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Preparing for Return to Work: What Employers Need to Know Now

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Most employers are anxiously awaiting the ability to return to business as usual. Business as usual, however, may be a thing of the past – at least until the science catches up with the COVID-19 virus and the risk of spreading the infection is drastically reduced. Even when stay at home orders are lifted, employers will face a myriad of issues related to requiring or allowing employees to return to the workplace. Some of those issues include how to provide a safe place to work, how to protect employees, clients and customers, how to minimize the risk of exposure to claims made by employees, and what should be done if an employee who has been in contact with co-workers, clients or customers tests positive for the disease.

Compliance with Centers of Disease Control (CDC)

While every workplace presents its own unique considerations, and there is no "one size fits all" answer to many of the issues that will arise, the general guiding principle that will continue to apply to all employers will be compliance with the guidance issued by the CDC. The EEOC has made it clear that although EEO laws, including the Americans with Disabilities Act (ADA) will continue to apply, they "do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus.." By complying with CDC guidelines, employers may prevent claims from arising and will be poised to defend against any possible claims that may related to the COVID-19 virus. Additionally, there is some speculation that legislation may be passed to provide employers who comply with the CDC guidelines immunity from some claims.

Regardless of whether such legislation is passed, compliance with CDC guidelines is critical, and may necessitate some changes in the way your workplace functions.

1. **What can and should employers require of employees before allowing the employee to reenter to workplace?**

Employers can require employees to provide the following information:

- Whether the employee has ever been diagnosed with COVID-19, when that occurred, and whether they have medical certification that they can safely return to work without posing a risk to others;
- Whether the employee had or has symptoms of infection with COVID-19, e.g., fever of or over 100.4°F, cough, shortness of breath, sore throat;
- Whether the employee has had "close contact" with any person who has tested positive for, or has otherwise been diagnosed with, COVID-19 infection within the preceding 14 days;
- Whether the employee has been asked to self-quarantine by a health official within the preceding 14 days;
- And whether the employee is considered "high risk" for COVID-19 infection, meaning over age 60, pregnant, or suffering from diabetes, lung disease, heart disease, asthma, HIV, or similar conditions.
- **NOTE: Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. All such records should be kept in a separate**

file, apart from general personnel files. Employers may want to consider keeping separate files for employees on issues related the COVID-19.

Employers are also permitted to perform certain medical tests that are generally prohibited under the ADA, because CVOID-19 poses a "direct threat to employees. Such tests include:

- According to the EEOC, an employer may choose to administer COVID-19 testing to certain employees before they enter the workplace to determine if they have the virus but must ensure that any tests are "accurate and reliable."
- The EEOC has also given the green light to allowing the employer to take employees temperatures, again with a requirement that the method must be reliable. More detailed information about employer testing related to COVID-19 can be accessed here: "When A Sick Employee Comes to Work" By Thomas L. McCally, Esq. and Edward J. Krill, Esq.
- Alternatively, the employer may require employees to take their own temperatures and to stay home if they have a temperature. The testing still needs to be reliable, and this policy may be difficult to monitor and may be subject to abuse.
- Counsel should be consulted before proceeding with any type of testing, including the taking of temperatures as an employer could inadvertently expose itself to additional liability as the result of such testing.
- Regardless of the above, any employee who has been diagnosed with the disease may be required to provide medical certification that they may return to work without posing any risk to others.

2. **Should employers require employees that have conditions that make them vulnerable to COVID-19 (or those that care for others that are vulnerable) to return to the worksite?**

Employers who have conditions that make them susceptible to the coronavirus may be considered as disabled under the ADA, and employers may need to engage in the interactive process with those employees to see if any reasonable accommodation can be made to assist the employee in continuing to perform the essential functions of their job. If the employee has already been working remotely, it may be necessary to allow the continuation of telework. Denial of such a request may be difficult to defend against if a claim is raised, as many employees have already been working remotely for many weeks.

