

# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Four: Accommodating Special Circumstances

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Employment

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Whether a company is an essential business or is expecting to reopen in the coming months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to the workplace, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return ([Part One](#))
2. Potential Screening Measures for Employees Returning to the Workplace ([Part Two](#))
3. General Workplace Safety Precautions ([Part Three](#))
4. **Accommodating Special Circumstances (Part Four)**
5. International Employment Considerations ([Part Five](#))

### Accommodating Special Circumstances

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As employers plan for and begin welcoming employees back into the workplace, a variety of unique employee situations may require attention. Some employees may still need to telework for operational reasons, others may have child care responsibilities or require medical accommodations, and more than a few will express fear about returning to the worksite. This alert provides an overview of how employers can navigate these special circumstances.

#### Are There Best Practices for Balancing Onsite and Remote Work?

For a variety of reasons, some employees will need to continue to work remotely. Operationally, employers may cap the number of employees initially invited to return to the workplace to implement social distancing measures; for the same reason, employers may want to consider splitting teams or rotating schedules to reduce the number of employees in the workplace at any one time. In planning for these steps, employers



should be guided by justifiable operational needs and goals so as to ensure consistency and fairness in who is invited to return. Employers should also review their policies and practices to ensure that there are no barriers—technological or otherwise—to communications between in-office and remote workers and that in-office and remote workers are treated equitably. Employers may also want to revisit best practices for remote working, taking into account what practices have worked well during the period of fully remote work and what could be improved.

### **How Should Employers Approach Accommodations for Employees with Medical Issues?**

Even in a pandemic, employers have a duty to provide reasonable accommodations for employees who may be considered disabled under the Americans with Disabilities Act (ADA) or corresponding state laws if an accommodation will not impose an undue hardship on the business. Some employees may have underlying health conditions that put them at greater risk of complication from COVID-19 and may therefore seek to remain out of the workplace or seek enhanced protections in the workplace. The latter might include increased protections to reduce the risk of exposure to co-workers or customers, such as physical barriers or temporary transfers to a different position. Flexible scheduling may be provided to allow employees to work or commute at times when exposure risks may be lower. Employers may also need to address accommodations for employees who were receiving accommodations prior to the pandemic or for employees with mental health conditions that have been exacerbated by the pandemic.

As always under the ADA, in response to an accommodation request, the employer may ask questions or request medical documentation to determine whether the individual is subject to the protections of the ADA, and, if so, the employer should engage in an interactive process to determine what type of accommodation might be needed. The EEOC has acknowledged in recent [guidance](#) that, given the pandemic, the usual interactive process may be infeasible; the EEOC suggests that employers may adapt the interactive process, such as by providing temporary or trial accommodations with end dates and then revisiting the accommodation later if it needs to be altered or extended.

Employers may also consider getting a head start on the accommodation process before the doors open. The EEOC has indicated that employers may proactively ask eligible employees to request accommodations that may be needed when the workplace reopens.

### **Can Employers Delay Returning Disabled or Older Workers to the Worksite?**

Employers should not make decisions or adopt blanket rules about who can return to work based on a protected characteristic, such as age or a known or suspected disability or health condition. Employers can, however, encourage workers to self-identify (without requiring detailed information) if they have special circumstances or vulnerabilities that may require accommodation or flexibility in the return- to-workplace process.

### **What Are Key Family Care Considerations?**

Some employees may be unable to return to the workplace, or to regular schedules, because of child or elder care responsibilities, particularly if schools remain closed. Employees may be eligible in these circumstances for emergency paid sick leave or emergency family leave under the Families First Coronavirus Response Act (FFCRA). If the employer is not covered under FFCRA or the leave is otherwise unavailable to an employee, employers should consider whether there is other COVID-19 leave available under state or local law or permit employees to use accrued vacation or PTO for child care reasons. Other options that should be considered,

and may need to be implemented for a longer term, include permitting continued telework and flexible schedules or locating or subsidizing child care.

