1. DETERMINING WHEN TO REOPEN PHYSICAL WORKPLACES

Determining when to permit employees to return to your physical workplace is a difficult decision that involves many considerations, including government restrictions, health and safety concerns and economic implications. Many state and local governments have imposed (and likely will continue to impose) restrictions on when you may return to your physical workplace, in what form you may reopen and how you can operate. To inform your decision and ensure that employees return to safe work conditions, you should monitor and review:

- ☐ State and local government orders

- ☐ Guidance issued by state and local health departments

- ☐ Guidance issued by the Centers for Disease Control and Prevention (CDC) for businesses and workplaces (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)

- ☐ Guidance issued by the Occupational Safety and Health Administration (https://www.osha.gov/SLTC/covid-19/)

- ☐ Resources posted by applicable business and industry associations

2. DECIDING WHO TO REHIRE OR RECALL AND IN WHAT CAPACITY

- ☐ Consider whether you will operate with full or reduced staff, whether your employees were terminated or temporarily laid off or furloughed in response to the pandemic, and, if so, whether you will need to rehire or recall employees

- ☐ Decide whether you will rehire or recall employees at one time or in multiple rounds

- ☐ Determine if any of the terminated or laid off/furloughed employees are service members and whether they are entitled to reemployment pursuant to the Uniformed Services Employment and Reemployment Rights Act

- ☐ Use objective, nondiscriminatory criteria for selecting employees for rehire or recall to avoid discrimination claims (e.g., seniority within each job classification)
  - ‣ If a unionized employer, review the collective bargaining agreement for provisions addressing layoffs and recalling employees

- ☐ Review the composition of returning employees to ensure that no protected classes are disparately impacted

- ☐ Review existing job descriptions and consider revisions due to changes in operations or business expectations due to COVID-19

- ☐ Consider requiring employees to take on additional job duties or cross-training employees in different tasks

- ☐ Consider the impact of rehiring or recalling employees on your receipt of government benefits or loans (e.g., analyze loan forgiveness requirements if you received a Paycheck Protection Program loan)

3. ONBOARDING REHIRED OR RECALLED EMPLOYEES

- ☐ Prepare and send offer letter or reinstatement memorandum to returning employees
  - ‣ Provide deadline for accepting offer of reemployment or reinstatement and consider confirming in writing if employees do not respond to offer
  - ‣ Advise that declining offer of reemployment or reinstatement may result in forfeiture of continuing eligibility for unemployment compensation benefits

- ☐ Complete a new hire process, including any pre-employment screening (mandatory for employees who were terminated; recommended for employees who were temporarily laid off or furloughed)

- ☐ Obtain employees' updated contact information, including personal email address and cell phone number, to ensure effective communications during the pandemic

- ☐ Consider making a conditional job offer and then screening all applicants for symptoms of COVID-19 and taking all applicants' temperatures

- ☐ Delay the start date for any applicant who has COVID-19 or is symptomatic or consider withdrawing the job offer if the applicant is needed to start work immediately (in consultation with counsel)
  - ‣ Do not unilaterally postpone an applicant's start date or withdraw a job offer because the individual presents a higher risk for COVID-19 complications (e.g., over 65 years of age or pregnant)

- ☐ Consider administering COVID-19 tests to all employees before they enter the workplace to determine if they have the virus
  - ‣ However, you must ensure that the tests are accurate and reliable and understand the limitations — a negative test result does not mean an employee will not become infected after returning to work
  - ‣ Review guidance from the Food and Drug Administration, CDC, and other public health authorities regarding safe and accurate testing (https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2)

☐ Consider whether any employee benefits available to employees prior to their termination or furlough need to be reinstated

- For example, accrued paid sick leave pursuant to state or local law may need to be reinstated (reinstatement should be documented)

☐ Determine if employees need to reenroll in any health insurance, retirement or other benefits plans and if any probationary periods apply

- Review plans and consult with administrators and benefits counsel

☐ Ensure employees are properly classified as exempt or nonexempt and consider adjusting employee pay or benefits

- Employees do not necessarily need to be paid the same amount that they were paid prior to their termination or furlough (unless their salaries are fixed by an employment contract or collective bargaining agreement)

- Consider pay equity and discrimination issues, any potential impact on receipt of government benefits or loans (e.g., Paycheck Protection Program), and any legal requirements to provide notice

