

RETURN TO OFFICE ISSUES

Perspective by CRF

As vaccination rates rise, many employers are contemplating “return to office” plans for their employees. The COVID-19 pandemic has pushed employers and employees to adapt—through virtual meetings, remote work, the use of new and emerging technologies, non-traditional working hours and other solutions—to continue operating. While remote work has become a “new normal” in many industries and workplaces, some work cannot be done remotely, and employers are finding that some work that technically can be done remotely is better done in person—negotiations, critical business decisions, brainstorming sessions, providing sensitive feedback, and onboarding new employees are examples of work that may lose some effectiveness when done remotely.

Planning a potential return to office for employees, some of whom have been away for 18 months or more, will require employers to consider a number of issues, including whether they intend to develop vaccine policies or offer incentives, how to handle requests for remote work or accommodations, data privacy issues, and compliance with state, local and federal law. In addition to the looming potential for a wave of defaults in the U.S., financial services organizations must also brace for complexities related to return to office. Employers should consider the following now as they begin or continue to develop policies for the future.

PEOPLE

Ida S. Shafaie

Onalee R. Yousey

PRACTICAL TIPS FOR EMPLOYERS FOR APPROACHING A RETURN TO OFFICE

1. **Don’t expect “return to office” to mean “return to normal.”**

Employers must implement new policies regarding vaccines, health and safety and remote work. Employers should expect that policies will remain fluid and adaptable as new information and new guidance is issued. In addition, it may take time before employees feel comfortable interacting in person again; employers should be patient with employees as they are reintroduced to the “old way” of conducting business.

2. **Keep good documentation of all COVID-19 policies (and changes in policies).** Throughout the pandemic, the Centers for Disease Control and Prevention (CDC) has released updated guidance concerning disease transmission, testing, vaccines, and workplace and public health policies. The Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC)

have routinely updated their policies in accordance with CDC guidelines, as have state and local agencies. It is important that employers consult CDC guidance regularly and keep track of state and local public health guidelines so that if a lawsuit or complaint from an employee arises, the employers have a detailed record of what they were doing and when. Employers should be prepared to establish that they were in compliance with “state-of-the-art” safety requirements at the time they were in effect.

3. **Communicate all policies to employees clearly.** Use multiple platforms, including email, the employee intranet and the company website to make sure employees understand policies and policy changes as they are happening. Provide opportunities for employee feedback through anonymous surveys or virtual town hall meetings. If employees are returning to the office, consider posting policies in communal or common areas.
4. **Plan to manage employee relations concerns.** Loss of morale during COVID-19 in general is a concern, but also loss of morale in contexts where employees are resistant to the vaccine may present a challenge to some employers. Employers should consider how this may impact the organization and whether Employee Assistance Programs (EAPs) or other resources may be available.
5. **Be prepared for loss of talent.** Employees may seek other work if not permitted to work from home. More and more, employees are demanding flexible work options. Employers should be cognizant of this as it relates to attracting and retaining top talent.
6. **Anticipate having employees in both environments.** Some employees may need to continue working remotely. Also, as there are increasingly blurred lines between work and home, it’s important to watch out for contact with employees on protected leave. For example, FMLA, ADA accommodation leave and sick leave under state laws are protected and employers generally cannot interfere with an employee’s protected leave from work. For non-exempt employees, it also continues to be important to monitor and accurately track time spent working from home to ensure compliance with applicable overtime requirements.
7. **Consult legal counsel with questions.** The pandemic has created a broad and ever-changing legal landscape. Advice that may have been sound several months ago may be stale given new information or changes in the law. Employers should make sure they are checking in with counsel to ensure their policies and practices remain legally compliant in order to reduce risk and future liability. Moreover, navigating accommodation requests and vaccine exemptions requires

very careful legal analysis to avoid violating employees' rights, even inadvertently.

