

LEGAL UPDATES

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Key Labor & Employment Considerations for Developing a Return-to-Work Strategy

As of April 26, 2020, isolation orders and business closures have helped to slow the number of new infections caused by SARS-CoV-2, the virus that causes COVID-19. Experts have explained that the infections grow and decline at “exponential rates” with this virus, so that changes in behavior – for the better or for the worse – result in significant decreases or increases in infections. As we know, the efforts to reduce the spread of infection have come at a substantial economic cost to business and families as economic activity has slowed and jobs have disappeared. For that reason, governments and businesses are contemplating re-opening businesses and permitting individuals to return to work. The challenge faced by employers is to structure a return-to-work strategy that continues to mitigate the spread of the virus in a way that enables the economy to operate without experiencing another shutdown.

This article will outline a judicious return-to-work strategy, drawing upon the advice of experts in government and science who are developing tools to fight the virus. Additionally, it will address legal issues and employer obligations that will arise as the workforce reenters the workplace during the pandemic.

Lifting of isolation and stay at home orders

Prior to returning to work, state and local governments must lift stay at home and isolation orders. The variations in the infection rates among different geographic regions and even localities will result in differences in not only when the orders will be lifted but by how much and for whom. As states lift orders, municipalities may seek to impose limitations on business openings. Employers must comply with not only all orders that are applicable to their business locations, but also must be cognizant of the orders applicable to the

locations in which their workers reside. Workers who remain in isolation in their locality will not be able to return to work in a different locality that has re-opened.

In the absence of uniformity among state government directives on re-opening, it will be incumbent on businesses to adopt work policies and rules regarding their workplace and workforce. Federal agencies provide guidance about policies that employers should adopt as they contemplate re-opening the business.

New work policies and rules to consider

The CDC, OSHA and the EEOC provide regulatory guidance for businesses about best practices to prevent transmission of COVID-19 among the workforce. Employers should begin the process of re-hiring their workforce by adopting temporary rules to mitigate the spread of the virus, including the use of administrative and engineering controls and personal protective equipment (PPE).

Exclusions from the workplace

The EEOC and CDC recommend that employees infected with, symptomatic, or exposed to COVID-19 be excluded from the workplace. Based on these recommendations, employers can adopt policies excluding such workers from the workplace until either they are asymptomatic for the required quarantine period or have satisfied the discontinue isolation criteria as established by the CDC. Additionally, employers should adopt related policies that:

Designate reporting procedures in the event an employee or worker becomes ill or experiences symptoms consistent with COVID-19. Provide training regarding appropriate protocols.

Require separation of workers who become symptomatic at work, compilation of a list of contacts, and sending the worker home.

Adopt flexible sick leave policies.

Hygiene and sanitation policies

Consistent with EEOC, OSHA and CDC guidelines, employers should limit the spread of infection by adopting policies and training employees on infection prevention measures:

Adopt and enforce policies to implement infection prevention measures as recommended by OSHA and CDC, including proper handwashing and respiratory etiquette. If available, provide hand sanitizer. At a minimum, ensure that all restrooms are equipped with soap, water and a means for drying hands.

Adopt policies to regularly sanitize the work environment, especially high-touch surface using disinfectants recommended by the CDC that are effective against the SARS-CoV-2 virus. Perform more extensive cleaning in conformity with CDC guidance in the event of an exposure in the workplace. Provide disinfecting wipes, if available, for employees to sanitize surfaces as needed.

Administrative and engineering controls

OSHA guidance for preparing the workplace describes a classification system for determining occupational exposure risk to COVID-19. OSHA reserves the very high and high exposure risk categories to healthcare, emergency response, laboratory, and death care jobs that expose workers to known or suspected cases of COVID-19. OSHA enforcement memos and a fact sheet describe the administrative and engineering controls and PPE that employers must provide to workers in very high and high exposure risk jobs.

All other jobs fall into the medium and low exposure risk categories. Workers in low exposure risk jobs have minimal contact with the public and co-workers. Workers in the medium exposure risk category have exposure to the public, to international travelers, or in areas of ongoing transmission.

OSHA does not currently recommend significant engineering, administrative or PPE for workers in low exposure risk jobs, other than monitoring public health communications about COVID-19. For workers in medium exposure risk jobs, employers should adopt the following infection control measures:

Social distancing and engineering controls. Adopt social distancing policies among workers and between workers and third-parties. The CDC recommends maintaining a distance of 6 feet between individuals. If the 6-foot distance is not achievable, consider erecting physical barriers such as clear plastic sneeze guards, reconfiguring the workspace, increasing ventilation, or installing high efficiency filters.

