



Returning to the Workplace: Practical Issues for Employers

Johanna Zelman

Michael C. Harrington

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Presenters:



Johanna G. Zelman
Office Managing Partner
Hartford Office
860.740.1361
jzelman@fordharrison.com



Michael C. Harrington
Partner
Hartford Office
860.740.1366
mharrington@fordharrison.com

Today's Agenda

- **Employee Health & Safety Issues**
 - OSHA Considerations
 - Testing, Temperature & Symptom Checks
 - CT's Requirements for offices
- **Wage-Hour Issues**
- **Discrimination / Retaliation**
 - Deciding who returns to work, and in what order
 - Reductions in Force
 - Employee Privacy Rights
 - Discipline / Termination for Non-Compliance
 - Employees Who Refuse to Return to Work When Recalled



Federal Assistance Programs

Families First Coronavirus Response Act (“FFCRA”)

- Applies to: **All** Public Employers and Private Employers with 500 or fewer employees
- **Emergency Paid Sick Leave (“EPSL”)**
 - Up to 80 Hours
 - COVID-19 related, including school/daycare closures
- **Emergency FMLA (“EFMLA”)**
 - Up to 12 weeks Leave of Absence for child-care needs due to COVID-19 related school or child-care closures

“Reopening American Business”

- State & Local Orders are as varied as the shut down orders
 - Some are industry-specific...healthcare, hotels, restaurants, retail, transportation, etc.
- But there are common themes:
 - Employee Health & Safety
 - Compensation / Wage-Hour
 - Discrimination / Retaliation

OSHA/ConnOSHA

General Duty Clause

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

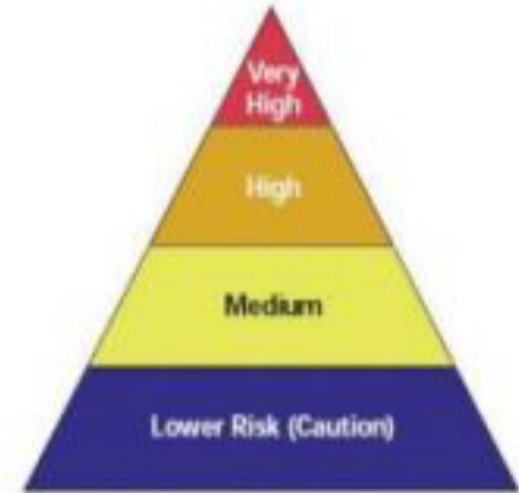
OSHA requires employers to assess occupational hazards to which their workers may be exposed.

The clause requires employers to have workplaces free of known hazards that can be feasibly mitigated.

Employee Health & Safety

OSHA Considerations

- Employers must provide a safe workplace
- OSHA recommends classifying risk of virus exposure by using risk pyramid.
- Risk will vary depending on the industry.



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Employee Health & Safety

CDC Guidelines

“All employers need to consider how best to decrease the spread of COVID-19 and lower the impact in their workplace.”

- Includes one or more of the following :
 - Reducing transmission among employees
 - Maintaining healthy business operations
 - Maintaining a healthy work environment.
- Employers must have a COVID-19 Response Plan

Employee Health & Safety

CDC Guidelines

- Review state and local rules; **comply with the strictest!**
 - 5/14/20 – CDC issued guidance. However, be mindful that State of Connecticut guidance is more restrictive
- Begin process by examining workspace.
 - Can social distance be maintained?
 - Can you minimize contact?
- Evaluate processes.
 - Is there contact with clients, customers?

Overview Questions

Assuming stay-at-home and shelter-in-place orders permit reopening, with or without restrictions, consider the following:

- Does the physical layout of my business practically allow me to reopen in compliance with applicable laws?
- Do I feel confident that I can adequately protect the health of my employees?
- Do I feel confident that I can adequately protect the health of my customers?
- Would customers be satisfied with the level of service?
- Would the level of business generated support additional payroll costs?

