



## COVID-19

### IMPORTANT CONSIDERATIONS FOR COMPANIES RETURNING TO WORK

COVID-19 HAS CREATED A HEALTH AND ECONOMIC CRISIS THAT HAS PROMPTED UNPRECEDENTED CHANGES IN THE WAY WE LIVE AND WORK. IT REQUIRED OUR GOVERNMENT TO MAKE DIFFICULT DECISIONS TO PROTECT OUR COUNTRY. THESE DECISIONS ARE CREATING CHALLENGES FOR OUR CLIENTS AS THEY EVALUATE HOW TO REENGAGE THEIR WORKFORCE, OPERATIONS, AND PRODUCTIVE ECONOMIC ACTIVITY.

The “[Guidelines for Opening Up America Again](#),” issued by the White House on April 16, 2020, offer guidance to state and local officials to help them determine how and when to reopen their economies and return people to work. These guidelines will be implemented in vastly different ways by each state and even local governments within the same state. Differing public health conditions in each state create varied needs that will invariably lead to different approaches for companies’ back-to-work strategies and tactics. Businesses with operations and offices in multiple jurisdictions will be required to keep constant track of these variances in the coming weeks and months to ensure compliance in each jurisdiction.

Even companies with most of their employees at work in essential services will have to manage the reopening process, including how it affects their suppliers and customers, demand for their products, travel to and within office buildings, and the personal demands on their employees. The myriad of complexities among different industry sectors highlights the need for clients to work closely with knowledgeable industry specialists when developing and implementing back-to-work strategies.

To help our attorneys, advisors, and clients analyze the complexities of the reopening process, Baker Donelson prepared this document to highlight categories of key considerations for companies developing and implementing back-to-work strategies.

# TAKING THE INITIAL STEPS TO BRING EMPLOYEES BACK TO WORK

IT IS IMPORTANT FOR ALL EMPLOYERS TO DEVELOP RETURN-TO-WORK PROTOCOLS AND HAVE PLANS IN PLACE TO ADDRESS POTENTIAL CHALLENGES AND COMPLICATIONS ASSOCIATED WITH A RETURNING WORKFORCE.

## CONSIDERATIONS FOR ALL EMPLOYERS

- If an employer is covered under the Families First Coronavirus Response Act (FFCRA), and has maintained some level of operations, it should retain all documentation to support tax credits associated with qualifying paid sick and family and medical leave payments made pursuant to the FFCRA. This information must be stored properly for at least four years.
- Employers should develop return-to-work protocols that address issues, including at a minimum: (i) when and how employees will return; (ii) which employees will return to work, when, and why they are being asked to return at this time; (iii) social distancing measures (e.g. physical changes to workspaces or other rules regarding limitations concerning common areas); (iv) use of supplies (e.g. personal protective equipment (PPE), thermometers, cleaning supplies, etc.); (v) cleaning procedures; and (iv) third-party vendors and visitor limitations or rules.



- Employers should consider Occupational Safety and Health Administration (OSHA) and Centers for Disease Control and Prevention (CDC) guidance to ensure that the workplace operates within applicable guidelines concerning employee safety, health, and other concerns.
  - Employers should review and revise handbooks and other policies and procedures addressing (i) travel, (ii) paid time off, (iii) telework, (iv) IT policies and procedures, (v) benefits, (vi) health screenings, (vi) employees who have been out with suspected or confirmed cases of COVID-19, (vii) employees with prolonged exposure to individuals with COVID-19, (viii) cleaning requirements, (ix) health and mental health considerations and options, and (x) future pandemics or other emergencies.
  - Employers should consider potential hot spots for legal liability and address any issues immediately in areas including, but not limited to, workers' compensation, employment discrimination, unemployment benefit issues (including if employees refuse to return to work), accommodation issues, retaliation claims, Department of Labor investigations, and OSHA complaints.
  - Employers should develop an initial communication plan for its employees to notify them of any new requirements or expectations and policy revisions. Employers should also be prepared for ongoing communication with their employees about these issues.
  - Employers should develop and schedule trainings for employees on new policies and procedures, discrimination and retaliation, and other areas that should be addressed as a result of COVID-19 and the new, resulting laws. Employers should be creative and prudent concerning the format of such trainings in light of social distancing.
  - If the employer made changes to an employee's salary/compensation, work schedule, or classification in reaction to the COVID-19 pandemic, there should be a plan in place regarding salary, pay and classification adjustments.
  - Employers should decide when to conduct performance reviews and how such reviews will be handled. Employers should review and revise job descriptions as necessary.
- Also, companies need to be prepared for the possibility that government shelter-in-place and stay-at-home orders could be reinstated shortly after reopening or later in the year depending on prevailing local public health conditions. Accordingly, they should evaluate lessons learned from their successes and failures during the prior order to develop or modify their operational plans for any future order. For example, companies should assess the actual efficacy of their work-from-home protocols, confirm contact information for all employees, and consider preparing remote work "packages" for some or all employees (e.g., containing office supplies and other materials).

Access materials from Baker Donelson's recent Return to Work webinar [here](#).