Work schedules. Adopt staggered schedules using work shifts or alternating days of work to minimize contact; limit or discontinue use of lunchrooms or other gathering places.

Travel and meetings Cancel unnecessary travel and use video-conferencing.

Shared office equipment. If possible, prohibit sharing of equipment such as phones, radios, keyboards, and desk space.

Public or customer access. Limit public or customer access to the worksite or restrict access to specific areas, use drive through windows or curbside pickup, or use virtual communication strategies.

PPE: Face masks/coverings, gloves

OSHA. OSHA recommends that workers in medium exposure risk jobs wear a combination of gloves, gown, face mask and/or face shield, and goggles. The type and extensiveness of PPE will depend on the individual's job tasks, the types of job exposures, and the employer's risk assessment.

CDC. The CDC recommends the use of face coverings for all individuals when out in public and around other individuals. A face covering protects individuals other than the person wearing the mask. Logically, if everyone is wearing a face covering, all individuals are protecting each other, reducing the risk of infection for all. The CDC recommends that face coverings and social distancing be used in tandem.

EEOC. The EEOC technical guidance permits employers to require employees to wear protective gear, including face coverings.

The OSH Act's general duty clause requires employers to provide employees with a workplace free from recognized hazards likely to cause death or serious bodily harm. COVID-19 has been characterized as a direct threat by the EEOC based on the CDC's recognition of the severity of COVID-19, the ease of transmission and community spread, and the novel nature of the virus. Employers should use their best efforts to mitigate the transmission of the virus by adopting the polices outlined above that are best suited for the specific workplace.

Employee and human resource issues

While the infection control policies discussed above have become the new normal in the last few weeks, for employers not designated as essential businesses, the return to work may be anything but normal. Employers will not only face challenges associated with renewing customer demand and maintaining social distancing among customers but also must resolve various human resource issues, with legal complexities. Throughout the pandemic, the EEOC has continued to issue technical guidance to employers concerning many of these legal issues.

Recalling fewer than all employees to work

An employer may be unable to call back to work all of its employees due to a lack of demand or logistics due to social distancing. To determine which employees to recall to work, employers may consider non-discriminatory, objective criteria such as whether the employee is essential to critical operations, has specialized essential skills, or performs high-quality work. Employers must ensure their re-hiring decisions are not based on protected characteristics such as race, national origin, age, sex, pregnancy or disability. Similarly, employers must not decline to re-hire employees because the

employee previously reported or opposed discrimination, or participated in a discrimination investigation or lawsuit. If an employer recalls less than its full workforce, the employer should ensure that the selection criteria did not result in a disproportionate dismissal of employees in a protected group.

Employing high-risk employees and requests for accommodation

At the outset, employers should realize that they will be modifying the workplace because of COVID-19 for all employees to some extent. The CDC has released information establishing that certain individuals are more susceptible to complications from exposure to COVID-19, including individuals who are older, pregnant, or have a pre-existing condition such as diabetes, chronic lung disease, obesity, and serious heart disease. While employers are making adjustments to the workplace, they should also continue to work with high-risk employees to decrease their risk of exposure to the virus. Employers' actions must comply with EEO laws.

Under the Age Discrimination in Employment Act (ADEA), American Disability Act (ADA), the Pregnancy Discrimination Act, and Title VII, employers are not permitted to refuse to employ or require individuals to telework because of a protected characteristic. An employer, however, may ask an employee with a known disability, on a case by case basis, if they need an accommodation when the employer has a reasonable belief that the accommodation is needed.

If a high-risk employee requests a change in the workplace because their medical disability under the ADA places them at a higher risk for complications from exposure to COVID-19, then the request must be treated as a request for accommodation, and the employer must determine if the accommodation is reasonable. In these challenging times, OSHA recommends that high-risk employees who voluntarily disclose health risks "should be considered for accommodations and/or additional protective measures (PPE)." Employees should consider temporary job restructuring of marginal duties, temporary transfers to another position, modification of a work schedule or shift assignment to reduce the exposure risk in the workplace or while commuting to work. Physical barriers that also reduce exposure may also be considered.

Accommodating an employee, however, does not require the employer to provide an accommodation that imposes significant difficulty or expense on an employer such that it constitutes an undue hardship. The level of expense that satisfies the "undue hardship" criteria may have significantly changed for many employers due to the lockdowns and pandemic.

As before the pandemic, an employer may continue to verify the existence of the disability, and to discuss the reason for and type of accommodation requested. Whether to require documentation of the disability is left to the discretion of the employer. Due to the burden on healthcare providers,

however, employers are strongly encouraged to accept other forms of documentation of the disability if they do not already have such information.

