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Manufacturing Success: Employment Issues and Data Privacy in the Era of COVID-19

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June 2, 2020

Agenda

- Practical and legal considerations as employees return to work
 - OSHA requirements
 - Balancing managerial prerogatives vs. employee rights
 - NLRA | ADA | FMLA | FLSA | Title VII
- Safety considerations
 - Testing, PPE, cleaning and social distancing
- Accommodation requests
- HIPAA and health privacy issues
- Preventing disclosure of employee information
- Use of tracking apps and contact tracing
- Governance considerations with respect to COVID-19 response



Threshold Questions

1. What industry are you in (healthcare, laboratories, critical infrastructure, retail, etc.)?
2. What are your employees' exposure risk level – low, medium, high, or very high?
3. **What federal, state, local laws, or executive orders apply?**

Your answers to the threshold questions will determine specific steps you may be required to follow.



State and Local Requirements

- Recognize and understand state and local requirements and standards for operating, i.e., “shutdown orders”
- Red/yellow/green framework in PA
 - Most counties have progressed to “yellow”
 - SE Pennsylvania – June 5
 - Social distancing and other requirements still apply
 - Employers should keep abreast of orders from state health departments, CDC, OSHA and other agencies



COVID-19 and Intersection of Laws

- **OSH Act** (proscriptive)
- ADA - discrimination and accommodation issues
- Title VII, ADEA, and state or local anti-discrimination laws
- FMLA and state or local leave laws
- FFCRA and CARES Act
- State or local paid sick leave laws
- NLRA (protected concerted activity)



OSHA

- Under the ***Occupational Safety and Health Act of 1970***, employers must furnish its employees a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees (“General Duty” clause)
- The Occupational Safety and Health Administration (“OSHA”) is authorized to conduct workplace inspections and investigations to determine whether employers are complying with standards issued by the agency for safe and healthy workplaces.



OSHA's Guidance on COVID-19

- Develop an infectious disease preparedness and response plan
- Implement basic infection prevention measures
- Develop policies and procedures for efficient identification and isolation of sick individuals
- Develop, implement and inform workers of workplace flexibilities and protections
- Implement workplace controls, specifically, engineering controls, administrative controls, and use of personal protective equipment (PPE)



OSHA's Levels of Risk

- The level of controls to be implemented depends on the level of the workers' risk of exposure
 - *Low Risk* (workers who do not have frequent contact with the general public)
 - *Medium Risk* (workers with ongoing community contact such as high-volume retail in areas experiencing ongoing community transmission)
 - *High Risk* and *Very High Risk* (workers, such as those in the healthcare industries, with high potential exposure to known or suspected sources of COVID-19)



OSHA's Levels of Risk

- Employers should assess the hazards to which their workers may be exposed;
- evaluate the risk of exposure; and
- select, implement, and ensure workers use controls to prevent exposure.



Masks and Personal Protective Equipment

- Your response to the threshold questions discussed earlier determines the appropriate type of PPE
- Conduct an assessment of need for PPE
- Don't forget state law: In New Jersey, certain business must provide, at their expense, face coverings and gloves for their employees. E.O. 122



Trainings Required by OSHA

- Training required by OSHA:
 - When PPE is necessary
 - What PPE is necessary
 - How to properly don, doff, adjust, and wear PPE
 - The limitations of the PPE
 - The proper care, maintenance, useful life, and disposal of PPE
- Re-training required when any of the above changes or if employee cannot demonstrate an understanding the above.
- Document training sessions.



Investigation of COVID-19 Related Complaints

- OSHA enforcement during COVID-19 will be prioritized based on the risk level of the workplace (Low, Medium, High)
- When a complaint is received, OSHA will:
 - notify the employer by telephone
 - maximize use of electronic communication, including phone interviews, email, fax, videoconferences and remote video surveillance
 - only conduct on-site investigations when deemed necessary
 - limit on-site inspections to formal complaints regarding unprotected exposure of workers with high/very high risk of transmission.



OSHA Recording Requirements

- Enforcement guidance from the OSHA directs employers to record when certain employees contract COVID-19 if:
 - A case of COVID-19 is confirmed
 - The case is work-related
 - In deciding whether the illness is work-related consider;
 - whether multiple employees working closely together become infected;
 - frequent, close exposure to the general public in a locality with ongoing community transmission;
 - the absence of alternative explanations.



