, contractors, customers or visitors) is at risk of contracting the virus from others or from commonly touched surfaces at your business locations?
- What economies of scale are lost when partial, in-person operations resume?

II. Workplace Risk Assessment

- How is transmission most likely to occur in your workplace?
- Where is transmission most likely?
 - Common areas?
 - Conference rooms?
 - Halls, aisleways and passages?
 - Stairwells, elevators?
 - Bathrooms?
 - Manufacturing floor, production areas, common work areas?
 - Areas of ingress/egress?
 - Areas of interaction with the public, etc.?
- Are there areas in the worksite where employees typically work in close contact?
- Are there populations in your workforce who are more “vulnerable” to the virus that need to be considered?

Workplace Safety Plans

Based upon the risks identified during the preliminary risk assessment, employers should consider implementing as many of the following workplace safety measures as practicable as part of their workplace safety plan to reduce the risk of disease transmission. Those plans should generally have the following features, at a minimum:

I. Social Distancing

- Can workspaces be redesigned or rearranged to ensure 6 feet of distance between employees?
- Can the number of employees on-site at any given time be reduced by staggering hours, rotating shifts, rotating days on site or any other mechanism to ensure 6 feet of distance?
- Can access to common rooms be limited or reduced?
- Can in-person meetings/conferences be limited or reduced?
- Can a one-way traffic pattern be developed in the building?
- Are there small spaces that may end up with employees in close quarters that can be closed?
- Can potential congregation at entry points be limited (e.g., reception, registration, etc.)?
- What signage can/should be displayed regarding social distancing?

II. Engineering Controls

- Can/should air filtration systems be installed to limit the spread of the virus?
- Can physical barriers be installed?
- Can touchless systems be installed (doors, sinks, etc.)?
- If your facility has been closed for a period of time, have you ensured that the key utilities (i.e., water, bathrooms, etc.) are functioning properly?

III. Remote Work/Telecommuting

- Can remote work arrangements continue, in whole or in part, for employees?
- Can employees be brought back to work in phases?
- Is there a set recall process?

IV. Cleaning and Disinfection

- Has your worksite been disinfected and sanitized prior to employees' scheduled return? If not, should it be?
- Do you have designated, appropriately trained individuals to disinfect common and high-traffic areas with sufficient frequency?

- Do you have adequate soap and water, hand sanitizer and sanitizing wipes available?
- Can you limit sharing of workspaces, equipment and supplies (e.g., phones, computers, time-entry systems, office supplies, tools, etc.)?

V. Employee Health Screening

- Are you going to conduct some form of employee health screening?
 - Who will conduct the testing (staff member, third party, etc.)?
 - Has the person who will conduct the testing been appropriately trained?
 - What personal protective equipment (PPE) or other methods of protection will you offer those being asked to conduct screenings?
 - What screening method will be used (thermometer, questions regarding symptoms, COVID-19 test, other)?
 - Where will screening take place (outside is preferable and workable with temperature screenings or immediately upon entry)?
 - Who will be screened (all employees vs. client facing)?
 - How will you ensure that employees do not congregate waiting to be screened?
 - Have you developed confidentiality protocols?
- Have you limited workplace entry points and taken steps to reduce employee interaction while moving through your facility?
- Have you posted signage regarding no entry with symptoms?
- If you are in a shared building, have you discussed protocols with the landlord and/or property manager?

VI. Employee Health Monitoring

- Have you developed a Proactive Infection Plan for the purposes of employee health monitoring? (See Proactive Infection Plan discussion below.)

VII. Personal Protective Equipment

- Are you going to require employees to wear face coverings or other protective equipment? (Please note that current Department of Health guidance requires essential businesses to provide face coverings, at its expense, to employees in direct contact with members of the public. Reopening guidance/orders may address this specifically.)
- If so, what are you going to provide and how?
- Business-specific concerns will need to be assessed and implemented.

VIII. Employee Hygiene

- Do you have signage regarding proper employee hygiene?
- Do you have a plan to clean shared workspaces (desk, equipment, supplies, etc.)?

