Considerations for Employers Bringing Employees Back to Work in the Wake of the COVID-19 Pandemic

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As the White House and state and local governments begin to assess business re-opening measures in the wake of the COVID-19 pandemic, employers are evaluating how to transition employees back to the physical workplace. As a threshold matter, employers must assess applicable state and local governmental orders for restrictions, timing, and guidelines regarding business re-opening, as the lifting of shelter-in-place orders and re-opening measures will vary by region and industry.

Transitioning employees back to work presents a multitude of unprecedented and complex challenges for employers now faced with navigating a web of new and existing federal, state, and local laws and governmental agency guidance regarding health, safety, discrimination and harassment, and wage and hour issues. The below presents an overview of the intersection of practical and legal considerations for employers in navigating these challenges.

Follow OSHA and CDC Guidance Regarding Workplace Health and Safety Standards

The Occupational Safety and Health Act (OSH Act) requires employers to comply with safety and health standards promulgated by the U.S. Department of Labor, Occupational and Safety and Health Administration (OSHA) or by a state with an OSHA-approved state plan (such as California, which in some instances imposes more stringent requirements on employers than federal law). OSHA has issued specific guidance for employers preparing workplaces in light of the COVID-19 pandemic. While this guidance does not create new legal obligations, it is prudent for employers navigating back-to-work challenges in the wake of the COVID-19 pandemic to adhere to this guidance where applicable. Employers have a general affirmative duty under the OSH Act to provide a workplace free from recognized hazards likely to cause death or serious physical harm (such as those posed by COVID-19). Per OSHA's guidance, steps all employers can and should evaluate to reduce workers' exposure to the virus that causes COVID-19 include:

(1) **Developing an Infectious Disease Preparedness Response Plan**: Such plans should consider and address the risk levels associated with various work sites and tasks workers perform at those sites. Certain states such as California in fact require that employers have an illness and injury prevention program. Employers may consider the need for **social distancing, staggering work shifts, downsizing operations, delivering services remotely**, and other exposure-reducing measures. **Having and strictly**

adhering to an Infectious Disease Preparedness Response Plan will be a useful tool in an employer's defense against potential OSHA liability.

(2) **Preparing to Implement Basic Infection Prevention Measures**: Employers should implement **good hygiene and infection control practices**, by promoting frequent and thorough handwashing (including by providing individuals a place to wash their hands or at least providing alcohol-based hand rubs containing at least 60% alcohol); **encouraging workers to stay home if they are sick**; encouraging respiratory etiquette including covering coughs and sneezes; providing tissues and trash receptacles; establishing policies and practices where possible, **such as allowing telecommuting, and staggering workers' shifts to increase physical distancing between individuals**; discouraging workers from using other workers' phones, desks, offices, or other work tools and equipment where possible; and **maintaining routine cleaning and disinfecting** of surfaces, equipment, etc. using EPA-approved disinfectant labels with claims against emerging viral pathogens.

(3) **Developing Policies and Procedures for Prompt Identification and Isolation of Sick People, Where Appropriate**: Employers should **inform and encourage employees to self-monitor for signs and symptoms of COVID-19**, and should develop policies and procedures for employees **to report when they suspect possible exposure, are sick or are experiencing COVID-19 symptoms**. Where appropriate, employers should also develop policies and procedures for isolating people with signs or symptoms of COVID-19, including policies and procedures for moving individuals to a location away from other individuals (*e.g.*, designated areas with closable doors can serve as isolation rooms until sick individuals can be removed from the worksite). Employers should also consider providing face masks to their employees.

(4) **Developing, Implementing, and Communicating about Workplace Flexibilities and Protections**: Employers should actively **encourage sick employees to stay home**; **ensure sick leave policies are legally compliant** and **that employees are aware** of these policies. Employers should **not require healthcare provider notes for employees sick with respiratory illnesses** (as such requirements can run afoul of certain state laws, and may take too much time to obtain as a practical matter). Employers should **provide training, education, and informational material** about essential job functions and worker health and safety, including proper hygiene practices and the use of workplace controls (informed workers who feel safe at work are less likely to be unnecessarily absent).

