

COVID-19 Return to Work Employer Considerations

LIVE Webinar

May 28, 2020

GETTING BACK TO WORK

Matthew Clarke



Speaking a New Language

- CARES Act
- Families First Coronavirus Response Act
- Payroll Protection Program
- CDC Guidelines
- Social Distancing
- Facemasks
- Temperature Checks
- Temporary Unemployment Claims
- Plexiglass Barriers
- Quarantine

Agenda for Today's Webinar

- Pat Cain: Laws, Orders, Guidelines and Protocols
- Pat Hill: Employee Screening and Testing
- Yash Dave: Employee Leave and Accommodations
- Steve O'Day: OSHA Considerations
- Emily Friedman: Unemployment Benefits
- Don Mazursky: Retirement Plans and Compensation
- Kelly Meyers: Health and Welfare Benefits
- Q&A: End of Program

RETURN TO WORK: WHERE IS THE RULE BOOK?

Laws, orders, guidelines, protocols. They are being issued at the federal, state, county and city levels. How do you know what to comply with as you bring your employees back to work?

Presented by Pat Cain



- The federal government has ceded to the various states the responsibility for managing the novel coronavirus outbreaks within their borders.
- While there are important federal guidelines, in most cases the mandatory obligations will be found at the state, county and city level.
- Some of the requirements involve application of traditional employment laws in the context of the pandemic, while others deal with requirements formulated specifically for business operations during the pandemic.

FEDERAL MATTERS

- Equal Employment Opportunity Commission (EEOC). Responsible for enforcing federal anti-discrimination and other employment laws. Webpage with information about workplace preparedness in a pandemic.
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.
- Centers for Disease Control (CDC). Relevant CDC guidelines can be found here.
<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

- CDC guidelines include a link to a flow chart that provides suggestions as to whether a business should consider reopening based on a variety of factors.
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/workplace-decision-tool.html>.
- The Occupational Safety and Health Administration (OSHA) also has extensive guidelines related to COVID-19 and return to work. <https://www.dol.gov/coronavirus>.
- White House guidelines can be found here.
<https://www.whitehouse.gov/openingamerica/>

STATE AND LOCAL MATTERS

- State and local governments have issued their own guidelines and orders, often tailored to meet needs and realities that are more local.
- California
(<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Guidance.aspx>), Los Angeles County
(<https://covid19.lacounty.gov/recovery/>), Los Angeles City
(<http://publichealth.lacounty.gov/media/Coronavirus/>).

- Cal/OSHA has published workplace safety guidelines.
<https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>
- California Department of Fair Employment and Housing (DFEH) guidelines.
<https://www.dfeh.ca.gov/covid-19-resources-and-guidance/>. Addresses potential issues arising from the unique intersection of the pandemic with general state law concerning discrimination, disability and employee privacy issues.

GUIDELINES VS. ORDERS

- Agency guidelines are not binding. That is, they are not mandatory. They lack the force of law.
- But guidelines are a pretty good indication of how the particular agency will enforce those of its regulations that do have the force of law.
- Even if guidelines are not mandatory, failure to follow an applicable guideline can be considered evidence of negligence, or worse.
- This is likely to be especially true of guidelines related to COVID-19, simply because we all are aware of the issues.

- In contrast to agency guidelines, local and state health orders do have the force of law.
- Violations of state or local health orders typically are treated as misdemeanors, which can result in fines, imprisonment, or both.
- Violations of such orders may not give an individual employee a right to sue their employer for the violation, but many states (including California) have rules under which a violation creates a rebuttable presumption of negligence.

TAKEAWAYS

- Be familiar with and understand both what is suggested (guidelines) and what is required (orders). You may have discretion in the case of a guideline, and you probably do not in the case of an order. Most agencies – federal, state and local – maintain specific COVID-19 websites.
- Stay current, as both guidelines and orders will change as matters evolve.
- Follow applicable guidelines and orders. Do not make your plans based on current popular opinion. “Everyone else was/was not doing it” is not a viable defense.

