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EMPLOYMENT LAW AND COVID-19
A BRIEF LEGAL REVIEW

We are in uncharted legal waters when dealing with the ramifications of the COVID-19 Pandemic on the relationship between employees and employers. There have always existed health issues in the workplace before i.e., asbestos, hazardous chemicals, carcinogens etc. The difference is that COVID-19 has affected almost every employer. It is not unique to a particular industry or region. It is an equal-opportunity scourge that every employer must learn about and protect against. Yet what guidance do employers have in determining how best to protect their employees from the novel coronavirus? Moreover, how do employers navigate these treacherous waters in managing their workforce, including layoffs and furloughs? In the absence of express legislative guidance from the State and federal governments, employers are left to applying the current situation to those laws that already exist governing employment, such as applicable discrimination, retaliation and workplace safety statutes. In addition, federal agencies such as the Occupational Safety and Health Administration ("OSHA"), the Equal Employment Opportunity Commission ("EEOC") and Centers for Disease Control and Prevention ("CDC") have prepared basic guidelines regarding COVID-19. It is important to note that these guidelines are just that—guidelines—and do not have the force and effect of law. However, it would behoove all employers to heed these guidelines, as they will most likely be seen as probative examples of employer "best practices."

1) WHAT IS THE BEST WAY TO RECALL LAID OFF EMPLOYEES?

When choosing laid off or furloughed employees to be recalled, employers should first apply employee seniority (years on the job) and job qualifications. This objective approach has been the general rule-of-thumb most employers follow when laying off and recalling employees. Employers that pick employees at random can have an inadvertent, negative impact on protected groups and that could lead to allegations of discrimination. To avoid such arbitrary decision-making, employers should first recall the most senior qualified employees who the employer needs to carry out certain jobs. After the employer prepares a list of the recalled employees and their assigned jobs, they should look at the age, race, etc. of the people being brought back. If there is the possibility of a negative impact (even if inadvertent) on those employees in a protected category, employers should consult with legal counsel. Employees should continue communicating with those employees that remain laid off or furloughed and provide them with useful updates on the status of their recall, probable timelines, etc.

When recalling employees, other issues may arise. What do employers do if a recalled employee has children at home? What if the employee has an underlying health condition and is

concerned about becoming exposed to the novel coronavirus. As a general rule employers should be creative and try to accommodate the employee wherever possible. There is no doubt some employees may need to work from home, if feasible. Paying a recall bonus or incentive may help to bring back the employees you need to operate the business.

2) WHAT HEALTH AND SAFETY RULES SHOULD THE EMPLOYER FOLLOW?

When an employer begins recalling employees, it is incumbent upon them to evaluate the business and its operations and prepare their own individual health and safety rules. If an employer has unionized employees, it is incumbent that it engage in an open dialogue with the union and seek its input. Certain protections are obvious, such as the providing and use of personal protective equipment ("PPE"), including face masks. The use of face masks will apply to most workplaces. One should make sure the masks fit snugly against the side of the face and nose. It should be multilayer and allow breathing without restriction. If it is cloth it should be able to be laundered. Employee distancing will vary from employer to employer depending on the industry, number of employees, business space available, and the work being performed by the employees.

Employers should be careful when providing PPE where needed. When provided, employers should make certain the equipment is of good quality and properly maintained. Employers should also be aware of possible employee inquiries regarding the provision and use of PPE. It is important that employers demonstrate that they procured PPE in sufficient quality and quantit.

To assist them, employers should review the recently-issued "OSHA Guidance on Preparing Workplaces for COVID-19, a 35-page guidebook issued by OSHA providing employers with general guidance and instruction on how to best protect employees from COVID-19. While not carrying the force of law, these guidelines can provide employers with a "safe harbor" if they follow its precepts should OSHA conduct an onsite inspection Moreover, following the COVID-19 guidelines may help insulate employers from any allegation of failing to abide by OSHA's "General Duty Clause," which requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm, and represents the main overarching principle governing OSHA. In addition to the COVID-19 guidelines, OSHA has also issued more specific guidance for various industries, such as construction, manufacturing and general health services.

