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The Legal and Practical Considerations of Re-Opening Workplaces in the COVID-19 Era: Part Two – Legal Considerations, FAQS, and Best Practices

In Part One of this alert, we discussed several practical considerations that employers should bear in mind as they plan for the safe return of their employees to the workplace. Here, in Part Two, we explain how employers can address some of the key legal considerations that have arisen from the pandemic, in addition to providing a list of best practices for employers to follow as they develop their reopening plans.

I. Discrimination, Retaliation and Accommodation Considerations

Employers are likely to face a new class of discrimination concerns arising from the pandemic, and should ensure that supervisors and employees responsible for implementing anti-discrimination policies are aware of and prepared to handle these concerns.

Workplace Discrimination: Sadly, as the coronavirus spread across the globe, reports emerged of increased animus and harassment towards individuals who may have been associated with early COVID-19 hotspots as a result of their race, ethnicity or national origin. Some jurisdictions, like New York for example, have also recognized that a COVID-19 diagnosis itself constitutes a disability, and have warned employers not to discriminate against members of their workplace who test positive for the disease. Employers should take the opportunity to reinforce their anti-discrimination and harassment policies with employees before they return to the office. Employers must remain vigilant to ensure that any instances of discrimination are dealt with swiftly and should consider re-training workers in management positions to help identify and eliminate such behavior.

Reasonable Accommodation: As set forth in the recent EEOC guidance, working in the era of COVID-19 is likely to raise particularly thorny issues when it comes to employers' obligation to provide reasonable accommodations to their employees.

Some employees will not feel safe returning to the office immediately, regardless of the safety precautions that their employers have put into place. In some cases, the concern will be related to an issue—such as pregnancy, caregiver status, mental and physical health, or age—that is a protected characteristic under federal, state, and/or local employment laws. The CDC has published information about pre-existing health conditions that are believed to put individuals at a greater risk of developing serious complications when they contract COVID-19, which employers may wish to refer to when assessing accommodation requests. The CDC has also issued specific guidance that employers should follow to help protect such individuals from the threat of contracting the disease in the workplace. Employers should also be on the alert for local guidance specific to the area in which they operate.

Employers should consider developing a protocol to address the increased volume of accommodation requests before returning to the worksite. For example, managers should be trained on the new safety procedures, as well as existing accommodation policies. In New York in particular, managers should be familiar with the requirements of the cooperative dialogue process. In most cases, it will be prudent to mandate that such conversations be centralized to ensure consistency in granting or denying requests.

Employers should not preemptively ban certain classes of employees from returning to the workplace, but may give employees the opportunity to voluntarily self-identify as belonging to a group the CDC recognizes as having higher risk and to initiate the accommodation discussion. Employers may also initiate a discussion with an employee already known to fall into a high-risk group as identified by the CDC, and, of course, should discuss an accommodation with

any employee who provides medical support for their request, regardless of whether they are in a group identified by the CDC as having higher risk.

Leave Policies and Employee Benefits: Employers should also anticipate that employees are likely to have personal obligations related to their own health and their caregiving duties to their families that will lead to increased requests for paid time off or the ability to work from home. Businesses should consider enacting an emergency leave policy to account for these unique circumstances that supplements existing leave policies. These benefits could be time-limited to accommodate the current public health crisis and should take into consideration the recent federal, state and local benefit enhancements that have been put into place. Employers may also need to modify existing policies to avoid the clustering of paid time off requests—for example, businesses can designate blackout periods or extend carryover periods to encourage employers to space out their requests. Above all, employers will need to be flexible while still attempting to police potential abuse. This will require organizations to request and maintain documentation related to all leave requests.

Retaliation: Finally, in light of the extensive and ongoing safety concerns arising from the coronavirus pandemic, employers can anticipate that employees will be more vocal about workplace safety issues. It is important to remember that federal (and many state and local) whistleblower laws protect individuals who raise such concerns. These protections are equally applicable to coronavirus-related issues. Simply put, an employer may not retaliate against an employee because he or she has complained about a potential workplace safety hazard or the denial of an accommodation or leave request. Business should be sure to refresh employees in management positions on existing whistleblower policies and make clear that these policies will continue to be enforced during the pandemic.

II. Frequently Asked Questions

What if an employee refuses to return to the office until there is an approved treatment or vaccine for COVID-19? Generally, an employer need not accommodate an employee's request to work from home on a permanent basis. However, an employer may need to accommodate such a request in the medium-term, particularly if the employee has already successfully worked from home for a lengthy period of time while a stay-at-home order was in place. The need to accommodate a request by an employee to continue working from home when other employees have returned to the workplace will necessarily depend on the individual circumstances of the request. For example, not all requests will be based on an employee's perceived or actual disability. An employer may not need to accommodate a request based on an employee's fear absent documentation that he or she is suffering from a diagnosed physical or mental health condition. Nonetheless, as the EEOC guidance makes clear, it is likely that employees' existing mental health conditions will be exacerbated by the ongoing public health crisis such that they will be entitled to additional reasonable accommodations from their employers.