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EMPLOYEE SCREENING AND TESTING

Presented by Patricia J. Hill



EEOC POSITION REGARDING SCREENING AND TESTING

- **When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19?**
(4/9/20)
 - As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.
 - If an employer is hiring, it may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all new employees in the same type of job.

EEOC POSITION REGARDING SCREENING AND TESTING

- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? (3/17/20)**
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
 - Employer may take applicant's temperature after a conditional offer of employment was made.

EEOC POSITION REGARDING SCREENING AND TESTING

- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? (3/17/20)**
 - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
 - An employer may delay the start date of an applicant who has COVID-19 or its symptoms.
 - An employer may withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or its symptoms.

EEOC POSITION REGARDING SCREENING AND TESTING

- **When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? (3/17/20)**
 - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

EEOC POSITION REGARDING SCREENING AND TESTING

- **May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?**
(4/23/20)
 - 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, 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. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

EEOC POSITION REGARDING SCREENING AND TESTING

- **May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?**
(4/23/20)
 - Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Confidentiality of Medical Information

- **May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? (4/9/20)**
 - The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Confidentiality of Medical Information

- **If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? (4/9/20)**
 - Yes. The employer needs to maintain the confidentiality of this information.

Confidentiality of Medical Information

- **May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?**
(4/9/20)

- Yes.

Confidentiality of Medical Information

- **May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? (4/9/20)**
 - Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

High Risk Employees/Applicants

- **May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? (4/9/20)**
 - No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Masks

- OSHA does not require the use of face coverings in the workplace except where there is a higher risk of airborne exposures such as hospitals and other workplaces where PPE required before the pandemic.
- The CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain, such as grocery stores, pharmacies, and gas stations.
 - Cloth face coverings may slow the spread of the virus and help people who may have the virus and do not know it from transmitting it.
 - Cloth face coverings can be made from household items.
 - The mouth and nose are to be fully covered.
 - The covering fits snugly against the sides of the face so there are no gaps.

Masks

Do any local or state governments require face coverings?

- See the SGR client alert “What Employers Need to Know About Face Coverings” with the requirements from the federal government and the states.

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COVID-19 RETURN TO WORK ISSUES: EMPLOYER CONSIDERATIONS

Employee Leave and Accommodations

Presented by Yash B. Dave



Employee Leave and Accommodations

- Families First Coronavirus Response Act
 - Emergency Paid Sick Leave
 - Emergency Family and Medical Leave
- Americans with Disabilities Act
- Family and Medical Leave Act
- State and Local Laws

Families First Coronavirus Response Act (FFCRA)

- Applies to employers with fewer than 500 employees.
 - Exception for small businesses with fewer than 50 employees if granting leave would “jeopardize viability of the business as a going concern.”
- Leave provisions effective April 1, 2020 through December 31, 2020.
- Employers may not discharge, discipline, or otherwise discriminate against any employee who seeks or takes paid leave under the FFCRA.

FFCRA: Emergency Paid Sick Leave

- Up to 80 hours of paid leave to full-time employees
- Part-time employees entitled to leave based on average number of hours worked in a two-week period
- May use paid sick leave if an employee is unable to work (or telework) due to a need for leave because:
 1. Employee is subject to a quarantine or isolation order related to COVID-19.
 2. Employee has been advised by a health care provider to self-quarantine.
 3. Employee has symptoms of COVID-19 and seeking medical diagnosis.
 4. Employee is caring for an individual subject to a quarantine or isolation order, or who has been advised to self-quarantine.
 5. The employee is caring for a child whose school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions.
 6. The employee is experiencing any other substantially similar condition specified by HHS in consultation with the Department of Treasury and Department of Labor.
- 100% pay for qualifying reasons #1-3, up to \$511 daily and \$5,110 total
- Two-thirds pay for qualifying reasons #4-6, up to \$200 daily and \$2,000 total

FFCRA: Emergency Family and Medical Leave

- Up to 12 weeks of protected leave if employee is unable to work (or telework) because employee is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons.
- Employee must be employed for at least 30 days.
- Initial 10 days are unpaid (but may be covered under Emergency Paid Sick Leave).
- The remaining 10 weeks are paid at two-thirds salary, up to \$200 daily and \$12,000 total.
- FMLA's reinstatement rights apply.
 - Hardship exception for employers with less than 25 employees.

