



Selden Beattie

When you *know* benefits, everyone benefits.

Presenters



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Agenda

- Where We've Been
- How It's Affected Us
- Government Criteria & Guidelines
- Return to Work Considerations
- The "New Workplace"
- Best Practices and Regulations: FLSA, FFCRA
- Discrimination & Unlawful Employment Practices



The Look Forward: What Employers Need to Know

Where We've Been

- On March 13, 2020, POTUS declared a National Emergency
- Shelter in Place orders were activated thru April 30th
- Non-Essential businesses were closed
- Travel Bans were put in place for Asia & Europe



How This Affected You...

- Business Closures
- Loss of Productivity / Revenue
- Remote Workforce
- Reduced work schedules
- Furloughs/Layoffs
- FFCRA (Effective 4/1 - 12/31/20)
- CARES Act



Proposed State or Regional Gating Criteria (Satisfy Before Proceeding to Phased Opening)

SYMPTOMS

Downward trajectory of influenza-like illnesses (ILI) reported within a 14-day period

AND

Downward trajectory of covid-like syndromic cases reported within a 14-day period

CASES

Downward trajectory of documented cases within a 14-day period

OR

Downward trajectory of positive tests as a percent of total tests within a 14-day period (flat or increasing volume of tests)

HOSPITALS

Treat all patients without crisis care

AND

Robust testing program in place for at-risk healthcare workers, including emerging antibody testing

*State and local officials may need to tailor the application of these criteria to local circumstances (e.g., metropolitan areas that have suffered severe COVID outbreaks, rural and suburban areas where outbreaks have not occurred or have been mild). Additionally, where appropriate, Governors should work on a regional basis to satisfy these criteria and to progress through the phases outlined below.





Guidelines For All Phases: Individuals

➤ Continue to Practice Good Hygiene

- Wash your hands with soap and water or use hand sanitizer, especially after touching frequently used items or surfaces.
- Avoid touching your face.
- Sneeze or cough into a tissue, or the inside of your elbow.
- Disinfect frequently used items and surfaces as much as possible.
- Strongly consider using face coverings while in public, and particularly when using mass transit

Continue to adhere to State and local guidance as well as complementary CDC guidance, particularly with respect to face coverings.

➤ People Who Feel Sick Should Stay Home

- Do not go to school or work
- Contact and follow the advice of your medical provider



Guidelines For All Phases: Employers

- Develop and implement appropriate polices, in accordance with Federal, state, and local regulations and guidance, and inform by industry best practices regards:
 - Social distancing and protective equipment
 - Temperature checks
 - Testing, isolating, and contact tracing
 - Sanitation
 - Use and disinfection of common and high-traffic areas
 - Business travel

- Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider.

- Develop and implement policies and procedures for workforce contact tracing following employee COVID+ test.



Phase One



Phase One

Individuals

- **ALL VULNERABLE INDIVIDUALS*** should continue to shelter in place. Members of households with vulnerable residents should be aware that by returning to work or other environments where distancing is not practical, they could carry the virus back home. Precautions should be taken to isolate from vulnerable residents.
- All individuals, **WHEN IN PUBLIC** (e.g., parks, outdoor recreation areas, shopping areas), should maximize physical distance from others. Social settings of more than 10 people, where appropriate distancing may not be practical, should be avoided unless precautionary measures are observed.
- Avoid **SOCIALIZING** in groups of more than 10 people in circumstances that do not readily allow for appropriate physical distancing.
- **MINIMIZE NON-ESSENTIAL TRAVEL** and adhere to CDC guidelines regarding isolation following travel.



Phase One

Employers

- Continue to **ENCOURAGE TELEWORK**, whenever possible and feasible with business operations.
- If possible, **RETURN TO WORK IN PHASES**.
- Close **COMMON AREAS** where personnel are likely to congregate and interact, or enforce strict social distancing protocols.
- **Minimize NON-ESSENTIAL TRAVEL** and adhere to CDC guidelines regarding isolation following travel.
- Strongly consider **SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION**.