IX. Business Travel

- Do you have company policies regarding business travel? Do they need to be revised in light of current CDC and State Department guidance and concerns regarding transmission of COVID-19?
- Have you reviewed all scheduled meetings and conferences to determine what can be postponed, cancelled or handled virtually?
- Do you have sufficient virtual conference capability to conduct meetings?

X. Customer/Vendor/Public Interaction

- Do you have protocols for admission of third parties (vendors, customers, etc.) to the workplace?
- Are you going to screen visitors?
- Have you limited workplace entry points and reduced cross-traffic?
- Have you posted signage regarding no entry with symptoms?
- Are you keeping a log of individuals entering your facility?

XI. Workplace Flexibility

- Do you have flexibility for employees to use sick leave or to stay at home if they or family members are experiencing symptoms?
- Are you prepared to change operations as needed to meet your business needs?

Proactive Infection Plans

Employers should also create a plan to address how to deal with employees who are diagnosed with COVID-19, exposed to the virus or suspected of sickness:

I. What should the employer do if an employee tests positive?

- Communication.
 - How and when is the employee required to notify the employer if he/she tests positive for COVID-19?
 - Who is designated as a point of contact to manage communications?
 - Do you have protocols in place to facilitate communication with local health authorities regarding the positive test?
 - Should you communicate with any other federal or state agencies regarding the positive test?
 - Do you have protocols in place regarding how and what information within applicable privacy constraints will be communicated with other employees about the positive test?
 - How and what will you communicate with the infected employee?
 - Are you in compliance with applicable state and federal laws regarding required leave for the infected employee?
 - Is there anyone else who should be notified about the positive test?
- Contact Tracing.
 - What information, if any, will you obtain regarding the infected employee's contacts while at work?
 - With whom will you communicate regarding the contact tracing?
 - Who will be your liaison with government contract tracers?
- Cleaning and Disinfection.
 - What enhanced cleaning and disinfection will you perform after an employee who has been in the workplace tests positive?
 - Will it be done immediately, or can you close off the area before disinfection is performed?
 - Will this be done by current staff or third-party cleaning contractors? If by third parties, do you have those arrangements in place?
 - Any cleaning and disinfection plan should follow the [CDC Guidance for Cleaning and Disinfection](#).

- Documentation.
 - Have you documented all necessary information, such as the results of your risk analysis and the steps taken to mitigate risk in the workplace?

II. What should an employer do if an employee is exhibiting symptoms but has not tested positive?

- What symptoms warrant sending the employee home?
 - Who has the authority to send an employee home (screener or a designated individual)?
- Who should be notified regarding the symptoms?
- If the employee is not able to go home immediately, what isolation/containment protocols will be followed?
 - Do you have sufficient spaces where the employee can be isolated until the employee can safely get home?
 - What information is gathered from the employee while in isolation (contact tracing, etc.)?
 - Should the symptoms be documented?
 - Will you coordinate with the local health authority?
 - Will you be able and ready to make arrangements so that the employee gets home or to a hospital safely?
- If the employee is sent home, what further steps should the employer take?
 - Will you attempt to perform any contact tracing?
 - Will you perform any enhanced cleaning and disinfecting where the employee has been?
 - Will you contact the local health department?
 - Will you request that the employee be tested?
- When will you allow the employee to return to work? Will you require a doctor's note or a negative test? (See Return to Work discussion below.)

III. What should an employer do if an employee is asymptomatic, but has had “close” or “proximate” contact with someone who tested positive?

- Treatment of asymptomatic employees with close or proximate contacts to positive cases should follow [applicable state and federal guidance](#).
- When will you allow these employees to return to work? (See Return to Work discussion below.)