COVID-19 and the ADA: Implications for Employers

- The ADA rules continue to apply, but they do not interfere with or prevent employers from following guidelines or suggestions made by the CDC.
- CDC has issued guidance for businesses and employers.
- EEOC has issued an updated Pandemic Preparedness Guidance and Technical Assistance Q&As consistent with the ADA.

ADA Reasonable Accommodations

- Typically, employee has duty to request an accommodation, which then triggers employer's obligation to engage in interactive process.
- However, even if employee has not made a request, employer may have an obligation to engage in an interactive process if it knows of an employee's disability and/or need for accommodation or the disability affects the employee's ability to request an accommodation.
- Interactive Process: informal dialogue through which employer and employee "identify the precise limitations" caused by the disability and "explore potential accommodations" to overcome those limitations.

Return to Work for “High Risk” Employees

- CDC has issued guidance identifying “People who are at higher risk for severe illness.”
- Common Return to Work Questions:
 - If the job may only be performed at the workplace, may an employer postpone the start date or withdraw a job offer because the individual is in a “high risk” category for COVID-19? **No.**
 - Can an employer exclude an employee from returning to work where the employer knows that an employee is in the “high risk” category and is concerned of the employee’s health upon returning to the workplace? **No.**

“Direct Threat” Rule

- ADA’s **direct threat** rule requires a showing that the individual has a disability that poses a “significant risk of substantial harm” to his own health.
 - Assessments must be based on objective, factual information, “not on subjective perceptions . . . [or] irrational fears” about a specific disability or disabilities.
 - If the CDC or state or local health authorities determine that a pandemic virus is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.
 - Even if an employer determines that an employee’s disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship).

Possible Reasonable Accommodations

- Certain reasonable accommodations may eliminate or reduce a direct threat to an employee:
 - Protective gowns, masks, gloves, or other PPE beyond what the employer may generally provide to employees returning to the workplace.
 - Erecting a barrier that provides separation between coworkers
 - Eliminating or substituting marginal job functions
 - Temporary modification of work schedule to decrease contact with coworkers or others
 - Moving the location where the employee works to provide more social distancing
 - Allowing employee to continue teleworking

Leave as a Reasonable Accommodation

- Leave may be a reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability.
- Length of leave required is a fact-specific inquiry.
- Courts generally agree leaves extending beyond one year are not required, although still subject to fact-specific inquiry as to reasonableness.
- Indefinite leave is not a reasonable accommodation because it does not allow the employee to perform the essential functions of the job in the near future.
- Evaluate employer's leave of absence policies, employer's past leave of absence practices, size of the company, cost of the leave, and existence of other accommodations that would allow the employee to return to his or her job.

Interaction with FMLA

- FMLA Basics:
 - Applies to employers with 50 or more employees.
 - 12 weeks of job-protected, unpaid leave for qualified employees.
 - Triggering events include employee's own serious health condition where employee is unable to perform the essential functions of his or her job.
 - Not necessarily a disability.
- Employee exhausts FMLA, but needs more leave for employee's health condition. What should I do?
 - Evaluate whether employee is entitled to reasonable accommodations under the ADA.
 - Engage in interactive process to determine a reasonable accommodation.
 - Additional leave may be a reasonable accommodation.
 - Do not rely on "no fault" leave policies that automatically terminate an employee after a specified duration of leave.

