Playing it Safe: Corporate Counsel's Role in Reopening Businesses During the COVID-19 Pandemic

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As the state slowly "reopens" and we look toward a new normal, the focus of corporate counsel will shift from operating reactively in "crisis mode" to cultivating a measured strategy for returning employees to in-office work and fully restoring business operations during the COVID-19 pandemic.

Companies must navigate the various health and safety requirements to ensure they are reopening in a way that is safe for their employees and customers and that limits potential corporate liability. Essential businesses that continued to operate through the shutdown are already facing lawsuits directly related to COVID-19, and pandemic-related employment litigation is expected to increase considerably as employees return to the workplace. To mitigate the risk of such litigation, counsel will need to stay up-to-date on evolving public health guidance and industry standards, develop new (and, hopefully, temporary) employment policies and procedures, and ensure compliance with both established and brand-new employment laws.

Employee Safety Concerns Associated with Reopening

An Employer's Legal Duty to Provide a Safe Workplace

Employees have already filed thousands of complaints with the Occupational Safety and Hazard Administration ("OSHA") against their employers based on purported potential exposure to COVID-19 or lack of safety measures designed to protect them from exposure to the virus.[1] Some companies, such as Walmart and McDonalds, have already been sued for claims related to potential exposure to COVID-19 in the workplace. [2]

Employers have a legal obligation to provide employees with a safe workplace. OSHA's General Duty Clause requires employers to provide employees with "employment and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm." Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29

[1] *See* Peter Whoriskey, et. al., *Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show*, WASHINGTON POST, (April 16, 2020), https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/.

[2] Toney Evans v. Walmart, Inc., et. al., Case No. 2020L003938 (Circuit Court of Cook County, Illinois) (filed April 6, 2020); Taynarvis Massey, et. al. v. McDonald's Corporation, et. al., Case No. 2020CH04247 (Circuit Court of Cook County, Illinois) (filed May 19, 2020).

U.S.C. § 654(a)(1). Compliance with the General Duty Clause will be challenging at best because employers cannot ensure that an employee will not be exposed to COVID-19 in the workplace. However, employers can take certain safety precautions to protect the health and safety of their employees and reduce the risk of OSHA complaints or litigation.

Consulting Appropriate Guidance to Inform a Reopening Plan

Companies should ensure that their reopening measures strictly comply with directives, including industry-specific guidance, from the Centers of Disease Control and Prevention ("CDC"); state and local health orders, including those from Governor McMaster and the South Carolina Department of Health and Environmental Control ("DHEC"); and OSHA.

This is a tall order, as not all directives comport with one another and the guidance changes frequently. For example, in late April, DHEC's reopening guidance described a fever as 100.0°F, which was not consistent with the CDC's definition of fever as 100.4°F or greater. As of early June, DHEC's guidance regarding fevers is now consistent with the CDC, but other guidance may still differ and continue to change.

Corporate counsel should consult closely with human resources and outside counsel to formulate a reopening approach that is informed by the most up-to-date guidance and tailored to their particular industry. Further, periodic changes to the reopening plan may be necessary, as COVID-19 public health guidance continues to develop over time.

Avoiding Legal Pitfalls in Implementing Necessary Safety Policies and Protocols

To comply with applicable health directives, assuage employee concerns about returning to the workplace, and minimize the risk of infection in the workplace and litigation related thereto, companies should consider implementing new COVID-19 personnel policies and procedures, such as a social-distancing policy, a face-covering policy, and symptom-screening protocols. To minimize the likelihood that a safety measure intended to mitigate risk of workplace infection results in employment litigation, corporate counsel should be mindful of potential legal pitfalls associated with these policies and protocols.

For example, companies may implement a temperature testing policy to comply with the CDC's current recommendation that employers conduct a daily health screen of employees. While the Equal Employment Opportunity Commission ("EEOC") has issued guidelines that allow employers to measure an employee's body temperature, the guidelines do not tell employers *how* to administer the temperature testing. Companies may decide to have employees self-administer a temperature test at home before reporting to work. Other companies may choose to contract with a medical professional, such as a registered nurse, to administer daily temperature tests to employees upon arrival at work. Others may elect to have employees self-administer the temperature test each day at the workplace with verification of the temperature reading by a designated and trained manager.

Whatever screening protocol a company chooses to implement, corporate counsel must consider the associated legal risks. For instance, employers must consider the privacy law implications of requiring employees to submit to a medical examination. Consistent with requirements imposed by the Americans with Disabilities Act ("ADA"), employers must keep an employee's medical information (including the employee's body temperature) confidential and separate from the employee's personnel file. Employers also should obtain consent from employees before

requiring any type of medical examination, including a temperature screening. If employers deputize an employee to conduct the temperature screening of other employees, the employer should provide the deputized employee with appropriate training and personal protective equipment ("PPE"). Additionally, under the Fair Labor Standards Act ("FLSA"), nonexempt employees must be paid for all time worked, including the time associated with symptom screening. Corporate counsel should work closely with outside counsel to ensure that all of these issues, as well as others, are considered in implementing COVID-19 protocols and policies.

