



Returning to Work: Practical Issues Every Employer Must Consider

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Coronavirus (COVID-19) in America

- As of May 14, 2020
 - 86,901 Americans have succumbed to the virus, and over 1,456,000 have tested positive.
 - Worldwide: over 303,000 dead, over 4,521,000 have tested positive.
- All levels of government have taken proactive steps to:
 - Protect human life by slowing the spread of the virus
 - Minimize economic pain and disruption via spending measures and new employment laws.
- This is by far the greatest challenge our nation and the world have faced in at least 75 years.
- Challenges will continue, and we must remain vigilant to contain and control the spread of the virus...BUT

Today's Focus is on RE-OPENING!!

Today's Agenda

- **The “Big Shut Down” -- Essential vs. Non-Essential**
 - State and Local Orders
- **Recap of Federal Assistance Programs**
 - **Families First Coronavirus Response Act (“FFCRA”)**
 - Emergency Paid Sick Leave (“EPSL”)
 - Emergency FMLA (“EFMLA”)
 - **Coronavirus Aid, Relief and Economic Stability Act (“CARES”)**
 - Payroll Protection Program (“PPP”) for Small Employers
 - Economic Stabilization Act (“ESA”) for Mid-Size Employers
 - Unemployment Relief for Employees
 - Pandemic Unemployment Compensation (“PUC”)
 - Pandemic Emergency Unemployment Compensation (“PEUC”)
 - Pandemic Unemployment Assistance (“PUA”)



Today's Agenda cont'd

- **“Reopening American Business”**
 - **State & Local Orders**
- **Key Employment Considerations**
 - **Employee Health & Safety**
 - **CDC Guidelines**
 - **OSHA Considerations**
 - **Hygiene, Sanitation, Social Distancing, etc.**
 - **Temperature & Symptom Checks**
 - **“Testing” Issues**
 - **Compensation / Wage-Hour**
 - **Vacations / PTO**
 - **Exempt Status**
 - **Personal Protective Equipment (PPE)**
 - **Workers Compensation**



Today's Agenda cont'd

- **Key Employment Considerations (cont'd)**
 - **Discrimination / Retaliation**
 - Deciding who returns to work, and in what order
 - Post-Furlough Reductions in Force
 - “Positives” and “Close-Contacts”
 - Employee Privacy Rights
 - Discipline / Termination for Non-Compliance
 - **When Practical Reality and “Legal” Collide**
 - **Employees Who Refuse to Return to Work When Recalled**
 - Fear for Own Safety / Safety of Others
 - \$\$\$\$
 - Childcare issues
 - Transportation Issues



COVID-19 Hit Us With The “Big Shut Down”

- Federal Authorities Issued Guidance
 - Cybersecurity & Infrastructure Security Agency (“CISA”) issued GUIDANCE ON THE ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE
- States and Local Authorities Issued a Patchwork of Orders
 - “Shelter-In-Place”
 - “Stay At Home”
 - “Gatherings”
- “Essential” Businesses Stayed Open to support the “Critical Infrastructure”
 - Remote / Work From Home, if possible
 - Safety / Health precautions if in the workplace
- Non-“Essential” Business could continue to operate, IF they could do so remotely / from home
- Employers were forced to respond with “lay-offs,” “furloughs,” and pay cuts, pushing Employees and Employers to the brink. 36.5 million new unemployment claims. 14.7% rate at end of April.
- Governments responded with assistance programs

Federal Assistance Programs

Families First Coronavirus Response Act (“FFCRA”)

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

Federal Assistance Programs

Coronavirus Aid, Relief and Economic Stability Act (“CARES”)

- Payroll Protection Program (“PPP”)
 - Loans for Small Employers (<500 employees)
 - Forgivable if Conditions Satisfied
 - Most will end the beginning of June 2020
- Economic Stabilization Act (“ESA”)
 - Loans for Mid-Size Employers (500-10,000 Employees)
 - Restrictions on Outsourcing and offshoring
 - Restrictions regarding unions during term of loan
 - Cannot abrogate existing collective bargaining agreements
 - Must remain neutral in any union organizing effort

Federal Assistance Programs

Coronavirus Aid, Relief and Economic Stability Act (“CARES”)

- Unemployment Relief for Employees
 - **Pandemic Unemployment Compensation (PUC)**
(Section 2104 of the CARES Act)
 - *Eligibility:* Those meeting state’s criteria to receive UI benefits.
 - *Benefit Provided:* Flat payment of \$600 per week in addition to state benefits.
 - *Time Period :* From start of state’s agreement to participate in the program through July 31, 2020.