3) CAN EMPLOYERS TEST EMPLOYEES?

The EEOC has issued guidelines stating that, under the right circumstances, testing employees for COVID-19 will not violate the Americans with Disabilities Act ("ADA"). Such testing can include something as simple as taking employees' temperatures to testing them for the virus itself. Decisions on whether to implement any such tests should be based on the type of business the employer runs and the possible risks of exposing the virus to customers, employees and the general public. If conducting actual coronavirus testing is too costly or impractical, temperature checks constitute a reasonable method in which to identify those employees who may need medical attention or should otherwise be instructed to self-quarantine at home.

4) EMPLOYEE LITIGATION.

When any new problem arises, the likelihood of increased litigation arises. Should an employee contract COVID-19 from work, he/she is usually limited to the no-fault remedies provided by the State's workers compensation laws. However, given the universal nature and high transmissibility of COVID-19, it would be very difficult for an employee to conclusively determine that the disease was contracted in the workplace, as opposed to someplace else. Yet should an employee accuse their employer of being responsible for his/her contraction of COVID-19, what should the employer do?

Should any such claim or allegation arise, the employer should immediately notify its workers compensation insurance carrier. In most instances, the carrier will indemnify the employer and assign legal counsel to defend the claim. If the employee's claim alleges employee negligence as the causative factor in the contraction of COVID-19, the claim will be adjudicated as a basic workers compensation claim, which in most states is handled by specialized workers compensation courts. However, if the employee accuses the employer of being grossly and/or wantonly negligent in creating a hazardous workplace, then the employer may be subject to a direct lawsuit, which runs the risk of additional liability beyond the parameters of the workers compensation law. Such lawsuits may not be covered by an employer's workers compensation policy, subjecting the employer to having to defend the claim out-of-pocket, but also exposing it to a substantial damages award that for which it will be liable without the cushion of an insurance indemnity.

4A. DISCRIMINATION CLAIMS. As another unfortunate consequence of the COVID-19 Pandemic is the risk of additional allegations of discrimination against employees. To mitigate the risk of having to defend against discrimination claims, employers should follow general rules of equal applicability to all employees, meaning all rules should be applied against each employee on equal terms and enforceability. Any exceptions or dispensations should be granted only in the rarest of instances, and only in those situations that can be rationally justified utilizing non-discriminatory criteria. For example, if an employer issues a general rule that an employee afflicted with COVID-19 cannot work until 14 days in self-quarantine, that rule must be followed for all employees.

The employer should also develop uniform guidelines setting forth the criteria for employees to work from home. Of course, not all jobs can be performed from one's home, while others would be entirely impractical. Thus, the underlying criteria the employer develops should be as objective as possible, without regard to non-work-related reasons. Also, employees who have certain underlying medical conditions (such as asthma) may request to work at home. As a general rule, accommodate the employee wherever feasible. Document the decision, otherwise this could lead to allegations of failure to accommodate or disability discrimination. Remember, carefully prepared procedures and the use of clear, reasonable, objective factors will make these difficult questions easier to implement and respond to allegations of discrimination and employee grievances.

5) THE IMPORTANCE OF EMPLOYEE MORALE AND OTHER RAMIFICATIONS.

This informational document provides practical tips on how this horrendous pandemic has impacted, and will continue to impact, the workplace from both a legal and practical standpoint. Whatever the the size, large or small, all employers must remain diligent and cognizant of the mood and temperament of its workforce. Employees who feel they are not being listened to seek other avenues such as litigation and collective bargaining. Many unions are becoming aggressively active on behalf of those employees they represent and those other employees they seek to organize. If an employer is a signatory to a collective bargaining, it is imperative that it constructively work alongside the union to ensure the workplace remains a safe, health and stable environment for the employees. Every issue or complaint should be treated seriously. As a general rule listen, question, respond to employees inquiries and when necessary seek legal counsel input. It is when employees stop to question or comment can be a sign of problems. Maintain a positive approach and we will get through this health crisis.

FOR QUESTIONS CALL JOSH AND PAUL WEINER. IF YOU NEED A COPY OF THE OSHA GUIDANCES CONTACT-------