



## Labor & Employment / Health Care / Corporate & Finance ADVISORY ■

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### Ramping Up: What Does Restarting Look Like?

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What does a post-pandemic business world look like? What should companies be planning and preparing for when restarting their businesses and bringing back employees? Protecting the health of employees and customers will remain paramount, and managing risk while ramping up a business will take careful planning and thoughtful decision-making.

There are few guideposts for ramping up business, either during the slowing of a pandemic or after a pandemic officially ends. We provide a starting point for legal and practical considerations for businesses planning to restart in a post-pandemic world. For purposes of this advisory, “post-pandemic” includes the deceleration of COVID-19 so that companies are able to resume business in some areas of the U.S. in accordance with local and state directives, even if the World Health Organization (WHO) or Centers for Disease Control and Prevention (CDC) have not yet officially declared an end to the COVID-19 pandemic.

Several states in the U.S. have recently announced formation of panels or pacts to plan for and coordinate the reopening of nonessential businesses, at the appropriate time. And federal “[Opening Up America Again](#)” guidelines were issued on April 16, 2020, which describe gating criteria and a phased approach for reopening. But there are potential issues for companies to consider when developing their plans to reopen.

#### **Plan for a Second Wave**

In its 2009 publication regarding the H1N1 pandemic (also referred to as the swine flu), the [WHO provided a sobering reminder](#):

Previous pandemics have been characterized by waves of activity spread over months. Once the level of disease activity drops, a critical communications task will be to balance this information with the possibility of another wave. Pandemic waves can be separated by months and an immediate “at-ease” signal may be premature.

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In a 2016 publication regarding Influenza A, the [CDC struck a similar chord](#):

When pandemic influenza has subsided, public health actions include continued monitoring of pandemic influenza A virus activity and preparing for potential additional waves of infection. It is possible that a 2nd pandemic wave could have higher severity than the initial wave. An influenza pandemic is declared ended when enough data shows that the influenza virus, worldwide, is similar to a seasonal influenza virus in how it spreads and the severity of the illness it can cause.

Accordingly, subject to more current guidance from the CDC and WHO, employers should prepare for and protect against the consequences of a “second wave” of COVID-19 cases. As businesses reopen at the appropriate time, reminders of the signs and symptoms of COVID-19, good hand hygiene, coughing/sneezing etiquette, and social distancing to employees remain vitally important. Employees should be encouraged to stay at home if they are sick. Employees who exhibit symptoms of COVID-19 at work should be separated from other employees, sent home, and instructed to contact their health care provider or local health department for follow-up.

Since a second wave could cause an increase in absenteeism, companies should consider which employees can perform essential functions remotely and which employees are required to be on-site to perform essential functions. Encourage telework when possible and feasible. Also, consider cross-training for essential functions as one measure to help combat the consequences of a second wave. [As noted during the H1N1 pandemic](#), “It’s also worth keeping in mind that even at peak levels of illness during a wave of an influenza pandemic, half of the people who will get sick have yet to become sick. You may be dealing with absenteeism for a while.”

## **Negotiate the Patchwork of Stay-at-Home Orders and Business Closure Orders**

Your business – and each location if you have more than one – is facing a new patchwork of rules and regulations. Each jurisdiction has its own unique circumstances, so government orders are different everywhere you turn. Be sure to stay on top of what your city, county, and state have ordered, plus any federal rules and regulations that apply to your industry.

- Open only in compliance with the terms, restrictions, and hours of your local and state orders for the permitted operations of essential or nonessential businesses. Current orders might be changed from time to time, so check frequently for updates that apply to your specific area.
- Consider contacting your local and state public health authority for recommendations, guidance, and specific proposals to allow you to reopen your business. As noted during the H1N1 pandemic, “Local public health authorities will have information that is most relevant to your location . . . , [including] changes in illness severity.” Moreover, “local public health recommendations to communities and businesses could be revised quickly.” It may also be helpful to contact the local mayor or your governor for alignment, support, and guidance regarding specific restrictions or considerations.
- Consider whether you are resuming your core business or modifying your business to make new products or perform different services (as directed by the federal government under the Defense Production Act).
- Are your employees able to travel to work, given possibly reduced availability of public transportation? Are your employees able to come to work if schools or childcare centers are still closed?

- Are necessary vendors able to conduct their business and provide you with needed supplies for you to operate and maintain your business? This may be a critical consideration, especially when your vendors are in different states and localities.

## Employee and Customer Health and Safety Issues

### Physical preparation of worksite or company premises

How to appropriately clean work areas before employees and customers return can depend on your specific work environment (manufacturing versus office) and can include workstations, restrooms, cafeterias, break rooms, locker areas, commonly used surfaces, high-traffic areas, elevators, tables, chairs, computer screens, and keyboards.