Employees who are vulnerable or who care for those that are vulnerable may also have other protections, such as the recently expanded FMLA and OSHA. Employers are strongly encouraged to confer with counsel prior to requiring any such employee to return to work.

If a vulnerable employee elects to return to work, consideration should be given to implementing additional measures to protect the employee from unnecessary exposure to other employees, clients or customers. This should be done in consultation with the employee, and care should be taken not to treat the employee differently (without legitimate reason) so as to avoid a claim that the employee is being subject to discrimination based upon a disability or perceived disability.

3. **What can and should employers do to comply with the CDC's recommendations of social distancing?**

According to the CDC: "Social distancing means avoiding large gatherings and maintaining distance (approximately 6 feet or 2 meters) from others when possible (e.g., breakrooms and cafeterias). Strategies that business could use include:

- Implementing or continuation of flexible worksites (e.g., telework). Employers could consider having some employees work remotely on alternate days so as to reduce the number of employees in the office on each day.
- Implementing flexible work hours (e.g., staggered shifts).
- Increasing physical space between employees at the worksite
- Increasing physical space between employees and customers (e.g., drive through, partitions)
- Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events or conduct such meetings and events virtually)
- Changes to the worksite, such as including plexiglass partitions between workstations, and designing workspaces so that the six-foot space can easily be seen by employees
- Delivering services remotely (e.g. phone, video, or web)
- Delivering products through curbside pick-up or delivery

4. **What can or should an employee do to comply with OSHA and to otherwise ensure that the workplace is safe?**

According to CDC's guidance, employers should consider taking the following actions:

- Consider improving the engineering controls using the building ventilation system. This may include increasing ventilation rates and increasing the percentage of outdoor air that circulates into the system.
- Support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors, by providing tissues, no-touch disposal receptacles, soap and water in the workplace. Place hand sanitizers in multiple locations to encourage hand hygiene. Discourage handshaking – encourage the use of other non-contact methods of greeting.
- Perform routine environmental cleaning and disinfection:
- Routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs. If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
- Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks, other work tools and equipment) can be wiped down by employees before each use. To disinfect, use products that meet EPA's criteria for use against SARS-Cov-2external icon, the cause of COVID-19, and are appropriate for the surface.
- Perform enhanced cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility.

5. **What should employers do if they become aware that an employee who has been in contact with other employees, clients or customers has tested positive?**

The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines

and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Accordingly, employers must act in compliance with the CDC while also attempting, to the extent possible, to protect the privacy rights of employees who may have the virus or have been exposed to the virus.

Given these parameters, and according to EEOC guidance, employers can and should determine who needs to be contacted (i.e. who has been in close contact with the person who tested positive). The employer generally should inform those co-workers, customers, clients or vendors that an "employee has tested positive for COVID-19" or that an employee "has been exposed to COVID-19," but the employee(s) should not be identified. The statement should be consistent to all, such as "Someone in our workplace has tested positive for COVID-19, and they have identified you as a close contact according to the CDC definition." This would be the recommended policy even if those notified may be able to determine on their own who the individual in question is.

With respect to the individual who tested positive and the employees with whom that individual had close contact it is important that the employer follow CDC guidelines. Employers should require all involved to stop reporting to work and to cease any in-person contact with clients. All employees involved should be advised to consult with their physician and to follow CDC guidelines. The employer should also comply with the Families First Coronavirus Response Act (FFCRA), which requires the provision of paid leave under certain specified circumstances. Information regarding the FFCRA can be found here: "The Families First Coronavirus Response Act Frequently Asked Questions Based Upon The New (4/1/2020) DOL Regulations" By Tina M. Maiolo, Esq.

Other resources regarding return to work issues, including links to CDC and EEOC guidance may be found on our website, at https://www.carrmaloney.com/covid-19-resources/

Employer obligations will continue to evolve as changes occur both legally and scientifically. Employers should keep apprised of all developments as they occur and should consult with counsel to determine the best way to navigate these laws as they continue to evolve.