Employment & Labor Guidance
Related to Coronavirus (COVID-19)

Employer’s Guide
to Reopening the Workplace

May 2020
Only two months ago, businesses across the country were forced to take fairly radical steps to modify their business practices to slow the spread of COVID-19. In response to federal recommendations, and state and local orders, companies took unprecedented efforts to protect their workers, their customers, and the public, with significant impacts on their businesses and their lives.

Now, attention turns to reopening the economy and developing a “new normal” for businesses that must find a way to operate. The crisis has created a new set of challenges that have the potential to change employer-employee relationships, including creating safe work environments, implementing new practices to reduce further spread of COVID-19, and assuring employees it is finally safe to return to work.

There is no one-size-fits-all plan for reopening. How and when businesses reopen will depend on their location, the size and nature of operations, the risk the employer is willing to assume, and of course, the continued spread of the virus itself. This article is intended to provide an understanding of the legal issues involved, so that businesses looking to the future can develop a thoughtful plan for opening their doors and their lunchrooms.

**Employer Legal Obligations – Old & New**

Reopening the workplace has the potential to create a minefield of issues for employers who must navigate both old and new employment laws in an unprecedented situation. Employers are advised to consider each of the following obligations at every stage of the process.

**Nondiscrimination:** Employees (and in many cases, applicants) are protected by a number of nondiscrimination statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). As employers plan to reopen, they must be careful not to make decisions that have a discriminatory impact, even in the name of safety. For example, while employers may be concerned about older employees, as age is currently associated with higher risk for COVID-19 complications, the ADEA prohibits singling out employees who are 40 or older for additional safety measures, such as restricting older employees’ access to the workspace. Additionally, as employers police employee health and safety during the pandemic, they should be mindful of their obligation to make decisions in a nondiscriminatory manner and should carefully analyze and document the business or other reasons for employment decisions.

**Workplace Safety:** Under the Occupational Safety and Health Act, administered by the Occupational Safety and Health Administration (OSHA), employers have a general duty to keep the workplace free from recognized hazards or conditions that could lead to death or serious harm for employees. The Act prohibits retaliation or harassment against employees who report unsafe working conditions, and requires employers to record confirmed cases of COVID-19 if there is objective evidence, or evidence the employer should reasonably have been aware of, that the exposure was work-related. Practically, this means that employers should consider adopting the Centers for Disease Control and Prevention (CDC)- and OSHA-recommended precautions as their standard for keeping the workplace safe.

**Wage & Hour:** Employers need to be aware of how various scenarios might impact their liability under the Fair Labor Standards Act (FLSA) and state and local wage and hour laws. Companies that employ exempt workers under the FLSA, for example, must be mindful of how flexible schedules or salary changes might affect an employee’s exempt status. FLSA exemption status is based on a combination of duties and a salary basis test. Regardless of duties, employees have to meet a minimum weekly salary ($684/week under the FLSA, although some states have a higher threshold) in order to be exempt from overtime requirements. If an employer, for example, decides to institute temporary salary cuts during a phased reopening, that may impact the employee’s exempt status.
The Families First Coronavirus Response Act (FFCRA) is in effect until December 31, 2020. Under the FFCRA, employers with fewer than 500 employees must provide emergency paid sick leave and emergency paid family and medical leave for specific COVID-19-related reasons. Further, employers need to post the Secretary of Labor’s notice about the Act (available here) in a central location in the workplace. Further guidance on the FFCRA is available here and here.

Employer Privacy: Under the ADA, employers must keep all employee personal health information confidential and stored separately from regular personnel files. Employers can expect to come into possession of more of this type of information in the coming months as protocols are established to protect the workplace (such as temperature checks) and accommodations are requested during the transition. The pandemic does not preempt this obligation – employers must review their privacy obligations and have a system in place for compliance before reopening. At minimum, the ADA requires keeping medical information separate from any other employee personnel files, and those files must be kept in a locked cabinet or room (if hardcopy) or protected electronically with a password or similar system.

