Employer Update

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Challenges For Employers Reopening During the Covid-19 Pandemic

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On March 22, 2020, Governor Cuomo issued an Executive Order titled "New York State on PAUSE" mandating closure of "non-essential businesses" and cancellation of "non-essential gatherings" in the State of New York. Six weeks later, on May 11, 2020, the Governor announced the "NY Forward Reopening Plan." Since then, New York has begun reopening. Real-time infection metrics will guide the State's decisions regarding where to lift or re-impose restrictions.

Other states have commenced or announced similar plans for reopening businesses. *All 50 States Have Now Taken Steps to Reopen*, The Wall Street Journal (updated May 20, 2020). Federal agencies have also weighed in on the reopening. On May 14, 2020, the Centers for Disease Control and Prevention ("CDC") published a 60-page presentation summarizing "CDC's initiatives, activities, and tools in support of the Whole-of-Government response to COVID-19." *CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again* (hereinafter *CDC Activities and Initiatives*).

Although some regions remain under stay-at-home orders, many employers have either reopened or expect to reopen in the near future. Reopening during a continuing pandemic undoubtedly will be accompanied by many employment-related challenges to businesses. In confronting these challenges, employers should institute plans whose touchstones are safety and efficiency in the workplace. This month's article will address a number of key topics employers will confront as employees return to work.

What should businesses do to promote health and safety prior to reopening the workplace?

In addition to promoting good hygiene and vigorous cleaning and disinfection measures, the CDC suggests that businesses should reengineer the jobsite to prevent people from crossing paths to the greatest extent possible. *See CDC Guidance for Businesses & Employers: Plan, Prepare and Respond to Coronavirus Disease 2019*. As many authorities suggest the novel coronavirus spreads primarily through respiratory droplets in the air, employers should provide masks and other personal protective equipment to employees and others at the worksite and should minimize use of common areas like elevators, cafeterias, or break rooms. *Id*. Further to that end, employers may consider one-way corridors throughout their workplaces, staggering shifts and breaks, installing physical barriers to separate people,

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and installing more robust ventilation or air filtration systems. *See id*. To minimize the risk that individuals track the novel coronavirus into the workplace, employers should monitor whether anyone at the worksite exhibits symptoms of COVID-19 and may implement pre-shift temperature checks, questionnaires, and other medical exams to identify those at significant risk of carrying the virus. *E.E.O.C. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (hereinafter *E.E.O.C. What You Should Know*). Employers should exclude from the workplace, and ask to self-quarantine for 14 days prior to return, individuals who are symptomatic, have a confirmed case, or have recently been in close contact with an individual who was symptomatic or developed symptoms within 48 hours of the contact. *CDC Community-Related Exposures Guidance*.

What should employers do to safeguard employees at heightened risk for serious COVID-19 complications?

The CDC recommends that employers encourage employees to self-identify if they are at a high risk, but suggests avoiding direct medical inquiries. *CDC Activities and Initiatives*. Where feasible, the CDC recommends offering accommodations to employees at higher risk, including offering telework or duties that minimize the amount of contact with others, like restocking shelves rather than working as a cashier. *Id*. Under rare circumstances, an employer may exclude a high-risk employee from the workplace, but only if (a) the employer cannot offer reasonable accommodation and (b) the employer establishes, "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence" and the four factor test set out in 29 C.F.R. § 1630.2(r), that presence at the jobsite would subject the employee to a "significant risk of substantial harm." *E.E.O.C. What You Should Know*.

Must employers compensate employees for time spent undergoing pre-shift temperature checks or other health screenings?

Employers should expect employees to contend that time spent waiting for pre-shift temperature checks or other health screenings is compensable time under the Fair Labor Standards Act ("FLSA"); however, employers in many jurisdictions will have strong rebuttals to such arguments. The Portal-to-Portal Act excludes preliminary and postliminary activities not "integral and indispensable" to an employee's principal job duties. Courts engage in a fact specific inquiry to weigh whether an activity is "integral and indispensable."

Employers may argue that health screening time is analogous to the time spent by employees at Amazon warehouses undergoing post-shift security screenings, which the Supreme Court held was not compensable time under the FLSA. *Integrity Staffing Solutions v. Busk*, 574 U.S. 27, 27-28 (2014). But, other courts have found that employers must compensate employees for preliminary or postliminary activities necessary to promote safety and health. *See Steiner v. Mitchell*, 350 U.S. 247, 248, 256 (1956) (holding FLSA requires compensation for clothes-changing and showering where the activities were encouraged by state law and vital to the health and safety of battery plant workers who regularly used toxic materials). Even if the FLSA does not require compensation for such time, employers should consider whether state wage and hour laws impose obligations beyond those of the FLSA. *See*, *e.g.*, *In re: Amazon.Com, Inc. Fulfillment Ctr. Fair Labor Standards Act (FLSA) and Wage and Hour Litig.*, 905 F.3d 387, 402-05 (6th Cir. 2018).