State and Local Laws

- Employees may be entitled to additional paid or unpaid leave under state or local laws
- Some states have expanded existing leave laws to allow employees to take leave for COVID-19 reasons.
- Some states have passed new laws requiring employers to provide COVID-19 paid leave to employees.
- California, Colorado, New York, Washington, D.C., and several cities have enacted new COVID-19 leave laws.

Resources

- FFCRA:
 - <https://www.dol.gov/agencies/whd/pandemic>
- ADA/FMLA:
 - <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- CDC Guidance:
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
 - <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>


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OSHA CONSIDERATIONS WITH RETURN TO WORK POLICIES

Presented by Steve O'Day



OSHA and COVID-19

- OSHA has not promulgated a standard specific to COVID-19, but has issued advisory guidance
- General Duty Clause,  5(a)(1)
- Existing obligations may be applicable to certain workplaces, such as PPE standards (29 CFR 1910 Subpart I), Hazard Communication Standard (29 CFR 1910 Subpart Z), and requirement to protect workers against hazardous chemicals, including those in cleaning products



Recommendations for All Employers

- Develop an Infectious Disease Preparedness and Response Plan

DATE: March 15, 2020

SUBJECT: INFECTIOUS DISEASE PREPAREDNESS AND RESPONSE PLAN

REGULATORY STANDARD: Section 5(a)(1) of the OSHA Act
Centers for Disease Control

- Stay informed on healthy agency guidance and incorporate recommendations into workplace plans
- Implement basic hygiene measures to reduce the spread of COVID-19, continue routine cleaning & housekeeping measures



Recommendations for All Employers

- Encourage sick workers to stay home
- Discourage sharing tools, equipment, desk, phones, etc.
- Train workers with reasonably anticipated occupational exposure to COVID-19 about sources of exposure, potential hazards, and workplace protocols to prevent or reduce exposure
- Identify workers who may be at increased risk and consider adjusting their location requirements, schedules or responsibilities

PPE Considerations

- PPE should be selected based on results of employer's hazard assessment and workers' specific job duties
 - OSHA recognizes shortage of PPE and is providing temporary enforcement flexibility
- Workers required to use PPE must be trained
- Respirator use must comply with OSHA's Respiratory Protection standard (29 CFR 1910.134)
- OSHA has issued guidance instructing CSHOs to exercise discretion in enforcements when considering an employer's good faith efforts to comply with training, auditing, equipment inspections, testing, and other safety and industrial hygiene services during the pandemic

Recording & Reporting Workplace Exposure

- COVID-19 can be recordable illness if it is contracted as a result of a worker performing his or her job duties
- Employers must record if:
 - The case is a confirmed case of COVID-19
 - The case is work-related as defined by 29 CFR 1904.5
 - The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., death, days away from work, medical treatment beyond first aid)
- Employers must report any worker fatality within 8 hours and any hospitalization within 24 hours

Recording & Reporting Workplace Exposure

- OSHA is suspending requirements to make “work-relatedness” determination except where:
 - There is objective evidence case may be work-related (ex: cluster of cases among workers in close proximity), and
 - The evidence is reasonably available to the employer
- “Objective evidence” is reasonably available to employer if provided by employees or obtained in the ordinary course of management
- OSHA has also directed its CSHOs to suspend enforcement of recordkeeping requirements, except in above scenario

Developing Industry Standards

- Contact tracing: no OSHA or CDC guidance on contact tracing, but an industry standard has begun to emerge in manufacturing and other essential services
 - Contact tracing + 14 day quarantine for employees who came into contact with infected worker
- CDC recently relaxed recommended quarantine period to 3 days without symptoms, which could be an indication that contact tracing programs could also be modified (for example, isolation and extra monitoring of potentially exposed employees instead of mandatory 14 day quarantine)

