

BACK TO BUSINESS WORKSHEET

Wisler Pearlstine, LLP

GENERAL COUNSEL INITIATIVE

LAW + BUSINESS + COMMON SENSE

www.wislerpearlstine.com/general-counsel-initiative/

Comments and Inquiries: generalcounsel@wispearl.com

INTRODUCTION

To assist businesses affected by the pandemic to reopen and recover, the Wisler Pearlstine **General Counsel Initiative** has created the **Back to Business Initiative**. We focus on three goals:

- *Legal*: minimize legal risks and liabilities
- *Safety*: protect the well-being of employees and the community
- *Recovery*: promote business recovery and success

These goals will be achieved most effectively and efficiently by the development of a **Back to Business Plan** that concentrates on:

- *Employees*: changes in policies, procedures and management
- *Workplaces*: changes in policies, procedures and structure
- *Business operations*: recognition of and planning for new risks and opportunities

The Back to Business Initiative assists businesses in the development of their Back to Business Plans in three ways:

- *Back to Business Worksheet*: The Worksheet, included below, compiles the decision points that will form the foundation of the Back to Business Plan.
- *Back to Business Guidance*: We will regularly publish practical, real-world guidance that will inform the content, implementation and evolution of the Back to Business Plan.
- *Back to Business Advisory Services*: We have assembled a multidisciplinary team to provide legal and other advice, tailored to our clients' specific goals and needs, on (wherever possible) a budgeted, not-to-exceed fee basis.

Please direct your suggestions, questions and requests for assistance to your Wisler Pearlstine attorney, or to generalcounsel@wispearl.com

INCORPORATE THE FOLLOWING INTO ALL ASPECTS OF

THE BACK TO BUSINESS PLAN

These strategies will assist in the effort to comply with the law, they will protect employees and encourage their willingness to return to work, and they will facilitate efforts to pay less attention to pandemic issues and more attention to getting back to business.

- *Appoint at least one individual to serve as the point-person and go-to resource for the Plan.* A “Safety Officer” is legally required in some states, but the role of this individual should extend beyond just safety and encompass all aspects of the Plan so that there is a first line of enforcement, and so that everyone knows to whom to direct questions and issues as they arise. For larger companies, a team may be appropriate.
- The Plan must be more than memos and emails. *Create a manual* (which can be a work-in-process at the start) and require employees to acknowledge receipt in writing, in accordance with best practices for employee handbooks generally. *Having established those ground rules, implement periodic management and employee training* so that the manual is more than just words on paper or a computer screen, so that all personnel understand what is expected of them, and so that the business is perceived as taking its commitment to the Plan seriously.
- *It will be much easier to implement and manage the Plan if employees view the Plan as the product of collaboration.* Form employee committees to advise management during the Plan development process, and to monitor and report on issues thereafter. Survey employees. Create clear channels through which employees can communicate questions and concerns, and make certain that responses are provided.
- Be prepared to deal with employees who refuse to abide by the Plan – for example, employees who refuse to report symptoms, submit to temperature checks, or utilize personal protective equipment when required. Tolerating such conduct can expose a company to serious liabilities and it can endanger other employees. *Management must send a clear message, through actions and not just written policies, that the Plan is taken seriously, from the top down.*

THE EMPLOYEE PLAN

- As you begin the reopening process, implement legally compliant procedures to determine which employees are recalled, which employees remain on layoff/furlough, which employees are restored to full time/full pay status, and which employees are placed on reduced pay/reduced hours status.

