Reopening Your Doors
BakerHostetler's Return-to-Work Toolkit

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As states and cities begin to lift lockdown restrictions, stay-at-home orders and social distancing measures, it's vital that businesses implement and communicate new protocols and safety precautions in the workplace before and after employees return.
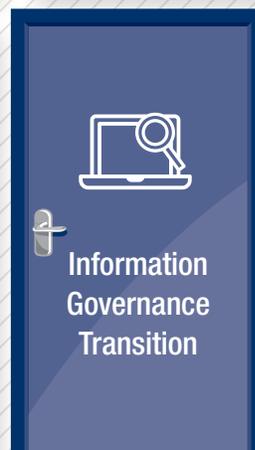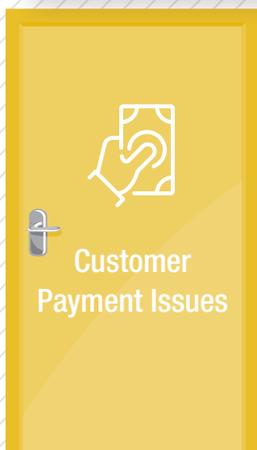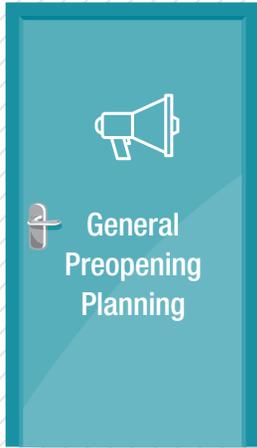
BakerHostetler has created this Return-to-Work Toolkit to help employers prepare to reopen their doors and return to operations under the COVID-19 restrictions imposed by local or state governments and recently issued health and safety guidance. Some local restrictions require many of these issues to be addressed in the form of written policies or protocols, and working through the practical Toolkit lists is a good first step toward developing a plan specific to your organization.

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CLICK ON THE DOORS BELOW

General Preopening Planning

Benefits Issues to Consider Before Employees Return

In-Office Protocols

Personal Protective Gear

Other Office Considerations

Sick Policies and Leave

Future Benefits Issues

Commercial Relationships

Customer Payment Issues

Customer Bankruptcy

Information Governance Transition

Cybersecurity

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General Preopening Planning

☐ Communicate with landlord and document appropriateness of any new planned facility uses or accommodations that may be required before reopening (e.g., curbside pickup services, restaurant takeout services for traditional sit-down restaurants, or other uses that have become a part of the new normal, yet were not contemplated before the COVID-19 pandemic).

☐ Understand new cleaning protocols initiated by landlord; potential use of HVAC systems; entry and exit rules; elevator usage; staggering of arrival, lunch and departure times; and other building requirements.

☐ Order ample supplies of antibacterial wipes, hand sanitizer, hand soap, gloves, disinfectant spray, and approved cleaning agents, and develop new cleaning protocols.

☐ Consider and sketch out staggered return or scheduling of personnel.

☐ Create a plan for how to handle employees, particularly those who are in high-risk categories (as defined by the Centers for Disease Control and Prevention (CDC)), who advise that they are not comfortable returning to work.

☐ Set return-to-work policies for employees whose residence is across a state line if the states have differing positions on reopening.

☐ Map out and implement physical space plan adjustments and markings that may be needed to maintain social distancing.

» Address personal workstations, as well as de-densification of common areas, conference rooms, break rooms, restrooms, etc.

☐ Decide whether any recall/rehire or onboarding paperwork will be required, or if and how any changes need to be made to compensation, hours worked, or other terms and conditions of employment.

☐ Address requests for "hazard" pay or additional compensation related to returning to work while the pandemic is ongoing.

☐ Decide whether any existing employee agreements or offer letters need to be updated.

☐ Decide whether to require employees to make any COVID-19-related certifications, take their temperature, or be tested (PCR? antibody?).

☐ Create visitor and vendor policy and protocols.

Benefits Issues to Consider Before Employees Return

☐ Consider whether the employer's employee assistance program and employee benefits personnel are providing robust enough support and services for employees, and outreach regarding availability of support and services.

☐ Determine potential classifications of employees returning to work, e.g., employees on leave covered by the Family and Medical Leave Act (FMLA), including extended FMLA leave under the Families First Coronavirus Response Act (FFCRA).

☐ Consider the provisions of each benefit plan (including the cafeteria plan), any exceptions that may have been made, and the applicable law for each classification. For example:

  » Whether the employee was treated as being on leave or terminated from employment.

