IMPORTANT CONSIDERATIONS FOR BUSINESSES TO CONSIDER AS THEY MOVE TOWARDS REOPENING

As states gradually move towards easing restrictions imposed as a result of the COVID-19 pandemic, many businesses are looking forward to opening again. While this is good news, employers must ensure that they have appropriate measures in place before reopening and have adjusted their employment practices to accommodate the new "normal." Employers should consider the following measures.

Make Adjustments to the Physical Workspace to Enhance Social Distancing

Although every workspace is different and there is no "one size fits all" model to create a physical work environment that minimizes the risk of spreading infection, certain measures can minimize the risk of disease spread once employees return to work.

- ☐ Eliminate communal areas or prohibit more than one person at a time in shared spaces, such as break rooms and elevators;
- ☐ Create "one-way" hallways;
- ☐ Add barriers, such as partitions and cubical walls, to open floor plans;
- ☐ Limit workplace occupancy through teleworking or split schedules;
- ☐ Increase the distance between workstations and desks;
- ☐ Create "touchless" entries and devices;
- ☐ Provide disinfecting wipes and solution at commonly used stations, such as the water dispenser and photocopier, and require that employees sanitize the station before and/or after each use;
- ☐ Require masks to be worn in the workplace.

Employee Screening

COVID-19 Testing. The Equal Employment Opportunity Commission ("EEOC") has confirmed that employers may require COVID-19 testing as a condition of allowing employees to return to the workplace as long as the testing is done in a manner to ensure that the test results are accurate and reliable. Employers should exercise caution however, as workplace-based medical examinations are generally frowned upon and many COVID-19 tests are proving to be less reliable than previously thought.[1]

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[1] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Temperature and Symptom Screening. The EEOC also permits employers to screen employees for the symptoms of COVID-19 before they return to work.[2] During the COVID-19 pandemic, employers now have more latitude to make medical inquiries and examinations of their employees. Employers should develop a plan for what, if any, shape these screenings should take. Consistency is key in order to avoid claims of discrimination or failing to provide a safe working environment. If screening is implemented, it should be consistently carried out among all employees entering the workplace, and businesses should consider using the same screening measures for all visitors and vendors.

Employers have a variety of screening options to choose from:

☐ Asking employees if they are experiencing any symptoms of COVID-19. (Employers should consult the CDC website for an up-to-date list of symptoms, as the list changes as more is learned of the disease).

☐ Asking employees if they have had recent contact with a confirmed or suspected infected person or recently traveled.

☐ Screening employees for a fever. The CDC considers a temperature of 100.4° F or higher to constitute a fever. However, a fever does not necessarily mean that an employee is COVID-19 positive, nor do all COVID-19 positive individuals display fevers.

If employers choose to screen their employees for a fever by taking their temperature when entering the building, they should follow these steps:

☐ Temperatures should be taken using a non-invasive thermometer such as a touchless thermometer.

☐ Testing should be conducted by a trained medical professional or, if not possible, designated employees who have been trained in how to take employees' temperatures.

☐ The temperature taker should wear adequate personal protective equipment.

☐ If possible, employee's temperatures should be taken in a separate room, where only one employee is allowed in at a time, in order to preserve confidentiality.

☐ Non-exempt employees should be paid any time spent waiting for, and having, their temperatures to be taken.

☐ If records are kept of employees' temperatures, they should be maintained confidentiality and separately from employee personnel files.

The Changing Legal Landscape

The COVID-19 pandemic has brought a host of new legislation that employers must be prepared to implement when employees return to work. In addition, preexisting

regulations have new relevance and importance in the context of an infectious disease epidemic.

Families First Coronavirus Response Act. Employers should ensure that managers and human resources personnel are familiar with the requirements of the Families First Coronavirus Response Act ("FFCRA"). The FFCRA applies to all businesses with fewer than 500 employees and provides two separate types of paid leave for employees affected by COVID-19 in certain situations: (i) Emergency Paid Sick Leave and (ii) Emergency Family Medical Leave. Momkus LLC has published updates on the requirements of the FFCRA. Its provisions became effective on April 1 and are scheduled to run through December 31, 2020.

OSHA Guidance. The Occupational Safety & Health Act (OSHA) has existing guidance that is applicable to workplace situations involving potential exposure to a contagious disease. It includes guidance on cleaning and sanitation, personal protective equipment, and safety measures if someone at work displays symptoms of a contagious disease. Although this guidance is only suggested and is not mandatory, following OSHA guidance could help protect employers from claims of negligence if employees contract COVID-19 while working. OSHA also imposes a general duty of care on employers to provide a safe and healthy working environment.

CDC Guidance.

The Centers for Disease Control ("CDC") has issued new guidance for business to consider before reopening during the COVID-19 pandemic.[3] The guidance stresses that, before opening, employers must have a plan in place to protect their vulnerable employees. In addition, the CDC recommends that businesses take the following steps before opening their doors:

- Review applicable state and local orders to ensure that reopening is (i) permitted and, if so, (ii) under what restrictions.
- Develop a plan to protect high-risk employees from infection. High-risk employees includes those who are 65 years old and older and people with underlying medical conditions.[4] These steps can include (i) encouraging high-risk employees to telework; and (ii) offering vulnerable employees duties that minimize their contact with customers and other employees (but only with the employee's consent).
- Promote healthy hygiene practices and the use of personal protective equipment, and provide training to employees on new health and safety protocols.
- Plan to increase the cleaning, disinfection and ventilation of the workspace.
- Make adjustments to the physical workspace to enhance social distancing.

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[3] https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/workplace-decision-tree.pdf
[4] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-

- Promote teleworking where possible.
- Implement procedures to check for signs and symptoms of COVID-19 upon employees' arrival to the workplace.

The Center for Disease Control's guidelines, medical knowledge, and legal requirements regarding COVID-19 and the workplace are constantly changing as our understanding of the disease and its transmission evolves. Employers should consult with their counsel before implementing return-to-work policies and should stay up to date regarding new medical guidance as it effects their workplace.

Momkus LLC is Here to Help

Please feel free to contact your Momkus LLC attorney with questions or concerns. Our office is fully operating and has been designated as an "essential service" during the crisis. Your calls and emails will receive prompt attention.