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Pandemic Pandemonium: Navigating Employment Considerations in the Face of COVID-19

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The global outbreak of COVID-19¹ presents significant issues for employers attempting to manage global and domestic workforces, address business disruptions, and navigate developing regulatory guidance and requirements. COVID-19 has led to seismic disruptions for employers, irrespective of their size or earlier financial stability. Amidst this pandemic, employers are continuing to wrestle with several challenges, including understanding and complying with new and existing laws, implementing workplace safety measures, and monitoring evolving federal, state, and local government responses and restrictions. Further, employers are beginning to assess re-open strategies and preparing to implement innovative solutions to an altered operational landscape. This article addresses how COVID-19 has affected businesses from an employment perspective; provide an overview of various regulatory changes; and identify future considerations as employers develop return-to-work strategies within the shadow of COVID-19.

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KEY COVID-19 EVENTS AFFECTING EMPLOYERS

Starting in late 2019, a new coronavirus was identified.² In the first quarter of 2020, the United States was forced to quickly grapple with the ever-changing landscape of COVID-19's impact on everyday life, including working conditions. Notably, on January 21, 2020, the Centers for Disease Control and Prevention (CDC) and the Washington State Department of Health announced that the first United States case of COVID-19 occurred in Washington State. In the weeks that followed, the spread of COVID-19 across the United States began to create increasing challenges across private and public workforces and across many, if not all, employment sectors. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic, which changed the legal framework against which employers were making employment decisions. Soon the United States was focused on how to flatten the curve and efforts turned to social distancing, including in the workplace. On March 19, 2020, California Governor Gavin Newsom announced the first statewide shelter-in-place order. Soon, state and local governments throughout the United States were issuing stay-at-home and/or shelter-in-place orders, which had impacts on business operations, including forcing nonessential businesses to have their workforces working remotely and/or not working at all. In the second quarter of 2020, the United States is still coping with the myriad of issues caused by COVID-19, including issues affecting employers, whether they have essential or nonessential businesses or operations.

THE CONTINUING EFFECTS OF COVID-19 ON EMPLOYERS

First, for many larger employers forced to shut their doors temporarily, conduct mass layoffs or furloughs of workers, significantly reduce hours, or cease operations entirely, the Worker Adjustment and Retraining Notification Act of 1988, commonly referred to as WARN, imposes certain notice requirements. Employers that may be covered³ must assess whether their intended layoffs or closures may trigger WARN notice requirements. Moreover, several states have their own "mini" WARN Acts that impose varying requirements and, in most instances, lower triggering numerical thresholds that employers must also consider when conducting a mass layoff or closure. Some states have other notice requirements and guidelines on notifying certain government agencies, such as a state department of labor or unemployment compensation commission.⁴ Similarly, employers considering pay-rate or other benefit reductions must review various notice requirements and restrictions under state law.

Second, for employers deciding whether to remain open, various federal, state, and local laws, orders, and regulations must guide those decisions. As COVID-19 began to disrupt employer operations across the United States, many states and local governments ordered non-essential businesses to close. On March 28, 2020, the Cybersecurity and Infrastructure Security Agency (CISA), tasked with executing the Secretary of Homeland Security's authority to secure critical infrastructure, issued an advisory list on critical infrastructure, sectors, workers, and functions that should continue during the COVID-19 response across all jurisdictions.⁵ CISA, however, emphasized that the list is only advisory in nature and intended to support state, local, tribal, territorial, and industry partners in identifying the critical infrastructure workers and sectors needed throughout the COVID-19 response.