  » Whether this was an FMLA leave for which healthcare and other benefits coverage was required to continue.

  » Whether this was furlough, and whether the employee ceased to be an active employee eligible for benefits under plan terms at any point during the furlough.

  » Whether exceptions to plan provisions were made, e.g., whether an employee who ceased to be eligible under plan terms was allowed to remain eligible.

  » Whether the employee is permitted to make benefit plan elections or election changes or is required to make elections to receive benefits, and whether related notifications are needed.

☐ If coverage ceased, determine when and how coverage recommences under plan terms, or any exceptions being implemented.

☐ Consider how the employee and the absence are required to be treated for purposes of the Affordable Care Act (ACA) employer coverage mandate, which generally requires large employers to offer affordable coverage to their "full-time" employees.

☐ Determine whether the employer paid the employee portion of any premiums, and if so, whether the employee is required to repay the employer, and how these funds may be recouped.

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In-Office Protocols

☐ Decide how to communicate new protocols and policies related to COVID-19 to returning employees and ensure acknowledgement and understanding.

☐ Decide how to maintain social distancing.

☐ Establish methods to reduce congestion in high-traffic areas.

☐ Establish means to reduce or eliminate employee contact with shared surfaces and items.

☐ Set limitations on in-person meetings and events.

☐ Communicate hand-washing and personal hygiene expectations.

☐ Create protocols for the use of gloves, hand sanitizer and antibacterial wipes, including when and where such use will be required.

☐ Establish policies concerning family-style or self-serve food offerings.

☐ Nail down office cleaning protocols, consistent with CDC and local guidance.

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Personal Protective Gear

☐ Establish whether/when/where/how employees will be required or requested to use cloth face coverings/ masks, gloves, etc.

» Be mindful of local and industry-specific requirements for same.

☐ Provide instructions and/or training for proper use of any protective gear required by the company.

☐ Decide whether the company or employees will be providing any protective gear for employees' use and/or reimbursing for maintenance of same.

» Be mindful of state and local reimbursement laws, as well as any requirements set forth in return-to-work orders.

☐ Be prepared to answer accommodation questions concerning any required protective gear.

☐ Set policies for addressing employees who fail to adhere to protective gear requirements.

Other Office Considerations

☐ Adhere to city, county, state, and federal stay-at-home/shelter-in-place/ business closure/return-to-work orders applicable to location at issue.

☐ Determine how to manage fundraising/outreach efforts among employees related to COVID-19 scenarios.

☐ Determine whether to cross-train employees to reduce impact of employee absences.

☐ Create policies for business and personal travel.

☐ Post CDC signage about COVID-19.

☐ Understand and adhere to accommodation requirements under city, state, and federal laws.

☐ Create procedures to follow with any non-employee visitors (e.g., vendors, maintenance personnel, etc.).

☐ Understand and communicate to employees, customers and others entering the facility any rules that may have been implemented by your landlord or applicable governmental authorities (such as protective equipment use, temperature checks, social distancing requirements, etc.).

☐ Conduct training of employees and decide how to address those that fail to adhere to new protocols.

☐ Establish clear and effective remote work policies.

» Consider electronic remote monitoring of employee activity for those who continue to work from home.

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Sick Policies and Leave
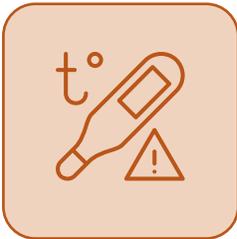
☐ Draft a policy for what to do if an employee gets sick while at work, including not just with regard to the employee but also as it pertains to cleaning of areas the employee frequented and whether some or all of a company must temporarily shut down for some period of time.

☐ Create procedures for tracking employee illnesses and notifying employees or departments of health of potential exposure.

☐ Determine whether and how temperatures of employees entering work facilities will be monitored.

☐ Create policy for obtaining consent (or not) from employees to disclose their COVID-19 status to fellow employees, service providers and others.

☐ Create procedures for responding to queries from employees concerning the health status of fellow employees and/or their family members.

☐ Create policies for when to allow previously ill employees back to work.

☐ Determine circumstances under which paid or unpaid leave will be available to employees for reasons related to COVID-19.

　　》 Be mindful of federal, state and local laws governing same.

☐ Determine circumstances under which temporary remote work will be available to employees for reasons related to COVID-19.

☐ Consider what will be the impact of employee absences to date and in the future on PTO, vacation and sick time banks.