Employee Health & Safety

COVID-19 Response Plan Considerations

- Where/how might employees be exposed?
- Risk factors in work environment?
- Employees' individual risk factors (age, pre-existing conditions, proximity to family or others with COVID-19)
- Hygiene, Sanitation, and Social Distancing Protocols
- Contingency plans for situations that may result from new outbreak or new Shelter in Place/Stay at Home Order, such as:
 - Increased rates of absenteeism
 - Staggered work shifts, downsizing operations, delivering services remotely
 - Conducting essential operations with reduced workforce (e.g. cross training employees).

Employee Health & Safety

Hygiene, Sanitation, Social Distancing, etc.

Goals

- Sick employees staying home
- Sick customers staying away
- Use of PPE
- Good hygienic habits
- Clean Environment

Tools

- Inform about FFCRA, other leave
- Signage at door, train front employees
- Provide masks, gloves for employees and customers; Plexiglass barriers for forward-facing employees
- Soap/water, sanitizer, disinfectant wipes placed everywhere.
- Routinize cleaning of surface, high-touch objects.

Employee Health & Safety

Hygiene, Sanitation, Social Distancing, etc.

Additional Considerations/Suggestions

- Minimize sharing work items such as laptops/tablets, handtools, pens.
- NEVER share PPE
- Use contactless tools where possible (faucets, lights, timekeeping systems)
- Establish protocols for receiving mail and packages
- Evaluate ventilation systems/Open windows
- Review use of common areas (kitchen, breakrooms) . . . Limit usage.
- Stagger meal/rest breaks.
- “One-way traffic” through workplace
- Conduct team meetings remotely
- Redesign workstations to increase space or install plexiglass

Connecticut Requirements for Offices – Phase 1 Guidelines

Prior to Reopening:

- Plan must be developed
 - Distributed to all employees
 - Program administrator appointed
- Offices and buildings must be thoroughly cleaned prior to reopening
- Procure PPE
- Reorganize building to maintain social distancing
 - Work zones
 - Visual markings
 - Work stations 6 feet apart/barriers between work areas
- Place signage prohibiting entrance of anyone who is symptomatic
- Place signage encouraging social distancing, handwashing, use of PPE and disinfecting
 - Signs must contain information on state hotline (211) to report potential violations
- Train all employees
- Designate a single area for shipping and deliveries
- Self-certify with State of Connecticut

Connecticut Requirements for Offices – Phase 1 Guidelines

- Continue to allow WFH where possible
- Limit occupancy to 50%
- Limit number of people in elevators
- Provide PPE . . .
 - Provide masks to all employees. Employee is permitted to use his/her own if he/she prefers. May only remove when at own workstation.
 - Provide hand sanitizer at entrance and in common areas
 - Place disinfectant wipes
- Daily health check
- Limit usage of break room to maintain social distancing
- Eat lunch at desks/outside
- Implement rigorous cleaning & disinfection Protocols
 - Wipe down office machinery after use
 - Restrooms should be cleaned frequently, once an hour during high traffic times.
- Wear face masks in public/common spaces
- Limit gathering to 5 persons and Limit visitors to office
- Log employees in the office (for contact tracing)

Connecticut Requirements for Offices – Phase 1 Guidelines

Other considerations:

- Designated time for at-risk population?
- Contactless payment methods?
- Citizens in buildings?
 - Designated stairwells? Elevators?
- Citizens wearing face masks?
- Physical barriers between citizens and employees?

Discrimination / Retaliation

Employee Privacy Rights

- Are you covered by HIPAA? Be sure to comply and remind employees of their obligations.
- ADA also protects employee privacy rights!
 - Employers that obtain medical information from employees must maintain it in a confidential medical file and keep it separate from the employee's personnel file.
 - Think about what the CDC, EEOC and others have encouraged employers to do in response to COVID-19 – question employees regarding travel, exposure, or symptoms, temperature checks, identify “positives” – *any medical information disclosed / collected must be treated as confidential.*

Connecticut Whistleblower Protections

- In addition to other whistleblower protections, the CT guidance specifies that any employee who reports a COVID-19 related safety or health concern is entitled to protection.

