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April 28, 2020

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COVID-19 RETURN-TO-WORK CHECKLIST FROM AN EMPLOYMENT LAW PERSPECTIVE

by Aaron V. Burrell

As employers attempt to return to workplaces in the midst of the COVID-19 pandemic, there are a number of considerations they must be mindful of. Indeed, among other things, employers must be sure to establish a COVID-19 response plan, refine their communications and policies, examine travel policies, and ensure compliance with state and federal leave laws. Employers must also remain cognizant of their obligations under the General Duty Clause of the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 654(a)(1), which requires employers to provide “employment, and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm.” Below is a checklist of issues employers should be mindful of.

1. STAY INFORMED

- Continue to monitor the Centers for Disease Control, World Health Organization, and OSHA websites for insight relative to navigating COVID-19 issues for employers.
- Learn of COVID-19 plans in the community where your business operates. Local conditions may have a significant impact on your business operations.
- Continue to stay informed relative to school and public transportation disruptions, which may affect business operations.

2. CREATE AND IMPLEMENT A RESPONSE AND COMMUNICATION PLAN

- Identify a team of individuals and a point of contact for the response plan. Be sure to involve key decision-makers and managers.
- Ensure flexibility—be ready to modify or amend business practices as needed.
- Where possible, prioritize customers, identify alternative suppliers, and determine where it may be appropriate to reduce operations.
- Prepare a plan of communication to employees that addresses:
 - Teleworking policies and staggered schedules, which may be effective at increasing the physical distance among employees.
 - Availability of company vacation and standard paid-sick leave under company policy.
 - Employee anxiety and misinformation.
 - Who employees should contact for further information.

3. CREATE AND IMPLEMENT A SAFETY PLAN

- Consider where, when, and how employees may be exposed (such as from the public or other co-workers).
- Consider employees’ individual risk factors.
- Follow governmental regulations.

- Consider limitations on nonessential travel.
- Communicate basic prevention measures, consistent with governmental guidelines:
 - Promote hand hygiene—frequent handwashing for all employees, visitors, and customers.
 - Provide soap and water (or hand sanitizer with at least 60% alcohol) where possible.
 - Encourage respiratory etiquette, including covering coughs and sneezes.
 - Provide tissues and trash bins.
- Consider employee screening, including temperature checks and symptom questionnaires. See below relative to confidentiality.
- Develop policies for identification and isolation of sick or exposed employees.
- Encourage employees to self-monitor for signs and symptoms of COVID-19.
- Ask employees who have been exposed to COVID-19 or traveled to a high-risk location to work from home for an incubation period of 14 days.
- Develop clear policies for reporting to human resources or management when an employee becomes sick or begins experiencing symptoms.
- Implement engineering controls such as high-efficiency air filters or sneeze guards where appropriate.
- Ensure the use of personal protective equipment where appropriate, including face masks, respiratory protection, goggles, gloves, and face shields.
- Considering ensuring that the plan has general applicability to cover other infectious diseases.
- Follow existing OSHA standards.

4. CONSIDER LEAVE OPTIONS

- Review existing policies to ensure consistency with state and federal law, including the Families First Coronavirus Response Act.
- Track employees’ use of leave, reason for leave, and duration.
- Ensure that individuals on leave return to their prior positions.
- To avoid layoffs, consider adopting part-time programs, which may allow employees to be eligible for partial unemployment insurance benefits.
- Consider potential applicability of WARN Act requirements.

5. CONSIDER CONFIDENTIALITY

- Require employees infected with COVID-19 to identify all individuals who have worked in close proximity.
 - Inform other employees of any possible exposure, *but keep the identity of infected employees confidential.*
- Consider non-invasive screenings for employees, including body temperature checks and symptom questionnaires when entering the workplace. Remain cognizant of EEOC guidelines relative to confidentiality:

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- (1) Results must be kept separate from personnel file.
- (2) Maintain confidentiality of temperature results.
- (3) You may disclose the name of an employee that has tested positive for COVID-19 to a public health agency.

6. CONSIDER WORKERS' COMPENSATION ISSUES

- The law remains unsettled relative to workers' compensation and COVID-19. It is advisable to remain abreast of developments.
 - There are questions as to whether COVID-19 will be considered an "ordinary disease of life," which generally will not be covered.
- Consider the workers' compensation factors relative to COVID-19:
 - Will the employee be able to demonstrate that he or she contracted the virus during the "course of their employment."
 - Will the employee be able to demonstrate whether the contraction "arose out of" their employment.
 - Did the position present the employee with an "increased risk" of contracting COVID-19?
- First responders and certain healthcare workers have a conclusive presumption of coverage in Michigan. EO 2020-10.

7. REMAIN COGNIZANT OF ANTI-DISCRIMINATION/ANTI-HARASSMENT POLICIES

- Remind employees that discrimination on the basis of any protected class (state or federal) is prohibited.
- Consider redistributing anti-discrimination and anti-harassment policies.
- Consider training for supervisory staff relative to responding to comments about COVID-19 and employees who may have been affected.

ABOUT THE AUTHOR



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