

Employer Considerations When Bringing Employees Back to Work

Many cities and city employees are eager to resume full operations and a sense of “normalcy,” but there are considerations that cities should keep in mind before going back to full operation. First, note that as of the date of this article Governor Beshear has not released the in-person restrictions for government operations. However, the governor has released [requirements](#) for businesses that are reopening or who have remained open. The governor has also said that local governments should consider incorporating these suggestions into their reopening plans as well and are summarized below.

First, cities should consider the following in order to safely bring back their workforce:

- Designate a “healthy-at-work” officer to provide guidance and ensure compliance. The officer should also assist in coordinating training on the healthy-at-work protocols adopted by the city.
- Continue to allow employees who can telecommute to continue to do so if possible.
- Determine which employees are essential to be in the workplace in order to do their jobs.
- Consider a phased return-to-work plan.
- Enforce [social distancing](#) and include markers throughout city hall and other city buildings as reminders of the 6 foot distance guidelines. If social distancing cannot be enforced, require the use of personal protective equipment or reconsider bringing employees back at full-force at this time.
- Reorganize work spaces to encourage social distancing.
- Close or limit the use of common gathering areas, such as break rooms and kitchens.
- Restructure meetings to limit the number in attendance and teleconference or video conference whenever possible.
- Limit employee contact with third-party vendors.
- Cities must ensure, to the greatest extent practicable, that their employees wear [a cloth mask](#) (a surgical or N95 mask is not required, but note the [requirements for first responders](#)). Provide accommodations to those who cannot wear them. Cities may also encourage customers entering city hall or other city buildings to wear masks. However, as a public entity, it is not currently recommended the city refuse service to a customer who is not wearing a mask.
- Cities must ensure that employees whose job duties include touching items often touched by others (e.g., credit cards/cash, paper, computers) wear [gloves](#) that are regularly replaced.
- Develop a plan on [cleaning and disinfecting](#) public spaces and high-use items, such as copiers or shared computers, at least twice daily.
- Provide adequate hand sanitizer (60% alcohol content or higher) for both employees and customers and ensure that it is made available near high-traffic and high-touch areas (e.g., doors or door handles) and [post notices on proper hygiene](#).
- Consider [on-site temperature](#) or other health questionnaires, but remember that not everyone with COVID-19 has a fever. Also note that these are considered medical exams, and as such this information must remain confidential.
- Make sure that all employees and supervisors know the [signs and symptoms](#) of COVID-19 and when employees are expected to stay home and when supervisors should send employees home.
- Have a process in place for [contact tracing](#) if an employee becomes ill, but again note that specific information regarding the sick employee must remain confidential. Also be prepared to

immediately restrict access to contaminated areas except for essential personnel for at least 24 hours, if practicable, and adequately disinfect the impacted areas.

- Note the Centers for Disease Control and Prevention (CDC) safety practices for [critical infrastructure workers](#) who may have been exposed to COVID-19 but are not showing symptoms.
- Update [leave policies based on federal law](#) (see below) and telecommuting (KLC has a sample policy). Also communicate and educate employees on the policies.

Other concerns include employees who are at a higher risk of severe illness due to COVID-19, such as those over age 65 and people of any age who have serious underlying medical conditions such as [diabetes, serious heart conditions and chronic kidney disease](#). In these situations, the employee will be protected by the Americans with Disabilities Act (ADA) and possibly Family and Medical Leave Act (FMLA), [if it is applicable in your city](#), and the [Emergency Paid Sick Leave Act](#) (EPSLA). If an employee requests an accommodation or refuses to come to work because of their condition, follow your ADA process for providing accommodations. This will include documentation from the health care provider of the need for an accommodation, but keep in mind that it may take longer to get that documentation during the pandemic. Remember that an accommodation may include unpaid [leave time](#). In addition, under EPSLA the employee may be entitled to 80 hours of paid sick leave, up to \$511 per day maximum, for a total of 80 hours in a two-week period if he or she has been advised by a health care provider to self-quarantine. Even if there is no accommodation that can be made or the employee has already used EPSLA, the employee may also qualify for FMLA, [if your employees are eligible for it](#) and if their condition is an [FMLA-qualifying condition](#) for which leave can be taken.