- Consider whether to use your current cleaning staff or a third-party company.
- Use cleaning products consistent with [Environmental Protection Agency](#) (EPA) and [CDC](#) guidance to employers regarding disinfection.
- Consider increased cleaning and disinfection schedules.
- Consider whether to replace HVAC filters or clean/disinfect them.
- Make proper sanitation easy and available:
  - Does the company have a sufficient amount of soap, disinfectant, hand sanitizer, paper towels, and tissues on hand for employees to use?
  - Consider establishing clean rooms – areas for employees to wipe down and sanitize their laptops and devices when arriving to work before going to their office.
  - Sanitation for elevator use and doorknobs.
  - Consider biohazard disposal bins – special bins or trash for employees to properly dispose of their gloves and masks.
- Inform your employees that the workplace has been cleaned, including elevators, restrooms, common work areas, and high-traffic areas.
- In accordance with public health recommendations, governing orders, and company policies on social distancing, consider how you can rearrange and restructure the physical environment to encourage and enforce social distancing:
  - Close or restrict common areas where employees are likely to congregate and interact together – or enforce social distancing.
  - Space out workstations, desks, lockers, and conference room and break room chairs.
  - Move desks from facing each other to provide more space in an office environment if possible.
- Consider limitations on elevator usage and signage for spacing.
- Consider having a specific “isolation room” for an employee to go to if they are exhibiting COVID-19 symptoms at work.

- Develop an appropriate policy regarding the topic of workforce contact tracing if an employee tests positive for COVID-19 (and consult public health authorities for assistance).

### **Employee health and safety**

Keeping your people healthy and safe while at work is paramount. Federal and state agencies have provided guidance that can help you get started on your plans.

- Consider a hazard analysis for ramped up operations, which may include outside resources, such as qualified consultants.
- Review orders, directives and guidance from the Occupational Safety and Health Administration (OSHA), CDC, and state and local authorities. Are your planned protective measures compliant and consistent with these authorities and sources? Is your plan for personal protective equipment (e.g., respirators, facemasks, gloves) compliant?
- Consider the CDC's guidance regarding [Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#). To maintain continuity of operations after ramp up, should you institute these procedures? (Pre-screening, including temperature checks; regular monitoring; masks; social distancing; disinfection and cleaning).

### **Staffing decisions and considerations**

How do you bring everyone back together after so much time apart? Start thinking about what to do when the second wave hits and some employees may need to return home, either to take care of a household member who is sick or because they have become sick themselves.

- Consider whether to start with staggered shifts or on a smaller pilot basis to begin with (to avoid large groups of employees being in one place at one time). For manufacturing plants or other shift work, options could include assigning staggered times for starting shifts, taking breaks, and having meals.
- Consider whether to also have employees confirm the absence of other symptoms that are now being mentioned as possible symptoms of COVID-19, including sudden loss of hearing or taste, pink eye, fatigue, aches, diarrhea, and gastrointestinal issues. Consult with local and state public health authorities, since they may have guidance on whether these less-common symptoms are present or relevant in your local community, especially in combination with other symptoms. Self-certifications and general survey responses submitted by employees who are self-monitoring their symptoms at home should be maintained in HR as an employment record. However, under the ADA, on-site screenings of employee temperatures should be maintained as a confidential medical record.
- Consider objective return-to-work criteria for employees who were diagnosed with COVID-19 or who self-quarantined (either as presumed infected or caring for a household member who was diagnosed with COVID-19). Keep in mind that testing may not have been available and that it could be difficult or infeasible for an employee to obtain a doctor's note for prior illness or current ability to return to work. An employer may request that employees provide a doctor's note, but should not take disciplinary action if the employee

is unable to provide one. Employers can consider whether an occupational health clinic may be able to see and clear employees to return to work.

- Consider objective return-to-work criteria for employees who recently returned from a cruise or international travel.
- Continue to maintain the privacy of employees who were previously diagnosed with COVID-19 or were quarantined with suspected COVID-19.
- Apply consistent policies for leave and PTO. Some employers during the H1N1 pandemic permitted employees to donate leave to others. Some employers also chose to let employees “borrow” from future accrual, exhaust PTO hours and go into a negative balance, and/or blend sick, vacation, and holiday time into one “bank” of PTO.

### **Communicate your plan to employees**

Having a plan in place not only helps with efficiency but also provides some peace of mind for employees who may be worried or anxious about returning to the workplace and being surrounded by people again. Communicating that plan will also smooth the transition back to on-site work.

- Clearly communicate steps taken to make the workplace safe and the general plan for resuming business in compliance with applicable local and state laws, and public health guidance, and tailor your communications to best suit your now dispersed workforce.
- Designate a contact person (with a phone number and email address) for employees to ask questions, and provide answers to those questions in a timely manner. Analysis of the questions employees have can provide insight into employee fears and topics for additional communication. Also, you might receive requests for special accommodations from employees who are members of a “vulnerable population,” as mentioned in the April 16, 2020 Guidelines. Being responsive to employee questions can help build employee trust in the company’s plan.
- Post signage in the workplace reminding employees of ongoing good handwashing hygiene, coughing/sneezing etiquette, precautions (wash hands, let us know if you become ill), and social distancing.
- Remind employees who they should contact within the company if they are approached by the media about the company’s COVID-19 response and reopening. The company’s designated media contact person should handle all media inquiries for consistent messaging.
- Assess whether there are gaps in services employees need because other businesses are not open (such as nearby restaurants). Consider whether, for example, to have employees bring their meals to work as other businesses nearby ramp up themselves. Other options might include food trucks.

