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The chief legal
officer's role in
transition back to
the workplace



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Employers are confronting a myriad of decisions as the workforce—or at least some of it—transitions back to the workplace. The chief legal officer (CLO) has a key leadership role to play as the enterprise considers the decisions and risks related to workplace transition.

The decision to transition back to the workplace

There are several sources that offer guidance for returning employees to the workplace. These include federal, state, and local sources and recommendations from health care professionals which may be relevant to your geography and industry.

- The White House and US Centers for Disease Control and Prevention's (CDC) [Guidelines for Opening Up America Again](#)
- Applicable state, county, and city schedules and guidance—being mindful that rules may differ significantly by jurisdiction
- Guidance propounded by the [CDC](#), the [Occupational Safety and Health Administration](#) (OSHA), and other applicable agencies
- Industry-specific guidance by OSHA ([package delivery workforce](#), [manufacturing industry](#), and [retail workers](#)) and other applicable agencies
- Industry group and/or third-party guidance (for example, National Retail Federation, National Restaurant Association, or US Chamber of Commerce)

The CLO is uniquely positioned to understand these varied and complex regulatory frameworks and to help inform the conversation relevant to risk related to potential outcomes. You can take the lead in helping your organization clearly articulate its risk profile and making related decisions, consider:

- Tools to inform strategic decisions: the [Reopen the Workplace Navigator](#) tool from Deloitte, [economic scenarios](#), and the

[government response portal](#) for up-to-date laws in more than 100 countries

Tip: Many organizations have created a crisis response command center,¹ with representatives from HR, IT, legal, security, and office management, to coordinate and oversee various aspects of a return to the workplace. The CLO should figure prominently in discussions with this group because so many transition issues implicate various levels of legal risk.

Many individual state orders mandate that telecommuting should continue for roles that have demonstrated success doing so during the stay-at-home period. Thus, a determination of which functions must be performed at the workplace will be helpful. As CLO, you should encourage the enterprise to document job functions that have not successfully been performed from home during stay-at-home orders for use in determining which employees and jobs must return to the workplace. The reasons why particular roles must be performed in the office should likewise be documented. It is likely that your workforce will fall into one of two categories, although several combinations of pieces of these two categories are also possible.



Work from home

For the portion of your workforce that will work entirely or partially from home, you may want to consider training related to cybersecurity and leading remote teams. For employees both within your legal department and the larger enterprise, carefully consider immigration, labor, and employment ramifications of remote work arrangements.

Tip: It is likely that much of what the legal function does can be continued in a remote work environment. For legal departments that continue to work virtually for a sustained period of time, training may be needed to reorient the team to a longer-term virtual work situation and provide relevant resources and support. If it hasn't been assigned already, priority should be given to training focused on cybersecurity and data protection.

Cybersecurity and data protection

Common challenges:

- Increases in socially engineered cyberattacks targeting financial and personally identifiable information (PII) data
- Cyber risk levels are elevated due to an increase in phishing and malware attacks

- Some communication and collaboration tools may not be secure, even where these platforms have their own built-in controls
- Client and customer data may be more vulnerable when employees work from home if employees are transmitting data on unsecure networks and/or saving or printing on home devices

Elevated threats of today will persist and pose substantial risk in your environment.

Source: *Deloitte COVID-19: Cyber preparedness & response*

- Employees who previously did not work at home may not be familiar with cybersecurity and data protection leading practices. Most are likely to benefit from regular reminders related to cybersecurity leading practices.

When asked which one matter will likely require the most additional resources in the coming year, the answer chosen most by general counsel was “data protection and privacy.” Indeed, the focus on data protection and privacy should not be relaxed at this time, and a continued and sustained focus is merited.

Source: *Association of Corporate Counsel, “2020 ACC Chief Legal Officer Survey,” 2020*

- Potential threats to attorney-client privilege may arise where there are risks to cybersecurity or where attorney-client conversations may be overheard (by family members, for example).

Responses:

- Roll out or reoffer cybersecurity training to employees, including training and guidance on how to best leverage controls for the various communication and collaboration tools they use. Repeat and reinforce training as often as necessary.
- Communicate new and emerging threats as they arise to legal and throughout the enterprise. Provide remote working employees with the tools and instructions necessary to protect data and maintain data privacy protocols.
- Prioritize the preservation of the attorney-client privilege in a remote working environment. Remind employees not to forward documents to personal email accounts or use other unsecure methods to transfer files or communicate with clients. Likewise, counsel them to avoid privileged conversations in the presence of family members or other housemates.

