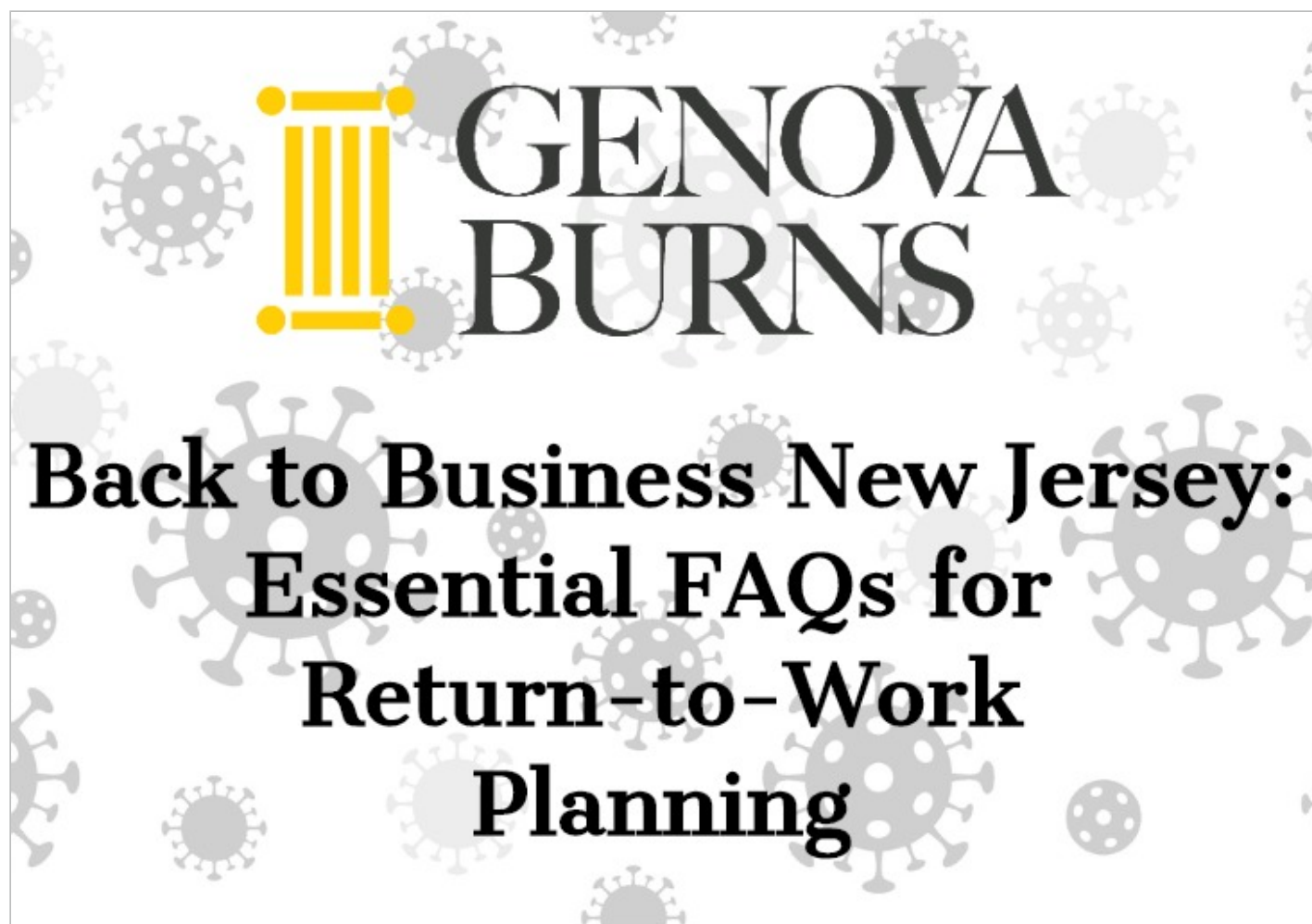




Back to Business New Jersey: Essential FAQs for Return-to-Work Planning

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Now is the time for employers to formulate action plans for returning employees to the workplace. We have developed the following FAQ's to guide the development of your return to work plan.

