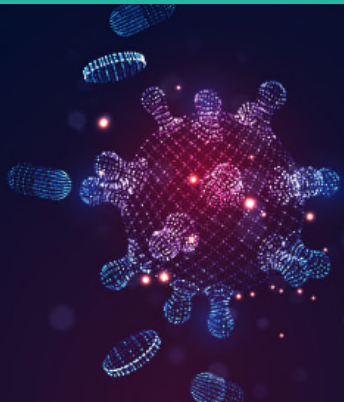


# Returning Employees to Work After COVID-19



## COVID-19

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## Ed Bardelli

- Employment and commercial litigator
- Represents manufacturers, utility companies, banks and more
- Defends against employment disputes that include race, sex, age, FMLA and disability discrimination claims and harassment, retaliation and whistleblower claims

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## Amanda Fielder

- Employment and commercial litigator
- Represents manufacturers, hospitals, schools and more
- Successfully defends employers against discrimination, harassment, retaliation, wrongful discharge, and wage and hour claims

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## Steve Palazzolo

- Counsels employers on employee issues, policy development, NLRB, ADA, FMLA and FLSA
- Advises clients all across Michigan, the nation and globally
- Experience in acquisitions, immigration, employee benefits, campaign finance, employment litigation and civil rights

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## Overview

- When to safely bring employees back
- Communication with employees
- Decision-making process regarding which employees to bring back
- Employees who refuse to return to work
- Q&A

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## Michigan Revised Executive Order

- Revised Executive Order issued April 24, 2020
- Continues through May 15, 2020
- Critical Infrastructure Workers and Minimum Business Operations

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## Federal Reopen Plan

- Criteria
  - Social distancing, PPE, temperature checks, sanitation, business travel, workplace monitor; policies and procedures for tracing
- Phasing
  - Phase 1: Encourage telework, return in phases, close common areas, minimize non-essential travel, special accommodations for vulnerable population
  - Phase 2: Encourage telework, close common areas, special accommodations for vulnerable population
  - Phase 3: Resume unrestricted staffing

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## Michigan Reopen Plan


- May 15, 2020
- Governor Whitmer April 20 and April 24 announcements
  - Essential to Safe
  - Phase
  - Industry
  - Region



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## Time to Bring Employees Back

Plan must be flexible



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## Time to Bring Employees Back

- State reopen
- Other states reopen
- Continue to telework
  - If working
  - Long term impact on staffing –14 day quarantine concerns



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## Safely Bring Back Employees

- Put yourself in employee's shoes
- Safety Checklist
  - Social Distancing
  - Sanitization
  - Common Areas
  - PPE
  - Landlord/Facility



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## Safely Bring Back Employees

### PLAN

- Protocols
- Develop a COVID-19 Preparedness Plan consistent with OSHA recommendations
- Response plan to COVID-19 positive test
- Update existing policies
- Prepare to implement



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## Communicate with Employees


- Engaging employees early in the restart process will be crucial to building trust and productivity
- Regularly communicate on expectations
- Provide updated information about safety protocols as they change
- Identify point of contact if employee has concerns
- Host employee training
- Reinforce with signage



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## Confidentiality Concerns

- CDC Guidance
- Employee confirmed to have COVID-19, employer should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA)
- Employer should instruct fellow employees about how to proceed based on the CDC Recommendations for Community-Related Exposure
  - 14 day quarantine
  - self-monitor symptoms
  - Avoid contact with people at high risk



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## Show Employees Safe


- Show employees that you have made it safe
- Conduct Audits
- Establishing workplace where employees feel comfortable performing their jobs safely is a multi-faceted challenge



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## Bringing Employees Back

- Do all employees come back at once?
  - Likely will not bring everyone back at once
  - Consistent with phasing and will depend on your circumstances and ability to comply with CDC and OSHA guidelines (e.g. social distancing, etc.)
    - 25%, 50%, 75%
    - Stagger shifts
    - To be clear, this relates to the physical return to the workplace, not telework




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## Bringing Employees Back

- Who?
  - Who's needed?
  - Volunteers is a good place to start
  - Those who cannot telework and now ready to return them to their jobs
  - Those who can continue to telework should continue to do so given the current state