☐ Ensure hourly employees are paid at least the applicable minimum wage and salaried employees are paid at least the minimum salary threshold under federal, state and/or local law

☐ Provide any wage notices that may be required under state or local law

☐ Verify the identity and employment authorization of all individuals rehired or recalled

- Consult with counsel about whether to complete a new Form I-9 or Section 3 (the "Rehire" section of Form I-9) and treat all rehired or recalled employees in the same manner

- Note there are temporarily relaxed requirements for remote verification (although in-person examination of documents is still required within three business days of resuming operations at the worksite)

- Consult with immigration counsel regarding any visa issues

☐ Ensure that employees complete all new hire paperwork and receive all notices required under federal, state and local law

☐ Ensure that all employment posters required under federal, state and local law are current and posted in a conspicuous location at the workplace

- Do not forget the new Families First Coronavirus Response Act (FFCRA) poster if you are a covered employer! (https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

- Consider relevant posters developed by CDC to support COVID-19 recommendations (https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc)

☐ Provide all employees with your employee handbook and ensure they sign and date an acknowledgement of receipt

☐ Revise policies to comply with updated government guidance concerning COVID-19 issues and recently enacted laws, such as the FFCRA and any state and/or local laws promulgated in response to COVID-19

- If a unionized employer, changes to policies and terms and conditions of employment may require collective bargaining

☐ Consider requiring employees to enter into restrictive covenant agreements as a condition of returning to work (if appropriate)

☐ Determine operational and/or policy changes to be implemented upon returning to work and advise employees of those changes

☐ Communicate with employees about actions taken and procedures implemented to ensure their safety prior to returning to work

☐ Provide employees with written protocol to follow in the event they become ill or are potentially exposed to COVID-19, including reporting requirements

4. ACCOMMODATING EMPLOYEES DUE TO COVID-19

☐ Anticipate an increase in requests for accommodations and leaves of absence related to COVID-19

☐ Prepare protocol for responding to employees requesting a delayed start date or telecommuting due to COVID-19 concerns, including high-risk employees, employees suffering from anxiety and employees with child care issues

☐ Consider requests for reasonable accommodations for reasons related to COVID-19, engage in interactive process with employees and maintain documentation

☐ Review essential functions of jobs and consider whether working remotely is possible for certain positions

☐ Advise employees of your leave policies and benefits available under federal, state and local laws and consider interplay between policies and laws

- Remember that employees do not necessarily need to be sick to be entitled to leave — for example, employees may be permitted to take time off to care for their child or a family member who is ill

☐ Train supervisors regarding leave of absence policies, not discriminating against employees when considering leave requests, not retaliating against employees for exercising their rights and the possibility of individual liability under certain laws

☐ Consider granting unpaid leaves of absence after employees exhaust all leave entitlements

☐ Track employees' use of leave and reasons for leave

☐ Offer wellness programs and resources to help employees cope with stress and anxiety

5. SCREENING EMPLOYEES AND VISITORS FOR COVID-19 (DURING THE PANDEMIC)

☐ Post signage at the entrance to your workplace stating that persons with a fever and/or other COVID-19 symptoms are not permitted inside

☐ Consider implementing a regular practice of taking temperatures of all employees and visitors and inquiring about whether they are experiencing any CDC designated symptoms before entering the workplace (Screen everyone or no one!)

  ‣ Establish logistics for temperature checks, including use of personal protective equipment (PPE)

  ‣ Ensure employees maintain at least six (6) feet of distance if waiting in line

  ‣ Consider using a non-contact thermometer

  ‣ Be mindful that some persons with COVID-19 do not have a fever

  ‣ Do not inquire beyond CDC designated symptoms, which currently include cough, shortness of breath or difficulty breathing, fever, chills, repeated shaking with chills, muscle pain, headache, sore throat and new loss of taste or smell (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html)

  ‣ You may send employees home or refuse entry to visitors as long as it is not for an unlawful or discriminatory reason (consider any call-in pay requirements in your jurisdiction)

  ‣ Review collective bargaining agreement and consider any bargaining obligation (if unionized employer)

☐ Review and consider any obligation to pay employees for time required for temperature taking and responding to medical inquiries

☐ Set expectations by issuing a policy to employees, posting a notice on the premises and providing advanced notice to vendors or other regular third parties of temperature checks and required reporting of CDC symptoms

☐ Require employees to sign and return a written consent form for daily temperature checks and COVID-19 screening questionnaires

