HR in a Post-Safer-at-Home Environment - What is the New Normal for HR?

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Today’s Agenda

1. Opening Up America Again
2. Engagement with Employees During Furlough
3. Key Questions to Consider During Re-Emergence
4. Strategies for the Workplace in the New World

Opening Up America Again

- On April 16, 2020, President Trump introduced the Opening Up America Again Plan, a three phased plan which provides guidance to States and local governments in relaxing the Safer-At-Home Orders
- The Opening Up America Again Plan contains overall guidelines that apply throughout all 3 phases of the plan

This material is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.
Guidelines for All 3 Phases

• Individuals - Continue to practice good hygiene, wash hands with soap and water or use hand sanitizer, avoid touching face, sneeze or cough into tissue (or elbow), disinfect frequently, and strongly consider using face coverings in public.

• Employers - Develop appropriate policies, in accordance with existing guidance - require social distancing, may provide protective equipment, temperature checks, testing, isolating and contact tracing, sanitation, use and disinfection of common high traffic areas, and restricting business travel.

Phase 1
For States and Regions that Satisfy the 3 Gating Criteria:

1. Symptoms - Downward trajectory of influenza-like illnesses reported within a 14-day period AND downward trajectory of COVID-like cases reported within a 14 day period;

2. Cases - Downward trajectory of documented cases within a 14-day period OR downward trajectory of positive tests as a percent of total tests within a 14-day period (flat or increasing volume of tests); and

3. Hospitals - Treat all patients without crisis care AND robust testing program in place for at-risk workers, including emerging antibody testing.

Phase 1 (cont.)

• Continue to encourage telework, whenever possible and feasible with business operations.

• If possible, return to work in phases.

• Close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols.

• Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel.
Phase 1 (cont.)

• Strongly consider Special Accommodations for personnel who are members of a vulnerable population.
• Schools and organized youth activities (e.g., daycare, camp) that are currently closed should remain closed.
• Visits to senior living facilities and hospitals should be prohibited. Those who do interact with residents and patients must adhere to strict protocols regarding hygiene.

Phase 1 (cont.)

• Large venues (e.g., sit down dining, movie theaters, sporting venues, places of worship) can operate under strict social-distancing protocols.
• Elective surgeries can resume on an outpatient basis at facilities that adhere to CMS guidelines.
• Gyms can open with strict physical distancing and sanitation.
• Bars should remain closed.

Phase 2

For States and Regions with no evidence of a rebound and that satisfy the Gating Criteria a Second Time

• Encourage telework, whenever possible and feasible with business operations.
• Close common areas where personnel are likely to congregate and interact, enforce moderate social distancing protocols.
Phase 2 (cont.)

- Non-essential travel can resume.
- Strongly consider special accommodations for personnel who are members of a vulnerable population.
- Schools and organized youth activities (daycare, camp) can reopen.
- Visits to senior care facilities still prohibited. Those interacting must follow strict hygiene protocols.

Phase 2 (cont.)

- Large venues (e.g., sit down dining, movie theaters, sporting venues, places of worship) can operate under moderate physical distancing protocols.
- Outpatient and inpatient elective surgeries can resume as clinically appropriate.
- Gyms can remain open with strict physical distancing and sanitation.
- Bars can open with diminished standing-room occupancy.

Phase 3

For States and Regions with no evidence of a rebound and that satisfy the Gating Criteria a Third Time.

- Resume unrestricted staffing of worksites.
- Visits to senior care facilities and hospitals can resume.
- Large venues can operate under limited physical distancing protocols.
- Gyms can remain open if they adhere to standard sanitation protocols.
- Bars may operate with increased standing room occupancy.
**Keys to Effectiveness**

1. Analyze your workforce and culture/response.
2. Analyze "pinch points" in facility flow in maintaining separation and meeting safety expectations:
   - Lunch rooms
   - Time locks
   - Locker rooms
   - Work spaces
   - Communal areas - coffee machine, water cooler, etc.
3. Be visible in sanitation efforts.

**Keys to Effectiveness (cont.)**

4. PPE availability and required use.
   - What is reasonable?
5. Where/How is work done?
6. Absenteeism, excused absences and leaves of absence.
7. Re-evaluate discipline/discharge process.

**Return to Work “Musts” in Managing Furloughed and Retained Employees**
“Musts”

1. Communications on state of operations and work.
2. Confirmation of their place in the organization - updated on return.
3. Evaluate organization needs:
   a) Critical roles
   b) New Policies
   c) Work Site - remote vs. onsite
   d) Rightsizing and departure strategy

“Musts” (cont.)

4. Managing the worksite:
   a) Capacity limits
   b) Social distancing
   c) Closed facilities - breakrooms, exercise room, locker rooms
   d) Meetings - phone vs. in-person
   e) Cleaning/sanitation protocols
   f) Service animals
   g) Clock-in procedures
   h) Medical checks - wellness
   i) PPE - mandates vs. recommendations

“Musts” (cont.)