Phase One

Specific Types of Employers

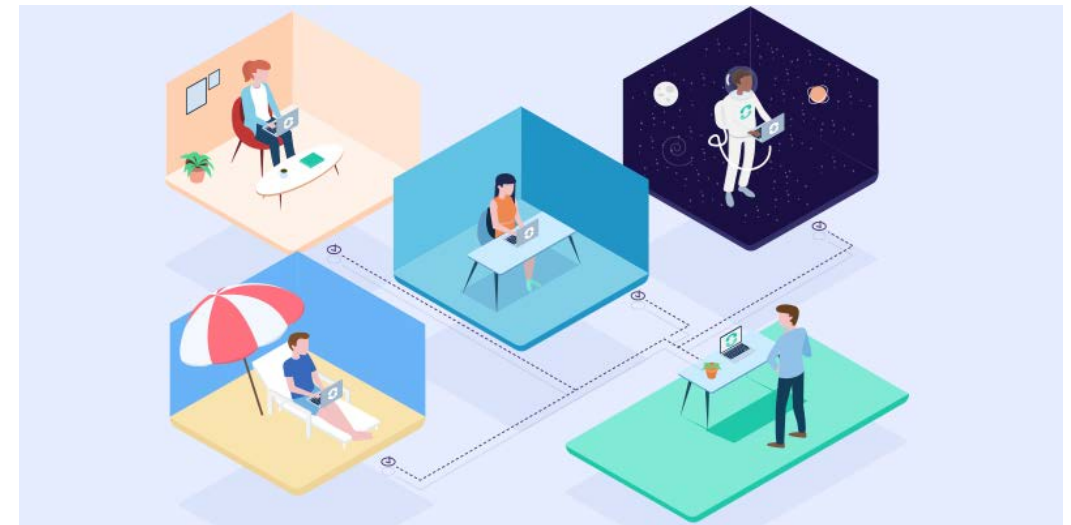
- **SCHOOLS AND ORGANIZED YOUTH ACTIVITIES** (e.g., daycare, camp) that are currently closed should remain closed.
- **VISITS TO SENIOR LIVING FACILITIES AND HOSPITALS** should be prohibited.
- **LARGE VENUES** (e.g., sit-down dining, movie theaters, sporting venues, places of worship) can operate under strict physical distancing protocols.
- **ELECTIVE SURGERIES** can resume, as clinically appropriate, on an outpatient basis at facilities that adhere to CMS guidelines.
- **GYMS** can open if they adhere to strict physical distancing and sanitation protocols.
- **BARS** should remain closed.



“It’s Not Business As Usual.”

Have You Considered...

- Is your company an essential workforce? If not, does your business vitality depend on your employees returning to the office?
 - Leadership Committee
 - Remote / Onsite
 - Furloughed employees
 - Staggered Shifts



Have You Considered...

- What measures do you have in place to Test/Track/Treat (Triple Ts)?
- Do you have employees who may be Vulnerable / High Risk?
 - Consistency
 - Documentation
 - Confidentiality (retain in a separate medical file; not Personnel file) with limited access to these files

RTW Testing Options

➤ “Bronze”

- Daily Temperature Readings
- Daily COVID-19 Questionnaire

➤ “Gold”

- Test all employees before their first day of work
 - Local Testing Center requirements
 - 3rd party / mobile units
 - Onsite Testing (consult with Counsel)
- Daily Temperature Checks

➤ “Platinum”

- Weekly testing for employees
- Daily Temperature Checks



RTW Screening Questions

- Have you traveled within the last 14 days (domestically or internationally)?
- Have you been in contact with someone who has tested positive to COVID-19?
- Have you been tested for COVID-19?
- Have you had a fever ($+100.4$), body aches or cough in the last 14 days?

Positive Result

- In the event an employee tests positive:
 - Report as per current Dept of Health guidelines
 - Thorough cleaning and sanitizing
 - Employee who tested positive will need to comply with current CDC “return to work” guidelines:
 - Time
 - Test
 - Advise employees who may have had contact



Have You Considered...

- Have you confirmed with your housekeeping company new guidelines on frequent cleaning and sanitation?
 - Internal staff
 - Contract additional services
 - Hand sanitizers / touchless station
 - Employee responsibilities
 - Air Quality



Have You Considered...

- Have work areas been restructured to allow for social distancing?
 - Work-Stations - set up, barriers
 - Common Areas - maximum capacity
- Do you have PPE for your staff?
 - Masks, Gloves, Face Shields...
- Have you considered the turnaround time for ordering supplies, maintaining inventory and request / distribution protocol?

Have You Considered...

- Communication Campaigns: Visual Alerts/Posters/Webinars
 - Messaging
 - Instill confidence in employees



The “New” Workplace

- Remote Employees
- Gradual “return to work” plan
 - Social Distancing and Masks
- Creative scheduling
- Touchless sanitizers and access points
- Limited points of entry/exit (one-way aisles)
- Employees should remain in their work area (no wandering)
- Increased frequency of “Housekeeping” services
- Signage with important “Reminders”
- Virtual Meetings
- Restrict outside visitors





Cole, Scott
& Kissane



Best Practices & Other Considerations

Potential Obstacles When Implementing Return to Work

- **Employees Refuse to Report to Work.**
 - Employee without symptoms or diagnosis cannot refuse to come to work just because they have a generalized fear of contracting COVID-19.
 - Because of whistleblower risks, employers should assess whether the workplace presents an *imminent danger*.
 - Reasonably expected to cause death or serious physical harm.
 - Must be immediate - occur in a short time.