# MANAGING CASH FLOW INCLUDING GOVERNMENT STIMULUS PAYMENTS

Companies should be careful to develop an inventory of the reporting requirements under any existing private loan facilities as well as requirements under the PPP and Economic Injury Disaster Loan Program.



As companies start to move toward more normal levels of operation – whether they have been operating at full-steam, on a reduced basis, or shut down – they are all likely to feel a cash crunch. Expenses will rise quickly from restarting or significantly modifying operations, purchasing supplies and materials, rehiring employees, and incurring other operational costs. Additionally, many of their customers may lengthen their payment cycles.

Companies should review their existing financing mechanisms and be flexible in exploring options with existing creditors, including (i) potential deferrals of principal or interest payments, (ii) extended terms from trade creditors, and (iii) tapping into other potential sources of financing.

Even after the Paycheck Protection Program (PPP), Main Street Loan Program, and other stimulus programs are exhausted, there may be additional financing available to companies from traditional bank loans, Small Business Administration loans, state loan and guaranty programs, and trade credit. Companies will likely have to be more engaged than in normal conditions and pursue potential financing options in parallel.

Companies should be careful to develop an inventory of the reporting requirements under any existing private loan facilities as well as requirements under the PPP and Economic Injury Disaster Loan Program.

More information is available [here](#).

# MAXIMIZING THE TAX EFFICIENCIES FROM FEDERAL GRANTS AND ASSISTANCE

Taking a coordinated approach will help companies maximize the loan forgiveness of the PPP funds, obtain greater deferral of certain employment taxes, and/or expand the available employment tax credits under the FFCRA and CARES Act.



There are several important federal income tax and employment tax rules that can significantly help a company's cash flow management during the current crisis which should be carefully reviewed. These rules include those applicable for payroll tax deferral and employment tax credits. Additional support mechanisms and benefits are available through the FFCRA and the CARES Act.

With full awareness of the company's overall federal and state tax structure, companies should pursue an organized, thoughtful, and coordinated "upfront" approach to accessing and implementing these programs. This will require coordination between the

company's accounting, human resources, finance, and payroll departments. Taking a coordinated approach will help companies maximize the loan forgiveness of the PPP funds, obtain greater deferral of certain employment taxes, and/or expand the available employment tax credits under the FFCRA and CARES Act.

More information about tax provisions in the CARES Act is available [here](#) and [here](#).

# ESTABLISHING PROCEDURES TO ENSURE FEDERAL GRANT COMPLIANCE

Recipients and subrecipients of federal grant dollars will be expected to demonstrate compliance with these requirements to maintain eligibility under the grant program, including substantiating costs with documentation.



Entities that are eligible for federal grant funding, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Federal Emergency Management Agency (FEMA) Public Assistance Program, or otherwise, must continue to track costs related to COVID-19 response efforts and maintain related documentation. Reimbursable costs may continue to be incurred even after shutdown orders are lifted.

Federal grants are subject to the extensive regulations at 2 C.F.R. Part 200, including procurement standards and cost principles. All purchases that are funded, in whole or in part, with federal grant dollars must be procured in compliance with these regulatory requirements and must also be reasonable. Recipients and subrecipients of federal grant dollars will be expected to demonstrate compliance with these requirements to maintain eligibility under the grant program, including substantiating

costs with documentation. Recipients must establish, document, and maintain a robust compliance program with contingencies for systems access limitations due to remote work and unpredictable employee availability due to potential illness.

In addition, we expect audits and investigations regarding how CARES Act money was used. To limit risk, companies should be truthful and accurate in all representations made in the loan application and not request more money than necessary to support ongoing business operations. Companies should set up a separate bank account to receive and disburse CARES Act funds so that the money is segregated and can be accounted for in case of an audit or investigation.

More information for CARES Act compliance is available [here](#) and FEMA compliance is available [here](#).



# PREPARING FOR POTENTIAL FEDERAL AND STATE INVESTIGATIONS

Companies that receive enforcement letters requesting information regarding their business operations should not respond without conferring with counsel to ensure a strategic response that avoids monetary penalties, or worse, an interruption to business operations.



While traditional investigations have slowed as federal and state regulators are also under stay-at-home orders, federal, state and local government and agencies stand ready to enforce COVID-19 related executive orders and local public health laws. These enforcement actions typically stem from a company's lack of compliance with social distancing and other related requirements in the workplace, often initiated by a complaint from an employee or competitor. Carefully reviewing all governing orders, both state and local, is critical to ensure a strategy for full compliance. Enforcement measures vary from warnings to civil enforcement to criminal punishment. Companies that receive enforcement letters requesting information regarding their business operations should not respond without conferring with counsel to ensure a strategic response that avoids monetary penalties, or worse, an interruption to business operations.

The Department of Justice (DOJ) and state attorneys general have already shifted enforcement priorities to fraud related to the COVID-19 pandemic. The DOJ's recent announcement notes that a wide variety of fraudulent activity is likely to result from the current public health crisis, including medical providers using patient information obtained for COVID-19 testing, fraudulent billing for services not provided, and cyberattacks like "ransomware," "phishing," and other cyber schemes. Attorneys general are highly focused on price-gouging and other consumer fraud issues.

