

Back to Business: Managing the Workplace in a COVID World

Did I properly onboard my recent new hires?

Federal law, and in many areas state and local law as well, require that businesses provide new employees with certain written notices and other materials upon hire. This is the case even if the employees will be working remotely. Many businesses also require new hires to sign additional documentation outlining the terms and conditions of employment.

To that end, now is a good time to ensure that all recent new hires (at least those since February or March 2020):

- Received and, to the extent required, signed all notices required by applicable law. This would include, for instance, any wage-related notices that identify whether the employee will be classified as exempt or non-exempt and his/her rate of pay (e.g., under New York's Wage Theft Prevention Act).
- Signed all required offer letters, restrictive covenant/confidentiality/works for hire agreements, arbitration agreements, remote working agreements, and/or other documents delineating the terms and conditions of employment.
- Acknowledged receipt of the company's employee handbook and any other personnel policies by which they will be bound.
- Completed the requisite immigration and tax forms (e.g., forms I-9, W-4).

Employers should also confirm that there have been no recent changes in applicable state and/or local law relating to the hiring and onboarding process (e.g., on May 10, an NYC law took effect that bans employers from testing job applicants for marijuana and THC).

Do I need to update my employee handbook?

The pandemic has not stopped federal, state, and local lawmakers from continuing to enact significant workplace-related laws in recent months. In mid-March, for instance, New York State legislators adopted a statewide paid sick leave law that takes effect on September 30, 2020. Still other laws that were passed prior to the pandemic have taken effect in recent months or are slated to do so between now and year-end. And this is to say nothing of recent developments at the federal level – e.g., passage of the Families First

Coronavirus Response Act (FFCRA) and the US Supreme Court's ruling that Title VII of the Civil Rights Act of 1964 bars sexual orientation and gender identity discrimination.

In light of this, employers should review their employee handbooks to ensure that they comply with federal and any applicable state and local laws. In New York, for instance, employers will, at a minimum, want to adopt policies that comply with the aforementioned statewide paid sick leave law as well as a recent change to the State's voting leave law. Likewise, any business with fewer than 500 employees would be well-served to adopt a policy that outlines employee rights and responsibilities under the FFCRA.

Regardless of location, all businesses should also consider adopting comprehensive remote working, bring your own device, business continuity, and information security policies, or updating any existing policies in this regard. You may also want to include a policy addressing how the company will support employees with young or school-aged children, who may be unable to attend childcare centers or schools this fall due to the pandemic.

Do I need to conduct any required sexual harassment prevention training?

Over the past several years, numerous states and cities have adopted requirements that employers provide annual sexual harassment prevention training to their workers. The pandemic has not lessened or delayed these requirements.

For example, most New York State and City employers must provide harassment prevention training to any new employees within 90 days of hire and, also, annually for existing employees (in New York City, this includes independent contractors as well). Despite the pandemic, Empire State employers must still ensure compliance with these requirements for both new and existing workers.

Under the current circumstances, compliance with applicable training requirements may mean that the training is conducted virtually. No matter the form or format, though, training must be conducted in line with applicable legal timeframes and with some sort of integrated interactive component, as required by law.

Have I properly managed, counseled, and documented employee performance issues?

For many businesses, the pandemic threw the employee performance management process into a state of upheaval. Now, however, perhaps more than ever, it is critical to properly manage and document worker performance issues. This includes:

- Conducting formal employee evaluations on or as close to schedule as possible.
- Reminding supervisors to, separate and apart from the formal evaluation process, continuously provide honest and accurate feedback to their reports throughout the year. A remote working environment does not change this.
- Taking appropriate corrective action concerning poor performers (e.g., putting them on a performance improvement plan).
- Documenting any performance issues – including the who’s, what’s, when’s, where’s, and how’s – and following up as appropriate under the circumstances.

Are my leave of absence and accommodations protocols legally-complaint?

Prior to the onset of the pandemic, understanding whether and to what extent employees were entitled to a leave of absence required a thorough analysis of often nuanced federal, state, and local leave laws, together with disability discrimination regulations. The pandemic has, if anything, amplified the complexity of this analysis, with new leave of absence laws having popped up at every level of government.

In addition, given that many employees may now require accommodations as a result of the pandemic, employers must be prepared to handle an onslaught of accommodation requests. For these reasons, all employers should:

- Ensure that they understand what leave of absence laws apply to their employees in the jurisdiction(s) in which they operate.
- Ensure that they have a clear process in place for employees to request accommodations on any basis protected by applicable federal, state, and local law. This process should include, among other things, information for individuals requiring an accommodation based on their status as being at high risk of serious illness, if infected with COVID-19

– for e.g., if the employee is over the age of 65, pregnant, or has an underlying health condition.

- Ensure that employees are aware of the procedure to request an accommodation – even and perhaps especially while teleworking – and that supervisors are properly trained to handle these requests.

What other items should I be considering when managing my “new” workplace?

- If employees’ duties have changed due to the pandemic, review and update their job descriptions as appropriate.
- Update any form separation/settlement agreements to include references to laws – e.g., the FFCRA – that have been passed within the past few months.
- If you are considering engaging workers as independent contractors rather than employees (e.g., to reduce financial expenditures), strongly consider whether the contractors are properly classified (particularly in states like California, Massachusetts, and New Jersey that use the so-called “ABC test” to determine worker misclassification).
- Consider conducting an audit to ensure that non-exempt employees who work remotely are accurately recording their daily time.
- Ensure that non-exempt employees who spend time waiting to be screened for COVID-19 related symptoms before entering the workplace, are compensated for their waiting time.
- Assess the parameters of the company’s workers’ compensation policy as it relates to employees who are working in their homes.
- Ensure that the company has a clear policy with respect to reimbursing employees for any equipment purchased for a remote work setting.
- Determine whether there are any implications for your company of having employees working in a remote capacity in states in which the company did not previously have a workforce presence. This may require the company to register to do business in that state and take other, related actions.
- In a related vein, if employees are now working primarily or exclusively from a different state/city than they did before the pandemic, ensure that you are complying with the laws – e.g., the leave of absence laws – of the new state/city.