Federal Assistance Programs

Coronavirus Aid, Relief and Economic Stability Act (“CARES”)

- Unemployment Relief for Employees
 - **Pandemic Emergency Unemployment Compensation (PEUC) (Section 2107 of the CARES Act)**
 - *Eligibility:* UI recipients who exhaust all of their regular state UI benefits and actively search for work
 - *Benefit Provided:* Additional 13 weeks of state UI benefits
 - *Time Period:* Through December 31, 2020, unless otherwise extended.

Federal Assistance Programs

Coronavirus Aid, Relief and Economic Stability Act (“CARES”)

- Unemployment Relief for Employees
- **Pandemic Unemployment Assistance (PUA) (Section 2102 of the CARES Act)**
 - *Eligibility:* Those usually ineligible for UI benefits, including self-employed and independent contractors, and those who have exhausted existing UI benefit provisions. (Excludes those who can telework.)
 - *Benefit Provided:* minimum weekly benefit amount described in the Stafford Act Disaster Unemployment Assistance (DUA) program, (20 CFR 625.6), **plus** the \$600 per week supplement.
 - *Additional Criteria:* (1) partially or fully unemployed or (2) unable to work because of identified COVID-19 related circumstances
 - *Time Period for Expanded Compensation:* January 27, 2020 through December 31, 2020.

Federal Assistance Programs

Coronavirus Aid, Relief and Economic Stability Act (“CARES”)

- *Other Key Provisions*
 - *Waiver of One-Week Waiting Period:* If a state waives its usual one week waiting period, the federal government will reimburse the state for that week of UI benefits paid to the individual.
 - *Short-Time Compensation Programs:* The CARES Act provides funding to support “short-time compensation” programs, where employers reduce employee hours instead of laying them off, and the employees with reduced hours receive a pro-rated unemployment benefit. Through December 31, the federal government will fully fund such a state’s existing program. For states that implement a new program the federal government will fund the program at a rate of 50%.

Results of Federal Efforts?

- PPP has helped 4.4 million businesses save over 35 million American jobs.....
- FFCRA and unemployment provisions of CARES have protected the income of millions of Americans.
- BUT
- These programs were designed to be **temporary**...
- As COVID-19 cases decline, America is clamoring to reopen!

“Reopening American Business”

- **State & Local Orders are as varied as the shut down orders**
 - **Some are industry-specific...healthcare, hotels, restaurants, retail, transportation, etc.**
 - **Please call or email with state, local, or industry specific questions**
- **But there are common themes!**
 - **Employee Health & Safety**
 - **Compensation / Wage-Hour**
 - **Discrimination / Retaliation**
 - **♪ ♪ “And the rest...” ♪ ♪**

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.”

- This 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

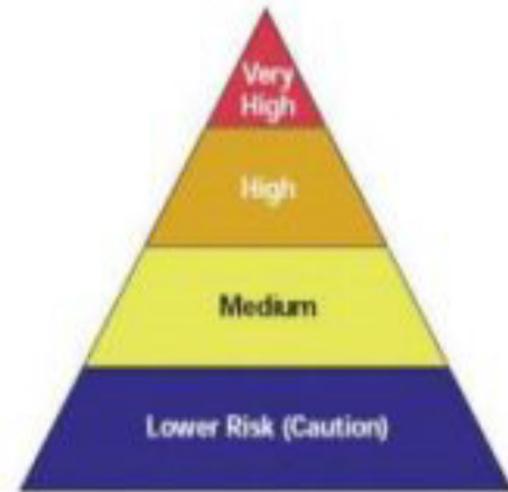
CDC Guidelines

- Review state and local rules; **comply with the strictest!**
- Begin process by examining workspace.
 - Can social distance be maintained?
 - Can you minimize contact?
- Evaluate processes.
 - Is there contact with clients, customers?

Employee Health & Safety

OSHA Considerations

- Employer is required to provide employees with a safe workplace
- OSHA recommends employers classify their risk of worker exposure to COVID-19 based on the occupational risk pyramid.
- Risk of exposure to COVID-19 during an outbreak will vary depending on the industry. Individualized risk assessments focusing on COVID-19 issues are necessary.



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Employee Health & Safety

COVID-19 Response Plan Considerations

- Where/how might employees be exposed?
- Risk factors at home and other community areas?
- 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
- Soap/water, sanitizer, disinfectant wipes placed everywhere.
- Routinize cleaning of surface, high-touch objects.

Employee Health & Safety

Hygiene, Sanitation, Social Distancing, etc.

