



BUSINESS AS USUAL?

TIPS AND ADVICE FOR EMPLOYERS AS COVID-19 LOCKDOWNS ARE LIFTED

Labor and Employment Webinar

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BUSINESS AS USUAL?

- **Returning Employees to the Workplace**
 - *Re-opening guidance is dynamic – sometimes changing on a daily basis*
 - *Recalling employees involves operational, logistical, and legal challenges*
 - *New legal requirements, such as monitoring employee symptoms and leave required by federal Families First Coronavirus Response Act (FFCRA)*
 - *New legal considerations in avoiding discrimination claims*
- **Preparing the Physical Worksite**
 - *Federal, state, and local governments have issued orders and guidance regarding re-opening worksites and protecting employees and the public from avoidable spread of COVID-19*
 - *New workplace requirements and office safety liability*



RETURNING EMPLOYEES TO THE WORKPLACE: REOPENING SCENARIO #1

Most of Employer's 75 employees have been working remotely for the past 8 weeks. The Governor, however, recently determined that Employer may re-open physical work locations. The Employer would like to get back to "business as usual" as soon as possible.

- *Can Employer require all employees to report to the office on the date of re-opening?*



RETURNING EMPLOYEES TO THE WORKPLACE: FEDERAL AND STATE GUIDANCE

- CDC Guidance and OSHA Guidance on Preparing Workplaces for COVID-19
- Stay apprised of all current public health guidance. PA Secretary of Health Order, for example, requires essential businesses with in-person operations and businesses in counties entering “yellow” phase to:
 - *Continue teleworking, where feasible*
 - *Capacity restrictions*
 - *Stagger work start and stop times to prevent large groups entering or leaving the premises*



RETURNING EMPLOYEES TO THE WORKPLACE: REQUESTS FOR PERMANENT REMOTE WORK

- Once restrictions are lifted, employees may ask to continue teleworking on a permanent or temporary basis
- Consider whether the employee making the request is a “qualified individual with a disability” under the ADA or applicable state law
- Consider whether in-person attendance is an “essential function” of the employee’s position and engage in the interactive process



RETURNING EMPLOYEES TO THE WORKPLACE: PUBLIC TRANSPORTATION

- Employees who travel to the office via public transportation may face heightened risk of exposure to COVID-19
- Consider:
 - *Whether these employees can telework*
 - *Ridesharing (Uber, Lyft, etc.)*
 - *Reimbursement?*
 - *Applicability of insurance policies to employer-reimbursed commuting*



RETURNING EMPLOYEES TO THE WORKPLACE: REOPENING SCENARIO #2

Employer has furloughed 100 employees for the past 8 weeks, but now is permitted to re-open work locations. Due to economic uncertainty, the Employer intends to first recall a small team of managerial employees to take on responsibility for the performance of all work within the worksite. Employer plans to reward these managers with bonus pay or compensatory time.

- *What should the Employer consider before making such decisions?*



RETURNING EMPLOYEES TO THE WORKPLACE: RECALLING EMPLOYEES FROM FURLOUGH

- Discrimination claims – selection criteria for furlough and recall
- Messages regarding reasons for furlough and expectation of recall
- Compliance with policies or collective bargaining agreement
- Fair Labor Standards Act compliance
- Documentation



RETURNING EMPLOYEES TO THE WORKPLACE: REOPENING SCENARIO #3

- After employees receive notice that the employer's worksite is reopening, several employees notify their manager that they do not feel safe returning to work or to the worksite.
 - *What should the manager do?*



RETURNING EMPLOYEES TO THE WORKPLACE: EMPLOYEE RESISTANCE

- Consider whether health status / COVID-19 is reason for employee's refusal to return to work.
- Is employee eligible for FFCRA leave?
- Is employee a qualified individual with a disability?
- Is employee requesting leave or remote work arrangement?



RETURNING EMPLOYEES TO THE WORKPLACE: EMPLOYEE RESISTANCE

- Employees who refuse to return to work may face significant consequences, such as loss of a job, loss of benefits, and ineligibility for unemployment compensation
- State Unemployment Compensation reporting requirements
- If the employer is receiving a PPP loan under the CARES Act, document the employee's rejection of re-employment offer



RETURNING EMPLOYEES TO THE WORKPLACE: EMPLOYMENT POLICIES

- The COVID-19 crisis may require employers to update employment policies, such as attendance, leave, remote work, and hours of work policies
- Ensure compliance with the FFCRA if a covered employer
- Educate employees on tactics for preventing COVID-19
 - Common symptoms of COVID-19
 - Safe behavioral practices (social distancing, hand washing, masks, cleaning and disinfecting frequently touched surfaces)



RETURNING EMPLOYEES TO THE WORKPLACE: EMPLOYEE RESISTANCE

- Employers should be mindful of increased harassment
 - *Discrimination/harassment based on national origin*
 - *Employees who had coronavirus but since recovered*
- Train supervisors and managers regarding observing and stopping harassment



RETURNING EMPLOYEES TO THE WORKPLACE: REOPENING SCENARIO #4

- Employer has employees on FFCRA leave because schools are closed or child care is unavailable.
- Government restrictions have been modified to permit employer's office to reopen on May 11, at which time employer believes employees' child care providers should also be available.
 - *Can employer order employees on leave to return to the office if they have no child care?*



RETURNING EMPLOYEES TO THE WORKPLACE: NEW LEAVE LAWS

- Applies to employers with 500 or fewer (U.S.-based) employees
- Provides employers refundable tax credits for the amounts paid to employees for covered leave
- Each covered employer must post a notice of the FFCRA requirements in a conspicuous place on its premises.
- Effective through December 31, 2020.



