REOPENING THE WORKPLACE DURING & AFTER COVID-19: TACKLING CRITICAL LEGAL ISSUES AND IMPLEMENTING EMPLOYER BEST PRACTICES FREQUENTLY ASKED QUESTION GUIDE

Thank you again for your attendance and interest in this week's webinar, "Reopening the Workplace During and After COVID-19; Tackling Critical Legal Issues and Implementing Employer Best Practices," presented by Members Mario R. Bordogna and Anne-Marie Vercruysse Welch, both of Clark Hill's Labor & Employment group.

Due to the content-rich nature of the program, time did not allow for addressing the many questions and issues submitted by attendees at the end of the program. However, as they pledged to do, Mario and Anne-Marie took some time after the webinar to answer several the most frequently asked questions. Please see the responses by Mario and Anne-Marie to those questions below.

Please note that this FAQ document consists of general information and that nothing in it should be construed as legal advice, nor does your receipt of the document consummate an attorney-client relationship with Clark Hill PLC. Exact answers to the general questions addressed in this FAQ may be fact, industry, and/or jurisdiction-dependent, so we recommend contacting Mario or Anne-Marie directly or seeking the advice of your attorney if you have specific questions which may pertain to your workplace.

Visit the links below for a downloadable copy of the presentation slides, as well as the recorded presentation. Additionally, we would appreciate your feedback on the webinar by clicking the survey link below.

Presentation | Recorded Webinar | Take Survey

In the coming weeks, please be on lookout for a virtual roundtable where we will further discuss the issues of returning to the workplace after COVID-19.

Thank you.

Contents

FREQUENTLY ASKED QUESTIONS: ACCOMMODATIONS 3

Is there an obligation to continue an accommodation in place prior to COVID-19, but new guidelines prevent continuation of it? 3

If we require face-coverings and an employee says they cannot tolerate it, or it makes them uncomfortable or claustrophobic, what options are there? 3

We have a pregnant worker, as well as a spouse of a pregnant worker, and both are concerned about returning to work. What recourse do we have in these situations? 3

FREQUENTLY ASKED QUESTIONS: HEALTH SCREENINGS 4

If we are going to take temperatures of all employees upon entering, are there HIPAA concerns involved with turning an employee away in front of other workers? 4

If we take temperatures, or the employee self-reports symptoms, do we have to document all results in the employee's medical or personnel file? 4

Because we are not doctors, how do we ask medical questions, take temperatures, and record the information without violating HIPAA? 4

Are there best practices related to sending employees home if they sound or look sick and do not voluntarily stay home? 4

If an employee is sent home because they have a fever but cannot see a doctor for several days, or at all, are we required to pay the employee for this time? 5

FREQUENTLY ASKED QUESTIONS: OSHA 6

Can OSHA cite an employer for exposing my workforce to COVID-19? 6

Is there a requirement to notify OSHA, CDC, or state/local authorities regarding a positive COVID-19 case in the workplace? 6

FREQUENTLY ASKED QUESTIONS: POLICIES 7

How do you best deal with employee non-compliance to a newly created pandemic response policy? 7

It seems guidance from every government department is changing rapidly. Are there any best practices for ensuring compliance? 7

Do you have samples of return to work ("RTW") policies or checklists for reopening businesses? 7

FREQUENTLY ASKED QUESTIONS: UNEMPLOYMENT AND LAYOFFS 8

What if an employee refuses to come back to work because they are making more on unemployment? 8

We have employees on lay off that we would not like to bring back due to poor performance. How should that be handled? 8

FOR OTHER INQUIRIES 9

LEGAL DISCLAIMER 10

FREQUENTLY ASKED QUESTIONS: ACCOMMODATIONS

Is there an obligation to continue an accommodation in place prior to COVID-19, but new guidelines prevent continuation of it?

According to the EEOC, not necessarily. The agency has recognized that current circumstances in the workplace due to the pandemic may prevent continuation of an accommodation which was in place prior to COVID-19. However, in that situation, employers can re-evaluate whether any other reasonable accommodation may be suitable for the employee – even if on a temporary or limited basis – by engaging in the interactive process to better make that determination.

Keep in mind that, employees are not always entitled to receive their requested accommodation, and that unpaid leave may be where you ultimately land depending on the circumstances. Be sure to document the interactive process that you took to arrive at a differing reasonable accommodation.

If we require face-coverings and an employee says they cannot tolerate it, or it makes them uncomfortable or claustrophobic, what options are there?

