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Are You Ready to Reopen? Legal and Practical Issues to Consider

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There is mounting pressure to reopen businesses as many, particularly small ones, are struggling to survive under various stay-at-home and shelter-in-place orders. President Trump issued his "Opening Up America Again" guidelines for reopening in phases. Several governors now have begun loosening restrictions and permitting more businesses to reopen if they follow certain safety measures. Georgia is permitting some businesses to resume operations effective today (April 24th).

Even if employers are willing to reopen if permitted, there are multiple issues to address, including making customers comfortable enough to visit the business.

Physical Considerations

Are customers going to be able to practice social distancing in the business? For example, if the business is a restaurant, can seating be reconfigured to allow social distancing between customers? Depending on the business, are customers going to be asked/required to wear masks, particularly if social distancing is difficult?

Businesses can consider limiting the number of customers inside at one time. Are customers willing to wait to be served? Would the level of business generated support additional payroll costs?

But I Don't Want to Return to Work Yet?

Employers are facing a conundrum in recalling furloughed employees. Those employees may be receiving state unemployment benefits as well as the $600 per week federal supplement under the CARES Act and receiving more than they would if they returned to work full-time at their previous compensation.

Employers have a right to recall workers. Generally, if a worker refuses to return to work after reasonable notice, the worker can be discharged and likely disqualified from receiving further unemployment benefits. A general anxiety about feeling unsafe going back to work is not an acceptable reason to refuse

to return to work. However, if an employer is not following CDC and OSHA guidelines and taking measures to ensure a safe workplace, an employee may be protected by OSHA and similar state laws from returning to work.

Some employers are attempting to address the unemployment claims issue by temporarily increasing the pay of recalled workers. Some are providing increased pay through July 31, 2020, when the federal supplement of $600 per week is scheduled to end.

Each state's unemployment compensation system is different, and the impact of returning to work will vary from state to state. For instance, the Georgia Department of Labor has issued an emergency rule that will let workers return to work part-time without losing their unemployment benefits as long as the worker is not paid above a maximum ceiling, depending on the employee's rate of unemployment compensation.

Safety Measures for Employees

There are a number of things employers can do to mitigate risks, including requiring their employees to complete return-to-work questionnaires, taking workers' temperatures, the use of masks in the workplace and COVID-19 testing.

The EEOC has issued guidance that permits employers to ask employees if they are experiencing symptoms of the coronavirus such as fever, chills, cough, shortness of breath, or sore throat. Employers can develop a questionnaire for employees to complete or be asked before entering the workplace. Depending on the nature of the business, the questions could be asked when the employee is recalled or hired or at the beginning of each shift. Employers must maintain information about an employee's illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA) and store such records potentially in compliance with OSHA requirements.

The EEOC also has stated that employers may take the temperature of employees during this pandemic. There are a number of issues to consider in taking employees' temperatures. What type of device is used and its quality? Who will be the temperature taker? Ideally, it would be a medical professional. If not, there should be a limited number of employees (health and safety, HR, management, etc.) designated and trained to take temperatures so that the results are accurate and there is consistency in the process. What type of protective equipment should the temperature taker wear (mask, gloves, etc.)? If the temperature taker is an employee, should you have the employee sign an acknowledgment or waiver? If employees are lined up to be tested, they should keep a social distance of 6 feet apart. If they are required to wait in line, will they be paid for that time? It may depend on the length of time waiting and the state where the worker is located. For example, in California, the time spent both waiting for and participating in the temperature checks must be paid (non-exempt employees only). Again, medical information should be kept confidential, and employers should comply with any state privacy law requirements, including mandatory notice requirements.

Another safety measure employers could choose to take, if not otherwise legally required to do so, is to require employees to wear masks. Generally, if employers require that masks be worn, the employer should provide the masks to employees. If the masks can be cleaned by employees by hand or in regular laundry, then employers would not be required to compensate employees for cleaning the masks. However, the employer may have that obligation under general state or local laws obligating

employers to provide or pay for equipment like face coverings. For example, New York specifically requires employers to provide employees in essential, customer-facing positions with face coverings at the employer's expense. Similarly, New Jersey requires restaurants and other food service businesses to provide their employees with face coverings and gloves at the business's expense.

On April 23, 2020, the EEOC yet again amended its guidance to specifically address whether an employer may require COVID-19 testing as a condition of returning to work. Answering generally in the affirmative, it explained that the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, the EEOC opined that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC cautioned that, consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and should check for updates.

Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Discrimination in Rehiring

Because of business needs, many employers will face the challenge of having to rehire some but not all of their work force, most of which may come back en masse. Anytime an employer has to make decisions among its workforce as to who will be rehired and when, it can potentially create legal challenges. For example, employees out on a protected leave during this crisis (such as the FFCRA or FMLA) may claim FFCRA or FMLA retaliation if not brought back. As much as possible, employers will have to use objective, measurable criteria when making these rehiring decisions.

These are general considerations for employers that may vary based on state and local laws. We would be glad to assist employers in putting together a return to work plan specific to their business and the jurisdictions in which they operate. In order to address these and related issues in more detail, Ford & Harrison will be presenting a complimentary webinar on Thursday, April 30 at 2:00 (EST). To register, click here.

If you have any questions regarding this Alert, please contact the authors, Rick Warren at rwarren@fordharrison.com, or Jeff Mokotoff at jmokotoff@fordharrison.com, both of whom are partners in our Atlanta office. Of course, you may also contact the FordHarrison attorney with whom you usually work.

FordHarrison is closely monitoring the spread of Coronavirus and associated federal and state legislation and has implemented continuity plans, including the ability to work remotely in a technologically secure environment when necessary, to ensure continuity of our operations and uninterrupted service to our clients. We are following all CDC guidelines and state and local laws as applicable. We are committed to ensuring the health and welfare of our clients, employees, and communities while continuing to provide

our clients with the highest quality service. Please see our dedicated Coronavirus Taskforce and Coronavirus – CARES Act pages for the latest FH Legal Alerts and webinars on Coronavirus and workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be connected with a Coronavirus Taskforce or CARES Act attorney, please contact clientservice@fordharrison.com.