### **Provide training to your employees**

Before the company reopens, there is plenty of new information your employees will need to know when they return to the workplace. The size of your workforce and type of workplace will determine how best to disseminate the information (handbooks, videos, new orientation, virtual meetings).

- Provide training to communicate new policies intended for health and wellness, including staggered shifts (if any), return-to-work criteria, self-screening protocols (if any), who to contact at the company if you become sick, vendor and contractor policies, personal protective equipment (if any), and reminders of the importance of good handwashing hygiene, coughing/sneezing etiquette, and social distancing. Emphasize to employees the importance of working together to maintain a safe and healthy work environment. Remember that such training is likely compensable time under applicable wage and hour laws.
- Educate employees on new procedures if employees will be screened before being permitted to come onto company premises or required to submit daily self-screening questionnaires or general surveys.
- Provide consistent and repeated education so employees are aware of the signs and symptoms of COVID-19 and know what to do and who to contact if they become ill at work or if they observe another employee with visible symptoms of COVID-19 at work. Emphasize the education through signage in the workplace.
- Encourage employees to self-clean their areas as appropriate (such as using a disinfecting wipe to clean a computer keyboard, telephone, or a commonly used printer). Do not expect or request that employees bring such cleaning items from home.
- Consider whether to establish and communicate travel restrictions for employees, such as for upcoming international or domestic travel and cruises, and consider questionnaires or self-certifications upon return. Consult the local public health authority and CDC for travel health notices and restrictions, including guidance for isolation practices after returning from travel.

## Business Considerations

Your vendors and customers will also be adjusting to the return to normality (or some semblance thereof) and will need to know you are back in business. As always, communication is key.

- Initiate proactive contact with your vendors; make sure you have sufficient supplies and supply chains in place to reopen your business and maintain operation.
- Let your customers know your intended plan and timetable for reopening plus any new precautions in place, such as a phased opening, shorter hours, modified modes of delivery, visitor and shopper restrictions, and expected turnaround time for orders.
- Consider whether there are any notices you need to provide to vendors or customers (in case you previously sent notices under contracts regarding closure or invocation of force majeure).
- Consider whether to prohibit or restrict vendors and contractors from visiting company premises, unless for critical functions that must be performed onsite on company premises.
- Consider posting signage at entrances on company premises encouraging vendors and contractors to conduct business through telephone or electronic means if possible.
- For business operations that must be conducted in person and onsite (such as fixing a machine), consider the use of screening questionnaires (which are printed and ready) for vendors and contractors to complete

before being permitted to enter company premises. Encourage such vendors and contractors to follow proper handwashing hygiene, coughing/sneezing etiquette, and social distancing while on company premises.

- Are upcoming meetings, conferences, workshops, and training sessions essential? Continue to consider alternative modes of meeting, such as remote or virtual meetings. Be cautious about rescheduling large conferences and mass gatherings in the immediate near future as conditions and guidance could rapidly change. Consult current CDC guidance for mass gatherings at that point in time and consider local and state orders, if any, regarding essential businesses, sheltering in place, and gatherings involving more than a specific number of individuals.

## Consider Publicizing Your Ramp-Up Plans

As the [SEC has noted](#), “broad and extensive coordination across workers, firms, investors and governmental officials will be critical to successfully emerge from this fight.” Accordingly, the SEC recommends that companies publicly articulate their strategies for restarting: “As just one of millions of examples, if the owner of an industrial laundry business becomes comfortable that the hotel industry is soon to pursue a credible plan for increasing activity, the laundry business may be less likely to furlough (or may plan to rehire) employees.” See our previous Alston & Bird advisory: [SEC Reminds Companies to Keep Their Disclosures Looking Forward](#).

## Remain Flexible and Prepare for Unpredictability

As [noted by the WHO](#) in 2010 regarding H1N1’s post-pandemic period, a post-pandemic phase does not mean the pandemic goes away. There can still be “localized outbreaks of different magnitudes” that can show “significant levels of ... transmission.”

“Pandemics, like the viruses that cause them, are unpredictable. So is the immediate post-pandemic period.” Plus, “no two pandemics are ever alike.”

As companies assess whether, when, and how to reopen, “flexibility and nimbleness” were some of the most valuable traits noted during the H1N1 pandemic in dealing “with rapidly shifting conditions.”

And operating during a pandemic has been analogized to “running a marathon with stages that feel more like sprinting. Pace yourself.”

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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