If the basis for the refusal is simply because it makes the employee uncomfortable, the employer can generally take appropriate action in that situation to restrict the employee from working. If there is a documented medical or a sincerely held religious reason for not being able to wear a mask at work, alternative avenues should be explored.
These situations are highly fact-specific, and consulting with us or your legal advisor prior to acting in a case like this is a smart step.

We have a pregnant worker, as well as a spouse of a pregnant worker, and both are concerned about returning to work. What recourse do we have in these situations?

These situations are obviously highly sensitive. As indicated during the webinar, plain fear standing alone – without a supporting basis under the law – is generally not a basis for refusing to return to work, but it may be wise to at least think about whether alternatives are available. For instance, is telework available, and is that an option you are comfortable considering in this situation?

One thing employers should take heed in, however, is making assumptions about situations like pregnancy. When it comes to returning to work, pregnant employees, absent the documented medical need for an accommodation, which is required or can be accommodated under state or federal law, generally need to be viewed as similarly situated to other, non-pregnant employees.
It should also be noted that if an employee's healthcare provider advises them to self-quarantine, or they are needed to care for an individual who has been advised to self-quarantine, they may be eligible for paid leave under FFCRA's Emergency Paid Sick Leave. Private employers are eligible for a tax credit to cover this paid leave. For more information on FFCRA, please click here.

FREQUENTLY ASKED QUESTIONS: HEALTH SCREENINGS

If we are going to take temperatures of all employees upon entering, are there HIPAA concerns involved with turning an employee away in front of other workers?

There has not been any formal guidance provided on this topic. Certainly, when an employer is using a screening process to take the temperatures of all employees upon entering, they should maintain the confidentiality of the information obtained. However, while employers should be concerned about improper disclosure of their employees' protected health information ("PHI"), there are differences between the disclosure of actual information and assumptions or conclusions which other workers may make based simply on appearances.

The safest course, where possible, is taking temperatures of employees in settings which are individual and private, and only the administrator of temperatures has the actual information obtained or witnesses resulting actions by employees. Keep in mind that employers may run into practical limits when it comes to keeping workers from drawing their own conclusions about absences, whether it is someone not working after being seen in a testing line, or another related situation.

If we take temperatures, or the employee self-reports symptoms, do we have to document all results in the employee's medical or personnel file?

We recommend that all temperature test results be maintained, but in an employee's medical file – which should generally be separately kept from an employee's personnel file. All test results must be maintained confidentially. We also recommend maintaining a written record of every instance when an employee self-reports their symptoms. Ideally, a self-report of symptoms should be executed by the employee, if possible.

Because we are not doctors, how do we ask medical questions, take temperatures, and record the information without violating HIPAA?

The EEOC has authorized employers to ask certain, but not all, types of medical questions, and further authorized them to take temperatures of employees, guests, and vendors, so long as the information is maintained confidentially. It is not automatically a HIPAA violation for employers to be provided with medical information about employees in the course of business. Many employer representatives are provided this information in the course of providing accommodations for a disability or administering workers' compensation claims. If the information is thereafter disclosed inappropriately, then there may be a violation.

If an employer endeavors to construct a program where COVID-19 testing occurs onsite as the EEOC now permits, we strongly recommend consulting us or qualified legal counsel about the development of such a process.

Are there best practices related to sending employees home if they sound or look sick and do not voluntarily stay home?

The EEOC has indicated employers can ask employees about symptoms that the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease have linked to COVID-19 (a list which grew only a few days ago) before permitting them to return to the workplace. The EEOC has stated that "[e]mployees who become ill with symptoms of

COVID-19 should leave the workplace. The Americans with Disabilities Act ("ADA") does not interfere with employers following this advice."

As discussed during the webinar, health screening could be done daily for all employees, perhaps through the completion of a form, to prohibit symptomatic employees from entering the workplace.

If an employee is sent home because they have a fever but cannot see a doctor for several days, or at all, are we required to pay the employee for this time?

As a baseline, unless they are on a form of approved paid leave under your policy or under a law which requires them to be paid for an absence, an employee in this situation *generally* doesn't have to be paid for not working. However, employees who are symptomatic and seeking a diagnosis may be eligible for paid leave under the Families First Coronavirus Response Act's (FFCRA) Emergency Paid Sick Leave, which is an illustration of when other considerations may be in play. Again, we recommend consulting us or your counsel for more particular advice which could apply in this fact-specific situation.
For more information on FFCRA, please click here.

FREQUENTLY ASKED QUESTIONS: OSHA

Can OSHA cite an employer for exposing my workforce to COVID-19?