IV. When should employees be permitted to return to work after exposure or sickness?

- Are you operating in compliance with state and federal guidelines that direct when employees can return to work?
- Follow latest applicable return-to-work guidelines.
- What documentation will be required to return to work?
- Will PPE be required after the employee returns to work?
- Assess necessary coordination with local health authorities.
- How will the return-to-work policies differ based on the employee's condition (asymptomatic exposed, symptomatic without a positive test or positive test)?
- Will employees be required to pass a fitness-for-duty test or supply medical documentation to ensure they are able to return to work?
- If available, will employees be required to undergo a COVID-19 test prior to returning to work?
- Depending on availability, reliability and current legal standards, what role, if any, will antibody testing have on the recall process or the order in which employees are recalled?
- Will employees be required to pass a drug test prior to returning to work, either pursuant to employer policy or regulatory requirement (e.g., safety and security sensitive positions subject to DOT regulation)?
- Will employees be required to pass a background check (criminal, financial, etc.) prior to returning to work?
- Are employees subject to certification, licensing or a continuing education requirement that may have lapsed during their absence?
- If one or more employees cannot satisfy a condition to return to work, what impact will that have on the recall process or whether a recall offer is made to the employee?
- Do external considerations – such as the current status of vendors, suppliers or customers – impact or influence the recall process?

Plan to Anticipate Labor and Employment Issues

Employers should take this time to develop a plan that anticipates employee labor relations issues that are likely to arise as part of a business reopening. Such a plan should take into consideration the following issues.

I. Repopulating the Workforce

- Which employees do you want to bring back, and when?
 - What, if any, preliminary activities must be completed to ensure that employees are recalled in a safe, orderly and efficient manner, including in regard to strategic planning, communication, sanitation, maintenance, human resources and other administrative functions?
 - Is the employer's discretion to recall employees restricted by existing policy or obligations under a collective bargaining agreement?
 - Will all employees be recalled at once, or is it more appropriate to recall employees in phases based upon location, shift, job title, business unit, product line or other considerations?
 - If less than the full complement of employees is recalled to work:
 - Will the recalls occur in a particular sequence or according to a prescribed schedule?
 - What criteria will be used to select employees for recall?
 - Who is applying, evaluating or weighing the selection criteria?
 - What documentation or proof is needed to substantiate that recall decisions are based on legitimate, non-discriminatory business reasons?
 - Is it appropriate to conduct an analysis to ensure that the recall decisions do not result in an adverse impact on one or more protected classifications?
 - Who is overseeing, coordinating and vetting the recall process?
- Communicate the recall decision.
 - How will the employer notify employees that they have been recalled?
 - How much time will employees have to accept an offer of recall and resume working?
 - What is the process for employees to accept an offer of recall?
 - What impact, if any, will the order in which employees accept a recall offer have on the recall process?

- Account for employees who are unable or unwilling to immediately return to work.
 - What is the plan if an employee cannot immediately return for a COVID-19-related reason, such as an order of quarantine or because the employee is caring for a child whose school or childcare provider is closed?
 - How will the employer respond if an employee refuses to return due to generalized fear or anxiety relating to COVID-19?
 - What is the plan if an employee cannot immediately return for a non-COVID-19 reason, such as an unrelated medical issue or change in personal circumstance?
 - What is the plan if an employee declines an offer of recall due to the responsibilities of the available position or assignment, refusal to work a particular schedule or shift or refusal to transfer to a particular work location?
 - What is the plan if an employee seeks to return to work under different terms and conditions than those which were offered?
 - What is the plan if an employee declines a recall offer because of a preference to continue collecting unemployment insurance/pandemic unemployment assistance benefits?

II. Managing Higher Incidence of Employee Absence

- How will the employer address absences related to COVID-19?
 - How will the employer maintain a sufficient workforce to resume and sustain safe, efficient and profitable business operations?
 - How will the employer address absentee issues? (See also Section IV. below.)
 - What sort of documentation will be required of employees who call off for COVID-19-related reasons?
- Consider options to make the workforce more resilient to short-term attendance swings.
 - Will increasing part-time employment opportunities make it possible to attract and retain a larger roster of employees?
 - Will adopting a flexible scheduling model allow for workforce adjustments upon shorter notice?
 - Do cross-training opportunities exist?
 - Does a process exist to call-in employees?
 - Does the call-in process function as practical matter, or will it cause employee burn-out, harm morale or result in other negative consequences?
 - Will adopting an alternative work schedule, such as a 4/10 or 8/80 schedule, increase the pool of employees available to call-in when needed?

