Return to Work: Best Practices

As restrictions loosen and businesses are permitted to reopen, employers will be faced with many legal and practical issues. Below is a "best practices" guide on how to approach different areas of concern based on the relevant guidance issued to date by the various federal agencies in the midst and wake of the Covid-19 pandemic. We provide this guidance to be considered in addition to, not instead of, observance of traditional workplace norms and procedures.

Instituting Safety Measures

On April 17, 2020, Governor Ned Lamont entered Executive Order No. 7BB requiring cloth face coverings or masks to be worn in public wherever close contact is unavoidable, including in the workplace for essential businesses. The Department of Economic and Community Development (DECD) has also issued Safe Workplace Rules for Essential Employers, which will likely also establish the standards for the re-opening of non-essential businesses. Employers should start planning now to do all they can to facilitate a safe return to work including making efforts to modify their workspaces to allow for social distancing and making arrangements to provide masks or facial coverings to any employees and visitors who do not already have them. For a detailed explanation of the Essential Workplace Guidelines, please visit: https://www.uks.com/news-events/posts/2020/april/uks-covid-19-essential-workplace-guidelines/.

Getting Employees Back to Work

Effective and ongoing communication with employees is critical especially in times of crisis. If employers have temporarily laid off employees, employers should contact their employees to provide them notice of when they are expected to return to work. This should be done as soon as reasonably practicable. One concern employers may have is whether their employees will resist returning to work and instead prefer to stay home collecting unemployment. With the additional federal pandemic unemployment assistance ("PUA") and heightened concerns about returning to the workplace, some employees may refuse to return to work. Employers should be prepared to review these instances on a case by case basis and be prepared to accommodate an employee if required by law or company policy. This interactive process is very important and will provide the employer with some level of protection against discrimination and retaliation claims. If this dialogue does not resolve the situation and the employee still refuses to return to work after being given reasonable notice of re-opening, the employer should contact the DOL at DOL.meritrating@ct.gov and provide the DOL the employee's name, social security number, the return to work date and the employee's reason for refusing to return to work, if known. The DOL will likely hold a hearing. Absent a legitimate excuse related to COVID-19, the employee will likely be denied unemployment benefits.

The employer may of course take such conduct into account if the employee then seeks re-employment. A general anxiety or concern about feeling unsafe going back to work is, in most instances, not an acceptable reason to refuse to return to work. Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act ("OSHA") defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. This guidance is general, so employers should take all precautionary measures to make their workplace safe (see above section on Safety Measures) so that they can show that there is no threat of immediate and imminent harm.

OSHA has recognized that some employers may have difficulty complying with certain standards during the crisis, and this may be identified at an OSHA inspection. Accordingly, OSHA will exercise enforcement discretion provided that the employer undertakes a good faith effort to comply. More specifically, OSHA "will assess an employer's efforts to comply with standards that require annual or recurring audits, reviews, training, or assessments." Employers should explore all options to comply, and the OSHA inspection will consider any interim measures implemented in lieu of full compliance. If the employer has made good faith efforts to comply, OSHA will take that into consideration when deciding to issue a violation.

Discrimination in Rehiring

Because of business needs, many employers will face the challenge of having to rehire some but not their entire workforce. The decision regarding who will be rehired and when may lead to legal challenges. For example, employees who were out on protected leave during the crisis (such as FFCRA or FMLA) may claim FFCRA or FMLA retaliation if they are not rehired. As with any employment decision, employers should use objective, measurable criteria when making rehiring decisions.

Understanding Expanded Leave Benefits

Employers should also keep in mind that the Families First Coronavirus Response Act ("FFCRA") provisions remain in effect through December 31, 2020. Under FFCRA, employees may seek additional paid leave pursuant to the Emergency Paid Sick Leave Act ("EPSLA") or the Emergency Family Medical Leave Act especially now that we know most schools have been closed for the remainder of the year.

