

Preparing for the Post-Pandemic Workplace

Just Getting Started When It's "Over"

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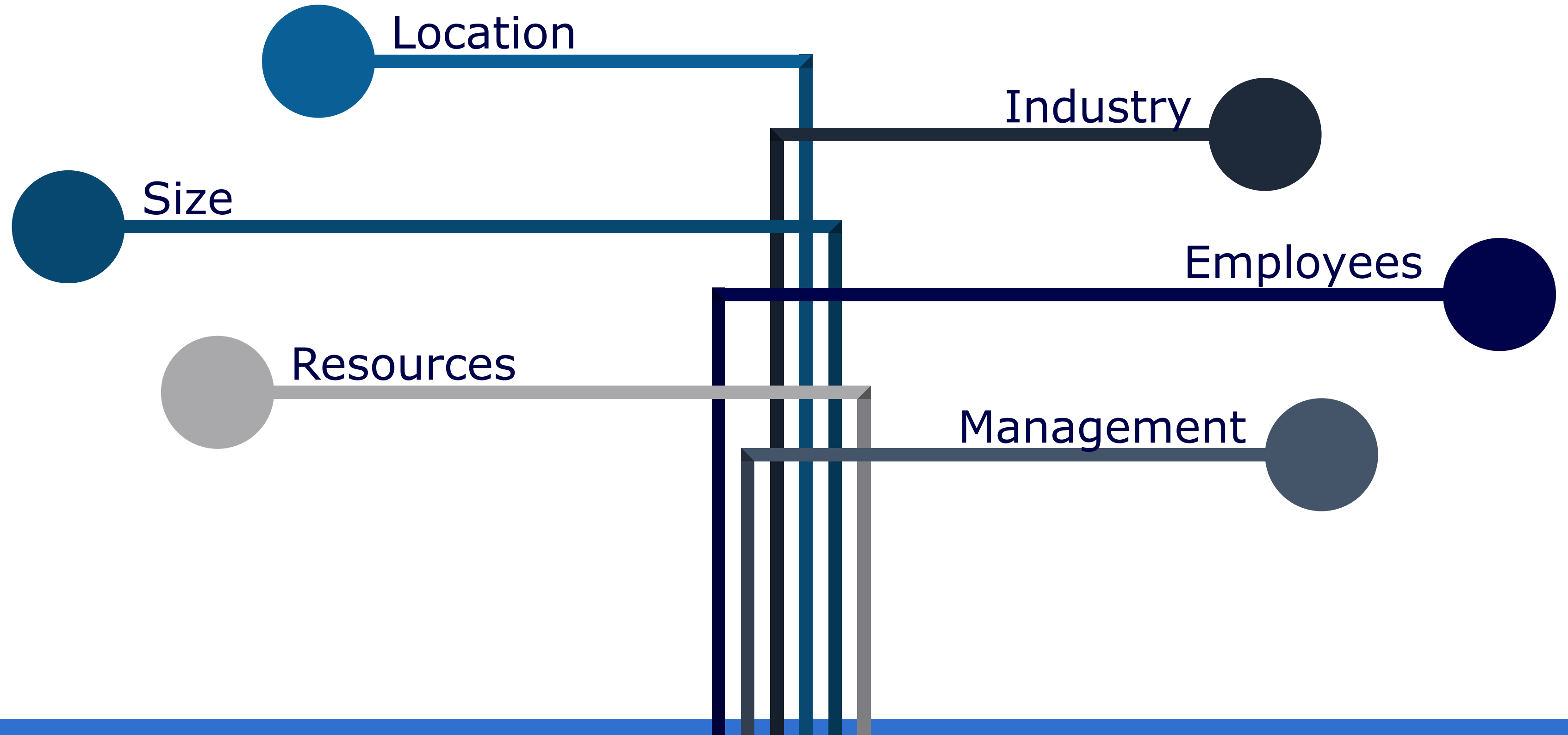


Big Picture

- The “New Normal” comes after widespread vaccination
- Currently in a chaotic transition
- Very little consistency
- Your organization’s reality depends on numerous factors



Victims of Circumstance



White House Guidelines for Opening Up America Again

- On April 16, 2020, President announced recommended three-phase approach to reopen states
- Data-driven conditions states should satisfy before proceeding to phased opening
- What states should do to meet the challenges ahead
- Responsibilities of individuals and employers during all phases

Prerequisites for Reopening States

» Symptoms

- Downward trajectory of influenza-like illnesses reported within a 14-day period; **AND**
- Downward trajectory of COVID-like cases reported within a 14-day period

» Cases

- Downward trajectory of documented cases within a 14-day period; **OR**
- Downward trajectory of positive test percentage within a 14-day period

» Hospitals

- All patients must be treated without crisis care; **AND**
- A robust testing program must be in place for at-risk healthcare workers, including emerging antibody test.

