

Preparing Your Business for a Post-COVID-19 World

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May 8, 2020

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As shelter-in-place orders begin to lift around the country and here in North Carolina, it is time for companies to shift from disaster response—making it through the immediate needs of the COVID-19 crisis and related shutdown—to plans for long-term business operations in the new normal.

Although the details remain murky in many ways, there are steps that business can take now to ensure their best chances at viability in a changed social and economic environment. Business owners will need to keep close tabs on the latest legal requirements and analyze, with the help of counsel and other professionals if possible, the best way to conduct business in a safe and profitable manner.

In particular, businesses that elect to reopen or expand operations as restrictions are lifted should formulate plans for protecting themselves, their employees, and their patrons. Taking precautions now will pay dividends later.

How do I bring my employees back to work?

Many have temporarily parted ways with employees during the shutdown. As employers look to reopen or bring those employees back, those employers should first make sure that they are as well-equipped as possible to provide those employees with a safe workplace.

OSHA's [Guidance on Preparing Workplaces for COVID-19](#) is a helpful starting point. While this is an “advisory” document, it provides identifiable steps that employers can take to show that they are taking the safety of employees, customers, and vendors seriously. Employers should also refer back to publications from the CDC for specific measures that should be included in workplace plans, policies, and controls.

Regardless of whether the employer called the employees’ separation from work a “furlough,” a “layoff,” or something else, this is the essential question: was the employment relationship severed? If so, returning those employees to work will be very similar to hiring them for the first time. Employers will need to follow their regular policies and procedures

for rehiring an employee, including collecting appropriate employment application materials and, as needed, a Form I-9. If employees have effectively been placed on leave instead of terminated, employers will need to follow their regular procedures for returning employees from leave.

In either situation, employers should be cognizant of their reporting requirements under the North Carolina New Hire Directory and E-verify. Employers will also need to work closely with benefits administrators to ensure they have not inadvertently disqualified someone from benefits for which they should be eligible.

What duties do I owe my employees?

Employers have a legal duty to provide a workplace free of known health and safety hazards. Pre-COVID, the way that an employer could meet this requirement—and the challenges the employer faced—often varied by industry. While that is still true in many ways, COVID-19 presents a new challenge: employers must act to mitigate, as much as possible, employees' risk of contracting COVID-19 in the workplace.

What safety precautions should I take to protect my employees?

The legal landscape on this point is changing as agencies and government officials gain a better understanding of COVID-19, its symptoms, and the way it is transmitted. For example, Gov. Cooper's May 5, 2020 Executive Order provides safety guidelines for businesses reopening during Phase I. OSHA also continues to offer industry-specific guidelines on a rolling basis.

As of this writing, employers should focus on, at a minimum, cleaning and disinfecting shared workspaces according to current CDC and OSHA standards; requiring or permitting PPE, and in certain circumstances providing PPE at the employer's expense; and monitoring employees for COVID-19 symptoms or possible exposure. Employers should also implement social distancing as much as possible.

Each of these precautions carries its own risks, however, and employers should consult legal counsel before implementing them. For example, while employers are currently encouraged to monitor employees' temperatures at the start of a shift, that information must be safeguarded as private health information. Employers also may run afoul of their legal obligations if they apply well-intentioned but discriminatory practices, such as unilaterally singling out employees the employer perceives as high risk and depriving them of the same work opportunities given to others.

What about the new leave laws?

Employers who have been closed may not be up to speed on recent federal legislation such as the Families First Coronavirus Response Act (FFCRA), which provides paid leave for most employees of companies that employ fewer than 500 people. Generally speaking, the FFCRA provides for leave if (1) an employee is subject to a government quarantine or isolation order that prevents them from working; (2) an employee has been advised by a health care provider to quarantine due to COVID-19 concerns; (3) an employee is experiencing COVID-19 symptoms and seeking a medical diagnosis; (4) an employee is caring for an individual who is under quarantine or isolation pursuant to government or doctor orders; (5) an employee is caring for a child whose child care provider is unavailable; or (6) the employee is experiencing a substantially similar condition, as set forth by the Secretary of Health and Human Services.

