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Reopening the Workplace: Considerations for U.S. Employers

Related Practices

COVID-19 Task Force

By Peabody & Arnold on June 1, 2020

As states across the country begin to lift pandemic-related restrictions, employers are planning for reopening workplaces and bringing employees back to work. This post highlights some of the key legal issues and guidance from government agencies that employers should consider as they reopen their offices and transition to the "new normal" way of doing business.

This article is not a substitute for legal advice. Employers are urged to consult with counsel as they develop reopening plans for their unique workplaces.

Government Requirements and Guidance

The reopening process will look different in every state, and it is critically important that employers comply with orders issued by state and local governments in the jurisdictions where their workplaces are located. While reopening requirements will vary from state to state, in most states reopening will not be as simple as flipping a switch. Instead, we anticipate states will likely follow a phased approach that is tied to a variety of metrics tracked by local public health officials.

In addition to state-specific requirements, several federal agencies have released voluntary guidelines on a variety of issues, including workplace safety, social distancing, medical testing and screening, and cleaning and disinfection. Before employees can return to the workplace, employers must craft reopening plans that address the specific concerns of their industries and worksites, consider federal guidelines, and comply with state and local health directives.

While the focus of this post is on federal guidelines, at the end of the post we have highlighted reopening requirements specific to Massachusetts employers.

Considerations When Preparing to Reopen the Workplace

Consider Establishing a Reopening Task Force

Employers should consider creating a task force to prepare for and implement the reopening process. Members of the task force could include employees who work in departments such as human resources, legal, facilities, operations, and supervisors from different departments within the company.

Whether as part of a formal task force or an informal committee, management should, among other things, coordinate with property or building management to create a plan for reopening the workplace in accordance with the Centers for Disease Control and Prevention (CDC) Guidance for Businesses, conduct a COVID-19 risk assessment of their work environments based on the Occupational Safety and Health Administration's (OSHA) Guidance on Preparing Workplaces for COVID-19, develop a strategy for communicating the reopening plan to employees, and prepare to answer any pandemic-related questions that employees may have. The CDC has also issued COVID-19 Employer Information for Office

Buildings that highlights the specific steps that employers should take in order to create a safe and healthy workplace for employees and clients in an office building setting.

Workplace Decision Tool

The CDC has provided a Workplace Decision Tool to assist employers in making reopening decisions. The CDC's tool advises employers to ask themselves three broad questions:

- Should you consider opening?

  - Ensure reopening will be consistent with applicable state and local orders; and

  - Prepare to protect employees at higher risk for severe illness.

- Are recommended health and safety actions in place?

  - Promote healthy hygiene practices;

  - Intensify cleaning, disinfection and ventilation measures, where possible, in the workplace;

  - Encourage social distancing and enhance the space between employees;

  - Consider modifying travel and commuting practices; and

  - Train all employees on health and safety protocols.

- Is ongoing monitoring in place?

  - Develop and implement procedures to check for signs and symptoms of employees daily upon arrival, as feasible;

  - Encourage anyone who is sick to stay home;

  - Develop a plan for if an employee gets sick;

  - Regularly communicate and monitor developments with local authorities and employees;

  - Monitor employee absences and have flexible leave policies and practices in place; and

  - Be ready to consult with local health authorities if there are cases in the workplace or an increase in cases in the local area.

According to the CDC, the employer should be able to answer "yes" to the three broad questions above before a workplace is ready to be reopened. In addition, the CDC reminds employers to check with state and local health officials to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

Considerations for the Workplace

Social Distancing and Physical Modifications

In its Guidance for Businesses on preventing and reducing transmission of COVID-19 among employees, the CDC recommends that employers alter their workspaces in order to help employees maintain a safe social distance of at least 6 feet by physically separating employees from each other, when possible. Some of the strategies suggested by the CDC include:

- Implementing flexible worksites (e.g., telework);

- Revising work hours (e.g., staggering shifts to limit the number of employees in the workplace at the same time);

- Using physical barriers such as partitions or plastic dividers to increase the physical distance between employees and visitors where adequate space is not possible;

- Using signs or other visual cues to remind employees to maintain a safe distance of 6 feet away from others; and

- Closing or limiting access to common areas where employees are likely to congregate and interact.

OSHA has provided two resources with suggested methods for providing safe and healthy workplaces: a fact sheet Protecting Workers during a Pandemic and OSHA's Guidance on Preparing Workplaces for COVID-19. Some of the measures recommended by OSHA in these documents mirror those recommended by the CDC. They also include recommendations for training employees about the importance of social distancing and other control and prevention measures; making physical modifications to the workplace, including improving ventilation; and developing flexible leave policies to help stop the spread of a disease.

