



Employer Resources from May 13, 2020 webinar *Leading Through COVID-19*




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During the webinar today I shared a hypothetical of how an employer might analyze a request for remote work from an employee. This example was pulled from an hour-long presentation I and two of my colleagues conducted yesterday for over 100 lawyers about what to expect when businesses return to work. As we discussed during the presentation, our workplaces may look significantly different than before: telework; face masks and other safety gear; new office floorplans for social distancing; altered work schedules to minimize crowding. The legal landscape is also different: the Family First Coronavirus Response Act (FFCRA) and new considerations in a COVID-19 context under the Americans with Disabilities Act, Family Medical Leave Act, the Oregon Sick Leave Law, and state and federal laws prohibiting retaliation. These are uncharted waters and employers need to be prepared to handle the “new normal.” Attached is the full presentation for your reference and I’m happy to answer any follow up inquiries.

IMPORTANT NOTICES

This material is provided for informational purposes only and does not represent a complete analysis of the topics. Readers should consult with legal counsel to conduct their own appropriate legal research. The information presented does not represent legal advice and no attorney-client relationship was formed or exists. Additionally, by providing links to potential resources, Markowitz Herbold is not in any way endorsing those resources.



MBA CLE

After the Quarantine: Employer Issues to Consider

May 12, 2020

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What We're Going to Discuss



THE PROCESS OF
REOPENING



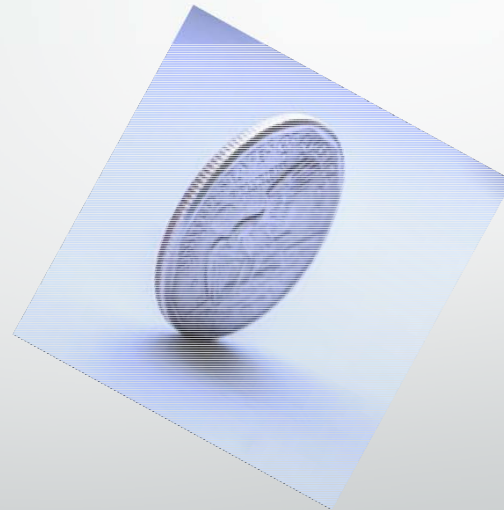
YOUR PRE-SUBMITTED
QUESTIONS



LEGAL
CONSIDERATIONS

The Process of Reopening

When Can I Reopen?



When Should I Reopen?

The Process of Reopening: When can I reopen? Current State of the Law



May 1 – Governor lifts order delaying non-urgent medical procedures

May 5 – Reopening Guidelines Announced

May 15 – Phase One Limited Business Reopening (County by County)

21 Days Before Phase Two Can Begin

The Process of Reopening: When Can I Reopen?



25

China (overall)
China (overall)

1-10 Feb 11-20 Feb

February

The Process of Reopening: When Should I Reopen?





The Process of Reopening: When Should I Reopen?

- Testing
- Update Policies
- Educate Employees

Employee Issues to Consider Before Reopening

- **Notification to employees**
 - Do you want them to return to the office? When?
- **Employees who don't want to return:**
 - Making more money on unemployment
 - Like working remotely on own schedule
 - Fear of contracting COVID-19



Hypothetical

Jane, a healthy employee at a health care facility who is needed to handle patient admissions, says that she cannot report to work because she has a baby and does not want to be exposed to COVID-19 and possibly bring the virus home.



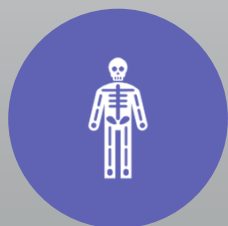
Hypothetical (cont'd)



Does Jane fall into one of the six categories of FFCRA leave?



Does Jane or her baby have a disability or a serious health condition? (ADA/FMLA)



Is Jane subject to “imminent danger” if she reports to work? (OSHA)



If the answer is no to all the above, not legally required to accommodate request to work remotely

Fall into Six Categories of FFCRA?

Subject to a federal, state, or local quarantine or isolation order related to COVID-19;

Under advice from health care provider to self-quarantine due to COVID-19 concerns;

Experiencing COVID-19 symptoms and seeking a medical diagnosis;

Caring for an individual subject to a government order or medically advised self quarantine as described above;

Caring for a child whose school or place of care is closed (or childcare provider is unavailable)

Experiencing any other substantially similar condition

Hypothetical

A medical office furloughed all of its employees in March. As of May 1, offices are reopen for elective treatment.