RETURNING EMPLOYEES TO THE WORKPLACE: NEW LEAVE LAWS - FFCRA

- Employee subject to a quarantine or isolation order related to COVID-19; advised by a health care provider to self-quarantine related to COVID-19; or experiencing COVID-19 symptoms and seeking a medical diagnosis:
 - *2 weeks of sick leave, paid at 100% of wages, up to \$511 daily and \$5,110 total.*
- Employee caring for an individual subject to a quarantine or isolation order related to COVID-19; advised by a health care provider to self-quarantine related to COVID-19 (or experiencing “substantially similar situation” declared by DHHS):
 - *2 weeks of sick leave, paid at 2/3 wages, up to \$200 daily and \$2,000 total.*
- Employee caring for child whose school or is closed (or child care provider is unavailable) due to COVID-19 related reasons:
 - *12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 wages, up to \$200 daily and \$12,000 total.*



RETURNING EMPLOYEES TO THE WORKPLACE: PREVENTING LEAVE POLICY ABUSE

- With respect to pre-pandemic unlimited leave policies, employers may change its employment policies to decrease paid time off in the future
- Ensure compliance with state law and any applicable collective bargaining agreements
- If implementing a voluntary attendance policy, ensure that the at-will employment relationship is maintained
- Avoid written guarantees against termination if employees utilize the policies



PREPARING THE PHYSICAL WORKSITE: REOPENING SCENARIO #5

- Employer has gone to “skeleton crew” staffing since mid-March, with only two or three of its 200 employees reporting to the office on a regular basis. All other employees have been working remotely.
- Employer would like to implement required precautions when workers begin to report to the office again.
 - *What changes to the physical office should employer consider?*



PREPARING THE PHYSICAL WORKSITE: REDUCING COVID-19 RELATED RISKS

- Consider requiring or making available employee personal protective equipment (“PPE”), such as masks, face shields, gloves
- Ensure availability of soap, hand sanitizer, disinfecting/cleaning wipes
- Physical changes to the office – plexiglass or screens, reconfigure space to ensure sufficient distance between work stations
- Prohibit sharing of equipment (computers, phones, etc.) where feasible
- Review and modify cleaning procedures to ensure high touch areas are frequently cleaned



PREPARING THE PHYSICAL WORKSITE: REDUCING COVID-19 RELATED RISKS

- Consider federal (CDC, OSHA) Guidance and state and local orders regarding worksites
- PA Secretary of Health Order, for example, requires essential businesses with in-person operations and businesses in counties entering “yellow” phase to:
 - *Require non-medical masks on the worksite*
 - *Provide employees access to regular handwashing with soap, hand sanitizer, and disinfectant wipes*
 - *Ensure that common areas are cleaned on a regular basis, including between any shifts*



PREPARING THE PHYSICAL WORKSITE: COVID-19 SYMPTOM MONITORING

- According to the EEOC, during a pandemic, ADA-covered employers **may** ask employees if they are experiencing symptoms of COVID-19
 - *Common symptoms according to the CDC: fever, cough, shortness of breath, chills, repeated shaking with chills, muscle pain, headache, sore throat, new loss of taste or smell*
- EEOC Guidance also permits employers to:
 - *Test employees for COVID-19 before they enter a worksite*
 - *Measure an employee's body temperature*
- Results of these tests or other employee health inquiries must be kept confidential (e.g., no public display of employee temperatures)



PREPARING THE PHYSICAL WORKSITE: EMPLOYEE TEMPERATURE CHECKS

- According to the PA Secretary of Health, essential businesses and businesses in counties that enter the “yellow” phase must:
 - *implement temperature screening before an employee enters the business, prior to the start of each shift or, for employees who do not work shifts, before the employee starts work.*
 - *send employees home that have an elevated temperature or fever of 100.4 degrees Fahrenheit or higher.*
 - *ensure employees practice social distancing while waiting to have temperatures screened.*



PREPARING THE PHYSICAL WORKSITE: MANAGING COVID-19 EXPOSURE

- Establish an action plan for responding to a diagnosis of or exposure to COVID-19 in the workplace
- Notify employees who may have been exposed to COVID-19 while maintaining confidentiality
- Return to work



PREPARING THE PHYSICAL WORKSITE: MANAGING COVID-19 EXPOSURE

- Employers should limit all non-essential business travel
- Monitor CDC travel guidance
- Consider requiring 14-days of self-quarantine after travel to high-risk areas
- Employers should not restrict employees' personal travel, but may institute certain precautions



PREPARING THE PHYSICAL WORKSITE: REOPENING SCENARIO #6

- In accordance with the Governor's orders, Employer now requires its employees to wear personal protective equipment (PPE), such as masks and gloves, in the workplace at all times. One employee reports to employer that he is unable to wear these items due to an allergic reaction.
 - *How should the employer respond?*



PREPARING THE PHYSICAL WORKSITE: LEGAL RISKS RELATED TO EXPOSURE TO COVID-19

- OSHA’s “general duty” clause and safety standards
- Government orders requiring face coverings or other PPE
- EEOC guidance regarding COVID-19 vs. confidentiality, medical inquiries, and accommodating disability



PREPARING THE PHYSICAL WORKSITE: LEGAL RISKS RELATED TO EXPOSURE TO COVID-19

- Potential claims against employer by employees who have contracted COVID-19 in the workplace:
 - Workers' compensation claims
 - Negligence claims
 - Wrongful death
- Potential claims by employees who do not feel safe or do not feel employer is complying with government orders or guidance.





Q&A

Questions?

