



April 6, 2020

COVID-19 TO-DO LIST – An Employer Checklist

Executive Summary

Employers are responding to a variety of employment issues as they try to maintain operations during the COVID-19 outbreak. The flexibility and unpredictability of this situation warrant a careful evaluation of the steps that employers have taken in response to the pandemic. To the extent possible, employers should now devise action plans for the coming weeks, and beyond. In view of these considerations, we updated our checklist of workplace guidance to summarize the priority issues employers should be considering now. For more information on these issues, Crowell & Moring has established an [e-hotline](#) and [online resource page](#) to address questions regarding COVID-19. Email inquiries sent to that e-hotline will be directed to the appropriate working group for prompt response.

1. Evaluate efficacy of pandemic preparedness and response to address changing circumstances

- Review steps taken to date to ensure that current practices will continue to meet business needs
- Ascertain whether safety measures are implemented to ensure workforce safety and well-being in accordance with OSHA and other government guidelines
- Consult CDC, OSHA, and applicable state health department and other guidelines regarding recommended health and safety best practices; consider CDC recommendation that individuals wear cloth face coverings in public areas, which would include worksites
- Assess sufficiency of the organization's leave policies to meet the needs of the workforce
- Consider the organization's obligations to continue the wages and benefits of a workforce that is working remotely, at reduced hours, or with reduced numbers
- Determine the organization's level of compliance with existing and new FMLA leave laws
- Evaluate the organization's emergency response plan in light of recent developments
- Review existing collective bargaining agreements
- Assess current telework and computer and electronic use policies to determine whether the organization's data security and proprietary information interests are met
- Reevaluate the effectiveness of the organization's wage and hour compliance programs (*e.g.*, time recording and expense reimbursement practices)
- Recognize that multiple-employee refusals to work due to safety concerns may constitute concerted, protected activity under the NLRA
- For unionized workforces, consider whether any new approaches to workforce management require union notice or bargaining obligations per the terms of the CBA



April 6, 2020

2. Assess permissibility of onsite operation in consideration of applicable closure orders

Crowell & Moring has drafted analyses of a majority of federal, state, and municipal emergency declarations and orders. To request information for a specific jurisdiction, please email COVID-19@crowell.com.

- Delineate essential and non-essential personnel
- Determine whether the entire business or parts of the business at any work site meet the classification criteria of “essential” – some state, county, or municipal orders require that employees performing non-essential tasks not be at the work site
- Review applicable orders for permissible “basic minimal operations”
- Consider application for exemption from closure order where available
- Audit practices to ensure management is following the organization’s directives regarding essential work and telework
- Understand local policies regarding enforcement
- Assess workforce needs, including consideration of telework, furlough, or layoff
- Monitor state and local laws for changes in designation of essential business

3. Essential businesses only

- Provide letters to employees to enable them to travel to and from work
- Consider monitoring health of workforce
 - Assess permissibility of body temperature scans – EEOC guidance permits
 - Implement return to duty questionnaire regarding employee exposure to COVID-19
 - Consider making personal protective equipment available to onsite employees
 - Enforce strict hygiene and sanitary practices
 - Rearrange physical space to ensure adequate social distance to the extent practicable
 - Evaluate shifting onsite work to telework and/or stagger or reduce onsite work schedules
 - Develop protocol to handle employees who test positive for, or are exposed to, COVID-19
 - Continue practice of regular deep cleaning of premises
 - Maintain all notices regarding washing of hands and other best practices
- Monitor travel history of employees and third parties entering onsite premises in accordance with CDC and other government issued guidelines
 - Ensure policies comply with applicable state or local quarantine orders for anyone returning from an area where COVID-19 is widespread
- Implement guidelines to limit or restrict visitor and other third party access to workplace
- Consider implementing policy to address concerns raised by employees who are uncomfortable reporting to work for fear of exposure



