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COVID-19: Back to Business

A US Employment Law Perspective

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EMPLOYMENT LITIGATION & COUNSELING



Andrew Rosenman
Partner | Chicago
+1 312 701 8744
arosenman@mayerbrown.com



Ruth Zadikany
Partner | Los Angeles
+1 213 621 3916
rzadikany@mayerbrown.com



Marcia E. Goodman
Partner | Chicago
+1 312 701 7953
mgoodman@mayerbrown.com

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Back to Business: 10 Issues for Employers in the Next 100 Days

1. Proactive Planning and Evaluation
2. Understand Governmental Directives on Reopening
3. Leaves of Absence in the New COVID-19 Stage
4. Implement Safety Measures
5. Consider Testing and Other Health Screenings
6. Navigating Likely Personnel Issues
7. Discrimination Issues A Key Employer Risk in Return to Work
8. Be Mindful of Wage and Hour Issues
9. OSHA and Workers' Compensation Considerations
10. Remember Privacy Requirements – Illness, Screening, Morale

1. Proactive Planning and Evaluation

- Assemble a Cross-Functional Team
- Communicate, Communicate, Communicate
 - Assess delivery mode and frequency of communications
 - Address employee concerns associated with returning to work
 - Training
- Perform a Comprehensive Review of Policies
 - Amend/update policies, including leave policies, travel policies and vacation policies
 - Implement new policies, e.g., communicable diseases policy, social media policy, expense reimbursement policy, teleworking policy

1. Proactive Planning Evaluation (*Cont'd*)

- Create a Workplace Health and Safety Plan
- Return to Work Protocol
 - 5 W's:
 - Who returns?
 - When?
 - Where?
 - Why them?
 - What do they return to at the worksite?
 - Document legitimate business justification for decisions
 - Disparate impact analysis
- Returnees from Furlough vs. Layoffs
 - New COVID-19 Right of Recall/Priority Laws (e.g., [City and County of Los Angeles](#))

2. Understand Governmental Directives on Reopening

- Many industry and/or geographic requirements (e.g. Chicago vs. IL)
- “New York Forward”
 - New York City – began Phase 1 as of June 8 – <https://forward.ny.gov/new-york-city-phase-one-industries>
 - New York State – Phase 2 – <https://forward.ny.gov/phase-two-industries>
 - The “Guidelines” are either “Mandatory” or “Recommended Best Practices”
 - Each Business Must Prepare A Written Safety Plan:
https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf
- L.A. County Dept. of Public Health: e.g., Protocols for Office Worksites
- Pennsylvania Department of Health – Use of Masks
 - *Pletcher v. Giant Eagle*, Case No. 20-cv-00754 (W.D. Pa.) (ADA Title III case)

2. Understand Governmental Directives on Reopening (Cont'd)

- Should Govt. Agencies or Judges Evaluate Workplace Safety?
 - *Rural Community Workers Alliance v. Smithfield Foods*, 2020 WL 2145350 (W.D. Mo. May 5, 2020) (invoking the “primary jurisdiction” doctrine as to OSHA)
 - *Massey v. McDonald’s*, No. 2020-CH-04247, Cook County, IL (June 3, 2020) (rejecting the doctrine during a P.I. hearing in class action alleging public nuisance and negligence claims)
 - *Palmer v. Amazon*, No. 20-cv-2468 (E.D.N.Y.) (filed June 3, 2020) (plaintiffs seek a preliminary injunction to comply with public health guidance)
- Predictive Scheduling Laws Can Impact Changes to Work Hours
 - Chicago Fair Workweek Ordinance – goes into effect on July 1, 2020
- A useful resource for multi-state employers to track developments:
 - <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>