In addition, some jurisdictions prohibit discrimination based on family responsibilities or caregiver status, and certain employer practices with regard to caregivers may implicate gender-specific issues. Employers should ensure that return-to-workplace policies treat caregivers equitably and that well-meaning supervisors do not exclude workers with child care or other family responsibilities from important work opportunities.

### **Are There Other Discrimination Issues Employers Should Monitor?**

As workers return to the job site, employers should reinforce their anti-bias and anti-harassment policies to ensure that employees are not subjected to misconduct or inequitable treatment based on their race or national origin, including as a result of bias arising from the perceived origin of COVID-19.

### **Are Businesses Required to Provide Commuter Assistance?**

Generally, employers are not required to provide transportation to work or assist with an employee's commute. However, during the pandemic, employee fears about using various forms of public transit—subways, buses, or shared rides—could interfere with their willingness to return to work. Thus, as part of an overall plan to maintain operations and a safe work environment, employers may want to consider whether it is feasible to find ways to temporarily reduce reliance on public transit, which could take the form of parking benefits or commuting stipends that would allow employees to take private transportation to work. Employers could also consider schedule flexibility to allow workers to use public transit at off-peak hours.

### **Do Business Travel Policies Need Attention?**

Business travel policies may need to be updated to comply with evolving travel precautions and recommendations set forth by the CDC and other health authorities, and to accommodate employees' health or child care concerns. Also, employers should assess how to address fear of traveling during the pandemic, such as postponing travel where feasible or having employees participate in meetings or events through video conference instead. For all work travel, employers should make reasonable efforts to promote social distancing during business trips, such as arranging for travel during off-peak hours or reserving airplane seats that are located away from other travelers if possible. Employers should also consider whether quarantines are required upon return from business travel, and ensure that employees continue to be paid during the quarantine period if they cannot otherwise work.

Because there could be intermittent disruptions to global travel for the foreseeable future, businesses should consider implementing a protocol in case travel is shut down while an employee is abroad. This could include educating employees on the current risks of travel, how company policies may apply during travel, and what assistance will be available if the employee is stranded during travel.

### **Any Other Policies We Should Consider?**

Employers may have adopted or revised a number of policies or practices during the period of remote work that may need to be revisited. For example, employers have been permitted during the remote work period to complete I-9 verifications over videoconference; the Department of

Homeland Security has implemented procedures that must be followed to revisit the verifications once operations resume. Likewise, background checks may have been postponed for onboarding employees due to court closures, and these should be completed once operations resume. Any deadlines that have been postponed during the period of remote work should be revisited.

### **How Should Employers Handle Employee Fears About Returning to the Workplace?**

Employers should communicate with employees who express concern about returning to identify the source of their fear. If an employee is hesitant to work alongside colleagues who may have already been infected with COVID-19, educating employees about the low exposure risk associated with this circumstance may be the best way to ameliorate concerns. Employees who are generally fearful about contracting COVID-19 at work may be reassured by communications from the employer concerning the steps that are being taken to ensure the safety of the workplace. A gradual, voluntary return-to-workplace plan may also enable hesitant employees to delay returning until they see that employers are able to safely operate with social distancing and other measures in place that are protective of employees. Employees may also be willing to return to the worksite but unwilling to take public transportation to get there. As discussed above, employers may consider measures to assist with commuting issues.

Despite an employer's best efforts to create a safe work environment, some employees may refuse to come to work based on nothing other than a general fear of rejoining public life while the pandemic continues. Although likely permissible in many circumstances, employers should exercise caution before disciplining or terminating such employees, in light of protections under the National Labor Relations Act for "concerted activity" by employees with regard to the terms and conditions of their work, and because of the uncertain legal landscape related to liability for exposure to the virus in the workplace. However, employers are not required to pay employees who refuse to return to work and cannot work remotely if the employer can demonstrate that it has complied with all appropriate measures to reduce the risk of exposure in the workplace.

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