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Employer Reopening Guidance: Tips for Navigating the New Normal

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"The power of the lawyer is in the uncertainty of law."

- Jeremy Bentham (English Legal Philosopher, 1748-1832)

When I started practicing law, I was given a plaque with Bentham's quote. When I get back to the office, I plan to find it and hang it. I need something inspirational as I repeatedly tell clients that there are few clear answers during the phased, partial reopening of our country and our world. But things could be tougher, I could have gone to medical school. The following is starting guidance for employers and employees as we go back to work while the threat of serious illness of COVID-19 remains very real for us and our loved ones.

1. **Who is making the rules about returning to work and where can employers look for guidance?**

   The state, the city, the county and their various health departments are responsible for issuing orders and rules allowing reopening. For example, in Colorado after the state permitted businesses to start a partial reopening (i.e., curbside pick-up for retail), the city of Denver was ordered to remain locked down for an additional week by its mayor and the surrounding counties continued lock down for another week by order of their respective health departments. Other counties received permission from the state to open on a faster schedule.

   In many instances these reopening orders create rules intended to protect at risk individuals and hospital capacity. The Executive Order allowing Colorado to start reopening mandates that vulnerable individuals continue to stay at home. Vulnerable individuals are defined as anyone who is 65 or older, people with chronic lung disease, asthma or heart disease, people who are immunocompromised, pregnant or have a doctor's note. Presumably, these people, still under a mandatory stay at home order, remain eligible for unemployment and other assistance provided by the legislation passed in light of COVID-19. Colorado's State Health Department issued a 34-page set of rules to support the Executive Order that included protections for employees. One week after the start of the partial reopening, the director of the state's unemployment insurance reported that approximately 150 people who have been called back to work have requested to stay on unemployment instead. The state is reviewing the requests and at least 50 people have already been granted permission to do so.

Similarly, in New York, Governor Cuomo has also ordered a phased reopening of the state that allows individual regions to reopen once the jurisdiction meets certain criteria. Nevertheless, meeting this criteria does not mean business as usual for the region, instead companies may begin reopening in four industry specific phases. The first to reopen are the construction, agriculture, manufacturing, wholesale and retail (limited to curbside pickup) industries, with the arts, entertainment, recreation and education opening last. This plan is detailed in *NY Forward, A Guide to Reopening New York & Building Back Better*.

New York's recently issued individualized guidance for each industry within phase 1. Critically, employers must review and affirm guidance specific to their industry before they can reopen. The guidance also includes industry specific reopening safety plans. Notably, essential businesses that have remained opened during shelter-at-home orders must now follow these newly issued industry guidelines.

New York's Frequently Asked Questions page makes clear that the state **will not be granting waivers** for businesses who cannot comply with the guidance due to hardship or other special circumstances.

Meanwhile, employment authorities, the EEOC and some state agencies, have issued guidance to help employers manage ADA rules in light of COVID-19. The U.S. Department of Labor has also published COVID-19 related OSHA guidance. This guidance is not law but courts are likely to consider it if there is litigation in the future.

The federal, state, and local anti-discrimination statues (for example Title VII, the Pregnancy Discrimination Act, the New York State Human Rights Law and the New York City Human Rights Law) as well as the federal and state wage and hour laws (for example Federal Labor Relations Act and the New York Labor Law) remain in effect and should not be forgotten about.

Employers must also be mindful of various federal and state laws which provide employees impacted by COVID-19 with paid and unpaid sick leave depending on their individual circumstance. At the federal level, the Families First Corona Virus Response Act requires private employers with less than 500 employees to provide up to 80 hours of paid sick leave in certain circumstances and the Family Medical Leave Act requires covered employers to provide up to 12 weeks of unpaid leave to qualifying employees. In many instances, states have also passed laws that provide employees with enhanced leave beyond that required at the federal level. For more information concerning paid and unpaid leave requirements, please consult Harris St. Laurent's Resources for Employers and Employee's impacted by COVID-19.

In short, employers should be familiar with the FMLA COVID-19 provisions, review reopening orders and guidance issued by the EEOC, state employment agencies and the other agencies that regulate their specific industry. Courts may eventually find that there has been executive branch overreach but complying with the guidance will help employers open their businesses, remain open and provide some defense in any future litigation. Employers who fail to heed this guidance may also find themselves in a PR nightmare.

2. **Can an employer require a medical note or require employees to undergo medical testing such as having their temperatures taken in order to take sick leave or return to work?**

The short answer is yes, but with some qualifications.

On a federal level, the ADA regulates disability related inquires and medical examinations. Each state may have different rules. What actions are permissible under the ADA depend on the phase of the employment, before a job offer, after a job offer but before employment has commenced and during employment. Here, we address only current employees, but employers should be aware that there are different and often stricter standards for job candidates.

According to EEOC guidance issued at the end of March 2020, employers may take temperatures of current employees as they come physically into the workplace and may ask employees who are coming physically into the workplace if they have COVID-19, have symptoms associated with COVID-19, have been tested for COVID-19 or have had contact with anyone who has the disease. Additionally, employers may require employees to undergo medical testing, such as testing to detect the presence of the virus before permitting employees to return to the workplace. However, consistent with the ADA, employers should ensure they are administering tests that are accurate and reliable, and should apply testing requirements consistently.

Employers may exclude employees with the disease or with symptoms of the disease from coming physically into the workplace because those employees would pose a direct threat to the safety of the workplace. If an employee is working from home, an employer is not permitted to ask these questions.

Employers should not ask if family members are ill and instead should ask about "contact with anyone." The broader question is better from a public health perspective as it would identify more exposures and it keeps employers from being liable for asking legally impermissible questions about family status.