Under EPSLA, private employers employing fewer than 500 employees and government employers to provide 80 hours (or 2 weeks) of paid sick time to employees who are unable to work because the employee:

1. is subject to a federal, state, or local quarantine or isolation order related to coronavirus;
2. was advised by a health care professional to quarantine or self-isolate due to coronavirus-related concerns;
3. is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
4. is caring for an individual who is subject to a quarantine or isolation order or who has been advised by a health care professional to quarantine;
5. is caring for a son or daughter because the child's school or place of care has been closed or his or her childcare is unavailable due to precautions related to COVID-19; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health in consultation with the Secretary of the Treasury and the Secretary of Labor.

For qualifying reasons 1, 2, or 3 above, full-time employees are entitled to their regular rate of pay capped at $511 per day and up to $5,110 total per employee. For qualifying reasons 4, 5, or 6 above, full-time employees are entitled to pay at 2/3 their regular rate capped at $200 per day and up to $2,000 total.

Full-time employees are entitled to EFMLA leave paid at 2/3 their regular rate for the number of hours the employee would otherwise be normally scheduled, with a max of $200 per day and $10,000 in the aggregate. With an employer's permission, employees can use EFMLA leave intermittently for childcare. For example, if an employer and employee agree, an employee can take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while their child is at home because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of the employee's leave.

Employees who work a part-time or irregular schedule are entitled to be paid EPSLA and EFMLA based on the average number of hours the employee worked for the six months prior to taking paid sick leave.

In addition, the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") provided three avenues of federal funding to assist individuals who are unemployed due to COVID-19:

1. Pandemic Unemployment Assistance ("PUA")
2. Federal Pandemic Unemployment Compensation ("FPUC") and
3. Pandemic Emergency Unemployment Compensation ("PEUC")

PUA provides up to 39 weeks of unemployment benefits to individuals who otherwise would not qualify for regular unemployment compensation (such as individuals who are self-employed, independent contractors, seeking part-time employment, or those who do not have a long enough work history to qualify), extended benefits under state or federal law, or PEUC. Coverage also includes individuals who have exhausted all rights to regular or extended unemployment compensation benefits under state or federal law.

Individuals must demonstrate that they are otherwise able to work and available to work within the meaning of applicable state law, except if they are (1) unemployed, (2) partially unemployed, or (3) unable or unavailable to work because of one of the following COVID-19 reasons:

- the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;
- a member of the individual's household has been diagnosed with COVID–19;

- the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;
- a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;
- the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;
- the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;
- the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;
- the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;
- the individual has to quit his or her job as a direct result of COVID–19;
- the individual's place of employment is closed as a direct result of the COVID–19 public health emergency; or
- the individual meets other criteria established by the Secretary of Labor.

FPUC grants individuals who are eligible for and awarded unemployment insurance benefits by their state an additional $600 per week for the next four months (through July 31, 2020). The supplement is paid at a flat rate of $600 weekly and is not prorated based on the employee's pay rate. Furthermore, the $600 supplement is paid on top of whatever compensation individuals are entitled to by the state of Connecticut or by PUEC.

Some individuals, primarily those whose hours were reduced and are collecting partial unemployment, will end up collecting more income than they otherwise would be if they had retained their job. This was a major concern when the bill was being debated, but the Senate rejected a proposed amendment that addressed this issue. Connecticut employers are concerned that the lump sum supplement will incentivize employees to remain out of work.

PUEC provides up to 13 weeks of unemployment benefits, covering individuals who:

- have exhausted all rights to regular unemployment compensation under state or federal law;
- have no rights to regular unemployment compensation under any other state or federal law;
- are not receiving compensation under the unemployment laws of Canada; and
- are able to work, available for work, and actively seeking work (states shall offer flexibility in meeting the "actively seeking work" requirement)

Monitoring Employees' Health

A key component of keeping a workplace safe is to mitigate the risk of infection among employees. The least intrusive of these is to require employees to complete return-to-work questionnaires or submit to a series of verbal questions. The EEOC has issued guidance that states that employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath.

Additional symptoms include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. Depending on the nature of the business, these questions could be asked when the employee is recalled or hired or at the beginning of each shift. Employers must keep the information collected in a confidential medical record separate from the personnel files.

Employers can also take a more active role in the monitoring process by using COVID-19 testing. It is important to keep in mind that practically speaking, very few employers can obtain COVID-19 tests for their workforce at this time, so employers should consider more feasible options such as temperature checkpoints as workers enter the workspace.