REQUIRING EMPLOYEES TO RETURN TO WORK

1. Can employees decline reinstatement from a furlough?

If an employee has no reason protected by law from returning to work, then that employee may be disqualified from unemployment benefits. Following are some common COVID-19 based protected reasons that would delay an employee's active return to work.

[New Jersey Paid Sick Leave Act](#) If an employee has not exhausted their sick leave, they can use their accrued earned sick time for the following reasons: (1) their own COVID-19 related illness, (2) a family member's COVID-19 related illness, (3) compliance with a quarantine order for the employee or the employee's family member, (4) if the employee's child's school is closed, (5) and, in some instances, for generalized fear of COVID-19 exposure.

[Federal Emergency Paid Sick Leave Act](#) Employees may receive up to 80 hours of pay (with certain limitations) for the following reasons: (1) they are subject to an order of quarantine or isolation (or are caring for an individual under such an order); (2) they have been advised by a health care provider to self-quarantine (or are caring for an individual who has been so advised); and (3) they are experiencing COVID-19 symptoms and are seeking a medical diagnosis.

[New Jersey Family Leave Act](#) An employee may request leave to care for a family member and/or child due to school closures related to COVID-19.

[Federal Emergency Family and Medical Leave Expansion Act](#) An employee may also be eligible for 12 weeks of leave (10 weeks at partial pay) to care for a child due to school COVID-19 related closures.

2. How will unemployment consider claims by employees who refuse reinstatement?

The New Jersey Division of Unemployment Insurance takes the position that employees are required to accept offers of suitable work, or the employee may be declined for unemployment benefits for the week in which the employee declines the job and the subsequent three (3) weeks. A "suitable job" depends on a variety of factors, including where the employee lives and the distance they travel to a new position. In short, a job is suitable if it is reasonably similar to the location of the employee's prior position.

The unemployment statute, N.J.S.A. 43:21-5(c)(1), also explains that in determining whether a claimant has good cause to decline an opportunity of employment, consideration is given to the health, safety, morals, individual's physical fitness, prior training, experience, prior earnings, length of unemployment, prospects for securing work in the employee's customary occupation and the distance of the available work from the employee's residence.

3. Does an employer have a duty to notify the New Jersey Division of Unemployment if an employee refuses reinstatement after a furlough?

The New Jersey Division of Unemployment Insurance requires an employer to immediately notify the Division within 48 hours of an employee's failure to return to work after an offer of employment is made to the employee. Employers can notify the Division by completing and

returning a Form BC-6 “Notice of Failure to Apply For, or to Accept, Suitable Work.” The employer will be required to include the date it offered the employee the position, the reason for the employee’s refusal to accept the offer, and the details about the specific position offered. The employer is also required to submit [Form B-187Q](#) to the Division, on a quarterly basis. The Form B-187Q requires the employer to provide, among other information, proof that the employer offered employment, the date that employment was offered, and the employee’s reason for refusing the work.

4. Can an employer choose who to recall from a furlough based on their assessment of risk to the employee of contracting COVID-19 and spreading it throughout the workplace?

No. Employers may not select employees for return based upon any considerations of risk for COVID-19. Employers should implement uniform criteria for selecting employees for recall. If an employer’s selection criteria has an unequal impact on certain categories of employees (for example, younger employees are disproportionately recalled), the employer’s selection criteria will be subject to legal exposure.

KEEPING THE WORKPLACE SAFE

5. What measures can employers take to ensure the health and safety of the workplace?

OSHA requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. To minimize the risk of complaints filed with OSHA and/or workers’ compensation claims, employers are encouraged to follow the recommendations of the U.S. Centers for Disease Control and Prevention (CDC) for maintaining a healthy work environment. CDC and state mandated recommendations include, but are not limited to:

- Ensuring that sick leave policies are flexible and consistent with public health guidance, and that employees are aware of and understand the policies.
- Reviewing Human Resources policies and procedures to ensure that they are consistent with public health recommendations.
- Connecting employees with employee assistance programs (EAP), if available.
- Providing employees with break time for repeated handwashing throughout the workday.
- Placing conspicuous signage alerting staff and customers to keep six feet of physical distance.
- Taking measures that support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors.
- Performing routine environmental cleaning and disinfection.
- Performing enhanced cleaning and disinfection after persons suspected or confirmed to have COVID-19 have been in the facility.