Potential Obstacles When Implementing Return to Work

- **Employees Falsely Calling in Sick.**
 - Employers can still enforce attendance policies, but must ensure that they are treating employees consistently.
 - Consider the context of why the employee is refusing to return to work.
 - Remember it is unlawful to discriminate against employees based on that employee exercising rights under Section 7 of the NLRA - organizing or protesting.

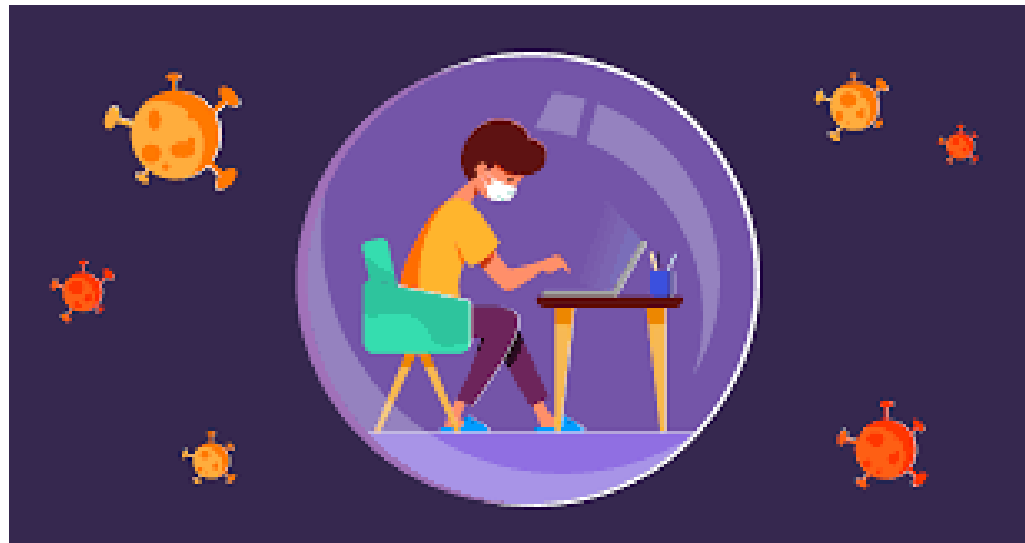


Potential Obstacles When Implementing Return to Work

- **What is protected, concerted activity?** 2+ employees acting together to try and improve their wages, hours, or conditions of employment.
 - May include:
 - Employees asking about hazard pay.
 - Employees asking about safety concerns (e.g., PPE, masks, sanitation, distancing).
 - Employees refusing to work without adequate PPE.
 - Section 7 applies to both union and non-union employers

FLSA Overtime and Wage Claims

- Continuing telework for some or all employees - employers need to be extra cautious of requirements under FLSA such as keeping accurate records of hours worked by employees.
- The obligation to pay *all* overtime and minimum wage is not excused because of the pandemic.



FLSA Overtime and Wage Claims

- Some previously exempt employees may start to perform more non-exempt duties than before, thus, losing their exempt status and becoming eligible for overtime.
 - Employers should ensure that they reclassify these employees and maintain records regarding hours worked.
 - Once an employee returns to work and engages in their exempt duties again to qualify for being exempt, employers should ensure to document the basis.
 - If the Company has opted to make pay cuts to all employees pay instead of laying employees off, be sure salary component of exemption is still met.



FLSA Overtime and Wage Claims

- Even if the Company maintains a policy prohibiting employees from working overtime without prior authorization, all overtime for hours *actually worked* must still be paid to the employee.
- However, the employee can be disciplined for the violation of Company policy (i.e., verbal warning, written warning, etc.).
 - Maintain consistency in disciplining employees to prevent discrimination claim.

FFCRA & FLSA Overlap

- Remember an employer who violates the FFCRA by failing to make mandated payments to employees who qualify for COVID-19 related leave can be sued under the FLSA for minimum wage violation.
- Remember obligations under the Families First Coronavirus Response Act runs through December 31, 2020.
- Covered Employer - those with *fewer than* 500 employees.
- Creates two new paid leave entitlements:
 - Emergency Paid Sick Leave
 - Emergency Paid Family Leave (amends FMLA).

FFCRA - Emergency Paid Sick Leave

- Gives all employees up to 80 hours (10 workdays) of emergency paid sick leave for:
 1. Their own **quarantine or isolation** order under federal, state or local law;
 2. To **self-quarantine**, as advised by a **health care provider**;
 3. Because they are **experiencing symptoms** and seeking a **medical diagnosis**;
 4. To **care for another individual** subject to a **quarantine or isolation** order or advised to self-quarantine (not limited to family members);
 5. To **care for a child** as the result the child's school closing or the closing or unavailability of the childcare provider; or
 6. Because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
- Reasons 1-3 - paid at 100% of employee's regular rate of pay (subject to daily caps).
- Reasons 4-6 paid at 2/3 regular rate of pay (subject to daily caps).