III. Complying With Governmental Workforce Restrictions

- Consider options to operate effectively while satisfying government requirements affecting the workplace.
 - Is it possible to operate with a reduced in-place workforce, including by:
 - Using multiple shifts or going to a 7-day-per-week operation to decrease the number of employees working at a given time?
 - Using telework opportunities for some positions to dilute the in-place count?
 - Outsourcing or subcontracting certain functions to focus available assets on downstream production and deliverables?
 - Can steps be taken to ensure/encourage social distancing? (See Workplace Safety Plan.)
 - Are operational changes necessary to satisfy hygiene standards? (See Workplace Safety Plan.)

IV. Reassessing Employment Policies

- Consider whether adjustments to an existing attendance policy are necessary.
 - Does the current attendance policy strike the right balance between encouraging employees to report to work on a reliable basis, safety issues created when sick employees report and taking corrective measures to address excessive absenteeism?
 - Will the current attendance policy pressure potentially infected employees to report to work, creating risks to a larger employee population?
 - Will the current attendance policy result in a higher incidence of discipline than is operationally desired?
- Consider whether the employer is compliant with COVID-19-related legislation permitting paid, job-protected leave for qualifying reasons.
 - Is the employer satisfying the New York COVID-19 Paid Leave law for employees subject to a mandatory or precautionary order of quarantine or isolation?
 - Is the employer, if covered, satisfying the Families First Coronavirus Response Act for employees who require leave for one of the six qualifying reasons?
 - Is the employer collecting the necessary documentation to substantiate the employee's reason for leave and/or to allow the employer to claim tax credits?
 - Has the employer posted required postings?
- Consider whether adjustments to an existing medical or personal leave of absence policy are necessary.

- Does the current leave policy account for employees who are unable to return to work once COVID-19-specific statutory leave expires?
- Do restrictions in the current leave policy pressure potentially infected employees to report to work, creating risks to a larger employee population?
- Do restrictions in the current leave policy create practical issues which might harm employee morale or require valued employees to choose between their job and personal considerations (e.g., employees with younger children or a special needs family member whose school or place of care remains closed)?
- Consider whether adjustments to scheduling or remote work policies or practices are necessary.
 - Will adopting a flexible schedule model allow employees to return to work or continue working in a productive manner, despite COVID-19-related considerations?
 - Will telework or work-from-home options allow the employer to increase operations at a faster rate or maintain operations at a desired level, while mitigating COVID-19 exposure risks?
- Reevaluate other policies to determine if changes are necessary to facilitate flexible scheduling or remote work and to otherwise protect the employer’s interests.
 - Does the current timekeeping policy sufficiently address telework or work-from-home scenarios with respect to recording time, prohibiting off-the-clock work and requiring advance approval for overtime?
 - Do confidential information and trade secret policies sufficiently address telework and work-from-home scenarios?
 - Are information technology and cybersecurity policies up to date and adequate to protect employer interests, including policies relating to email, mobile device and remote access?
 - Should compensation policies be adjusted to accommodate post-COVID-19 expectations and business realities, including in regards to decreasing compensation upon unforeseen business challenges, providing for increased bonus or incentive pay opportunities or identifying the circumstances under which “hazard pay” will be provided?
 - Is it necessary to rewrite job descriptions due to lessons learned during the COVID-19 pandemic?

