TOP OF MIND ISSUES FOR EMPLOYERS IN OPENING THE WORKPLACE AND RETURNING EMPLOYEES TO WORK

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The restrictions on business operations implemented after the onset of COVID-19 in March 2020 vary greatly from state-to-state and across industries. But one thing is clear: After implementing far-reaching furloughs and layoffs, many businesses are endeavoring to resume operations with employees working either on site or remotely, or a combination of both, or in stages. This effort presents numerous legal challenges for employers. Although there are not always clear answers to the questions which arise, employers should have a plan with built-in flexibility to ensure that they bring employees back as safely as possible and that their decisions as to which employees to re-hire or reinstate are sound and fully justifiable. It is unknown whether the method in which employers conduct their businesses may ever return to "normal", but compliance with the myriad of employment laws remains essential.

Apart from legal constraints, employer flexibility is key. Being open to new and innovative methods of managing staff will encourage employees to work productively while being protected from unnecessary risks.

Selecting Which Employees Should Be Brought Back

If an employer is recalling workers in phases, employers must consider the order in which these employees should be brought back. If an employer expressly told employees about how recall selection decisions would be reached, it should make every effort to follow the announced criteria. The same is true for any guidelines established by an employer in its employee handbook, even if the handbook contains a contractual disclaimer. This is because, in certain states, the failure of an employer to adhere to its own personnel policies may be evidence of discriminatory or retaliatory animus. If the employer did not advise employees about the order of recall, then an employer may certainly recall employees in a way that meets its business needs – ***e.g.***, job function, performance, knowledge of the employer's business operations. Employers should avoid any possible inferences of discrimination or retaliation in recall decisions by ensuring that a disproportionate number of employees in a protected class are not adversely affected or that an employee who recently engaged in protected activity is not penalized for such activity.

There is nothing to prohibit an employer from asking for volunteers from its workforce to return to work. Although some employers might be tempted to recall younger employees or employees without childcare responsibilities, such actions could subject the employer to legal challenges. Employers who are reluctant to recall older workers, women with school-aged children, or a perception of disability risk a discrimination claim. Employers should leave the choice to the employee, and consider requests for a delayed return-to-work date based on a documented medical condition. Similarly, employees with child care responsibilities should be allowed to decide for themselves if they want to return to work. Employees may choose to take FFCRA family leave, if available.

Recall Letters

There is no specific requirement regarding when advance notice of recall must be provided. If an employee has been furloughed or laid off with the expectation of being recalled, the employer should send the letter sufficiently in advance of the date when the employee is expected to return to allow him or her to make

arrangements.

There are no specific legal guidelines for what an employer must include in a recall letter. However, an informative letter should specify the expected date of return, the position to which the employee will return, the hours of work, the pay rate, the benefits to be included, the employee's seniority date for purposes of leave and benefit accrual, and the employee's immediate supervisor. The letter should also confirm the employee's at-will status. Finally, the employee should be advised that he or she should immediately notify the employer if, for some reason, he or she cannot return to work on the expected date.

To reassure employees, employers should inform employees of the COVID-related precautions they are taking to protect workers and visitors to the workplace based on recommendations from OSHA and the Center for Disease Control.

Guidelines To Be Consulted in Reopening the Workplace and Maintaining Safe Working Conditions

Various government entities have issued orders and ordinances to address safety protocols and timetables for reopening the workplace, including but not limited to Guidelines from the Center for Disease Control, state and local executive orders and ordinances, and the White House Guidelines. In addition, the federal Occupational Safety and Health Administration has issued Guidance on Preparing Workplaces for COVID-19 addressing the safety procedures to be followed to satisfy OSHA's general duty clause and other applicable safety and health standards and regulations promulgated by OSHA. https://www.osha.gov/Publications/OSHA3990.pdf. Such authorities may require PPE, health screening, increased hygiene practices, and/or additional social distancing.

Center for Disease Control Guidance

In May, 2020, the Centers for Disease Control and Prevention issued a guidance on reopening workplaces. In its Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020, the agency offered a series of items for employers to follow in planning to ensure that their offices are prepared for employees who return to work and in instructing its employees in interacting with others in the office. Among those recommendations include conducting daily health checks, conducting a hazard assessment of the workplace, encouraging employees to wear cloth face coverings in the workplace, implementing policies and practices for social distancing in the workplace, and improving the building ventilation system. The CDC advised a collaborative process between employers and employees about steps to be taken: "Talk with your employees about planned changes and seek their input. Additionally, collaborate with employees and unions to effectively communicate important COVID-19 information."