- If employee refuses to return to work because of general fear of COVID-19, will the employee be eligible for unemployment benefits?



Social Distancing

- Elevator protocols/“safe zones” demarcating spots to stand in
- Desk configurations/moving furniture
- Social distancing signage in lobbies and waiting areas
- Floor directional signage
- Create work zones
- Hold fewer in-person meetings/staggered shifts
- Establish maximum capacities for restrooms
- Close common areas and breakrooms?
- Enforce social distancing policies



Cleaning and sanitation timing and procedures

- Clean and disinfect frequently touched surfaces, tools, equipment, and other elements of the work environment as appropriate
- Disinfection with products meeting [EPA's criteria](#) for use against SARS-CoV-2, the virus that causes COVID-19, or identified equivalents.
- Follow CDC and OSHA guidelines





Personal Protective Equipment

An employer may require employees to wear masks.

- If the employer requires employees to wear cloth face covers, it should provide or pay for them.

Consider OSHA's General Duty Clause.

Develop a non-discriminatory policy.

Train workers on how implementing any new policies to reduce the spread of COVID-19 may affect existing health and safety practices.

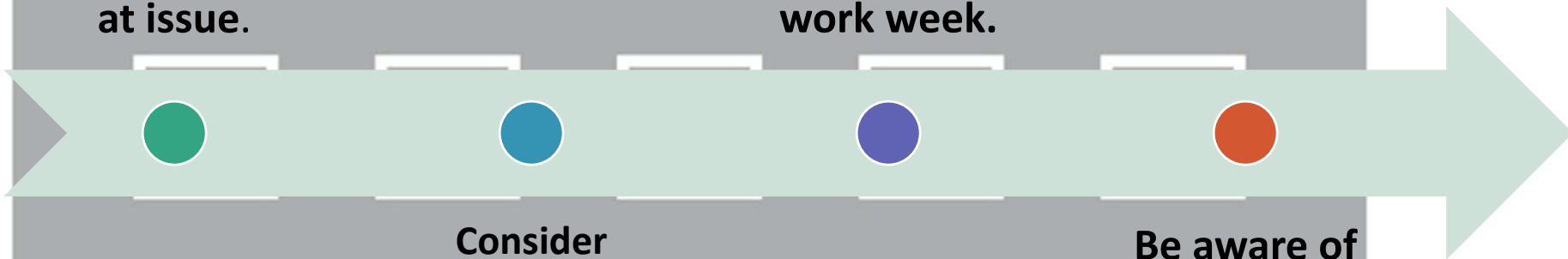
Modified Scheduling

Develop a scheduling system that fits the workplace at issue.

Revisit the work week.

Consider utilizing teams for tasks, staggered shifts, or telework.

Be aware of wage and hour implications.



Employers must establish a protocol to address instances of employees exhibiting COVID-19 symptoms at work.



TRAVEL



Employers can ask an employee returning from an affected area (or exposure to a person with the disease) to stay home.

Utilize the CDC's Risk Assessment.

Employers are generally not required to provide transportation to work or assist with an employee's commute.

Consider whether it is feasible to find ways to temporarily reduce reliance on public transit.



What to Consider Before Reopening:
Nuts and Bolts in the New Frontier

What to
consider before
reopening?

Remote Work Policy



What to
consider before
reopening?



Flexible Scheduling



What to consider before reopening?

Equipment



The Legal Landscape: New Law

Families First Coronavirus Response Act (FFCRA)

- For employers with fewer than 500 employees, provides up to 12 weeks of public health emergency leave to eligible employees
- Provides up to 80 hours of emergency “paid sick leave”
- Up to 10 weeks of “expanded family and medical leave” at 2/3 pay
- Not in addition to FMLA/OFLA leave
- Very useful FAQ
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



The Legal Landscape: New Considerations for Existing Laws

- Americans with Disabilities Act (ADA)
- Family Medical Leave (OFLA/FMLA)
- OSHA and Safety Issues
- Workers' Compensation
- Whistleblower Claims
- Limitation of liability laws?

Hypothetical

Joe, an essential employee, refuses to report to work because he has asthma and he is concerned he may be at high risk of a severe infection if exposed to COVID-19. He demands to work from home, but his job requires him to handle documents that can only be accessed at work via the employer's computers.



Hypothetical
(cont'd)

First, does the FFCRA apply?
Required documentation?

If FFCRA does not apply, does
FMLA?

If neither applies, or if protected
leave is exhausted, does the ADA
apply?

Thank you!



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