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## Bringing Employees Back

- Decision-making process
  - Be mindful of anti-discrimination statutes
    - FMLA
    - ADA
    - FFCRA
      - Emergency Paid Sick Leave
      - Expanded FMLA leave
    - Age/Sex/Race
    - State law



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## Bringing Employees Back

- What can you do?
  - Require employees with COVID-19 to stay home
  - If employee had confirmed case of COVID-19 you can require medical clearance to return
  - Take temperature/ask questions about symptoms for all those entering workplace
  - An employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus
    - Ensure that the tests are accurate and reliable. Guidance from FDA and CDC or other public health authorities
    - Consider the incidence of false-positives or false-negatives associated with a particular test.
    - Accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

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## Bringing Employees Back

- What can you do?
  - Employees in vulnerable categories – as defined by CDC <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>
    - Those relevant for us are:
    - 65 and over
    - Underlying health conditions
    - Can we force them to stay home?

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## Bringing Employees Back


- Practical considerations
- Understand each employee's individual pressures/issues
  - Individual
  - Child care
  - Vulnerable individuals in household
  - Medical professional in household



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## Employees Who Refuse to Return

- EO 2020-36
- FFCRA (sick leave, expanded FMLA)
- FMLA
- ADA
- NLRA



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## Employees Who Refuse to Return

- No retaliation
- Executive Order (2020-36) protection
  - Employees cannot be retaliated against for staying home if test positive for COVID-19 or display symptoms or close contact with someone in those categories
  - Employees cannot be retaliated against for lack of documentation
  - It does not prevent an employer from disciplining or discharging an employee: (a) who is allowed to return to work under the conditions of the Order but refuses to do so; (b) with the employee's consent; or (c) for any other reason that is not unlawful
- Continues to the end of the state of emergency and disaster

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## Employees Who Refuse to Return

- No retaliation
- FFCRA
  - If you terminate while on FFCRA leave burden shifts to you to prove you would have laid them off anyway.
  - Can not discharge, discipline or discriminate because EE to PSL or EFMLA

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## Employees Who Refuse to Return


- No retaliation
- FMLA
  - There is no doubt, COVID-19 is a serious health condition
  - If you terminate while on FMLA leave burden shifts to you to prove you would have laid them off anyway.
  - All of the normal FMLA rules apply.



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## Employees Who Refuse to Return


- No retaliation
- ADA
  - Is attendance at work an essential function
  - Don't forget, leave can be a reasonable accommodation



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# Employees Who Refuse to Return

Cannot refuse to return to work because they are afraid




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This slide features a dark blue background with a light purple gradient on the right side. The title 'Employees Who Refuse to Return' is in white. Below it, the text 'Cannot refuse to return to work because they are afraid' is centered. A central image shows a person in a white lab coat holding a white sign with a sad face icon. A small graphic of colorful virus particles is in the top right corner. The Warner Norcross + Judd logo is in the bottom right corner.

# Employees Who Refuse to Return

Or can they?



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This slide features a dark blue background with a light purple gradient on the right side. The title 'Employees Who Refuse to Return' is in white. Below it, the text 'Or can they?' is centered. A central image shows a woman in a striped shirt sitting at a desk with a laptop, looking stressed with her hands to her face. A small graphic of colorful virus particles is in the top right corner. The Warner Norcross + Judd logo is in the bottom right corner.

## Employees Who Refuse to Return

- NLRA
  - All employees, as that term is defined in the NLRA, have Section 7 rights.
    - Protected Concerted Activity



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## Employees Who Refuse to Return

- Unemployment
  - Fraudulent Claim under the Michigan Unemployment Statute
    - [https://www.michigan.gov/documents/uia/UI\\_Benefit\\_Fraud\\_Fact\\_Sheet\\_367770\\_7.pdf](https://www.michigan.gov/documents/uia/UI_Benefit_Fraud_Fact_Sheet_367770_7.pdf)
  - “Whenever a claimant or employer conceals or misrepresents any eligibility information that can affect benefits paid, you have potential fraud.”

