

Countdown to Re-Entry: The Return-to-Work Punch List

As we pass the one-year anniversary of the start of the COVID-19 pandemic and shutdown, it seems there's finally a light at the end of the long, socially distanced tunnel. With three COVID-19 vaccines being administered across the country and two more vaccines in clinical trials, President Joe Biden has set a goal of being able to offer the vaccine to all adults by April 19, 2021. The increasing availability of vaccines means employers are beginning to look at the logistics of bringing employees back to the physical workplace. But while some employees would welcome the return to in-person work, many others have concerns about returning to work that employers will need to consider. A study commissioned by Envoy found that 66% of employees surveyed are worried that returning to work in person could compromise their health.

Companies also need to address changing norms and expectations around remote work, given how well—or how poorly—organizations have been functioning during the yearlong hiatus from in-person work. Nearly half (48%) of employees surveyed by Envoy stated that they would prefer a hybrid work schedule—working from home on some days and in the office on others.

Across the country and across industries, employers looking to reopen are grappling with this question: "How do we actually do this?"

What follows is a non-exhaustive punch list of issues and items (from legal to operational to existential) for employers to consider before reopening.

When should we return? Is a specific date being considered?

It depends. Employers' return-to-work plans vary by state, industry and organization, and those plans are continually



reevaluated according to rising and falling COVID-19 infection rates. As a result, companies have had to reschedule reopening dates, leaving many employees in work-from-home limbo. Much depends on whether schools are operating on an all-remote, hybrid or fully reopened schedule.

But one return-to-work date that keeps coming up, at least for professional services and office-based roles, is Sept. 6, 2021—Labor Day—based on hopes that widespread vaccinations will have been completed by summer and that children will return to school full time for the 2021 – 2022 year. Could that happen? It's possible, but with plans to bring employees back to work in person repeatedly pushed back, some employers have stopped sharing their plans with employees, leaving things open-ended or "until further notice." Some companies with workforces that have successfully transitioned to working remotely are considering keeping employees home until 2022 or beyond.

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Vaccines: Can I require that my workforce be vaccinated? Can I ask employees to show proof of vaccination or to certify that they've been vaccinated in order to return to the workplace?

Can you? At the moment, and consistent with [current guidance from the Equal Employment Opportunity Commission \(EEOC\)](#), yes, subject to exceptions for those employees who require accommodations for a disability or a sincerely held religious belief. The prevailing view, for legal, logistical and practical considerations, that seems to be emerging is to strongly encourage, but not require vaccinations. Equally permissible at the moment is for employers to require that employees show proof of vaccinations or to ask employees to certify that they have been vaccinated and provide the date of full vaccination.

Pending legislation in a host of states might very well impact the “encourage versus require” discussion.

A number of states are considering legislation to prevent employers from forcing employees to get the COVID-19 vaccine. For example, in New York, [Assembly Bill 4602](#) would bar mandated COVID-19 vaccinations as a condition of employment. In Illinois, [House Bill 3682](#) would prohibit the creation of a workforce vaccination program that requires employees to prove that they had received the COVID-19 vaccine.

The Centers for Disease Control and Prevention (CDC) recommends that employers encourage rather than require employees to be vaccinated in order to return to work on-site. Consider employee attitudes. Is there a high degree of vaccine hesitancy in your company's state or region?

The CDC suggests that employers help build confidence in COVID-19 vaccination by communicating the importance of vaccination through email, [signage and leadership example](#).

Companies should also give employees time off to get vaccinated. In fact, New York just passed a new law mandating that public and private employers in the state give employees four hours of paid leave to obtain a COVID-19 vaccination. Senate Bill S2588A, which creates Labor Law Section 196-C, bars employers from making employees use sick leave or vacation time to get the shot. The provision is temporary and sunsets on Dec. 31, 2022.

Do I still need a written return-to-work plan?

In a word, yes. Comprehensive return-to-work health and safety plans should comply with current federal, state and local requirements; industry-specific guidelines; and parameters set by building owners and management companies, and should consider the practical considerations of the physical spaces occupied by the organization. These different sets of requirements are not static—many state and local reopening plans are being adopted in phases and continue to evolve with developing health information—and should be closely monitored.

