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Return to Work: What Employers Need to Know

In light of the White House's "Opening Up America Again" Guidelines released on April 16, 2020, several states have begun to scale back their shelter-in-place orders. A number of businesses will again be able to open their doors—at least in some capacity—following the relaxation of some of these stay-at-home restrictions. In many instances, this will mean the return of employees to the workplace. Given the ongoing COVID-19 pandemic, this return-to-work process may not be as straightforward as it would be under ordinary circumstances. This alert will cover various questions and considerations of which employers should be aware during this time.

When will we be able to bring our employees back on-site?

This largely depends on the decisions of state and local governments. Each state (and even some cities and counties) has its own respective shelter-in-place order. While some jurisdictions are easing these restrictions, others are moving more slowly in allowing employees to return to their on-site routines. These differing circumstances largely track the conditions on the ground—with harder hit areas remaining locked down and areas with improving statistics opening back up. Of course, the states and localities that are allowing employees to return to work are not doing so immediately. Instead, these restrictions are easing in a deliberate, phased manner. Employers should be sure to stay apprised of all updates from their governing jurisdictions, which are ever evolving.

Do we need to alter any of our policies?

With the COVID-19 pandemic has come new federally mandated paid leave obligations for many employers. The Families First Coronavirus Response Act ("FFCRA") applies to covered employers for the remainder of 2020. Employers should be mindful of their continuing obligations under the FFCRA and any applicable state and local leave laws. Where necessary, employers should reassess their existing leave policies and examine how they interact with these new requirements. Employees throughout the country are facing similar COVID-19-related issues that are hindering their ability to report to work—even those employees who work for larger employers that are exempt from the FFCRA's requirements. Therefore, even larger employers should consider accommodating changes to their existing leave and attendance policies, even when not legally required. For more information on the FFCRA, see our detailed analysis here and here.

The work-from-home necessities of late may also lead employers to reassess their previously held notions of remote work. Employers may either have no current work-from-home policy or have one with minimal guidelines. As employees discover their own capacity to work remotely and employers discover previously unknown benefits of such an arrangement (either on an

intermittent or more extensive basis), employers may consider fleshing out their expectations and requirements for employee remote work in the future.

My business received Paycheck Protection Program funding. Do we need to take any special action?

Under recent federal legislation known as the CARES Act, Congress established a Paycheck Protection Program ("PPP") that provides loans to various small businesses throughout the country. Employers who receive PPP funding are authorized to use this money for various expenses including payroll costs, mortgage interest, and rent and utility payments. Although these funds are, in fact, loans, employers who follow specified guidelines may have their loan repayments forgiven by the federal government.

By and large, employers who maintain their employment levels and do not reduce their employees' wages will be eligible for loan forgiveness for a great deal of their PPP funding. With this in mind, employers who have received a PPP loan should pay special care to set their short and mid-term plans for retaining their workforce and avoiding cuts to employee salaries. Employers should be mindful of complex situations that may arise at the crossroads of PPP forgiveness and FFCRA leave. Businesses face difficult questions surrounding the availability of PPP forgiveness when employees are away from the workplace and earning less money while on FFCRA leave.

Employers should note that the SBA is encouraging companies that applied for a PPP loan to "review carefully" the certification they made that the loan was necessary for their continued operations. Whether a loan was necessary can be a confusing issue, and a company faces serious ramifications if the SBA concludes its certification was not made in good faith. The SBA is allowing companies until May 14, 2020, to return the PPP funds and avoid any consequences relating to their certification. If you have any questions about your certification, please reach out to David Kinman or your contact with Maynard Cooper's COVID-19 Coronavirus Task Force.

What should we consider in bringing back furloughed or laid-off employees?

As noted above, the return of employees to the workplace will almost uniformly be a gradual process. This applies equally to employees whom their employers have made the difficult decision to furlough or lay off. Just as with the lay-offs or furloughs themselves, employers need to make sure that their procedures for choosing which workers will return to work are done in a non-discriminatory manner. Adverse impacts on employees in protected categories could lead to legal claims against an employer. Accordingly, employers should keep some objective criteria in mind when bringing back furloughed or laid-off employees in order to avoid unnecessary and costly litigation.

Which employees should return to work?

As an initial matter, employers should only bring back employees who are permitted to return under applicable governmental orders. Some of these orders may allow certain employees to return to their employer's worksite while restricting others from doing so. Even apart from these requirements, employers may consider special protocols for certain "high-risk" employees. For the initial return-to-work stages, the White House's guidance advises "all vulnerable individuals" to continue to quarantine. This category includes older employees, employees with known preexisting conditions, and pregnant employees. The guidance also warns employees with

vulnerable individuals within their household should exhibit caution before returning to work. Because of these potential risks for certain portions of their employee population, employers should pay special care to ensure the safety of these individuals. For some, this may include a delayed return to the workplace. For others, it may require special on-site isolation strategies.

Employers may also take efficiency into consideration when determining which employees should return to their worksite. All things being equal, employees who are unable to telework will obviously be best utilized on-site as compared to their colleagues who are able to perform their work from home. Even within the teleworking group, some employees are able to perform their job duties remotely more effectively than others. Employers may be in no rush to hurry back employees who have been efficient in their remote work environment over the last several weeks.

What protocols should we implement after employees return to work?

The return of employees to the workplace does not necessarily mean business as usual for employee interactions. As employers bring their employees back on-site, many will want to implement their own versions of social-distancing measures for their workers. The details of these distancing policies will vary from employer to employer depending on their specific circumstances, but the underlying theme remains the same—avoiding too many people in too small of a space. Examples of specific practices employers may want to implement include limiting the number of employees in a given room or area at one time and placing restrictions on the number of people in bathrooms and elevators. Other practices may be legally required. Some jurisdictions—the city of Birmingham, AL, for example—have instituted ordinances that place an obligation on employers to ensure their employees wear masks in the workplace.