Under the ADA, any mandatory medical test or disability-related inquiries of employees are prohibited unless they are "job related and consistent with business necessity." Such an examination or inquiry is considered job related and consistent with business necessity when the employer has a reasonable belief, based on objective evidence, that: (1) An employee's ability to perform essential job functions will be impaired by a medical condition; or (2) An employee will pose a direct threat due to a medical condition.

A "direct threat" is "a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation." The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

Based on guidance from the CDC and public health authorities, the EEOC has concluded that the COVID-19 pandemic meets the direct threat standard. The EEOC guidance is available at https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-acthttps://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2. As a result, employers may take steps to determine if employees entering the workplace have COVID-19—such as instituting temperature checks or administering COVID-19 testing prior to entering their workspace. Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable by reviewing guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing (available at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2), 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, and keep in mind 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. The employer must also maintain the confidentiality of the information gathered. Medical information (including temperature readings) must be stored separately from the employee's personnel file, thus limiting its access.

The ADA allows the employer to bar an employee from entering the workplace if he or she refuses to submit to a test to detect the presence of COVID-19 because the employee's physical presence could pose a threat to others. The employer may also bar an employee's physical presence in the workplace if the employee refuses to answer questions about whether he or she has COVID-19, COVID-19 related symptoms, or has been tested for COVID-19. Employers should ask for the reason behind the employee's refusal and reassure them that the information will be kept confidential.

An employer may terminate an employee who refuses a test, but the employee will likely be able to collect unemployment benefits. We recommend that employers first have a dialogue with the employee and explain the alternatives to termination. Employers should advise employees who are not comfortable returning to work, or who refuse to undergo the employer's required screening, that they can quit and explain the possible implications. The employer will provide them an unemployment package, but will check off the box that it was a voluntary quit. In that case, the employee may be unable to collect unemployment benefits.

Responding to Employee COVID-19 Diagnoses

Once an employer has made a commitment to monitor its employees' health, the employer must also have a plan for what to do with the information received. An employee who tests positive for COVID-19 should self-quarantine for 14 days. We also recommend that the employer take the following steps:

1. Employer should ask the infected employee to identify all other employees with whom they've been in "close contact" during the two days prior to symptoms. The CDC defines "close contact" as "a person that has been within six feet of the infected employee for a prolonged period of time." Recommendations vary on the length of time of exposure, but the CDC considers exposure of 15 minutes to be the operational definition.
2. Employers should inform all employees on the "close contact" list of their possible exposure to COVID-19 but maintain confidentiality of the infected individual as required by the ADA—unless the infected employee consents to using his/her name while communicating with other employees.
3. Ask all employees on the "close contact" list to stay home, maintain social distancing, and self-monitor for any symptoms (i.e. fever, cough, shortness of breath) and to talk to their doctor if they have any concerns.
4. Employees who have had an exposure may continue working so long as they remain asymptomatic and adhere to the following practices prior to and during their work shift:
    - Pre-Screen: Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
    - Regular Monitoring: As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
    - Wear a Mask: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
    - Social Distance: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
    - Disinfect and Clean work spaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.
5. After the Employer has spoken with employees on the "close contact" list, the employer should consider whether it needs to alert others in the workplace. **We can assist clients with the preparation of these notices.**

6. The CDC provides recommendations for businesses that have suspected or confirmed cases:
    - It is recommended to close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.
    - Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill persons, focusing especially on frequently touched surfaces.
    - To clean and disinfect:
        - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: "cleaning" will remove some germs, but "disinfection" is also necessary).
        - For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
        - Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer's instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
        - Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
        - Gloves and gowns should be compatible with the disinfectant products being used.
        - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.

Considering "Vulnerable" Employees

The federal government's "Opening Up America Again" plan (available at https://www.whitehouse.gov/openingamerica/) provides for additional considerations regarding the return of "vulnerable individuals" to the workplace. "Vulnerable individuals" include elderly individuals, and individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy. In some circumstances, pregnant employees may also be included in this definition.

