

LEGALLY SPEAKING

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PREPARING FOR A POST-PANDEMIC WORKPLACE – TOP 10 EMPLOYER CONSIDERATIONS

As states, industries, and businesses begin to reopen or ramp up to full production after months of enduring a statewide shutdown due to COVID-19, employers must now shift gears and prepare for a post-pandemic workplace and workforce. Although many businesses remained operating at some capacity during the shutdown, no employer will escape the pandemic unscathed or unaffected. The crisis isn't over just yet. To that end, employers should turn their sights toward the following top 10 employer considerations in preparing for a post-pandemic workplace:

1. Communication

Communication is critical to any return-to-work strategy. As you implement new safety and health guidelines, ensure that you take a proactive approach to communicating with all employees, supervisors, customers, and vendors to ensure that your message is consistently communicated at all levels of your supply chain. Invite dialogue with your employees and be prepared to make changes when you discover what works and what doesn't for your unique workforce and workplace.

2. Return of the Workforce and Competing with Expanded Benefits

With the expansion of unemployment compensation benefit eligibility, as well as the extra \$600 from the feds, some employees might be incentivized to remain on unemployment instead of heeding a recall notice. Consider now what impact this might have to your particular workforce, and develop a strategy to deal with it before it becomes an issue. Consider reporting quits or refusals to work when work is available directly to the Ohio Department of Job and Family Services.

3. Workplace Safety

The challenges associated with re-opening a workplace will be unique to every employer and will require a multi-disciplinary approach to ensure that all aspects of the business are addressed, including HR, IT, compliance and safety, and management throughout facilities, divisions, departments, etc. Create a task force or team to deal with all issues associated with returning to work. Other items that must be considered, addressed, and communicated about to employees include: maintaining a clean workspace, assessing and eliminating risks, identifying proper equipment for employee use, development of good hygiene practices, and ensuring compliance with the Director's Stay Safe Ohio Order. Most importantly, workplace safety should be **assessed daily**.

4. Always be mindful of OSHA

Don't forget that while there is no specific OSHA standard to address coronavirus, employers remain obligated under the general duty clause to provide a safe workplace that is free from recognized hazards. To that end, employers should identify and assess workplace hazards, then identify and implement controls. Also recall that Section 13 of the Occupational Safety & Health Act permits employees to refuse to work if there is an *imminent danger*, which means that a threat of death or serious physical harm exists in the workplace. Consider now the OSHA implications that may impact your particular workplace.

5. Workers' Compensation

A mass return to work may result in a rise in workers' compensation claims. However, employers should be mindful that all workers' compensation claims are highly fact-specific in each particular case, and an employee asserting a workers' compensation claim related to the contracting of coronavirus will likely face causation challenges. In any event, employers should not be surprised to see a rise in claims when the workforce returns.

6. ADA Pitfalls

Employers should be careful not to invite ADA claims by asking employees to report conditions that make them more susceptible to COVID-19, regardless of how well-intentioned the employer may be in doing so. Additionally, employers should be careful not to assume that all employee "asks" are related to COVID-19; instead, employers should take steps to determine whether the request is a request for a reasonable accommodation under the ADA, such that the employer is obligated to engage in the

interactive process. If the request is solely related to the avoidance of COVID-19, then the request is likely not related to a disability and would not be protected by the ADA. But, even if the request is seemingly related to the avoidance of COVID-19, be careful that the request is not related to an underlying condition, which could be protected by the ADA. Finally, for employers considering whether or not to test employees for COVID-19, the EEOC has given employers the green light on COVID-19 testing; however, note that accurate testing only reveals if the virus is present at the time of testing. Thus, a negative test does not mean that an employee will not later acquire the virus.

7. Potential wage/hour claims

As employers face the economic realities of the shutdown, make sure that you are staying on top of potential wage/hour challenges. Especially if you will have employees continuing to work remotely, make sure to communicate and implement good timekeeping practices so that you are compensating employees for all time under employer control, which also includes time they spend checking emails at home, taking their temperature, cleaning required PPE or required facial coverings, and obtaining COVID-19 testing (if the employer requires the testing). Failure to properly compensate employees in this regard may lead to FLSA claims and penalties. Again, communication is key so that employees and supervisors know and understand the expectations.

8. Layoffs

Now that we're coming out of the shutdown, many employers may think that they're completely finished with layoffs. Think again. The wave of layoffs and workforce reductions that accompanied the rapid spread of COVID-19 may very well lead to lawsuits by employees alleging that employers failed to give workers proper notice, as required under certain circumstances by federal and state WARN Acts, or that employers discriminated against employees by laying off certain workers but not others.

9. FFCRA Liabilities

With new leave laws comes new liabilities. The Families First Coronavirus Response Act was signed into law by President Trump on March 18, 2020, and has had a substantial impact on employers across the country by extending employee sick leave benefits through two components – the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. In addition to new leave benefits, the law also mandates employers retain various records for a period of four years and imposes on employers an obligation to restore employees taking leave to an equivalent position upon their return to work. The law also prohibits employers from disciplining, discharging and discriminating or retaliating against employees who take leave or file a complaint related to the use of the leave. Employers who violate the new leave laws are subject to the same penalties and enforcement mechanisms as the FLSA and FMLA. The law remains in effect until December 31, 2020, which means that qualifying employees may still be entitled to utilize the leave, even while the state and businesses are re-opening. Employers should carefully re-examine their obligations under the new law in an effort to avoid running afoul of it and inviting additional claims and liabilities.

10. Long-term workplace changes

While businesses may be re-opening or ramping up production, the next couple of months will be anything but business as usual. In light of the extraordinary measures taken by many employers over the last eight weeks, including widespread remote work arrangements, employers may face challenges in denying employees remote work arrangements in the future. Certainly, many employers will be unable to claim infeasibility or impossibility in response to reasonable accommodation requests. In the aftermath of COVID-19, I anticipate that remote work and other accommodation requests will be on the rise for the foreseeable future. Additionally, mental health issues will be on the rise in many industries, particularly given that many employees have been cooped up in their homes or deprived of their favorite places, events, hobbies, and the list goes on. Prior to the shut downs, approximately two-thirds of workers claimed that their productivity was affected in some way by mental health issues, and certainly in the aftermath of a national public health emergency, it is unlikely that percentage will go down anytime soon. Certainly, the workplace will see many continued changes over the next several weeks and months to come. Employers should stay abreast of all legal developments to ensure that they remain in compliance with all local, state, and federal laws, and maintain frequent and consistent communication with their employees and customers on all significant issues.

For additional or more specific information about any of these considerations or for assistance with any labor and employment issue, contact **Nadia A. Lampton** at nlampton@taftlaw.com or (937) 641-2055.