Before implementing a vaccine and/or testing mandate in the workplace, employers should consider the following:

1. Determine how to handle exemption requests from employees.

1. Establish a clear and well-developed process for receiving, evaluating and responding to requests for exemption. Avoid ad hoc decision-making regarding such requests. Designate one or more individuals to handle such inquiries and requests, including decision-making, to ensure uniformity of application. Consider and decide whether to accept exemption requests for any reasons other than those required by applicable law, and do not waiver from that decision.
2. Trends show an uptick in litigation from workers who have requested telework as a reasonable accommodation for a disability. Post-pandemic, it may be more difficult for employers to raise the defense that telework is not reasonable or is an undue hardship if it was permitted and the employee successfully performed the essential functions of the job during the pandemic. However, employers may still be able to maintain the argument that in-person work is an essential function of the job, depending on the industry and context.
3. Vaccine mandates are attractive to employers because they are easier to enforce than other COVID-19 policies. The EEOC and the Department of Justice have found that vaccine mandates are legal, as long as an employer offers exemptions for sincerely held religious beliefs and disabilities.
4. Employers may use rigorous COVID-19 testing as an accommodation, in addition to mask-wearing, alternative work schedules, isolated work environments and even worker reassignment. But beware: time spent by non-exempt employees obtaining required tests should be considered compensable.

2. Consider local and state laws—not just federal law.

1. Some jurisdictions have enacted laws that prevent vaccine mandates in the workplace. Others have enacted laws regarding using vaccine status in employment decision-making (Montana). Consult with legal counsel to determine if any such laws have been enacted in your jurisdiction(s) that may impact your decision-making before implementing any new policies.

3. Be mindful of unions and collective bargaining obligations.

1. Some collective bargaining agreements require notice and an



opportunity to bargain over vaccine mandates and other return to office policies.

4. Watch out for wage and hour issues.

1. Employee time spent getting vaccines or testing can trigger wage and hour issues. In particular, if employers decide to mandate vaccines or COVID-19 testing, they should consider such time as compensable and pay employees accordingly, potentially including overtime pay for non-exempt employees.

5. Manage data privacy concerns.

1. The EEOC has indicated that vaccination records are confidential medical records, but the ADA does not prohibit employers from requesting copies. Nevertheless, employers must be prepared to preserve and maintain confidentiality. Confidential medical records must be kept separate from personnel files.
2. While some employees may raise concerns about data privacy under HIPAA, it typically does not apply in the private employment context. Consult an attorney regarding your specific case.
3. Confirm that no vaccine passport law prevents an employer from asking employees about their vaccination status or for copies of vaccination cards; consult counsel in your jurisdiction regarding changes and updates to local laws.
4. Use a consistent method for collecting data regarding vaccination status from employees—whether that's a survey, collecting attestations or actual photos/copies of vaccination cards.
5. Employers may use a visual marker to show who is vaccinated in the workplace. Some companies are choosing to use stickers on workers' badges, for example. Employers are cautioned to use the markers to delineate the vaccinated – not unvaccinated employees.
6. Note that monitoring hourly workers' time while they work from home may trigger privacy issues.

6. Identify potential incentive programs.

1. Vaccine incentives are permitted according to the EEOC, as long as they are not so substantial as to be coercive.
2. It is unlikely that incentives such as raffle tickets, one-time payments, PTO or company swag would be considered coercive.
3. However, using an incentive program creates a risk of lawsuits on the basis of disability or religious discrimination—will employees who cannot get the vaccine because of a disability or because of their religion be given access to the incentive?



While these considerations are not all-encompassing, they demonstrate the breadth of issues associated with both continued remote work and return to office planning and policies. Although many employers have adapted well to both working environments, it is important to remain vigilant when developing policies and practices that will almost certainly be subject to change, and even scrutiny, in the future. As a result, careful planning now, combined with flexibility in the future, is key. No one knows when a “return to normal” will happen or what “normal” will be. Diligence now, however, will help ensure that employers are able to return their workforce to the office in an effective manner with minimal complications.