Most states, if not all, provide information online about return-to-work safety requirements and recommendations based on an organization's location, industry and workplace type. States including New York and California have set up websites dedicated to helping businesses reopen as the vaccination effort ramps up, providing detailed guidance on safely bringing employees back to work on-site.

Individual state requirements. For example, under [New York state's reopening plan, New York Forward](#), businesses and industries are opening back up in four phases. New York state is currently in Phase 3 of reopening, which allows food services businesses, restaurants and personal services businesses to reopen. The state's plan provides guidance for mandatory physical distancing as well as best practices.

In California, most employers must comply with the state's [COVID-19 emergency temporary standards \(ETS\)](#), which are regularly updated. The ETS outlines requirements for communicating with employees, physical distancing and face coverings, ventilation, and training, among other issues.

Industry requirements. Employers should note whether industry- or sector-specific requirements apply to their business and what guidance is provided. New York offers an online tool, the [New York Forward Business Reopening Lookup Wizard](#), to help businesses determine their eligibility to reopen and any restrictions that may apply according to their industries, including manufacturing, retail, real estate and technical services, among many others. California has a similar tool, the [Blueprint for a Safer Economy](#), to inform businesses about the restrictions and safety modifications they must follow by county, according to a four-tier system based on

infection rates. The state also provides industry-specific [guidance for creating safe environments for employees and customers](#).

Physical workplace type. Safety requirements also vary by workplace type, from office space to retail center to industrial site. Employer guidelines should address issues including the use and/or rearrangement of common areas and meeting rooms, when face masks should be worn, when and where visitors are permitted, and employee self-screening requirements.

New York has issued rules and recommended best practices to provide adequate physical distancing and other safety measures at a range of workplaces, by county and industry, which can be accessed through its [New York Forward Business Reopening Lookup Wizard](#). Similarly, California created a [COVID-19 Employer Portal](#), a tool that generates a road map, customizable by county and industry, to ensure safe and compliant workplace reopening and operations.

Do I still need to train my employees, and if so, on what?

Since this is a new situation for employers and their employees, you'll need to implement some training. The good news is that much of the required training is fairly intuitive and widely available.

- [The New York Forward Business Reopening Lookup Wizard](#) offers mandated minimum training guidelines by industry. Training is part of a broad communications plan that employers must develop, which also includes signage posted in the workplace and a consistent means to provide employees with COVID-19 information. The site also refers employers to the [Occupational Safety and Health Administration's \(OSHA\) COVID-19 website](#) for additional information about training.
- According to [California's COVID-19 emergency temporary standards](#), employers need to provide employee training that covers how COVID-19 is spread and how to mitigate the spread by wearing masks, washing hands and physically distancing. Employers must also educate employees on COVID-19-related benefit information, either from the employer or from federal, state or local government, that may be available to employees, such as paid sick leave and workers' compensation.

Can all my employees return to work at once?

Probably not—and you probably should consider whether you want them to do so, for a host of practical considerations. Indeed, many states and municipalities have specific occupancy guidelines for physical spaces, which will be the rate-limiting factor for how and when a business can return fully.

[New York's current state guidelines](#) limit the total number of occupants at any given time to no more than 50% of the maximum occupancy for a particular area as set by the building's certificate of occupancy.

California's occupancy guidelines emphasize increased ventilation to stop the spread of COVID-19. The state advises providing fresh air ventilation to the spaces with the highest density of occupants and spaces where occupants may be unmasked. [According to the California Department of Public Health Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments](#), where ventilation cannot be increased, employers should limit occupancy.

Many cities, including Chicago, have issued their own guidelines for reopening commercial workplaces. [Chicago's current guidelines](#) currently advise employers to have all employees who can work remotely continue to do so (For employees unable to work remotely, employers should limit capacity to 50% for all indoor spaces. Gathering places such as cafeterias and meeting rooms should be limited to 50% capacity or no more than 50 individuals.

Some common approaches to re-entry include rotating staff schedules (A and B teams; or Monday – Wednesday, Tuesday – Thursday, and alternating Fridays); “checkerboarding” employees based in cubicles to maintain social distance; and using other creative solutions to slowly reacclimate employees and even incentivize them to return to the office.

Is guidance available on the logistics of bringing employees back on-site?