For businesses bringing employees back in waves, what can employers do to minimize the risk of employment discrimination claims?

Considering the general downturn in business, employers may reopen with fewer workers than prior to the pandemic. Employers may decide to bring

employees back to work in waves, or to undertake layoffs. In such circumstances, employers should document the legitimate business rationale and criteria applied in selecting employees for return or layoff. Armed with such documentation, employers will be prepared to rebut claims that they selected employees for discriminatory reasons rather than legitimate business reasons. *See Mestecky v. New York City Dep't of Educ.*, 791 Fed. App'x. 236, 238-39 (2d Cir. 2019) (affirming dismissal based on employer's "well-documented reasons" for the employment decision).

How should employers respond to employees who refuse to return to the workplace based upon safety concerns?

Employees expressing safety concerns may be engaging in conduct protected by the Americans with Disabilities Act ("ADA"), National Labor Relations Act ("NLRA"), or Occupational Safety and Health Act ("OSH Act"). Accordingly, in responding to employees expressing such concerns, employers should avoid taking action the employee could argue constitutes unlawful discrimination or retaliation. For example, if the employee requests continuation of a work from home arrangement to accommodate a disability, the ADA requires that the employer engage in an "interactive process" to determine whether working from home constitutes a reasonable accommodation. *See Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1134-35 (7th Cir. 1996). If one or more employees object to returning to work due to the adequacy of protective equipment given to workers, such statements may constitute "concerted activities for the purpose of . . . mutual aid or protection" under the NLRA. *See* 29 U.S. Code § 157. Finally, an employee who refuses to return to work claiming to face the risk of serious injury or death may be engaging in conduct protected by the OSH Act, but only if the employer refuses to correct the hazard, regular enforcement channels would react too slowly, and the employee has "no reasonable alternative." *See* 29 C.F.R. § 1977.12(b)(2).

In responding to employees expressing such safety concerns, employers should remain empathetic and seek to engage in an interactive process to explain the employer's basis for believing the workplace is safe, or to take further feasible steps that might mitigate a hazard. Even if lacking a legal obligation, businesses may consider voluntarily extending accommodations to employees by extending temporary work from home measures or by offering an unpaid leave of absence as a way to avoid unnecessary workplace conflicts. Alternatively, if employees persist in refusing to return to work despite the employer's mitigation of known hazards, the employer may have grounds to terminate the employment relationship.

Do employers owe any duties to family members to prevent spread of COVID-19 emanating from the workplace?

On April 6, 2020, the estate of a Walmart worker who died due to complications related to COVID-19 sued Walmart for negligence, willful and wanton misconduct, and other violations of state law. Complaint, *Evans v. Walmart, Inc.*, No. 2020L003938 (Ill. Cir. Ct. filed April 6, 2020). Among the chief allegations, the plaintiff claimed that Walmart failed to abide by various measures suggested by OSHA and the CDC.

In most circumstances, workers' compensation laws shield businesses from liability for employee-injuries that occur at the jobsite. Generally, each state's workers' compensation law caps the compensation that an employee can receive for unintentional injuries or illnesses arising out of an employee's occupation. Similarly, workers' compensation laws can bar claims derivative to an employee's injury or death, like claims for loss of consortium that seek damages for the loss of services, companionship, and comfort that an injured or deceased employee previously provided to a spouse or child. *E.g.*, *Pizza Hut of America, Inc. v. Keefe*, 900 P.2d 97 (Colo. 1995). However, in some states, where an employer engages in intentional, egregious, or grossly negligent conduct likely to pose a risk of injury or death to an employee, the employer can be sued in tort if the harm within the risk materializes. *E.g.*, *Phillips v. Grand Haven Brass*

Foundry, No. 176645, 1997 WL 33353739 (Mich. Ct. App. Apr. 1, 1997).

Further, businesses must remain cautious of claims for consequential bodily injury if an employee carries the novel coronavirus out of the workplace and infects someone else. For example, the New Jersey Supreme Court has acknowledged that an employee's spouse can bring a tort claim against an employer after suffering injury from repeatedly handling the employee's asbestos-laden work clothes. *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 404-05 (N.J. 2006). The court held that the employer, Exxon Mobil, owed a duty of care to the spouse who foreseeably was put at risk while laundering the clothing. Similar logic may apply to loved ones put at risk if an employee carries the virus home.

Although employers may be protected by the workers' compensation laws against employees' claims, businesses should assess whether their insurance policies provide adequate coverage for injuries related to COVID-19 that emanate from the jobsite. While much remains unknown, a comprehensive reopening plan, replete with guidance from trusted health authorities, will serve as valuable evidence that the employer took the risks of COVID-19 seriously and implemented the best practices known at the time to protect its employees and other business partners.

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