- **Note:** Discrimination issues may arise if there is evidence that recalls and post-recall terms of employment were (intentionally or unintentionally) influenced by factors such as age, nationality, race, gender, disability or any other protected characteristics. A lawful selection process, carefully documented, will be of primary importance.
 - **Note:** Layoffs, furloughs, and reductions in hours and compensation may affect PPP loan forgiveness. Careful planning and documentation will be important.
- As needed, develop and implement legally compliant procedures to adjust the compensation and benefits of recalled nonexempt and exempt employees.
 - **Note:** Similar discrimination issues may arise. Lawful selection processes and documentation are crucial.
 - **Note:** With limited exceptions, salaried exempt employees are legally entitled to receive their full weekly salary for any week in which they perform *any* work. However, compensation may be reduced so long as the reduction is not based on the number of hours the exempt employee works.
 - **Note:** Compensation reductions may affect PPP loan forgiveness, and careful planning and documentation will be important.
- Comply with the paid leave requirements of the Families First Coronavirus Response Act (FFCRA)
 - **Note:** Under the FFCRA, an employee at a business with fewer than 500 employees is entitled to various types of paid leave in COVID-19-related circumstances. Employers must develop protocols to satisfy these statutory requirements.
 - **Note:** Certain exemptions are available with proper documentation.
 - **Note:** Tax credits are available with proper documentation.
 - **Note:** Revise PTO policies to facilitate compliance with FFCRA legal requirements and COVID-19 best practices, and to facilitate adequate attendance to permit business operations.
- Develop procedures to comply with state and federal requirements pertaining to employees with probable or confirmed COVID-19 exposure.
 - **Note:** The Center for Disease Control (CDC), the Occupational Health and Safety Administration (OSHA), and state departments of health impose various requirements on employers who become aware (or should

have become aware) of employees who may have been exposed, and employees who were exposed to COVID-19.

- **Note:** These requirements may involve, for example, mandatory quarantine, contact tracing, confidentiality, and workforce alerts. Businesses must implement plans to address these requirements.
- Develop procedures to deal with at-risk employees (employees with immunological or other conditions that make them particularly susceptible to COVID-19) who a) demand the right to return to work despite the risks to their health, or b) refuse to return to work because of the risks to their health
- **Note:** The EEOC has promulgated guidance that determines when an employer can bar an employee from returning to work over the employee's objections based on the employee's health conditions. By way of summary, the employer will have to satisfy a difficult burden in order to be permitted to do so.
- **Note:** Depending on the circumstances, the ADA may require an employer to reasonably accommodate an at-risk employee who refuses to return to work, depending on the circumstances. This could include, for example, restructuring work location or duties, telework or unpaid leave.
- Develop procedures to deal with employees who are not at-risk, but who refuse to report to work because of their fear of infection.
 - **Note:** Employers may be required to accommodate employees whose fears are based on management's failure to satisfy applicable workplace social distancing, sanitation and related protocols.
 - **Note:** Where an employer has satisfied all requirements and, nevertheless, an employee refuses to return to work based on the fear of infection, however remote, the employer may still wish to accommodate the employee to preserve the relationship, but care must be taken to avoid potential discrimination issues.
 - **Note:** Distinguish employees who refuse to return to work for other reasons, such as the desire to remain on unemployment compensation as increased by the federal government's pandemic unemployment assistance program.
 - **Note:** With proper documentation, an employee who refuses to return to work might not count as a lost FTE for PPP forgiveness purposes.
- Develop procedures to screen employees (for example, by requiring completion of a symptom questionnaire or temperature screening) before they enter the facility.

- **Note:** Properly administered, these screenings are permitted despite the ADA's prohibition of medical examinations. The EEOC mandates certain confidentiality and privacy procedures. The CDC and state departments of health mandate additional requirements.
- Develop procedures to comply with state and federal requirements respecting employees who have COVID-19 symptoms. Such employees should be instructed, in advance, to notify their supervisor and remain home (with potential telework obligations) until symptoms have resolved or as directed in compliance with law.
 - **Note:** Educate employees about COVID-19 symptoms: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID19-symptoms.pdf>
- Cross-train and equip employees to increase their productivity and flexibility to counteract reductions in the number of employees permitted on business premises (see **Workplace Plan**, below).
- Educate employees on methods to minimize the spread of COVID-19 during their non-working time.
- Review employment practices liability insurance, workers compensation insurance, and related insurance policies and coverages in view of new and increased risks.
- Employees who have teleworked, or not worked at all, during the pandemic may not be able to seamlessly re-assume their positions. To varying degrees depending on the nature of each business, the pandemic has changed and will continue to change the way many employees will be required to work, and it has changed and will continue to change the nature of the workplace. Businesses must carefully assess and react to how these changes may compromise (or, in some cases, increase) employee productivity and commitment and, ultimately, profitability. For example:
 - Many employees will need training and counseling to effectively assume the roles they will be expected to serve in a post-pandemic workplace.
 - To the extent telework increases, businesses must develop techniques to assess employee productivity and goal achievement, not just hours, and managers must be trained to effectively utilize those techniques.
 - To the extent telework increases, employees may lose the social and business connections with colleagues, and the business itself, that facilitates engagement and idea sharing. Management must implement techniques to replace these interactions, often using chat and conferencing technology in a scheduled, structured way.

