



COVID-19 Update

May 2020

Employment Law Considerations as Our Economy Begins to Reopen

The reopening of our economy is underway, but things will not be business as usual. In addition to the general state of uncertainty, there are also a multitude of new restrictions, expectations, and legal obligations being imposed upon employers in an effort to keep employees, customers, vendors and others safe in the workplace.

The Equal Employment Opportunity Commission (EEOC) has issued new guidance that addresses several return-to-work issues. Many essential employers have already been taking employees' temperatures in order to monitor for symptoms of COVID-19. The new guidance suggests that employers may be able to go even further under certain circumstances, and require testing in order for employees to return to work. The guidance also sets forth requirements on how employers must protect information that they obtain through any type of testing, and explains the limited circumstances when employers may disclose the identity of an employee who tests positive for COVID-19.

Employers have confronted a number of accommodation issues during the coronavirus pandemic, and will face even more as a greater number of employees return to onsite operations. Employees who have disabilities that place them at greater risk may request an accommodation to reduce or eliminate possible exposure. The EEOC guidance provides instruction on this situation. At the same time, the guidance recognizes that it may be more difficult for employers to provide accommodations related to any type of request in the current environment, due to both potential delays in obtaining necessary supplies or equipment and loss of revenue. In fact, the EEOC specifically recognizes that an accommodation that may not have been an undue hardship a few months ago may well

be one now. Employers should work closely with counsel in evaluating requested accommodations, and in determining whether a proposed accommodation (1) is reasonable, and if it is, (2) would create an undue hardship.

In connection with reopening, there are state orders and recommendations regarding the use of facial coverings and other protective gear by employees. However, the EEOC further complicates the question of how to comply by instructing that some employees may be entitled to a religious or disability-related accommodation that would require that these standards be modified or eliminated.

Further, while states are issuing directives in relation to safe business practices to be implemented for a return to work as our economy reopens, employers should also keep in mind the interplay of these state directives and various federal laws applicable to employers and safe work practices. The Occupational Safety and Health Administration (OSHA) has made clear that with the advent of the COVID-19 pandemic in our country, the federal OSHA regulations do apply to this pandemic and COVID-19 exposures in the workplace. Moreover, in many cases what is being "recommended" as a safe practice by state and local governments and the Centers for Disease Control (CDC) for the public is legally *required* of employers where violations can result in civil and criminal penalties. Finally, in some cases, federal law requirements applicable to employers to maintain safe workplaces as relating to potential COVID-19 exposures may exceed what is being otherwise recommended by state and local governments or the CDC. This is also important to keep in mind regarding potential legal exposure to claims by employees and

customers if they allegedly contract COVID-19 in connection with an employer's business.

OSHA has a general duty clause, set forth in 29 U.S.C. 654, that requires employers to provide employees with a workplace that is free from recognized hazards. Additionally, there are a number of specific federal regulations that apply, including OSHA's personal protective equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which requires using gloves, eye and face protection, and appropriate respiratory protection when job hazards warrant it. Note that not all face coverings are considered respiratory protection, and thus, the face covering to be worn by an employee may or may not be respiratory protection subject to OSHA standards and related obligations. If job conditions do place employees at risk of COVID-19 exposures, then PPE may be legally required under OSHA standards along with a comprehensive respiratory protection program to follow beyond state and CDC directives for face coverings.

OSHA, through existing federal regulations, places obligations on employers for tracking COVID-19 exposures in the workplace and making that information available, if requested, by other impacted employees. The obligations are intertwined with the related Americans with Disabilities Act privacy considerations for individual employees who may have COVID-19. There are recording and reporting obligations under OSHA regulations as applicable to cases of employee contracted COVID-19 exposures, including where, how, or whether workers' compensation claims for these conditions could, but not necessarily, impact these recording and reporting obligations.

While states and the CDC are recommending that workplaces be kept sanitized, that is an area of law already subject to detailed federal OSHA regulations. Finally, employers must address their training obligations, under federal OSHA regulations, to both warn and train employees on how to stay reasonably safe from COVID-19 exposures in the workplace, which would need to be tailored according to job duties and anticipated risks.

FOR MORE INFORMATION

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ADDITIONAL RESOURCES

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force web page](#) for additional information and resources.

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