- Isolating employees who appear to have COVID-19 related symptoms or who have tested positive for COVID-19.
- Discouraging employees from using other employee's phones, desks, offices, or other tools and equipment.
- Providing disinfecting supplies, like wipes and hand sanitizer, in multiple locations throughout the workplace.
- Limiting in-person meetings and gatherings and using videoconferencing and/or teleconferencing whenever possible.
- Encouraging employees to notify their employer if they are experiencing COVID-19 related symptoms, have tested positive for COVID-19 or if someone in their family is experiencing symptoms or has tested positive.

On a practical level, this means that when considering the new work-space, it not only looks clean, it looks fairly sparse. To ensure social distancing within the confines of smaller workspaces, employers may be forced to implement staggered shifts or rotating days/schedules. Employers must also consider maintaining supplies of personal protective equipment for employees, such as gloves and masks.

6. What should employers do in the event that an employee reports unsafe working conditions?

On April 8, 2020, OSHA issued an advisory notice indicating that employers are prohibited from retaliating against employees who report unsafe and unhealthful working conditions during the COVID-19 pandemic. Retaliation can include termination, demotion, denial of overtime, denial of a promotion, and/or reduction in pay or hours. As with all employee complaints, employers are advised to be proactive in handling the employee's concerns and to take swift and prudent remedial actions in addressing any health and safety related issues. If no action is warranted, employers should document their investigation of the employee's complaint and explain why no remedial action is needed.

MEDICAL INQUIRIES

7. Can an employer screen employees by administering COVID-19 tests and taking employees' temperature at work?

Yes. The U.S. Equal Employment Opportunity Commission has determined that, considering the risks associated with COVID-19, screening in the workplace is permissible. Confidentiality restrictions apply and there are limitations to permissible medical inquiries.

8. Does an employer have a duty to inform employees of a colleague's positive COVID-19 test?

If an employee tests positive for COVID-19, the employer should inform fellow employees of their possible exposure. However, it is unlawful to disclose the name of the positive employee.

9. Can an employer direct an employee who is showing COVID-19 symptoms to go home?

Yes. An employer has a duty to protect all employees and, given the risks associated with COVID-19, employers may send employees with COVID-19 symptoms home.

ENFORCING ATTENDANCE REQUIREMENTS

10. Should employers require employees to present a positive COVID-19 test in order to be eligible for leave or excused absences?

No. Considering that COVID-19 tests are still limited and the delay in testing results, coupled with how quickly the virus can spread throughout the workplace, employers should allow employees to take leave if they have COVID-19 related symptoms or have been exposed to someone with COVID-19, even if they have not tested positive.

11. Can an employer terminate an employee who has been unable to work due to COVID-19?

No. On March 20, 2020, Governor Philip Murphy signed New Jersey Assembly Bill 3848, which prohibits employers (with few exceptions) from terminating or refusing to reinstate an employee who has or is likely to have COVID-19.

In sum, as with all policies and procedures, employers should ensure that any return to work plan is implemented uniformly, without a disproportionate impact on any protected class. Employers must remember that while the pandemic has created a crisis method of operating, once the dust settles, for at least up to two years employers will be held accountable to New Jersey and Federal employment discrimination laws.

For more information regarding planning and preparing your workforce to return-to-work, please [email Dina M. Mastellone, Esq.](#), Chair of the firm's [Human Resources Counseling & Compliance Practice Group](#), or [Brigette N. Eagan, Esq.](#), Counsel in the firm's Human Resources Counseling & Compliance Practice Group [here](#) or call 973.533.0777.



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