If an employee refuses to have his temperature taken or to answer these questions, the employer may bar the employee from physical presence in the workplace. Employers should listen to employees about the reason for such a refusal and consider options. Specifically, the ADA prevents the dissemination of health information the employers obtain and this may help an employee to feel more comfortable.

As a general rule, employers should treat all employees in the same manner with respect to temperatures and questions. However, if the employer has a reasonable belief based on objective evidence that an employee may have COVID-19, the employer may ask that employee specifically.

Employers who conduct medical examinations, including temperature checks, and collect doctors' notes, must maintain employee illness information as confidential medical

information in compliance with the ADA. For example, medical information or testing results should not be stored with employees' personnel records.

3. **How do employers assign shifts or bring people back to work in a phased or partial reopening? Can employers consider COVID-19 illness factors such as age, medical conditions and family status?**

   This is a grey area where federal law, such as the age discrimination laws, and Title VII of the Civil Rights Act prohibit discrimination based on certain factors such as age and pregnancy. States, however, are taking steps to protect vulnerable individuals and the health care system's capacity.

   According to the EEOC, neither age nor pregnancy can be the basis for any employment decision even in the time of COVID-19 and do not entitle individuals to accommodation, such as being permitted to work from home. However, Colorado's Labor Department is enforcing the state's partial reopening order and prohibiting employers from requiring pregnant women or people over the age of 65 to return to work.

   Under the ADA, where an employee has a disability that makes him more suspectable to complications from COVID-19, i.e., chronic lung disease, an employee may ask for a reasonable accommodation. The employer may verify through a doctor's note, health insurance record or other method, the fact of the disability and should make an effort to make a reasonable accommodation. Existing federal legal standards will govern when and what type of accommodation is reasonable. Under the ADA, employees are not entitled to a reasonable accommodation for a family member's disability, for example living with an elderly or immunocompromised relative. Again, the EEOC's general guidance is focused only on federal law and the state may offer broader protections.

   For example, state and local laws, such as the New York State Human Rights Law and the New York City Pregnant Workers Fairness Act may, in some circumstances, require an employer to provide a reasonable accommodation to pregnant employees.

   While the ADA, and other state and local laws require employers to engage in an interactive process to determine whether a reasonable accommodation is available to certain protected employees, employers are encouraged to discuss shift changes, work from home, and other arrangements with all employees.

   Employers should document which guidance they are following by retaining hard copies, PDFs or another permanent form. Agencies are updating websites regularly with revised guidance and rules. Employers should document all requests not to return to work and for reasonable accommodations and should be as consistent as possible.

4. **How do I create a safe workplace with COVID-19?**

   At all times, employers are under an obligation to create a safe workplace. This can be a difficult task in the normal course and seems ludicrous in these times. Employers should look

at state, local and health department orders and comply with them. For example, Pennsylvania requires employers to provide masks. Salons in Colorado may open but masks are required, there is a limit to the number of people and there are strict requirements on space. OSHA and the CDC have also issued industry specific guidance. Some businesses such as retail locations, pet groomers and salons have regular health and safety inspections. Employers may want to contact their inspector for guidance on unique problems or questions that were not covered in the published guidance. In some cases, health departments have formed task forces to respond to questions from business owners. Document all of this contact and steps to comply.

Safety procedures and policies should be posted and employees should be given a written copy and asked to sign a statement that they have reviewed the policies and procedures. These procedures should contain instructions on how to report concerns and the procedure for reviewing concerns. Most workplaces have harassment policies and other reporting policies already in place. In some cases, it may be appropriate to duplicate those for COVID-19.

Employers will need to instruct employees on dealing with non-compliance by other employees and members of the public and may need to consider hiring security. The media has reported tragic events of employees injured trying to enforce safety standards.

Finally, New York employers should consult and ensure compliance with industry specific guidance issued by the state.

5. What can I do to limit liability?

- Employers should make sure they are complying with all legal postering requirements. The recent FMLA provisions contain a postering provision and if managers have been working from home, those posters may not be in place. Handwashing and other safety placards should be double checked and put in all required locations.

- Document all safety efforts and retain copies of the guidance being followed. Do not rely on the internet to store the webpages. The guidance is being frequently updated and files should note the date the guidance was taken and the steps followed.

- Keep files showing that all employees were appraised of new safety policies and procedures.

- Make it explicit in writing that decisions are temporary and will need to be revisited as the situation evolves.

- Asking employees to sign a liability waiver or new terms of employment limiting an employer's liability for safety in the workplace, may backfire. There is a meaningful chance that a court will deem it unenforceable, in contrivance to the law and coercive. It may also damage employee loyalty and moral and create bad publicity.

- Employers should make sure their existing employee handbooks comply with newly enacted federal and state family and sick leave laws. Where changes to policies have been made, employers should communicate such policy updates to employees.

- Employers might consider asking returning employees to sign arbitration and class action waiver agreements which can reduce litigation risks in the event the employer is sued.

- If employers reduced the number of hours worked and/or compensation of employees, these changes should be well documented and compliance with the various wage and hour laws maintained. For example, New York employers who reduced employees' hourly wages should have such employees execute revised wage notices. Where employers reduced the compensation and/or duties of salary (overtime-exempt) workers, such employees may no longer qualify for an exemption under the FLSA and corresponding wage and hour laws.

- Employers who are permitting or requiring employees to continue working from home should consider implementing more formal work from home policies. Such policies might consider, for example, how hourly employees are to record their hours, protecting the businesses' confidential information, and reimbursement for work from home expenses.

- Be creative, be flexible and be kind.