

COVID-19 Return-to-Work: Key Employer Considerations

A Practical Guidance® Practice Note by Jennifer B. Rubin, Mintz



Jennifer B. Rubin
Mintz

This practice note addresses key legal considerations and guidelines for advising employers on returning the workforce to the physical workplace during the COVID-19 pandemic and post-availability of the COVID-19 vaccine. The emergent nature of the pandemic's onset in 2020 forced many employers to make rapid decisions about the manner, method, and approach to virtual work as well as managing safely and within regulatory guidelines the essential workers whose jobs required continued on-site work. This note will provide guidance about returning employees to the physical workplace in a sensible and safe manner as well as advice concerning the adjustment of the workforce to key pandemic and post-pandemic workplace changes and challenges.

In particular, this practice note discusses:

- Where Are the Workplaces Located?
- Ensuring Office Safety
- The Importance of Training and Mitigating Discrimination and Other Claims
- What Does the New Workplace Look Like?
- Updating Office Policies, Procedures, and Job Descriptions
- Best Practices for Employers to Consider

For guidance on a wide variety of COVID-19 labor and employment legal issues, see [Coronavirus \(COVID-19\)](#)

[Resource Kit: Return to Work, Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response, Pandemic Flu/Influenza/Coronavirus \(COVID-19\) Prevention, Response, and Return to Work Checklist \(Best Practices for Employers\), and COVID-19 and Emerging Workplace Issues § 16.1.](#) For additional resources on the coronavirus (COVID-19), see [Coronavirus \(COVID-19\) Resource Kit](#).

For tracking of key federal, state, and major local employment laws addressing the coronavirus (COVID-19) pandemic, see [Coronavirus \(COVID-19\) Federal and State Employment Law Tracker](#).

For a detailed survey of state and local orders and guidance on vaccinations in the workplace, see [Vaccination in the Workplace State Law Survey](#). For guidance on the various types of COVID-19 workplace cases that employees have filed against employers to date, along with an analysis of the frequency of these types of lawsuits to identify current litigation trends, see [COVID-19 Workplace Litigation Trends](#).

For a detailed survey of state and local orders and guidance governing the use of face coverings in the workplace, see [Coronavirus \(COVID-19\) Face Masks State and Local Law Survey](#). For a detailed survey of state and local orders and guidance governing various types of COVID-19 employee health screening requirements, see [Coronavirus \(COVID-19\) Employee Screening State and Local Law Survey](#).

Where Are the Workplaces Located?

Structuring an organized and compliant return to the nonvirtual workplace starts with the relatively simple but important task of identifying each of the employer's work locations.

Identify the Work Location

The employment laws applicable to the location of a particular employer's workforce will dictate the regulations concerning the return to the office setting. Understanding where each workplace is situated is critical for employers to structure the return of their workforce by each state, county, and city location. Each state may have specific rules applicable to post-pandemic office reopenings—and in some cases, county or municipal regulations may dictate the rules for office reopenings. The starting point for an organized and compliant reopening, therefore, is to identify each work location maintained by the employer.

Review State and Local Laws

States and municipalities have significant interests in protecting the health and safety of workers as well as ensuring fundamental work rules and rights. It is likely, therefore, that employers with employees in multiple jurisdictions may have different rules governing their workplaces depending on where the employees physically report to work as the employee's home base.

In [Montana](#), for example, employers may not discriminate based on vaccination status. If a Montana employer asks an individual about vaccination status, the individual is not required to respond and the employer may not discriminate against him or her for failing to do so. Some states, on the other hand, require certain employers to mandate COVID-19 vaccines. For example, [New York](#) requires healthcare workers to receive the COVID-19 vaccine. As a result of differences in state and local COVID-19-related workplace laws, understanding what rules are and are not in effect for each worksite is the starting point for any return to office plan.

For a detailed survey of state and local orders and guidance on vaccinations in the workplace, see [Vaccination in the Workplace State Law Survey](#). For a detailed survey of state and local orders and guidance governing the use of face coverings in the workplace, see [Coronavirus \(COVID-19\) Face Masks State and Local Law Survey](#). For a detailed survey of state and local orders and guidance governing various types of COVID-19 employee health screening requirements, see [Coronavirus \(COVID-19\) Employee Screening State and Local Law Survey](#).

For more information on vaccinations, see [COVID-19 Vaccination: Key Employment Law Issues](#).

