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Alert

Back to the Future: Employer Considerations for Returning to the Workplace

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As government mandated stay-at-home orders are eased or lifted, employers will be presented with the decisions of if, when and how, to bring their employees back to the workplace. A return to the workplace from lockdown mode does not mean a return to how business was conducted prior to the COVID-19 pandemic. New laws, orders, directives and guidance from every level of government are being issued and have weaved a complex regulatory web for employers to navigate. Employers need to be cautious, engage in advanced planning and make numerous important decisions prior to reopening offices.

Plethora of Guidance

Guidance has been issued from all levels of government and is expected to continue to be issued in the coming weeks. The White House has issued nonbinding guidelines, which envision a slow, phased reopening over a period of weeks or months. The Centers for Disease Control and Prevention ("CDC") published a checklist for employers considering reopening workplaces, providing a list of recommended health and safety actions and ongoing monitoring plans employers should take before reopening.[1] State and local governments have also issued guidelines. In New York State, Governor Andrew M. Cuomo issued Regional Guidelines for Reopening New York, which provide that different types of businesses in 10 different regions of the state will be permitted to open in phases. The phases are based on the CDC's recommendations. Prior to reopening, a region must experience a 14-day decline in hospitalizations and deaths over a three-day rolling average.[2] Governor Cuomo's guidelines provide, *inter alia*, that to maintain the phased reopening, each region must have at least 30% total hospital beds and ICU beds available after elective surgeries resume, coupled with at least a 90-day stockpile of personal protective equipment ("PPE").[3] The Governor also requires capacity for diagnostic testing regimen, a comprehensive tracing system and isolation facilities.[4] The Governor's "shelter in-place" order for the State of New York was extended until May 28, 2020, provided that certain industries in certain parts of the state outside of the New York City metropolitan area may reopen as early as May 15, 2020.

Should an Employer Reopen?

The health and safety of the workforce should be the guiding principle behind all decisions concerning reopening. The general duty clause of the Occupational Safety and Health Act ("OSHA") requires that

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[1] Workplaces During the COVID-19 Pandemic, Centers for Disease Control and Prevention, available here.

[2] Regional Guidelines for Reopening New York State, available here.

[3] *Id.*

[4] *Id.*

each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm.[5] Absent a vaccine or treatment, reopening will be gradual as stay-at-home orders are lifted. Further, there is a concern that there will be a second wave of the COVID-19 with a much larger spread. When considering reopening, an employer should determine if its workplace is in a community no longer requiring significant mitigation and whether the employer has protective measures in place for employees, including those at high risk. All employers should familiarize themselves with OSHA's Guidance on Preparing Workplaces for COVID-19 and closely follow guidance from other government agencies as the crisis evolves.

Doing so should help address employer concerns related to potential litigation and COVID-19. The COVID-19 pandemic is already proving to be fertile breeding ground for litigation, which will likely continue, and infected employees (and plaintiffs' counsel) may seek to hold employers liable. While it is not yet clear how workplace contractions of the COVID-19 will be treated, state workers' compensation statutes may bar many employee tort claims. Proving causation will present another challenge to these types of claims. Furthermore, state and federal lawmakers are considering legislation that would immunize certain employers from these types of claims. Accordingly, to protect employees and help mitigate potential liability, before reopening their worksites, employers need to consider how best to reduce the risk of COVID-19 infection in their workplace.

Preparing the Workplace

Prior to reopening, employers should consider reconfiguring their physical workplaces and modifying floor plans. Alterations to workspaces and layouts should be considered to place employees further apart from one another so that coworkers can realistically maintain at least a six-foot distance during the work day. Some employers should use Plexiglas, tables or other barriers to ensure minimum distances between coworkers and/or customers. In enclosed spaces, employers should consider establishing one-way directional flow of movement. Coworkers should not share property, such as phones, computers or desks in the workplace. Employers should conduct deep cleanings of entire workplaces frequently, conduct regular disinfecting of high-touch surfaces and shared equipment, and consider increasing ventilation of their workplaces. If industrial cleaning solutions will be used to clean workspaces, employees using and storing such solutions should be trained on their use and the proper protective equipment that should be worn during such use. The necessary protective equipment to administer the cleaning solutions (e.g., masks and gloves) should be provided by the employer.

Access to nonessential shared spaces, such as large meetings rooms, should be restricted. For essential shared spaces, such as restrooms, elevators, office printers and perhaps pantries, employers should adopt policies that limit the number of individuals permitted in such areas. These policies may include posting signage to inform employees to limit the number of individuals in these shared areas to a "safe" number, closing off sections of the shared areas, or raising temporary barriers in such areas to reduce the number of employees able to contemporaneously access those areas. Close contact between employees should be avoided as much as practicable. Food deliveries to the workplace should be prohibited. Likewise, access to joint refrigerators and kitchen areas should be restricted. To the extent applicable, employees should be required to bring their own food and utensils to work.

[5] 29 U.S.C. § 654 (1970).

Personal hygiene items, such as hand soap, hand sanitizer containing at least 60% alcohol, disinfectant wipes, sanitizer and tissues, should be made readily available and distributed throughout the workplace. Employers should consider providing single-use tools to employees to limit direct contact with high-touch surfaces.