3. Leaves of Absence in the COVID-19 Era

- Federal laws for COVID-19 Leaves – for employers with *fewer* than 500 employees
 - Emergency Family and Medical Leave Expansion Act (“EFMLEA”)
 - Emergency Paid Sick Leave Act (“EPSLA”)
 - *Graham v. Barrier Technologies LLC* (S.D. Fla.)
- Combined, the two laws provide for a total of twelve (12) weeks of paid leave, with reimbursement to Employer in payroll tax credits.
 - EPSLA -- First 2 weeks is Emergency Paid Sick Leave – You are unable to work or telework due to a need for leave because you (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, (4) are caring for a person in one of those categories, or (5) are caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
 - EFMLEA – Expanded FMLA – covers next 10 weeks. BUT ONLY IF: You are caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- In many circumstances, the requirements do not apply – e.g. layoff, unable to work because business is closed, when child care providers become available again

3. Leaves of Absence in the COVID-19 Era (*Cont'd*)

- But the FMLA and related state and local laws still apply to employers with 500 or more employees
- New state and local laws; some apply to *all* employers in location
 - e.g., New York Emergency Paid Sick Leave Law (March 18, 2020)
 - e.g., Los Angeles City and County Supplemental Paid Sick Leave Laws (April 2020)
- Practical approaches to challenges in balancing employee needs and coworker safety in return to work
- Review existing leave policies and consider appropriate updates

4. Implement Safety Measures

- Occupational Health & Safety Act “General Duty” Clause
- CDC Guidance
 - [Interim Guidance for Businesses & Employers Responding to Coronavirus Disease 2019 \(COVID-19\), May 2020](#)
 - Industry-specific guidance for employers (e.g., [office buildings](#), [manufacturing](#), [meat and poultry processors](#))
 - [General Business Frequently Asked Questions](#)
- OSHA Guidance
 - [Guidance on Preparing Workplaces for COVID-19](#)
 - [COVID-19 Guidance on Social Distancing at Work](#)
- Local Guidance
- Optional vs. required measures

4. Implement Safety Measures (Cont'd)

- Perform an Initial Hazard Assessment
- Implement a "Hierarchy of Controls"
 - Engineering Controls
 - E.g., reconfiguration of physical space, installation of physical barriers, HVAC issues, removal of communal items
- Administrative Controls
 - E.g., Masks/face covering, schedule modifications, policies re sick employees, disinfecting and cleaning, elevator occupancy limits, signs and reminders re social distancing, health screenings, policies re public transportation
- Personal Protective Equipment
- Training



5. Consider Testing and Other Health Screenings

- Temperature Testing of Employees
 - Optional or Required?
 - CDC/OSHA Joint Guidance for Meat and Poultry Processing Facilities is relevant for all employers
 - Testing at-home or at-work?
 - Infrared, touch-free methods viewed as less invasive
 - Imperfect process, but good for employee morale?
- COVID-19 Testing of Employees
 - EEOC: “Employers should ensure the tests are accurate and reliable”
 - FDA, CDC, incidences of false negatives and false positives all should be considered
- Antibody Testing
 - FDA and CDC express concerns about it as an option to detect infection
- Who Will Perform the Testing?
 - Employer’s personnel? Training needed, and risk of workers’ comp. and other claims
 - Third Party? Potential commercial terms and indemnification

5. Consider Testing and Other Health Screenings (Cont'd)

- Health Screening Questionnaires
 - Common symptoms of COVID-19
 - How, when and where will employees provide responses?
 - Before leaving for work? Poster vs. daily email or online form or app?
- Testing and Screening of On-Site Customers, Vendors and Visitors
 - Double standard not to test and screen?
 - Building landlords may need to be part of the equation too.
- What about obtaining liability waivers?
 - May be enforceable, but state law varies widely.

6. Navigating Likely Personnel Issues

- Employees who do not want to return to work
 - OSHA “Imminent Danger” Test
 - Child care concerns
 - Household members who are at higher risk
- Employees who test positive for COVID-19 or are quarantined
- Employees who use public transportation to commute to work
- Employees who refuse to wear a mask/face covering
- International travel by employees for personal reasons

7. Discrimination and Retaliation Concerns

- Criteria for assigning employees to “Waves” in wave-based return to work plan
 - Age Discrimination – Age-based stereotyping because of perceived health risk
 - ADA and related state Disability protections – Actual or perceived health risk in return to office
 - Direct Threat
 - Perceived preferential treatment – gender, race, sexual orientation, religion, national origin discrimination
 - Pregnancy