(5) **Implementing Workplace Controls**: Ways employers can control workplace hazards, in order of effectiveness, include the following:

a. **Engineering Controls**: COVID-19-related engineering controls include: installing **high-efficiency air filters**; increasing **ventilation**; installing **physical barriers**, such as clear plastic sneeze guards; installing a drive-through window for customer service; having specialized negative pressure ventilation in some settings (*e.g.*, healthcare settings).

b. **Administrative Controls**: COVID-19-related administrative controls include: **encouraging sick workers to stay at home**; minimizing contact among individuals (*e.g.*, **replacing face-to-face meetings with virtual communications and implementing telework where possible**); establishing **alternating days or shifts** to reduce the total number of employees in the same location at a given time; **discontinuing non-essential travel** to locations with ongoing COVID-19 outbreaks; developing emergency communications plans; providing workers with education and training on COVID-19 risk factors and protective measures; and training workers on how to use protective clothing and equipment.

    i. **Safe Work Practices**: COVID-19 safe work practices, which are types of administrative controls, include: promoting personal hygiene, including by providing no-touch trashcans, hand soap, alcohol-based hand rubs with at least 60% alcohol, disinfectants, and disposable towels, requiring regular handwashing or use of alcohol-based hands, and posting handwashing signs in restrooms. In California, all employers must provide washing facilities that have an adequate supply of suitable cleansing agents, water and single-use towels or blowers, regardless of COVID-19 risk.

c. **PPE**: Employers are obligated to provide employees with Personal Protective Equipment (PPE) necessary to keep them safe while performing their jobs, and the types of PPE required by the COVID-19 outbreak will depend on the risk of infection while working, and job tasks that may lead to exposure.

Further, employers may **measure the body temperatures of employees and may choose to administer COVID-19 tests** to employees before they enter the workplace to determine if they have the virus. Additional information and caveats regarding workplace medical examinations and testing is found in the section below.

OSHA has provided additional industry-specific guidance and resources for employers in the healthcare, emergency response, meat and poultry processing, airline, retail, environmental, in-home repair, and business travel industries.

The Centers for Disease Control (CDC) has also issued interim guidance for businesses and employers to plan and respond to COVID-19, echoing much of the above.

We note that it is critical for employers to adhere closely to OSHA and CDC guidance in determining the risk of COVID-19 infection, so that **determinations of risk are not based on a protected characteristic of an employee such as race or country of origin**, which would run afoul of state and federal anti-discrimination laws. It is also critical to **maintain confidentiality** of those with confirmed COVID-19 infection in compliance with applicable state and federal laws. Employers should take care not to identify any employee who has tested

positive for COVID-19 by name in the workplace, though employers may notify other potentially affected employees in a way that does reveal identity or personal health information. For example, the California Department of Fair Employment and Housing recommends that an employer communicate with potentially affected employees by stating: *"[Employer] has learned that an employee at [office location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances."* Note, however, that the U.S. Equal Employment Opportunity Commission (EEOC) allows an employer to disclose the names of those with COVID-19 to public health agencies. Additional information regarding compliance with workplace anti-discrimination laws is found below.

Maintain Compliance with Workplace Anti-Discrimination Laws

The EEOC enforces federal anti-discrimination laws, including the Americans with Disability Act (ADA), the Rehabilitation Act (which includes the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. The majority of states have also passed anti-discrimination laws in the workplace, which are in some instances more protective of employee rights than federal laws. It is critical for employers to maintain compliance with the applicable laws most protective of employees' rights in the workplace. **Anti-discrimination laws remain in full force and effect during the COVID-19 pandemic**, and the EEOC has expressly stated that such laws do not interfere with guidelines made by the CDC or state and local public health authorities.

The EEOC has provided the following technical assistance guidance for employers in the wake of COVID-19:

Disability-Related Inquiries and Medical Exams

- Inquiries Regarding Employee Symptoms: During a pandemic, ADA-covered employers **may ask employees if they are experiencing symptoms of the pandemic virus, and may require self-reporting**. In the case of COVID-19, this includes fever, chills, cough, shortness of breath, or sore throat. The list of associated symptoms may expand over time, so employers should rely on the CDC guidance and public health authorities regarding associated symptoms. All information regarding employee illness must be kept as a confidential medical record.

- Temperature Checks and COVID-19 Testing: Generally, measuring an employee's body temperature is considered a medical examination. The EEOC, however, has expressly stated that **employers may measure employee's body temperature**, though it is important to note that some individuals with

COVID-19 do not experience a fever. As to COVID-19 testing, any mandatory medical test of an employee must be "job related and consistent with business necessity," but because an individual with the virus poses a "direct threat" to the health of others, **an employer may choose to administer a COVID-19 test to employees before they enter the workplace to determine if they have the virus**.