Tip: CLOs may want to consider cybersecurity insurance or review their existing policy to identify gaps in coverage arising as a result of the increased or complete reliance on work-from-home mandates.² Specialized training relating to carve-outs in the policy—for example, the use of unencrypted storage devices—should be made available to employees. Issues may also arise where employees use home or personal devices, and employees in legal and throughout the organization should be aware of the potential for forensic investigation of these devices if an incident occurs or a claim is made.³

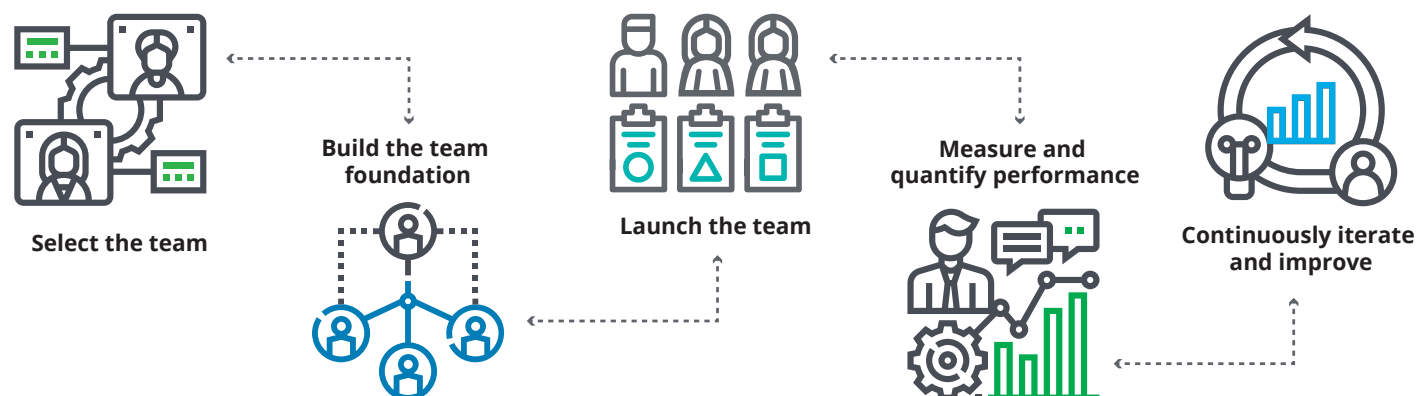
Tip: Consider developing a written risk assessment and information security plan for remote workers. Identify the most likely threats and provide regular training to prevent data theft.

Leadership

Common challenges:

- Even before COVID-19, many respondents to Deloitte Consulting LLP’s 2019 Human Capital Trends⁴ survey believed that new leadership skills would be required in the 21st century, with half citing an ability to manage on a remote basis as being important.⁵

Establishing a high-performing virtual team



- Legal executives have also identified leadership training as a top priority,⁶ and thought should be given to what new, different, or more deeply developed skills leaders may need in a fully or partially virtual environment.

Responses:

- The Simply Irresistible Organization™ framework provides a starting place for thinking through which leadership skills you may want to emphasize. Note that, while the areas of focus may be the same in both virtual and in-person environments, the appropriate leadership behaviors may be very different.

The social contract between employer and employee has changed, leading to a shift in the previously accepted terms of the relationship:

- The boundaries between work and life are evolving. For some, biases against working from home are also dissolving.
- The topic of emotional well-being is at the forefront of business leadership topics.
- Employees' concerns of safety in all forms, including physical, emotional, and even financial and digital, have increased and become more prominent in conversation.

Source: Deloitte Development LLC, "Reopening the workplace: The resilient leader's guide," April 2020

- More specifically, you may want to consider the following to help engage your teams in a virtual environment:
 - Check in frequently. Keep communications positive, if possible, but when not possible, be transparent about what you know, what you don't know, and what you're going to do about it.
 - Keep messaging clear. Separate messages focused on well-being from those focused on substantive work. A message that addresses both runs the risk of being perceived as insincere.
 - Be other-centric. "How are you" is better than "I care about you," because it focuses on the recipient of the message, not the sender. Try to remember that each person is adapting to the workplace changes in his or her own way and at his or her own pace.
 - Be open and honest. Share your own experience. Doing so can help to create a sense of psychological safety, which in turn opens the door for others to talk about their experiences.
 - In addition to individual leadership skills, training may be necessary to help legal department leaders reimagine team dynamics for the extended virtual work environment.