Many employers may have employees that fit into the high-risk category, but employers should not require that these employees stay home, because this may be considered discrimination under ADA. Employers must keep in mind that even though an employee may be at a higher risk if they contract COVID-19, it does not mean that they cannot perform the essential functions of their job or that they pose a safety risk. To lessen liability concerns, all employees should be made aware of their options under EPSLA and be allowed to make the request for an accommodation to the employer.

The next concern may be an employee who is fearful of returning to work because they live with or they care for an individual who may be considered high risk as discussed above. Under ADA, an employer only has an obligation to accommodate an employee's own health condition, so ADA will not apply in this situation. Under EPSLA, an employee may be eligible for two-thirds of his or her regular salary, capped at \$200 per day, for up to 80 hours in a two-week period to care for an individual who is quarantined or has been advised by a health care provider to self-quarantine because of an underlying health condition. As stated above, they need to provide a statement from a health care provider, but it may take time for that to be provided. In addition, if the employee is eligible for FMLA, they may also be entitled to FMLA leave. It is important to note that EPSLA allows an employee paid leave when caring for an "individual," which is not limited to family members, so it is a much broader definition than what is allowed by [FMLA, which only includes a child, spouse or parent](#).

In some situations, employees may not have an underlying health risk nor do they have contact with anyone with an underlying health risk, but they are still fearful of returning. In these cases, EPSLA, ADA and FMLA will not apply; however, employers should be compassionate when making decisions related

to fearful employees. If it is possible to allow an employee to telecommute or take leave, those options should be considered.

Last, cities may have employees who are unable to return based on childcare obligations. In this situation, the [Emergency Family and Medical Leave Expansion Act](#) (EFMLEA) will apply and EPSLA may also apply. Under EFMLEA, employees are entitled to 12 weeks of leave when their day cares are closed or their childcare providers are unavailable due to COVID-19 related reasons, such as a closure. This leave is not in addition to the 12 weeks provided by FMLA, but is an additional reason for use of the leave. If an employee has used four weeks of FMLA during the designated FMLA year, he or she would only have eight weeks left available to use for this reason. There are also many nuances within EFMLEA that are much different from FMLA. For instance, this leave is provided to any employee who has worked for the employer for 30 days and is applicable to any employer with between one and 500 employees. Under [FMLA the requirements](#) to use are much more strict.

The first two weeks of the 12-week EFMLEA is unpaid; however, the employee may choose to use EPSLA at two-thirds of their regular rate up to \$200 per day and may also choose to supplement this first two-weeks with accrued vacation or personal leave. The employee may choose to use their accrued vacation or leave time during the first two weeks or to take the leave as unpaid. The next 10 weeks is paid to the employee at two-thirds of their regular rate up to \$200 per day and a total of \$10,000 over the period of leave. During the 10-week period, the employer can require, or the employee can request, the use of accrued vacation or personal leave to supplement the unpaid one-third portion. In some cases, such as when parents are sharing childcare duties, employees may need to use this leave intermittently. Under EFMLEA, an employee can only use this time intermittently when the employee and employer can agree on a schedule; however, the Department of Labor encourages employers to collaborate and be as flexible as possible during this difficult time.

Keep in mind this is an overview to prompt considerations before beginning this process, and many details of these laws are not included in this article. Returning to work at full capacity is not a process that should be taken lightly because it is fraught with liability concerns if not handled correctly. If you have any questions about this or any other personnel-related questions, contact KLC Personnel Services Manager Andrea Shindlebower Main or Personnel Services Attorney Courtney Risk Straw.