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Reopening and Reimagining the Workplace

COVID-19 Employment Considerations

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Jackson Lewis P.C. - Jacksonville

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COVID-19 Reopening Resources

- Jackson Lewis Coronavirus/COVID-19 Task Force, www.jacksonlewis.com
 - 50-State Survey Interactive Maps
 - Daily Webinars and Publications
 - Industry-specific
 - Location-specific
- Department of Labor, www.dol.gov/coronavirus
 - FFCRA, FMLA
 - OSHA
 - Wage and Hour
 - Unemployment Compensation
- EEOC, www.eeoc.gov/coronavirus
 - Americans with Disabilities Act
 - Testing
 - Medical Inquiries
- Centers for Disease Control and Prevention, www.cdc.gov

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- Returning Employees to Work
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Returning Employees to Work

Develop a Return to Work Plan

General Business Considerations

- Check state and local mandates.
- Use neutral selection criteria.
- Consider remote work.
- Consider obligations under collective bargaining agreements and negotiate with the union as appropriate.
- Notify employees regarding their return to work.
- If employees were terminated, need to “rehire.”
- Ensure employees who are returning to work are properly classified as exempt or non-exempt.
- Evaluate implications on employee benefit plans.

Determine an Organizational Approach

- Designate a point person or core return-to-work team that can make company-wide policy decisions
 - Legal
 - HR
 - IT
 - Building Facilities
 - Health & Safety
 - Office Managers
 - Senior Management
- Determine an approach that is right for the business and the workforce

Bringing Employees Back to Work

- Identify individuals who will be brought back to work.
- Determine when these individuals will return.
- Articulate legitimate, non-discriminatory reasons for making employment decisions and consider challenges.
- Develop written employee communications.
- Consider staggered scheduling and group scheduling to minimize the impact of a COVID-19 exposure on the workforce.

Written Employee Communications

Notice of Recall from Temporary Furlough due to COVID-19

- Notify furloughed employees regarding their return to work.
- “Return to Work” letters will typically provide information regarding return date and schedule, as well as information regarding any changes or updates regarding pay, benefits, PTO, new policies and procedures, and an at-will employment disclaimer.
- Also, any changes to pay or hours of work may be subject to advance written notice requirements under state law.

Written Employee Communications

Notice of Rehire After Termination due to COVID-19

- Send “Rehire” letters, wage payment notices, and other onboarding paperwork for employees who were previously terminated.
- For rehires, plan for drug tests, background checks (some of which may take longer due to court and college closures), W-4s, I-9s, and other on-boarding processes.

Advise Returning Employees About Benefits

- Did benefits continue during furlough?
- What if benefits continued and the employer paid the employee's portion of the premium?
- What if benefits continued and the employees continued to pay their portion of the premium?
- What if benefits did not continue?

Hiring New Employees in a COVID-19 World

- How should interviews be conducted?
 - Telephone
 - Virtual (Zoom, Skype)
 - Review state-specific laws on video interviews.
 - In person
 - Will interviewees be required to submit to a COVID-19 questionnaire or temperature check?
- Will new hires be tested for COVID-19 before they start work?
- Plan for drug tests, background checks (some of which may take longer due to court and college closures), W-4s, I-9s, and other on-boarding processes.
- How will training be conducted?
 - Training usually requires close contact with existing employees.

Wage and Hour Issues

- Unpaid wage claims from exempt employees who work while furloughed.
- Overtime claims from exempt employees who claim they lost the exemption based on their duties during COVID-19.
- Off-the-clock claims by non-exempt employees working from home.

General Business Considerations

- Consider whether re-employment provides an opportunity to have employees sign non-competes, arbitration agreements, or other agreements that you may want to roll-out.
- Consider whether now is the time to address known or suspected compliance issues.
- Determine whether there is a need to permanently reduce the number of employees.
- When temporary furloughs turn into terminations, the WARN Act and/or similar state laws may be implicated.

Workplace Modifications

- Check state and local government mandates impacting reopening (e.g., social distancing, sanitation, and masks, etc.).
- Consider general and industry-specific guidance from OSHA and CDC.
- Consider changes to reduce risk of exposure to COVID-19, including social distancing protocols.
- Implement cleaning and disinfection protocols, consistent with CDC and OSHA guidance.
- Evaluate mandatory or voluntary use of PPE (masks, gloves, face shields).
- Determine protocols for use with customers, vendors, or the public.
- Questioning and testing employees for COVID-19.

Develop and Implement an Infectious Disease Preparedness and Response Plan

COVID-19 Workplace Modifications

OSHA Requirements

- What type of “safe workplace” must an employer provide for employees?
- OSHA has not issued an emergency rule for the COVID-19 pandemic.
 - No OSHA rule requiring employers to adopt infectious disease plans for the workplace, though they are a best practice.
- So, what does OSHA *require*?

General Duty Clause

- OSHA requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

COVID-19 Workplace Modifications

Personal Protective Equipment (PPE)

- OSHA requires that “[p]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.”

