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COVID-19: 15 Key Workforce Considerations for Business Reopening

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In response to the lifting or relaxing of shelter in place orders in a number of states, many businesses plan to resume certain operations during the pendency of the COVID-19 pandemic. The health, safety, and well-being of employees is paramount, and companies should update or develop their pandemic response operations plans to ensure that work may resume safely. Any resumption of operations must heed to the requirements of federal and state orders and directives. In addition to complying with such requirements, or where no such enforceable standards exist, businesses should consider the recommendations and guidance issued by relevant government entities and public health agencies.

While reopening plans are inherently workplace and location specific, certain overarching workforce considerations should inform both the drafting of such plans and broader decision-making by management and boards. Below is a list of 15 key legal considerations for employers that are planning to reopen their businesses. This list is non-exhaustive and focused on issues related to personnel policies, worker safety, regulatory compliance, and privacy. Employers should ensure that reopening plans are tailored to their workplaces and updated to reflect emerging developments—in particular, municipal and state orders and announcements applicable to their facility locations.

1. ***Reopening task force:*** A company's reopening taskforce should be comprised mainly of the same people charged with developing and implementing its COVID-19 response plan. This team would be prepared to communicate new protocols to employees and answer any pandemic-related questions that may arise.

2. ***Social distancing:*** Employers must implement social distancing measures that are consistent with state and local requirements as well as industry best practices. Such measures should include those designed to maintain six feet of distance between workers; implementing staggered shifts; closing common areas and breakrooms; and prohibiting handshaking and other unnecessary person-to-person contact. Retail businesses should take additional precautions such as designating with signage, tape, or by other means six-foot spacing for employees and customers to maintain appropriate distance, including in lines; installing protective screens or other mitigation measures where worker-customer

interactions are likely; limiting the number of customers in the facility at any one time; implementing separate operating hours for elderly and high risk customers; and adopting contactless payment systems whenever possible.

3. ***Workplace cleaning and disinfecting:*** Companies should implement enhanced housekeeping practices, which include cleaning and disinfecting frequently touched surfaces, tools, equipment, and other elements of the work environment as appropriate, consistent with guidance issued by the Centers for Disease Control and Prevention (CDC) and the U.S. Environmental Protection Agency (EPA). Specifically, disinfection should be conducted using products meeting EPA's criteria for use against SARS-CoV-2, the virus that causes COVID-19, or identified equivalents.

4. ***Personal Protective Equipment:*** In workplaces where PPE is not already required, companies should develop a non-discriminatory policy governing employee use of respiratory protection and may choose whether to make wearing of such equipment mandatory (in the case of a recognized hazard in the workplace) or voluntary (taking into account the CDC's April 3rd recommendation that cloth masks should be worn in public and in areas where social distancing is difficult). Considerations related to masks and respirators were discussed in a previous WilmerHale advisories, available here and here.

5. ***Self-reporting of COVID-19 symptoms or exposure:*** If not already required by state or local order, employers should develop a policy to address whether and how employees should notify the company if they test positive for COVID-19, learn they have been exposed to COVID-19, and/or are exhibiting COVID-19 symptoms (including coughing, fever (100.0 or higher), shortness of breath or difficulty breathing, or a combination of early symptoms such as chills, body aches, sore throat, headache, diarrhea, nausea/vomiting, loss of smell, and/or runny nose). Additionally, a developing best practice—and a requirement in certain jurisdictions—is to require employees to self-certify, prior to entering the workplace, that they do not have a fever or other symptoms of COVID-19, have not to their knowledge been in close contact with someone who has recently contracted COVID-19, and have not been advised by a doctor or health agency to self-isolate or quarantine.

Some jurisdictions have mandated that employers administer on-site temperature checks before allowing employees to enter the work facility. As discussed in a previous WilmerHale alert, such a practice is more involved than self-reporting from a compliance perspective, and counsel should be involved in developing a protocol to conduct on-site screening.

6. ***COVID-19 testing:*** Updated guidance issued by the Equal Employment Opportunity Commission (EEOC) on April 23, 2020, indicates that an employer may choose to administer COVID-19 testing to employees before they enter the workplace. The EEOC noted, however, that employers must ensure that the tests are accurate and reliable. Per the EEOC, employers may consult (and should track updates to) guidance from the U.S. Food and Drug Administration (FDA), the CDC, and/or other public health authorities to make that

determination. However, testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. The EEOC also cautioned that, for a variety of reasons (including the fact that testing is not 100% accurate), COVID-19 testing is not a substitute for taking other protective measures at a work site.

7. ***Employee exhibits symptoms at work:*** Employers must have an established protocol to address instances of employees exhibiting COVID-19 symptoms at work. Any employee who is feeling ill or is exhibiting COVID-19 symptoms should be immediately separated from the rest of the staff and moved to a company-designated isolation area. The employee should be given a mask and protective gloves as soon as practicable, and arrangements should be made for the employee to return home or go to a nearby health center, if circumstances dictate. Guidance from the CDC and local health departments, if applicable, should be consulted to inform cleaning and disinfecting protocols.

