Cooley

Practical Considerations for Boston Employers Preparing 'Return to Office' Plans

May 4, 2020

Due to the COVID-19 pandemic and related federal, state and local orders, most employers have shut down or significantly reduced their operations. As stay-at-home and social distancing efforts continue to help flatten the curve, government officials are signaling that current restrictions may loosen in coming weeks. For example, on April 16, 2020, the federal government issued guidelines on a three-phased approach to "Opening Up America Again," on the advice of public health experts.

While we do not yet know when and how current restrictions may be lifted, many employers are starting to proactively draft "return to office" or "return to work" plans. While it is clear that things will not return to normal for a while, certain operations may be able to resume in the near term, albeit under restrictions that will likely differ from location to location.

We have listed below the key considerations employers should take into account in drafting these plans. Of course, each employer will have its own unique considerations given the nature of its operations. More importantly, each employer's plan will need to comply with all applicable government orders and guidance from federal, state and local officials as the situation evolves.

Step one: Determine applicable rules and organizational approach

- **Designate a point person or team.** One employee (or a team of employees) should be tasked with leading the effort on drafting a "return to office" plan. Ideally, this team would include, at a minimum, employees with expertise in IT, human resources, the physical office facilities and the legal requirements of the governing orders. The team also should include senior management members who can make company-wide policy decisions.
- **Determine which orders apply.** In looking to reopen or scale up operations at each individual office, employers will need to review all relevant federal, state and local orders and ensure that their operations comply with the ***most restrictive*** rules in their jurisdiction. This assessment may need to continue to occur on a rolling basis, like we saw with the initial shelter-in-place orders, where state and local orders varied in terms of timing and scope.
  In the Boston area, employers are subject to any federal executive orders that may be issued, as well as guidance from federal agencies such as the CDC, OSHA, EEOC and DOL. In addition, employers are currently subject to the state-wide order issued by Governor Baker on March 23, 2020, and as updated on March 31, 2020 and April 28, 2020, and may be subject to additional county, city, or other local orders as the situation evolves (see, e.g., the Public Health Advisories currently in place in Boston). In deciding how to reopen or scale up operations at a worksite, employers will have to comply with the ***most restrictive*** rules – whether those rules have been issued at the federal, state or local level
- **Assess what is right for your organization and your workforce.** Even when employers are legally permitted to reopen their facilities or scale up their operations, they will nonetheless want to do so cautiously. Since it does not appear that the risk of infection will be eliminated any time soon, employers may still be exposed to legal liability if sufficient precautions are not taken. Employees may also be hesitant to return to work if they have concerns that overall conditions are not sufficiently safe. Employers may consider supporting the overall community goal of flattening the curve by continuing to allow some or all of their employees to work from home, to the extent they can do so productively. For example, the April 16 federal guidelines suggest that employers continue to encourage telework, as feasible, during the first two of three phases.

Step two: Determine who will be returning to the office

- **Decide which employees may be able to return to the office.** As restrictions loosen, government officials will likely provide guidance on what kind of operations may resume and in what ways. Such guidance may dictate phasing employees back to the office slowly, with a priority on those who need to be in the office to perform their duties.
  Once the relevant guidelines are set by the applicable authorities, employers will need to make additional decisions. Out of the group of employees who are legally permitted to return to the office, which employees will be asked to do so? All employees? Only employee performing certain critical functions? Will those employees be *required* to return or *asked* to return if they feel comfortable doing so? Consider using anonymous surveys to gauge employees' concerns and willingness to return to work.
- **Decide which employees will be prohibited from returning to the office.** Employers should also decide which employees will be prohibited from returning to the office, such as those currently experiencing COVID-19 symptoms and those who are still in home isolation due to actual or potential exposure due to COVID-19. All such decisions should be made after careful consideration of any guidance from the CDC and local health officials.
- **Decide how to handle higher-risk employees.** Employers will need to think through whether employees who are at higher risk of contracting COVID-19 should be asked, much less required, to return to the workplace. The CDC has identified a list of individuals who may be at higher risk and local health officials may have additional guidelines or restrictions with respect to such employees returning to work. Even if employers are permitted to ask such employees to return to work, they should be thoughtful about accommodating any concerns from such employees.
- **Decide how to handle employees with caretaking obligations.** Even after workplaces are permitted to reopen, it is possible that employees may have children whose schools or childcare facilities have not yet reopened. Employers will need to be prepared to respond to requests from such employees to either continue working from home or take a leave of absence in order to care for such children.
- **Administer leave laws and policies.** Consider how federal and state leave and disability laws and the employer's own policies may apply to employees who cannot return to the office or work remotely due to their own illness or health condition, that of a family member or caretaking obligations. Such employees may be eligible for paid leave under an employer's policy, short-term disability or paid family leave benefits through the state, or similar benefits through a private insurer. Employers should consider the impact of the recently passed federal Families First Coronavirus Response Act (FFCRA), as well as state and local laws that may be passed in direct response to the COVID-19 pandemic. See our prior alerts on the FFCRA here and here. Massachusetts employers should also refer to the Massachusetts Attorney General's guidance on sick leave and COVID-19.