Employee Health & Safety

- Symptomatic employees may NOT be at work.
- EEOC has issued guidance that permits employers to ask employees if they are experiencing symptoms of the coronavirus such as fever, chills, cough, shortness of breath, or sore throat.
- Employers can develop a questionnaire for employees to complete or be asked before entering the workplace. Depending on the nature of the business, the questions could be asked when the employee is recalled or hired or at the beginning of each shift.
- Employers must maintain information about an employee's illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA) and store such records potentially in compliance with OSHA requirements.

Employee Health & Safety

- The EEOC also has stated that employers may take the temperature of employees during the pandemic.
 - Consider:
 - What type of device is used and its quality?
 - Who will be the temperature taker?
 - What type of protective equipment should the temperature taker wear (mask, gloves, etc.)?
 - If employees are lined up to be tested, they should keep a social distance of 6 feet apart. If they are required to wait in line, will they be paid for that time?
- CT guidance requires daily health checks.
- Be mindful that all information obtained as a result of health/temperature checks is medical information and must be stored as such.

Testing Employees

- Employers may require COVID-19 testing as a condition of returning to work.
- The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity."
- Applying this standard to the current circumstances of the COVID-19 pandemic, the EEOC opined that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.
- The EEOC cautioned that, consistent with the ADA standard, employers should ensure that the tests are accurate and reliable.

Employee Health & Safety

Testing

- “Mandatory” vs. “Voluntary” testing...
- Beware retaliation and discrimination issues...
- Are reasonable accommodations available for those who are not tested?
- Remember compensation/pay issues

Compensation / Wage Hour

Personal Protective Equipment (PPE)

- State/local Orders require it in the workplace?
- OSHA regulations and guidance require PPE in order to satisfy the safe workplace requirement?
- Employer must provide/maintain (pays for) the PPE.
- Employer must train employees on use of PPE.

Discrimination / Retaliation

Discipline / Termination for Non-Compliance

- What if an employee refuses to comply with a state or local order? For example, refuses to wear a mask, or refuses to be temp checked?
 - Employers cannot be in violation of orders...must hold employees to comply
 - BUT, *why* is the employee refusing to comply?
 - Is a disability, religion, or other protected category behind the non-compliance?
 - If so, is an accommodation possible?
 - Seek specific legal advice before taking adverse action against the employee if not easily resolved

OSHA Considerations

Protection from Retaliation

It is illegal for an employer to fire, demote, transfer or otherwise retaliate against workers for exercising their rights under OSHA.

OSHA Considerations

Limited Right to Refuse Work

If an employee believes working conditions are unsafe or unhealthy, the employee may file a complaint with OSHA concerning a hazardous condition at any time.

If the condition clearly represents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and where possible, the employee has brought the condition to the attention of the employer, the worker may have a legal right to refuse to work in a situation in which he or she would be exposed to the hazard.

Resistance to Returning – General Concern

- A general anxiety about feeling unsafe going back to work **is not an acceptable reason** to refuse to return to work.
- However, if an employee requests an accommodation to work from home or take leave due to a disability or medical condition, you should engage in the interactive process under the Americans With Disabilities Act (“ADA”) to determine if such an accommodation can be made.

Recalling Employees – Discrimination

- Many employers will face the challenge of having to rehire some but not all of their work force. Deciding who will be rehired and when, can pose legal challenges.
- Develop internal criteria for determining who will be recalled from the recall list. The following are steps to consider in the recall process:
 - Identify the Company's business needs which necessitate or warrant the recall. For example, is there a particular area or division where business has picked up and therefore there is a need for additional workers? If so, which positions are impacted?
 - Identify the skill set and training required for the individuals who will fill the available positions.

Recalling Employees - Discrimination

- Of the persons who meet the skill set, make final selections based on such business reasons. This criteria may include the same considerations that you used when making the original selections for furlough, such as relative performance, relative capabilities, length of service. The more objective the criteria, the more defensible (e.g., last in first out), but that may not be the best criteria for business.
- Assess whether employees will be similar to your pre-layoff workforce in terms of diversity. You should make this determination for all protected groups (e.g., sex, age, race). Consider whether to employ outside counsel to conduct disparate impact or disparate treatment analysis.

Discrimination / Retaliation

Deciding who returns to work, and in what order...

