Employment Law and COVID-19 – A Brief Legal Review
May 4, 2020

We are in uncharted legal waters when dealing with the ramifications of the COVID-19 Pandemic on the relationship between employees and employers. There have always existed health issues in the workplace, i.e., asbestos, hazardous chemicals, carcinogens, etc. The difference is that COVID-19 has affected almost every employer. It is not unique to a particular industry or region. It is an equal-opportunity scourge that every employer must learn about and protect against. Yet what guidance do employers have in determining how best to protect their employees from the novel coronavirus? Moreover, how do employers navigate these treacherous waters in managing their workforce, including layoffs and furloughs? In the absence of express legislative guidance from the State and federal governments, employers are left applying the current situation to those laws that already exist governing employment, such as applicable discrimination, retaliation and workplace safety statutes. In addition, federal agencies such as the Occupational Safety and Health Administration ("OSHA"), the Equal Employment Opportunity Commission ("EEOC"), and Centers for Disease Control and Prevention ("CDC") have prepared basic guidelines regarding COVID-19. It is important to note that these guidelines are just that—guidelines—and do not have the force and effect of law. However, it would behoove all employers to heed these guidelines, as they will most likely be seen as probative examples of employer "best practices."

1**) WHAT IS THE BEST WAY TO RECALL LAID OFF EMPLOYEES?**

When choosing laid off or furloughed employees to be recalled, employers should first apply employee seniority (years on the job) and job qualifications. This objective approach has been the general rule-of-thumb most employers follow when laying off and recalling employees. Employers that pick employees at random can have an inadvertent, negative impact on protected groups and that could lead to allegations of discrimination. To avoid claims of arbitrary decision-making, employers should first recall the most senior qualified employees who the employer needs to carry out certain jobs. After the employer prepares a list of the recalled employees and their assigned jobs, it should review the age, race, etc. of the people being brought back. If there is the possibility of a negative impact (even if inadvertent) on employees that fit a protected category, employers should consult with legal counsel. Employees should continue communicating with those employees that remain laid off or furloughed and provide them with useful updates on the status of their recall, probable timelines, etc.

When recalling employees, other issues may arise. What does an employer do if a recalled employee has children at home? What if the employee has an underlying health condition and is concerned about being exposed to the novel coronavirus in the workplace? As a general rule, employers should be creative and consider accommodating the employee wherever possible. There is no doubt some employees may need to work from home, if feasible. Paying a recall bonus or incentive may help to bring back the employees you need to operate the business.

2) WHAT HEALTH AND SAFETY RULES SHOULD THE EMPLOYER FOLLOW?

When an employer begins recalling employees, it is incumbent upon it to evaluate the business and its

operations and prepare its own individual health and safety rules. Any such evaluation will also be fact-specific depending on the vagaries of the employer's industry and business operations. If an employer has unionized employees, it should seek to engage in an open dialogue with the union and seek its input. Certain protective considerations are obvious, such as the provision and use of personal protective equipment ("PPE"), including face masks. The use of face masks will apply to many situations where worker proximity is unavoidable. One should make sure the masks fit snugly against the side of the face and nose. The mask should be multilayer and allow breathing without restriction. If it is cloth it should be able to be laundered. Employee distancing will vary from employer to employer depending on the industry, number of employees, business space available, and the work being performed by the employees.

Employers should be careful when providing PPE where needed. When provided, employers should make certain the equipment is of good quality and properly maintained. Employers should also be aware of possible employee inquiries regarding the provision and use of PPE. It is important that employers demonstrate that they procured PPE in sufficient quality and quantity.

To assist them, employers should review the recently-issued "OSHA Guidance on Preparing Workplaces for COVID-19, a 35-page guidebook issued by OSHA providing employers with general guidance and instruction on how to best protect employees from COVID-19. While not carrying the force of law, these guidelines can provide employers with a "safe harbor" if they follow its precepts should OSHA conduct an onsite inspection. Moreover, following the COVID-19 guidelines may help insulate employers from any allegation of failing to abide by OSHA's "General Duty Clause," which requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm, and represents the main overarching principle governing OSHA. In addition to the COVID-19 guidelines, OSHA has also issued more specific guidance for various industries, such as construction, manufacturing and general health services.

3) CAN EMPLOYERS TEST EMPLOYEES?