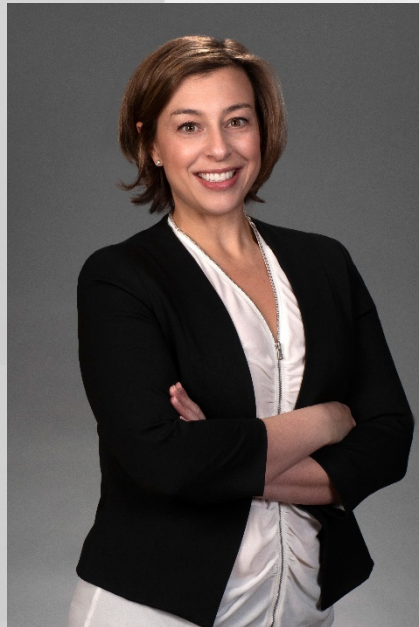
Other Hot Button Issues

- Section 11(c) of OSHA Act prohibits employers from retaliating against workers for raising safety concerns
- OSHA also protects employees who refuse to work where the employee, with no reasonable alternative, refuses to expose himself to a dangerous condition at the workplace
- Employers are responsible for the safety of employees who work at remote job sites
- Workers comp may not protect employers who use contract or temp employees if one of them gets sick and claims it was because of negligent COVID-19 related practices

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UNEMPLOYMENT BENEFITS AND OTHER RETURN TO WORK CONSIDERATIONS

Presented by Emily Friedman



Impact of COVID-19 on State Unemployment Compensation Rules

- Traditional unemployment rules vary by state
- States have adopted varying COVID-19 rules
 - Eased eligibility to allow benefits to individuals impacted by COVID-19 (e.g., vulnerable individuals, quarantined individuals, unable to work due to school closure, etc.)
 - Elimination of actively seeking work requirement
 - Elimination of waiting periods
 - Increased maximum benefit periods
- These rules continue to apply even after businesses reopen

Impact of Federal CARES Act

- Expands benefits entitlement to those unable to work or who are partially unemployed due to COVID-19
 - Pandemic Unemployment Assistance (**PUA**) –individuals who do not qualify for traditional unemployment benefits (self-employed, gig workers, 1099 ICs, limited work history, exhausted all state benefits, etc.)
 - Federal Pandemic Unemployment Compensation (**FPUC**) program – provides additional \$600 weekly payment to individuals receiving other UC benefits
 - Through benefit week ending on or before July 31, 2020
 - Those collecting partial UC benefits also eligible
 - Pandemic Emergency Unemployment Compensation (**PEUC**) program – provides 13 extra weeks of benefits to individuals who have exhausted regular state benefits
- Federal government funds these benefits

Employer Obligations

- Many states encourage – but do not require – employers to file claims on behalf of employees to streamline the process
- Georgia requires more!
 - New requirement that employers must e-file partial claims ***on behalf of their employees*** for any week during which a full or part-time employee's hours are reduced due to COVID-19
 - This rule also applies in the event no work is available for a short period of time
 - If employer fails to abide by new rules, employer must pay to the Commissioner the full amount of benefits paid to the employee

Work Share Programs

- What are they?
 - Voluntary programs that allow employers to divide available hours among group of employees instead of implementing a layoff
 - Offer greater benefits to employees participating in work share program than those traditionally available for partial unemployment
 - Eligibility thresholds easier to meet
- Program eligibility and design will vary by state
 - Eligibility criteria and work reduction rules
 - Identification of impacted business units
 - Reporting requirements
 - Duration of program
- Programs not available in every state

Work Share Programs (continued)

- Employers not off the hook that easily
 - Some states require certifications by employer that the program is in lieu of layoffs, or that employer will not conduct layoffs or further reduce work hours
 - Most states require all employees in affected unit to be covered
 - Most states require employers to reduce hours by same percentage
 - Most states require employers to maintain pre-plan benefits and benefit levels
 - Most restrict ability to hire or transfer in new employees into the work group covered by plan
 - Most states require union approval of plan
 - Most states prohibit temporary or seasonal workers from participating

