

Reopening After COVID-19: What Business Owners Should Know

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Back to business doesn't mean back to *normal*.

As COVID-19 lockdown restrictions begin to ease, business owners are grappling with new challenges and are being forced to make tough decisions in an environment of great uncertainty. In this article, my colleague and I, address issues most companies will likely face. Keep in mind: the road back to normalcy could be a long and potentially difficult one.

We are going to reopen as soon as the Governor lifts restrictions. What are the most important things I should be thinking about as a business owner?

JAMES TODD: The most immediate concern for many businesses is how to bring employees back to the business safely and with minimum disruption to normal operating procedures. It is important to follow any changing Centers for Disease Control, Occupational Safety and Health Administration, and the North Carolina Department of Labor recommendations. Having access to an attorney who understands federal and North Carolina employment laws is well-advised. It's also important to have clear, written rules and procedures in place and knowledgeable boots on the ground to implement those safety initiatives when employees return.

Bringing employees back in phases – either by bringing them back in stages or by staggering schedules to limit the number of people working together at one time – may be an effective way to limit exposure and ensure employee and customer safety. Once employees are back, having a clear strategy to emphasize and enforce infection prevention methods such as handwashing, disinfecting, and personal protective equipment (PPE) will be vital.

It's important to think about how these strategies will comply with wage and hour laws. Also, if a business plans to screen its employees before they enter the workplace, by conducting temperature checks or another method, the business needs to consider how to implement social distancing measures during that process and whether to extend that practice to vendors, customers, and visitors.

How does somebody enforce social distancing in the workplace?

ALLEN TRASK: Bringing employees back in phases can help to limit the number of people in close proximity, but other measures may include closing high-traffic areas such as cafeterias and meeting places, encouraging employees to meet virtually and avoid unnecessary meetings when possible, reminding employees to stay

home if they feel ill, and minimizing non-essential travel. Employers may also consider rearranging their workspaces to provide as much space as possible between employees.

I applied for an SBA Paycheck Protection Act Loan. Now that I have these funds, what kind of documentation do I need to keep to be sure the maximum amount is forgivable?

TODD: To achieve maximum loan forgiveness, PPP recipients should, at a minimum, retain all records of their application materials including emails or other written advice from any advisors that assisted with the PPP application (CPAs, attorneys, lenders, etc.) as well as all documentation submitted to the SBA as part of the application. In addition, all payroll and compensation documentation – including any records you reviewed in preparing the application and all records showing how the PPP funds were spent – should be retained. This information should be stored in a safe and secure location. If you are maintaining it electronically, maintain a back-up, and limit access to those electronic files. This is a new program, and additional guidance is likely to come from the SBA as businesses begin to apply for forgiveness. As a result, we encourage borrowers to err on the side of retaining "too much" rather than too little.

My suppliers are not able to come through with my materials due to COVID-19 related shortages. What can I do?

TODD: Whether it's supply chain disruptions or cash-flow problems, many businesses are seeing their suppliers default on contracts. Responding to those disruptions requires a business to balance the need to meet their own obligations with the importance of maintaining relationships that may extend beyond the COVID-19 crisis.

It's important to carefully review all existing and proposed supply contracts to identify contract provisions related to default and remedies, as well as force-majeure provisions that could excuse performance because of the pandemic. It's equally important to be proactive and communicate with suppliers or distributors before problems arise.

If a party to a contract is simply unable to perform their end of the bargain, a business needs to decide whether that nonperformance can be addressed by modifying the contract or seeking a more formal resolution through litigation. It's important to remember that most businesses are doing everything they can to perform and that you may need to work with those suppliers in the future when they are able to perform. Litigation can be a powerful tool, but it can also burn bridges that are vital to the success of your business down the road.

What clauses should I make sure are in my future agreements to try to blunt the impacts of business interruptions?

TRASK: No one could have anticipated the impact of COVID-19. There are, however, best practices for all business owners to consider in all contracts. Too often, "boilerplate" clauses like force majeure and "industry standard" clauses such as deposit amounts or termination provisions are overlooked. Many now are wondering why they did not have a better force majeure clause, or why they do not have adequate security for the contract. *All* clauses in a contract are important and relevant, and should be given due care.

I know the ADA requires reasonable accommodation in the workplace, but with an airborne virus, what's reasonable? Do I have to let my employees wear masks and gloves as they serve people?

TODD: Generally speaking, the Americans with Disabilities Act (ADA) requires an employer to accommodate a

"disabled" employee if such a reasonable accommodation would make it possible for the "disabled" employee to perform the essential functions of their position. Requiring infection control practices such as hand washing, coughing and sneezing etiquette, and social distancing should not implicate the ADA, but the bar for what constitutes a "disability" under the ADA is low, and employees with a wide variety of risk factors may request a disability-related accommodation to limit their risk of contracting COVID-19.

Each situation will be unique and will require a particularized analysis, but some employers have provided enhanced PPE, increased sanitation and social distancing, modified work schedules or allowed telework, or granted limited leaves of absences. There is no "one-size-fits-all" approach here, but employers should be sensitive to their obligations under the ADA while remembering that the accommodation must be reasonable and should not impose an "undue burden" on the employer. For example, a request to create a new position to accommodate an employee with COVID-19 risk factors would likely be unreasonable. Allowing an employee to wear PPE during their shift may be reasonable, but the specific facts of the job need to be taken into account to be sure.

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