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Preparing Employers for the New Normal: Reopening During the COVID-19 Pandemic

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Agenda

1. Basics of reopening in accordance with state and local executive orders
2. Leave and accommodation issues related to reopening
3. Potential legal claims to be aware of when reopening



When to Reopen

Centers for Disease Control and Prevention (CDC)
threshold questions:

1. Will reopening be consistent with applicable state and local orders?
2. Are you ready to protect employees at higher risk for severe illness?



When to Reopen

1. Will reopening be consistent with applicable state and local orders?
 - Review local state reopening plans
 - Ensure your business is allowed to reopen based on current phase
 - Check for more restrictive reopening requirements issued by localities
 - Monitor for changing phases and new restrictions



When to Reopen

2. Are you ready to protect employees at higher risk for severe illness?

- Review state and local reopening orders and plans for required health and safety measures for reopening
- Check for industry and job classification guidance
- Consider feasibility and modifications to operations
- Create COVID-19 Preparedness Plan



How to Reopen: COVID-19 Preparedness Plan

- Requirements mandated by your state or local government
 - General business guidelines
 - Industry and job-specific guidelines
- OSHA guidelines
 - Assess the hazards to which workers may be exposed
 - Evaluate the level of risk of exposure
 - Select and implement certain controls to prevent exposure
- CDC recommendations



Occupational Health & Safety Administration (OSHA)

- OSHA enforces the safety and health standards and regulations issued by the Occupational Health & Safety Act (OSH Act) or under an OSHA-approved state plan
- Under the OSH Act's General Duty Clause, employers are required to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm



OSHA's Guidance on COVID-19

- OSHA's Guidance on Preparing Workplaces for COVID-19
 - Includes criteria for assessing workers' risk level
 - Recommended safety measures based on risk level



**Guidance on Preparing
Workplaces for COVID-19**



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Centers for Disease Control & Prevention (CDC)

- Nation's health protection agency
- Issued reopening guidelines and flowcharts to assist business in determining when and how to reopen
- Industry-specific guidance



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Key Components of COVID-19 Preparedness Plan

- Employee hygiene and cleanliness practices
- Employee health screenings and/or COVID-19 testing
- COVID-19 case response protocol
- Social distancing practices
- Cleaning, sanitation and ventilation measures
- Business travel policy
- Additional employment-related considerations



Employee Hygiene and Cleanliness Practices

- Basic infection prevention measures
 - Frequent hand washing / cleaning practices
 - Proper respiratory etiquette
 - Proper use of face coverings
- Remind employees with signage
- Provide resources as appropriate
 - Hand sanitizer
 - Soap
 - Wipes
 - Tissues



Health Screenings/COVID-19 Testing

- Types:
 - Written questionnaire
 - Temperature checks
 - COVID-19 testing
- Consider appropriate type of screening or testing based on orders, industry and job classification
- Keep in mind issues related to confidentiality of medical information and potential need for accommodations



Health Screenings/COVID-19 Testing

- Temperature checks
 - Appropriate during pandemic
 - Reliable and accurate
 - Confidentiality procedures
 - PPE
 - 100.4° F CDC recommended threshold
 - Only one component
- COVID-19 testing
 - EEOC says can conduct COVID-19 testing under ADA
 - Reliable and accurate
 - Guidance from FDA
 - Antibody testing – still much unknown



COVID-19 Case Response Plan

- Develop procedure for reporting of employee illness
- Prepare protocol for responding to a suspected or confirmed case of COVID-19 in workforce
 - Isolation and removal from workforce
 - Work from home or paid/unpaid leave
 - Contact tracing – “close contact” – within 6 feet
 - Cleaning and sanitation
 - Confidentiality
 - Returning to work



CDC Guidance on Returning to Work

- *Symptom-based strategy.* Exclude from work until:
 - At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and**,
 - At least 10 days have passed *since symptoms first appeared*
- *Test-based strategy.* Exclude from work until:
 - Resolution of fever without the use of fever-reducing medications **and**
 - Improvement in respiratory symptoms (e.g., cough, shortness of breath), **and**
 - Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥ 24 hours apart (total of two negative specimens)[1]. See [Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens for 2019 Novel Coronavirus \(2019-nCoV\)](#). Of note, there have been reports of prolonged detection of RNA without direct correlation to viral culture.



Social Distancing Practices

- CDC/OSHA recommended social distancing practices
 - Modified work schedules
 - Staggered shifts/break times
 - Virtual meetings
 - Encouraging telework
 - Physical spacing between employees (at least 6 feet)
 - Limiting use of communal spaces
 - Limiting shared food and beverages



Cleaning, Sanitation & Ventilation Measures

- CDC-issued guidance on cleaning workplaces
 - Routine cleaning practices – handwashing, etc..
 - [EPA-approved disinfectant products](#)
 - Recommended cleaning procedures based on types of surfaces
- CDC recommendations on ventilation
 - Ensure ventilation systems operate properly and provide acceptable indoor air quality for the current occupancy level for each space
 - Increase outdoor air ventilation
 - Improve air filtration



Business Travel

- Evaluate essential and non-essential travel
- Limit or restrict travel to certain areas based on U.S. Department of State travel advisories and CDC travel warnings
- Encourage same limitations for personal travel and require reporting



Personal Protective Equipment (PPE)

- Conduct assessment regarding need for PPE for employees based on risk level/hazard to worker in accordance with OSHA
- Have required PPE available and distribute to workers
- Masks/face coverings
- Train on proper use, fit
- Require use for safety of worker
- Process for responding to accommodation requests



Other COVID-19 Preparedness Plan Topics

- Protections for visitors/customers
- Employee concern reporting procedure
- Accommodation request procedure
- Leaves of absence



Implementation

- Implement internal plan
- Create employee-facing policies or update existing policies
- Distribute to employees and require acknowledgement
- Train supervisors and employees on plan requirements
- Monitor and adjust as needed



What If Employees Are Afraid to Return to Work?