Additional Work Share Considerations

- Exempt workforce issues
 - Some exempt employees may not be eligible
 - Unclear whether employer would have to convert participating exempt employees to non-exempt
- Additional administrative burden on employers
 - Administrative burden will vary by state
 - Need resources to design program and handle application process
 - Need to ensure resources to administer program after approval
 - Requirement to certify wages/work hours on regular basis
 - Requirement to provide employee communications
 - Some states require employers to take more active roles

Employees Refusing to RTW – Federal Considerations

- Generally, individuals are not entitled to unemployment benefits if work is available
- DOL guidance on CARES Act:
 - Employee refusing to RTW when called back simply because individual wishes to receive unemployment benefits is not eligible
 - Employee refusing to RTW due to general fear of exposure does not render individual eligible
 - **BUT** individuals with health complications rendering them unable to work, or advised by health care provider to self-quarantine to avoid health risks may be eligible

Employees Refusing to RTW – State Considerations

- States approaches differ
- Some states have enacted rules that entitle employees to benefits even after refusing to RTW if there is good cause
 - Employer has not been deemed an essential business and is not designated for reopening by state
 - Employer not complying with reopening or safety requirements
 - Employee is particularly vulnerable due to health condition(s)
 - Employee lives with someone at high risk for severe complications from COVID-19
 - Employee cannot work due to school closure / childcare issues
- Other states have taken the position that refusing to RTW may be considered a “refusal to work”
- States allow employers to contest claims filed by employees when work is available or if fraud is suspected

Best Practices & Reminders

- Avoid giving advice to employees about unemployment benefits entitlement; direct them to state resources
- Encourage employees to apply through the state administered programs – outcome will vary based on individual facts and circumstances
- Stay apprised of state-issued guidance on COVID-19 and related RTW issues; they are changing daily
- Unemployment eligibility has no bearing on employment status; employers still can terminate employment for lawful reasons

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RETIREMENT PLANS AND COMPENSATION

Return to Work Considerations
Presented by Don Mazursky



Deferral Elections under 401(k) Plans

- Return from Unpaid Layoff/Furlough or Termination
 - Deferral election, in effect before beginning of unpaid layoff/furlough or termination of employment, will be reinstated when employee returns, to extent determined under terms of the plan and customary practice
 - If the deferral is reinstated, an auto-escalation provision that increased the deferral percentage during the layoff/furlough generally should be given effect
 - Under a QACA, reinstatement of the deferral percentage may be required, depending on the period of absence

Qualified Retirement Plans

- Service Counting for Eligibility and/or Vesting
 - If the plan counts hours of service, ERISA does not require that hours of service be given for periods of layoff/furlough or termination with no pay (including no back pay for that period)
 - If the plan counts periods of employment (elapsed time) and an employee returns to active service within 12 months, the period of leave must be counted as service
- If an employee had satisfied the eligibility requirements before the layoff/furlough or termination, he/she will become a participant upon return to active service

Qualified Retirement Plans

- If an employee whose pay was reduced receives a payment to restore lost wages –
 - Payment generally will be counted as “benefits compensation” under the plan if it constitutes “back wages” or a make-up for the lost pay
 - It is important to check the terms of the plan to ensure proper treatment

Nonqualified Deferred Compensation Plans

- Separation from Service
 - Layoff/furlough will constitute a “separation from service” under Section 409A, if:
 - There is no reasonable expectation that the employee will return to perform services for the employer; or
 - The layoff/furlough lasts more than 6 months, and
 - The employee has no contractual or legal right to reemployment
 - Termination of employment will constitute a “separation from service” if there is no reasonable anticipation of future services
- If a separation from service triggers a distribution, it must be made even if the employee returns

Nonqualified Deferred Compensation Plans

- Deferrals After Unpaid Layoff/Furlough or Termination
 - Deferral election, in effect before beginning of unpaid layoff/furlough or termination of employment, must be reinstated when the employee returns during the same calendar year, even if the employee had a separation from service
 - If employee returns in a future calendar year, whether prior deferral election recommences depends on terms of plan document:
 - Is deferral election evergreen?
 - Does plan provide that deferral election ends at end of each calendar year?