Ensuring Office Safety

Worker safety was, of course, a key obligation of all employers even before the pandemic and it remains a key focus of regulators in the COVID-19 pandemic world. But

the scope and severity of the COVID-19 pandemic has created a dense and often conflicting regulatory landscape for worker safety.

For more information on workplace safety and COVID-19, see [Coronavirus \(COVID-19\) Resource Kit: Return to Work – Health and Safety Considerations](#).

Review State and Local Laws

Again, the first order of business for any employer returning employees to the physical workplace is to consult the laws of the jurisdiction in which the office is located to ensure compliance with all state and local ordinances. Some states, such as California, through its [Temporary Emergency Standards](#), and New York, through [New York's HERO Act](#), will require employers to put into place certain preparedness plans for each worksite to address airborne infectious diseases and to provide best safety practices to prevent employees from becoming exposed to or ill from such diseases.

Again, the local regulatory framework dictates the minimum standards and measures employers must adopt. Once the regulatory "floor" is established, the employer is then free to adopt other and more strict work rules for offices.

Office Cleaning

Federal guidance from Center for Disease Control ([CDC](#)) and Occupational Safety and Health Administration ([OSHA](#)) is available that provides cleaning and disinfection guidance for offices and workspaces; other state OSHA and public health agencies also publish guidance that is applicable to disinfecting measures and other safety issues such as office ventilation. For more information, see [Pandemic Flu/Influenza/Coronavirus \(COVID-19\): Key Employment Law Issues, Prevention, and Response](#).

Vaccination and Testing

Implementing a mandatory vaccination program, which the Equal Employment Opportunity Commission (EEOC) has approved (with certain restrictions) pursuant to the [EEOC](#) guidance, is discussed in [COVID-19 Vaccination: Key Employment Law Issues](#). Both the EEOC and OSHA have confirmed that employers, at least from the perspective of federal law, may operate a two-tier system of employees—the vaccinated and unvaccinated. But distinguishing between those who are vaccinated and those who are not are important data points in planning for the return of the workforce because it will impact safety measures in the workplace, including whether employees must wear face coverings and engage in social distancing in the office. For a social distancing policy that requires employees to maintain a safe distance from others to avoid the spread of COVID-19 in the workplace, see [Social Distancing Policy](#).

For more information on vaccinations, see [Vaccination in the Workplace State Law Survey](#).

Vaccine Verification Approaches

This section addresses potential employer approaches to vaccine verification.

Inquiring about Vaccinations and Requiring Proof of Vaccination

Unless barred by state or local law, employers may wish to implement a vaccine verification program, which certifies an individual is fully vaccinated pursuant to one of the existing COVID-19 vaccines. Employers may have a vaccine verification program in conjunction with a mandatory or voluntary (incentive) program. In addition, unless prohibited by state or local law, employers may have a vaccine verification program to discern the vaccination status of vendors and third parties entering the worksite.

The Health Insurance Portability and Accountability Act (HIPAA) does not prevent a business from inquiring about vaccination status. The EEOC has also confirmed that this inquiry is not an American with Disabilities Act (ADA)-prohibited medical inquiry. See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Question K.9). If an employer requests records, however, it is important that at least one individual is available to act as a designated records collection agent, and he or she should keep the information confidential and secure. Employers should never request or collect other medical or genetic information.

Honor System Approach

Some employers may opt for an “honor system” approach to vaccine verification where the employer simply relies upon each employee’s statement of vaccination status in the same way employers rely upon other information employees provide in the employment relationship. Employers will need to confirm state and local laws permit this system and whether the honor system inquiries elicit the information the locality requires employers to collect (if any) regarding vaccination status.

No matter which vaccination verification approach the employer uses, the employer should develop a system that documents the date the employee verifies, the person’s name, and the form of verification used. Consistency in the application of vaccine verification is important to mitigate against potential discrimination claims.

For more information on vaccinations, see [COVID-19 Vaccination: Key Employment Law Issues](#) and [Vaccination in the Workplace State Law Survey](#).

For sample vaccine policies, see [Coronavirus \(COVID-19\) Vaccine Policy](#) and [Declination of Coronavirus \(COVID-19\) Vaccination for Medical Contraindication](#).