Phase 1 Operations

- Schools and organized youth activities remain closed
- No/limited visitation to senior living facilities and hospitals
- Restaurants, movie theaters, sporting venues, places of worship open with strict physical distancing protocols
- Resume elective surgeries, as clinically appropriate, on outpatient basis
- Gyms open with strict physical distancing and sanitation protocols
- Bars remain closed

Phase 2 Operations

- Schools and organized youth activities **reopen**
- No/limited visitation to senior living facilities and hospitals
- Restaurants, movie theaters, sporting venues, places of worship open with **moderate** physical distancing protocols
- Resume elective surgeries, as clinically appropriate, on outpatient **and inpatient** basis
- Gyms open with strict physical distancing and sanitation protocols
- Bars **reopen with diminished standing-room occupancy**

Phase 3 Operations

- **Resume** visitation to senior living facilities and hospitals
- Restaurants, movie theaters, sporting venues, places of worship open with **limited** physical distancing protocols
- Gyms open with **standard** sanitation protocols
- Bars open with **increased** standing-room occupancy

Federal “Recommendations”

- State and local governments will determine when, where, and how to reopen businesses.
- Many Governors retaining this authority at the state level.
- Before reopening, states should develop a preparedness plan and be able to provide adequate testing and screening, PPE, and medical equipment if COVID-19 cases, particularly hospitalizations begin to rise.

NY Governor Cuomo's Two-Phased Approach

Two weeks between phases to determine the impact of reopening

» Phase One

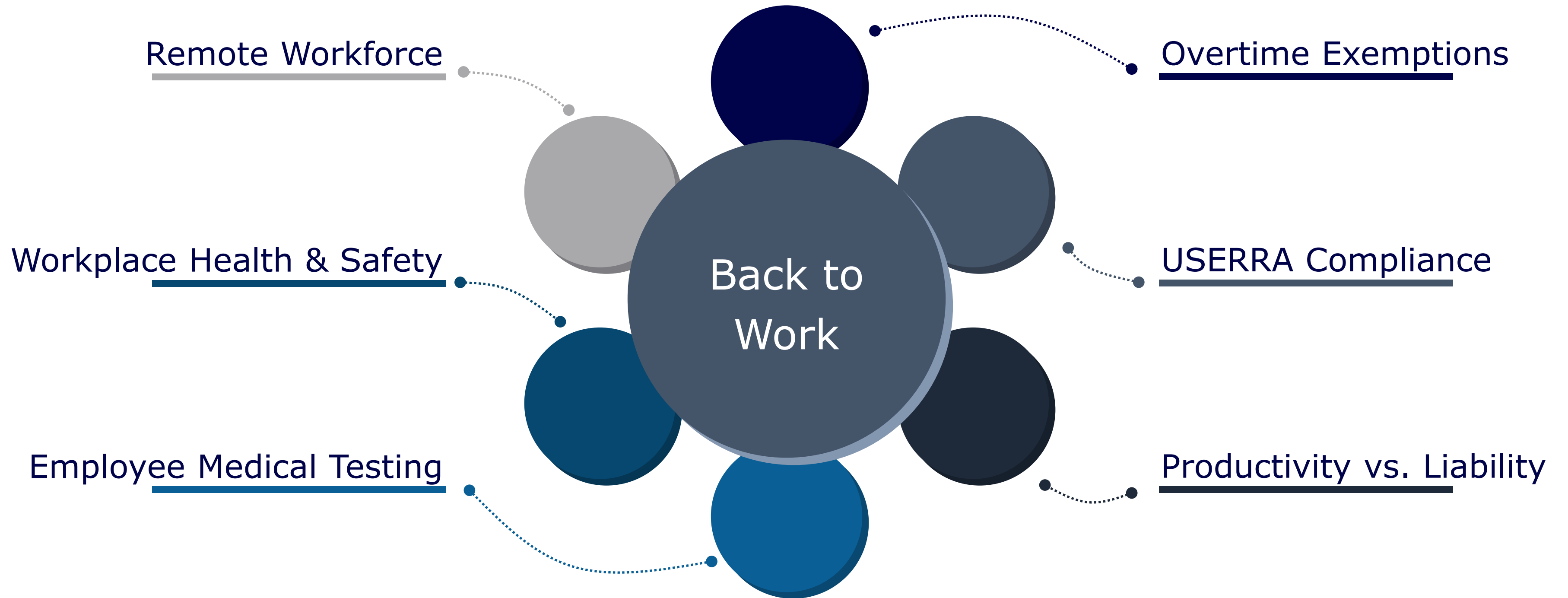
Reopen some construction and manufacturing industry on regional basis

