CLIENTS & EMPLOYEES

SAFELY RETURNING TO WORK: 7 STEPS

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The workforce is returning to the workplace. Public health questions loom large, generally speaking. For PEOs and their clients, there are major legal risk management issues. Employees will file workers' compensation claims based on COVID-19 diagnoses. In some jurisdictions, COVID-19 is presumed to be a work-related illness. The Occupational Safety and Health Administration (OSHA) will scrutinize return-to-work safety due diligence and will issue citations. Employees may use such safety violations to pursue enhanced workers' compensation penalties. Creative plaintiffs' lawyers will search for loopholes to file civil lawsuits against employers for inadequate safety measures. It will be a feeding frenzy.

All of this underscores the importance of a diligent focus on safety in the return to work. The PEO obviously should take good care of its own internal workforce. Much more nuanced is the question of the role of the PEO in assisting clients with the return of worksite employees, which will vary by PEO. Regardless of the PEO's role or lack thereof, the following seven key steps will significantly mitigate the litigation risks for both PEOs and their clients.

1. DEVELOP A CUSTOMIZED PLAN & COMMUNICATE IT

Employers should prepare a site-specific plan for employees returning to the workplace and publish some version of it for them in conjunction with training. The plan should not be a cookie-cutter plan. A generic approach will be ineffective and could exacerbate the legal risks because a cookie-cutter plan likely will not be followed. Having a plan and not following it could be worse than not having a plan at all.

2. MAXIMIZE SANITATION & HYGIENE STANDARDS

Cleaning your office has a whole new meaning after COVID-19. The Centers for Disease Control and Prevention (CDC) released guidance[1] with a blueprint for cleaning and disinfecting schedules and methods. The guidance should be the standard for any return-to-work plan. Employers also should follow industry-specific guidance from state and local government, as well as OSHA. For example, the return-to-work plan should explain how often frequently touched and hard surfaces will be cleaned, who will be responsible for cleaning them, on what schedule, and using what products, etc.

3. DEVELOP EMPLOYEE HEALTH CHECKING STANDARDS

Unless required by a local or state law, taking employee temperatures is not required in most workplaces. Doing so will require extensive planning and training. Those tasked with the job will need personal protective equipment (PPE) consisting of some combination of gloves, gowns, face masks, and/or face shields or goggles,[2] and training under OSHA's PPE standard.[3]

Many employers will use written employee health questionnaires in lieu of, or in addition to, temperature checking. Verbal questions can also be effective, and they eliminate recordkeeping burdens, but the verbal approach has complications of its own.

Regardless of the type of checking required before an employee enters the workplace, employers may need to create outdoor waiting areas where employees

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can wait in lines prior to entering the facility. Account for employee privacy—especially when screening takes place and results are announced—during this time.

Some states, such as California, may require employers to provide a notice to all employees prior to screening them for biomedical data. Keep in mind that employees may claim their time spent waiting in line or being screened for a fever is compensable and they should be paid for it.

4. PROVIDE PPE AS NEEDED

Because OSHA PPE standards apply to "all protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers," it is safe to assume that any equipment you provide falls under this category, even face masks. Therefore, regardless of whether you require facemasks or other PPE, employers should, among other things:

- Perform a hazard assessment;
- Consider alternative options to protect employees;
- Identify and provide appropriate PPE for employees;
- Train employees in the use and care of PPE;
- Train employees how to clean and maintain PPE, including replacing worn or damaged PPE; and
- Prepare a plan that is periodically reviewed.

Remember, also, that employees may resist wearing PPE based on a disability or religious belief. If such a request arises, the employer must engage in the interactive process to determine if reasonable accommodations can be provided.

5. ENFORCE SOCIAL DISTANCING STANDARDS

If you have shared office arrangements, open-floor worksites, or close common areas where employees are likely to congregate and interact, consider reconfiguring these spaces, for example:

- Adding partitions between receptionists and others who may directly interact with employees;
- Separating employees who work in adjacent cubicle spaces;
- Removing every other chair in break areas and lunchrooms;
- Adding partitions to tables where employees congregate during breaks;
- Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid head-on pedestrian traffic;
- Consulting with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users;
- Arranging for food trucks or other food delivery services to serve employees outside to separate employees during lunch breaks; and