5. Managing Attendance:
   a) FFCRA obligations
   b) Flu-like symptoms
   c) Supervisor evaluation of employee readiness
   d) Disqualification from work
   e) For non-FFCRA - granting additional time away - paid vs. unpaid
   f) Refusal to work
   g) Required medical verification
   h) FMLA Interface
6. COVID Positive Management:
   a) Develop response
      i. HR essential
      ii. Communications (Internal and External)
      iii. Facilities/Sanitation

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Engagement with Furloughed Employees

Why does engagement with furloughed employees matter?
- We want our employees to come back to work when the circumstances change.
- With engagement - employees feel connected, and are more likely to return to employment.
- Without engagement - employees lose connection, and may find employment elsewhere.

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Tips to Engage Furloughed Employees

1. Ensure the company has current contact information for furloughed employees
   - Furloughed employees are likely not accessing work email. Make sure you have your employees' personal email addresses.
   - Ensure you have furloughed employees' telephone numbers.
Tips to Engage Furloughed Employees

2. Check In With Your Furloughed Employees
   - Let your furloughed employees know the company is thinking about them - personal contact is the best.
   - Suggest supervisors and managers call their furloughed employees directly to see how they are doing.

3. Update Furloughed Employees With Company News
   - Send e-mail updates to the furloughed employees.
   - Provide encouraging news about the company.
   - Let the employees know that the company is thinking about them and hopes to return them to work as soon as possible.

4. Create a Website for the Furloughed Employees
   - Website could provide company updates
   - Could provide health living tips
   - Could provide suggestions on how employees can spend their time while out on furlough
   - Can provide links to benefits information, etc.
Returning to Work Amid COVID-19

The Workplace

• Arrangement and social distancing
• Flow of personnel
• Not business as usual - think it through
  - Visitors
  - Deliveries
  - Shipments
  - Meetings
  - “Audits” social or otherwise
  - Vending machines
  - Community areas
  - Food at meetings
  - “Bringing in donuts”
  - Smoking

The Workplace (cont.)

• Sanitation
  - Work area - employee responsibility
  - Deep clean
  - Common areas
• Testing for access
The People

- Hiring Protocol
- Attendance
- Recall Protocol
- Refusals to Work
- Commuting to Work
- Travel
- Application of work rules

- The working sick
- Compromised persons and accommodation issues
- Customer/Visitor interface
- PPE - desires/obligations
- Written affirmation of obligations and responsibilities

The Government

- OSHA
- Community compliance obligations
- “Accommodations”
- Workers Compensation
- Unemployment Compensation
- Social Compliance Audits
- Grants/Reimbursements

Safety in the Spotlight

- Challenges: novel virus; evolving guidance; nature of work environments (esp. manufacturing and customer facing)
- Legal Watch-out:
  - Early cases provide roadmap
    - *Rural Comm. Worker’s Alliance, v. Smithfield* (W.D. Mo.) - unsafe operation leading to spread
    - *Evans v. Wal-Mart* (N.D. Ill.) - wrongful death lawsuit
Minimizing Safety Risk

- Employee vs. Visitor Expectations
- Comply with CDC, OSHA, and state/local guidance
  - Facemask orders
- Testing (particularly at larger facilities)
- Employee affirmations of wellness
- Established procedures for responding to, tracing, and isolating cases of COVID in workforce
  - Certain jurisdictions prohibit requirement of Return to Work note BUT...

Testing

- Must be “accurate and reliable”
- Key Considerations:
  - Uniformity—who is tested, testing procedures, applicable threshold, consequences of “positive” result, refusals, and duration of program
  - Documentation options
  - Confidentiality
  - Time spent testing or waiting to test compensable

Testing (cont.)

- Thermo-scanner
- Visual observation
- Blood draws
- Nasal swab
- Frequency
- By Who?
Screening Questionnaire

- Questions: Whether employee/visitor or those in close contact have COVID symptoms, COVID diagnosis, or Health Care Provider directive to quarantine
  - Questions on high risk conditions? EEOC says permissible during pandemic, but consider risks
- Frequency of questionnaire
- Confidentiality and secure storage
- Time spent completing compensable and by who

Source of Exposure?

- OSHA
  - COVID-19 a recordable illness if work-related
  - OSHA will not enforce recordkeeping requirements unless there was objective evidence that case is work related
  - Develop guidance and train applicable personnel
- Worker’s Compensation
  - Do not discourage or prevent employees from filing claims
  - Employee generally has burden of establishing that illness arose out of employment
  - Monitor state law developments that shift burden or create presumption of work-relatedness
  - Safety violation penalties

Anticipated Litigation

- Consider as part of risk assessment but do not become paralyzed by fear of being sued:
  - OSHA exposure
  - NLRA challenges
- Liability shield?
  - 1000+ civil lawsuits across country
  - Push for federal-level protection
  - Not a get out of jail free card
Additional Considerations

- ADA/Wisconsin Disability implications
  - Handling high risk employees (disability or age)
  - Improper medical inquiries by managers
  - Is physical presence still an essential function?
- Wage/hour claims resulting from new safety procedures, telework, and reimbursable expenses
- FMLA Eligibility and Notice Obligations

Questions?

Thank You