Third, employers that have remained open during this pandemic have faced a host of challenges in ensuring business continuity. The Occupational Safety and Health Administration (OSHA) has issued *Guidance on Preparing Workplaces for COVID-19*,⁶ which contains recommendations intended to assist employers in providing a safe and healthful workplace. Furthermore, the Centers for Disease Control and Prevention (CDC) has issued detailed guidance instructing employers to respond in a flexible way to varying levels of disease transmission in the community and to be prepared to refine their business response plans as needed.⁷ Among the CDC's recommendations to reduce transmission among employees are (1) actively encouraging sick employees to stay home, (2) identifying where and how workers might be exposed to COVID-19 at work, (3) separating sick employees, and (4) educating employees on how they can reduce the spread of COVID-19. Furthermore, the CDC, as well as the U.S. Department of Labor, has encouraged employers to implement flexible sick leave and supportive policies during the pandemic. Additionally, in order to maintain a healthy work environment, the CDC has recommended that employers: (1) consider increasing ventilation rates and the percentage of outdoor air that circulates into a building ventilation system; (2) promote respiratory etiquette and hand hygiene for employees, customers, and worksite visitors; (3) perform routine environmental cleaning and disinfection; (4) advise employees before traveling to take additional preparations; and (5) adjust meeting and gathering requirements. Importantly, employers must take heightened measures and consider additional action-steps in the event an employee tests positive with COVID-19, including possible reporting requirements to OSHA.⁸

Lastly,⁹ employers should continue to be mindful of their unchanged obligations under various employment laws, including the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act

(FMLA), and various state sick leave, unemployment, and workers' compensation laws.

The ADA prohibits covered employers from making disability-related inquiries and requiring medical examinations unless the employer can show that the inquiry or exam is job-related and consistent with business necessity, or where the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The Equal Employment Opportunity Commission (EEOC) has stated that during a pandemic, the ADA allows employers to ask employees if they are experiencing symptoms of the pandemic virus. Employers, however, must maintain all information about employee illness as a confidential medical record in compliance with the ADA. Furthermore, the EEOC has also stated that because the CDC and state and local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperatures. Employers should ensure they have proper temperature-taking policies in place. Under Title VII, covered employers must continue to make all employment decisions, including pay-rate reductions, furloughs, and telework-arrangements in a nondiscriminatory manner. Employers cannot select employees for disparate treatment based on various protected classes under Title VII and state laws. In particular, the CDC has cautioned against showing prejudice to people of Asian descent during this pandemic. Under the FLSA, employers must be mindful of minimum wage requirements, proper employee classifications as exempt or nonexempt, and other compensation considerations. Lastly, covered employers should continue to provide FMLA leave to eligible employees irrespective of the additional leave entitlements provided in the Families First Coronavirus Response Act (FFCRA), further described below in this article.

GOVERNING DURING THE PANDEMIC

State and Local Government Reaction

State governments responded to the COVID-19 pandemic with varying measures, more stringent in states with earlier and more concentrated numbers of positive cases. In particular, all 50 states declared states of emergency, and all but five states¹⁰ enacted executive or emergency orders instructing citizens to shelter-in-place or stay-at-home, and closing operations at all nonessential businesses as determined by the orders or under the federal CISA guidance. For employers with

operations in these states, it is important to accurately assess (1) if the business is considered essential; and (2) any mandatory restrictions on operations, from cleaning protocols to customer restrictions and use of personal protective equipment (PPE). Furthermore, employers deemed essential should consider employee mobility restrictions within the state and plan appropriately. Such plans may include providing employees with some form of proof of employment in case local law enforcement or health department authorities stop an employee traveling to or from work. In addition to the shelter-in-place or stay-at-home orders, state and local governments have imposed requirements on employers to provide face coverings to employees who continue to report to a worksite and/or interact with the public. Employers should comply with these mandates, while simultaneously evaluating other personnel policies, such as dress and grooming codes, to avoid contradictory directives to employees.

Additionally, many states have eased regulations governing unemployment insurance eligibility, from waiving initial waiting periods and easing work search requirements, to extending benefits to otherwise unqualified workers. Other states have extended mandatory paid sick and family leave benefits to employees, requiring employers to provide additional leave entitlements for employees affected by COVID-19. Furthermore, employers should be aware that states may enact temporary changes to workers' compensation regimes to allow for employees to file claims related to a COVID-19 diagnosis. For example, the Illinois Workers' Compensation Commission enacted a temporary rule setting forth a rebuttable presumption that the workplace was the cause of a person getting COVID-19. Therefore, employees, especially those at essential businesses, will likely be able to get workers' compensation benefits if they are diagnosed with COVID-19.