What if an individual wants to continue working from home not based on their own disability, but because they live with or care for an individual who falls into one of the high-risk categories? Both the ADA and the New York City Human Rights Law provide protections to employees based on their association with an individual who has an actual or perceived disability. These protections, however, do not expressly extend an employer's obligation to provide reasonable accommodations to such individuals. That being said, it is foreseeable that under the current circumstances, courts might be willing to stretch their view of what constitutes an adverse employment decision under the associational provisions of these laws. Therefore, the best practice will be for an employer to at least engage in a cooperative dialogue with such individuals. It may be the case that their desire to continue working from home does not significantly impact their ability to successfully perform their job functions, or that their concerns can be accommodated in some other way—perhaps via schedule modifications and enhanced safety precautions. Employers should also ensure that they do not discriminate in granting these accommodations (e.g., by granting accommodations to a woman based on her caretaking responsibilities, but not a man).

What if an individual comes to the office exhibiting flu-like symptoms? The EEOC guidance makes clear that the ADA does not interfere with an employer's ability to abide by the CDC direction that employees exhibiting symptoms of COVID-19 should leave the workplace. As set forth above, to ensure public safety, employers can screen individuals for such symptoms before they enter the worksite and can mandate that sick employees do not come into the office. Employers should have a plan in place to address a suspected COVID-19 exposure in the workplace, including procedures for isolating a sick individual and safely transporting him or her home, tracing that employee's contacts and notifying the appropriate authorities, and communicating with other members of workforce who may have been exposed while maintaining employee privacy. If an employee develops a confirmed case of COVID-19 after returning to the workplace, an employer can likely also require employees who were directly exposed to that individual to work from home during the period most recently recommended by the CDC (currently 14 days). Nonetheless, if an individual is well enough to continue working from home, the employer cannot force that individual to take paid time off. The easiest way to enforce these measures will be through employee screening via temperature checks or rapid COVID-19 testing at the entrance to the worksite.

What if one employee refuses to work with another employee whose family member is a frontline worker with a higher risk of COVID-19 exposure? To the extent an employee has a specific confirmed or suspected exposure to COVID-19 outside of the workplace, an employer may require them to work from home during the generally accepted quarantine period. An employer cannot bar an individual from the office, however, based solely on his or her potential increased risk of exposure as a family member of a frontline worker. The Genetic Information Nondiscrimination Act (GINA) protects individuals from discrimination on the basis of their family medical history, and arguably would bar discrimination on the basis of an employer's family association with someone who was exposed to or suffering from COVID-19. Thus, if an employer decides to require employees to certify that they have not recently been exposed to COVID-19, the employer should be careful not to limit this inquiry to exposure by an employee's family members. The best practice to address this issue will likely be for the employer to engage in a cooperative dialogue with the employee who raised the complaint. If the complaint was motivated by the employee's own underlying health concerns, the employer will need to consider offering an accommodation to the vulnerable individual, such as modifying his or her employee cohort or work location, or permitting that individual to work from home for a more extended period of time.

III. Conclusions & Best Practices

Each individual employer's workplace reopening plan must be flexible and should be guided by state and local safety guidance and orders, which are currently in flux. Below are a few best practices that employers can follow to develop a robust safety plan that addresses the legal and practical considerations discussed above:

- Create a COVID-19 taskforce.
    - An individual taskforce leader should be identified, but the taskforce should be multi-disciplinary and encompass senior leadership, as well as representatives of the IT, HR, facilities, and legal departments if available.
    - The taskforce should designate an individual or team of individuals to track the frequent regulatory changes from federal, state, and local governments. This will require multi-jurisdictional tracking for employers with multiple worksites or a workforce that commutes from out of state.
    - The taskforce should also monitor evolving safety guidance and make necessary workplace changes in response to that guidance.
    - The taskforce should designate one or two individuals who will be responsible for communicating regarding

safety and employee expectations. This individual or individuals should set a schedule for regular communication on these topics and stick to it.

- Before returning to the office, do a "day-in-the-life" walkthrough to test your plans and confirm that they reflect how the office space will actually be used.
- Update employee handbooks to reflect the policy changes mentioned above.
    - In connection with this effort, consider developing more robust work-from-home policies. It is foreseeable that at least some portion of the work force will be working from home for an extended period of time, so business expectations should be clear.
- Train employees on new policies and safety procedures remotely before they return to the office.
- Take this opportunity to update business continuity plans based on the learnings from the recent shutdown—what worked, what didn't, and what needs to change. Businesses should be prepared to shut-down again quickly in the event that we face a second wave of infections later this year.

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