Tip: Transparency and vulnerability are valuable leadership attributes. By sharing your own challenges with your team, you open the door for others to acknowledge they are also feeling affected and create an opportunity to problem-solve together.

Tax and immigration considerations

Common challenges:

- Workers who normally work in the office may incur tax consequences as a result of working in another geography, whether they are at home or stranded or quarantined in another location, if that alternate location is in a tax jurisdiction that is different from that of their office.
- Where employee furloughs or separations are expected, consider the implications on those employees who hold visas. In the case of separations, impacted employees may be delayed in leaving the country in a timely manner as required by applicable immigration law because of travel restrictions in the United States or abroad, and furloughs may not be allowed.

Responses:

- Know where your employees are physically located. Maintain records for days worked from any location that is not the office and check state and international tax rules and guidance to determine any potential tax ramifications.
- Understand the current state of immigration law to inform decision-making related to employee furloughs and terminations without discriminating.

Tip: Know the obligations to reimburse employees for expenditures related to remote work, such as any Internet access fees and office supplies, especially where having an employee incur such expenses would cause an hourly employee to make less than minimum wage.



Transition back to the workplace

A return to the physical workplace may be necessary for some portion of your workforce. Note that employees may have strong feelings about returning to work, both for and against. If possible, allow employees to express these concerns and play an active role in planning their transition back to work, if possible. How employees are treated now will likely affect their long-term loyalty to the organization.

Tip: Some employees may fear a return to the workplace. Consistency in the treatment of these employees is critical to prevent potential discrimination claims.

When planning for a return to the workplace, several relevant considerations are important:

Testing and protective gear **Common challenges:**

- Employers may consider workplace testing to help allay concerns over physical workplace safety. Equal Employment Opportunity Commission (EEOC) guidance addresses certain diagnostic testing, but in an environment where employees may want to know the status of their coworkers' health, maintaining data privacy may be more difficult.

- Employers may still be required to accommodate employees with disabilities, including those with a higher risk for severe illness.
- The availability and efficacy of protective gear for both your workforce and visitors and customers should be considered, and OSHA may have issued specific guidance for your industry related to protective gear.

Responses:

- Require that managers and other leaders are well-trained and frequently updated on procedures related to testing and the requirements related to protected employee health data. It is critical that this data not be used in employment-related decisions (such as raises and promotions).
- Establish protocol related to accommodations and employee health considerations. Managers should not be making these decisions on their own.
- Be proactive in securing the appropriate protective gear. Typical supply chain systems may not be functioning as usual, and timelines may be extended while shortages in supply are to be expected.

Tip: Consider adding an extra layer of controls related to employment decisions to help support the more complicated situations that may arise.

Tip: Review your organization's employee assistance program to confirm that benefits and program offered align to the current needs of the workforce.

Facilities and customs

Common challenges:

- The pre-COVID-19 trend toward coworking, hoteling, and shared or creative spaces may make returning to the workplace more challenging.
- Workplace hygiene standards will be significantly more important to workers,

but may be difficult to meet. What may have been previously unnoticed will likely be met with intensified scrutiny.

- Mail distribution and deliveries can be a source of concern.

Tip: Consider adding new building technologies. Technologies such as air quality monitors, white light disinfecting, and even sensors to help monitor the number of people that gather in small spaces like elevators could be useful.

Responses:

- Consider renovations to the workspace that may include the installation of no-touch options, screens, or partitions between employee workstations. The office may need to be reoriented so that employees do not face others and can maintain the appropriate distance. Common and community spaces may need to be closed or limited in their use.
- Review and renegotiate contracts with building maintenance and cleaning crews to include provisions related to using FDA-approved disinfecting products and techniques. The frequency and scope of cleaning may need to be expanded as well. Be sure to set up communication channels so employees can report concerns with office cleaning routines.
- Establish mail- and package-handling protocols that may include requirements to wear gloves when handling, disinfection of packages, and holding mail for a sitting period prior to distribution. Train staff on appropriate protocols.