- Did you make any commitments when you “furloughed” or “laid off” your employees?
- Partial recalls should follow the same principles as RIFs...
 - Do disparate impact and disparate treatment analysis!
 - Disparate impact = decisions appear neutral but result disproportionate impact on a protected group.
 - Disparate treatment = decisions intentionally impact protected individuals/groups.
 - Identify legitimate, non-discriminatory reasons for who comes back, and in what order. Be prepared to explain those reasons.

Recalling Employees - Discrimination

Attorney-Client Privilege

- As you assemble the above information, prepare a privileged and confidential memorandum specifically directed to legal counsel, outlining the information compiled for items above.
- Avoid sending internal emails and creating unnecessary documentation unless legal counsel is copied on these documents so that the attorney-client privilege is maintained. Remember that any documents you create internally may become discoverable in the event of future litigation unless prepare specifically for your legal counsel.

Special Challenges Keeping Willing Employees Away

Transportation Issues

- Social distancing can't always be accomplished on a subway or bus.
- Will your employees be unable to get to work?
- What are some solutions?
 - Continue WFH
 - Stagger schedules to give employees more options, less crowded times/days
 - Provide loaner cars or lease assistance as employee benefit?
 - Review any carpool programs for ongoing viability given other social distancing goals.

Special Challenges Keeping Willing Employees Away

Childcare

- Schools in Connecticut are closed for the year. As of yesterday, overnight camps have been canceled by Governor's order. Day camps can operate, but in limited capacity and may be canceled. Some parents may not be comfortable with sending their children, even if opened.
- Employees with children might have no solution
- What options exist?
 - FMLA and most existing state laws only provide for unpaid leave upon birth or adoption of a child or for a child's "serious health condition."
 - FFCRA's provisions of EFML and EPSL last only a few weeks and may have been exhausted.
- Time to get creative?
 - Offer Childcare as employee benefit (Section 125 cafeteria plan)
 - Stagger schedules?

Compensation / Wage Hour

Exempt Status

Did you, or will you, make salary/wage cuts?

- Remember:
 - White-collar exemptions require a specific minimum salary; and
 - The commissioned sales exemption requires a minimum compensation level, and that more than half the wages come from commissions.
- Otherwise, employee may lose their exempt status . . .

Laying Off Employees- Permanent

- If you are laying off two or more employees permanently, consider:
 - Appropriate release with schedules in compliance with ADEA and OWBPA, identifying by age and position those selected for termination and those within same class or job unit retaining their position.
 - Engaging in disparate impact and disparate treatment analysis as above (e.g., age, race, sex).

When Practical Reality and “Legal” Collide

Employee Who Refuses to Return to Work

“I don’t feel safe coming to work. I might be exposed at work and take it home to others.”

“Hey! With all these unemployment programs, I make more \$\$ sitting on the couch than coming to work...”

- USDOL issued guidance May 11, 2020 on “program integrity, “Improper payments and fraud in the UI program” are a “top priority!”
 - Individuals may not claim benefits if they have been offered suitable work!
 - Employees who refuse recall to work are ineligible for any further UI payments.

Compensation / Wage Hour

Vacations / PTO

Scenario

Employee was furloughed. Needed \$\$\$. Drained Vacation/PTO “bank”. Comes back to work. Time comes to take that “time off” that has been scheduled for months. No Vacation/PTO on the books to take...

- What does/can the Employer do?
 - First step – what does your Vacation/PTO policy say? Do you have other discretionary LOA policies that may be useful?
 - Consider Vacation/PTO “debt,” but comes with risks.

Compensation / Wage Hour

Workers Compensation

- Discussion regarding a rebuttable presumption that any employee who is diagnosed with COVID-19 within XX days of being at work *contracted the virus at work*, and thus is entitled to workers' comp benefits!
- If you have an employee who tests positive, seek legal assistance promptly....many state's workers comp laws require the employer to provide benefits/claim paperwork within a very short time period.

Key Points to Remember

- Keep current on latest orders and guidance
- Train Managers and Employees
- Implement measures to keep everyone safe and healthy
- Remember “traditional” HR best practices
- Protect privacy rights
- Communicate – everyone is worried right now.
- When hard decision have to be made...kindness goes a long way...

Presenters:



Johanna G. Zelman
Partner
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