More information is available [here](#).

# ENSURING DATA AND NETWORK SAFETY AND SECURITY

Management teams need to anticipate potential security issues and establish controls to reduce potential exposure.



In the rush to respond to the government shelter-in-place and stay-at-home orders and ensure employees could work from home, many companies were not able to implement a “lock down” framework for all systems, networks, and internal technical controls. IT teams – especially those who were not previously accustomed to remote work – could not plan for all usage scenarios.

Executives should have some understanding of the current information privacy and security posture and stop deferring to the IT team. Management teams need to anticipate potential security issues and establish controls to reduce potential exposure.

Management and IT teams should work together to plan for reconnections and to help ensure that a secure environment is maintained. For example, before remote workers reconnect to the company’s network or system it is important to determine if appropriate system patching updates were deployed and implemented.

More information is available [here](#) and [here](#).



# MANAGING GLOBAL SUPPLY CHAINS IN A GLOBAL PANDEMIC

Once weaknesses have been identified, companies should review existing contractual obligations to determine the possibility of establishing or expanding secondary supplier relationships.

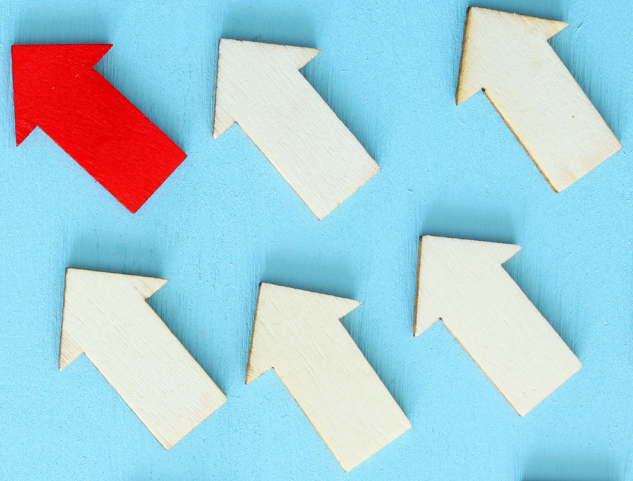


As governmental authorities implement measures for multi-stage approaches on easing restrictions related to COVID-19, globally connected companies struggle to address various challenges, including reviving shut-down or partially functioning supply chains. To reduce delays and ongoing disruptions, companies need to plan for partial operations and ensure existing suppliers' ability to meet customer demands. Specifically, companies should regularly communicate short-term needs, such as start-up capabilities, purchase volumes, and delivery timelines, to suppliers and customers to identify weaknesses in existing supply chains. Once weaknesses have been identified, companies should review existing contractual obligations to determine the possibility of establishing or expanding secondary supplier relationships. By doing this, companies may be able to bridge otherwise existing gaps in supply chains.

Companies will likely face at least some level of supplier and demand disruption. To address such issues, while communicating expected shortages and potential alternative arrangements to customers, companies need to adapt production schedules based on available inventory, synchronize demand and supply (i.e., build inventory whenever practical for future projects and absorb costs or reduce certain production operations to save costs), and evaluate alternative logistics options.

More information is available [here](#), [here](#), and [here](#).

# PLANNING FOR RISKS IN EVEN THE BEST RETURN-TO-WORK PLANS



As companies move rapidly to resume operations and return their teams to work in an accelerated environment, there is potential they will ignore standard planning processes that are designed to avoid mistakes and reduce risks. This will be compounded by the fact that re-opening requirements will vary by state and even local governments within the same state. Several of our recommendations include the review of lessons learned from work-from-home procedures and the need to set aside time to quantify future risks. A streamlined and fast-track approach to risk assessment, prioritization, and mitigation will be critical to ensure a smooth and error-free transition.

We recommend that the strategy includes the following: (i) an organization-wide procedure to quantify lessons learned from shelter-in-place; (ii) identification of potential risks related to resuming business operations; (iii) mitigation strategies that will limit further disruptions in operations and potential liability; and (iv) a contingency plan for the possible resurgence of the virus and a need to revert to shelter-in-place again.

In our experience, a process which integrates both legal and business unit analysis and execution can yield significant value to an organization. For example, we recently worked with a client to develop a root cause analysis related to human resource claims (similar to the type of potential employment claims highlighted above). This process included the triage and identification of high-risk issues, creation of a formal review process involving both legal and business units, and resulted in the development of expedited remedial measures that positioned the client to avoid similar claims.

This integrated approach to risk assessment will help ensure that companies quantify and benefit from lessons learned across all departments and quickly identify new issues that could lead to disruption or liability. Additionally, it ensures that companies implement mitigation strategies sensitive to the needs of potentially impacted departments and customers.

For additional information, please access Baker Donelson's resource for legal guidance and information about the COVID-19 pandemic at [www.bakerdonelson.com/coronavirus](http://www.bakerdonelson.com/coronavirus).

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