COVID-19 Workplace Modifications

State OSHA Requirements

- 28 OSHA-approved state plans operating state-wide occupational safety and health programs.
- State Plans are required to have standards and enforcement programs that are at least as effective as OSHA's and may have different or more stringent requirements.

COVID-19 Workplace Modifications

OSHA Guidance

- OSHA issued “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019”
- OSHA and the U.S. Department of Health and Human Services jointly issued “Guidance on Preparing Workplaces for COVID-19”

COVID-19 Workplace Modifications

Conduct Risk Assessment of Worker Exposure

- OSHA suggests employers determine the level of risk of exposure for their employees.
- Consider the industry, the need for contact within 6 feet of people known to be, or suspected of being infected, the communities where employees live and work, their activities outside of work, and their individual health conditions.
- Workplace modifications should be tailored to address the risk of worker exposure to COVID-19.



Infectious Disease Preparedness and Response Plan - The Basics

- Handwashing and respiratory etiquette.
- Remind and encourage employees that they should not report to work when sick.
- Impose appropriate limits on business travel.
- Post hygiene/handwashing reminders, social distancing reminders, and applicable state and local posting requirements.

Infectious Disease Preparedness and Response Plan - Steps to Consider

- Consider changes to reduce risk of exposure to COVID-19 and comply with applicable social distancing mandates
- Telecommuting
- Moving workstations, altering layouts and access points, and installation of barriers
- Implement cleaning and disinfection protocols, consistent with CDC and OSHA guidance. Obtain necessary supplies.

Infectious Disease Preparedness and Response Plan - Steps to Consider

- Staggered scheduling and group scheduling to minimize the impact of a COVID-19 exposure on the workforce.
- Mandatory or voluntary use of PPE (masks, gloves, face shields). Obtain necessary equipment.
- Prohibit or limit shared use of handheld telephones, headsets or other devices that touch or are used near an employee's face or mouth.
- Determine protocols for use with customers or the public, including eliminating handshakes, posting customer facing signage, adding plexiglass or other barriers, providing and/or requiring masks.
- Consider training, retraining and cross-training.

Infectious Disease Preparedness and Response Plan

Determining If Individual Employees Are Safe to Return

- Screening process to determine if individual employees are safe to return
- Questionnaires, temperature checks, self-certifications and testing
- Determine protocol for employees who:
 - have tested positive for COVID-19
 - have been diagnosed as presumptively positive for COVID-19
 - have experienced COVID-19 symptoms
 - have potential exposure, but no symptoms

Questioning and Testing Employees

Questioning and Testing Employees

- EEOC Technical Assistance Questions & Answers:
 - When employees return to work, an employer may require a doctor's note confirming they do not have COVID-19.
 - An employer may administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.
 - Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Questioning and Testing Employees

- EEOC Technical Assistance Questions & Answers:
 - Employers may ask employees if they are experiencing symptoms of COVID-19.
 - However, employers should not ask employees about symptoms that are unrelated to COVID-19.
 - Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with COVID-19.
 - Employers may screen applicants for COVID-19 symptoms after a conditional job offer.

Taking Temperatures

- Must I take the temperatures of employees?
- Can I take the temperatures of employees?
- Can I have a third party vendor take the temperatures of employees?
- Can I require employees to take their own temperatures before coming to work?

Questioning and Testing Employees

- EEOC says employers may also measure employees' body temperature on a daily or less frequent basis.
- EEOC says employers may take an applicant's temperature as part of a post-offer, pre-employment medical exam.
- This is a medical examination and, therefore, the results of these checks must be treated confidentially.
- Wage and hour concerns with screening, taking temperatures, and testing employees.

New Hires With COVID-19

According to the EEOC, employers may:

- Delay the start date of an applicant who has COVID-19 or associated symptoms, or
- Withdraw a job offer when an applicant is needed to start immediately but cannot because the applicant has COVID-19 or associated symptoms.

Questioning and Testing Employees

- EEOC allows an employer to require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).
- However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the employer.

Respond to Suspected or Positive COVID-19 Cases

Develop Protocol for Addressing Employees with Reported COVID-19 Symptoms or Diagnosis

Employees in the Workplace with COVID-19 Symptoms

- Make sure employees know who and how they should notify the employer if they develop COVID-19 symptoms during their shift.
- Immediately isolate employees suspected of having COVID-19.
- If possible, move the employee to a location away from others and with a closed door, provide a face mask and gloves, take steps to limit the spread of COVID-19.
- Safely remove the employee from the workplace.
- Clean and disinfect in accordance with CDC and EPA guidance.
- Follow up with the employee to determine if the employee is diagnosed with COVID-19.

Develop Protocol for Addressing Employees with Reported COVID-19 Symptoms or Diagnosis

Employees Diagnosed With COVID-19 and/or Positive Test

- Make sure employees know who and how they should notify the employer if they are diagnosed with COVID-19 or have a positive test result.
- Should not be allowed to return to the workplace until medical clearance per CDC criteria to discontinue home isolation are met in consultation with healthcare providers and state and local health departments.
- Work with the employee on telecommuting and/or sick or FMLA leave.