Yes. Employers do indeed face numerous practical challenges in bringing employees back to the workplace. California, for example, [outlines employer obligations](#) for ensuring a safe and healthy workplace, including:

Enforcement of physical distancing. Employers need to adjust work practices, procedures and/or schedules

to help workers maintain at least six feet of physical distance from each other where possible. This may include staggering break times, adjusting the number of workers on the line or in the shift, limiting the number of customers that can enter the establishment, and installing protective barriers.

Provision of hand sanitizer. To help prevent the spread of COVID-19, employers should provide effective hand sanitizer at various locations throughout the worksite, particularly where soap and water are not immediately available.

Disinfection of commonly touched surfaces. Employers must establish procedures to routinely clean and disinfect commonly touched objects and surfaces. Adequate time and supplies to support cleaning and disinfection practices also need to be provided. Frequently touched surfaces include doorknobs, elevator buttons, tools, handrails, handles, controls, bathroom surfaces and steering wheels.

Provision of face coverings and personal protective equipment (PPE). California law requires employers to provide face coverings and ensure they are used by workers properly when indoors and when they are less than six feet from others when outdoors. Employers must provide face coverings for workers or reimburse them for the reasonable costs of obtaining them. Employers may also be required to provide PPE and related training depending on employees' risk of exposure. PPE may include gloves, goggles and face shields.

Permission to use certain time off for COVID-19 exposure and infection. If a worker is sick or has been exposed to COVID-19, employers must allow the worker to use paid sick leave, supplemental paid sick leave or workers' compensation benefits for medical care and disability leave, if eligible.

New York outlines similar [mandates and best practices](#).

What potential employment litigation should I be prepared for?

COVID-19-related employment lawsuits are beginning to emerge, with wide-ranging allegations and across geographies:

Vaccinations. In what's believed to be the first suit of its kind, a detention center officer sued his employer in

a New Mexico federal court in early March for requiring him to receive the COVID-19 vaccine. He maintains that the vaccines, approved under an Emergency Use Authorization, did not go through the Food and Drug Administration's usual approval process.

Wage and hour violations. Numerous proposed class action and individual lawsuits have been filed around the country, with plaintiffs alleging their employers require them to arrive for their shifts early for COVID-19 screenings but fail to compensate them for the time it takes to have their temperature taken before work and after meal breaks, and to respond to a questionnaire about possible symptoms.

Negligence and wrongful death. Employees have filed negligence suits arguing that they contracted COVID-19 because their employers failed to enact COVID-19 safety measures in the workplace. Families of employees have brought wrongful death suits, blaming employers for failing to mitigate COVID-19 risks, which they say led to the decedents' death from the virus. Lawsuits have targeted employers in industries including cruise lines, manufacturing and mass transit.

Leave. Plaintiffs allege they were fired by their employers for taking leave to quarantine after being exposed to COVID-19 or to care for a family member ill with the virus, or they are suing employers for failure to provide leave to receive the vaccination in accordance with applicable law, like New York state's new leave law requiring up to four hours of paid leave per vaccination.

Discrimination. Others say they were terminated after attempting to work from home to avoid COVID-19 exposure due to their age or underlying medical conditions. Employees who are members of minority groups allege they were denied COVID-19-related requests for leave or to work from home.

Retaliation. Some employees maintain they lost their jobs for complaining that their employers failed to implement COVID-19 safety standards.

OSHA claims. Not all claims are filed in court. OSHA has logged thousands of complaints per month by workers in essential and nonessential industries in 2021. The agency has issued [citations](#) to hundreds of employers across the country and levied millions of dollars in penalties.

Employees can also file complaints with their state

OSHA. Like their federal counterpart, state agencies require employers to protect their workforces from COVID-19 and to post resources.

The California Division of Occupational Safety and Health (Cal/OSHA), for example, [posts guidance](#), educational materials, model programs and plans, and other resources to help employers ensure that workers are protected.

What are the “sleeper issues” that I should be thinking about?

The pandemic gave rise to a whole new set of workplace issues while amplifying existing ones (even if they present differently). Here are a few sleeper issues to keep in mind:

Sexual harassment. Working remotely means most communication has been happening via videoconferencing, telephone, email, social media and company messaging platforms. As a result, some interactions have become more casual and less professional, whether on-screen or in writing. The isolated nature of one-on-one communication also makes victims easier to target and reporting less likely.