Likewise, the Equal Employment Opportunity Commission's (EEOC) Pandemic Preparedness in the Workplace and the Americans with Disabilities Act and corresponding Technical Assistance Questions and Answers encourage employers to implement infection control practices including mandatory social distancing in the workplace, modifying work schedules, and implementing telework and liberal work leave policies.

Guidelines for Cleaning and Disinfecting the Workplace

The CDC recommends employers follow its Reopening Guidance for cleaning and disinfection practices in the workplace. This guidance provides helpful information about what types of cleaning supplies and disinfectants should be used; how to determine what needs to be cleaned and/or disinfected; and how to develop, implement, and maintain a routine cleaning plan to reduce the risk of exposure to COVID-19.

As the CDC explains, there is a difference between cleaning and disinfecting. Cleaning refers to the removal of dirt and germs from surfaces but cleaning alone does not kill germs. Disinfecting, on the other hand, refers to using chemicals to kill germs on surfaces, but it does not, by itself, clean the dirty surfaces or remove germs. The most effective method of reducing the risk of spreading infections is to disinfect surfaces after cleaning them. However, according to the CDC most surfaces and objects in the workplace will need only normal routine cleaning with soap and water to remove germs and dirt from surfaces. Where disinfecting is required, the CDC recommends employers use disinfectants approved by the Environmental Protection Agency (EPA) and follow the instructions on the manufacturer's label.

Additionally, the CDC has issued a separate guidance for cleaning and disinfecting workplaces where there has been an individual with a suspected or confirmed case of COVID-19. This guidance also provides important information about when and how to properly clean and disinfect areas and objects that an individual with COVID-19 came into contact with. According to OSHA's COVID-19 Control and Prevention guidance, employees performing cleaning and disinfecting must also be protected from exposure to any hazardous chemicals used in these tasks; be provided with the appropriate personal protective equipment, supplies, Material Safety Data Sheet for chemicals used; and receive training on how to properly use the equipment and supplies when cleaning and disinfecting after a confirmed case of COVID-19.

Cloth Face Coverings and Personal Protective Equipment

Several federal agencies, including the CDC, OSHA, and EEOC have addressed the use of cloth face coverings and personal protective equipment (PPE).

For most workplaces, the CDC's Guidance for Businesses and COVID-19 Employer Information for Office Buildings recommend employees wear cloth protective face coverings. Cloth face coverings are appropriate if a hazard assessment has determined that employees do not need PPE, such as a respirator or medical facemask. While cloth face coverings are not considered PPE by the CDC, they may still prevent workers who do not know they have the virus from spreading it. In workplaces where there is an increased risk of transmission and masks or respirators are recommended, the CDC notes that cloth face coverings are not appropriate substitutes.

In workplaces where a hazard assessment determines that employees should wear PPE, employers must comply with specific OSHA standards for the type of PPE used. For example, under these standards the employer is responsible to assure the adequacy of PPE, including the proper selection, maintenance, and sanitation of the PPE. OSHA also reminds employers that if employees are required to wear PPE, the employer must provide the appropriate PPE at no cost to employees and provide employees with training on how to properly use the PPE.

Many employers question whether requiring employees to wear cloth face coverings or PPE implicates the anti-discrimination laws. According to the EEOC's Technical Assistance Questions and Answers, employers may require employees to wear PPE or cloth face coverings while in the workplace. Employers should keep in mind, however, that if an employee declines to wear PPE or a face covering due to a disability or other medical reasons, they should engage in the interactive process with the employee, as required under the Americans with Disabilities Act (ADA). If an employee requests an alternative or modification to the PPE, such as telework or moving the employee's workstation, employers may need to make reasonable accommodations unless doing so would cause the employer undue hardship.

Medical Testing and Screenings

The EEOC has updated its guidance entitled Pandemic Preparedness in the Workplace and the Americans with Disabilities Act and has provided Technical Assistance Questions and Answers to confirm that COVID-19 is considered a direct threat under the ADA based on guidance from the CDC and other public health authorities. Therefore, the EEOC has advised that employers will not run afoul of the ADA if

they implement medical screening procedures in a manner consistent with advice from the CDC and other public health authorities.

Employers may require employees to undergo certain medical screenings when entering the workplace, such as on-site temperature checks and COVID-19 testing, in a manner that complies with CDC guidance. Employers who wish to implement COVID-19 testing should review the guidance from the Food and Drug Administration (FDA) to ensure that the selected testing method is accurate and reliable.

