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Tips for Preparing to Reopen the Workplace After "Safer at Home" Expires

Wisconsin, like most of the country, has been under a "Safer at Home" order for almost eight weeks. However, the country is beginning to reopen and we are seeing plans for reopening both at the federal and state levels. In anticipation for this shift away from "Safer at Home," employers must plan for the numerous issues that will inevitably arise during this transition. Comprehensive planning and communication in the time leading up to and during the return-to-work process will be key to ensuring a safe and productive reopening. Here, we outline the critical issues to be addressed.

When and How to Reopen

For businesses that were previously shut down or essential businesses that are ramping up, you must not only assess when to reopen but also *how* to reopen. This involves monitoring federal and state orders, including keeping an eye out for a decision from the Wisconsin Supreme Court on the legality of the extension of Gov. Tony Evers' Safer at Home order.

Employers should have a team that is responsible for coordinating the reopening, ensuring communication from a single source and establishing accountability for putting all plans into action.

How to reopen also includes considering which employees to bring back and confirming that the method for recalling employees is appropriate and nondiscriminatory. While many employers will likely implement a gradual or phased reopening, employees cannot be required to remain at home based solely on their age or the fact that they have an underlying health condition.

Making the Workplace Safer

Reopening will likely require changes and adjustments to the workplace. Because physical separation will continue to play an important role in slowing the spread of the coronavirus, employers should assess how they can enforce social distancing within the facility. If the nature of the work or the workplace itself is not conducive to keeping employees sufficiently separated, additional measures should be considered.

For example, installing temporary physical barriers between work stations, requiring that employees wear facemasks and altering schedules to allow for a

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less densely packed facility can help prevent transmission between employees who normally work in close quarters. Similar steps should be taken to ensure that employees do not congregate in common areas such as bathrooms, break rooms, elevators and cafeterias. Posting notices to remind employees to keep at least six feet apart and altering these spaces to support social distancing (*e.g.*, removing and rearranging tables and chairs, blocking off every other stall and sink in restrooms, using tape to create visual cues) will help accomplish this objective.

Employers should assess how their facility is cleaned and disinfected, which will almost certainly need to occur more frequently than is customary. The Centers for Disease Control and Prevention (CDC) released guidance specifically for businesses, schools and other public places regarding proper cleaning and disinfecting procedures for employers to consult while preparing a specific plan. Employers should pay particular attention to regularly touched surfaces like door handles, faucets, printers/copiers and communal kitchen appliances, and take extra care to ensure that these are sanitized consistently throughout the day. In an effort to minimize the number of surfaces with which multiple people come in contact, employees should not, where possible, share telephone headsets, key boards, desks and similar workspace items.

Employers will want to stay apprised of best practices issued by the Occupational Safety and Health Administration (OSHA), the CDC and the guidelines provided by the Wisconsin Economic Development Corporation (WEDC) issued on May 8, 2020. The WEDC guidelines are actually a series of guidance documents, including a general guidance and guidance documents for 15 specific industries such as agriculture, construction, gym and fitness centers, hair and nail salons, manufacturing, professional services, restaurants and retail.

Employee Safety and Personnel Management

Navigating employees' reintroduction to the office could be one of the most challenging aspects of implementing a return-to-work plan. Employees may be apprehensive about resuming their work duties away from home, but employers can help ease these fears by communicating the safety precautions being implemented, providing any necessary training, setting clear guidelines regarding expectations, such as use of masks and hand washing, and providing a reporting channel for employees to raise safety concerns.

Employers should remind employees that they should stay home if they feel ill, are experiencing symptoms of COVID-19 as recognized by the CDC, or have come in contact with someone who has tested positive for COVID-19. Employers are

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also permitted to measure employees' temperatures prior to their entrance into the facility and may require that employees who exhibit symptoms of or have been diagnosed with COVID-19 return home. Employers should also assess whether to test employees for COVID-19.

It is essential that employers do not lose sight of their responsibilities under federal and state law when obtaining information from employees about their symptoms, taking their temperatures or determining who should continue to work from home. For example, any information the company gathers in these types of screenings must be maintained as a confidential medical record in accordance with the Americans with Disabilities Act (ADA). Furthermore, employers may not ask employees who are not exhibiting COVID-19 symptoms to disclose whether they have an underlying medical condition that makes them susceptible to complications related to COVID-19.

These legal obligations are particularly salient if the employer learns that an employee has tested positive for COVID-19 and, because of his or her presence in the workplace, may have exposed others to the coronavirus. Employers' return-to-work plans should address this scenario, which could include a process by which potentially exposed employees are subsequently notified, but it is imperative that employers do not disclose the name of the employee who tested positive or reveal any information that could be used to identify the particular employee.

Leave and Accommodation Issues

Once employees return to the workplace, employers will likely be faced with a number of inquiries related to leave and accommodations in light of the pandemic. An employee with a disability, however, may be entitled to a reasonable accommodation, including, if appropriate, the continuation of a telework arrangement. Employers must be mindful that the pandemic poses a heightened risk to not only those with physical disabilities, but also those with anxiety, obsessive-compulsive disorder or similar mental health conditions. Employers should approach requests for an accommodation by engaging in the interactive process, which may take into account the unique position in which both companies and their employees have been placed as a result of the pandemic.

Employees may also be eligible for leave under the Families First Coronavirus Response Act (FFCRA). Employers should confirm that they have updated their policies, leave requests and certification forms to address these benefits. The U.S.

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Department of Labor issued regulations related to FFCRA, and subsequent guidance to help employers navigate employee requests for leave related to COVID-19.

Another issue that may arise in the initial stages of reopening is an employee's refusal to report to work because he or she fears being exposed to the coronavirus or has an underlying medical condition that may make contracting COVID-19 more dangerous. While employees have a right to refuse to engage in dangerous work under certain conditions pursuant to the Occupational Safety and Health Act and the National Labor Relations Act, as a general matter, an employee's anxiety about the pandemic, alone, is likely not sufficient to excuse that employee from being absent from work. Employers can reduce this anxiety by providing transparency into the precautions they are taking and the measures they are implementing to protect employees and limit any potential spread of the virus. Consider employee concerns in light of the uncertain environment and remember that the best practice for maintaining employee morale and cooperation may dictate that employers be patient in working with employees through this return-to-work transition.

Finally, in addition to certain rights to refuse unsafe work, various federal laws provide protection to employees who express concerns about workplace safety, particularly if this concern is communicated by a group of employees or one employee acting on behalf others. Document safety concerns that are raised and what steps were taken to investigate and remedy those concerns. Reiterate your non-retaliation policies and encourage employees to report safety issues.

Reopening your business in a safe and productive manner involves assessing a myriad of issues that may seem daunting. Developing a plan that addresses these issues is a step in the right direction. Learn more about these action items and other things to address in your reopening plan, including wage and hour issues, ensuring compliance with the Paycheck Protection Program loan forgiveness requirements and employee benefit considerations, at a webinar presented by Reinhart's Labor and Employment Practice Group at 10:00 a.m. on Monday, May 18, 2020. View the the webinar here.

If you have questions about reopening your workplace, please reach out to your Reinhart attorney.

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