Enforcement practices at OSHA vary, and their attention is on specific industries right now. However, yes, the agency could cite any employer for permitting such exposure. As mentioned during the webinar, OSHA has deferred on issuing a formal regulation pertaining to COVID-19, and the general duty clause remains applicable to an OSHA-covered entity. However, keep in mind that it is sometimes difficult to link exposure to COVID-19 to any one place or source. Nevertheless, employers should take all possible steps to maintain a safe workplace, including by following CDC guidance.

Is there a requirement to notify OSHA, CDC, or state/local authorities regarding a positive COVID-19 case in the workplace?

The answer to this may vary by state or local authorities. We advise consultation with those authorities depending on where you do business. Typically, those authorities will notify the CDC. According to OSHA, COVID-19 would be reportable, "If an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." [1]

Given this vague definition and the uncertain information we have about COVID-19 itself, it will be hard for employers to determine whether a positive COVID-19 case is connected to the workplace. However, documenting the steps taken to reduce that risk may reduce the opportunity to connect a COVID-19 diagnosis with the workplace.

FREQUENTLY ASKED QUESTIONS: POLICIES

How do you best deal with employee non-compliance to a newly created pandemic response policy?

To address noncompliance with any policy, including a newly created pandemic response policy, it is important to go back to the beginning, which means ensuring that the policy was rolled out properly, including at the very least by providing it to all employees and documenting their signed acknowledgement of the policy. On critical standalone workplace policies, such as a pandemic response policy, training on the policy should be considered. It is also a good idea to incorporate express language into the policy that the employer reserves the right to discipline for violations of the policy, up to and including discharge.

Any specific instance of noncompliance is likely to be fact-specific and, thus, something which we cannot address in this guide. In that situation, you may wish to contact us or your legal advisor about the situation for a full evaluation of the facts and risks involved prior to acting.

It seems guidance from every government department is changing rapidly. Are there any best practices for ensuring compliance?

This is certainly one of the most challenging aspects to reopening. We recommend regularly checking guidance issued by appropriate authorities, including local and state governments, as well as the CDC. Additionally, you could consult with us or your legal advisor for the latest information on relevant legal changes and updates.

Clark Hill provides alerts via email and other webinars when there are significant changes in guidance or the law. You can sign up here to receive relevant alerts for that information.

You can also view the latest in Clark Hill COVID-19 thought leadership by visiting our resource page.

Do you have samples of return to work ("RTW") policies or checklists for reopening businesses?

As stated during the webinar, we believe that it is very difficult to come up with a single RTW policy or checklist equally applicable to every business, due to the variations in the applicable rules and regulations being issued at the state, federal, and industry levels. However, we are finalizing a great resource which we believe will provide useful general guidance for employers who are or will be reopening their workplaces, with potential industry-specific addenda to supplement.

If you are interested, please feel free to reach out to us to discuss the availability of those resources. With or without them, consulting with us for advice about the individual circumstances and requirements which may be applicable to reopening your workplace is strongly recommended.

FREQUENTLY ASKED QUESTIONS: UNEMPLOYMENT & LAYOFFS

What if an employee refuses to come back to work because they are making more on unemployment?

This is shaping up as an increasingly bigger problem for employers. There is no doubt that certain employees can currently make more money if they are able to receive UC benefits, thanks to the $600 weekly federal stipend being added to state benefits through July 31, 2020. Additionally, states are now taking competing positions on whether an employee is ineligible for benefits by refusing to come to work when asked. For example, Texas says yes; New Jersey says no.

In general, if a laid off or furloughed employee has no legally protected basis to refuse to come to work when recalled, then they are likely subject to possible discipline and/or discharge for job abandonment. Employers should document the attempts to recall the employee back to work for their own records and to provide to the unemployment insurance agency. Whether it is best for an employer to carry through with that decision in any given situation is subject to many variables. These variables include policy language, workforce needs, and other considerations.

If faced with this scenario, contacting us or your legal advisor for a full evaluation of the facts and circumstances involved prior to acting is advisable.

We have employees on lay off that we would not like to bring back due to poor performance. How should that be handled?

In general, no employer is required to bring back an employee they have laid off. As discussed in the webinar, an employer's statements (or promises) to employees at the time of the layoff could possibly alter that calculus, as could the terms of a collective bargaining agreement. Those circumstances excluded, and with the understanding that there will always be some degree of risk involved in situations where employees are not being brought back for performance reasons, depending on the strength of the support and documentation you have for the decision, employers should not feel an absolute obligation to bring back a poor performer.

These situations are certainly fact-specific, and so consulting with us or your legal advisor prior to acting in a case is advised.

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This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.