Preparing the Workforce

Employees should be apprised of new safety and workplace policies before returning to work. Social distancing in the workplace should be required and enforced. Not all employees need be recalled to the workplace at the same time. Employers should consider gradually recalling employees to reduce density in the workplace, beginning with those employees or departments that are the most "essential." In addition, work hours or work days can be staggered so that not all recalled employees are physically present in the workplace at the same time. All nonessential business travel should be prohibited. The number of customers or clients permitted into an employer's facilities should be restricted. In-person meetings, if required, should have limited attendees with required physical distancing and be of short duration.

Some employers successfully operated various departments or businesses by telework. These businesses should determine whether employees can and should continue to work from home. Many predict that telework is here to stay and that the future of work has been permanently altered, and employers should develop and publicize policies on teleworking. An employer's teleworking policy should clarify that it is temporary (e.g., lasting only for the duration of the COVID-19 pandemic) and that it can be terminated by the employer, in its sole discretion, at any time. Such policies may, if appropriate, further clarify that employees' physical attendance is still considered an essential job function.

Employers should consider providing personal protective equipment, including masks and gloves, to all employees and require the donning of all such PPE in the workplace at all times. Masks must be utilized in all close-contact settings. Employers should also require employees to follow certain hygiene protocols, such as periodic hand washing or sanitizing, and the use and disposal of tissues. Signage reflecting these protocols should be strategically posted to boost employee compliance.

Employers have a responsibility to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic. The U.S. Equal Employment Opportunity Commission ("EEOC") has recommended that employers explicitly communicate to their 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."[6] They note that it may be helpful for employers to advise supervisors and managers of their roles in "watching for, stopping and reporting any harassment or other discrimination."[7]

Responding to Employee COVID-19 Concerns

Communication during this period of uncertainty is critical. Employers should develop policies and procedures to deal with COVID-19 issues and concerns. Managers should be trained and point persons

[6] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available here.

[7] *Id.*

assigned to answer any questions and record comments and concerns. Employers must be sensitive to employee concerns and deal with each employee on an individualized basis. Employers should adapt or create systems to receive feedback. For example, some employees may refuse to return to work out of fear of contracting COVID-19. While employers do not necessarily need to comply with an employee's desire to continue teleworking, employers should have personal discussions with such employees to address their concerns and reach a resolution. If an employee has a reasonable belief that he or she is under imminent threat of death or serious physical harm, OSHA permits such an employee to refuse to work.[8] This, however, is a high standard and will be a steep hurdle for employees to clear. Employers should be creative in developing policies to put employees at ease and increase employee participation in reopening. For example, in the early days of reopening, an employer may permit employees to telework for a certain number of days per week or make coming to the workplace voluntary for all employees.

Employers should also be aware of what options their employees have to commute to work. Certain locations and forms of commuting may put employees at increased risk to contract the virus. Some employers are considering offering private shuttles to employees or giving employees a stipend to cover private cars or rental cars for their commutes.

In addition to considering applicability of the employer's existing leave policies and the Family and Medical Leave Act ("FMLA") and state and city leave requirements, such as New York's new paid sick leave laws, employers should be aware that the federal Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act have added additional legal requirements concerning employee leave. Employers with fewer than 500 employees are required to provide certain paid childcare leave and paid sick leave through Dec. 31, 2020.[9] Of most concern to employers seeking to have employees return to the workplace is the acts' temporary amendment of FMLA to include a new entitlement of up to 12 weeks of paid leave to employees that are unable to work (in person or remotely) due to a need to care for a child because the child's physical school or child care is unavailable due to a public health emergency.[10] Caring for a child in this circumstance is a qualifying reason for both emergency paid sick leave and emergency FMLA leave. Paid sick leave (limited to $200 per day or $2,000 total) is available for the first 10 work days of expanded FMLA leave, which are otherwise unpaid.[11] After the 10 work days elapse, the employee would receive two-thirds of the employee's regular rate of pay for the hours the employee would have been scheduled to work in the ensuing 10 weeks (capped at $200 per day or $10,000 total).[12] Employers with fewer than 50 employees are exempt from this new FMLA requirement if they can establish that leave would jeopardize the viability of their business according to criteria set by the U.S. Department of Labor.[13]

[8] 29 U.S.C. § 662(a).

[9] Families First Coronavirus Response Act, Pub. L. No. 116-127, § 3102, 134 Stat. 189-92 (2020).

[10] *Id.* at § 110(a)(2)(A), 134 Stat. 189-90.

[11] *Id.* at § 5110(5)(A)(i)-(ii), 134 Stat. 200.

[12] *Id.* at § 110(b)(2)(B)(i)-(ii), 134 Stat. 190-91.

[13] *Id.* at § 110(a)(3)(B), 134 Stat. 190.