April 6, 2020

4. Gauge workforce needs on an ongoing basis

- Shift positions to telework where practicable, even if designated as “essential business” (see below for more information on telework guidelines)
- Weigh options of prospective salary reduction, conversion of salary to hourly pay structure, reduction of work hours, and other methods to reduce wage-related expenses
- If furloughs and/or layoffs are necessary:
 - Review for WARN issues under both federal and applicable state laws
 - Conduct adverse impact analyses and document business justification for selection decisions
 - Assess impact of furlough or layoffs on retirement plans (partial termination) and healthcare benefits and triggers of COBRA notice and related obligations
 - If furloughing, establish policies and procedures to ensure employees refrain from work (*e.g.*, block remote access, request return of company devices)
 - Provide employees with information regarding state unemployment benefits program and the CARES Act enhancement
- Consider pay and/or hours reduction in lieu of furlough or layoff
 - Be mindful of wage and hour laws, including wage reduction notices and predictive scheduling laws
 - Ensure exempt salaried employees remain above applicable salaried-exempt threshold or convert them to hourly employees
 - Provide employees with information regarding any partial state unemployment benefits that may be available
 - Consider that reduction in hours may trigger loss of retirement plan and healthcare coverage resulting in various funding, notice, regulatory filings, or other obligations including COBRA
- Evaluate the viability of bringing on new hires who have not yet started
 - Consider delayed start date vs. revoking offers
 - Be transparent in communications and mindful of potential detrimental reliance claims
 - Ensure compliance with work authorization (I-9) processes; DHS has temporarily permitted remote verification subject to later in-person inspection
- Assess rights and obligations under executive agreements to excuse or delay performance of obligations. Ensure any such action complies with IRC 409A.
- Consider suspending, where practicable, discretionary contribution obligations in accordance with benefit plan provisions, collective bargaining terms, and the anti-cutback rules of ERISA
- Consider implementing incentive plans or extra cash compensation to ensure adequate staffing, while being mindful of wage and hour implications and impact on the definition of compensation in benefit plans



April 6, 2020

- Monitor influx of questions/complaints about retirement or health plan coverage and determine whether formal ERISA internal determination appeal has commenced

5. Evaluate leave policies in consideration of recent federal and state COVID-19 leave laws

- Evaluate applicability of Families First Coronavirus Response Act (employers with fewer than 500 employees)
- Revise policies and comply with posting requirements
- Review qualifying reasons and plan for impact on workforce
- Consider benefits of proactively offering leave (*e.g.*, tax credits, predictability)
- Monitor state and local jurisdictions for new legislative developments (*e.g.*, New York's state-wide paid sick leave in response to COVID-19)
- Ensure continuing compliance with pre-existing state and local paid leave laws

6. Maintain employer communications with employees

- Communicate with employees regarding the following topics:
 - Anticipated worksite closures, furloughs, and layoffs
 - Anticipated impact on compensation and benefits
 - Risk/impact of spread of virus based on current information
 - Social distancing and personal hygiene recommendations based on latest CDC and other guidance
 - Policies affecting those exposed to infection or risk of infection
 - Applicable travel restrictions/guidelines
 - PTO/leave availability and company guidelines
 - Assurance against retaliation
 - Maintain confidentiality regarding reporting exposure and infection
 - Non-discrimination and anti-harassment policies
- Develop emergency communication protocol and consider implementing hotline/dedicated webpage/email address/text messaging system
- Compile short list of helpful resources and contacts for distribution among employees
- Maintain and update employee contact information and emergency contacts

7. Manage remote workforce

- Implement or update a telework policy that includes codes of conduct, data security and confidentiality safeguards
- Consider expense reimbursement policy as required by law



April 6, 2020

- Reinforce attendance and punctuality policies
- Ensure timekeeping requirements are followed to safeguard against off the clock work for non-exempt employees
- Assess (and reinforce if needed) reporting and supervisory structure for effective performance management strategies
- Consider implementing daily or weekly reporting requirements to maintain necessary levels of productivity and quality of work
- Consider increasing monitoring of company systems to prevent misappropriation of company confidential or proprietary information
- Evaluate work hours and make necessary adjustments to satisfy business needs
- Manage employee leave in accordance with company policies and federal, state and local leave laws
- Evaluate whether remote onboarding procedures comply with applicable legal requirements (e.g., remote I-9 verification)
- Evaluate current hiring needs and determine whether to defer pending offers
- Consider OSHA obligations and workers compensation issues applicable to offsite workforce

8. Develop external communications

- Advise customers, clients, and vendors regarding impact of COVID-19 crisis on business operations
- Maintain regular communication with third party payroll services provider and benefits administrator regarding continuation of services

9. Formulate post-pandemic business plans

- Maintain communications with employees, customers, clients, vendors, and other third parties to protect goodwill
- Develop plans to ensure that the workplace is prepared for the safe return of the workforce
- Evaluate level and nature of staffing needs once the workplace reopens
 - Develop non-discriminatory selection criteria of staff members who are to return
 - Reassess the propriety of continuing practice of employee health monitoring and screening
 - Reevaluate the duties of returning staff to confirm FLSA exemption status
- Evaluate record retention practices to ensure (1) preparedness in event of litigation, and (2) compliance with requirements of ERISA, ACA and the IRC
- Establish a hotline (or reaffirm an existing one) for employees to initially raise concerns regarding COVID-19-related employment issues
- Review and assess insurance coverage to address post pandemic needs



April 6, 2020

10. Consideration of other actions

- Assess available financial assistance and other resources under CARES Act and other government assistance programs
- Consider introducing ADR programs limited to COVID-19-related claims with class and collective action waivers to returning employees or those who are receiving paid leave
- Devise strategy to respond to anticipated aggressive organizing by unions.

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For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.



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