Return to Work and COVID-19

NCHER Presentation
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Visit Our COVID-19 Disease Resource Center

Ballard Spahr COVID-19 Resource Center
Leadership & Planning

• Establish a team or task force to oversee planning, execution and monitoring
• Conduct COVID-19 risk/hazard assessment
• Create the Reopening Plan
• Communicate the plan and the right to modify the plan
• Undertake regular monitoring and updates
• Document the process
Reopening Plan

• Health and safety mitigation measures
• COVID-19 response process
• Staffing (e.g., security, janitorial, screening)
• Workplace screening and testing
• Leave and other employee concerns
• Transition from partial remote to in-person operations
• Recall and rehiring processes
• Communication and education plan
• Consider retrenchment, if needed
Policies & Protocols

• Social distancing
• Hand washing
• Cleaning & sanitation
• PPE (face coverings, gloves)
• Scheduling, breaks, shifts, interaction
• Workspace and movement (entry, exit, elevators, common space)
• Screening and testing
• COVID-19 “Open Door” policy
• ADA and accommodation requests
• Leave and attendance policies
Monitoring and Compliance

• Regular and ongoing review of guidance – public orders, CDC, OSHA, etc.
  – Adjust reopening plan based on changes

• Be prepared to address issues as they arise
  – Consider “coordinators” in departments and facilities to oversee compliance
  – Establish “open door” policy to report, investigate, remediate issues and complaints

• Media/PR issues
Liability Mitigation

• Third Party Agreements
  - Staffing agencies
  - Lease agreements (common space)
  - Cleaning and janitorial
  - Screening and testing vendor

• Insurance
  - Workers’ compensation coverage (employee infections)
  - General liability coverage (infection of customers, vendors, third parties)
Health & Safety & Operations
OSHA Duty & Standard of Care

• General duty to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

• No specific, mandatory COVID standards

• Protection for employees who refuse to engage in dangerous work when subjectively and objectively dangerous, employer refuses to eliminate danger and there is no time to correct through enforcement channels
Engineering & Administrative Controls

- Cleaning/disinfection protocols
- Work area partitions, workspace configuration, Plexiglas
- Social distancing protocols
- Reconfiguring work spaces
- Limiting in-person interaction (cohorting)
- Scheduling changes (staggered shifts, teams)
- Continued remote work

- Additional time clocks to limit congregation of workers
- Single file movement (could include directional arrows like in store aisles)
- Additional breaks and changed schedules
- Reviewing and revising sick time and leave policies
- PPE: face coverings (already required in some states), gloves
Personal Protective Equipment

- Considerations include:
  - Who provides?
  - What kinds?
  - Who will be required to wear it?
  - Under what circumstances?
  - What do to with people who refuse?
- Following OSHA standards
- Handling requests for religious or medical exemptions
Testing and Screening Protocols

• In some jurisdictions, COVID-19 screening or testing may be required
• Where not required, considerations include:
  – What to test?
  – Who to test?
  – How to test?
• Maintaining records; confidentiality
  – HIPAA
  – ADA
  – Consent
• Accommodations
Wage and Hour and Related Issues

• FLSA
  – Exempt vs. non-exempt
  – Integral and indispensable vs. preliminary and postliminary activities
  – *De minimis* rules

• State and local wage and hour laws

• Independent contractor and joint employment concerns
Exposure Response

- COVID-19 emergency response plan that follows CDC guidance and applicable public orders
- If an individual is confirmed to have COVID-19, inform employees (and others?) who had close exposure
  - Maintain confidentiality as required by the ADA - do not disclose names of individuals who have or suspected to have COVID-19
  - Close exposure = within 6 feet for more than 15 minutes
- Disinfecting and isolation and screening measures
Exposure Response

• Individuals exhibiting COVID-19 symptoms should immediately be separated from others and isolated.

• Individuals with symptoms or positive tests should not be permitted to return to work until they have met the CDC’s latest criteria to discontinue home isolation:
  – At least 10 days have passed since symptoms first appeared & 3 days since recovery under symptom-based strategy
  – Or no symptoms and 2 negative tests 24 hours apart
  – Different standards for essential employees
Signs/Postings

• Posting reminders about the new policies in the workplace, such as reminders to wash hands and social distance, one direction hallways, break/lunch rooms

• OSHA industry specific posters

• DOL FFCRA/Employee Rights poster
Workforce Issues
Remote vs. In-Person Work

• Should you continue to offer remote work?
• Phasing back workforce with continued balance between remote work and in-person work
• Voluntary vs. mandatory return to in-person work
• Remote work policies if continuing
• Managing requests for continued telework
• Remote work as reasonable accommodation
Return to In Person Work

• As employees return to in person work, be prepared to address:
  — Communication with employees about safety measures
  — Requests for accommodation
  — Potential changes to leave and attendance policies
  — Changes in business and travel policies
  — Changes in benefit plan design
Wage & Hour Concerns

• Exempt Employees—
  – Due to staffing shortages, exempt employees may have been performing nonexempt tasks
  – Does this sacrifice the exemption?

• Temporarily converted to non-exempt—
  – Because of decreased work demands, some employers may have converted exempt employees to nonexempt

• Capturing work time for non-exempt employees who continue to work remotely
Employees Who Refuse to Return

- Employees may not want to return:
  - Fear about contracting COVID-19 at work or during their commute
  - Underlying health conditions that make them particularly susceptible to falling ill if they contract the virus or high risk family member
  - Childcare issues
  - Supplemental unemployment benefits pay more than working

- Response depends on whether reason has legal protections
High Risk Employees

• Employers may seek to exclude high-risk employees or the employees may request not to return to avoid exposure
  – Direct threat analysis under ADA
  – Interactive process and reasonable accommodation
  – Pregnant employees
  – Older employees

• Indefinite leave is not a reasonable accommodation – what about indefinite remote work?
Leave Issues

- FFCRA leave
- FMLA
- State and local leave
- Employer policies
Families First Coronavirus Response Act

- Two forms of new federal leave for COVID-19 events
  - Emergency Paid Sick Leave (EPSL): 80 hours
  - FMLA-Public Health Emergency (PHE) Leave: 12 workweeks of FMLA leave (including EPSL)
- Covered employers: private employers with less than 500 employees. Exemption for small business with fewer than 50 employees
- Both paid leaves subject to maximum dollar caps
- Available for different, but overlapping reasons, until December 31, 2020
State & Local Leave Laws

- FFCRA does not preempt or supersede other laws
- Some states and locales have enacted or amended leave laws to cover COVID-19 situations
  - These provisions vary from jurisdiction to jurisdiction
- Others already apply leave to certain public health emergencies impacting work or school
Labor Issues

• Responding to information requests
• Duty to bargain plans to reopen
• Negotiable subjects
• Force Majeure clauses
• Exigent circumstances exception
Protected, Concerted Activity

• Refusing to work based on safety concerns – objective standard
• Invoking health/safety provisions of the CBA
• Speaking to the media about PPE
• Walk-outs to protest an employer’s handling of the pandemic
• Sick-outs
• Demanding hazard pay and safety gear
• Demanding paid leave for COVID-19
Questions?