Tip: While providing for clear lines of communication from the employee to the employer related to health and safety, note that these concerns may give rise to whistleblower protections. Be sure to review whistleblower protection protocols and provide updated training and regular reminders to managers and leaders.

Whether employees remain virtual or return to the workplace, communication will be critically important to enterprise success. Having clear communication protocols and a regular cadence of communication can help to reassure employees that work policies, whether virtual or in-person, have been well-thought-out. Be sure communication channels allow for workers to quickly escalate concerns to management and, whenever possible, address concerns promptly.

It will also be important to rely on a strong network of peers and colleagues. Shari Fallek Coats, deputy general counsel, Deloitte LLP, says "CLOs are having to step into areas of law and situations that they may not have navigated before. It is critical that they become comfortable not just with identifying issues, but in providing well-thought-out solutions, even on topics that may not be purely legal. To do this effectively, lean on your networks, your trusted community of peers, to get through this together. No one knows everything at this point, but allowing yourself to be a little vulnerable, and asking colleagues for their thoughts and advice, can help."

As employers continue to navigate work transition considerations, the CLO can play a key role in establishing the protocols that enable success. For more insight into transition strategies and other insights to help you respond to the COVID-19 crisis, visit Deloitte's COVID-19 Resource and Insights hub and Epstein Becker Green's Coronavirus Resource Center.

Endnotes

1. Deloitte Development LLC, "COVID-19 checklist: Practical steps for the immediate, midterm, and long term, Part II," May 2020.
2. Deborah Golden, Jason Frame, and Kevin Miller Smith, "Staying safe: Sustaining your organizational cyber hygiene amid COVID-19 disruption," Deloitte, May 2020.
3. Judy Greenwald, "Surge in working from home raises cyber exposure issues," Business Insurance, March 17, 2020.
4. Deloitte Development LLC, "2019 Deloitte Human Capital Trends," May 2019.
5. Ibid.
6. Association of Corporate Counsel, "2020 ACC Chief Legal Officer Survey," 2020.

Authors

Lori Lorenzo

Research & Insights Director
Chief Legal Officer Program
Deloitte Transactions and Business Analytics LLP
lorilorenzo@deloitte.com

David W. Garland

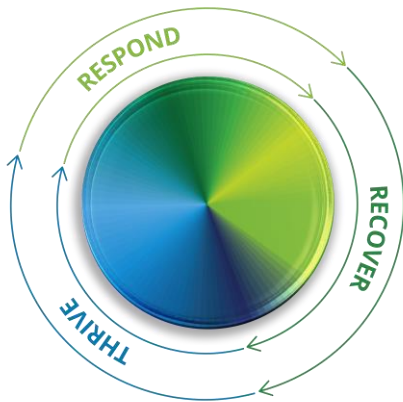
Chair, Labor and Employment Steering Committee
Epstein Becker Green
DGarland@EBGlaw.com



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The legal considerations for returning to work

RECOVER – A COVID-19 response series for general counsel

Companies all over the world reacted swiftly and empathetically to the COVID-19 crisis, altering their working practices to facilitate their employees working from home and maintaining operations. Many companies took aid from their governments to retain as many jobs as possible through furlough schemes, while others had to make difficult decisions to preserve their businesses, including layoffs/redundancies, reduced working hours, pay cuts and pay freezes.

As many governments start to lift restrictions, and encourage businesses to re-open in order to reverse the economic decline caused by the pandemic, employers are facing a new set of considerations. From the physical considerations of how to maintain productivity while also ensuring a safe working environment, to how to limit workplace exposure, and the employment law considerations of whether what they need from employees is actually lawful.

Employers will need to consider the short-term implications, and also what the long-term impact will be. This article explores the immediate, short-term implications of returning to work.

Regardless of the outcome of vaccine and treatment development, or the success of social distancing measures, employers need to prepare for their employees' return to work by considering their obligations to protect their employees' rights, safety, and well-being, while also safeguarding their business.

What will the immediate "new normal" look like?

There are a number of scenarios that companies are planning for. In the best case, the pandemic disappears and employers only need to consider whether they need to write (or adapt) policies and procedures for potential future pandemics. In a worst case, a "second wave" appears, or even a recurring "wave" of COVID-19 outbreaks.