Employers who wish to measure the temperatures of employees should be aware of the three recommended methods for taking temperatures provided in the CDC's general business FAQs: reliance on social distancing, reliance on barrier/partition controls, and reliance on PPE. These FAQs provide important information about each of these methods for taking temperatures in the workplace, including a detailed overview of what steps and precautions employers need to take when performing temperature checks. For example, employers relying on barrier/partition controls should ensure the designated screener is provided with adequate PPE, the screener's face must remain behind the barrier/partition at all times, and the screener is able to remove, discard, and change PPE, such as gloves, if physical contact occurs with an employee before conducting the next temperature check. Employers should carefully review CDC guidance before taking employee temperatures.

In addition to or as an alternative to conducting temperature checks, employers may instead consider requiring employees to review or complete a daily questionnaire certifying that they are not experiencing symptoms identified by the CDC and other public health authorities that are associated with COVID-19, that they are not aware of any exposure to a confirmed case of COVID-19, and have not traveled to a high-risk area where there is widespread transmission of COVID-19.

Whether employers implement temperature checks, require employees to complete a medical questionnaire, or both, they must ensure they are not engaging in disparate treatment based on protected characteristics. Likewise, employers must also ensure that any medical information obtained about an employee is maintained in a confidential file that is separate from the employee's personnel file. Finally, employers should also be aware that non-exempt employees may need to be paid for the time spent being tested at the workplace or completing a self-assessment.

Symptomatic Employees in the Workplace

According to the CDC's Guidance for Businesses, employers should actively encourage sick employees to stay home. Employees who appear to have symptoms upon arrival at work, or who become symptomatic during the workday, should immediately be separated from all other employees, customers and visitors, and sent home. According to the CDC, in most cases, the workplace does not need to be shut down if an employee is suspected or confirmed to have contracted COVID-19. However, the areas where the sick employee has been may need to be shut down, cleaned, and disinfected before they can be reopened.

Additionally, employers should notify employees who may have been exposed to the symptomatic individual, while maintaining the confidentiality of the individual in accordance with the ADA. The CDC advises that employees who were exposed to COVID-19 may need to take additional precautions, including leaving the workplace and self-isolating for up to 14 days.

Employers should visit the CDC's Guidance for Businesses and general business FAQs for additional information about handling confirmed cases of COVID-19 in the workplace.

Employees Returning to the Workplace After a Suspected Case or COVID-19 Diagnosis

The CDC recommends that employees with a confirmed or suspected case of COVID-19 should not return to the workplace until they meet the CDC's criteria to discontinue home isolation and have consulted with a healthcare provider and state or local health department.

While the EEOC has advised that employers may require an employee with a confirmed case of COVID-19 to provide a doctor's note to certify that they are healthy and able to return to work, it also notes that healthcare providers may be extremely busy and it may be difficult for employees to obtain this documentation in a timely manner. Nevertheless, employers should request employees to provide some type of medical documentation to verify they are healthy and able to return to work before allowing the employee to return, especially in areas where there is significant widespread transmission.

Anti-Discrimination Laws, Leaves, and High-Risk Employees

Anti-Discrimination Laws

The EEOC has notified the public that it will continue to enforce the country's employment non-discrimination laws while its physical offices are closed in compliance with public health guidelines. Additionally, the EEOC has issued a message for employers and employees alike to be mindful of instances of harassment, intimidation, or discrimination in the workplace and urges employers to take actions to prevent or correct this behavior.

Leave Laws

The EEOC, CDC, and OSHA are encouraging employers to consider modifying existing leave policies in order to allow employees who are sick or have been exposed to a confirmed case of COVID-19 to stay home.

Employers should also consider whether there are federal and state laws regarding use of leave and sick time that apply to the employer. For example, employers with fewer than 500 employees may be required to provide employees with paid sick leave under the Families First Coronavirus Response Act (FFCRA). Under the FFCRA, employees who are unable to work or telework in order to care for their child whose school or place of care, or childcare provider, is closed or unavailable due to reasons related to COVID-19, may be eligible for both Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFML). For additional information about leave available under the FFCRA, please visit our update for employers on the FFCRA regulations and our guide to calculating FFCRA leave entitlements and pay.

Employees who are eligible for leave under the Family and Medical Leave Act (FMLA) might also be entitled to FMLA leave for their own or a family member's serious health condition, as defined by the FMLA.