- **Additional Tips**

- Do not share 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
- Review ventilation systems: are they efficient and in good working order?
- Review use of common areas (kitchen, breakrooms). Restrict usage.
- Stagger meal/rest breaks.
- “One-way traffic” through workplace
- Conduct team meetings remotely
- Redesign workstations to increase space or install plexiglass

Employee Health & Safety

Temperature & Symptom Checks

- EEOC Guidance – Temp Checks allowed
- State/Local Orders prohibit symptomatic employees from being at work
- Some State/Local Orders REQUIRE temp checks
 - For ALL employers
 - For certain industries
- Beware employee privacy rights protections!
 - California has the CCPA...other states have similar protections
- Beware compensation/pay issues!
 - California requires employees to be paid for time waiting for and while being temp checked, and employees who are sent home entitled to “reporting time” pay...others may have similar laws.

Employee Health & Safety

“Testing” Issues

- “Mandatory” vs. “Voluntary” testing...
- Call for assistance with specific issues before implementing any “testing” program.
- Beware retaliation and discrimination issues...
- Are reasonable accommodations available for those who are not tested?
- Remember privacy rights protections!
- Remember compensation/pay issues!

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.**
 - **Hard decisions...Seek help before jumping...**

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.
- Did/Will any employees lose their exempt status due to salary/wage cuts, or reduced commission levels/earnings?

Compensation / Wage Hour

Personal Protective Equipment (PPE)

- Do state/local Orders require it in the workplace?
- Do applicable OSHA regulations and guidance require PPE in order to satisfy the safe workplace requirement?
- Who provides/maintains (pays for) the PPE?
- What about training on use of PPE?

Compensation / Wage Hour

Workers Compensation

- Latest trend in state/local Orders...
- Creates 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.

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.
 - Beware state/local orders that pay protect employees with COVID-19 specific issues! (for example, New Jersey has new law on this issue...)

Discrimination / Retaliation

“Positives” and “Close-Contacts”

- **Special considerations for employees who tested positive or who have “close contact” with persons who tested positive...**
- **Again, check state and local orders!**
 - **As a general practice...these persons likely were subject to quarantine.**
 - **Industry specific Orders and guidance may apply...seek assistance.**
- **Can require medical clearance and non-symptomatic before they are allowed to return to work.**
- **Follow CDC guidelines regarding workspace cleaning.**
- **Remember the employee’s privacy rights!**

Discrimination / Retaliation

Employee Privacy Rights

- Surprise....This is becoming a HUGE issue...
- Are you covered by HIPAA? Comply!
- The 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.* Be extra careful when doing investigations to comply with Orders!

Discrimination / Retaliation

Discipline / Termination for Non-Compliance

- Thanks for the pre-submitted questions!
- 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?
 - Let your pre-COVID-19 well-honed HR skills kick in...! With extra sensitivity and caution...
 - 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

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 playing Fortnite than coming to work...I ain’t coming back yet...”

- 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!
 - States must conduct weekly certification process
 - Employees who refuse recall to work are ineligible for any further UI payments.
- Decision time for the Employer...what commitments were made when the employee was furloughed?
 - Put to the “bottom of list”?
 - Terminate?

Special Challenges Keeping Willing Employees Away

Childcare issues

- Schools in at least 47 states are closed for year.
- Many summer camps and programs are cancelled
- 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?
 - Childcare as employee benefit (Section 125 cafeteria plan)
 - Provide it at or near workplace?
 - Stagger schedules?

Special Challenges Keeping Willing Employees Away

Transportation Issues

- **Some agencies saw drops of 95% during peak of pandemic and are proposing reduced schedules to save money**
- **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.**

Take advantage of this Opportunity!

We all need a little more stability right now!

- Get that Employee Handbook Up-To-Date!
- Establish new procedures to keep everyone healthy and safe, and to address new needs!
- Train Managers!
- Train Employees!
- Communicate early and often with employees. Goals are to PROTECT THEIR JOBS and to PROTECT THEIR HEALTH. Don't be afraid to ask for—and take—suggestions.
- Foster a “we're all in this together” mentality.

Key Points to Remember

- **Educate yourself on “the new normal”**
 - **State & Local Orders – stay current**
 - **Review guidance from agencies**
 - **Seek competent advice and assistance**
- **Implement measures to keep everyone safe and healthy**
- **Remember “traditional” HR best practices**
- **Protect privacy rights**
- **Communicate – everyone is worried right now...working together achieves solutions. Individualized attention needed.**
- **When hard decision have to be made...kindness goes a long way...**

FordHarrison Coronavirus Taskforce Webpage

www.fordharrison.com/CoronavirusTaskforce

- Links to:
 - State and Local Orders
 - Agency Guidance
 - Alerts
 - Webinar Archives
 - Knowledge Center
 - Contact info if you have questions

Questions?



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