ThompsonKnight

Client Alert *May 14, 2020*

EMPLOYER CONSIDERATIONS FOR RETURNING EMPLOYEES TO THE OFFICE AFTER COVID-19 SHUTDOWNS

For the past several weeks, a majority of brick and mortar workplaces across the nation have effectively shut down in the wake of the COVID-19 pandemic. In response to numerous state and local "stay home" orders, many employees have been working remotely, while others have been furloughed or laid off. Recently, however, the President and several state governors have started to ease restrictions so that more businesses may reopen. In light of this proverbial "new normal," employers need to be mindful of various legal and practical considerations while balancing employee safety and productivity when planning to allow or require employees to return to the office.

Medical Screening

The EEOC has recently issued guidance stating that an individual with coronavirus poses a direct threat to co-workers, and employers can screen for COVID-19 without violating the Americans with Disabilities Act (ADA). The most common screening tool is temperature checks, which the EEOC has specifically authorized. Employers may also ask employees whether they have been exposed, or have symptoms associated with the virus. The EEOC has taken the position, however, that employers should refrain from asking employees whether they have family members who have COVID-19 or who exhibit symptoms of COVID-19. Instead, the EEOC recommends asking whether the employee has had contact with anyone who has been diagnosed with COVID-19 or who has symptoms of the virus.

The EEOC has also stated that employers can test specifically for COVID-19 or COVID-19 antibodies as long as the tests are medically reliable. Employers considering such testing should review guidance from the FDA about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates.

If an employee either contracts COVID-19 or is sent home for showing symptoms, an employer can require the employee to provide a doctor's note stating that the employee is fit for duty prior to returning to work. Employers should also determine the steps to take to trace other employees who may have had contact with the infected individual. Employers may inform employees who were in contact with the infected individual that they may have had close contact with someone who has or may have COVID-19 but may not reveal the identity of the individual.

Employers should remember that employee medical information must be kept confidential under the ADA and only shared as permitted by the statute. For example, medical information of employees may be shared with supervisors and managers who may be told about necessary restrictions on work duties and

about necessary accommodations. Employers should also protect the persons administrating tests or taking employee temperatures by issuing masks and gloves and using no touch thermometers where possible.

Preparing a Safe Workplace

Employers can and should require employees to wear personal protective equipment (PPE), like masks, while in common areas of the workplace and wash their hands while at work. The Occupational Safety and Health Administration (OSHA) has provided general guidance which sets forth minimum standards for the various exposure risk levels, although employers may opt for more stringent protections. If non-healthcare employers require or allow employees to wear face masks, no OSHA standards apply.

Employees may not refuse those requirements based on a general disagreement with the employer imposing them. If, however, an employee claims that the PPE protocols interfere with a disability and requests to deviate from them for that reason, employers must engage in the normal ADA interactive process.

Employers also should consult the U.S. Centers for Disease Control and Prevention's (CDC) recommendations for maintaining a healthy work environment, which includes recommended ways to support respiratory etiquette and hand hygiene for employees, steps to implement frequent cleaning and disinfecting of frequently touched surfaces, and suggested methods to encourage social distancing in the workplace.

Determining Who Should Return to Work

State and local officials may limit the proportion of the workforce that may return in person and may require employers to continue to have some employees work remotely. For example, on May 5, 2020, Texas Governor Greg Abbott signed Executive Order GA 21 which governs the provision of "essential services" and "reopened services" in Texas. "Reopened services," include, among other things as of 12:01 a.m. on Monday May 18, 2020, "[s]ervices provided by office workers in offices that operate at up to the greater of (i) five individuals or (ii) 25 percent of the total workforce; provided, however, that the individuals maintain appropriate social distancing." These conditions and limitations do not, however, apply to essential services which include everything listed by the U.S. Department of Homeland Security (DHS) in its Guidance on Critical Infrastructure Workforce, Version 3.0 (or subsequent versions), plus certain religious services. Consequently, some employers will need decide how to comply with the above-referenced 25% rule when they may have a mix of employees performing essential services and reopened services in the same offices.

