

LABOR & EMPLOYMENT WEBINAR

What Employers Should Consider as They Prepare to Return to Work



Welcome and Introductions

Christopher P. Banaszak

Shareholder &
Chair of Reinhart's
Labor & Employment
414-298-8320

cbanaszak@reinhartlaw.com

Laura L. Ferrari

Attorney
Labor & Employment
414-298-8369

lferrari@reinhartlaw.com

Rebecca E. Greene

Shareholder
Employee Benefits
414-298-8244

rgreene@reinhartlaw.com

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**Brittany Lopez
Naleid**

Shareholder
Labor & Employment
414-298-8215
bnaleid@reinhardtlaw.com

Robert K. Sholl

Shareholder
Labor & Employment
414-298-8143
rsholl@reinhardtlaw.com

Shannon M. Toole

Attorney
Labor & Employment
414-298-8526
stoole@reinhardtlaw.com

Reopening Considerations

- Regardless of when your business is legally able to reopen, there are a number of factors employers should consider in planning how to transition back to working from a shared facility
 - Possibility of continuing remote and alternative work arrangements
 - When employees return to the office, it should not be business as usual
 - Personnel matters should be incorporated into the company's business continuity plan

Return-To-Work Team

- Employers should assemble a team that will be primarily responsible for preparing the transition plan and coordinating the logistics of employees' return
- This team should be the primary source of communication and information for the company's plan
 - Regular and consistent communication will be key
 - Must be flexible and adapt to changing circumstances and government directives

Timing Your Reopening

- The safer-at-home order that was set to expire on May 26 was struck down by the Wisconsin Supreme Court
 - The decision does not mean that all businesses within the State can immediately resume normal operations
- Unless there are new State limitations, local government will be the primary source of any restrictions
 - Decentralized rulemaking will require employers, especially those with multiple facilities, to monitor for changes

Employee Return

- Many companies will likely implement a phased plan in which employees will return at gradual or staggered intervals
 - It is important to keep in mind obligations under anti-discrimination laws
- Employers must also be conscious of employees who have an existing or new need for an accommodation

Increasing Workplace Safety

- Assess all areas and job functions within the workplace and determine appropriate control measures to eliminate or reduce exposure
- Monitor guidance from OSHA, the CDC, and other state and local agencies
 - OSHA: https://www.osha.gov/SLTC/covid-19/news_updates.html
 - CDC: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
 - WEDC: <https://wedc.org/reopen-guidelines/>

Social Distancing within the Workplace

- How to implement social distancing within the workplace
 - Reducing the number of people in the workplace at a given time
 - Stagger work hours, breaks, lunches, etc. to reduce traffic in common areas
 - Reorganization of the workplace
 - Use of visual cues and signage
- Consider installing physical barriers or requiring face masks
- Clear expectations of social distancing and other precautions

Additional Safety Considerations

- Conduct a personal protective equipment hazard assessment
- Reduce exposure from “high touch” surfaces
- Confirm that your cleaning and disinfecting practices are sufficient
- Documentation and communication of safety precautions being implemented
- Training for management and employees
- On-going monitoring and evolution of safety plan

What to Do if An Employee Tests Positive for COVID-19?

- Your return to work plan should address this scenario.
- Any employee with symptoms when they arrive or becoming sick during the day should immediately be separated and sent home
- Assess what cleaning and disinfecting must be done
- Contact tracing and employee confidentiality
- What are the next steps for employees that were exposed?
- When can a sick employee can return to work?
- Determine whether to record the illness or report to OSHA

Employee Safety Concerns

- The Occupational Safety and Health Act's anti-retaliation provision prohibits employers from disciplining or terminating an employee who refuses to perform dangerous work
- The National Labor Relations Act provides all employees the right to engage in concerted activity
 - The Labor Management Relations Act affords similar protections

Employee Harassment

- Harassment based on an employee's protected characteristics, including national origin and ancestry, is unlawful
- Employees with a disability and those who are older may be more susceptible to complications related to COVID-19, but employers should not treat these employees differently on those grounds alone

How the NLRA May Impact Reopening

- Right to engage in “concerted activities ... for the purpose of collective bargaining or other mutual aid or protection.”
- Protections available to all employees, not just those in a union.
- Examples of protected activities during COVID-19.
- Retaliation concerns.

Wage & Hour Issues That May Arise During Reopening

- Misclassification of employees.
- New and/or additional compensable tasks.
- Timekeeping.

Implementing Medical Testing in the Workplace

- Medical testing for applicants
 - Pre-offer
 - Post-offer
- Medical testing for employees
 - Permitted types of tests
 - Reliability
 - Confidentiality

Implementing Medical Testing in the Workplace

- EEOC Pandemic Preparedness in the Workplace and the Americans with Disabilities Act:
<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- EEOC's "What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws:
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- FDA's FAQs on Testing for SARS-CoV-2:
<https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2>

Addressing Accommodation Requests and Leave Requests

- Americans with Disabilities Act
 - Accommodating employees with underlying conditions
 - Confidentiality
- Families First Coronavirus Response Act
 - Types of leave
 - Who can take leave
 - Requests for documentation
 - Interaction with Paycheck Protection Program (PPP)

Employee Benefits - Retirement Plans

- COVID specific law changes
 - Waiver of 2020 required minimum distributions in DC Plans
 - Optional COVID in-service distributions and expanded loans available
- Plan design questions
 - Suspension of employer contributions?
 - Were any erroneous distributions made to employees who were not terminated?
 - Did layoffs result in a partial termination of the Plan, triggering full vesting?
- Administrative considerations
 - Crediting hours of service for employees taking FFCRA or expanded FMLA leave
 - Employee deferrals and employer contributions on wages for paid leave

Employee Benefits - Other Benefit Programs

- How did the employer handle benefit plan eligibility during the shut-down
 - Plan documents and insurance policies set forth specific eligibility rules
 - Coordinate with insurers regarding furloughed employees or employees whose hours were reduced while on shut-down
 - Employers sponsoring self-funded plans may need to revise plan documents
- Handling employee payroll deductions who return from layoff
 - Determine whether prior FSA or DCAP elections must be reinstated or if a new enrollment is needed
 - Can the employee change his or her prior health plan election?
- Determine what notices need to be delivered to participants to document the expanded health plan coverage required by COVID-19 legislation (SMM, SBC, etc.)
- Voluntary separation/severance programs are common in an economic downturn
 - Programs need to be carefully designed to avoid legal pitfalls

Employee Benefits - Other Considerations

- Certain participant deadlines are delayed, including requesting special enrollment, COBRA election/payment periods, making claims, and appealing a claim denial
- Certain employer deadlines for reports and disclosures are extended, provided the employer delivers the documents as soon as practicable

Questions?

Thank You!

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