Responding at the Federal Level

Both the federal and the various state governments have responded to the COVID-19 pandemic through legislation, executive orders, and regulatory changes. As one of the initial federal legislative responses to the COVID-19 pandemic, the FFCRA¹¹ went into effect on April 1, 2020. The FFCRA contains multiple provisions aimed at extending temporary relief through December 31, 2020, to eligible employees affected by the COVID-19 pandemic, which in turn imposes various leave requirements on employers, though only those with fewer than 500 employees. In addition to emergency paid sick leave, the FFCRA amends the FMLA¹² to provide for an expansion of eligibility for leave for certain employees and provides for payments to employees

taking unpaid leave for childcare purposes due to the COVID-19 outbreak. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.

In order to be eligible for the tax credit, employers must obtain from employees who are requesting FFCRA leave a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Furthermore, an employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. Since the FFCRA extends paid leave eligibility to employees through December 31, 2020, employers should maintain compliance with all provisions, specifically any documentation requirements, to ensure receipt of all available tax credits. As businesses begin to restore operational capacity, employers must continue to comply with the FFCRA's provision, even as provision of leave may affect staffing levels, especially with the extended school closures due to COVID-19.

As part of a separate legislative response, the federal government enacted a multi-faceted aid package containing a combination of funding for public health programs, tax benefits for businesses and individuals, appropriations for government programs supporting coronavirus relief efforts, and other items to help stabilize the economy. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)¹³ is a multifaceted relief program, with a specific program directed toward small businesses and certain industries. Specifically, the bill enables small businesses to tap into an assortment of loans and loan guarantees to help maintain ongoing operations during the crisis. The CARES Act also created the Paycheck Protection Program (PPP), which allows a special class of business concerns to qualify for forgivable Small Business Administration (SBA) loans.¹⁴ Under the PPP, the SBA will forgive loans if the employer either retains or restores its workforce to pre-pandemic levels and uses no less than 75 percent of the loan proceeds for payroll costs. Employers that received PPP loans should be aware that forgiveness will be reduced if full-time headcount declines or if salaries and wages decrease. Additionally, the CARES Act provides payroll tax credits or deferrals to qualifying employers and qualifying wages.

Under both the FFCRA and CARES Act, the federal government expanded the unemployment insurance benefits available to workers affected by COVID-19, including for workers who are not ordinarily eligible for unemployment benefits. The benefits cover weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 during the period January 27, 2020 through December 31, 2020. Workers must have experienced a job loss or reduced hours through no fault of their own, not be able to telework, and be able

and available to work (as defined under existing state law) but for the fact that a specific COVID-19–related reason has caused them to be unable to work, including a worker’s own or household member’s diagnosis of or quarantine related to COVID-19; a worker’s need to care for a family or household member with COVID-19; a worker’s need to provide childcare as a result of a COVID-19 closure; the closure of a business due to COVID-19; a worker’s inability to reach the worksite due to a quarantine; and a worker’s need to quit a job as a direct result of COVID-19.

Envisioning a Post-Pandemic Workplace

As both the federal and state governments look ahead to reopening the country and loosening restrictions on business and social functions, employers will be required to comply with various directives. On April 16, 2020, the federal government released its plan¹⁵ for “Opening Up America Again,” which outlines the process for states to determine the appropriate time to resume economic and social activities within its boundaries and provides different phases for reopening. Furthermore, governors have formed regional coalitions to address reopening strategies, with the Northeast, Midwest, and Pacific Northwest coordinating their responses. Given the federal government’s directive that states will determine the optimal time to reduce restrictions and begin to reopen local economies, employers should be cognizant of all state and municipal orders, as well as specific federal guidance, especially from the CDC and OSHA, before returning to pre-pandemic operations. As these orders likely will address both timelines for returning to work as well as additional precautions, such as mandated face coverings for employees and customers, increased telework opportunities, and social distancing requirements, employers should anticipate changes, at times significant, to standard operating procedures, workplace policies—and the workplace itself. Indeed, the EEOC began to issue “return to work” guidance on April 17, 2020, related to the ADA and protective gear inquiries.¹⁶

It is difficult to predict what the future will hold for the workforce in the United States in a post-pandemic world. There are some common issues employers are considering and following as the landscape continues to change as we approach a post-pandemic workforce. For example:

- What are the obligations to provide PPE, and what PPE must be provided?
- Who will pay for and provide the PPE—employers or employees?

