Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part Three: General Workplace Safety Precautions

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Employment

Whether a company is an essential business or is expecting to reopen its doors in the coming months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return (Part One)
2. Potential Screening Measures for Employees Returning to the Workplace (Part Two)
3. **General Workplace Safety Precautions (Part Three)**
4. Accommodating Special Circumstances (Part Four)
5. International Employment Considerations (Part Five)

General Workplace Safety Precautions

As described in Part One, employers have a general duty under the Occupational Safety and Health Act (OSHA) and comparable state laws to provide a safe workplace for employees. Employers should consult federal, state, and local agency guidance regarding workplace safety measures to be taken during the pandemic, including CDC and OSHA guidance on the subject. Complying with applicable guidance on workplace safety issues will help minimize the risk of claims by employees, vendors, visitors, or other parties alleging that the employer negligently or willfully failed to maintain a safe work environment.

This alert addresses safety precautions all employers should consider, including social distancing, use of protective equipment, hygiene practices, developing protocols for workplace and off-duty exposures, and more.

How Should We Address Social Distancing in the Workplace?

Implementing social distancing measures will is an important key to maintaining a safe workplace during the COVID-19 pandemic. While the particular social distancing practices will need to vary depending on the type of workplace or as may be required by an applicable public health agency or other governmental order, examples of social distancing measures in the workplace could include:

- closing lunch rooms or staggering lunch and break times;

- removing chairs from conference rooms to limit attendance at meetings and ensure employees can sit at least six feet apart;

- leaving a buffer between scheduled meetings in conference or meeting rooms to avoid overlap between two groups and to allow time for cleanings;

- installing social distancing decals on the floors of any shared spaces in the workplace;

- encouraging employees with their own offices to stay in their offices as much as possible;

- adopting videoconference guidelines or installing video phones so that even when in the office, employees are discouraged from meeting in person;

- to the extent possible, restructuring open floor layouts to ensure that employees can sit at least six feet away from each other;

- installing barriers between workspaces, in reception areas, or between customers and employees that can be easily cleaned and are high enough to prevent contact;

- delivering products through curbside pick-up or delivery; and

- posting social distancing reminders throughout the workplace, including compliance with any state or local posting requirements.

Can Changes to Work Schedules Be a Part of the Overall Plan?

Staggering shifts or splitting or rotating work schedules may also reduce the number of employees present in the office at any given time. When considering this approach, review applicable state and local laws that affect the timing of meal and rest periods, as well as laws regarding payment of overtime if these practices result in longer shifts for employees. Employers may also consider staggering employee returns in order to minimize the number of employees returning at once and the logistics of staggered or split shifts.

Employers should also consider limiting the number of clients, customers, and other third parties in the facility or workplace. Decisions about limiting the number of employees or visitors allowed onsite should be made on a nondiscriminatory and consistent basis.

What Protective Equipment Should Be Used?

Depending on the particular workplace and job duties, personal protective equipment (PPE) may be recommended or required by OSHA or state law, and employers should follow OSHA and other governmental guidelines for training employees on the donning and doffing, use, and maintenance of this equipment. PPE may include, for example, gloves, goggles, face shields, masks (see more below), and respiratory protection. Employers may need to prepare a written hazard assessment relating to PPE use.

Can Employers Require Employees to Wear Face Coverings?

Masks may be required PPE depending on the job and risks. In addition, employers should consider encouraging or requiring the use of cloth face coverings or masks to limit the potential spread of germs (although due to current shortages in supply, N-95 masks should generally not be used or required unless indicated by the type of work). Note that many jurisdictions require face coverings in the workplace.

Generally, employers can issue face coverings or can approve employee-supplied cloth coverings, although it is important to note that some jurisdictions specifically require employers to provide the coverings. Also, employers may be required to accommodate workers who cannot wear a mask or face covering for medical or religious reasons provided that doing so would not pose an undue hardship for the company's operations—though this does not necessarily mean permitting an employee to enter the workplace without a face covering.

What Are Basic Hygiene and Infection Control Practices to Implement?