Creating Rules for Unvaccinated Individuals

Whether or not an employer implements a mandatory vaccination policy, workplace rules may require employers to make a vaccination inquiry to permit an employee to forgo wearing a face covering in the workplace or to avoid social distancing. It is important to understand, as outlined above in the section regarding vaccination programs, that some individuals may justifiably and legally refuse to be vaccinated because of medical or religious reasons. Other employees may be entitled to voice their concerns regarding vaccination to engage in protected concerted activities pursuant to Section 7 of the National Labor Relations Act (NLRA). Employers should be cautious about imposing discipline or retaliating against individuals who raise these concerns. Employers should be cautious before imposing any workplace discipline on an individual who refuses to take a COVID-19 vaccine or to provide proof of vaccination status. In any event, all employers must be prepared in certain circumstances to accommodate having unvaccinated individuals in the employer’s workplace or working for the employer.

Employers may differentiate among vaccinated and unvaccinated employees for safety reasons based upon health threats in the workplace and, in fact, the ADA specifically permits employers to make this differentiation once the employer concludes that a particular employee presents a direct threat to the workplace. Pursuant to the [EEOC guidance](#), unvaccinated employees who may pose a “direct threat to the health or safety of individuals in the workplace” may be excluded from the workplace if there is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Question K.5).

This determination requires an employer to make an “individualized assessment” of the employee’s ability to safely perform their job assessed with reference to “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Question K.5). But the decision to exclude an individual because of vaccinated status does not end the legal inquiry.

Excluding employees from the workplace due to vaccination status requires an employer to undertake

certain inquiries that includes potential accommodations for those employees. Toward this end, the EEOC encourages employers to consider:

- The work environment
 - Ask whether the employee works alone? Or in an enclosed office?
- The available ventilation
- The frequency and duration of interaction with other employees –and–
- The number of partially or fully vaccinated individuals already in the workplace

See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Question K.5).

Other risk factors include whether other employees are wearing masks and whether the employer has implemented routine diagnostic testing.

When advising employers on this subject, make them aware that physical separation—such as requiring individuals to work on different floors, work in specific offices, or only use certain communal areas—is by itself legal. But also advise employers that taking these steps can create morale issues and/or potentially cause employees to make workplace bullying or harassment allegations.

Other Accommodations to Consider for the Unvaccinated

There are many accommodations for employees who cannot take a vaccine or refuse to do so. Those accommodations could include:

- Requiring the unvaccinated individual to wear masks or facial coverings
- Engaging in social distancing in the workplace
- Limiting contact with other employees and nonemployees
- Providing modified work shifts
- Reassigning the employee to a vacant position in a different workplace –or–
- If appropriate and consistent with the role and the employer’s business, allowing a worker to continue to work virtually (if the job permits virtual work)

Another accommodation that is of relatively low cost and administrative barrier and burden is frequent COVID-19 testing of unvaccinated individuals who must be present in the workplace (which testing must be done at the employer’s expense and, if the employees are not exempt from overtime, for which the employees must receive their usual hourly rate).

For more information on vaccinations, see [COVID-19 Vaccination: Key Employment Law Issues](#), [Vaccination in the Workplace State Law Survey](#), [Coronavirus \(COVID-19\) Vaccine Policy](#), and [Declination of Coronavirus \(COVID-19\) Vaccination for Medical Contraindication](#).

For a detailed survey of state and local orders and guidance governing the use of face coverings in the workplace, see [Coronavirus \(COVID-19\) Face Masks State and Local Law Survey](#). For a detailed survey of state and local orders and guidance governing various types of COVID-19 employee health screening requirements, see [Coronavirus \(COVID-19\) Employee Screening State and Local Law Survey](#).

For a social distancing policy that requires employees to maintain a safe distance from others to avoid the spread of COVID-19 in the workplace, see [Social Distancing Policy](#).

For a sample COVID-19 testing policy, see [COVID-19 Testing Policy](#). For a policy requiring employees to obtain the COVID-19 vaccine to minimize transmission of the virus in the workplace, see [Coronavirus \(COVID-19\) Vaccine Policy](#).

The Importance of Training and Mitigating Discrimination and Other Claims

Employers that implement a two-tier system for the vaccinated and unvaccinated will need to ensure that frontline managers are appropriately trained to ensure the employer’s policies are applied in a balanced and nondiscriminatory fashion. Employees who are able to perform their work in a physical location may be better able to take advantage of opportunities for advancement through person interaction (face time), as well as more timely and direct performance management that invariably impacts career development in a beneficial way.

But some employees may have no choice but to continue virtual work or other work arrangements that necessarily prevent such personal interaction. Employers will need to provide these individuals with sufficient support and career development activities as well as modified performance feedback. Some managers may be unfamiliar (even after the time away from the office during the pandemic) with the best manner to deliver performance feedback and to provide the same collegial and collaborative atmosphere that benefit the in-office employees.