Working parents. By most public surveys, the pandemic has been particularly challenging for working parents with school-age children. Parents have found themselves trying to do their jobs while overseeing children going to school remotely or taking care of younger children in the absence of day care facilities. Clearly, flexible schedules have helped working parents do it all, but burnout has caused some women to leave the workforce. In addition, parents worry that their work/family needs could jeopardize their jobs. [A study by Catalyst and CNBC](#) found that more than 40% of parents feel they have less job security due to the pandemic and fear taking advantage of workplace benefits for working parents could have a negative impact on their employment. In the long term, this time away from employment could have serious impacts on families and the workforce in general. And the research compiled to date indicates that women have been disproportionately economically impacted by the pandemic, which may have a compounding effect that will be felt for years to come. [Research by Gallup Inc.](#) found that, as of February 2021, the female workforce had shrunk 3.1% over the past year, compared to a 2.2% reduction of the male workforce. That means 493,000

more working women than men stopped working during the pandemic.

Diversity issues. The COVID-19 pandemic has hit LGBTQ+ individuals and people of color in the workplace particularly hard, but in ways that aren't always readily apparent. Inequities that existed before the pandemic have only been intensified by the crisis. For example, for LGBTQ+ employees, who may draw significant support from their workplaces, the loss of connection can negatively impact their work experience. Further, 56% of LGBTQ+ individuals [surveyed by the Kaiser Family Foundation](#) said they or someone in their household are more likely to lose their jobs due to COVID-19, compared to 44% of non-LGBTQ+ employees. Nearly 75% of LGBTQ+ employees reported that pandemic-induced stress has had a negative impact on their mental health, compared to nearly 50% of non-LGBTQ+ individuals. For people of color, the documented disproportionate impacts of COVID-19 on their health can affect job performance, career progression and overall well-being. More Black, Hispanic and Latino people are likely to be unemployed during the pandemic. In the fourth quarter of 2020, only 53% of Black workers in the United States were employed, compared to 57% of white workers, according to [McKinsey research](#). This is likely due to the fact that Black individuals are more likely to work at jobs that are more vulnerable to furloughs and layoffs related to the pandemic. [McKinsey also reports](#) that Hispanic and Latino individuals tend to work in sectors that have been hit hardest by COVID-19, including hospitality and retail.

Mental health. Employee mental health has always been a hot topic among human resource professionals. The pandemic accelerated and heightened our collective awareness and focus on these matters. The CDC found that in recent surveys it conducted, more than 40% of individuals reported at least one adverse mental or behavioral condition related to the pandemic, including depression and anxiety. Continued awareness and support for employees, through flexibility, time off, employee assistance programs (EAPs) and Zoom-free days in the coming months, will be critical.

Discrimination—the at-home versus the in-office worker. As workplaces reopen in earnest, and as some workplaces consider moving to hybrid models, there exists a potential for discrimination against and disparate treatment of employees who are based primarily in an

office versus those who work from home. Decisions about who is allowed workplace flexibility and who is not, and about compensation and benefits decisions, will all have at their core issues of internal equity and the risk of discrimination.

Is the five-days-per-week-in-office schedule dead?

Maybe. Let's face it, the five-day, on-site workweek could well become a relic for some organizations. After a year of having employees work remotely all or part of the time, many companies have found these arrangements have increased productivity and profitability.

Now that many employees have experienced the benefits of having no commute, more flexible hours and a better work-life balance overall, working from home and having more flexible work schedules are likely to become coveted employee benefits. That doesn't mean every company will continue with remote work, but more will be likely to be receptive to it.

At one end of the flexibility spectrum is media company Spotify, which introduced its [Working From Anywhere program](#) in February to enable employees to work from home or the office or a combination of the two. The terms of the arrangement are up to each employee and his or her manager. These distributed arrangements and approaches (which existed prior to the pandemic but have been proliferated during the pandemic) can exponentially expand the pool of talent from which to source.

At the other end are a number of Wall Street institutions, which are bullish on returning to the physical office as soon as possible based on the belief that working from home is not a good fit for their corporate culture.

But for many businesses, the right approach lies somewhere in between. The most successful ventures will undoubtedly involve employee input and collaboration at all levels of the organization, not just top down.

In short, the pandemic has presented companies the opportunity to fundamentally rethink the paradigm of work—that work is something you do, not necessarily somewhere you go.

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