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Employers' Great Balancing Act in Reopening: An Update for Employers on Returning to Work

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Employers starting to reopen and return employees to work are wrestling with unprecedented and difficult business decisions while continuing to monitor and implement the ever-evolving health and safety risks and legal issues. Following is an update and summary on the latest guidance and best practices in reopening and returning to work, and is intended to build on previous articles and newsletters issued by Nexsen Pruet.

EEOC

Employee Screening, COVID-19 Testing, and Requiring Employees to Stay Home or Leave the Workplace

As an initial matter, employers should regularly consult the EEOC COVID-19 hub for updates and information.

→ Employee Screening Before Entry into Workplace

Due to the global pandemic, the EEOC has concluded that, at this time, COVID-19 poses a "direct threat" both to individuals with the disease and to those with whom they come into contact. This determination allows employers to implement infection control strategies, including conducting certain employee screening and medical exams as well as making inquiries of employees, aimed at determining if an employee is infected with COVID-19, without contravening the ADA.

At this time, employers may require daily symptom checks and temperature screenings, as well as certain diagnostic testing, for employees prior to entering the workplace.

Employers should keep in mind that any and all inquiries, exams, or screenings must be done with the goal of determining whether the employee is infected with COVID-19 as that is the "direct threat" identified by EEOC that permits these screenings.

→ Temperature screening (fever over 100.4 F)

- → Least invasive method is advisable

→ Daily symptom screening or questionnaire

- → Develop list of permissible inquiries for employees before entering workplace, including:
- → Symptoms of COVID-19: whether employee is experiencing symptoms of COVID-19 or has in the past 14 days
- → Exposure to COVID-19: whether employee has been exposed to individual(s) that may have COVID-19
- → Travel history: whether employee has traveled in the last 14 days to an area that is under a Department of State travel advisory

→ Diagnostic COVID-19 Testing

- → Employers are permitted to require diagnostic testing for COVID-19 of employees, but EEOC cautions employers to use FDA approved and reliable tests.

EEOC has still not provided specific information about best practices in temperature screening or COVID-19 diagnostic test administration. Accordingly, employers should exercise caution and work to implement such tests in the least invasive way possible. Remember that all medical information collected as part of the screenings or testing should be kept strictly confidential.

→ NOT PERMITTED: Antibody or Serology Testing for COVID-19

The DOL issued new guidance on June 17, 2020 stating that an employer cannot require employees to undergo COVID-19 "antibody" or "serology" testing as a condition of returning to the workplace. Such a requirement would constitute a violation of the ADA. Note the antibody test is separate and distinct from the currently permissible diagnostic test for COVID-19. The antibody test is generally performed in an effort to determine if the employee has already had the virus and/or has immunity to the same.

EEOC determined that antibody tests cannot be used to determine if someone is immune to the virus or as a basis for decisions about allowing workers back on the job, and employers cannot mandate those tests before allowing employees back to work. EEOC cited CDC's lack of information about reliability of antibody tests, potential for false positives, and lack of data about possibility of immunity even in presence of antibodies.

→ "At Risk" Employees, COVID-19, and Returning to Work

EEOC has underscored the importance of employers implementing return to work procedures evenhandedly.

Employers cannot require an employee to stay home or otherwise require changes to the employee's job duties and functions because the employee has a disability or other condition or characteristic that CDC has identified as placing that person at "higher risk for severe illness." Employers are also not permitted to ask whether an employee has an underlying health condition that places the employee at higher risk for severe illness upon contracting COVID-19.

Consistent with the ADA, employees at "higher risk" who request an accommodation still should follow the typical reasonable accommodation process with the employer. If an employer is put on notice of an at-risk condition that triggers a concern about the employee's health in returning to work, employers would need to conduct a "direct

threat" analysis to determine if an "at risk" employee's own health is jeopardized by returning to work, as well as an "individualized assessment" to determine if a reasonable accommodation can mitigate that risk. If requested by the employee, an employer may choose to allow telework or other accommodations. However, employers cannot require employees in high-risk categories to work remotely solely because they are determined to be "at risk."

But even if an employer concludes the employee's condition poses a direct threat to the employee's own health if s/he returns to work, the employer still cannot exclude the employee unless there is no way to provide a reasonable accommodation. This involves a difficult balance by the employer of ensuring compliance with CDC and other agency guidance on a "safe" return to work with the concern about risk of violating the ADA.

Note that on June 25, 2020, CDC updated and revised its guidance regarding COVID-19 and people who need to take extra precautions and who is at increased risk for severe illness.

FFCRA

As positive COVID-19 cases continue to increase, and states across the nation see record-setting positive counts, employers must remember their obligations under the FFCRA. Employers should be aware of changing guidance in eligibility under the FFCRA as well.

Wage and Hour Division Guidance Letter

Employees are eligible for FFCRA leave to care for children if COVID-19 disrupted a demonstrable plan to send the children to summer camp, even if the children were not enrolled when the pandemic began according to a DOL Wage and Hour Division letter issued on June 26, 2020.

The Head of the Wage and Hour Division noted covered employees can take off if the child was scheduled to attend summer camp, but also stated circumstances when other "affirmative steps short of actual enrollment may also be sufficient" to qualify for FFCRA leave based on need to care for kids. "For example, if the summer camp or program has an application process, submission of an application before the camp's closure may establish the camp or program as the child's planned place of care during the summer; submission of a deposit may also establish intent to enroll."

Online Tool

DOL recently launched an online tool to assist employees and employers in determining if they qualify or are eligible for benefits under the FFCRA including emergency paid sick leave or emergency extended FMLA. The tool takes the individual through a series of questions and options to aid in determining if the requirements and benefits provided for in the FFCRA are applicable to that person or circumstance.

Nexsen Pruet's Employment and Labor Law Group is continuing to follow Executive Orders, legislation, regulations, and other developments related to COVID-19.

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