8. ***Returning to work after illness:*** Employers also should issue clear policies explaining when an employee may return to work after experiencing symptoms associated with COVID-19. Pursuant to CDC guidance, an employee with confirmed or suspected COVID-19 can return to work after at least 3 days (72 hours) have passed since symptoms have dissipated without the aid of medications ***and*** at least 7 days have passed since symptoms first appeared. An asymptomatic employee who tests positive for COVID-19 may return to work after at least 7 days have passed since the positive test, provided that the employee remains asymptomatic that entire time. Employers should establish a protocol based on (or more restrictive than) those guidelines and enforce that protocol consistently for all workers.

9. ***Contractors and vendors:*** It is important to remember that other members of the community—–contractors, vendors, and other business partners—may also have an impact on the safety of a company's workplace and employees. To the extent that it is not necessary for such other persons to be on-site at a company, they should be instructed, until further notice, not to report to the company's office or facility (without written approval by a designated company official). Where such persons are deemed critical for the maintenance of a company's operations, the company should be regularly communicating with such contractors, vendors, and other business partners and ensuring that they utilize the same types of precautionary measures and protocols for themselves and their employees that the company requires for its own employees. For example, if a company requires that its own employees provide a daily certification they are not exhibiting COVID-19 symptoms and have not been exposed to the virus, third parties permitted to enter the company's premises should be required to make the same reports, either directly to the company or through their own employer (if, for example, they are engaged through a staffing company). A company should ensure that its business partners communicate any known risks or exposures as soon as they arise, and it should likewise provide such partners with the reciprocal commitment and courtesy (while maintaining appropriate confidentiality of employee information). A company should also carefully review its contracts with contractors, vendors,

and other partners to determine the parties' respective rights and responsibilities in the case of work disruption.

10. ***Telework:*** Employers have an enduring obligation to address known workplace hazards. One of the best ways to minimize employee exposure to hazards during the current public health crisis, as emphasized by the CDC and other agencies, is to allow those who can perform their work remotely to do so. When a business has decided that it is necessary to continue or resume on-site operations, it should identify those individuals whose on-site presence is essential to the company's operations and consider whether other workers may continue to work remotely for some period of time. Employers may also consider shift work to minimize the number of workers who are in the workplace at any one time, which may promote better social distancing. Certain Occupational Safety and Health Administration (OSHA) considerations related to remote workers are discussed in a WilmerHale client alert available here.

11. ***Leave and absence protocol:*** During the public health crisis, employers should consider modifying or extending existing company leave policies to encourage employees to stay home from work if they are sick or have been exposed to COVID-19. Employers should be consistent in granting leave requests and abide by company policy, as well as applicable federal, state, and local law.

Additionally, for employers with fewer than 500 employees, the Families First Coronavirus Response Act (FFCRA) provides up to 12 weeks of public health emergency leave to eligible employees who are unable to work because they must care for their child whose school is closed or whose childcare provider is unavailable due to a public health emergency related to COVID-19. The first ten days of such leave may be unpaid, but the remaining days must be paid in an amount prescribed by the statute. An employee may elect, but is not required, to use other types of paid leave (including the emergency paid sick leave available under the FFCRA) during the ten-day waiting period that would otherwise be unpaid under the FFCRA.

The FFCRA also provides up to 80 hours of emergency paid sick leave (in an amount prescribed by statute) to eligible full-time employees who are unable to work for specified reasons related to COVID-19. Part-time employees are entitled to emergency paid sick leave based on their average number of work hours in a two-week period. An employer may not require an employee to use other paid leave already provided by the employer before the employee uses emergency paid sick leave under the FFCRA. See WilmerHale alerts on the FFCRA by clicking here and here.

Although not required to do so, larger employers (*i.e.*, those with more than 500 employees) may consider temporarily adopting a policy that provides for paid (or partially paid) childcare-related leave. If such paid leave is not feasible, larger employers may consider offering unpaid leave to employees who need to stay home due to a school or daycare closure and have already exhausted available paid time off.

12. ***Discrimination, harassment and retaliation:*** Employers must make every effort to prevent discrimination, harassment and retaliation in the workplace. All return-to-work protocols, as well as decisions regarding COVID-19 related leave requests, must be implemented without discrimination or retaliation. Employers also should remind employees that discrimination, harassment, and retaliation—COVID-19 related or otherwise—will not be tolerated.