- Businesses within the industries with low risk
- Earliest: May 15, 2020

» Phase Two

- Develop matrix: Evaluate who is essential, risk level of business or industry, and importance of reopening to economy
- Plan for reopening based on matrix

Legal Issues



Remote Workforce

» Telework

Employers may be required or decide to have a portion of their staff continue to work from home.

Alternatives to Consider:

- Ongoing need to continue allowing employees to work from home
- Rotating office schedules – Alternative office days/shifts, allowing only a portion of the workforce in the office at a time
- Changes to the physical workspace in the office to allow for maximum social distancing between employees
- Individual employee accommodation requests

Telecommuting

Employers should be prepared to address ongoing employee requests to telework:

- Based on proof of previous success or productivity
- Due to childcare needs (closed schools and daycares)
- Concerns about health and safety upon return to the office
- Accommodation request for employees that fall in high-risk category or with other disabilities

Workplace Health and Safety

CDC Guidelines



Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)

OSHA Guidelines



Guidance on Preparing Workplaces for COVID-19

EEOC Guidelines



Pandemic Preparedness in the Workplace and ADA

Mandates by federal, state and local government



New laws and Executive Orders

Workplace Health and Safety Considerations



- 1 Comply with OSHA Rules
- 2 Implement Infectious Disease Controls
- 3 Adopt Workplace Preparedness Policies
- 4 Appoint Company Representative
- 5 Provide Training

OSHA Compliance

- Screening Policies
- Personal Protection Equipment
- Procedures for cleaning and disinfecting the workplace
- Social Distancing – Alternative workweeks, schedules or shifts
- Continued teleworking arrangements

OSHA Guidelines

- Infectious Disease Preparedness and Response Plan
- Implement Basic Infection Prevention Measures
- Policies and procedures for prompt identification and isolation of sick people
- Workplace flexibilities and protections
- Implement Workplace Controls (Engineering Controls, Administrative Controls, Safe Work Practices, PPE)
- Existing and new OSHA standards
- Classifying Worker Exposure to COVID-19 (Very High, High, Medium and Low Risk)
- Safe Work Practices
- PPE
- Travel

Infectious Disease Controls

- Personal Protective Equipment
- Physical workspaces
- COVID-19 cases
- Symptomatic employees
- Adopt cleaning and disinfecting procedures for high traffic areas
- Encourage frequent handwashing or use of hand sanitizer

Employee Screenings



- **Temperature Screenings, Symptom inquiries, COVID-19 Tests**
- **Positive Cases of COVID-19**
- **Confidentiality: screening results, questionnaires, positive COVID-19 cases & medical documentation**
- **Proper training for staff**

Screening & Testing

- Temperature screening, testing, and symptom checker should be applied consistently to avoid allegations of discrimination.
- Employers with multiple entry and exit points should determine how best to administer employment screening, testing, and symptom checking to cover all employees
- Determine how positive COVID-19 cases and symptomatic employees will be handled

Company Representative

- Appoint one or more people within the Company as designated representative responsible for communications with staff regarding COVID-19
- Adopt Procedures for reporting and communicating positive COVID-19 cases among workers
- Adopt and implement employee screening and testing procedures
- Record and report positive OSHA cases where employer reasonably believes it was contracted at work
- Stay abreast of all new laws or guidelines issued by the federal government, state governor, CDC, OSHA, and the EEOC

Training

- Personal Protective Equipment
- Workplace safety policies and procedures
- Infectious disease controls
- Reasonable accommodation requests under the ADA
- Employee's Rights under USERRA

Working Overtime:

Are employees that experienced changes to their compensation or duties as a result of the pandemic still exempt?