- Employee perceptions that employers may not be able to continue to employ all employees will heighten employee urgency to move to a more secure position at another business. Employee retention strategies will be crucial, including communication, benefits, and revised compensation and bonus structures.
- Employees in sales and service capacities who formerly depended on personal visits with customers may be required to deal with customers in different ways -- for example, many customers may limit outsiders, and air travel may be restricted. New approaches will have to be developed for these employees, and for the sales/service process itself, and new training and management protocols will need to be utilized.
- Many businesses rely on more senior employees working with less senior employees as a means to mentor and train, and as a means to transfer knowledge throughout an organization. These efforts may be compromised in the future, necessitating new training and knowledge transfer approaches.

THE WORKPLACE PLAN

Revisions to workplace facilities and procedures must be designed and implemented to satisfy legal requirements, to protect employees and visitors, to protect the community, and to promote the employee and customer confidence that enables profitable operations

Note: Businesses must anticipate lawsuits brought by employees (and others) claiming that they contracted COVID-19 as a result of the failure to comply with CDC, OSHA and state health department requirements. This changing liability landscape mandates particular care in implementing the Workplace Plan.

Note: State departments of health, the CDC and OSHA have promulgated and continue to revise and update guidance on workplace changes intended to limit the spread of COVID-19. Office facilities are, obviously, different from manufacturing facilities, and each facility has its own risks, possibilities and limitations. There is no alternative but for management to consider all possibilities and exercise their judgment respecting what their workplace requires, and can tolerate.

For that purpose, we recommend reference to the following:

CDC: Employer Information for Office Buildings
<https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html?referringSource=articleShare>

CDC: Interim Guidance for Businesses and Employers
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

OSHA: Guidance on Preparing Workplaces for COVID-19
<https://www.osha.gov/Publications/OSHA3990.pdf>

OSHA: Social Distancing
<https://www.osha.gov/Publications/OSHA4027.pdf>

Key aspects of the guidance included in these materials is summarized below.

- Manage social distancing requirements through telework and scheduling policies
- Manage social distancing requirements through physical alterations to workplaces (such as relocation of workstations and equipment and shields between employees who are required to work in close proximity)
- Manage social distancing requirements through elimination/alteration of locations in which employees and others may gather (such as refreshment and break areas, conference rooms, locker areas, areas of ingress and egress)
- Use signs, floor and wall markings, and other visual cues to indicate social distancing requirements when physical barriers are not possible
- Implement employee and visitor temperature and symptom check procedures in compliance with ADA, EEOC and other requirements
- Encourage (such as through cost reimbursement) commuting methods that do not require close employee contact
- Replace high-touch items, such as coffee pots, water coolers, and bulk snacks, with alternatives, such as pre-packaged, single-serving items.
- Analyze and revise building ventilation and plumbing systems to reduce COVID-19 transmission risks
- Mandate use of (and supply) personal protective equipment (such as masks and gloves), hand sanitation capabilities, and wipes to employees, contractors, customers and visitors
- Implement cleaning and disinfecting in accordance with government protocols

- Minimize travel requirements
 - Conduct a thorough workplace hazard assessment – including employees in the process -- to identify areas and practices that could increase risks of COVID-19 transmission
 - Manage outside contractors to prevent transmission of COVID-19
 - Develop procedures to comply with OSHA reporting requirements respecting COVID-19 cases in the workplace.
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THE BUSINESS PLAN

Each business will, obviously, have to assess its post-pandemic products and services, update its competition analysis, refine its marketing strategies and budgets, quantify its margins, and complete the other nuts and bolts of business planning. In addition to these fundamental concerns, we can assist with the following issues.