Pay and Benefits Upon Return to Work

Absent an employment contract or a collective bargaining agreement, an employer may generally alter the compensation and benefits that were provided to recalled employees prior to the furlough or layoff. However, employees should receive advance notice of any changes in the terms and conditions of their employment. Employees may be returned to work on a reduced hours schedule, but employers should make sure that their exempt status under the Fair Labor Standards Act is not jeopardized by improper deductions from salary.

An employer may be prevented from reducing the salary during the pandemic where the employment contract states a specific salary and provides no exceptions for when a salary may be reduced. Going forward, employers should consider including a clause that allows for pay reductions and the cessation of salary due to forces beyond the employer's control that have a substantial negative impact on operations.

Employees Who Prefer to Remain on Leave When Recalled to Work

An employee who refuses to return to work out of a generalized fear of contracting the virus may be deemed to have resigned. Employees' requests to work from home for disability-related reasons should be analyzed on a case-by-case basis to determine whether a physical presence in the workplace is an essential job function or instead can be reasonably accommodated. The same standards and interactive process under the Americans with Disabilities Act apply, but employers and employees may now have additional information on the feasibility of remote work.

If an employee refuses to return to work because he or she prefers to receive unemployment compensation

benefits, the employee may also be deemed to have resigned. In such instances, the employee may be disqualified from receiving further unemployment compensation.

Medical-Related Inquiries and Documentation

Employers may ask employees if they are experiencing COVID-19 symptoms, and may take their temperatures. Employers may also require COVID-19 testing, if the testing is accurate and reliable. All such information must be treated as a confidential medical record in compliance with the ADA.

If an employee states that he or she is not comfortable returning to work because of an underlying health condition, but refuses to disclose the condition, the employer may request documentation from the employee's physician to support that claim.

The EEOC has stated that if an influenza pandemic becomes more severe or serious according to local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. ADA-covered employers may make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications if the employer has sufficient objective information from public health agencies to conclude that employees will face a direct threat if they contract the virus.

According to the EEOC, employers may request fitness for duty certifications from employees' doctors. Certain state laws may limit an employer's ability to require medical documentation, so employers should check to see if such state laws or local ordinances exist.
The EEOC has stated that COVID-19 viral tests are permissible. However, on June 17, 2020, the EEOC posted an updated technical assistance publication which stated that the EEOC does not currently allow employers to require antibody testing before permitting employees to re-enter the workplace.

Personal Protective Equipment Requirements

Under the Occupational Safety and Health Act, the workplace must be free of hazards likely to cause death or serious physical harm. Consequently, PPE should be provided consistent with the level of risk in an employee's position. Such equipment may be a reasonable accommodation for disabled employees.

Many state and local governments have required that masks are required in certain establishments, so employers must consult their local governments to understand the extent of the requirement. In its Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, which was updated in response to the Covid-19 Pandemic on March 21, 2020, the EEOC stated that an employer may requires that its employees wear personal protective equipment (e.g., face masks, gloves, or gowns) that is designed to reduce the transmission of pandemic infection.

However, there may be certain exceptions. If an employee refuses to wear a mask in the workplace, the employer must attempt to find out the underlying reason for that refusal. If the employee claims that he or she has a medical condition that prevents the wearing of a face mask, the employer should determine whether the employee has an ADA-protected disability that would require the employer to accommodate the disability. In that event, the employer should engage in an interactive process with the employee to determine whether the disability can be reasonably accommodated without posing an undue hardship upon the employer. If the employer determines that allowing the employee to work in without a face mask in proximity to other employees a would pose a direct threat, then the employer is not under a duty to accommodate the employee.

If an employee objects to wearing a face mask on religious grounds, he or she is entitled to a discussion with the employer about possible reasonable accommodations. In either situation, the employer does not have to grant the employee the precise accommodation requested by the employee as long as the accommodation offered by the employer is a reasonable one.

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