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Navigating the Minefield of Legal Challenges as Employees Return to Work

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Employers face a host of potential legal pitfalls as businesses that were closed in response to the COVID-19 pandemic reopen and new virus hotspots continue to emerge across the county. As guidance from state and federal agencies continues to evolve, it is important for employers to develop a plan to address both the legal and practical considerations for safely returning employees to work.

Recalling Furloughed or Laid-Off Workers

Given phased reopening recommendations, social distancing requirements, and employees working remotely, employers may have to choose which employees to return to work first. Employers should have legitimate, business-related reasons for asking certain employees to come back while leaving others at home and should clearly document those reasons to ensure consistency. Even if motivated by concern for the employee's well-being, recalling only younger workers but not older employees, pregnant employees or employees with underlying health conditions who may be more at risk of developing health complications from COVID-19 may lead to discrimination claims.

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Workers who refuse to return to work without good cause will generally be disqualified from receiving unemployment benefits. Employees may only refuse to work because of general COVID-related fears if they have a good faith belief that they are in "imminent danger" and have no reasonable alternative but to avoid the workplace. If an employee reasonably believes there is a danger of being infected with COVID-19, for example because of a confirmed or suspected case of COVID-19 in the workplace, the employee cannot be disciplined or discharged for refusing to come to work.

Finally, the Families First Coronavirus Response Act (FFCRA) remains in effect until December 31, 2020, meaning employees are still entitled to up to 80 hours of paid sick leave when the employee is unable to work for certain reasons related to COVID-19. In addition, many childcare facilities remain closed. Employees are entitled to up to 12 weeks of paid family leave when the employee is unable to work because the employee must care for a child under 18 whose childcare provider is closed for reasons related to COVID-19. In light of the piecemeal and often convoluted guidance issued by federal agencies since the Act was passed, the Department of Labor recently launched an interactive online tool for workers, and soon for employers, to help determine if they qualify for paid sick leave or extended family and medical leave for time away from work due to COVID-19.

Addressing Workplace Safety Concerns

OSHA recently issued return-to-work guidance that encourages employers to develop and implement policies to address "preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace." Specifically, OSHA suggests employers focus on strategies for hazard assessment, basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training. With regard to enforcement, OSHA is focusing on employer's "good faith" efforts in complying with applicable safety and health standards during the pandemic so it is important for all employers to take appropriate infection control measures and document those practices.

In particular, employers should document their safety plan and train all employees on the safety measures in place to protect against further spread of the virus. Ensuring all employees are aware of and understand the reasons safety measures are being taken will reduce the likelihood that employees will complain to OSHA or others regarding perceived risk of exposure in the workplace. If employees do raise complaints about unsafe working conditions, those complaints should be taken seriously and investigated. Both OSHA and the National Labor Relations Act prohibit retaliation against employees who make good faith complaints regarding unsafe work conditions or who engage in "protected concerted activity for mutual aid and protection."

Screening Employees and Compliance with the Americans with Disabilities Act

Since many return-to-work guidelines recommend screening employees for COVID-19, employers should ensure they are acting in compliance with the Americans with Disabilities Act (ADA). Employees may be tested to determine if they have an active case of COVID-19 as a condition of returning to work, but employers may not require employees to undergo antibody testing, which the EEOC considers to be an

unlawful medical examination. Employers must ensure that any tests used are accurate and reliable, and the testing has to be applied in a transparent and non-retaliatory manner that is applicable to all employees.

In addition to testing, employers may also take employees' temperatures and may ask employees if they are experiencing symptoms of COVID-19. Employers who screen employees should have clear and consistent guidelines for: (1) the screening procedures that will be used, (2) the criteria for failing the screening procedure, (3) how to respond if an employee refuses to be screened, and (4) how to respond if an employee does not pass the screen. If a designated employee will be performing the temperature check or other screening, that employee should be properly trained and should have the appropriate personal protective equipment. If the employer uses medical questionnaires to assess whether an employee is experiencing COVID-19 symptoms or otherwise poses an exposure risk, the questions should be narrowly focused to collect only information that is relevant to assessing the COVID-19 threat.

Access to medical information should be limited to only HR or management with a need to know. All medical information must be kept confidential and stored separately from the employee's personnel file. If an employee tests positive for COVID-19, employers should inform anyone the employee may have come into contact with of their possible exposure to COVID-19 in the workplace but should maintain confidentiality and not disclose the name of the employee with COVID-19 to other employees without the employee's express written consent. Finally, employers in certain jurisdictions, such as California, should also ensure they are complying with applicable data privacy statutes that may impose additional requirements for providing written notice to employees and maintaining security of the information.

Employees with "high risk" medical conditions may seek reasonable accommodations under the ADA, including teleworking, modified schedules or unpaid leave. However, a non-disabled employee is not entitled to an accommodation to protect a disabled family member from potential COVID-19 exposure. Although employers do not have to provide a reasonable accommodation to an employee who does not request it, employers may be concerned for the health of employees with certain underlying conditions. An employer may not exclude from the workplace or take any adverse action against an employee merely because the employee has a disability identified by the CDC as high risk unless the employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation.

An employee's disability does not pose a direct threat simply because it is listed on the CDC's high risk list. Instead, the direct threat determination must be made after an individualized assessment of the particular employee's disability using the most current medical knowledge and the best available objective evidence, which may include the severity of the COVID-19 outbreak in a specific area. The analysis may consider the employee's own health (such as whether the employee's disability is well-controlled) and the likelihood that an employee will be exposed to COVID-19 at work. Even if the employer determines that the employee's disability poses a direct threat, the employer still cannot exclude or take adverse action against the employee unless there is no reasonable accommodation, absent undue hardship, that the employer can make to eliminate or reduce the risk so that it would be safe for the employee to return to work but that still allows the employee to perform the essential functions of the job.

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Conclusion

As the legal landscape continues to evolve and new questions arise, employers should work closely with legal counsel to ensure compliance with federal and state employment laws as well as with federal, state, and local guidelines for safely reopening.