Compensation Changes

Many employers were required to make necessary modifications to their workforce as a result of the COVID-19 pandemic. These changes include permanent layoffs, temporary furloughs, reduction in hours or compensation for certain employees or groups of employees, and participation in an Unemployment Shared Work Program.

Temporary changes to the compensation for exempt salaried employees

- Change to non-exempt hourly employees
- Reduction in weekly salary rate with or without a reduction in hours

What will happen when businesses reopen?

Exempt Salaried Employee Changed to Non-Exempt Hourly

An exempt salaried employee that was temporarily changed to a non-exempt hourly employee during the pandemic can be brought back as an exempt salaried employee without losing the exemption status if the following conditions have been met:

- Employee was properly compensated for overtime hours while set up as hourly;
- The change in compensation was not done to avoid paying overtime.

Exempt Salaried Employee Had Compensation Reduced

An employer is permitted to reinstate the employee at either the original weekly salary or designate a new salary rate without jeopardizing the exemption status if the following conditions are met:

- The salary rate meets the minimum threshold for compensation under state and federal law;
- New salary is applied prospectively;
- The employee is provided with advance notice; and
- The change was not implemented to avoid paying overtime wages

Duties Changes

- Exemptions based on “primary duties”
- Temporary increase in non-exempt duties doesn’t necessarily destroy exemption
- But if nature of the job has changed, must review to determine whether new duties still qualify for exemption

Uniformed Services Employment and Reemployment Rights Act



What is USERRA?

- Applies to employees who perform duties, voluntary or involuntary, in “uniformed services”
- Applies to all employers regardless of size and to full and part-time workers.
- Provides for job-protected leave and reinstatement of employment

National Guard Duty During the Pandemic

- Air and Army National Guardsmen mobilized to support COVID-19 Response
- ~29,000 activated
- ~16,500 National Guardsmen placed under state control but receive federal funding and are entitled to protected leave and reemployment with their employer under USERRA
- ~12,500 Guardsman placed on State Active Duty are not protected under USERRA, but may have reinstatement rights under a similar state law

“Uniformed Services”

»» What “services” are covered”?

- Armed Forces, which includes National Guard and Air National Guard;
- Navy, Marine Corp;
- Coastguard;
- Commissioned Corp. of Public Health Services

»» What “duties” are covered?

- Active or Inactive Duty;
- Training during active or inactive duty;
- Reserve work;
- Disaster response work for Public Health Security and Bioterrorism Agency

Employee Responsibilities Under USERRA

» Notice

Where possible, employees must provide employers with 30 days notice

- Exceptions for Confidentiality and where notice is not feasible
- Notice can be verbal or in writing

» Request for Reemployment

- Employer must reinstate covered employee if proper notice given based on length of deployment
- Employee may need to provide additional documentation to prove that the request was timely and that the leave was covered.

USERRA - Employer Pitfalls

- Treating voluntary and involuntary services differently
- USERRA policies that require advanced approval
- Policies that require employees to submit documentation prior to departure
- Failure to properly apply the “Escalator Principle”
- Failure to educate managers on employee rights under USERRA and take corrective action for unlawful conduct that could be considered discriminatory, harassing, or retaliatory



When should businesses reopen?

PRODUCTIVITY VERSUS LIABILITY

Employer Liability

- 1 OSHA
- 2 Worker's Comp.
- 3 Wage and Hour Claims
- 4 Personal Injury
- 5 Discrimination/Failure to Accommodate

PREP Act Declaration

The Secretary of Health and Human Services issued a Declaration under the Public Readiness and Emergency Preparedness Act (PREP Act) on February 4, 2020 granting tort immunity to entities involved in the creation or distribution of “medical counter measures” to the COVID-19 Virus.

- This includes the production, manufacturing, distribution, development, testing or administration of any drug, medicine, vaccine, or device used to treat, diagnose, cure, mitigate, or prevent COVID-19.
- It covers the United States government, manufacturer, distributor, program planner and other qualified persons, as well as the officers, agents, and employees who distribute, manufacture, and administer Covid-19 Counter Measures.
- A covered distributor includes mail and air carriers, brokers, warehouses, and retail pharmacies.
- “Qualified Person” means licensed health professional or other individual authorized to prescribe, administer, or dispense covered countermeasures under the state where the covered countermeasure was prescribed, administered, or dispensed.
- **Some believe that employers required to distribute PPE or that administer COVID-19 testing to employees may be covered under the Declaration, which would grant them tort immunity for related claims by employees or family members.**

Unsurprising Tension

- The U.S. Chamber of Commerce and 20 business groups sent a letter requesting that preventative measures be implemented to protect businesses and employers from lawsuits due to the financial impact it will have on companies.
- Richard Trumka, President of AFL-CIO, demanded that the federal government adopt protective measures to protect employees from exposure to the virus and prevent employer retaliation before businesses reopen.