V. Ensuring Compliance with Legal and Other Requirements

- Evaluate all adjustments to policies and practices to ensure they do not violate requirements under law, contracts (including collective bargaining agreements) and benefit plan documents.
 - Ensure compliance with time and attendance rules under state or federal wage and hour laws, including:

- NYSDOL regulations regarding split-shift, spread of hours, call-in pay, etc.?
- FLSA and NY Labor Law overtime requirements?
- Prevailing wage requirements applicable to state or federal public work?
- Do changes to terms and conditions of employment violate the terms of an individual employment contract?
- Do changes to terms and conditions of employment violate the terms of a collective bargaining agreement and/or trigger a bargaining obligation?
- Are changes to policies or practice based on unlawful criteria, such as an individual's protected characteristic?
- Will changes to policies or practices cause a disparate impact upon a protected class of employees or applicants?
- Consider whether job accommodations might be available or necessary to maximize employee productivity and satisfy legal requirements.
 - Are ADA/NYSHRL reasonable accommodations required to permit a disabled employee to perform the essential functions of his/her job in a safe manner?
 - Are other accommodations available and appropriate to satisfy the objective of "Matilda's Law" in regard to at-risk populations?
- Are non-discrimination and anti-harassment policies up to date to help avoid the potential for COVID-19-related differential treatment or workplace harassment?
- Have you developed a plan for communication and training to returning employees concerning current safety procedures and protocols, attendance policies, non-discrimination and anti-harassment policies and other re-orientation/reemployment issues?

Communication and Training Plan

Employers will need to communicate any new protocols and any changes to existing policies to employees returning to work to make sure they're followed on day one. This communication should be well thought out and provided in a clear and understandable format prior to employees' return to work.

I. General Considerations

- Method of Communication.
 - What existing methods and platforms for communicating with employees are used?
 - Do they need to be updated or revised to reach your workforce, especially if you have a significant percentage of the workforce teleworking or furloughed?
- Designate Responsibility.
 - Have you designated an individual or a committee as responsible contacts for overseeing, ensuring implementation and conducting periodic reviews of communication?
- Timing and Frequency of Communication.
 - How and when will you make these communications? Can you provide this information to employees before they return to work?
 - How effective have the communications been? Do you need to address any gaps in communication?

II. Return to Work Communication

- What information needs to be communicated to employees before they return to work?
 - What information from your workplace safety plan and your proactive infection plan will employees need to know before they return to the workplace?
 - Have you updated any existing policies (e.g., regarding employee leave, employee absence, travel policies, etc.)?
 - Have you told employees what they should do and who they should contact if they experience symptoms?
- How will this communication be disseminated? Can you reach employees through email? Video conferencing? Written correspondence?

III. Training

- Training of employees, especially supervisors and managers, will be critical to ensure consistent compliance with and enforcement of infectious disease control and workplace safety plans.

- Training should include information on new policies and procedures put in place, including new employee leave policies, sanitization and hygiene protocols, screenings/temperature checks, PPE requirements and travel policies; how supervisors are expected to monitor/report non-compliance and successes; and how to respond to suspected cases of COVID-19.

IV. Workplace Signage

- Can you create any workplace signage to remind employees and third parties of your new protocols (like PPE, hand and respiratory hygiene, social distancing, etc.)?

V. Communications to Customers/Clients/Vendors/Visitors

- Consideration should be given as to how to communicate to customers, clients, vendors and visitors the new rules regarding accessing the worksite and any changes in hours/availability.
- Should changes be made to the company website? Workplace signage? Direct communication?

VI. Periodic Review and Update Regarding Important Changes

- How can you ensure that communications are being received and understood by employees? If protocols aren't being followed, or there are gaps in communication, how will that be addressed?

VII. Maintain Copies of Communications

- Who will maintain copies of these communications? How and where are communications stored?

Government Guidance, Outside Experts and Continuous Review

Employers will need to consider the latest state and federal government guidance. This guidance is evolving over time and should be consulted periodically for updates.

In addition, employers should consider retaining occupational health and safety experts to evaluate their specific workplaces and the risks and mitigation measures that may be taken to reduced or eliminate those risks.

Finally, after having considered the above, and developed their plans, employers should consult with their attorneys and review the plans upon implementation and periodically as things progress.

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