> Covid-19 Client Alert

Developing a Pandemic Plan for Employers to Safely Reopen the Workplace

April 27, 2020

Authors and Key Contacts

If you would like any additional information about reopening the workplace, or any other employment-related issue, please contact any of the Labor & Employment attorneys listed below.

Jeffrey P. Englander
Partner & Co-Chair
P (212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
P (212) 735-8736
kmarkel@morrisoncohen.com

Theresa D'Andrea
Associate
P (212) 735-8751
tdandrea@morrisoncohen.com

John B. Fulfree
Associate
P (212) 735-8850
jfulfree@morrisoncohen.com

Christopher W. Pendleton
Associate
P (212) 735-8783
cpendleton@morrisoncohen.com

Though our country is still fully immersed in the COVID-19 crisis and most "non-essential" businesses remain shuttered, it is a good time for employers to start formulating and implementing a plan to safely reopen the workplace. Employers have long been required to provide a safe place of employment,[1] but doing so in the wake of the COVID-19 pandemic will be unprecedented. The reality is that the workplace most employees left when they were ordered to shelter-in-place is not the same workplace to which they will return in the weeks and months ahead. New measures must be implemented to ensure employee safety and compliance with COVID-19 related laws while also balancing the operational necessities of the business. As such, we have compiled a list of certain legal requirements for employers to consider when developing a proactive and flexible COVID-19 pandemic plan to bring back their workforces in an efficient and safe manner.[2]

As a preliminary matter, it is important to appreciate that many of the measures discussed herein, such as taking an employee's temperature, are temporary and are only permissible during the COVID-19 pandemic. Employer policies that implement such measures should therefore be limited and adjusted over time accordingly.

Revisit the Employee Handbook to Include Workplace Safety Policies and Update Paid Leave Procedures

(a) **Establish a Written Plan.** A well-reasoned and robust pandemic plan will alleviate employees' fears of returning to the workplace, as well as minimize discrimination claims by ensuring uniformity and consistency. The plan should address such issues as the following, which is not exhaustive by any means and further discussed herein:

- When an employee may be sent home due to illness and under what circumstances they may return;
- When an employee should disclose potential exposure and what the employer should do with that information;

[1] *See* the General Duty Clause set forth by the Occupational Safety and Health Administration (OSHA) ("Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees").

[2] Please note that the state, county and/or city in which the workplace is located may issue their own orders requiring employers to implement certain protective measures upon reopening. As such, this list should not be used as a checklist for compliance with each individual order. We are, however, happy to further assist employers in meeting each of those state and local mandates.

- Whether an employer should check employees' temperatures before entering the workplace, and, if so, how to appropriately screen employees and who should conduct these checks (more on this below);

- How to protect confidential medical disclosures by employees;

- What leave benefits are available to employees and the procedures for requesting such leave; and

- What accommodations can be provided to those employees whose disabilities may make them more susceptible to contracting COVID-19.

(b) **Health and Safety Considerations.** When implementing workplace safety policies, the following considerations should be at the forefront for every employer:

- **Encourage Sick Employees to Stay Home.** First and foremost, employers should actively encourage sick employees to stay home (or immediately head home if they do not feel well). Employers should revise policies to ensure employees are not required to provide a doctor's note or proof of a positive COVID-19 test result prior to staying home. Flexibility is key to minimizing the spread of COVID-19 in the workplace. Sick employees should follow CDC-recommended steps and self-isolate until criteria to discontinue home isolation are met. Such criteria differ depending on whether COVID-19 testing is available, and should be followed in consultation with healthcare providers and advice issued by state and local health departments. Employees who are healthy but have a family member at home who is known to be infected with COVID-19 should notify their supervisor(s) and also follow the CDC-recommended steps.

- **Be Transparent about Exposure of COVID-19 at the Workplace.** If an employee is confirmed to be infected with COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 but maintain confidentiality as required by the Americans with Disabilities Act (ADA), *meaning the name or other identifying characteristics of the employee who tested positive must not be disclosed*. Employers may not require employees who tested positive for the virus to voluntarily disclose their identities. The CDC recommends that if an individual has come into close contact (less than 6 feet) for a prolonged period of time (which could vary from 10 minutes or more) with an individual who tests positive for the virus, the exposed individual should stay home for 14 days after last exposure and maintain social distancing (at least 6 feet) from others at all times. Thus, to reduce the risk of COVID-19 spreading in the workplace, employers should consider requesting that exposed employees work from home for a period of 14 days, if possible. Employers should also notify any vendors or contractors that the infected employee came into contact with, as well as building management. A deep cleaning of the workplace should follow.