Longterm Predictions

- New legal parameters for business operations
- Increased teleworking
- Rebalancing of many industries
- Reinvigorate union organizing
- Greater emphasis on employee relations

Stay Updated!

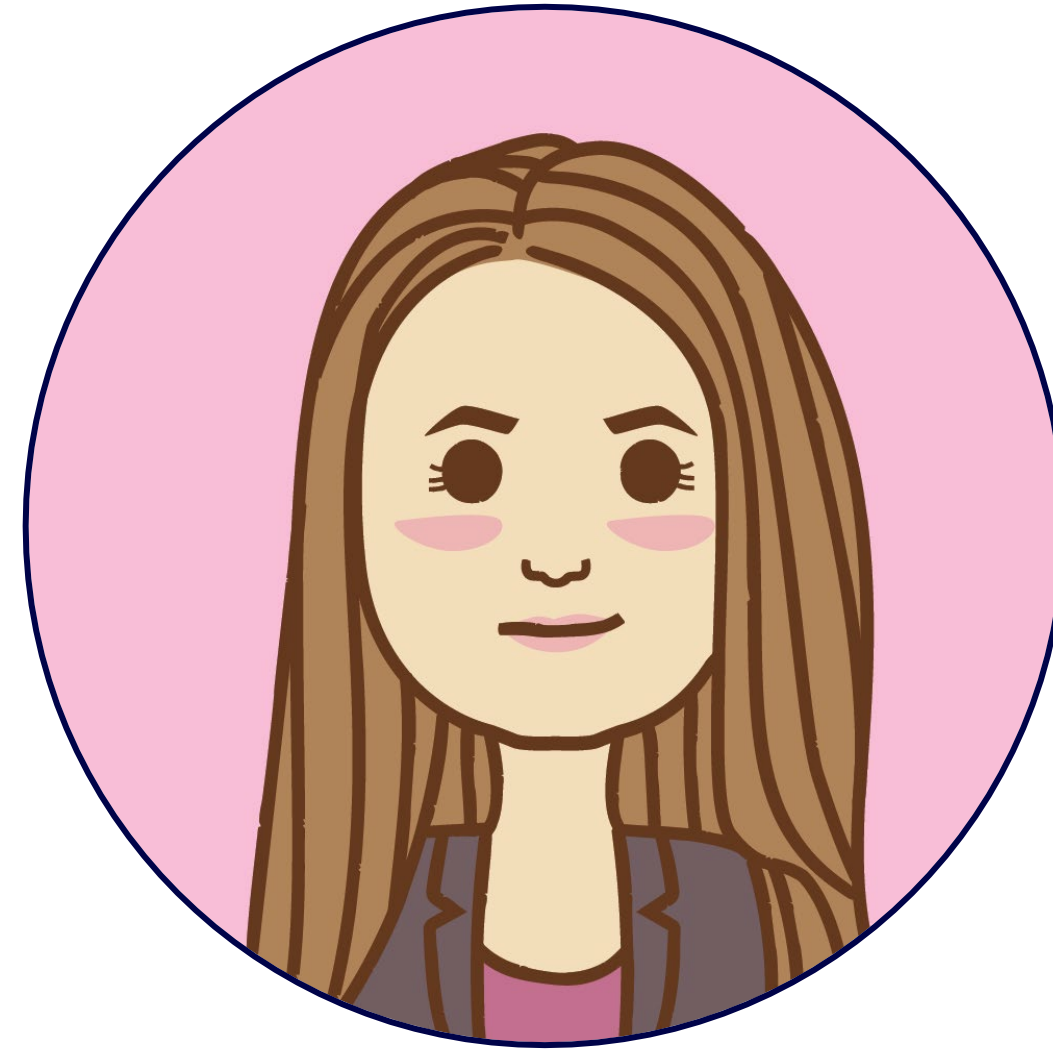
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Thanks for your time!

Questions?

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