Nonqualified Deferred Compensation Plans

- If deferral election ends at end of a calendar year and employee returns in a future calendar year to which a prior deferral election does not apply; and
 - He/she had been paid out 100% of his/her account balance before he/she again becomes eligible for the plan; or
 - He/she had been ineligible to actively participate in the plan for at least 24 months;

Then, and only then, may he/she make a mid-year deferral election upon his/her return

- Otherwise, he/she must wait until the beginning of the next calendar year

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HEALTH AND WELFARE BENEFITS FOR RETURNING EMPLOYEES

Presented by: Kelly Meyers



Health and Welfare Benefits for Returning Employees

- Benefit Continuation/Reinstatement
- ACA Considerations
- Employee Election Changes
- Administrative Considerations
- Next Steps

Benefits Continuation/Reinstatement

- Requires a fact specific analysis
- Key factors
 - Returning Employee Status
 - Benefit Status
 - Plan Terms

ACA Considerations

- ACA Employer Mandate
 - Coverage may need to be offered to returning ACA Full-Time employees, even if they no longer satisfy the plan's eligibility requirements (*e.g.*, former full-time employees who return to part-time employment)
 - Hours paid during the non-active employment period may need to be counted toward determining the employee's ongoing ACA Full-Time status

Employee Election Changes

- Returning employees may be permitted to opt-out of or into health and welfare benefits if:
 - The employee experiences a change in status event (e.g., commencing employment, returning from unpaid leave) and the terms of the plan allow for the change
- Employers are permitted to provide additional flexibility with respect to mid-year election changes due to COVID-19, by allowing employees to:
 - Enroll in health coverage, change health coverage options, or drop health coverage if the employee attests in writing he will be enrolled in other health coverage
 - Change healthcare or dependent care flexible spending account elections to start, stop, increase or decrease contributions

Administrative Considerations

- During the COVID-19 emergency period:
 - Plan participants have additional time to (i) request a special enrollment right, (ii) provide notice of a COBRA qualifying event, (iii) elect and pay for COBRA coverage, and (iv) file claims and appeals
 - Plan sponsors have additional time to furnish ERISA-required documents, such as summary plan descriptions and annual notices

Next Steps

- Employers will need to review their plan documents and have a good understanding of benefit reinstatement provisions
 - If changes in eligibility requirements are desired, stop-loss carrier or insurance carrier approval may be needed
 - Plan documents may also need to be updated to account for any changes
- Coordination with third party vendors will be necessary to ensure a smooth transition
 - Notice requirements
 - ACA hours counting
 - Expanded participant deadlines
 - Terminating direct bill/reinstating payroll deductions

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Additional SGR Resources

- COVID-19 Resource Center
 - Payroll Protection Program
 - Corporate
 - Construction
 - Employment
 - Employee Benefits & Executive Compensation
 - Environmental
 - Health Care
 - Tax
 - White Collar
 - International
 - Intellectual Property
 - <https://www.sgrlaw.com/covid-19-resource-center/>

- **Returning to Work During the COVID-19 Pandemic: Are You Ready?**

- <https://www.sgrlaw.com/client-alerts/returning-to-work-during-the-covid-19-pandemic-are-you-ready/>

- **Getting Back to Work in Uncertain Times – Guidelines for Employers**

- <https://www.sgrlaw.com/client-alerts/employers-prepare-to-get-back-to-work-the-easing-of-covid-19-stay-home-restrictions-and-what-employers-need-to-do/>

- **Employer Guidance on Preparing the Workplace for COVID-19**

- <https://www.sgrlaw.com/client-alerts/employer-guidance-on-preparing-the-workplace-for-covid-19/#>

- **What Employers Need to Know About Face Coverings**

- https://www.sgrlaw.com/wp-content/uploads/2020/05/Face-covering-requirements-w_OSHA-requirements.pdf

Questions & Answers



THANK YOU FOR ATTENDING

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