- Whether there is a "direct threat" to other employees is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will comply with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

- Employers must ensure that the tests are accurate and reliable, for example, by reviewing guidance from the U.S. Food and Drug Administration, the CDC, and information from public health authorities. We also note that employers implementing testing must do so in the most private and least intrusive manner possible. Employers will need to adhere to state and federal compliance requirements associated with collecting personal health data and must ensure that test data is protected from unauthorized use or disclosure. States such as California have specific privacy and data breach laws that employers also must evaluate.

- We note that employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

- We also note that implementing new safety measures such as temperature checks and testing (and even increased cleaning and sanitation measures) in the workplace may implicate wage and hour issues. For example, a class of workers has already filed a proposed class action under the federal Fair Labor Standards Act and state wage laws in federal court in Illinois, alleging they were not properly compensated for time spent related to increased safety protocols related to COVID-19. This may become a heavily litigated issue, with the outcomes varying based upon each state's wage and hour laws. Earlier this year, the California Supreme Court held that employee time spent in anti-theft security screenings at Apple stores was compensable because the workers were under the company's control.

Confidentiality of Medical Information

- An employer may store all medical information related to COVID-19 in an employee's existing medical file. However, the ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, so that access is limited to this confidential medical information.

- An employer may maintain a log of temperature results from a daily temperature check of employees, but this log must be kept confidential.

- An employer may disclose the name of an employee to a public health agency when it learns the employee has COVID-19.

Reasonable Accommodations

- If an individual has a disability putting him or her at a greater risk of infection from COVID-19 and requests a reasonable accommodation to eliminate possible exposure, there may be reasonable accommodations that meet an employee's needs on a temporary basis without causing hardship to the employer. Low-cost solutions for those requesting reduced contact could include designation of one-way aisles, using plexiglass, tables, or other barriers to create distance between individuals, or other accommodations to reduce the chances of exposure. Flexibility by employers and employees is important in determining whether accommodations are possible. Other solutions could include the restructuring of marginal job duties, temporary transfers to different positions, or modifications to work schedules or shift assignments.

- If an individual with a preexisting mental illness or disorder exacerbated by COVID-19 seeks a reasonable accommodation, an employer should treat this as it would any other accommodation request: the employer may ask questions to determine whether the condition is a disability, ask how the requested accommodation would assist the employee, explore accommodations that may effectively meet the employee's needs, and request medical documentation if needed.

- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional accommodation, absent undue hardship. The employer may discuss with the employee whether the same or a different disability is the basis for a new request, and why an additional or altered request is needed.

- During the pandemic, an employer should still engage in the interactive process and request information from an employee about why an accommodation is needed, though given the pandemic, an employer can choose to forgo or shorten the exchange of information during the interactive process, and grant the request. An employer may also choose to place an end date on the accommodation, or may opt to provide the requested accommodation on an interim or trial basis, while awaiting documentation.

- An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship" which means "significant difficulty or expense" and in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. The sudden loss of all or some of the employer's income stream because of the pandemic is a relevant consideration, as is the amount of discretionary funds available. An employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. Even under current circumstances, there may be many no-cost or very low-cost accommodations available.

- Employers receiving requests for reasonable accommodation from essential critical workers must process the requests as they would for any other employee.

- The CDC has identified a number of medical conditions that may place individuals at higher risk for severe illness if they contract COVID-19. If an employer is aware that an **employee has a medical condition placing the employee at higher risk for severe illness if they contract COVID-19**, the employer may be concerned that the employee's health will be jeopardized upon returning to the workplace. The EEOC has made clear, however, that if the employee does not request a reasonable accommodation, the employer does not need to take action. **The EEOC has also made clear that an employer is not permitted to exclude the employee from the workplace or take adverse action *solely* because the employee has a disability that the CDC has identified as placing the individual at higher risk for severe illness if the employee contracts COVID-19.** Under the ADA, such action is not allowed unless the condition poses **a "direct threat" to the employee's health that cannot be eliminated by a reasonable accommodation. Whether the condition poses a "direct threat" to the employee's health is a high legal standard, and must involve an individualized assessment** based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. The applicable ADA regulation requires a multi-factor analysis. **Even if an employer determines that an employee's disability poses a direct threat to the employee's own health, the employer still cannot exclude the employee from the workplace unless there is no way to provide a reasonable accommodation (absent undue hardship).**