- Developing, negotiating and drafting agreements with, consultants, contractors, suppliers and other service providers
 - **Note:** In the post-pandemic world, many businesses will seek assistance from consultants, contractors and other service providers to help them assess, plan, manage and fulfill their business missions. The agreements that are often utilized in these contexts are standard form and wholly inadequate. For example, of primary importance are the "scope" sections of these agreements, in which the services to be provided and the results/benchmarks to be achieved are stated -- otherwise, there is no way to assess whether a business obtained value for the money paid. Many other provisions are routinely drafted with inadequate or, even, dangerous language, such as completion dates, intellectual property protections, and damage limitations.
- Revision/negotiation/drafting of loans and financing transactions
 - **Note:** It is generally in a lender's best interest to promote their borrowers' financial well-being, and the easing of some government regulations has made it easier for many lenders to do so, both in respect to existing and new lending transactions. This can open a door for the negotiation of productive lending relationships for both lenders and borrowers.
- Revision/negotiation/drafting of commercial leases
 - **Note:** Similarly, commercial landlords generally prefer to assist their

tenants to remain in business rather than contribute to a tenant's demise. In addition, the market for commercial office space may be constricting as telework increases. Existing leases and new leases can be negotiated and drafted to take advantage of these changing circumstances – on behalf of both tenants and landlords.

- Revision/negotiation/drafting of contracts with customers
 - **Note:** Businesses must account for the fact that future pandemic spikes and economic uncertainties may create situations in which they may not be able to timely satisfy the requirements included in their customer/client contracts. Contracts must be drafted with these contingencies in mind.
- Employment agreements: term, compensation, severance
 - **Note:** Current and future uncertainties should also influence the drafting of employment agreements. For example, guaranteed employment terms, compensation and severance, if included at all, should be drafted with "outs" depending on circumstances that the employer cannot control. Importantly, new and creative compensation strategies must be designed to encourage key employee retention and commitment – the usual benchmarks and approaches may no longer reliably apply
- Employment agreements: non-compete covenants/non-solicit covenants
 - **Note:** We believe that in reaction to current and anticipated economic conditions, courts and state legislatures will limit the enforceability of noncompete agreements – they will be loath to restrain employees from seeking better and more stable opportunities. This will increase the importance of carefully drafted non-solicitation agreements, and confidentiality/trade secret provisions.
- Liability waivers of employees, contractors, customers, other third parties
 - **Note:** Lawsuits are being filed in which employees and visitors who contract the virus assert that they were infected on a particular business' premises. Liability waivers may help limit these risks.
- Obtaining and administering PPP, EIDL and other SBA/government guaranteed or funded loans, forgivable loans, and grants
 - **Note:** The nature and availability of government guaranteed loans and grants will continue to change as new programs are developed. It is crucial that businesses stay apprised of these developments, particularly since some of these programs will operate on a "first come – first served" basis until available funds are expended. It is equally crucial that businesses remain current regarding forgiveness requirements, including

accounting and documentation issues.

- Understanding the *force majeure* contract law doctrine
 - **Note:** A *force majeure* clause is, generally, a contractual "out" in the event of natural disasters, insurrections, "acts of God" ...and so on. *Force majeure* clauses become extremely important when a party to a contract (for example, a lease, or an agreement to complete certain work by a stated deadline, or an agreement to buy a certain quantity of products for a defined price) wants to change the terms of the contract because circumstances beyond the party's control made performance impossible or, at the least, impractical. Most *force majeure* causes do not provide an "out" based on the pandemic – but some do, and to the extent the issue is pertinent, you should seek counsel. Just as important: the precise terms of *force majeure* clauses in agreements drafted from this point forward will be very important and, depending on whether you want to take advantage of or want to prevent the "out", businesses will need to be extremely cautious about the wording of these clauses – expect this to be a point of serious negotiation in many agreements.

- Understanding impossibility and frustration of purpose contract law doctrines
 - **Note:** Like *force majeure* clauses, these legal doctrines can provide an excuse for contractual nonperformance based on unusual circumstances that mitigate the underlying purpose of the contract. Especially in the face of potential pandemic spikes in the future, it is important to understand how these doctrines may work for, or against you.

- Understanding business interruption insurance
 - **Note:** Most business interruption insurance policies will not cover losses caused by the pandemic, but some will, and your coverages should be reviewed with counsel. We recommend making a claim under any applicable business interruption policy even if it is likely that the claim will be denied – class action lawsuits and legislative changes are being pursued, and these could result in recoveries for businesses that incurred claim denials.

- Understanding insurance coverages, exclusions, requirements and limits
 - **Note:** The pandemic has resulted in, and will continue to result in, new types of risks, some of which could be substantial, beyond the employment practices risks mentioned previously. This mandates a global review of insurance policies, coverages and limits.

We are continuing to monitor and assess reopening and recovery requirements and opportunities. If you need assistance, contact your Wisler Pearlstine attorney, or email us at generalcounsel@wispearl.com.