Considerations and Action Items Before Reopening

There are a number of unique issues that employers are now confronted with in bringing employees back to the workplace. The CDC’s current guidance for reopening suggests that employers deciding whether (and when) to reopen consider the following issues: (i) whether the community the employer operates in is no longer requiring significant mitigation; (ii) whether the employer will be able to limit returning nonessential employees to those from the local geographic area; and (iii) whether the employer has protective measures for employees at higher risk (e.g., teleworking, tasks that minimize contact). According to the CDC, employers should consider the following actions now to best prepare for the eventuality that workplaces will reopen.

Conduct a Risk Assessment: Every employer considering reopening should conduct a risk assessment to determine what they can do to mitigate health risks to their employees. This assessment should consider the potential for COVID-19 exposure in the workplace, reasonable steps (such as office modifications) that could be taken to reduce that risk, and how the company is prepared to handle eventualities such as the need for flexible work arrangements or putting a plan in place in the event of workplace exposure. Part of this assessment should include a review of relevant state and local requirements specific to reopening the workforce and whether physical changes could be made to the workspace to reduce the spread of the virus, such as moving desks or adding kick pedals to doors. OSHA has created a helpful document that can be used to guide this assessment, available here.

Develop Written Plans and Guidance: Employers are encouraged to develop written policies and procedures before reopening and to clearly communicate those policies to employees. While no one can predict every eventuality, at minimum every employer should have written guidance for maintaining a safe workplace (which should include social distancing measures consistent with state and CDC guidelines), the plan of action to implement if a worker tests positive for or is potentially exposed to COVID-19, a telework policy or flexible work arrangement policy, a health policy that includes guidelines for employees coming back to work, and clear guidance for employees to report suspected or known COVID-19 cases in a way that maintains privacy and confidentiality (such as designating a single human resources officer as the point of contact).

Consider Flexible Options: Employers should be prepared to offer flexible work arrangements such as continuing with remote work for some or all employees, staggered workweeks, or flexible time-off policies. The reality of this crisis is that even if workplaces are allowed to reopen, that does not mean every employee will be able to return full time. Schools have been closed for the remainder of the year, and certain jurisdictions are already considering whether schools can be operational after the summer. Likewise, summer camps that parents rely on for childcare are likely going to be closed or have significantly scaled back offerings. Many employees will be facing difficulty finding care for their children, but also many employees may be concerned about returning to work given that COVID-19 continues to spread. The FFCRA will be in place until December 31, 2020, but some employees may use (or already have used) their available paid leave under that Act. Thus, from the standpoint of employer-employee relations and a practical standpoint of needing a workforce, businesses need to prepare to be flexible.

Communicate Expectations with Employees: Employers should anticipate that employees may have concerns about returning to work. Indeed, even as the state and local governments move to reopen the economy, the true risk of returning to work is still an unknown due to the nature of COVID-19. Transparency is, therefore, more important than ever to help alleviate employee concerns and to bolster employer-employee relations. Employers are urged to communicate with their employees before
reopening so that expectations are clear from the first day back in the office. These communications should cover any flexible work arrangements the company is putting in place, how to request such an arrangement or an accommodation, safety precautions and procedures that can be expected, and employees’ obligations to help maintain a safe workplace.

**Bringing Back Employees from Furlough or Layoffs:** Many employers attempting to reopen will do so by re-engaging furloughed employees or rehiring employees who were laid off. Further, businesses may not be at full operation from day one, so even if an employer intends to bring back all employees, they may not be able to do so all at once. In this situation, employers need to be extremely careful that the hiring or rehiring decisions are made in a way that does not risk potential discrimination claims. The crisis cannot be used as a pretext for discriminatory decisions. Employers are also urged to be especially cautious not to make rehiring decisions based on perceived higher risk of COVID-19 complications, which has the potential to implicate the ADEA and the ADA, among other statutes and state laws.

**After Reopening – Ongoing Concerns and Obligations**

Once employees begin to return to physical worksites, employers should actively implement, monitor, and update their approaches to the following matters. Employers should provide training (available online or in written format from OSHA) on these measures to all employees, especially those returning to the worksite or client worksites.

