Jones Waldo Legal Alert

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Top Ten Questions an Employer Should Ask Before Returning Employees to Work

As various states and municipalities across the country lift shutdowns and begin easing COVID restrictions, employers are faced with complex questions about safely bringing their employees back to the workplace. We've compiled the top ten questions every employer should consider before returning employees to work.

1. HOW DO WE IMPLEMENT PROPER INFECTION PREVENTION MEASURES? First, and perhaps foremost, employers should design, implement, communicate, and begin to monitor basic infection prevention measures as they return employees to onsite work. Although a complex task, OSHA and CDC have both published step-by-step instructions for employers on how to implement appropriate infection prevention measures. OSHA has published an employer Guidance on Preparing Workplaces for COVID-19, which outlines the specific steps it believes all employers should take to reduce workers' risk of exposure to COVID-19. Just last week, the CDC published its Workplace Decision Tree, that walks employers through all the issues they should consider as they implement and monitor appropriate health and safety measures. In addition to this general Workplace Decision Tree, the CDC has published specific decision trees for Youth Programs and Camps, Child Care Programs, and Restaurants and Bars. Employers should also follow all state and local guidelines for reopening.

2. WHAT SHOULD WE DO FOR AN EMPLOYEE WHO CANNOT RETURN TO WORK BECAUSE OF A MEDICAL CONDITION THAT PLACES THEM AT HIGHER RISK FOR COVID-19? The EEOC, OSHA, and CDC all have offered guidance on how to respond to employees who are at higher risk for COVID-19 infection (see our prior updates). Most recently, the EEOC updated (again) its COVID-19 technical assistance document to address questions relating to higher-risk employees, including possible accommodations that might reduce the threat of the novel coronavirus for such workers, when a worker's disability may pose a "direct threat," and what to do when a worker poses a "direct threat."

The EEOC reminds employers that a higher-risk employee may be entitled to a reasonable accommodation under the ADA, and workers may request such accommodations without using the term "reasonable accommodation." What must the worker seeking accommodation do? Simply notify the employer that "she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing." Once an employer receives a request for accommodation, the employer should engage in the interactive process, and may seek medical documentation or ask questions to obtain needed information. Through that process, the employer should determine whether the worker has a disability and whether there is a reasonable accommodation that can be provided without undue hardship.

This issue is discussed in more detail on the Jones Waldo COVID Hub: Government Agencies Address Higher-Risk Employees.

3. WHAT LEAVE ENTITLEMENTS DO EMPLOYEES HAVE IF THEY NEED TIME OFF WORK BECAUSE OF COVID-19? Employers who have been shut down because of the pandemic, and are just now opening back up, may not have considered the new paid leave entitlements of the Families First Coronavirus Reponse Act (FFCRA). Some employees may be unable to return to onsite work for reasons related to COVID-19. Under the FFCRA, employees (who work at an employer with fewer than 500 employees) are entitled to paid leave if they cannot work or telework because of a health care provider's isolation order, because they have symptoms of COVID-19 and are seeking a diagnosis, because they are caring for someone with COVID-19, or because they need to care for children who are at home because of a school or daycare closure. If they have not already done so, employers should publish the Department of Labor's FFCRA Poster and familiarize themselves with the requirements of these

laws, including by reviewing our Jones Waldo COVID Hub: FFCRA Paid Leave Summary and our Jones Waldo COVID Hub: Accessing FFCRA Tax Credits.

Utah has not adopted any paid employment leave entitlements associated with COVID-19. But many other states and municipalities have provided such additional protections (e.g., New York State COVID-19 Paid Quarantine Leave). If you have employees in other states, you'll want to check the laws in the cities and states where you operate to make sure your employer is in compliance with all applicable paid leave laws.

Additionally, long-standing employment laws like the FMLA and ADA may require unpaid leave accommodations arising from the FMLA. Thus, an employee may exhaust paid sick leave entitlements under the FFCRA, but be entitled to additional unpaid leave under the FMLA and/or the ADA.

4. WHAT SHOULD WE DO IF AN EMPLOYEE REFUSES TO RETURN TO WORK? For a variety of reasons, some employees may be reluctant to return to onsite work. As described above, some employees may need additional leave time, or remote work, if they have COVID-19, a disability that places them at higher risk for COVID-infection, or if they another FFCRA-qualifying reason for leave. Employers also may need to consider accommodations for employees with disabling mental health impairments that preclude a return to onsite work. However, other employees who just don't feel comfortable returning to onsite work and who would prefer to remain on unemployment are not protected.