FFCRA - Expansion of FMLA

- As to reason no. 5 under the paid sick leave provision of the FFCRA (“to care for a child as the result of the child’s school closing or the closing or unavailability of the childcare provider”), employees may also qualify for up to 12 weeks of job protected emergency family leave.
- Paid sick leave runs concurrently with, and counts toward, the total 12 weeks available for emergency paid family leave.



FFCRA Considerations

REQUEST FOR EMERGENCY FAMILY AND MEDICAL AND/OR PAID SICK LEAVE

Employees requesting Emergency FMLA (EFMLA) or Emergency Paid Sick Leave (EPSL) under the Families First Coronavirus Response Act (FFCRA) must complete this form in its entirety and submit it to [Human Resources](#) via [Email/Intranet Site](#). Leave is only available between April 1, 2020 and December 31, 2020 unless otherwise extended by law.

Employee Name: *****
Employee Home Address: ***** E-mail: *****
Home Phone Number: ***** Cell Phone Number: *****
This is a (choose one): <input type="checkbox"/> New request for leave <input type="checkbox"/> Request for an extension of leave
Anticipated Start Date of Leave: ***** Expected Return to Work Date: *****
Reason for Leave (check all applicable) I am unable to work or telework for the following reasons:
<input type="checkbox"/> I am subject to a federal, state, or local quarantine or isolation order. (List the name of government entity that issued the quarantine or isolation order): _____
<input type="checkbox"/> I have been advised by a health care provider to self-quarantine. (List the name of health care professional advising self-quarantine): _____
<input type="checkbox"/> I am experiencing symptoms of COVID-19 and seeking a medical diagnosis.
<input type="checkbox"/> I am caring for an individual that is subject to a federal, state, or local quarantine or isolation order or has been advised by a health care provider to self-quarantine. (List the name of the individual and relation of individual to you and of the government entity issuing the order/of the individual's health care provider): _____
<input type="checkbox"/> I am caring for my son or daughter under age 18 (or 18 or over if disabled and cannot care for self) because his/her school or place of care has been closed, or his/her childcare provider is unavailable, due to COVID-19 precautions. (List the name and age of the child/children to be cared for, the name of the school/place of care): _____

- Documentation is mandatory for reimbursement (4-year retention requirement).
- Also, key in preventing abuse.
- Build all the information needed and which employers permitted to obtain into an FFCRA form.

FFCRA Considerations

- **Documentation should include:**
 - Reason for leave and statement from employee that he/she is unable to work.
 - Name of healthcare provider.
 - Copy of quarantine order.
 - If employee cannot get a copy, form should still require employee to document the name of the issuing governmental entity.
 - Copy of e-mail from school regarding closures.
 - If child is not in school, form should require employee to document the name of child being cared for, the name of the place of care, or child care provider that has closed or become unavailable, and require a statement from the employee that no other suitable person is available to care for the child.

Whistleblower Claims and Retaliation

- Employees will have a lot to complain about.
- An employee who objects to an employer violating a law, rule, regulation and who suffers an *adverse employment action* may bring a claim for retaliation under Florida's private whistleblower statute.
- Employers may get sued for not bringing an employee back from furlough, layoff, or reduction in pay if that employee previously complained or objected to an employer's violation of law.



Whistleblower and Retaliation

- Also, be mindful of those employees who have:
 - Made a claim of unpaid overtime;
 - Filed a workers' compensation claim for injury on the job (i.e. likely to be claims for contracting the virus due to unsafe workplace conditions);
 - Requested leave under the Family Medical Leave Act and First Families Coronavirus Response Act; or
 - Made a complaint to a supervisor regarding potential discrimination/harassment in the workplace.



Documentation

- Policies and procedures
- Return to work plan
- Employment terms and conditions

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Additional Questions?

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COVID-19 Resource Center

<https://seldenbeattie.com/covid-19-resource-center/>





Also Remember to BREATHE

Namaste...

- Accept that you cannot control everything
- Welcome humor
- Maintain a positive attitude
- Do your best
- Exercise and eat healthy



Thank you!

This presentation is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Participants should consult with their legal counsel before taking any action.

Appendix

➤ “Opening Up America”

- <https://sunbeamwsvn.files.wordpress.com/2020/04/guidelines.pdf>
- *Vulnerable Individuals means elderly or Individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.*

➤ Screening Questions

- Baptist Health of South Florida

➤ Visual Alerts

- https://www.cdc.gov/flu/pdf/protect/cdc_cough.pdf