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Considerations for Employers During the "Re-Opening" Phase

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As government officials are loosening the shelter in place orders and allowing businesses to re-open while COVID-19 is still present, employers are faced with critical decisions as to how to re-open for business and do so safely. Employer decisions now will be viewed critically—and, if done incorrectly, could lead to a plethora of claims from employees down the road.

Employers Should Create a Plan for Re-Opening

What should employers do? Here is a quick checklist of recommendations and considerations as employers move forward in these uncharted waters:

1. Develop a Re-Opening Plan.
2. Identify a workplace coordinator who will be responsible for COVID-19 issues.
3. Strictly follow any CDC and OSHA guidelines for the workplace.
4. Consider COVID-19 testing or temperature testing before allowing employees to return to the workplace (see further discussion below).
5. Create or update an emergency communication and response plan, ensuring that employee contact information is up to date.
6. Make every effort to enable working from home as a first option. If working from home is not an option, social distancing guidelines and plans should be adopted and implemented.
7. Consider providing personal protection equipment (PPE) and require face coverings to be worn by employees where other social distancing measures are difficult to maintain (*note, some state or local requirements may be more stringent).
8. Minimize face-to-face interactions, including with customers, where reasonable and available.
9. Where possible and reasonable, eliminate unnecessary travel, postpone in-person meetings, conferences, workshops, and training sessions, and encourage the use of online conferencing, email, or telephone in place of in-person meetings, even when in the same building.
10. Encourage contactless pay options. If not possible, then disinfect transaction terminals between customers.

Employers must continue to balance best practices, guidance, applicable government orders, and business needs. Navigating these issues requires up-to-date information on EEOC, DOL, OSHA, and CDC guidance as the

guidance continues to change weekly. Employers should consult with counsel to determine whether additional requirements apply to your business, then have been stated in this alert.

Permitted Health Testing and Inquiries of Returning Employees

On April 23, 2020, the EEOC updated its guidance addressing medical examinations and inquiries, confidentiality of medical information, and reasonable accommodations. As of this alert, the EEOC continues to relax the Americans with Disabilities Act regulations, so that employers can balance health and safety while not violating the ADA.

According to the EEOC, under most circumstances when an employee is returning to the workplace, an employer is allowed to do the following without violating the ADA:

1. Inquire if the employee has COVID-19 symptoms—including any symptoms listed by the CDC.
2. Employers can send home or require employees to stay home if the employee has COVID-19 symptoms.
3. Employers can take the body temperature of employees entering the workplace.
4. Employers may administer a COVID-19 test before permitting employees to enter the workplace
5. Employers can require medical documentation certifying an employee as fit for duty to return to the workplace if they have had COVID-19 or symptoms.
6. Employers may disclose the name of any employee who tests positive for COVID-19 to a public health agency.
7. Identify a workplace coordinator who will be responsible for COVID-19 issues.

These potential actions for employers are not unfettered—they come with significant confidentiality requirements. The information may only be used for workplace safety and must be kept separate from any personnel file of the employee. The information is not to be disclosed or shared with any other employees.

Employers seeking to implement the above practices should consult counsel as the above actions are deemed a "health examination" under the ADA. However, because a person with COVID-19 is now considered a potential "direct threat" to the health of other employees and the public, the EEOC will allow such examinations.

Pay attention as these guidelines will likely change and be scaled back in the future after the pandemic subsides. The full EEOC guidance can be found here.

For a more complete discussion of these topics and the reasonable accommodation process, please click here.

Other Legal Issues to Consider

There are additional legal issues and mandates that employers will confront relating to COVID-19 upon re-opening. Employers should be aware of and discuss the following with counsel:

- Accommodation requests under the Families First Coronavirus Response Act (FFCRA).
- Leave and Paid Leave requests under the FFCRA
- Reintegrating or rehiring employees without discriminating against a protected class (i.e., age, pregnancy, disability).
- Following relevant directives and guidelines from the Center for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA) and any relevant state and local agencies regarding employers' responsibilities to protect employees from exposure to COVID-19.

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