

# **Business Unusual: Planning for the Return of Your Workforce Post-COVID- 19**

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## Where We Are/Planning Ahead

- While it is unclear exactly when “stay-at-home” orders will be lifted, employers should start planning now for the reopening of their workplaces.
- Things are unlikely to immediately return to “normal” or pre-COVID-19 conditions.
- There will be many new or modified regulations and employer obligations.
- Purpose of today’s presentation is to provide guidance around what employers should be thinking about and planning for now in order to best prepare for reopening and/or continuing operations once stay-at-home orders are lifted.

## Topics We Will Cover Today

- Health Screening and Privacy Issues
- COVID-19 Discrimination Claims
- OSHA Obligations and Reporting, Personal Protective Equipment and Social Distancing
- Compensation and Leave Issues
- Ongoing Employee Concerns – Fears, Transportation, Childcare & Protected Activity

# Health Screening and ADA/Privacy Issues

## Health Screening Requirements

Employers will likely be required to screen employees for COVID-19 each day before allowing them to begin work.

This may include:

- Taking employee temperatures;
- Interviewing employees to confirm whether they are experiencing symptoms;
- Confirming if employees have been recently exposed to someone who has COVID-19.

These requirements may apply not just to employees but all who enter your workspace – customers, vendors, etc.

## Health Screening Concerns

- Who will be responsible for the health screening?
- How will you obtain necessary equipment?
- How can you screen and maintain social distancing?
- COVID-19 Testing specifically
  - When would an employee have to be tested?
  - Will there be sufficient tests available?
  - Who will bear the costs?

## Health Screening Privacy

- Health screening information is confidential medical information.
- Disclosure must be on a need-to-know basis.
- *BUT* – balancing employee privacy interests vs. employee safety concerns
  - “Need-to-know” may include employees who have been exposed
  - Disclosure without identifying sick employee

## Health Screening and the ADA

- The EEOC usually limits medical tests and inquiries to situations where there is a business need to know or a “direct threat.”
- EEOC has indicated that health screening is permissible given the pandemic.
  - Can take employee temperature and inquire about symptoms
  - Can send sick employees home
- EEOC says you can require fitness for duty/doctor’s clearance note before returning employee to work, but must keep in mind the challenges of getting such documentation during pandemic.
- Employees with disabilities related to or impacted by COVID-19 may be entitled to reasonable accommodation in the workplace.



# COVID-19 Discrimination Claims

## **COVID-19 Discrimination Claims – Americans with Disabilities Act**

Questionable whether COVID-19 is a disability, but still potential for claims:

- Improper medical inquiries
- Regarded as Disabled – improper assumptions
- Failure to Reasonably Accommodate
- Delay in returning to work

## COVID-19 Discrimination Claims – Age Discrimination Employment Act

- Treating older employees – who may be at higher risk – differently because of age
- Making assumptions about employee capabilities because of age

## COVID-19 Discrimination Claims – Race/National Origin

Several documented incidents of attacks on Asians based on alleged fear of COVID-19.

EEOC has come out and stated that:

*Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.*

Failure to take such proactive steps – training, updating policies, etc. – may increase chance of liability if incident does occur.

# OSHA Obligations and Reporting

## OSHA Obligations

OSHA's General Duty Clause 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."

Many industries have regulatory requirements which are the subject of employee discontent, especially in health care, nursing care and death industries. Unions have been particularly active in these areas and with groups of grocery and service workers.

Many states have their own safety standards which impose similar obligations.

## OSHA Obligations

Prepare an Infectious Disease Preparedness Response Plan.

- Implement basic infection prevention measures.
- Develop policies and Procedures to identify and isolate sick employees.
- Implement workplace controls:
  - Engineering
  - Administrative
  - PPE
- Communicate about flexibilities/protections.

## OSHA Obligations

Practically: Employers have an obligation to protect employees from getting COVID-19 at work by performing a Hazard Assessment, generally by position.

Control and prevention methods may include:

- Health screening
- Provision of personal protective equipment and cleaning supplies
- Social distancing
- Enhanced cleaning and decontamination

Your obligations will depend on your industry, the type of work being performed and the setting. You must review the physical operation and install engineering controls if possible.

Increased ventilation is an engineering control as are sneeze guards, distancing in the work area and enlarged and outside break areas.



## Social Distancing

- Likely that CDC and other agencies will continue to recommend (and even require) social distancing in the workplace.
- Consider what it means for your workplace if employees are expected to work at least six feet apart and not gather in large groups.
- Options might include:
  - Rearranging office space
  - Alternating remote work days
  - Limiting in-person meetings and interactions
  - Buying equipment or furniture to further segregate employees
- Business travel

## OSHA Reporting

Under OSHA's recordkeeping requirements, employers are responsible for recording cases of COVID-19 but reporting is relaxed for now according to new Guidance.

- (1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention;
- (2) the case is work-related, meaning the work event or exposure caused or contributed to the resulting condition or exacerbated an underlying injury or illness; and
- (3) the case involves one or more of the following:
  - a. death
  - b. days away from work
  - c. restricted work or transfer to another job
  - d. medical treatment beyond first aid
  - e. loss of consciousness
  - f. a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

## OSHA Reporting

- Given community spread, OSHA acknowledges that it will be very difficult to determine if “work related”
- Certain industries are required to make the work related determination:
  - Healthcare industry
  - Emergency responders (emergency medical, firefighting, and law enforcement)
  - Correctional institutions
- OSHA will not require others to make the determination unless
  - There is objective evidence that the spread of COVID-19 is work related. For example, a number of employees who work closely together all become ill; and
  - The evidence is reasonably available to the employer, including if employees disclose the information to the employer.