Employers should consider reasonable accommodations for these employees, if requested, when the business re-opens and/or to offer these employees the opportunity to work from home or delay their return. However, an employer must have a mechanism for determining whether an individual falls into the category of a "vulnerable employee." Employers may ask employees to self-identify or to provide a note from their healthcare provider indicating that they fall into this category.

Anticipating Other Employee Inquiries

Prior to reopening and as business resume work, employers should think about how they will address unprecedented inquiries from employees in response to COVID-19, such as:

- Employees who request to telework due to ongoing caregiving issues (for a child or a family member, including situations where they may not qualify for FFCRA leave);
- Employees who do not want to travel where travel is required as part of their position;

- Employees who return to work but desire more "flexibility" to telework for some portion of the work week given their ability to have teleworked during the peak of the pandemic.

Regardless of how employers decide to treat these requests and other similar inquiries, they should remain consistent in their response. Implementing new policies to address these issues can help to maintain consistency (see next section). Employers should also consider how their decisions will impact company morale and business reputation.

Implementing New Policies and Practices

Policies will be important in setting the expectation for employees. Many employers have historically allowed flexibility in some of their policies, especially those related to time off, remote working and flexible work schedules. Upon setting the new organizational framework coming back into the workplace, employers should consider what policies need to change or be reinstated.

Policies for consideration might include the following:

- Return to work policies.
    - For non-essential roles, determine what work from home policy should be followed
    - Protocols around a phased re-introduction of workers based on essential roles to re-open business
    - Determine if and how to screen employees before they return
    - Mandatory personal protective equipment (face masks/cloth face covers) to minimize exposure
- Guest and visitor policies.
    - Limiting access to certain categories of site visitors such as vendors, contractors, and brokerage tour groups
    - Restricting the general public's access to the workspace
    - Restricting access to only certain workplace areas
    - Policies around temporary help in the event a subset of the full-time workforce becomes unavailable, including policies and practices around accepting and training temporary workers
- Employee travel policies.
- When employees should return to work.
    - Considerations around at-risk groups
    - Exceptions and processes for parents/caregivers when schools are closed or other caregivers are unavailable
- Policies related to WFH environments.
    - May include ergonomic instructions, stipends, purchase program for WFH tools and equipment
- Employee work safety policy and guidelines for the prevention of virus transfer. Categories for consideration include:
    - Health screening and testing
    - Clearly defined actions, roles and responsibilities for communications in response to a potential COVID-19 case, designated confinement areas, FAQs
- Communication and escalation protocols outlining the management and decision-making processes of all stakeholders involved in response to a potential COVID-19 emergency, including:
    - Protocols with health and other emergency services
    - Protocols with local, regional, and national institutions

These are just general considerations for employers. The UKS Employment Practices Group would be glad to assist employers in putting together a more detailed return to work plan and/or policies specific to your business and workplace. Please contact Christopher L. Brigham, Chair of the Employment Law Practice Group at Updike, Kelly & Spellacy, P.C. at (203) 786-8310 or cbrigham@uks.com, Andrew L. Houlding, Principal in the Employment Law Practice Group at (203) 786-8315 or ahoulding@uks.com, Valerie M. Ferdon, Associate Attorney in the Employment Law Practice Group at (860) 548-2607 or vferdon@uks.com; or Jeffrey Renaud, Associate in the Employment Law Practice Group at (860) 548-2629 or jrenaud@uks.com.

For further information on the implications of COVID-19 on healthcare, or other healthcare related questions, please contact Jennifer Groves Fusco at (203) 786-8316 or jfusco@uks.com.

For further information on the implications of COVID-19 in the construction industry, or other construction industry or design engineering related questions, please contact Attorney Donald Doeg at ddoeg@uks.com or at (860) 548-2638 Attorney Richard Dighello at rdighello@uks.com or (860) 548-2633.

For questions regarding all tax matters, including corporate or business and personal taxes, please contact Donald R. Seifel, Jr. at (860) 548-2676 or drseifel@uks.com.

For further information on the Paycheck Protection Program and the implications of COVID-19 on commercial lending and banking, please contact John F. (Jef) Wolter at (860) 548-2645 or jwolter@uks.com.

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