Develop Protocol for Addressing Employees with Reported COVID-19 Symptoms or Diagnosis

Employees With Potential Exposure to COVID-19

- Employees exposed to a co-worker (or other individual) with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.
- CDC guidance currently permits essential workers with potential exposure who are asymptomatic to remain in the workplace if certain steps are taken.
- Non-essential workers should not be required to come into the workplace, even if asymptomatic, until medically cleared.

Notice to Others Regarding a COVID-19 Diagnosis or Positive Test – Contact Tracing

- Employer should ask an employee who has tested positive to provide a list of individuals (employees, clients, contractors, vendors) with whom the employee came in close contact for beginning with the period of time of 48 hours before becoming symptomatic in connection with their employment.
- Employer should also ask what areas/floors the employee may have visited and whether the employee used any shared spaces, like a cafeteria, break room, office supply room.
- Employer should disclose to employees (and others) who have come in close contact with a co-worker (or a visitor) who has been diagnosed with and/or tested positive for COVID-19, without disclosing the identity of the person.
- NOTE: EEOC allows an employer to disclose the name of an employee to a public health agency when it learns the employee has COVID-19.

Visitors and Other Workers in the Workplace

- Determine how and in what respects the return to work plan will apply to temporary workers, staffing agency workers, independent contractors, vendors, clients, customers, delivery workers, visitors, and others when they are in the workplace.
 - Consider joint employer issues
 - Consider independent contractor classification issues
- Work with staffing agencies on protocols.
- Consider limiting visitors to the workplace.
- Consider requiring visitors to complete a questionnaire before entering an office, facility, or other work location.

- Anticipate possible government enforcement.
 - Surprise OSHA inspections
 - Police/Sheriff (enforcement of shelter-in-place and other state and local orders and laws)
- Develop an action plan in advance.
- Train managers on what to do if OSHA, police, etc., show up onsite unannounced.
- Designate a point person to take the lead.
- Seek legal advice – whether to have managers represented during interviews, decisions about what to keep privileged, etc.
- Have key documents ready to produce promptly.
 - Required posters
 - Health and safety measure/social distancing protocols
 - Required policies
 - OSHA programs and logs are up-to-date

Protocol in the Event of an Unannounced Inspection by OSHA, A Public Health Officer or the Police

Update Workplace Policies

- Develop protocol or policy for addressing employees with reported COVID-19 symptoms or diagnosis.
- Impose appropriate limits on business travel.
- Consider restrictions on off-duty activities where permitted.
- Develop protocols or policies for modified work practices to enhance social distancing.
 - Limits on size of in-person meetings and proximity of seating.
 - Closing or limiting access to common areas, break rooms, vending machines, microwaves, etc.
 - PPE.
 - COVID-19 questioning and testing.
- ***Train employees on new policies, protocols, and rules.***

Responding to an Employee Who Refuses to Return to Work

- Employees may be hesitant to return to work for a variety of reasons.
- **Step 1:** Determine the reason.
- **Step 2:** Is the employee entitled to stay home pursuant to a state or local order? (Some orders may require or permit the medically fragile to continue sheltering in place.)
- **Step 3:** Is the employee entitled to leave pursuant to the FFCRA?

Reasons for Leave under FMLA Expansion:

- An employee who is unable to work (or telework) to take leave due to a need to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency."

Responding to an Employee Who Refuses to Return to Work

Reasons for Paid Sick Leave:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Responding to an Employee Who Refuses to Return to Work

Reasons for Paid Sick Leave:

4. The employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Responding to an Employee Who Refuses to Return to Work

- **Step 4:** Is the employee entitled to leave as a reasonable accommodation under the ADA because of a disability (physical or mental)?
- **Step 5:** Does the employee have any company PTO/sick/vacation time that could be used?
- **Step 6:** Is the employee entitled to leave under any state or local law, ordinance, order?
- **Step 7:** If none of the foregoing are applicable, engage in an interactive process regarding the reason and consider reasonable alternatives.
 - If safety is a concern, review legitimacy.
 - Is remote work possible?
 - Flexible schedules, unpaid leaves?
- **Step 8:** Refusal to return where there is no protected reason, could result in dismissal.

Responding to an Employee Who Refuses to Return to Work

- General fear is not a legally protected reason for an employee to refuse to return to work.
- However, refusal to return to work due to safety concerns can be protected activity.
- The National Labor Relations Act protects a refusal to work due to “abnormally dangerous” working condition.
- OSHA protects a refusal to work where a reasonable person would conclude there is a real danger of serious injury or death, and there is insufficient time to eliminate the danger.
- Overall, this will be a high burden to prove for employees.

Responding to an Employee Who Refuses to Return to Work

- Employees who refuse to return to work because they are earning more in unemployment insurance benefits: In some states the refusal to return to work when return is offered may result in the denial of continued unemployment. In general, an employer may terminate an employee who refuses to return for this reason.
 - Carefully document notices to return to work, such refusals and decisions to terminate.

Questions?

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Thank **you.**