

Getting Back to Work During COVID-19: What's the New Normal?

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Agenda

1. Ensuring employee and customer safety in the workplace and beyond;
2. Policies every business must have to reduce liability and workplace risks; and
3. Preparing for the avalanche of new legal claims on the horizon

Safety Regulations

For now: best practice is to follow Occupational Safety Health Act (OSHA) and CDC guidelines. If followed, liability for injury to employees is less likely.

- **AFL-CIO lawsuit against the DOL**
- **Several proposals in Congress for legislation:**
 - OSHA must promulgate federal safety regulations mandating companies to protect high-risk workers or all workers
 - Republican proposal: limit liability of companies
 - if they are following public health guidelines to the best of their abilities
 - NO immunity for grossly negligent or intentional misconduct

What Does a Safe Workplace Look Like?

- Modify layout if possible so that workers are adequately spaced out / not facing each other
 - Break and rest room rules, clock in, elevators
- Consider erecting physical partitions like plexiglass or cubicles between workers.
- For a large or spread-out workplace, appoint monitors to ensure that social distancing rules are being followed.
- Post rules / visitor advisories.
- Appoint a “qualified workplace coordinator” to oversee coronavirus mitigation efforts and answer questions
- Training employees how to reduce exposure and cleaning is key

Ensuring Employee Safety

Adopt and enforce policies which prevent spread of illness:

- ✓ Limit in-person meetings, no more than 10 in groups, maximize telecommuting
- ✓ Encourage calling out, if in doubt
- ✓ Provide paid leave or unpaid with guaranteed return to position
- ✓ Require hand cleaning on a regular basis and before beginning work
- ✓ Regular sanitization and deep cleaning as needed (find contractor)
- ✓ Wearing masks or gloves as appropriate (who provides?)
- ✓ Distancing
- ✓ Regularly sanitize any shared areas, tools or equipment

Monitoring Symptoms

- Tests are permitted; high number of false positive antibodies tests
- Temperature screenings – who does these? Training.
- Customers/visitors?
- Symptoms checklist – basic questionnaire
- Pay for time being screened
- Training on policies including to whom to report or direct questions

Ensuring Customer Safety

- Limit number of visitors/customers
- Mandate masks
- Generous return policies and/or returns only via mail
- Barriers between public and workers
- Distancing: seating and floor decals
- Take-out, pick-up, delivery services, or by appointment only
- Increase circulation

More For Customer Safety

- Increase common touch surface cleaning (handles, carts, pens, doorknobs)
- Clean hands after touching money / touch screens
- Customer disposes of items – dishware, utensils.
- Customer brings own bags or containers
- Have deep cleaning service on call
- Encourage ordering on-line or calling before coming in
- Non-punitive cancelation policies

Updating Current Policies

Where should you start?

- Review Policies and Consider Modifications:
 - Sanitization and Distancing
 - Sick Leave
 - Family and Medical Leave
 - Employee Leaves of Absences
 - Teleworking
 - Paid Time Off

Implementing New Policies & Procedures

What new policies and procedures should you consider?

- Policies limiting gatherings in the office and limiting seating in breakrooms and communal areas
- Employee testing or self-reporting symptoms
- Scheduling policies
- Commuting and travel policies
- Telework policy
- Enhanced anti-retaliation policy
- State specific laws
- Employee leave requests and tracking procedures

Other Policy Considerations

What else should you be thinking about?

- Consistency in Selecting Employees for Testing
- Wage and Hour Considerations
- Establish, Communicate and Adhere to Clear and Uniform Standards – leave, layoffs, bonuses
- Maintaining Confidentiality of Test Records
- Develop a Response to Employees Who Refuse Testing

******Require sign-off on policies*

Preparing for the Avalanche of New Claims

- Occupational Safety and Health Act
- Workers' Compensation & Negligence
- Americans with Disabilities Act
- Families First Coronavirus Response Act & Other Sick Leave
- Family Medical Leave Act
- Wage and Hour Laws – Timekeeping, Compensable Time & Exempt Status
- Unemployment Compensation Issues
- WARN Act
- CBA violations
- Discrimination claims including disparate impact
- Whistleblower claims

Preparing for the Avalanche of New Claims

A Hazard Free Workplace

- **Occupational Safety and Health Act**
 - General duty clause, but no private right of action
 - Complaints filed with the DOL
 - Recordkeeping requirements
- **Workers' Compensation & Negligence**
 - May cover when employee contracts COVID-19 at work
 - Negligence or wrongful death (limited to family members)

Preparing for the Avalanche of New Claims

Medical & Leave Issues

- **Americans with Disabilities Act**
 - Requests for accommodations – expect increase in accommodation requests from employees with underlying medical issues, including mental health
 - If an employee's job can't be performed remotely, and the employee has a disability making them more susceptible to severe effects or complications of COVID
 - consider the cost, and whether the employee will only require the accommodation for a limited period of time (for the duration of the pandemic)
 - Boundaries of proper medical inquiries

Preparing for the Avalanche of New Claims

Other Medical & Leave Issues

- **Families First Act & Other Sick Leave**
 - Coverage & applicability
 - Caregiver discrimination
 - State & city mandated leave – including expansions
 - Retaliation – suits already filed
- **Family Medical Leave Act**
 - Considering applicability for COVID-19 related issues
 - Subtraction from weeks of childcare under FFCRA

Preparing for the Avalanche of New Claims

Compensation Issues

- **Wage and Hour Laws**
 - Classification of employees
 - Recording time worked remotely
 - Time spent undergoing screenings
- **Unemployment Compensation Issues**
 - Employees who request to stay on UC

Preparing for the Avalanche of New Claims

WARN Act Claims:

- The WARN Act requires employers with 100 or more employees to provide at least 60 calendar days advance written notice of a plant closing and mass layoff affecting 50 or more employees at a single site of employment.
 - “Mini” WARN Acts
- An employer that violates the WARN Act notice requirement is liable to each affected employee for an amount equal to back pay and benefits for the period of violation up to 60 days
- A temporary layoff of six months or less is not an "employment loss" under WARN. But a plant closing or mass layoff that is intended to be temporary will trigger WARN obligations if it later turns out to exceed six months
- WARN makes certain exceptions to the 60 day notice requirement when layoffs occur due to unforeseeable business circumstances, faltering companies, and natural disasters. But notice should still be issued as soon as practicable.

Preparing for the Avalanche of New Claims

Potential violations of a Collective Bargaining Agreement

- NLRB has recognized employer ability to take certain steps without Union approval or bargaining when there are exigent circumstances.
- May be a duty to bargain over changes to mandatory subjects like scheduling, meal and rest breaks, work assignments, layoffs, and other terms and conditions of employment. Employers should consider how a contemplated change in response to COVID-19 may impact a CBA.

Preparing for the Avalanche of New Claims

Disparate Impact: layoffs, bonuses, duty changes

- Decisions will open the door to possible claims for discrimination due to disparate impact or racial identity (Asian)
- When cutbacks occur, target retaining best – not necessarily most tenured - employees
- Employers should clearly set out and document non-discriminatory reasons for adverse employment decisions and make sure those reasons are applied objectively – layoffs are no exception

Preparing for the Avalanche of New Claims

Whistleblower Claims:

- An adverse employment action taken by an employer in response to an employee's reasonable, good-faith complaint that the employer has violated workplace safety laws could serve as a basis for a retaliation claim
- Employees claiming to be subject to retaliation for raising concerns about health and safety or compliance with laws, including COVID-19-related directives.
- Workers who are terminated for voicing concerns about working conditions facilities may have a retaliation claim under the NLRA.
- False Claims Act

Update Your Policies!

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