Step three: Develop a plan for those who do return to the office

- **Decide whether to require certifications or doctors' notes.** Consider asking all employees returning to the office to first fill out a questionnaire asking about COVID-19 symptoms, exposure to others with symptoms, travel or non-essential activities. Also consider asking employees to certify that they are not in a high-risk category as identified by the CDC. Any such requests should be made in compliance with applicable privacy and disability discrimination laws.
  Based upon the employee's responses, consider asking the employee not to return to work until circumstances change or they can provide a doctor's note clearing them to return to work. Consider how regularly you may ask employees to fill out follow-on questionnaires.
  Note that, while the EEOC permits requiring a doctor's note before employees return to work in this pandemic environment, both the EEOC and CDC have warned that healthcare professionals may be too busy to provide such documentation and thus employers may need to be flexible in terms of what they require.
- **Decide whether to require temperature checks, symptom checks, testing or vaccinations.** Given the current pandemic, the EEOC permits temperature checks of employees. Symptom checks may also be permitted, or even required, in some jurisdictions. Employers implementing such checks should implement them thoughtfully and in compliance with all local laws. Ensure you have the equipment, personnel and protocols in place to implement such checks and respond properly to any signs of illness. If employers plan to use vendors to implement such checks, they should reach out to such vendors proactively, as such services will be in increased demand.
  Employers may also want to consider whether to offer, or require, employees to complete antibody testing or COVID-19 testing before they return to work. The EEOC has released guidance allowing for COVID-19 testing, but an employer's ability

to offer or require antibody testing is unclear at present. Counsel should be consulted if you are considering any such testing, since there are anti-discrimination and privacy issues to consider. Similar issues will need to be addressed if a COVID-19 vaccine becomes available.

- **Perform enhanced and routine workplace cleaning.** Prior to reopening a facility, employers should consider conducting enhanced cleaning. After reopening, employers should also consider routine cleaning, particularly of frequently touched workspaces. The CDC has provided guidance on cleaning and disinfection procedures, including cleaning after a sick person enters the workplace. Again, employers should contact vendors proactively to arrange for such cleaning, as such services will be in increased demand.
- **Coordinate with landlords and building management teams.** Employers in multitenant buildings should proactively work with their landlords and building management teams to ensure adequate cleaning and social distancing measures are taken in all common areas, including elevators. Employers may also explore the possibility of staggering work hours among tenants in the building.
- **Reconfigure workspaces.** As foreshadowed by California Governor Newsom and as is apparent in the current Massachusetts guidance, workplaces will likely need to be configured to comply with social distancing requirements. Employers should start reviewing floor plans now to think through how the facility may need to be reconfigured so that, for example, all workspaces are at least six feet apart. Consider marking quadrants on the floor of open areas, such as labs or manufacturing facilities, so there is only one employee per section at a time. Also consider the use of protective barriers for workspaces that cannot be separated by more than six feet.
- **Implement social distancing protocols.** The CDC defines social distancing as deliberately increasing the physical space between people to avoid spreading illness. Employers should consider implementing additional social distancing rules, such as requiring employees to stay six feet apart at all times, unless closer contact is required for a particular job duty, discouraging employees from shaking hands, and prohibiting sharing headsets or other items. Employers should consult pre-existing guidelines, such as those issued by Governor Baker, for ideas. View a sample.
- **Consider limiting in-person meetings and visitors to the workplace.** Encourage employees to conduct meetings by videoconference when possible and to limit in-person meetings to a certain maximum number of individuals, all of whom are adhering to social distancing. Also consider holding any in-person meetings in open, well-ventilated spaces. Reassess visitor policies to either limit visitors or ask visitors to fill out a questionnaire before entering the facility.
- **Consider staggering shifts.** Another element of social distancing can be staggering work shifts so that fewer employees are in the office at the same time. Staggering can be implemented in numerous ways: having teams of employees come in every other week, every other day or at different start times within the same day. Cleaning between shifts increases the effectiveness of this measure. Employers may also consider keeping employees on the same shifts, to the extent possible, so that any potential exposure between employees can be contained.
- **Consider employees' commutes.** Employees may hesitate to return to work if their commute involves public transportation. Staggered shifts and flexible schedules will help employees avoid using public transportation at peak times. In areas where employees often commute using public transportation, employers may consider offering a commuting stipend that incentivizes employees to use a private vehicle instead.
- **Rethink meal times.** Employers may wait to reopen any employer-run cafeterias or may only reopen such facilities in a limited manner. Food service may be limited to pre-packaged foods, and floors may be marked with lanes or quadrants to enforce social distancing. Common areas such as kitchens and break areas should be closed or reconfigured to meet social distancing requirements and meal and rest breaks should be staggered, to the extent consistent with applicable law, to ensure any open common spaces are not overcrowded. Employers may consider arranging for food catering or delivery to help minimize the need for employees to frequent other public facilities and then return to the office during their shift.
- **Require use of face coverings.** Governor Baker has issued an order, effective on May 6, 2020, mandating the use of face coverings where social distancing is not possible. Massachusetts employers may therefore require the use of face coverings in such circumstances, and also consider encouraging the use of such face coverings by employees even where social distancing measures are in place. Employers may also consider providing materials for employees to use
- **Remind employees about proper hygiene.** Once employees return to the workplace, employers should regularly remind employees about cough and sneeze etiquette and hand hygiene. The CDC also recommends that employers place posters relating to these concepts in the entrance to the workplace and other workplace areas they are likely to be seen (such as bathrooms and kitchens).
- **Stock the workplace with adequate supplies.** To reinforce messages about proper hygiene, provide employees with tissues, no-touch disposal receptacles and hand sanitizer. Placing these materials throughout the workplace and in

