Post COVID-19 Return to Work

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Amidst all the controversy and uncertainty as to when both "essential" and "non-essential" businesses will reopen, one thing is certain: at some point in the future all businesses who have survived the crisis will reopen. This article focuses on some of the employment law issues and challenges which business leadership will need to assess when moving forward to compete in the post crisis era.

EMPLOYEE HEALTH AND SAFETY

Employers may face liability under OSHA regulations for actions taken before, during and after the COVID-19 crisis. There is no specific OSHA standard covering COVID-19. However, several OSHA requirements apply to preventing COVID-19, including Personal Protective Equipment (PPE) Standards (29CFR1910 and 29CFR1910.134); Hazardous Communication Standards re. sanitizers and sterilization (29CFR1910.1200); and the "General Duty Clause" 29 USC 654(a)(1), which requires employers to furnish to workers "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." For further details, click **here**.

OSHA has also prepared a comprehensive guide covering procedures to follow re. workplace cleaning, etc. called "**Guidance on Preparing Workplaces for COVID-19**".

OSHA claims brought by an employee or OSHA itself related to COVID-19 are a real possibility, so it is highly advisable for employers to dot their "i's" and cross their "t's" with respect to their COVID-19 related practices and recordkeeping, as well as general cleaning and sanitation procedures.

The easing of travel and work restrictions does not mean that COVID-19 has disappeared. Employers should still evaluate whether returning employees may have symptoms of COVID-19. In addition to asking about and looking for symptoms (e.g., fever, chest congestion, cough, fatigue), employers may ask employees if they have been tested for COVID-19. The EEOC also allows employers to take temperatures. This is a departure from previous EEOC policy, which viewed taking temperatures as constituting a "medical examination" barred by the Americans With Disabilities Act (ADA).

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The question has arisen as to whether employers could use other testing devices such as oximeters, which measures a person's blood oxygen level, in looking for signs of COVID-19. This would also constitute a medical examination and should not, therefore, be utilized by an employer unless the EEOC makes a similar exception allowing their use.

EMPLOYEE SELECTION

Whenever an employer makes selections among various individuals for hiring, layoff, promotion, compensation increases or decreases, or any other significant change, the employer runs the risk of facing allegations of illegal discrimination in that decision making. The "reopening" process is likely to generate a number of such decisional checkpoints, especially for those businesses that will phase in their returning employees. It is imperative that such decisions be made for reasons that are not based on a protected class as defined by a multitude of discrimination laws. Employers need to be careful to document their selection process and avoid making any decisions based on, for example, age or disabilities that might be perceived to make an applicant more vulnerable to the virus as it remains in circulation even after reopening.

On the other side of the coin, some employers may see the need to downsize their workforce if business conditions have deteriorated to the point the pre-crisis workforce cannot be sustained. Selection for reduction should be made carefully. For example, if an employer was to retain only those employees who did not access the emergency sick leave or extended family leave, a claim alleging retaliation for accessing those rights would likely arise.

While "at-will" employment is still the starting point for most employment relationships in Wisconsin, that is not a license for employers to make employment decisions that discriminate on the basis of one of the protected classes under state or federal law. The employer will want to be in a position to articulate why certain positions were more or less critical, what sets individual employees apart – either positively or negatively – from their peers.

TELEWORKING AND ACCOMMODATION

Many commentators have noted that the expansion of teleworking and other means of working from home during the crisis may result in more use of such work methods even after the crisis. At the same time, however, some employers who place a priority on physical presence in the workplace may see more employees requesting to work from home. When such requests are made as part of the interactive process with an employee with a documented disability, there may now be a greater burden on the employer to demonstrate why the telework is not an effective accommodation.

CONCLUSION

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The COVID-19 crisis will have many different longstanding impacts on our society. From an employment perspective, the issues will not disappear as the virus recedes. Employers will need to carefully evaluate their employment decisions which might be precipitated by the crisis but will endure beyond.