- May employers conduct health screenings (*e.g.*, temperature readings, COVID-19 tests, and antibody tests) on employees and job candidates in a post-pandemic world?
- Should employers permit teleworking once shelter-in-place or stay-at-home orders are lifted for some or all employees?
- Should companies curtail business travel now that the world is getting more comfortable with remote meetings?
- Should companies have established pandemic and natural disaster plans that are revisited annually?

Though there exists uncertainty as to an exact timeline for reopening, employers should be prepared for a vastly different workplace as the country adapts to life during and even after the COVID-19 period.

NOTES

1. Reflecting the rapid development of this situation, the name of the virus and the disease it causes changed as it emerged in the world. At times, the virus's name and the disease were used interchangeably, but there is a difference between the virus' name (*e.g.*, human immunodeficiency virus or HIV) and the disease it causes (*e.g.*, acquired immune deficiency syndrome or AIDS). On February 11, 2020, the International Committee on Taxonomy of Viruses named the virus responsible for causing the coronavirus disease COVID-19 the "severe acute respiratory syndrome coronavirus 2" (SARS-CoV-2). The same day, the World Health Organization officially named the disease "COVID-19," which had been known as 2019 novel coronavirus.

2. Currently, the scientific consensus appears to be that COVID-19 originated in China. Specifically, toward the end of December 2019, authorities in Wuhan, Hubei province, China, announced a cluster of cases of pneumonia associated with a local seafood wholesale market for which a cause had not yet been identified.

3. Any employer with 100 or more full-time employees nationwide comes under the purview of WARN. WARN also covers any employer with 100 or more employees nationwide if the total hours worked, excluding overtime, are at least 4,000 per week, with the hours worked by part-time and full-time employees both counting toward the 4,000 total.

4. The following states have mini-WARN laws: California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan (voluntary basis only), Minnesota (voluntary basis only), New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Vermont, and Wisconsin.

5. The sectors deemed critical infrastructure by CISA include (1) health care/public health, (2) law enforcement, public safety, and other first responders, (3) food and agriculture, (4) energy, (5) water and wastewater, (6) transportation and logistics, (7) public works and infrastructure support services, (8) communications and information

technology, (9) other community or government-based operations and essential functions, (10) critical manufacturing, (11) hazardous materials, (12) financial services, (13) chemical, (14) defense industrial base, (15) commercial facilities, (16) residential/shelter facilities and services, and (17) hygiene products and services.

6. See “Guidance on Preparing Workplaces for COVID-19” available at <https://www.osba.gov/Publications/OSHA3990.pdf>.

7. See “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019” available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

8. See “Enforcement Guidance for Recording Cases of Coronavirus 2019” available at <https://www.osba.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

9. This list provides examples of some of the many considerations and effects employers are facing due to the outbreak of COVID-19. It is not intended to be an exhaustive list of the myriad issues, challenges, and requirements employers must consider during this pandemic and in the post-pandemic world.

10. As of April 17, 2020, Arkansas, Iowa, Nebraska, North Dakota, and South Dakota had not implemented stay-at-home orders.

11. P.L. 116-127 (2019–2020).

12. 29 U.S.C. 2601, *et seq.*

13. P.L. 116-136 (2019–2020).

14. As of April 16, 2020, the SBA publicly announced that the PPP funds had been exhausted and no new applications would be accepted. Additional funding is anticipated.

15. See “Guidelines for Opening Up America Again” available at <https://int.nyt.com/data/documenthelper/6890-guidelines-pdf/124d0959e9a00d2779b0/optimized/full.pdf#page=1>.

16. See “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” available at: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

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