High-Risk Employees

Employers will likely need to engage in a dialogue with employees who are at increased risk of developing severe illness from COVID-19 about the circumstances of their return to the office. While employers should be vigilant about protecting vulnerable workers from COVID-19, the the EEOC's Technical Assistance Questions and Answers reminds employers to be cautious about excluding workers from the workplace *solely* because they are more vulnerable to developing a severe illness due to a disability or medical condition. Such exclusionary policies, while well-intentioned, could risk running afoul of anti-discrimination laws that protect older, disabled, or pregnant workers. On the other hand, the EEOC's guidance may conflict with the reopening requirements in place in some states that have implemented increased protections for vulnerable populations. Employers in states where there is tension between the EEOC guidance and state return-to-work requirements are encouraged to consult with counsel as they develop their reopening plans.

Considerations for Massachusetts Employers

Governor Baker recently announced a Four-Phase Approach to reopening businesses in Massachusetts based on public health guidance and metrics. The goal of the Four-Phase Approach is to methodically allow businesses, services, and activities to resume, while avoiding the possibility of a resurgence of COVID-19 cases that could overwhelm the healthcare system. The four phases include "Start," "Cautious," "Vigilant," and "New Normal." The Commonwealth's reopening plan identifies specific industries and types of businesses that are permitted to open during each phase. Each phase will last at least three weeks and the Commonwealth may revert back to an earlier phase if there are negative public health data trends.

When businesses are eligible to reopen, they must comply with three related sets of requirements: Mandatory Workplace Safety Standards that apply to businesses in all sectors and industries; self-certification requirements for all businesses; and sector-specific protocols.

The Mandatory Workplace Safety Standards provide requirements for businesses in the key areas of social distancing, hygiene protocols, staffing and operations, and cleaning and disinfecting the workplace. Among the most noteworthy of the standards is that businesses must require employees to wear cloth face coverings. All businesses must follow these standards before their workplaces can be reopened at any phase during the reopening process.

Additionally, the self-certification requirements apply to all businesses eligible to reopen. Before opening, businesses must self-certify that they have met the following requirements:

- Implement Social Distancing and Hygiene Measures

    - Employers must put social distancing measures in place.

    - Employers must require all employees to wear masks or face coverings in the workplace.

    - Employers must establish cleaning and disinfecting protocols.

    - Employers must ensure the necessary handwashing supplies and capabilities are provided throughout the workplace.

    - Employers must train employees on social distancing and hygiene protocols.

- Develop a COVID-19 Control Plan

  - Employers should complete a Control Plan Template to outline how they will prevent the spread of COVID-19 in their workplaces.

  - The Control Plan does not need to be submitted to a state agency for approval, but it must be retained on the premises and made available in the event of an inspection or outbreak.

- Print and Display the Compliance Attestation Poster

  - Employers must print, sign, and post the Compliance Attestation Poster attesting that they have completed a COVID-19 Control Plan.

  - This must be posted in an area within the business premises that is visible to employees and visitors.

- Print and Display Additional Posters

  - Employers must post signage describing the rules for maintaining social distancing, hygiene protocols, cleaning and disinfecting.

  - Poster templates are available on the mass.gov website, including this Poster for Employees.

Finally, all businesses that are reopening must comply with applicable sector-specific protocols. For example, the sector-specific protocols for offices, which can be found here, provide a detailed set of additional requirements for office environments. During Phase I, offices are permitted to reopen with limited occupancy not to exceed 25% of (a) the maximum occupancy level specified in any certificate of occupancy or similar permit or as provided for under the state building code; or (b) the business or organization's typical occupancy as of March 1, 2020. In addition to the Control Plan required of all businesses, offices must also prepare a COVID-19 Prevention Plan that includes contact information for state and local health authorities; a plan to regularly evaluate the workspace for compliance with state and federal requirements; and an isolation, contact tracing, and communication plan for if a worker is diagnosed as positive with COVID-19, or comes into close contact with an individual diagnosed with COVID-19. Offices must also train their employees on a variety of topics and maintain logs of cleaning and disinfection as well as of individuals who are present in the workplace. At present, there are sector-specific protocols for construction, manufacturing, laboratories, car washes, pet grooming, and hair salons and barber shops. Sector-specific protocols for other industries are expected to be added as the Commonwealth moves through each phase of the reopening plan.

Further Information

Additional information and guidance about reopening the workplace will continue to be issued by federal, state, and local officials. We will continue to monitor these developments and provide updates as necessary. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information about reopening their workplaces.