Even prior to the outbreak of COVID-19 in the U.S., OSHA and the CDC recommended that employers implement good hygiene and infection control practices to curb the spread of the virus, and these should continue as employees return to the workplace. These measures include promoting frequent hand washing and making soap and running water readily available, providing hand sanitizer, encouraging employees to cover their coughs and sneezes, providing tissues and trash receptacles, and requiring workers to stay home when they are ill or have been exposed. Employers should discourage the sharing of personal work equipment, if feasible, such as desks, phones, headsets (or any other equipment that will touch the face), computers, and work tools, and clean and disinfect such items that are shared. Also, it is critical to implement routine and careful cleaning and disinfecting of surfaces, equipment, and work areas. The U.S. Environmental Protection Agency (EPA) has issued guidance on disinfectants for use against COVID-19, and the CDC has issued guidance on cleaning and disinfecting workplaces, which employers should follow.

Are There Additional Safety Controls that Employers Should Consider?

The types of controls that should be implemented will depend on the risks of exposure in the particular workplace or facility. Additional measures for all employers to consider include:

- developing an infectious disease preparedness and response plan;
- keeping current on federal, state, and local public health guidance;
- providing workers with education and training on COVID-19 risk factors and infection control and hygiene practices;
- screening employees for entry to the workplace (see Part Two for more information);
- engineering controls, such as installing high-efficiency air filters and increasing ventilation rates, installing physical barriers like sneeze guards, and installing drive-up or drive-through windows for customer service; and
- performing a formal hazard assessment to evaluate whether any other controls may be necessary.

What Steps Are Recommended to Address Workplace Exposures to COVID-19?

In addition to implementing general safety practices to avoid the spread of COVID-19 in the workplace, it is critical to have in place clear procedures to follow when an employer discovers that an individual with COVID-19 is or has been in the workplace. The employer's protocol should follow CDC and other applicable guidance and should include:

- procedures to identify and isolate individuals who have symptoms of COVID-19, and to seek medical attention for them if needed;

- guidelines to ensure that the affected individual's identity is kept confidential;

- plans for identifying "close contacts"—co-workers or others the affected individual may have come into close contact with as defined by the CDC—which can include a questionnaire for interviewing the individual to determine when symptoms began and with whom he or she interacted while contagious (typically beginning two days prior to the onset of symptoms or the date of a positive test if the individual is asymptomatic, according to current CDC guidance) and other steps that may be needed to accurately identify contacts;

- communication plans and template notifications, including a detailed notice to send to employees who were in close contact with the affected person, with instructions on self-quarantine requirements; a more general notice for the workplace indicating that workers may have been exposed; and notifications to any contractors, customers, vendors, or other third parties who may be close contacts;

- processes for disinfecting the workspace and common areas, in accordance with CDC guidelines and using products and chemicals that meet the EPA's criteria for use against the virus that causes COVID-19; and

- processes for recording and/or reporting illnesses to OSHA or state and local authorities, as may be required by OSHA or state and local guidance on the topic.

Employers also should develop a return-to-work protocol for employees who contract COVID-19, following CDC or other public health agency guidance on ending isolation. Employers generally may ask for medical certification in this circumstance, but should consider that such certifications may continue to be difficult for employees to obtain. Employers may consider instead using questionnaires or interviews to obtain the necessary information to confirm that the recommended isolation/quarantine protocol has been followed and that it is safe for the employee to return.

How Should Employers Address Quarantine Requirements for Employees Exposed to COVID-19 While Off-Duty?

When an employee has been exposed to COVID-19 outside the workplace, either due to close contact with a household member or through other contacts, the employee should be required to self-quarantine as recommended by CDC standards or as mandated by state or local health authorities. The CDC has indicated that critical infrastructure workers who have been exposed but remain asymptomatic may continue working in very limited circumstances, such as when cessation of operation of a facility may cause serious harm or danger to public health or safety,

provided that appropriate screening measures and other enhanced safety protocols are in place with respect to such workers.

Should Employers Consider Workplace Tracking to Ensure That Close Contacts Can Be Accurately and Promptly Determined?

Numerous vendors have developed devices and programs for tracking employee movement in the workplace, both to monitor compliance with social distancing requirements and to track any close contacts of infected employees in the workplace. The use of these products could have workplace privacy implications. Employers should therefore carefully review what data may be captured, how the data might be used or disclosed, and what measures might be needed, including confidentiality requirements and employee notice and/or consent, to mitigate legal risks.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Employment practice:

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