conference rooms (and even placing posters next to these items) helps encourage good hygiene habits. This can be in addition to any face coverings that are provided, as noted above. Employers may consider contacting vendors proactively for any supply requests, as all such supplies are likely to be in high demand.

- **Reconsider travel policies.** While most business travel policies were suspended during the pandemic, employers may consider revisiting those policies as restrictions lighten. Employers should continue to regularly consult the travel health notices posted by the CDC and consider curtailing all business travel to areas that are listed as level 2 or level 3. Employees returning from high-risk areas, whether for business or personal travel, may need to self-quarantine before returning to the office. If an employee expresses concerns or refuses to engage in business travel due to fear of COVID-19, the employer should take such concerns seriously and explore alternatives, such as holding videoconferences or postponing the travel.
- **Respond swiftly to any COVID-19 diagnosis.** If an employee reports that they have tested positive for COVID-19, the employer should respond swiftly but carefully, to both protect other employees from exposure but also respect the privacy of that individual. Employers should consider taking similar steps if an employee has a suspected case of COVID-19 or has had close contact with someone who has tested positive. The CDC is recommending that employers inform fellow employees of their possible exposure to COVID-19, but the employer should refrain from disclosing the identity of the affected employee. The employer may also develop a workforce contact tracing protocol to identify and inform those individuals who have been in close contact with the affected employee. The CDC is regularly updating its definition of "close contact." Any such procedures should be drafted in compliance with privacy and disability discrimination laws. Consider using a third-party contact tracing vendor, as various solutions are currently being developed.
  Employers may also be required to notify relevant public authorities and should consider taking steps to decontaminate or temporarily shut down the workplace. Employers should consult OSHA guidance on whether to record the diagnosis as a work-related illness and should also consider notifying their workers' compensation carriers.
- **Avoid discrimination and harassment.** Employers should be careful to implement policies, procedures and protocols in a way that does not single out employees based on any protected characteristic, but particularly national origin or ethnicity. There continue to be reports of xenophobia and backlash toward Asian employees, and particularly Chinese workers.

Step four: Be prepared for plans to change

- **Monitor daily for official updates.** A designated individual should check the websites for the CDC and local or state government officials every day for any changes in guidance. By complying with any such official guidance, employers can demonstrate that they are taking reasonable steps to return to "normal" in a way that priorities employee safety.
- **Be prepared for restrictions to tighten again.** Officials have already warned that restrictions, once loosened, may need to be tightened again if it turns out relaxing the restrictions was premature. Employers should be ready for such possibilities and build sufficient flexibility into their plans to provide for quick adjustments as needed. Employers should communicate this possibility clearly to employees, whose cooperation and flexibility will also be needed in coming months.
- **Be responsive to employee sensitivities.** Novel issues and questions will arise as public health officials, government officials and business leaders work together to figure a path forward. Employees may be hesitant to return to work even if all possible precautions are taken. Be prepared to respond to requests in a consistent way that addresses any legitimate concerns from the employee and ensures productivity can be maintained. Consider check-ins with employees to collect feedback and gauge concerns.

Coronavirus resource hub

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Ann Bevitt **London**	**abevitt@cooley.com** **+44 (0) 20 7556 4264**
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.