Executive Order GA 21 further states that, in providing essential or reopened services, all persons "should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS [Department of State Health Services], found at

www.dshs.texas.gov/coronavirus." With respect to employers, the minimum health standard protocols issued by DSHS are included within the following checklists published by Governor Abbott's Strike Force to Open Texas: (1) Checklist for All Employers and (2) Checklist for Office-Based Employers.

Some local jurisdictions in Texas have mandated the use of the DSHS minimum standard health protocols referenced above. For example, the Supplemental Order of County Judge Clay Jenkins on Reopened Services and Food Processing Plants dated May 4, 2020 states that the DSHS minimum standard health protocols referenced in Executive Order GA 21 "are adopted as mandatory rules in Dallas County," at least through May 15, 2020.

To further add to the confusion or to clarify the requirements — depending on how you view it — Texas Attorney General Ken Paxton wrote Dallas County (in addition to certain other counties) a letter on May 12, 2020. The letter states that Executive Order GA 21 "recommends but does not mandate" that all essential and reopened businesses follow the DSHS minimum standard health protocols. Accordingly, the Attorney General concluded that Judge Jenkins could not make the minimum standard health protocols mandatory in Dallas County.

Despite the back-and-forth between the state and local governments, we do recommend that employers in Texas strongly consider complying with all of the applicable DSHS minimum standard health protocols, both to ensure compliance with OSHA's general duty clause and to help avoid potential legal claims, such as for gross negligence if an employee were to contract COVID 19 after returning to the office and pass away. In addition, employers may want to assess which employees to prioritize returning to the workplace in order to comply with any applicable restrictions on office occupancy, such as the above-referenced 25% rule contained in Executive Order GA 21 for reopened services performed in offices. Options include gauging employees' willingness and ability to return to work, or implementing staggered work schedules to reduce the number of employees in the workplace at any given time.

Several employees may voice concerns about returning to work, even in light of an employer's precautionary safety measures. While generalized fear is not an excuse for refusing to return to work, employers should question whether the refusal is based on a qualifying reason under the Emergency Paid Sick Leave Act (EPSLA) or the Emergency Family and Medical Leave Expansion Act (EFMLEA), which we previously discussed here. For example, covered employers (generally, employers with fewer than 500 employees) cannot require an employee to return to work if the employee is unable to work (or telework) because they need to care for children due to school closures or the unavailability of childcare for a COVID-19-related reason.

Some employees' safety concerns may arise from an ADA-protected anxiety disorder, which would require the employer to engage in the interactive process to discuss potential accommodations. Employers may also need to engage in dialogue with employees who may be at higher risk if they contract COVID-19

(such as older adults and people of any age who have serious underlying medical condition, as discussed in CDC guidance), and consider accommodations for members of that vulnerable population. At the same time, employers may not refuse to allow those employees who do not seek an accommodation merely because they are "high risk" employees. Instead, the employer must conduct a direct-threat analysis before barring an employee from returning to work, considering the actual risks presented.

Finally, the National Labor Relations Act (NLRA) protects concerted employee activity designed to increase workplace safety, even for nonunion employees. If two or more employees refuse to work due to safety concerns, their action is likely to be deemed protected concerted activity, and the NLRA may limit or preclude discipline or termination. Accordingly, it is important for employers to communicate with employees who refuse to return to the workplace (and document those conversations) before any disciplinary measures are taken.

At all times, employers should make sure that their reopening is compliant with all applicable state and local laws and regulations, and use best efforts to obtain public health advice that is contemporaneous and appropriate for their location. As with all COVID-19-related guidance, employers should continue to monitor recent developments and consult with counsel for specific guidance tailored to the particulars of their workforce.

Questions? If you have any questions about returning your employees to the workplace during the COVID-19 pandemic, we have the experience and expertise to help. Please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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