With regard to older workers, the ADEA does not contain an accommodation provision similar to the ADA. If an employee protected by the ADEA requests PPE or to telework to avoid exposure to COVID-19 and the heightened risk, and the employer is providing the opportunity to telework or PPE to other employees, the employer should treat the older employee similarly and offer the same opportunities.

Teleworking

One of the administrative controls recommended by OSHA to protect workers from exposure during the pandemic is teleworking. Many employees have been teleworking during the lockdown. Teleworking may provide employers and employees with a good resolution during the initial phases of re-opening the economy. Employers with a workforce that can perform some or all of the essential functions of the job by teleworking can reduce the number of workers in the workplace, reduce the number of employees commuting on public transportation, and offer employees the opportunity to temporarily avoid the work environment while coping with fears of exposure to the virus.

Where feasible, employers should adopt temporary teleworking policies. Additionally, employers who choose to temporarily excuse performance of one or more essential job functions during the COVID-19 crisis for the purpose of protecting employee safety doesn't mean the employer has permanently changed a job's essential functions, that telework is a feasible accommodation, or that it does not pose an undue hardship. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties after the crisis has passed or at a specified future date.

Screening and testing

As employers re-open businesses and in the absence of sufficient testing capacity to identify infections, employers must screen the health of employees to maintain the health and safety of the workplace. It is permissible to ask employees about symptoms related to COVID-19, including "emerging symptoms" as indicated by the CDC and public health authorities.

Because COVID-19 poses a direct threat to the workplace, employers are also permitted to require medical testing by measuring an employee's temperatures during the COVID-19 pandemic. State and local laws, however, may impose other restrictions on testing. On April 23, 2020, the EEOC also published a technical assistance question and answer guide that authorizes employers to "administer COVID-19 testing to employees before they enter the workplace" to identify infected employees. The EEOC cautions that employers have an obligation to ensure the tests administered are safe and accurate and should rely on FDA, CDC and public health authority guidance.

The sudden announcement by the EEOC on testing occurs while there is still a limited capacity to test symptomatic or exposed individuals and workers in very high and high exposure risk jobs. Additionally, current testing kits do not provide immediate results and must be processed by labs with specialized equipment. According to the FDA, not all testing kits commercially distributed have been authorized by the FDA. As a result, at the time of this article, the use of COVID-19 diagnostic testing does not appear to be a useful screening option for employers.

A Rapid Diagnostic Test that uses a nose swab and can be administered at home with instant test results is under development. This type of test appears minimally invasive and, if accurate, could be used by employers to detect whether employees are infected. Additionally, to the extent the test can be self-administered at the workplace, it may abrogate the need for the test to be administered by a medical professional or to provide required training and PPE to employees to conduct the diagnostic test.

It is important to note that all results of medical exams are considered confidential medical information and must be maintained as confidential and separate from personnel files.

Protected concerted activity

Section 7 of the National Labor Relations Act (NLRA) protects the right of employees to engage in concerted activity for the purpose of ...”other mutual aid and protection.” Although concerted activity refers to actions by two or more persons, it can also refer to a single employee who engages in protected concerted activity by bringing group complaints to the attention of the employer or by acting on the authority of other employees. Employees who raise health and safety concerns in the workplace related to COVID-19 exposure or PPE issues may be protected under the NLRA. Employers should refrain from penalizing or discharging employees who raise health and safety concerns or who discuss concerns with third-parties related to COVID-19 exposure.

Similarly, employees’ refusal to work because of fears related COVID-19 and the health and safety issues in the workplace may also constitute protected concerted activity or be protected under §502 of the Labor Management Relations Act. When faced with employee concerns, employers should assess the exposure risk, the preventative measures undertaken, the training provided to employees and compliance with regulations and guidance from OSHA, CDC and other public health authorities. Transparent discussions with employees about compliance with federal and local directives may calm the fears of an otherwise nervous workforce and avert worker walkouts, protests and strikes.

Final thoughts

We are in uncharted territory in the economic and legal challenges presented by a novel infectious disease. The promise of a successful re-opening will necessitate adaptations to previous ways of

conducting business, and the adoption of a holistic approach to employment issues. Assessing risks to employees and embracing new, flexible strategies that focus on the safety and health of the workplace and employees will be paramount. Working to achieve our common goal of increasing economic activity while mitigating the transmission of the virus will only be accomplished by a slow, coordinated effort that recognizes our shared interests.

Contact us

If you have further questions or require more information regarding this update, please contact Erik Eisenmann or your Husch Blackwell attorney.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.