☐ Consider what will be the impact of absence/return on employee benefits.

Future Benefits Issues

☐ Determine whether any benefit plans operated differently from plan terms, pursuant to employer discretion, statutory changes, and/or other emergency guidance. This may include:

» Whether insurer approval was required for any changes or exceptions necessary, and whether that was obtained.

» Whether any plan amendments are required for any changes and exceptions, and if so, the applicable amendment deadlines (which may have been extended).

» Whether any disclosures or notices are required (such as ACA summaries of benefits and coverage material modifications and ERISA summaries of material modifications), and if so when are the notices required to be provided, under any exceptions that have been announced.

☐ Determine whether the employer wants to implement any additional benefit plan changes to assist employees, e.g., special COVID-19 401(k) plan loan provisions and/or distribution provisions.

Commercial Relationships

☐ Identify commercial arrangements with outside parties that have become problematic or strained as a result of the pandemic and associated business disturbances.

☐ Determine whether refunds, fee cancellations, liquidated damages or similar actions are required under contracts that have been materially impacted by COVID-19 governmental restrictions and lockdown orders.

☐ Review the dispute resolution mechanisms in contracts impacted by COVID-19 and consider the possibility of bringing or responding to a dispute arising under the affected contracts.

☐ Open lines of communication with vendors, suppliers and other contracting parties, and attempt to modify problematic contracts in a manner satisfactory to all parties.

☐ Seek advice from legal counsel when managing strained commercial arrangements resulting from the business challenges associated with COVID-19 to ensure all material legal rights are considered and preserved.

Customer Payment Issues

☐ Contact the company and set up a payment arrangement.

☐ Get the agreement in writing.

☐ Keep copies of your invoices.

☐ Keep copies of any checks received from the customer.

☐ If the company tells you they are considering filing a bankruptcy, apply payments to the most current invoice first.

☐ Keep track of any new goods or services you supply after the payment arrangement is made.

Customer Bankruptcy

☐ Determine if the case is a chapter 11 (reorganization) or a chapter 7 case.

☐ Determine if there is any reason that you might have a lien.

☐ If the case is a chapter 11 and you have a significant unsecured debt, ask to join the unsecured creditors committee.

   » The committee counsel is paid for by the debtor and it protects the interests of all unsecured creditors.

☐ Make sure you know the claims bar date.

☐ File a claim before the bar date and include the backup material for your claim with the claim form.

☐ If you believe the debtor may have claims against you for any reason, contact a lawyer before filing a claim.

Information Governance Transition

☐ Consider information governance/e-discovery strategy as employees transition back from remote work.

☐ Where employees are subject to current legal hold requirements, consider questionnaires to identify and preserve covered information that was managed outside company networks and systems.

☐ Recognize that employees who are not subject to legal hold requirements could face future preservation requirements relating to the time of remote work.

☐ Consider minimizing the cost and burden of future discovery by taking action now to identify and appropriately manage company information that may have spread to, and reside only on, employee personal devices.

☐ Remind employees of company policies concerning storage of company information on employee-owned devices and provide time and tools to return company information stored outside those policies to a managed state.

☐ Consider revisiting bring-your-own device policies, record retention policies and discovery response programs to account for new information governance challenges identified during the pandemic.

Cybersecurity

☐ Consider information security governance and controls to protect the organization and ensure the organization can articulate "reasonable security."

☐ As the organization recovers from emergency and contingency operations, review ad hoc measures used to support remote work to ensure they are secure. Eliminate or enhance less-secure, temporary solutions used to support employee access (e.g., a remote desktop server) and transition to secure technologies like VPN, cloud access security brokers, and multifactor authentication for all types of remote access.

☐ Take the opportunity now to document the organization's actions to respond to the pandemic and the circumstances that required those actions. The organization may leverage this documentation to help justify actions that result in a later security incident.

☐ The organization's security steering committee or data protection committee should meet to assess risk in light of whatever new circumstances the organization finds itself in. This includes evaluating new threats to the organization and new vulnerabilities that emerged because of extended remote work or other pandemic response activity. If the organization has never completed a risk assessment, do one now. Risk assessments are a primary focus for regulatory inquiry following a data security incident.

☐ Review lessons learned from the pandemic response to evaluate what worked well and what activities require more support. Consider the need for better contingency, business continuity and disaster recovery plans to supplement your existing incident response plans. Assume that it is likely there will be a resurgence of COVID-19 during the coming fall and winter or into next year and prepare now for contingency operations and business continuity.