13. ***Workers' compensation laws:*** State workers' compensation benefits generally are an exclusive remedy for employees injured in the scope of their employment. Employers should be cautioned, however, that workers' compensation law may not be an absolute bar to other claims by employees who contract COVID-19 in the workplace. As an initial matter, the contracting of COVID-19 in the workplace may or may not be considered a workplace injury for purposes of workers' compensation, depending on applicable state law, the specific circumstances of the infection, and/or the employee's line of work. And if an employee's COVID-19 illness is not deemed a workplace injury (or if a business has not obtained workers' compensation coverage on behalf of a worker), that individual may be able to pursue a traditional "tort" claim against a business. Such a claim would typically require a demonstration of some level of negligence or other fault on the part of the business; causation would also be a key issue in litigation. In addition, even where an employee's COVID-19 illness *would* be considered a workplace injury (and thus allow an employee to be eligible for workers' compensation benefits), an employee still might be able to assert a tort claim in certain states—depending on the circumstances—based upon a demonstration of intentional misconduct, fraud, or serious and willful conduct. A subcontractor employee also could seek to hold a contractor liable for environmental, health and safety damages under Supreme Court precedent that imposes liability when a company assumes responsibility for day-to-day management of environmental, health and safety matters.

14. ***OSHA enforcement:*** Beyond workers' compensation (and/or tort claims, as applicable), if an employer is cited for workplace hazards by OSHA because of a failure to act reasonably to address known COVID-19 related risks in the workplace, it can be subject to penalties. An employer can best position itself to avoid such liability by following the guidance and directives of the CDC, OSHA, and state/local governments and agencies, and preparing employees for unannounced site visits from these agencies.

Importantly, COVID-19, unlike the common cold and influenza, is not exempted from OSHA reporting and recordkeeping requirements. Employer responsibilities related to confirmed cases of COVID-19 in their workforce are detailed in a WilmerHale client alert available here. OSHA also recently issued updated guidance effectively loosening its enforcement of COVID-19 recordkeeping for industries other than healthcare, emergency response, and correctional institutions; for all other industries, a COVID-19 case is potentially reportable only if there is objective evidence that is reasonably available to the employer that the case is work-related (e.g., a number of cases developing among employees who work closely together without another explanation).

15. ***Employee privacy and appropriate privacy protection for others:*** Businesses that reopen during the pandemic must take steps to protect employee privacy and keep medical information confidential in accordance with federal law. It also will be critical to plan carefully for any information collection about other individuals—including visitors, clients, contractors and retail consumers.

Companies will want to pay careful attention to applicable law and related best practices in connection with the collection of information concerning employee health. These activities typically do not require compliance with the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), as these actions of an employer to monitor temperatures and the like are not subject to HIPAA. Nonetheless, appropriate attention should be paid to how this information is gathered, how employees with particular medical conditions are identified and treated, and how this information is shared and maintained. The Americans with Disabilities Act (ADA) includes protections for employee medical information, including employee temperature reports, reports of other health symptoms, and the fact that an employee has tested positive for COVID-19. Per the EEOC, the ADA requires that all medical information (including the examples provided in the previous sentence) about a particular employee "be stored separately from the employee's personnel file, thus limiting access to this confidential information." Although such information may be communicated to those in company leadership with a true need to know (so that they can, for example, take precautions consistent with CDC guidance), such information should not otherwise be disclosed to employees. For the avoidance of doubt, this means that, if an employee reports COVID-19 symptoms or tests positive for COVID-19, a company should not disclose the name of that employee to their coworkers (provided, however, the company should inform potential close contacts of the employee that they may have been exposed to COVID-19).

Companies also may be considering various tracking activities related to employees, either in direct connection to work activities or in "away from work" situations.Companies may wish to monitor employee movement within office settings, when engaged in company business (such as visiting clients or other business travel), and (perhaps) even in non-work settings. These efforts require careful planning on privacy-related issues, both in the United States and in other countries, particularly in Europe. Companies should carefully balance the legitimate business purpose of this monitoring with the extent and intrusiveness of the information gathering. In any event, companies should plan carefully to ensure that information can be gathered appropriately and only used and maintained for legally permissible purposes.

Many companies also will need to consider whether to collect information about non-employees in connection with operating a safe business environment. This can include (for most companies) vendors, contractors and other "on-site" assistance for the company. For many companies, it also will involve visitors or clients, in a professional setting, or, more broadly, guests or consumers in retail, entertainment or travel-related settings. While

employee privacy laws typically will not apply in these settings, companies should carefully consider other appropriate privacy protections as well as ensure that any information gathering activities are consistent with applicable non-discrimination principles. While (at least in the United States) most of these activities will be regulated primarily through appropriate best practices, data that is collected and maintained still may be subject to company privacy policies and perhaps other applicable laws (such as the California Consumer Privacy Act for California residents), as well as potential enforcement if there is a data breach or potentially unpermitted use of this information. In addition, a number of states are implementing specific legal requirements in connection with the collection of biometric information. Accordingly, companies who will be collecting information about non-employees will need to carefully consider the appropriate uses and disclosures of this personal information to ensure that they do not run afoul of privacy and consumer protection principles. This must include data retention issues and other activities to link this data to other data that companies may collect about these individuals, which will be particularly important in connection with individual rights that are emerging in California, Europe and other places concerning personal data.

Next Steps

As employers resume operations, they should continue to monitor emerging developments, including location-specific orders and new and revised federal guidance, to update their operations plans—and communicate those changes to their workforce—as appropriate. The authors are following these developments closely and can assist employers in developing reopening plans tailored to their specific needs.

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