- The business imperatives of getting “back to work”
- Should it be considered job abandonment or voluntary resignation?
- Importance of **having real conversations** with employees
 - Two-way conversations (i.e., dialogue)
 - Actively listening
 - Accommodations?
 - Many times, problems can be solved this way without the need for escalation
- Role of medical and scientific guidance



Practical Considerations With Testing

- Testing requirements to return to work?
- Temperature checks
- COVID-19 tests
 - Active virus tests
 - Antibody tests
- False negatives
- Applying testing in neutral, non-discriminatory ways



Families First Coronavirus Response Act (FFCRA)

- Enacted March 18, 2020; effective April 1, 2020
- Applies to public (governmental) employers and private employers with < 500 employees
- Expands unemployment compensation; required employer notice
- Covered employers required to provide paid sick leave and paid family leave to employees
- Tax credit
- Exemptions
 - Employees who are specifically defined health care providers or emergency responders
 - Certain (but not all) businesses under 50 employees



FFCRA Paid Sick Time – Qualifying Reasons

Employees (any duration) who are **unable to work (or telework)** because:

1. Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19
2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
3. Employee is experiencing COVID-19 symptoms and is seeking a diagnosis
4. Employee is caring for an individual who is: (a) subject to a federal, state, or local quarantine or isolation order related to COVID-19 or (b) who has been advised to self-quarantine due to concerns related to COVID-19
5. Employee is caring for a child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions
6. Employee experiencing a “substantially similar condition” specified by Secretary of Health and Human Services, Secretary of Labor and Secretary of the Treasury



FFCRA Paid Sick Time – Duration/Rate of Pay

- Duration
 - Full-time employees: 80 hours
 - Part-time employees: average number of hours the employee works over a 2-week period.
- Rate of pay
 - For qualifying reasons 1, 2 and 3: employee's regular rate of pay up to \$511 per day (\$5,110 aggregate)
 - For qualifying reasons 4, 5 and 6: 2/3 the employee's regular rate of pay up to \$200 per day (\$2,000 aggregate)



FFCRA Paid Family Leave

- Available for employees who:
 - Have been employed for at least 30 calendar days
 - Are unable to work or telework due to caring for a child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions
- Job-protected leave
- Structure:
 - First 10 days unpaid (but FFCRA paid sick leave applies)
 - Up to 10 weeks paid at 2/3 of regular rate of pay, up to \$200 per day (\$10,000 aggregate)



FFCRA – Other Considerations

- Paid sick leave interaction with paid leave under state/local law or existing employer policy
- No carryover of paid sick leave or payout at termination
- No discrimination or retaliation
- Notice of rights
 - Some options for electronic distribution
- Rights to leave expire December 31, 2020
 - For now!



Other Considerations

- Vaccine requirements to return to work?
 - Accommodations?
- State/local paid sick leave laws
 - COVID-19 related expansions for qualifying uses
 - Suspected workplace exposures covered?
 - Can the employer require the employee to use paid sick leave?
- Unemployment compensation laws



Potential Legal Risks For Employers

1. Retaliation

- a) Employees have a right to complain about conditions they reasonably believe are unsafe
- b) Actions taken against employees because they complain can be deemed retaliation



Potential Legal Risks For Employers

2. Wage and hour claims

a) Non-exempt

- i. Paying for all hours worked
- ii. Tracking time
- iii. Meal and rest breaks (CA)

b) Exempt

- i. Salary test Full pay for workweek if they do any work
- ii. Duties test



Potential Legal Risks For Employers

3. Americans with Disabilities Act claims
 - a) Failure to accommodate
 - b) Failure to engage in the interactive process
 - c) Disclosure of protected information about employees
 - d) Disability discrimination
 - e) Testing



Potential Legal Risks For Employers

4. Failure to provide statutory leaves (FFCRA, FMLA, etc.)
5. Age discrimination
6. Union organizing
7. OSHA citations
8. Workers' compensation claims
9. Data security



Where Can We Get Additional Information?

- U.S. DOL - <https://www.dol.gov/agencies/whd/pandemic>
- OSHA coronavirus guidance:
www.osha.gov/SLTC/covid-19/www.Congress.gov
- CDC Guidance for business and workplaces:
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- EEOC - <https://www.eeoc.gov/coronavirus/>
- Fox Rothschild Coronavirus Resources:
<https://www.foxrothschild.com/coronavirus-resources/>



Thank You for Joining Us



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