Another strategy for a gradual return is implementing shifts during which certain employees may report to work while others telework remotely. For example, employers may categorize their employees into different subsets. Group A could work on the employer's premises from 8:00 a.m. until 12:30 p.m. while Group B is allowed to utilize the office space from 1:30 p.m. until 6:00 p.m. The same concept could apply to various days of the week for the different employee groups. This approach allows for a less densely populated work environment and permits time for workplace sanitation. Finally, employers may consider easing back into normalcy with an interim policy of voluntary attendance.

Especially during the initial stages of employees returning to campus, employers should make a conscious effort to ramp up both one time and regular cleaning, janitorial and sanitation efforts, with a special emphasis on disinfecting common spaces such as break rooms and restrooms, and be able to detail those additional efforts and costs. In addition, employers should provide their employees with the supplies they need to sanitize their own areas, such as disinfecting wipes and sprays for their own work spaces and for surfaces they touch.

The EEOC has provided employers with guidance regarding administering testing and screening to employees as a prerequisite for their return to work. Generally speaking, the ADA applies heightened suspicion toward mandatory medical tests, requiring that they be "job related and consistent with business necessity." Because an employee with COVID-19 would present a direct threat to his or her co-workers, the EEOC has explicitly authorized employers to administer COVID-19 testing to their employees before they enter the workplace in order to determine if they have the virus, assuming that such tests are accurate and reliable. The same holds true for employers who wish to take their employees' temperatures before they are permitted to work on-

site. However, employers should be aware that not all people with COVID-19 have a fever as a symptom, and any medical information gathered must continue to be handled confidentially.

How should we handle an employee who refuses to return to work?

Generally speaking, an employee does not have a right to refuse to report to work. This is not an absolute rule, however, and the current pandemic highlights some potential exceptions. For example, employers are not permitted to retaliate against employees who exercise their rights under the Occupational Safety and Health Act. Essentially, the relevant question under this analysis is whether an employee has a reasonable fear of danger from a hazard presented in the workplace. What constitutes such a "reasonable" fear in these times of Coronavirus? That is not totally clear, but the inquiry is fact-intensive and employers should consider the severity of the pandemic in their particular locality and whether the virus has infiltrated their workforce.

This situation can become slightly trickier within the context of the ADA. For example, an employee with some preexisting condition that puts him or her particularly vulnerable to the effects of COVID-19 may be additionally apprehensive about returning to work too soon. Likewise, an employee with a mental condition, such as some anxiety disorders, may be more fearful than an employee without the same diagnosis. To the extent these physical or mental conditions may rise to the level of a disability under the ADA, employers should be willing to engage in the interactive process with these employees to identify potential accommodations that may help alleviate potential physical or mental risks.

Have there been any changes in immigration law that may affect my business?

Yes. There have also been several COVID-19 developments involving federal immigration law in the workplace of which employers should be aware. A few among them include the following:

- I-9 and E-Verify Requirements for Remote Workers. Employers must continue to complete Form I-9 for all workers during this time, but for employers with telecommuting policies in place, employees may present copies of List A or List B and C documents to human resources for verification purposes. Likewise, viewing documents for I-9 purposes by video conference is acceptable. After the federal government declares that the present national emergency is over, employers must view each employee's original documents for I-9 purposes within three business days of the end of the national emergency.

- USCIS No Longer Requiring Wet Ink Signatures. USCIS temporarily waived the requirement of having original wet ink signatures on visa petitions. Employers may opt to use scanned handwritten signatures at the present time. However, the original signature pages must be retained internally in case of an audit.

- Premium Processing is Temporarily Suspended. USCIS temporarily suspended premium processing, which results in decisions on certain visa cases in 15 calendar days.

- H-1B Employees Moving to Remote Work. H-1B workers presently employed can work at "unintended places" (i.e., home) without the employer filing a new Labor Condition Application, as long as the home office is in the original area of intended employment. This means that the remote work location must be within the same Metropolitan Statistical Area (MSA) as the original place of employment listed in the Labor Condition Application.

Employers need to instruct their H-1B employees to post their Labor Condition Applications at their new remote work site for ten consecutive days in order to ensure compliance with the regulations. If an H-1B worker intends to work remotely *outside the MSA*, the employer will likely need to file a new Labor Condition Application and H-1B amendment with USCIS.

What can we do to ensure the well-being of our employees following their return to the workplace?

As with many aspects of the employment relationship, communication is key. In addition to ordinary lines of communications, employers may implement special channels through which their employees may quickly and easily voice their concerns or seek instruction on the employer's procedures, policies, and recent updates. To the extent employers offer an Employee Assistance Program ("EAP"), it may be worth reminding employees of this resource. For employers who do not offer EAP assistance, implementing some version of a similar program might be a good option for their employees during these unpredictable times.

Employers may also want to utilize their most reliable lines of mass communication to send their employees helpful resources for coping with the remote working schedules. Tips for maintaining a useful daily routine, encouraging daily exercise and outdoor activities, and promoting helpful personal hygiene habits may provide employees with useful information.

Ata minimum, employers should communicate clearly to their employees that they remain present to provide them with the assistance they need. Empathy and availability will go a long way in reminding your workforce that you remain there to support them.

Please reach out to your contacts in the Firm's Labor & Employment Practice if you have any questions or comments about your employee leave provisions and obligations in light of these legislative proposals.

Maynard Cooper's COVID-19 Coronavirus Task Force is closely monitoring all updates to pending legislation related to the Coronavirus pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the lawyers serving on the Task Force.