The Utah Department of Workforce Services (DWS) has published DWS Guidance on COVID and Unemployment Benefits, including several FAQs for employees and employers. Each one of these FAQs addresses in some manner the issue of an employee who declines to come back to work because he/she is making more money on unemployment insurance compensation (UI) than he/she makes working. DWS notes that a refusal to work may mean that an employee is no longer eligible for UI compensation. An employer with this problem can inform the employee that a refusal to accept work may deprive that employee of his/her eligibility for UI compensation. In other words, the employee may be without a job and without UI. The employer also can report the work refusal to DWS and the employee has an obligation to report work refusals too.

5. HOW DO WE AVOID RETALIATION CLAIMS FROM EMPLOYEES WHO COMPLAIN ABOUT RETURNING TO WORK? Employees who band together to complain about returning to work may be engaging in protected "concerted activity," under Section 7 of the National Labor Relations Act (NLRA). Such concerted activity rights apply whether or not a union is in place. Thus, employers should be careful not to terminate an employee, or group of employees, because they have raised a concern about returning to onsite work. Such terminations could give rise to a Section 7 wrongful termination claim under the NLRA. However, although employees are entitled to engage in concerted activity, they are not necessarily entitled to refuse to return to work (e.g., unless leave is required by the FFCRA, FMLA, or ADA). An employer can likely terminate an employee who refuses to return to work—just not for complaining about returning to work. Your termination documentation should be clear on this important distinction.

6. WILL OFFERING REMOTE WORK IN RESPONSE TO COVID-19 SET A PRECEDENT FOR THE FUTURE? Many employers and employees have experimented with remote work, and have found it to be a viable alternative to onsite work. Such realizations may forever change employer tolerance to remote work. Still, some employers who have provided remote work have done so only as a matter of pandemic necessity. These employers have deemed remote work better than no work, but they still view onsite work as essential. Employers adhering to the mantra that no good deed goes unpunished may be worried about setting a precedent for future remote work requests. It's not hard to

imagine this future hypothetical employee's take during an ADA interactive process: "Of course I can do this job remotely. Don't you remember 2020 when I worked remotely for several months?"

Forward-thinking employers will want to prepare for such a future claim by notifying employees that remote work will not be available when pandemic conditions subside. David Fram, Director of ADA Services for the National Employment Law Institute, recommends that employers accompany a pandemic-related remote work assignment with a disclaimer like this:

"Because of the extraordinary situation in the workplace caused by the coronavirus, you will be working remotely for a temporary period. We understand that you might not be able to perform all of your job's essential functions during this temporary period because you will be working remotely."

7. MAY WE TAKE EMPLOYEE TEMPERATURES, MAKE HEALTH RELATED INQUIRIES, AND TEST OUR EMPLOYEES FOR COVID-19? In its pandemic guidance, the EEOC expressly states that an employer may screen employees for COVID-19 through medical exams (including taking temperatures) and by asking health related inquiries. However, employers may only screen job applicants for COVID-19 after making a conditional job offer. The EEOC has published this information and more in its updated Pandemic Preparedness in the Workplace and the ADA guidance.

Take note that while an employer may ask an employee about his/her own health, an employer may not ask about the health of the employer's family. This means that an employer cannot ask its employees if any of their family members have contracted COVID-10. Doing so likely violates the Genetic Information Nondiscrimination Act (GINA), a federal law that broadly prohibits employers from gathering genetic information about their employees. So, rather than ask about your employee's family members, ask instead if your employee has been exposed to ***anyone*** who has COVID-19.

8. HAS COVID-19 CREATED ANY WAGE AND HOUR PROBLEMS? We anticipate a number of possible wage and hour claims arising from COVID-19. For example, many employers have decreased wages in light of the pandemic, including the salaries of exempt employees. Temporary salary changes could cause problems for the Fair Labor Standards Act (FLSA) exemption. In September 2019, the Department of Labor published a FAQ Regarding Furloughs and Pay Reductions. In this timely guidance, the DOL states that "[r]eductions in the predetermined salary of an employee who is exempt under [FLSA regulations] will ordinarily cause a loss of the exemption." However, the DOL explained that an "employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to [an] exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements." Such salary changes should "reflect long term business needs," and not "a short-term, day-to-day or week-to-week deduction" occasioned by business slowdowns. Thus, the key to reducing salaries, without losing FLSA exemptions, is to provide advance notice of the salary reduction and to implement it on an indefinite basis, rather than a fluctuating week-to-week basis.

Another wage and hour concern could arise from managers who have previously qualified for the executive FLSA exemption. Because of furloughs, layoffs, or other pandemic-related business changes, some managers are performing more non-exempt work. For example, a business may choose to maintain a manager's employment, while furloughing all of the manager's subordinate employees. Such a manager, who is no longer supervising the work of others, likely does not qualify for the "executive" exemption under the FLSA.