A company's risk-reduction efforts must also include developing a response plan to address an employee's positive or presumptively positive COVID-19 test. The response plan should contain steps to protect the employee's confidentiality (as required by the ADA) and to prevent contamination of the workplace and transmission between employees. For instance, employers should require ill employees not to report to work and to follow CDC guidance on self-isolation. Companies must also assess whether a confirmed case of COVID-19 is work-related and subject to OSHA's reporting or record-keeping obligations. Other response steps include requiring all employees who were in close contact with the ill employee to self-quarantine for fourteen days, designing a staggered workforce policy to limit the number of employees in the workplace at any time, and conducting a professional cleaning and disinfecting of the workplace.

Accommodating Employees with Disabilities

Companies should expect to receive more ADA accommodation requests from employees required to return to in-office work. In general, EEOC guidance issued in response to COVID-19 encourages employers to be flexible and to work with employees to provide reasonable accommodation. To minimize the risk of failure-to-accommodate or discrimination claims, corporate counsel should ensure that the company properly responds to each accommodation request.

Whenever an employer receives a request for an ADA accommodation, or simply notification from an employee that he/she has health concerns, the company must promptly engage in the interactive process with the employee. The interactive process should focus on determining (1) if the employee actually has a condition that constitutes a "disability" for purposes of the ADA, and (2) whether the employer can provide the employee with a reasonable accommodation without causing an undue hardship (i.e., significant difficulty or expense). Although teleworking accommodations may not have been common in the past, if the company operated for some amount of time during the pandemic with employees working remotely, it may be difficult to demonstrate that an employee's teleworking causes an undue hardship on the company.

The ADA requires employers to accommodate employee mental-health conditions that rise to the level of a disability in the same way employers are required to accommodate physical disabilities. However, because of the significant misinformation associated with COVID-19, as well as the general fear and uncertainty associated with the virus, employers may receive requests from employees that do not warrant protection under the ADA. For example, if an employee requests to continue teleworking because he/she is "scared" of contracting COVID-19 upon returning to in-office work, the employee's fear may not constitute a "disability" for purposes of the ADA. As such, the employee would not be legally entitled to an accommodation. Nonetheless, the company must still engage in the interactive process with the employee to determine if the purported fear is associated with a medical condition that could constitute a disability under the ADA. If so, the company would then need to determine whether it could provide a reasonable accommodation.

Absent a request for an accommodation, employers should be careful not to automatically exclude an employee from the workplace, or take any other adverse action, solely because the company knows that the employee has a disability that the CDC identifies as potentially placing him/her at higher risk for severe illness if he/she gets COVID-19. Such action is not allowed under the ADA unless the employee's disability poses a "direct threat" to his/her health that cannot be eliminated or reduced by reasonable accommodation. The "direct threat" analysis is fact-intensive and should be conducted with counsel to minimize the risk of ADA liability.

Leave Requests Under the FFCRA

Pursuant to the Families First Coronavirus Response Act ("FFCRA"), companies with fewer than 500 employees (and not subject to certain exemptions) implemented mandatory emergency paid sick leave and expanded leave under the Family and Medical Leave Act ("expanded FMLA leave") for employees. Because many companies transitioned to remote work shortly after the FFCRA was passed, reopening may be the first time that some companies receive leave requests under the FFCRA. The FFCRA does not sunset until December 31, 2020. Consequently, companies must continue to evaluate leave requests under the FFCRA until the law through the end of the year.

Because employees may take paid leave under the FFCRA for a variety of COVID-related qualifying reasons, employers should expect expanded FMLA leave requests throughout the summer, particularly as employees are required to return to in-office work while children's summer activities and childcare facilities remain closed. The Department of Labor has made clear that an employee may be entitled to take leave if a child's summer childcare provider, including camps or other programs, is closed for COVID-related reasons.[3]

The FFCRA's Emergency FMLA provisions maintain the same enforcement mechanisms contained in the FMLA and the FLSA. Accordingly, employees can maintain a private right of action for FFCRA leave interference and retaliation against employers who employ 50 or more employees. Unlike discrimination claims, employees are not required to exhaust administrative remedies before bringing these interference and retaliation claims. Additionally, managers and supervisors can be sued and held liable in their individual capacities for FFCRA leave interference and retaliation claims. Employees have already begun bringing such suits,[4] and lawsuits are expected to multiply as the country reopens.

The Long Road Ahead

For months, COVID-19 has affected the lives of every person on the globe. For corporate counsel and human resources professionals, COVID-19 has affected their business and employment decisions on an almost daily basis. As South Carolina and the rest of the country reopen and resume "normal" operations, corporate counsel's job navigating the COVID-19 public health crisis is far from over and likely will continue for years. K&L Gates and our COVID-19 task force are committed to helping employers navigate these obstacles in every state in the United States and

[3] United States Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, Question 93, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#93 (last accessed May 27, 2020).
[4] Stephanie Jones v. Eastern Airlines, LLC, Case No. 2:20-cv-01927 (E.D. Pa.) (filed April 16, 2020).

globally as we forge ahead together into the “new normal.” Please consult our variety of resources related to Reopening and Return to Work on the **K&L Gates HUB**.

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