## Masks and PPE

- CDC and most states are now recommending (and some are requiring) that everyone wear a mask or face covering when outside the home. Likely that this will be continued in Phase 1.
- Employees will likely be required to wear at least some of the time they are at work.
- Proactive employers will be required to provide the PPE and to train employees about types of masks/face covering/PPE and their appropriate use. While guidelines are currently relaxed, training, reuse, cleaning and replacement will likely be mandatory.

## Masks and PPE – Challenges

- Who will be responsible for supplying and paying for masks and PPE?
- Shortages of equipment
  - “Do it Yourself” options
- What if employees want to wear their own?
- What if employees refuse to wear the mask/PPE?

## Employee Involvement, Auditing and Whistleblowers

- While the Hazard Assessment is a management obligation, employees should be involved at some stage depending on the workforce. Unions' contractual requirements and best practices should engage employees. First line supervisors will become trainers and auditors and should report concerns.
- OSHA and MOSH letters of concern should be expected if the process fails. Inspection activity will remain down under new Guidance.
- Remember, OSHA had the first express non-retaliation provisions by statute, which have been perfected over 40 years. If an employee has a reasonable belief that there is a danger, they may be protected. Provide a process and deal with issues as they arise. Office of the Whistleblower remains very active.

# Compensation, Leave and Recall Issues

## Compensation

- Must employees be paid for time spent in health screening each day?
- What if I can't pay employees at the same level as before because I have less work or because I am staggering schedules?
- Paying employees more – hazard pay, retro bonuses, attendance bonuses
  - May create issues with non-exempt employees
- Hourly employees working from home
  - “all in a days’ work” concerns, timekeeping, breaks



## Sick and Vacation Leave

- Many employees will have exhausted all paid time off during furloughs and/or leave.
- How will you handle planned vacations, illness and holiday time throughout remainder of the year?
  - Additional PTO
  - Leave without pay
  - Deny time off
- Mandatory state and local paid sick leave laws
  - If employees have exhausted all PTO but not technically had opportunity to utilize for “sick and safe leave” purposes – are you obligated to provide that additional time?
  - Restoration of paid sick leave upon re-instatement
  - Watch for new laws

## FFCRA – EPSL and EFMLA

- Employees remain eligible for FFCRA until December 31, 2020
  - Under/over 500 due to layoffs/rehiring – snapshot at time leave requested
  - Employees unable to be recalled due to FFCRA qualifying reason
  - EFMLA – 30 days on payroll prior to layoff/furlough
- Will lack of summer camp count for EFMLA?

## ADA and FMLA

- FMLA claims may increase – particularly due to mental health conditions such as anxiety and depression
  - EFMLA time counts against 12 weeks of FMLA
  - Difficulties in obtaining doctors' certifications
  - “serious health condition” requires in-person visit to doctor
- Increased requests for remote work
  - Undue hardship under ADA may be more difficult now – but employer still gets to choose preferred accommodation if more than one effective accommodation
  - Teleworking policies – more important than ever

## Recall Issues

### Unemployment reporting

- Employees who were terminated - new hire reporting
- Employee who refuses recall
- Report to [uifraud@dllr.state.md.us](mailto:uifraud@dllr.state.md.us) (form available at <https://www.dllr.state.md.us/forms/uifraudtipform.pdf>) or call **1-800-492-6804**

### Process

- Handbook policy
- CBA
- Objective business-related criteria – beware discrimination/retaliation risks

### Communication!

# **Potential Ongoing Employee Concerns – Fears, Transportation, Childcare & Protected Activity**

## Potential Ongoing Employee Concerns – Fears

Some employees may be concerned about returning to work in the office.

Employers will need to determine the reason for the hesitancy:

- Underlying medical issue of employee – may need to engage in interactive process to determine if reasonable accommodation is required.
- Concern about becoming ill and infecting a family member with whom employee resides who has an underlying condition
  - Not covered by regular FMLA
  - But may be entitled to FFCRA Emergency Paid Sick Leave – up to 80 hours of paid sick leave – if family member has been advised to self-quarantine because of the underlying condition.
- Generalized fear of getting sick – probably will not be required to accommodate

## Potential Ongoing Employee Concerns – Transportation

- Employees who usually take public transportation to work may wish to avoid rush hour/crowded trains and buses
- Consider staggering employee start times to avoid such issues

## Potential Ongoing Employee Concerns – Childcare

- Possibility exists that K-12 public and private schools will not return to onsite instruction this school year.
- Unclear when daycare facilities will reopen to non-essential workers.
- Employees may require ongoing flexibility and remote work to accommodate childcare issues.
- FFCRA entitles eligible employees to 2 weeks of EPSL and up to 10 weeks of EFMLA leave to care for a child whose school or childcare is closed.
  - Law remains in effect through December 31, 2020.



## Potential Ongoing Employee Concerns – Protected Activity

- Most private employers are covered by the NLRA which protects the rights of employees to engage in concerted activity for mutual aid and protection
- The press is reporting numerous examples of employees being disciplined for speaking out about coronavirus-related issues in the workplace
- Protected activity can include speaking to colleagues, speaking to the press, or posting messages on social media about workplace concerns
- Disciplining an employee for engaging in protected concerted activity may lead to a number of issues
  - ULP
  - Morale
  - Unwanted negative press
  - Unions
- Provide an outlet and listen

## Practical Takeaways

- Beginning planning NOW for eventual return to office.
- Consider what your workplace will physically look like and how you will acquire any new equipment or furniture.
- Determine what PPE you will provide employees and how to obtain it.
- Consider providing additional training to employees on social distancing, PPE, non-discrimination and expectations around reporting of health issues.
- Be alert to new guidance or publications issued by federal, state and local authorities on rules for return to work.
- When in doubt – call your counsel! These are complicated and ever-changing issues!

## Questions? Please Contact Us.



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## Firm Overview

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