The EEOC has issued guidelines stating that, under the right circumstances, testing employees for COVID-19 will not violate the Americans with Disabilities Act ("ADA"). Such testing can include measures as simple as taking employees' temperatures or as potentially invasive as testing them for the virus itself. Decisions on whether to implement any such tests should be based upon such considerations as the type of business the employer operates and the potential for inadvertent transmission to customers, employees and the general public. What steps an employer should take will thus be dependent on numerous factors and may even vary internally depending on which employees may require more protections than others. It is not a one-size-fits-all proposition. If conducting actual coronavirus testing is too costly or impractical, temperature checks constitute a reasonable method in which to identify those employees who may need medical attention or should otherwise be instructed to self-quarantine at home.

4) EMPLOYEE LITIGATION.

When any new problem arises, the likelihood of increased litigation arises. Should an employee contract COVID-19 from work, he/she is usually limited to the no-fault remedies provided by the State's workers compensation laws. However, given the universal nature and high transmissibility of COVID-19, it would be very difficult for an employee to conclusively determine that the disease was contracted in the workplace, as opposed to someplace else. Yet should an employee accuse their employer of being responsible for his/her contraction of COVID-19, what should the employer do?

Should any such claim or allegation arise, the employer should immediately notify its workers compensation insurance carrier. In most instances (and depending on the terms of the policy issued), the carrier will assign legal counsel to defend the claim and pay the benefits owed under the workers compensation statute. If the employee's claim alleges ordinary employer negligence as the causative factor in the contraction of COVID-19, the claim will be adjudicated as a basic workers compensation claim, which in most states is handled by specialized workers compensation tribunals. However, if the employee accuses the employer of intentional or wanton misconduct or gross negligence in creating a workplace hazard, then the employer may be subject to a direct lawsuit, which presents the risk of liability outside the parameters of the workers compensation law. Such lawsuits may not be covered by an employer's workers compensation policy, subjecting the employer to having to defend the suit out-of-pocket and exposing it to a substantial damages award for which it will be liable without the assistance of insurance indemnification.

4A) DISCRIMINATION CLAIMS.

Another unfortunate consequence of the COVID-19 Pandemic is the risk of additional allegations of discrimination against employers. To mitigate the risk of having to defend against discrimination claims, employers should follow general rules of equal applicability to all employees, meaning all rules should be applied against each employee on equal terms and enforceability. Any exceptions or dispensations should be granted only in the rarest of instances, and only in those situations that can be rationally justified utilizing non-discriminatory criteria. For example, if an employer issues a general rule that an employee afflicted with COVID-19 cannot work until the conclusion of 14 days in self-quarantine, that rule must be followed for all employees.

The employer should also consider developing uniform guidelines setting forth the criteria for permitting employees to work from home. Of course, not all jobs can be performed from one's home, while others would be entirely impractical. Thus, the underlying criteria the employer develops should be as objective as possible, without regard to non-work-related reasons. Additionally, employees with certain underlying medical conditions (such as asthma) may request to work at home. As a general rule, accommodate the employee wherever feasible, taking into account whether an accommodation will permit the employer to perform the essential functions of his/her job and, if so, whether providing the accommodation will cause the employer to incur a business hardship. Employers will not be required to accommodate an employee who wants to work from home simply because he/she is concerned about contracting COVID-19. Document the decision and supporting rationale in order to rebut any future allegations of failure to accommodate or disability discrimination. Remember, carefully prepared procedures and the use of clear, reasonable, objective factors will make these difficult questions easier to implement and prepare your business to respond effectively to allegations of discrimination and employee grievances.

5) THE IMPORTANCE OF EMPLOYEE MORALE AND OTHER RAMIFICATIONS.

This informational document provides practical tips on how this horrendous pandemic has impacted, and will continue to impact, the workplace from both a legal and practical standpoint. Employers large and small should remain diligent and cognizant of the mood and temperament of their workforce. Employees who believe their issues are not being addressed will seek other avenues, such as litigation and unionization. Many unions are becoming aggressively active on behalf of the employees they represent and as well as those employees they seek to organize. If an employer is a signatory to a collective bargaining agreement, it is imperative that it constructively work alongside the union to ensure the workplace remains a safe, healthy and stable environment. Every issue or complaint should be treated

seriously. As a general rule: listen, question, respond to employee inquiries, and when uncertain seek legal counsel. It is when employees stop to question or comment can be a sign of problems. Maintain a positive approach and we will all get through this health crisis.