

# Legal considerations for returning to business as usual post-COVID



While returning to business as usual may look a little different for everyone, most businesses are beginning to take the steps, or at least plan them out. The COVID-19 pandemic is showing signs of winding down as vaccinations take hold. Major employers are announcing that workers will soon be called back to their cubicles. Google, Bloomberg, and other major employers say it will be business as usual by Labor Day. And a [recent survey](#) indicates 70% of 350 CFOs, HR, and finance leaders expect the same.

However, businesses may face challenges from employees concerned about returning full time. After all, with new COVID variants and a portion of the population refusing to get vaccinated, there are some justifiable reasons for concern. With that in mind, it's time to think about supporting returning employees who may have lingering concerns that their work environment isn't safe.

The key is to implement strategies to prevent a workplace outbreak or at least short-circuit one. Then get employee buy-in for the plan. Once employees understand that safety measures are key to remaining open, and keeping their jobs, you will get better cooperation. Here's how to plan for a smooth transition.

## Prepare the workplace

Some of your returning employees may welcome returning to the workplace. That's especially true for those whom you put on lay-off status and have exhausted their unemployment benefits. Others who worked from

home while managing remote schooling and childcare may welcome a distraction-free environment. Still, there are those who aren't likely to be excited about the return. Either way, they will want reassurance that the office, factory floor, or retail setting is safe. Your mission is to make it so. Start with CDC and OSHA guidelines.

**CDC:** The Centers for Disease Control and Prevention maintain a comprehensive [COVID](#) website with crucial information for employers. It incorporates much of OSHA's pandemic advice, too.

If you used the resource in the past, be sure to check for updates. The CDC's new director, Dr. Rochelle Walensky, just completed a review of past guidance and replaced key components. The latest updates or old guidance that did not need modification include:

### **Actively encourage sick workers to stay home**

The CDC would like to see employers offering appropriate sick leave policies that discourage employees from coming to work sick. If you have a no-fault absenteeism policy, modify it to exclude missing work for potential COVID infections. Provide paid leave to encourage staying home. Notify workers of the new policies before you reopen the workplace. Be sure to include supervisors and managers in the discussions. They must understand the need to adopt a more lenient approach to missing work.

### **Provide health checks**

Employees should be screened before coming to work. This could be a self-screening through an app or a daily check-in. Employees should be prepared to report no fever, no symptoms, and no known exposure or pending test. Employers can also legally screen all employees with temperature checks [without violating](#) the Americans with Disabilities Act (ADA). However, make sure screening and health checks are as private as possible. If your employees have been away from the workplace for any length of time, consider mass testing. That way, you start off with a virus-free work environment. That may ease many returning workers who are going from self-isolation to an unknown environment.

## assessment

## Conduct a hazard

If you start with healthy workers, you want to keep it that way. Employee screening and sick leave policies will help, but you also have to conduct a hazard assessment. This has two parts.

First, determine what environmental challenges the physical workplace has. A workplace with private offices poses less risk than an open workspace, for example. Common areas workers share such as lunch and conference rooms and bathrooms pose virus transmission challenges.

Second, set rules for social distancing, sanitation, and mask-wearing. These rules depend on the physical risks identified earlier. Remember that under the Occupational Safety and Health Act (OSHA) employers are responsible for providing a safe and healthy workplace. Both the CDC and OSHA suggest that employers provide all personal protective gear (masks, sanitizer, etc.) at no cost.

## Provide leave to ease return fears

If you do not provide paid leave as a routine matter, consider making a change. Recent state, local, and federal legislation make it clear that a key to ending the pandemic is paid leave. When workers don't come to work sick, they can't start a COVID outbreak. The first federal pandemic leave law was the Families First Coronavirus Relief Act (FFCRA). The FFCRA had required employers to provide paid time off for many COVID-19-related reasons. These included time for testing, isolation, recovery, and caring for COVID-positive family members. However, FFCRA mandated leave ended December 31, 2020.

Two other COVID-related relief acts do allow employers to offer voluntary FFCRA leave. Employers that do will receive a tax credit to cover the complete cost in most cases. The latest, American Rescue Plan Act (ARPA), extends the credits for leave through September 30, 2021. It also adds a new type of COVID-19 leave for employers that choose to provide it. Employers will get tax credits for providing paid time off for employees to get vaccinated and to deal with vaccination side effects.

Be sure to check your state and local leave laws, too. In addition, some states now mandate paid time off to get vaccinated and for recovery.

## Vaccination programs

The best way to prevent a workplace COVID outbreak and create a safe working environment is with a vaccination program. Currently, every state is rolling out vaccination programs for all segments of the adult population. Very soon, enough vaccine will be available for all adults who want to be protected from COVID infection. With widespread availability, some employers are requiring that returning employees get the vaccine.

The EEOC has issued [extensive guidance](#) on when, how, and where employers may require COVID-19 vaccinations. Essentially, the EEOC says that employers may require vaccination, subject to ADA and religious discrimination limitations. For example, some disabilities may make it medically inadvisable to get certain vaccines. These include allergies to some of the vaccine ingredients and immune-compromised status. Employers must make reasonable accommodations for disabilities that prevent vaccination. They must also do the same for religious objections.

Employers that don't want to mandate vaccinations can consider an incentive program. Incentives can include time off to get vaccinated and to recover. They can also include small awards or monetary payments. Just be sure to not exclude the disabled who cannot be vaccinated from the incentives. Doing so may violate the ADA.

**Warning:** Employers should stay alert for state legislative efforts on vaccinations. An increasing number of states are considering legislation that **bars** employers from mandating vaccinations. These would make it illegal to discriminate against workers, customers, or clients who refuse to become vaccinated. If a non-discrimination bill passes in your jurisdiction, you will have to rely on voluntary incentives.



## Fear of confrontation

Some employees, especially those in direct contact with customers, may fear workplace exposure. More states are relaxing or dropping masking rules, for example. One approach is for employers to continue their own mandates for distancing, masking, and sanitation. But such an approach can inspire a different worker fear — violence. Grocery and retail workers, for example, may fear having to enforce your masking and distance rules. Media reports of violent customers don't help.

Employers should offer training in de-escalation practices and think of ways to mitigate risk. You could, for example, hire additional security whose job it is to enforce such rules. They can be stationed at entrances and strategically throughout the facility. That way, front-line workers don't have to play rule enforcers.

## Handbook changes

New leave, vaccination requirements, and safety rules require immediate changes to employee handbooks. Go through your handbook thoroughly or issue a supplemental handbook covering COVID changes. Include modifications to attendance policies, paid leave provisions, your vaccination program, and masking/distancing rules. Then provide the updates and training before bringing workers back.

**Additional resource:** [COVID litigation, lessons for businesses from the courtroom.](#)