Workplace Litigation Mitigation Considerations

Federal laws such as the ADA and Title VII of the Civil Rights of Act of 1964 prevent discrimination or retaliation against employees. For example, the ADA prohibits discrimination against those with disabilities or illnesses, which may include COVID-19. The Family Medical Leave Act (FMLA) prohibits discrimination or retaliation against those who take protected medical leave. The new federal Families First Coronavirus Response Act (FFCRA) also protects employees against retaliation for using emergency paid sick time or paid family leave because of COVID-19, and plaintiffs are already beginning to file lawsuits alleging that they were wrongfully denied benefits under the FFCRA, or that they were terminated for requesting such benefits. Further, states such as California have made clear that existing state laws prohibiting discrimination and retaliation apply at all times, and that employers maintain the same responsibilities to employees with disabilities during a pandemic.

In bringing employees back to the workplace, employers must **ensure that onboarding and/or re-hiring decisions are based on neutral, legitimate, non-discriminatory factors to minimize exposure under federal and state anti-discrimination laws**. For example, an employer should not make assumptions about which employees want or do not want to return to work based on age, gender, pregnancy, or parental status, and should not assume that certain individuals of a certain age have disabilities. Indeed, while employers may have legitimate concerns about bringing back employees who may be at greater risk of COVID-19 infection, the EEOC

has indicated that the fact that the CDC has identified those who are 65 or older or pregnant as being at greater risk does not justify unilaterally postponing an employee's start date (though an employer can discuss telework options, or ask if such individuals would like to postpone their start date). If an employee feels that he or she was not selected to come back to work right away due to a protected characteristic, or that the employer's decision-making process disparately impacts a protected group, this creates litigation exposure for the company. To avoid such issues, employers should **focus on operational needs of the business, and should document its neutral decision-making procedures in writing**.

It is also important to remember that certain federal and state laws protect employees who may complain about returning to work and/or workplace safety issues. As such, an employer may not take an adverse employment action against an employee speaking out or raising concerns regarding COVID-19 and workplace safety.

Further, to prevent pandemic-related harassment and/or discrimination of employees due to a protected characteristic (such as race, national origin, color, sex, religion, age, disability, etc.) and minimize the attendant litigation risks associated with such harassment and/or discrimination, employers should explicitly communicate to employees that fear related to the COVID-19 pandemic should not be misdirected towards individuals because of a protected characteristic. Employers should ensure that clear anti-harassment and discrimination policies regarding prevention, reporting, and investigations are up to date, and remind employees that harassing or discriminating against coworkers due to a protected characteristic is illegal. Employers should reiterate that instances of workplace harassment, discrimination, and/or retaliation will be subject to investigation and appropriate disciplinary action. Employers may also consider providing additional compliance training to managers and supervisors regarding workplace laws and the managerial employees' roles in watching for, stopping, and reporting any instances of harassment or discrimination.

We note that many employers **will face questions from employees who are fearful of returning to work, and some employees may refuse to do so**. While an employee can generally not refuse to return to work, employers will need to balance federal, state, and local leave requirements, considerations under the OSH Act and ADA, applicable state laws, and their own policies on a case-by-case basis to minimize legal exposure.

Maintain Compliance with Leave Laws

Employers onboarding, rehiring, or transitioning employees back to the physical workplace must be mindful of and remain in compliance with the panoply of paid leave requirements that apply in the wake of the COVID-19 pandemic, including federal and state laws and local emergency ordinances and orders passed or issued due to the pandemic. For example, re-hired employees may still be entitled to benefits under the Emergency Paid Sick Leave Act or the Emergency Family Leave Expansion Act of the FFCRA if they meet a qualifying reason for these entitlements. Employers must also comply with state and local emergency paid leave laws, ordinances, and orders enacted to address COVID-19 concerns. For example, cities such as San Francisco, Los Angeles, and San Jose have issued their own specific local ordinances and/or emergency orders regarding

emergency paid sick leave. Buchalter Client Alerts on the FFCRA can be found here and here, and Buchalter Client Alerts on local emergency paid sick leave requirements can be found here and here.

The novel coronavirus presents novel challenges and as such, employers are well advised to engage experienced employment counsel to help navigate these complex and delicate considerations and the myriad laws implicated. Buchalter Attorneys have decades of experience providing counsel to employers on complex workplace issues and applicable laws and are uniquely equipped to help clients adapt and navigate these specific challenges. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

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