Employers should therefore train managers in steps they can take to ensure a balanced and fair approach. In

addition, employers should train managers to identify and address behavior that violates the employer's discrimination and harassment policies. For example, some employees may share their views on vaccination in a manner that others find to be harassing.

Effective communications to the workforce is key so that employees understand why employers are implementing policies and what conduct the employer expects.

For a practice note summarizing the various types of COVID-19-related workplace cases that employees have filed against employers to date, along with an analysis of the frequency of these types of lawsuits to identify current litigation trends, see [COVID-19 Workplace Litigation Trends](#).

What Does the New Workplace Look Like?

Employers should be prepared to modify the post-pandemic workplace—in fact, it would be unusual for an employer to not consider pandemic-influenced changes. In addition, some employees may not be able to return to the workplace or they may refuse to return—particularly given that so many workers were able to perform their jobs remotely, often very well. Employers should be prepared to address telecommuting requests whether as a legal accommodation or for the employee's convenience.

For more information on telework, see [Telecommuting Employees: Best Practices Checklist](#), [Telecommuting Agreements: Key Drafting Considerations](#), [Telecommuting Agreement](#), [Telecommuting Policy](#), and [Telecommuting Request Form](#). For a five-minute video providing best practices for employers on telecommuting, see [Telecommuting Video](#).

Developing Hybrid Work Policies

A hybrid approach to the workplace may involve permitting some employees to work in the office part of the time and virtually for the balance of their work time. Employers that are considering these policies will need to understand how these policies will change the way the employer does business, the way the employer handles recruitment and retention, and the way the employer manages productivity and collaboration.

The architecture of a hybrid work program requires employers to focus on a number of questions:

- **Exempt vs. nonexempt.** Will both exempt and nonexempt employees be eligible to work remotely? It is more difficult to manage nonexempt employees, in part because of the wage and hour restrictions on such workers (such as overtime and other rules applicable to hourly workers). See [Employee Classification Policy](#).

- **Schedules.** How will employers manage schedules for in-office days? How much flexibility does the employer want to provide managers when building these types of schedules? What guidelines does the employer want to provide managers if there is to be flexibility among teams?
- **Remote locations.** How much flexibility does the company want to provide in permitting employees to select their remote location? Does the person work in a home environment that is conducive to the hybrid work arrangement?
- **State and local laws.** Are there special state or local licensing requirements?
- **Insurance.** Do insurance policies need to be adjusted or amended?
- **Digital component.** Will all team meetings have both digital and in-office components?
- **Travel.** How will employers manage employees' work travel, especially for employees with travel as an essential function of their job duties?

In addition to answering these questions, employers may as a legal matter have to accommodate certain employees, apart from those who cannot be vaccinated. For example, some employees may have a member of their household who is unvaccinated or particularly susceptible to COVID-19 infection. Others may be temporarily disabled, such as pregnant employees. Employers will need to revise or revisit their policies to address these special situations.

Updating Office Policies, Procedures, and Job Descriptions

The pandemic has profoundly and fundamentally changed the workplace, including the nature of work, how it is performed, and what an employer's expectations should be for employees returning to the workplace. But employers should not overlook the fundamentals of the workplace once employees return to the office.

Work with employers to review their employee handbooks and update them to account for new employment regulations, whether or not related to the pandemic. For comprehensive employee handbook guidance, see [Employee Handbook Resource Kit](#).

In addition, job descriptions might require revision to ensure that the essential functions of each position have remained unchanged due to the pandemic's impact. For example, is it fair to say that some jobs cannot be performed remotely at all if the past year has not proven otherwise?

For guidance on job descriptions, see [Job Description Drafting Checklist for Exempt Employees](#) and [Job Descriptions for Exempt Employees: Drafting and Revising Tips](#).

To the extent an employer wishes to remain in a hybrid mode or to officially adopt that mode, then temporary changes to telecommuting, privacy, and other policies may need to be made permanent. Work with employers to review template policies, offer letters, and other basic employment documents to ensure continued post-pandemic relevance.

Best Practices for Employers to Consider

Employers should consider the following best practices when returning the workforce to the physical workplace following the COVID-19 pandemic.