Screening Employees

The EEOC has issued guidance concerning monitoring COVID-19 symptoms and making medical inquiries. Before permitting employees to repopulate the workplace, employers should consider asking their employees to answer questions on their symptoms, exposure and any previous diagnosis related to COVID-19. Questions concerning whether an employee tested positive or has been experiencing

COVID-19 symptoms, or whether the employee has been exposed to anyone who has been diagnosed with COVID-19 or who has displayed symptoms associated with COVID-19, are permissible.[14]

The EEOC has clarified that even if an employer knows that an employee has a medical condition that might place the employee at high risk of severe illness if he or she becomes infected with COVID-19, the employer is not allowed to exclude the employee — or take any other adverse action solely because the employee has a disability that the CDC identifies as potentially placing the employee at high risk.[15] If the employee does not request a reasonable accommodation, the law does not mandate that the employer take action. Such action is only allowed if the employee's disability poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation.[16] The direct threat requirement is a high standard and is not satisfied based solely on the condition being on the CDC's list — "the determination must be an individualized assessment based on a reasonable medical judgment [using the most current medical knowledge and/or best available objective evidence] about the employee's disability."[17] In making this determination, employers may ask an employee to submit to a medical examination if the employer has "a reasonable belief, based on objective evidence," that the employee will pose a "direct threat" due to their medical condition.[18] Even if an employer determines that the disability constitutes a direct threat to the employee's health, the employer can only exclude the employee from the workplace if there is no way to provide a reasonable accommodation that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace.[19]

The EEOC noted that accommodation may include:

- Additional or enhanced protective gowns, masks, gloves or other gear.
- Additional or enhanced protective measures, for example, erecting a barrier that provides separation or increasing the space between an employee with a disability and others.
- Elimination of marginal job duties — i.e., duties that can be reassigned as a reasonable accommodation without causing an undue burden or hardship.
- Temporary modification of work schedules.

[14] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available here.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, U.S. Equal Employment Opportunity Commission, available here.

[19] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, U.S. Equal Employment Opportunity Commission, available here.

- Moving the location of where the employee performs work.[20]

The EEOC has stated that disability-related inquiries and conducting medical exams are permitted if job-related and consistent with business necessity and that inquiries and reliable medical exams meet this standard, if necessary, to exclude employees with a medical condition that would pose a direct threat to their health and safety.[21] Accordingly, during the pandemic, employers are permitted to conduct COVID-19 tests on employees, including taking employee body temperatures, before permitting employees to enter their worksite.[22] Employers should ensure that their tests are accurate and reliable using available guidance from the CDC or other public health authorities. All tests must be administered in a non-discriminatory manner. Further, such tests should be, when possible, conducted by a health care professional. Tests and screenings should be done privately and the results of such tests and screenings are confidential and should be maintained by employers as confidential medical records. With respect to antibody testing, the EEOC has not yet issued guidance on the legality of administering such testing.

Moreover, the antibody tests in their current form may have reliability and accuracy issues and the EEOC warns employers to be cautious of relying on inaccurate testing. Finally, there have been extensive discussions about utilizing technologies that track the movement of individuals for purposes of limiting the spread of COVID-19. These contact tracing technologies in the workplace raise serious privacy concerns.

The COVID-19 Consumer Data Protection Act was recently introduced in the U.S. Senate and aims to "provide all Americans with more transparency, choice, and control over the collection and use of their personal health, geolocation and proximity data" by entities working to track and limit the spread of COVID-19. A second bill, the Public Health Emergency Privacy Act introduced in the U.S. Senate and U.S. House of Representatives on May 14, also aims to regulate the use of contact tracking technologies.

Employees who become ill with symptoms of COVID-19 should be directed to stay home. Employees who become symptomatic at work should be immediately sent home and all potentially exposed employees quarantined. Employees can be required to obtain a doctor's note certifying fitness for duty in order for an employee to be permitted to return to work. The EEOC, however, has stated that doctors may be too busy during the pandemic to provide such documentation. They note that new approaches may be necessary such as an email to certify that an individual does not have COVID-19.[23]

Employers should be aware that their employees may request accommodations for religious or disability reasons. Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act of 1990 ("ADA") require employers to engage in the "interactive process" to determine a suitable accommodation that does not pose a hardship for the employer under Title VII[24] or an undue burden for the employer under the ADA.[25] Local laws, such as New York City's Human Rights Law, also require employers to provide reasonable accommodations to certain employees unless doing so would create

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 29 C.F.R. § 1605.2(e).

[25] 42 U.S.C. § 12111(10).

an undue hardship for the employer.[26] The employer may ask questions or request medical documentation to determine whether the employee has a "disability," and whether the disability necessitates an accommodation.

What's Next?

As noted by the EEOC, "[e]mployers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety." As more guidance and rules are published, employers will be equipped with more practical measures for preparing their worksites. In the meantime, employers must enforce the rules they establish to protect the health and safety of their employees.

Future mandated closures may be on the horizon. Employers should monitor and update their business continuity and safety communication plans accordingly. In the event another round of mandatory closures takes place, employers should have an emergency plan in place detailing how the employer and its employees will navigate that challenge.

Authored by Mark E. Brossman, Ronald E. Richman, Max Garfield, Scott A. Gold and Abdulrahman Alwattar.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

Schulte Roth & Zabel
New York | Washington DC | London
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[26] *See generally* N.Y.C. Admin. Code § 8-107.