**Social Distancing:** Reopening does not mean that the pandemic is over. It is important to be mindful that social distancing has been shown to be effective at slowing the spread of COVID-19. Both OSHA and the CDC recommend that workplaces adhere to the latest social distancing protocols. Employers should emphasize social distancing measures in the workplace, monitor the efficacy of those measures in terms of employee health, and distribute written policies that reflect current federal and state guidance or directives.

**Use of Masks:** The current CDC guidance recommends that all individuals wear masks when interacting with others. Employers can require that employees wear masks in the workplace, although it is important to check state law requirements for whether the employer is responsible for providing the masks or other personal protective equipment (PPE). Employers that require the use of masks should provide clear written policies explaining the requirements and the process for requesting an accommodation under the ADA if necessary.

**Cleaning Protocols and Infection Control Processes:** As COVID-19 is believed to be passed by respiratory droplets, employers must establish and adhere to protocols for cleaning common spaces, shared equipment, or any other surfaces or areas that may cause the virus to spread. There are also a number of infection control processes that can greatly reduce the risk of workplace exposure, such as frequent handwashing. The CDC has created a comprehensive guide for keeping workplaces clean, which is available here.

**Monitor Employee Health and Conduct:** According to current CDC guidance, an individual who has COVID-19 symptoms associated with it should not be in the workplace. The U.S. Equal Employment Opportunity Commission (EEOC) has released guidance detailing what employers may do to keep their workplaces safe, including instituting testing for COVID-19, requiring sick employees to stay home, and inquiring about symptoms.

Importantly, employers need to stay vigilant and ensure that employees are following the safety guidance that has been put in place. Written policies are essential so that expectations are clearly communicated and the consequences for not following the policies are clear. Additionally, employers have the responsibility to keep their workplaces free from discriminatory behavior and harassment. Public discourse has not always been polite during this crisis, but all employees have a right to a workplace free from discriminatory conduct, even during a global pandemic.

**Disclose and Record Confirmed or Suspected Cases of COVID-19:** If an employee reports either a COVID-19 diagnosis or symptoms, employers should share information with their employees and non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) without revealing the infected individual’s name or any other identifying information. To the extent that providing the name of the individual is deemed necessary to protect a co-worker who has worked directly with the infected individual, consent should be sought before making any such disclosure.

**Provide Reasonable Accommodations:** While an employer may require employees to wear PPE and observe infection control procedures, employers must also provide reasonable accommodations to employees under the ADA. The regular accommodation
request rules and processes continue to apply to requests made during the pandemic. Employers may ask questions and request documentation and are obligated to engage in the interactive process where they know or reasonably should know of an employee’s need for accommodations.

**Take Employee Concerns Seriously:** Engaging with employees effectively during this time may be an employer’s strongest defense for avoiding an outbreak of COVID-19 within the workplace and is also the strongest deterrent to potential legal claims. Employers should ensure that employees know how to file complaints, report concerns, and request reasonable accommodations. One way to streamline this process is to designate a specific individual to receive COVID-19-related inquiries and complaints and clearly communicate reporting instructions in written guidance.

**Stay Informed:** No one can predict how the reopening of American workplaces is going to unfold. Staying up to date on the latest guidance from federal, state, and local governments (including the CDC, OSHA, and the EEOC) will be as important as flexibility. The best practices for minimizing employer liability and maximizing employee productivity are staying informed of key developments, communicating clearly with employees, and regularly consulting with counsel at critical points along the way.

**Looking to the Future**

Employers have had to make many difficult decisions, often in a matter of days, during this pandemic, and they have been scrutinized perhaps more than ever for the choices they have made with respect to the treatment of their employees and their acceptance of government funds. This is the time to take a measured and thoughtful approach to reopening America that considers the present realities and the long-term ramifications of a given action.

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Employment & Labor Practice Contacts

Contact information for members of Wiley’s Employment & Labor Practice is outlined below. Please contact us with any questions or concerns. To learn about Wiley’s Employment Capabilities Related to the COVID-19 Pandemic, please visit our website.

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