- **Taking Employees' Temperatures.** As mentioned above, the Equal Employment Opportunity Commission (EEOC) has recently updated its Technical Assistance Questions and Answers to clarify that employers may administer or require COVID-19 testing or ask questions about symptoms (or require self-reporting) of employees entering the workplace without violating the American with Disabilities Act (ADA). Of course, such administration must be done in a non-discriminatory manner with careful consideration to safeguard all medical information the employer receives (more below). The EEOC has also stated that, "[c]onsistent with the ADA standard, employers should ensure that the tests are accurate and reliable" including the ability to handle false-positives or false-negatives associated with a particular test. As such, employers must determine whether they will screen employees as they enter the workplace, and, if so, remain vigilant as to the accuracy of the testing it employs.

- **Pay Employees for Screening.** Employers could face potential wage and hour claims under federal, state, and municipal laws if they do not compensate employees for time spent having their body

temperatures checked and/or for administering COVID-19 testing and screening at the workplace (more information on process considerations below). Although legal guidance has not been issued by federal, state or municipal governments regarding payment of an employee's time to be screened, this process can be analogous to "donning and doffing laws," where employers can be required to pay employees for a reasonable time it takes to put on or take off their uniforms or protective gear. The safest approach is to pay employees for time spent waiting to be screened. A staggered work schedule can also assist with lessening the screening time of employees (as well as protecting employees who are waiting to be screened).

- **Ensure Social Distancing at the Workplace.** Social distancing (*i.e.*, remaining 6 feet apart) is still a crucial safely measure while the COVID-19 pandemic is ongoing. Employers should prohibit holding in-person meetings, group lunches, or any large gatherings, unless absolutely necessary and only if PPE is worn by employees. Virtual meetings should be a strongly encouraged alternative. Staggering work schedules may also maximize social distancing by limiting the number of employees in the workplace at the same time. Employers should further consider reconfiguring the office to increase physical space between employees at the worksite. Guests and visitors in the workplace should also be strictly curtailed if not completely prohibited.

- **Educate Employees on the Importance of Hand Hygiene and Respiratory Etiquette.** Remind employees to wash their hands with soap for at least 20 seconds. Place hand sanitizers in multiple locations at the workplace to encourage hand hygiene. Place posters that encourage hand hygiene at the entrance to the workplace and in other workplace areas where they are likely to be seen. Discourage handshaking, and, instead, encourage the use of other noncontact methods of greeting. Employees should also be directed to practice proper coughing and sneezing etiquette, such as (i) covering of mouth and nose with a tissue when one coughs or sneezes; (ii) throwing used tissues in the trash; and (iii) if a tissue is not available, coughing or sneezing into an elbow, and not into one's hands. Employees should also be reminded to immediately wash or sanitize their hands after blowing their nose, coughing or sneezing.

- **Perform Robust and Frequent Environmental Cleaning.** Employers must clean AND disinfect frequently touched objects and surfaces, such as workstations, keyboards, telephones, handrails, and doorknobs. Best practices may include keeping a log of how often environmental cleaning is performed at the workplace. To disinfect, use products that meet the Environmental Protection Agency's (EPA) criteria for use against SARS-CoV-2, the cause of COVID-19, and are appropriate for the surface. Advise employees to avoid using another employee's phone, desk, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.

- **Be Prepared to Address Concerns of Fear.** Naturally, employees may be fearful of returning to the workplace. Written policies and open dialogue with employees can ease concerns surrounding the return. As a reminder, an employee's refusal to return to work may under certain circumstances be protected by OSHA and the National Labor Relations Act ("NLRA"). Under Section 13(a) of OSHA, employees can refuse to return to work if they believe they are in imminent danger. Similarly, Section 7 of the NLRA protects employees who engage in "concerted activities for the purpose of … mutual aid or protection." To minimize legal risks and address concerns, employers are advised to engage in an interactive dialogue with employees who express fear about returning to work. Consider allowing such employees to utilize paid time off (PTO) or provide an accommodation, such as continuing to work from home for a period of time, if feasible. If an employee uses all their available PTO or is otherwise required to return to the workplace, but still refuses, this could be considered job abandonment and a lawful reason for termination. In these circumstances, employers should take prudent steps to avoid situations which require this type of decision making.