Questions employers may now be asking include:

- Should they change their workforce structure to a higher proportion of temporary or contingent workers that can be hired, let go, and re-hired more easily?
- Should they ask some of their workforce to work from home permanently?
- What long-term provisions need to be made to deal with sudden out-breaks of contagion?



Employment Law

The employment law considerations for returning to work

Laws will vary between countries, but the following are questions to consider when planning a return to work for your employees:

Can you introduce rotations in order to reduce the number of employees in your premises at any one time?

Some employers may be considering staggered working hours to reduce exposure to the virus on rush-hour public transport, while some are thinking about rotating working weeks to reduce the need for deep sanitization of the office. Consider whether your policy alters the employee's existing terms and conditions for employment, and whether you will need trade union agreement, collective consultation or individual agreement.

If you have reduced your employee base through lay-offs/redundancy, can you gradually re-hire ex-employees, and again let them go should the government impose a further lockdown?

It is generally not recommended to re-employ staff you made redundant, because of the extra complexity it brings, but you may be able to bring back ex-employees on a freelance basis for projects. Before embarking on a lay-off program, consider the potential future requirement for skills, and decide whether alternatives such as furlough or reduced working hours may be more appropriate.

Should you change the make-up of your workforce to make employment more agile and therefore easier to respond to various government restrictions?

Employing a contingent workforce or temporary workers may make it easier to reduce or increase the size of your workforce in response to changes in government policies or the economy, but if these workers also support other companies and they are required to be present in your workplace, the risk of spreading COVID-19 may increase. New policies will need careful consideration, as will the availability of testing, tracking and tracing programs in your country.

Can you introduce or extend a "reduced working week" if you need to?

In many jurisdictions, it is unlikely that you can impose a forced reduction in hours, but you would be able to request voluntary reductions in hours with commensurate wage reductions; however, laws in your jurisdiction would guide you on whether you need individual consent, collective consultation, and union involvement.

Do you need special policies for seasonal/migrant workers?

With many countries starting to open borders, it may be worth considering whether to amend your existing policies for testing, monitoring and communicating infection in the workplace, or whether reducing your use of foreign workers would breach policies.

Do you need new policies for ongoing testing or health screening?

Consider the legal implication of forcing testing/health screening on your employees, as well as the data privacy implications of processing and storing the personal information on a database. How frequently would you need to test? Is measuring temperature effective? And what facilities do you need to put in place for employees that start to feel unwell at work?



Employment Law

Can you force employees to use personal protective equipment (e.g., facemasks) at work?

While many governments are encouraging the use of facemasks rather than making it mandatory, it is generally accepted that employers are allowed to stipulate the use of PPE for the safety of the workforce.

What other policies need consideration?

Many companies have put new policies in place since the start of the COVID-19 pandemic. While there is still no cure or vaccine, it would be prudent to extend policies, but also revisit your policies on discrimination or inclusion (in case suffering from COVID-19 attaches a stigma to your employees at work), and considering your sick leave/absence policy and whether limits on time off should be altered.

RECOMMENDED ACTIONS

1. Review your workforce needs in relation to business strategy

Map out your workforce and compare it to your likely workforce needs for the immediate future. Identify all the types of workers you use or employ, and identify the employment law implications of any changes necessary.

2. Review your policies

Review all your policies, not just those directly affected by the pandemic (e.g., sick leave or remote working policies). Decide on proposed changes and consult with your workforce or their representatives as necessary, before implementing the new policies.

3. Create a return to work strategy

Set out all the considerations, alternations and potential phases.

4. Communicate the strategy

Communicate the return to work strategy with your employers and suppliers (such as facilities, cleaning and catering suppliers) with enough notice.

5. Implement your strategy

Implement the strategy and monitor continuously for any future considerations.

Contact

Nicolaas Vermandel

Deloitte Global Legal Leader:
Employment & Benefits
nvermandel@deloitte.com

Stijn Demeestere

Partner
Deloitte Legal Belgium
sdemeestere@deloitte.com

David Garland

Member of the firm: Epstein Becker Green
United States – New Jersey/New York
dgarland@ebglaw.com

Susan Gross Sholinsky

Member of the firm: Epstein Becker Green
United States – New Jersey/New York
sgross@ebglaw.com

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