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## Employees Who Refuse to Return

- Unemployment
- “Any benefits paid as a result of fraud must be paid back” Also a penalty of up to 4 times the amount fraudulently received
- Potential criminal penalties



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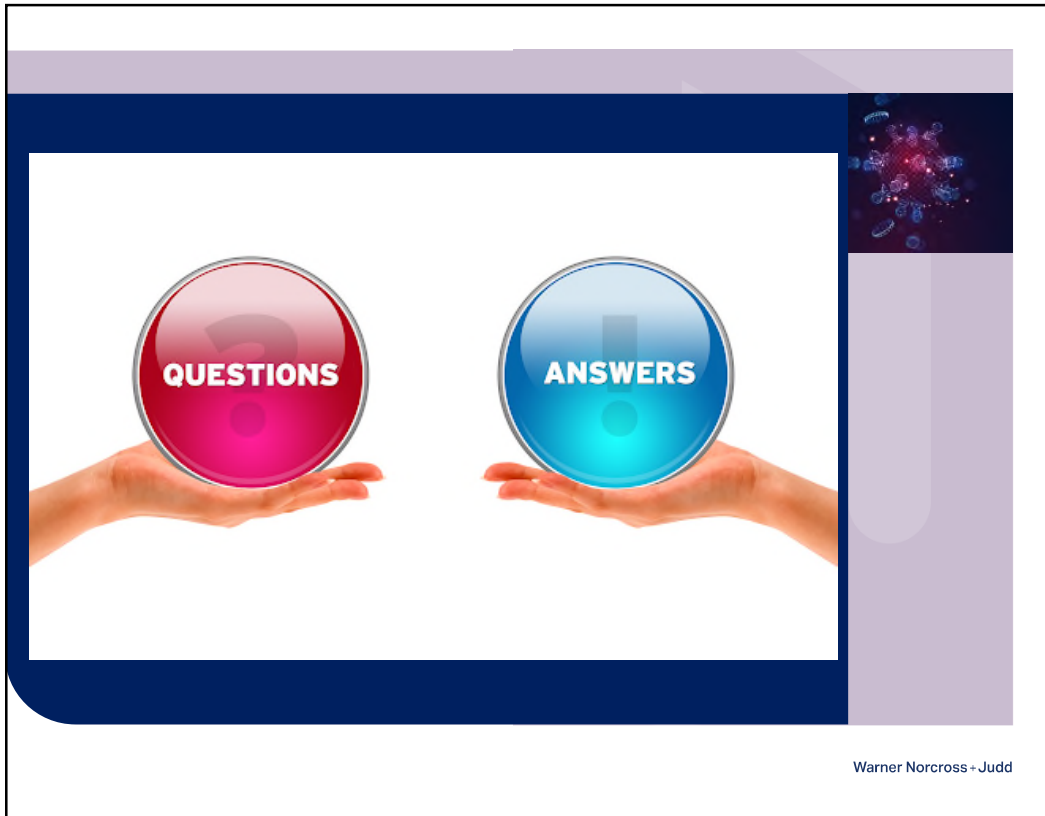
## Employees Who Refuse to Return

- Unemployment
- CARES ACT if an employee commits fraud:
  - Lose further benefits
  - Pay back what they received
  - Potential prosecution



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## Question

Is it legal to require temperature checks before entering the company facility? Should we consider taking the temperature of employees daily? Is this going to be a requirement?

A close-up photograph of a blue digital thermometer. The display shows "Body temp" at the top, followed by "HOLD" and a large "98.4" with a degree Fahrenheit symbol. Below that, it says "LOG 31 98.4". The thermometer is held in front of a person's face, with their eyes visible in the background.

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## Question

If an employer requires employees to wear face masks and other PPE, and the employee refuses, what options does the employer have? Is this considered a voluntary quit? Can the employer fire the employee?

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## Question

Are masks required to be supplied by the employer and worn by all employees even if our company business is not open to the public?

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## Question

The Guidelines by the Governor state masks must be worn at workplace. Who is responsible for providing them?



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## Question

How long are employers obligated to provide sanitizing and protective supplies when returning to work after the pandemic?



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## Question

If offers were extended to new hires, who could not begin due to COVID, who is the chargeable employer?



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## Question

How do you as an employer handle employees who have a compromised immune system and don't want to come back to work, but they cannot continue to work from home?



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## Upcoming Warner Webinars

- **April 29:** Preparing the Facility for Operations after COVID-19
- **May 1:** Managing your Supply Chains After COVID-19
- Visit WNJ COVID-19 Resource Center





Your Legal Resource for  
**COVID-19**

Click here for legal updates from Warner's COVID-19 Resource Center

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## Conclusion



# COVID-19

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