(c) **Discrimination and Leave Considerations.** Since shelter-in-place orders have required non-essential employees to work from home, major legislation was passed in March and April 2020 to provide federal, state, and local paid leave laws in response to the COVID-19 pandemic. Now is the time for employers to revisit their handbooks and ensure that any policies therein do not conflict with the newly enacted Families First Coronavirus Response Act (FFCRA), state and local paid leave laws.

Importantly, employers must ensure that any paid leave requests by employees are determined in a uniform and consistent manner to minimize the risk of any discrimination claims. Under the FFCRA, employers must ascertain and request from employees certain information and/or documentation to substantiate eligibility for sick or family leave, including to determine the length of such leave, as those documents may be reviewed by the IRS when the tax credit is claimed. Although these decisions are made on a case by case basis, the same types of information and/or documents should be obtained from each employee requesting such FFCRA leave.

Furthermore, if an employer intends to require employees to take PTO concurrently with emergency family & medical leave (EFML) under the FFCRA, it can only do so if PTO would otherwise be available to the employee pursuant to the employer's PTO policy. *See* FFCRA Q&A No. 33. Thus, it is important to consider what the Employee Handbook mandates regarding the use of PTO, and perhaps make any changes now in furtherance of policies that the employer wishes to enact in this regard. In addition, because many states and municipalities have also enacted paid sick leave laws, it is especially important for employers to understand the interplay of federal, state and municipal paid sick leave laws, in order to properly advise their employees and ensure that their policies do not conflict with what is legally required.

Notably, FFCRA litigation has already begun. The inaugural case, *Stephanie Jones v. Eastern Airlines*, 2:20-cv-01927 (E.D. Pa. Filed 4/16/20), has demonstrated that there is no requirement that an employee exhaust administrative remedies before filing a federal lawsuit. Moreover, managers may be sued in tandem with the employer. Potential damages are also hefty, as an employee may demand liquidated damages, on top of compensatory damages and attorneys' fees and costs, for claims of interference with FFCRA leave and retaliation. Employers should therefore proceed with caution when vetting requests for FFCRA leave.

The Proper Way to Screen Employees' Temperatures

If employers believe that taking employees' temperatures as they enter the workplace is the best course of action to protect their businesses, legal considerations require that such screening not be done on a whim. To ensure a consistent and uniform application of screening that minimizes any discrimination claims, certain individuals should be trained to be the "screener" – whether it be an employee from Human Resources, a manager at a retail store or office, or a third-party hired to perform such services. Any training provided to the screener should be well-documented and comply with the following recommendations below.

- **Screen in the least invasive manner.** Employers should seek to facilitate testing in the least invasive manner possible, taking care to avoid contact with bodily fluids. Forehead thermometers that do not touch employees are recommended, but employers may use oral or other types of thermometers if necessary due to procurement challenges, so long as they ensure such thermometers are properly disinfected after each use.

- **Do not single out employees**. The ADA requires an employer to have a reasonable belief based on objective evidence that an employee might have COVID-19 before taking that employee's temperature. This heightened standard can be avoided by screening all employees. As such, this is the recommended protocol.

- **An employer can send home an employee who refuses to be screened**. The EEOC has said that an employer may bar an employee from being physically present in the workplace if the employee refuses to answer questions about whether he or she has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19. Moreover, an employer may bar an employee's presence if the employee refuses to have his or her temperature taken. In case the employee is expressing fear of returning to the workplace, which may

be protected activity under OSHA and NLRA as discussed above, the best practice is to engage in an open dialogue with that employee as to why they are refusing screening and reassure the employee that appropriate protective measures have been implemented.

- **Protect the screener**. Since screeners are in a high risk area (due to close contact with more people), OSHA suggests that they be provided with appropriate PPE, including gloves, gown, face shield or goggles, and either a face mask or a respirator (*e.g.*, an N95 filtering face piece), depending on the circumstances. The screener should use equipment that requires no direct contact between them and the employees, such as the forehead thermometer recommended above.

  All other precautions for COVID-19 (social distancing, protective equipment, deep cleaning, washing hands, etc.) should remain in place, especially considering screening will not detect if an employee later contracts COVID-19. Staggering schedules of employees can help maximize social distancing to ensure that there is not a line of employees in close proximity to one another waiting to be screened.