Recalling Employees to Work // Operational Considerations

- Question 1: WHAT IS MY OPERATIONAL NEED?
 - Question 2: Who should I call back to work?
- Acceptable criteria:
 1. Ability to perform the work available
 2. Pre-existing criteria for determining order of recall as set forth in notice of furlough or layoff
 3. Guidelines from Employee Handbook
 4. Seniority
 5. Volunteers



Recalling Employees to Work // Operational Considerations

Absent contractual restrictions, it should be OK to:

- Change hours / schedules
- Bring FT employees back on part-time basis
- Allow employees to “platoon” in a position
 - Unemployment comp considerations
- Adjust rates of pay temporarily, up or down
- Permit “at risk” workers to take a leave of absence



Recalling Employees to Work // Legal Issues

Illegal criteria

- Cannot make decisions based upon race, gender, age
 - Disparate impact considerations
 - Conducting disparate impact analysis?
- Disability?
 - Higher risk employees?
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



Recalling Employees // Legal Issues

What about employees who refuse to return to work?



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Accommodation // OSHA Considerations

- What if an employee refuses to work? Does OSHA apply?
 - an employer cannot discriminate against (discipline) an employee who: (a) refuses, in good faith, to expose himself or herself to a dangerous condition in the workplace; and (b) believes they have no reasonable alternative but to avoid the workplace (or assignment)
 - the condition causing the employee's fear must be one that a *reasonable person* in *similar circumstances* would conclude possess a real danger of death or serious injury
 - where possible the employee has asked his employer for, but not obtained, a correction of the dangerous condition



Accommodation // NLRA Considerations

- NLRA Section 7 protects various forms of employee activity
- Applies in unionized and non-union settings
- “Protected concerted activity”
 - Expressing concerns about workplace safety (internally and externally)
 - Taking action to force action by Employer (walkout, strike)
 - E.g., Amazon fulfillment centers, Instacart, others
- What are the Employer’s legal obligations in this context?
 - Cannot terminate employees for PCA, but can replace “strikers”



Accommodation / ADA Considerations

- ADA applies if employee claims he cannot return to work due to existing physical or mental impairment such as asthma or extreme anxiety.
- Employer must engage in interactive process.
- OK to require documentation of condition.



ADA // Safety Considerations

- EEOC Testing Guidelines
 - Generally OK if job-related and consistent with business necessity
 - OK to require employees to submit to temperature checks
 - OK to require employees to submit to viral testing but not antibody testing
- Social Distancing within the facility
- PPE
- Cleaning



Safety Considerations / Sick Employees

- Require employees diagnosed with COVID-19 or experiencing symptoms of COVID-19 to stay home until they receive clearance to return to work from a licensed health care provider
- Consider if state or local sick leave laws impose any requirements on requesting documentation
- Keep medical documentation separate from employee personnel files
- Identify other employees potentially exposed to COVID-19 and notify employees - workers have a right to know if there is a health risk at their workplace
- Advise employees to follow CDC guidance and to self-monitor and report any symptoms that develop
- Put procedural safeguards in place to maintain the confidentiality of any employee with a suspected or confirmed case of COVID-19



FFCRA and UC Considerations

FFCRA (<500 employees)

- Paid Sick Leave (80 hours max)
 - 5 qualifying events
- Emergency FML (10 weeks)
 - Unable to work because they need to care for child due to school closure or unavailability of child care provider
- Employers may not take adverse action against employees based on exercise of FFCRA rights.

Unemployment Compensation (UC)

- Varies by state
- General rule: Employees who refuse available work are not eligible for UC benefits.
- Know and understand the framework in your state and **communicate** with UC offices.
- CARES Act \$600/week premium set to lapse July 31 (for now).



Where Can We Get Additional Information?

- U.S. DOL - <https://www.dol.gov/agencies/whd/pandemic>
- OSHA coronavirus guidance:
www.osha.gov/SLTC/covid-19/www.Congress.gov
- CDC Guidance for business and workplaces:
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- EEOC - <https://www.eeoc.gov/coronavirus/>



HIPAA and Health Privacy

- Already seen US Department of Health and Human Services roll back enforcement and make exceptions
 - Community-based testing sites
 - Telehealth remote communications
 - Not an absolute suspension, must still be good efforts
- Not every business is subject to HIPAA
- Testing employees will necessarily have privacy implications



Health Privacy for Most Businesses

- Self-certification not experienced COVID-19 CDC-defined symptoms
 - Should limit collection of data to pass/fail
- Recording of actual temperature not necessary or recommended
 - If above 100.4 degrees (may vary by state) is the only fact needed
- Must treat surveys, temperature checks, and related records as confidential health records