Appointment of Chief Safety Officer or Other Designated Safety Individual

If an employer does not already have a centralized function for implementing and managing safety rules, it is important to establish that function. The function might be assigned to a single person with overall responsibility or a team of individuals. But that person or team should have a reporting relationship to and visibility with the person who has overall management responsibility for the enterprise.

How Best to Manage Employees Who Refuse to Return

Some employees may not wish to return to their jobs in the physical office. These employees may couch their requests as religious or disability accommodations or they may simply request that the employer make special arrangements to permit them to continue their virtual work, likely resting their request on the success of the prior year. Employers that grant these requests on an ad hoc basis might face potential claims of discrimination or other inequitable treatment.

If an employer decides not to make any exceptions (except for those that are legally mandated, such as those dictated by the ADA or other federal or state statutes), the employer may also face a situation where the employee simply refuses to return to the office. Such a refusal would be considered job abandonment to the extent the employee fails to comply with a directive to return to the office (i.e., insubordination). Once terminated, these employees could bring constructive discharge claims which might result in unemployment and other claims against the employer. It is important, therefore, that employers act in a consistent manner in applying these policies and exceptions to them.

Crafting and Using Employee Surveys

Surveys are a useful tool to understand the unique issues associated with each particular workforce. A survey may disclose needs that a particular workforce may have or concerns that an employer might be able to address that will facilitate the return to the office. A workforce survey also serves an important morale function—it shows employees that the employer cares about their needs and concerns and that the employer will take those concerns into consideration in designing the plan to return to work.

A survey can be anonymous—employees may be more forthcoming about how they feel and what they need if they know the employer cannot tie any particular response specifically to them. Anonymous surveys can also provide information concerning employees' special needs that employee have not brought to the employer's attention. An anonymous survey can also focus employers on specific concerns and how to address them.

For example, whether or not an employer has decided to put a mandatory vaccination program in place, it would be useful to know how many employees have been vaccinated, as that information might allay concerns about workplace safety. It also might address concerns about group gatherings. A survey might also key the employer as to whether commuting through public transportation is a workforce concern. And understanding if individuals have been vaccinated will be helpful in planning employee travel—whether necessary or not—and whether the employer must comply with any applicable quarantine rules.

Surveys, by the way, do not only need to relate to pre-return matters. Surveys may also be useful in understanding what is and is not working for those who have returned to the office. Obtaining information about what has and has not worked once the employees have returned to the physical office may allow an employer to make prompt modifications that will not only be useful to the employer's business but may address employee morale issues as well (and may surface any safety issues the employer may have overlooked).

Don't Overlook Structural Changes

The success of the post-pandemic workplace will depend greatly on the ability of the employer to adapt to new ways of working and thinking about work. This is not only a safety and health issue, but operational changes will take place as well. Employers may need to adopt technology that facilitates new working spaces and patterns and employees will need to receive training on accepting and deploying those new methods of work (including, for example, hybrid video working platforms and other pandemic-related developments).

The concept of offices may need to be altered as employees view workspaces as fungible—this may dictate changing real estate needs for employers. Data privacy and security and regular security training will need to take center stage as employees are able to quickly modulate among platforms and perhaps move and manipulate data that was previously tightly controlled. Creating acceptable and data-secure workspaces at home and ensuring bandwidth to support that new technology will be of primary importance.

Adapt to a Fluid and Changing Landscape

Finally, the scope of the pandemic, the response to it, the vaccination effort, the variants, and issues regarding booster shots all compel a common sense approach to office reopenings. You must stay up to date with ever changing employment regulations regarding office safety, vaccination, and other return to office matters. Regularly check the regulations applicable to each work location in which employers you advise operate to ensure you achieve the most up to date return to work compliance efforts.

Jennifer B. Rubin, Member, Mintz

Jen draws on over 30 years of experience crafting legal solutions to employment challenges. Her clients include large and small businesses and executives. She advises technology, financial services, publishing, retail, professional services, and health care companies seeking regulatory, litigation, and compliance advice. Her employment practice includes counseling clients regarding wage and hour compliance and trial practice, with a focus on class actions, trade secrets and employment mobility disputes, and disputes arising from the employment relationship. While Jen is a zealous advocate in the courtroom, she relishes finding solutions for her clients as they navigate the manner in which the employment relationship impacts their business and personal lives. Jen serves on the firm's Policy Committee and co-leads the firm's ESG Practice Group, which leverages her experience advising corporate boards on social and governance issues. She is recognized by Chambers USA, and has an AV Preeminent ranking from Martindale-Hubbell.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.