These requirements remain in effect even as stay-home restrictions are being lifted. Accordingly, employers should familiarize themselves with their legal obligations under the FFCRA—including the government-ordered notice that employers must provide to employees—and create workplace policies and procedures so that they can respond appropriately if an employee presents a qualifying need for FFCRA leave.

I'm ready to get employees back into the office. I'm over remote work.

Many of us are ready to get back to "normal." As previewed above, however, the new "normal" will be different than the way business was conducted in January or February of this year.

Safety and health concerns will be prevalent. Employers should be cognizant of that fact as they begin calling remote workers back into the office. In addition to social distancing, employers should consider having employees return to the

office in “phases,” to test office protocol and ensure that social distancing is feasible, or alternating or changing shifts to limit the number of people on the premises at one time. Employers should consider permitting as many employees as possible to continue working remotely.

Throughout this process, employers should proceed with caution to avoid infringing on legally protected rights of individual employees. For example, employers should not call only employees under 50 years of age back to the office under the presumption that older individuals are at higher risk for contracting COVID-19; doing so can lead to a claim for age discrimination. Similarly, employers should be cognizant of their obligations under the Americans with Disabilities Act when evaluating whether an individual with a known disability or underlying condition is scheduled to return to the workplace. While the EEOC has outlined certain steps that employers can take to protect those employees in particular, it is essential that employers engage in an individualized analysis of a particular employee’s condition and job duties. It is not one size fits all.

My workplace policies are all pre-COVID-19. What now?

This is a great opportunity to clean up company policies, and draft new COVID-19 specific policies as necessary. Employers should look closely at policies regulating workplace benefits, such as PTO, to see whether they permit the kind of flexibility the business needs to keep sick individuals out of the workplace. North Carolina law permits changes to such policies on a prospective (going forward) basis. Employers should also revisit remote work and device policies to ensure that they have documented expectations for the larger percentage of employees that are likely to be working from home.

Finally, employers should take advantage of this experience to preserve, in a central location, how the company has responded to COVID-19. This includes company plans, technology accommodations, policies and procedures, and communications to employees, as well as notes on what worked and what could be improved. This will place businesses in a better position to respond to future emergencies, including but not limited to a secondary COVID-19 outbreak.

What steps should I be taking now to protect my business going forward?

Nobody knows what the COVID-19 virus is going to do moving forward and many experts predict we could see another spike in cases in the coming months. Businesses should think strategically about steps to take now to prepare for ongoing uncertainty. These steps may include:

Stress test – If you have not already, determine your capital needs for the next three, six and twelve months at inflection points (10%, 25%, 50%, or whatever is material to your business). Investigate and confirm the availability of credit options, if you think they might be needed.

Apply for government funding – The government has created several stimulus programs and special loan funds to help businesses that have been negatively impacted by the coronavirus. The state of North Carolina, as well as some municipalities and private foundations, also have grants and loans available for businesses.

Review and update your insurance policies – Do they reflect the current needs of your business, especially if it has changed as a result of the COVID-19 pandemic? If you plan to make changes to your business model going forward, including things like allowing employees to work remotely, make sure those changes are covered by your insurance. Schedule a meeting with your insurance agent.

Review your supply chain and vendors – Forecast the services and materials your business will need to operate. If needed, reach out to your vendors and suppliers to have discussions on your business needs.

Talk to your customers – Now is a great time to connect with your customers. Call them and ask how they and their business are faring. Find out what their gating conditions are and see if there are ways you can help and support them.

Review your key standard operating procedures (SOP), service agreements and contract terms – Make sure they are still meeting your needs and ready for a future pandemic or unforeseen event. Review the provisions for vendor or supply chain disruptions or force majeure clauses and what permissible defenses might be available to you if the terms

of the contracts cannot be met.

Revisit your employee policies and privacy regulations- Make sure they are still relevant and compliant with changing regulations.

Reflect and adapt – Take some time to think about how your business has changed over the past few months. Are there new strengths you have identified or specific weaknesses you may need to address to ensure stability going forward?

While it is hard to know what the next weeks, much less months, will bring with the COVID-19 pandemic, with deliberate planning now, businesses can better prepare themselves for future challenges and opportunities.

Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our [COVID-19 Response Resources](#) page.