Health Privacy for Most Businesses

- Determined acceptable to require temperature check prior to entering workplace even though a “medical examination”
- Difficult to not reveal potential positive case when refusing admittance to work
 - Important to NOT speak of workers not allowed to work as positive for COVID-19
 - They only exhibited a sign or condition, not a positive test
- Identity of positive tested individuals should remain confidential



Health Privacy for Most Businesses

- How long store data is a big question
 - 30 days should be more than enough, maybe too long
- The method of taking temperatures should be as minimally invasive as possible
- Can require the use of personal protective equipment
 - Where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship



Preventing Disclosure of Employee Information

- Must limit the number of individuals with access to information
 - For collection tools, the number of people with access should be limited
 - Do not share passwords for access
- Delete or destroy information when no longer needed
 - Data in electronic or paper form
 - Will be more difficult if using email to self-certify
- Strong agreements with third party vendors
 - Must certify data practices
 - Indemnification and few limitations of liability



Preventing Disclosure of Employee Information

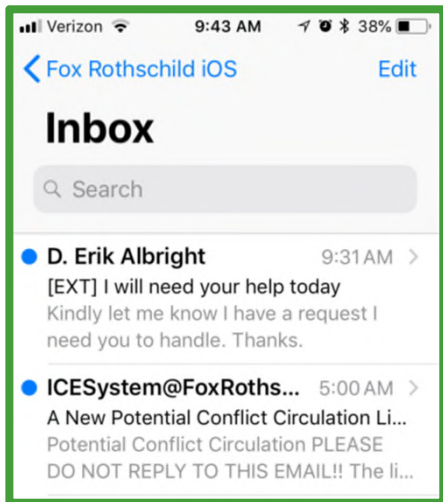
- Issues Inherent to Remote Access
- Resiliency of Remote Systems
- Use of Personal Computers
- Paper!
- Heightened Risk of Phishing and Scams
- IT Department Concerns
- Data Incidents



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Heightened Risk of Phishing and Scams

- Out of office locations are distracting and guards may be down
- COVID-19 scams and ALERTS! are rampant and tempting
- We are inherently tricked more easily on mobile devices



From: D. Erik Albright <paulramsey176@gmail.com>
Sent: Sunday, December 2, 2018 9:31 AM
To: Jefferson, Mike <MJefferson@foxrothschild.com>
Subject: [EXT] I will need your help today

Kindly let me know I have a request I need you to handle.

Thanks.



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IT Department Concerns

- Skeleton and remote crew is likely
- Augmented help desk may be a good option, but means new people on unfamiliar systems with access to your data
- Security Information and Event Management (SIEM) will likely have more false positives
- Still MUST patch while workers are working remotely
- Split tunneling may not be appropriate and/or prohibited by client data security obligations



Data Incidents

- Data breaches happen at seemingly the worst times
- Executing even the best Incident Response Plan is extremely difficult when all are remote
- Practicing (tabletop exercise) a remote workforce event
- Limited resources will slow things down
- Forensic experts and data coaches may also have workforce issues and/or be overwhelmed with cases



Use of Tracking Apps and Contact Tracing

- Completely uncharted territory
- Paper tracking requires absolute diligence and does create a paper record
- Apps have different methods, and therefore different effectiveness
 - Using only Bluetooth is not terribly helpful
 - Adding Wi-Fi improves accuracy, but still not great
 - Using geo-location is the most accurate, but does not work everywhere



Use of Tracking Apps and Contact Tracing

- Mobile applications are being widely considered
- Allows to see where co-workers interacted
- Tells us nothing about interactions in the rest of the world
- Must be opt-in, but likely can be a condition to re-enter the office/workspace
- What's the point if not all workers participate?



Governance Considerations

- **E. Environmental**
- **S. Social**
- **G. Governance**

- Where do the boardroom and leadership fit into the response to COVID-19?
- With new costs, hectic markets, skittish investors, will ESG continue to reign supreme?



Governance Considerations

- Some companies will experience working remotely on a large scale for the first time
- Silicon Valley has already predicted those employees will never return to the office
- Will employee relations change with a remote workforce?
 - Of course!
- Will leadership be prepared to adapt?



Governance Considerations

- Leading an organization that is spread in many directions requires more than good communication
- Proper governance will have to continue the same goals of improving environmental, social and governance concerns
- Whether the commitment will continue with decimated profits and investors who suddenly have new priorities will be a huge test for the ESG efforts and gains



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