

# Total Recall

## Returning to the Office after COVID-19

by **WILSON JARRELL — Barran Liebman LLP**

It's been an unexpectedly unusual couple of months, which have been particularly difficult for employers and employees alike. While we will continue to feel the shockwaves of COVID-19 for many more months to come, we are beginning to approach a place where businesses can slowly open up again and return to some semblance of normalcy.

While each business is unique and will require different considerations for reopening, there are a few items that all businesses should consider:

### I. Returning to the Office

Soon, many employers will begin to reopen their office spaces and recall their employees to the worksite. The best practice is for employers to require each returning employee to complete a certification confirming whether they are currently experiencing symptoms, their potential exposure and their previous symptoms of COVID-19 before having them return to the office. Implementing temperature checks before an employee can return to the office is also an option, but employers differ on their comfort with that step.

In addition to strict legal compliance with any laws, regulations or Executive Orders that are applicable to an employer's worksite, there are other decisions that employers will have to make as we move towards reopening our offices. These considerations include policies on mask wearing, social distancing, temperature checks, cleaning practices and interactions with customers or the public. Employees may be hesitant or nervous to return to work, and communicating clearly why and how the office is opening will be key in successfully moving forward.

### II. Rehiring Employees

If you are recalling employees that were laid off, rather than those working from home, it is important to note that if it has been 180 days or less since they were laid off, their sick leave balance must be reinstated under the Oregon Sick Leave Laws (under Washington law, sick leave balances must be reinstated if rehired within 365 days). It is important to note that BOLI takes the position that an employer who cashed out accrued sick leave upon layoff must still restore sick time to employees rehired within 180 days so the employee can still use *unpaid* protected time off.

Also, when rehiring employees, you must review each employee's Form I-9, and identify whether the form was completed within the last three years. If the employee is rehired within three years of having completed the previous form, you do not need to require a new one; simply verify that no authorization document has expired and add the new rehire date to Section 3 of the form before signing and dating. If the form was completed longer than three years before the rehire date, you must require a new form and follow your usual process for verifying employment eligibility.

### III. The Remote Work Question

State and federal guidance still frown on work in a physical office unless telework/



working from home is impossible. Therefore, you must consider whether each employee or class of employees can complete their work remotely. Even when this guidance changes, you may be faced with requests from employees to continue to work remotely rather than return to the office.

Employers can allow employees to continue to work remotely if they wish. Otherwise, you will have to evaluate whether an employee is requesting that opportunity to work from home as a disability accommodation or in lieu of taking leave under the Families First Coronavirus Response Act.

Deciding whether to grant such an accommodation is a case-specific, fact-intensive inquiry. Depending on the reason for the request, an employer can ask the employee to provide documentation of the need to continue to work remotely (such as a doctor's note), but we recommend consulting with counsel before taking any such step.

If you will continue to allow some or all employees to work remotely, either for a period of time or indefinitely, it is important to have a clear Telecommuting or Remote Work Agreement in place that lays out expectations and requirements. This can be paired with a Confidentiality or Non-Disclosure Agreement if you do not have one already, depending on the type of work the employee will be completing. It is important that timekeeping, privacy and security expectations are clearly addressed and acknowledged, as well as any other reporting expectations or other responsibilities that you want to make clear.

### IV. "Hazard" Pay

If an employer has essential workers, then many of the above considerations won't apply, but another issue may be on the horizon. Many employers have granted essential employees some form of additional pay while working during COVID, often classified as "appreciation pay," "thank-you pay" or referred to by employees as "hazard pay."

As businesses begin to seek a return to pre-COVID times, they may wish to pull back these additional payments. However, businesses may receive pushback from employees who have grown used to these payments, or those who feel like the danger of COVID has yet to pass.

Employers in most situations are free to stop these additional payments prospectively. The Fair Labor Standards Act — the federal law that governs minimum wage, overtime pay and record keeping — does not address hazard pay, except that it must be taken into account when calculating a federal employee's overtime pay. Employees have no right to "hazard pay," although in a unionized environment, a collective bargaining agreement may include hazard pay and a formulation for calculating it. As with many COVID considerations, communication with employees will be key.

*Wilson Jarrell is an attorney at Barran Liebman LLP, where he represents employers on a wide range of employment issues. Contact him at 503-276-2181 or [wjarrell@barran.com](mailto:wjarrell@barran.com).*