- **The screener must know how to administer screening, including when to send an employee home**. As an initial matter, the screener must know how to properly administer a thermometer and/or COVID-19 testing, including how to safeguard the equipment, such as properly cleaning a thermometer to minimize the spread of COVID-19 amongst employees.

- If an employee has a fever of at least 100.4 degrees Fahrenheit (per the CDC), the screener should discreetly notify the employee that he or she has a fever and not allow him or her to enter the work environment. Employers should consider whether they will pay wages to those employees who are sent home. Employees who are sent home should begin quarantine procedures, as discussed above, and should not return to work for 14 days, and only if, by that point, the employee has been fever-free for at least 3 days and is otherwise symptom-free as well.

- **Confidentiality is paramount**. If the temperatures of employees are recorded, the ADA mandates that such information be maintained confidentially and only provided to those who require knowledge. Employers may also consider simply recording "no" (meaning the employee's temperature is under the appropriate threshold) or "yes" (meaning the employee has a fever of 100.4 degrees or above) for each employee, instead of recording each individual employee's specific temperature on any given work day. Regardless, the information that is recorded should be treated as a confidential medical document and the ADA requires that all medical information be stored separately from the employee's personnel file.

  Furthermore, screening should be done in a private area so other employees are not privy to their colleagues' medical information, such as whether an employee has a fever and/or is being sent home.

Consider Vetting Accommodation Requests Now

Employees with a known or perceived disability or other risk factors may be at greater risk for contracting COVID-19. The EEOC has advised that "[t]here may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer."

As employers prepare to reopen the workplace, the EEOC explains that they may ask employees with disabilities to request accommodations that they believe they may need in order to return to work. Discussions of this nature must be an "interactive process" between the employer and employee, focused on whether the impairment is a disability and the reasons that an accommodation is needed. Please note that some states or municipalities may require a more stringent review standard, such as the "cooperative dialogue" required under New York City law.

Engaging in this interactive process or cooperative dialogue now can ease fears that employees may have about returning. Employers may experience an increase in accommodation requests from employees with underlying ADA-qualifying (or state or city-qualifying) physical or mental health conditions that may be exacerbated or complicated by COVID-19. If an employee is unable to perform his or her job remotely, and the employee has a disability that makes him or her more susceptible to severe effects or complications from the virus, the employer should grant an employee's request for a reasonable accommodation that would minimize the employee's potential exposure to COVID-19, or offer the employee additional protection, unless doing so would cause an undue hardship. In assessing whether an accommodation is reasonable, the employer should consider the cost to the employer, and whether the employee will only require the accommodation for a limited period of time (*i.e.*, for the duration of the pandemic).

Other Considerations

Management should be well-versed in discussing any pandemic plan that is implemented with employees. A point of contact, such as a Human Resources manager, should be shared with all employees to immediately start addressing these considerations.

Once the workplace is reopened, employers must remember to post the FFCRA "Employee Rights" Notice in a conspicuous place. If an employer has not yet done so, it should also proceed with emailing or direct mailing of this notice to all employees, and/or posting this notice on an employee information internal or external website.

When the workplace is reopened, employers should also remind all employees, especially supervisors and managers, to review workplace conduct policies, and particularly those related to anti-discrimination, harassment and retaliation in the workplace. Having worked from home for weeks or months, employees will need to be reminded of what is expected of them now that they will interacting again with their colleagues in the workplace.

* * * * * *

Morrison Cohen LLP has created the COVID-19 Resource Taskforce, a multidisciplinary taskforce comprised of attorneys with deep expertise in a broad range of legal areas, to assist clients navigating the challenging and uncertain business and legal environment caused by the COVID-19 pandemic. We encourage clients to utilize our capabilities by reaching out to their primary Morrison Cohen attorney contact, who will put you in touch with the appropriate Taskforce person. You may also reach out directly to Joe Moldovan and Alec Nealon, the Taskforce co-chairs:

Joseph T. Moldovan
Chair, Business Solutions, Restructuring & Governance Practice
Co-Chair COVID-19 Taskforce
P (212) 735-8603
C (917) 693-9682
F (917) 522-3103
jmoldovan@morrisoncohen.com

Alec Nealon
Partner, Executive Compensation & Employee Benefits Practice
Co-Chair COVID-19 Taskforce
P (212) 735-8878
C (646) 318-4845
F (917) 522-9978
anealon@morrisoncohen.com