Employers should also ensure that remote-working hourly employees are recording all of their working time. One common problem arises from after-hours email review. For example, if an employee spends

15 minutes reading work emails at 8 pm, does that employee know to record a quarter hour of working time?

Additionally, employers who implement onsite testing, such as temperature checks, should consider if the time spent by an employee waiting for, and being tested, at work is compensable time. Surprisingly, the DOL has not yet provided any specific guidance on this issue. However, the DOL has addressed this issue in somewhat similar circumstances—the donning and doffing of work-related clothing. DOL regulations require employers to pay employees for the time employees spend at work "donning and doffing" safety and sanitation equipment (e.g., helmets, smocks, aprons, face shields, and other PPE). Drawing from these resources, we recommend that employers pay employees for the time they spend waiting at the worksite, e.g., before a shift, for a temperature check or other COVID-19 inquiries or testing. Employers should consider staggered shift times to hold down on health-check wait times.

9. WHAT HAPPENS WHEN AN EMPLOYEE TESTS POSITIVE FOR COVID-19? If an employee has tested positive for COVID-19, an employer should immediately send the employee home or instruct the employee not to report to work. Employees who have tested positive for COVID-19 may be entitled to job-protected leave, including under the FFCRA, the FMLA, and (depending on the seriousness of the condition) the ADA. Additionally, employers should take care to sanitize areas where an infected employee worked and will want to notify employees who may have been in contact with the infected employee. However, employers should not disclose the identity of an employee who has tested positive for COVID-19—doing so violates the confidentiality provisions of the ADA.

Employers should follow CDC guidelines before returning an infected employee to the worksite. In the CDC's General Business FAQs, the CDC recommends that employees who have tested positive for COVID-19 should not return to work until (1) the employee no longer has a fever (without the use of fever-reducing medicine), (2) respiratory symptoms (e.g., cough, shortness of breath) have improved, and (3) the employee has received two negative tests in a row, at least 24 hours apart.

10. MAY AN EMPLOYEE WHO CONTRACTS COVID-19 AT WORK SUE HIS OR HER EMPLOYER? On May 4, 2020, Governor Herbert signed into law a bill that addresses immunity related to COVID-19. Under this new law, businesses (and other property owners) cannot be sued by persons who contract COVID-19 on their premises. The law includes an exception: a business can be sued if it acted willfully, recklessly, or intentionally to get someone sick. Although this new law will certainly provide some protection to businesses from claims by patrons, we do not believe it changes the employment liability landscape.

The exclusive remedy for workplace illnesses and injuries is the administrative remedies provided by the Utah Workers Compensation Act (WCA) and Utah Occupational Disease Act (ODA)—claims that are administered by the Utah Labor Commission. Employees cannot sue their employers in court for workplace injuries or illnesses unless they could show that the employer acted intentionally to harm them. The new immunity bill does not change any of that. In fact, the bill expressly states that it "does not modify the application of" the WCA or the ODA. You can read the full text of the bill here Utah Senate Bill 3007.

Thus, an employee cannot sue his or her employer in court for causing them to contract COVID-19, except upon a showing that the employer intentionally caused them to contract the illness. On Friday, May 15, 2020, the Salt Lake Tribune reported on just such a case filed by an employee of Built Bar, an American Fork company. According to the Tribune's report, the employee alleges that Built Bar engaged in "willful misconduct" that caused her to contract COVID-19 at work. The employee alleges that she wrote to Human Resources about her concern that a number of employees on a production line had fallen ill. The employee wanted a professional cleaning company to clean and fumigate the building. She alleges

that HR ignored her, that the company failed to provide PPE or to sanitize its facility, and that she contracted COVID-19 at work. Built Bar denies wrongdoing and asserts that it has "dedicated significant company resources to protecting our customers and employees . . . ." You can read the full story here: Salt Lake Tribune: Utah woman sues employer she claims "recklessly" exposed her to coronavirus.

Employers hoping to avoid such lawsuits—which must be premised on willful or intentional misconduct—will want to circle back to our first question posed above, and carefully implement (and document) infection prevention measures that are consistent with OSHA and CDC guidelines.

Outside of the rare case when an employer allegedly acts with intent to harm its employees, all other workplace illness cases should be processed under the administrative scheme provided by either the WCA or ODA. Given that the World Health Organization (WHO) declared that COVID-19 is a global pandemic, it may be very difficult for an employee to establish that he/she caught COVID-19 at work. However, if an employer can point to other employees who have contracted the virus (e.g., meat-packing plants and assisted living centers in certain parts of the country), an employee might have an easier time establishing that he/she caught COVID-19 at work. So here again, employers will do well to implement effective infection prevention measures to avoid mass workplace infections.

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