7. Discrimination and Retaliation Concerns (*Cont'd*)

- Impact of masks, screening, other safety conditions on individual employees
 - Reasonable Accommodations
 - Can include additional leave
 - Concerns about risk from coworkers or visitors
- Serious Health Conditions – FMLA, EFMLEA, State and local law
- Retaliation
 - Whistleblowers – OSHA, State and Federal Statutes, Common Law, etc.
 - *Hinich v. Norwood Life Society, Inc.* (Cook County, IL)
 - Workers' Compensation Retaliation
 - New Anti-Retaliation Ordinances (e.g., Chicago and Los Angeles)

8. Be Mindful of Wage and Hour Issues

- Working from Home = Less Direct Supervision
 - Update Written Policies and Refine, e.g., Meals, Breaks, Optional Teleworking
 - Compliance Issues with Timekeeping and Hours Worked
 - Change frequency of reporting process? Reduces potential overtime liability
- Potential “Waiting Time” Claims for Testing and Health Screening
 - Portal-to-Portal Act differs from certain state wage and hour laws
 - *Frlekin v. Apple*, 8 Cal. 5th 1038 (2020) (mandatory bag checks)
 - Reporting Time Pay
- Short-time and Shared Work Compensation Programs
- Reimbursement of Business Expenses, e.g., IL and CA statutes

8. Be Mindful of Wage and Hour Issues (*Cont'd*)

- Salary Reduction Measures
 - Across-the-board or for certain groups?
 - FLSA and state minimum salary tests for exemptions (e.g., NY and CA)
- Rolling Furloughs and Effect on Pay
 - Employees may earn more by coupling furlough with unemployment benefits
 - Exempt employees (potential need to pay for the full workweek if *any* work is done during the week, no matter how slight the amount)
- Bonus and Incentive Compensation
 - Adjustments needed?

9. OSHA and Workers' Comp. Considerations

- OSHA's Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), issued May 19, 2020
 - When is a COVID-19 case recordable by the employer?
 - How to reasonably assess work-relatedness
 - a) Ask the employee how he/she believes he/she contracted the illness;
 - b) Discuss with the employee his/her work and out-of-work activities that may have led to the illness; and
 - c) Review the employee's work environment for potential COVID-19 exposure.
- Workers' Compensation
 - Temporary changes to state standards for COVID-19 workers' compensation liability.
- State Immunity Laws
 - E.g., North Carolina, Oklahoma, Utah and Wyoming

10. Privacy Issues

- Handling information about infected coworkers, unrelated illness or death, transparency, contact tracing and more – ADA confidentiality requirements, other privacy requirements
- Testing and screening-related privacy issues
 - Required testing after symptoms or positive COVID-19 test
 - Retention of health data re temperature or symptom screening
 - Consent Forms
- State statutes such as Illinois (BIPA and PIPA) and California (CCPA)
- Reporting obligations to various state, local and federal agencies (e.g., New York)

Mayer Brown's Articles for US Employers

- [Back to Business: Checklist for Multinational Employers](#)
- [Reopening Your Business During the COVID-19 Pandemic: The New Normal for the US Workplace](#)
- [All Employers Should Pay Close Attention to New CDC and OSHA Guidance on COVID-19 in Meat and Poultry Processing Facilities](#)
- [US Department of Labor Issues Temporary Regulations and Further Guidance on COVID-19 Paid Sick and Family Leave](#)
- [EEOC Updates COVID-19 Guidance for Employers](#)
- [Managing HR Through COVID-19: A Practical Guide for Multinational Employers](#)
- [US Department of Labor Issues Guidance Concerning COVID-19 OSHA Reporting Requirements and Unemployment Compensation Under the CARES Act](#)
- [COVID-19 Related Worker Retention and Right of Recall Protections Adopted for Airport, Event Center, Hotel, and Commercial Property Employees in Los Angeles City and County](#)
- [Chicago Enacts New COVID-19 Anti-Retaliation Law](#)
- For a complete list of employment related articles, [click here](#).
- To view our COVID-19 Blog, [click here](#).

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