  ‣ Specify that you are not conducting a diagnostic test and that employees should consult with their medical providers if they are experiencing a fever or any other COVID-19 symptoms

☐ Determine whether any privacy notices may be required under federal, state or local law

☐ Train employees responsible for taking temperatures on appropriate procedures, safety precautions and protocol for consistent treatment of employees and visitors

  ‣ Avoid having an employee's supervisor conduct the testing (if possible)

☐ Consider requirements for confidentiality of medical records, privacy issues and data security concerns

  ‣ Maintain medical records separately from personnel files

  ‣ Consider only documenting whether temperatures are above or below the CDC threshold (100.4 degrees Fahrenheit)

☐ Monitor and follow guidance from the Equal Employment Opportunity Commission (https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?) and similar state and local government agencies

6. HANDLING CONFIRMED OR SUSPECTED CASES OF COVID-19

☐ Prepare policy and procedures for reporting illness and responding to employees who test positive for COVID-19 or are suspected of having COVID-19

☐ 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

☐ Consider whether you are required to notify any government agencies

☐ Put procedural safeguards in place to maintain the confidentiality of any employee with a suspected or confirmed case of COVID-19

7. REQUIRING USE OF PERSONAL PROTECTIVE EQUIPMENT

☐ Follow OSHA guidance and any requirements issued by state and local authorities

☐ Order appropriate PPE such as face coverings, gloves, etc., and ensure ample supply

☐ Distribute PPE to employees and properly maintain any PPE that employees may safely reuse

☐ Implement procedures for distributing appropriate PPE to visitors

☐ Train employees on PPE available, when to use PPE, how to safely don and doff PPE, how to properly dispose of PPE and the limitations of PPE

☐ Make PPE requirements terms and conditions of employment and consider requiring employees to sign a written acknowledgement

  ‣ Review collective bargaining agreement and consider any bargaining obligation (if unionized employer)

☐ Consider requests for reasonable accommodations for medical or religious reasons prior to taking adverse action against employees who refuse to don PPE

‣ For example, employees may require non-latex gloves if allergic to latex, modified face masks if they are communicating with an employee who uses lip reading, gowns designed for individuals who use wheelchairs or modified equipment due to religious garb

☐ Consider maintaining uniforms for employees and laundering daily (if applicable)

8. PROMOTING EMPLOYEE HYGIENE

☐ Establish hygiene practices for employees based on CDC guidance

☐ Advise employees to wash their hands often with soap and water for a minimum of 20 seconds and provide a location for handwashing

☐ Provide 60% minimum alcohol-based hand sanitizer and install dispensers in public and nonpublic areas of workplace, including next to restroom doors

☐ Direct employees to cover their mouths and noses with a tissue (or their sleeve) when coughing or sneezing

☐ Advise employees to avoid touching their eyes, nose and mouth with unwashed hands

☐ Encourage employees to stay home if they are sick or experiencing any CDC designated COVID-19 symptoms

9. MAINTAINING A CLEAN AND SANITARY WORKPLACE

☐ Review CDC's Reopening Guidance for Cleaning and Disinfecting Workplaces (https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html)

☐ Establish cleaning and sanitization measures and protocol in accordance with recommendations provided by the CDC

☐ Consider engaging a professional third-party cleaning company to maintain appropriate standards

☐ Review guidance issued by the Environmental Protection Agency (EPA) regarding disinfectants (https://www.epa.gov/coronavirus)

☐ Use cleaning and disinfectant products pre-approved and certified by the EPA for use against COVID-19 and other viruses (https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2)

☐ Make cleaning and disinfectant products available to employees

☐ Follow manufacturer instructions when using cleaning and disinfectant products

☐ Disinfect "high-touch" surfaces and equipment frequently, including doorknobs, countertops and workstations

☐ Clean and sanitize restrooms regularly and ensure adequate supply of soap and paper towels

☐ Establish procedures for closing the workplace and conducting a deep cleaning and sanitizing in the event of a suspected or confirmed COVID-19 exposure

☐ Work with facility maintenance staff and/or engage HVAC contractors to increase air exchanges and improve ventilation within the workplace

☐ Implement rules restricting visitors to the workplace, including shoe shine services, meal delivery, messengers, vendors, etc.

10. PROMOTING SOCIAL DISTANCING

☐ Restrict occupancy at the workplace

☐ Establish a work-from-home policy

‣ Consider wage and hour and expense reimbursement issues

‣ Consider data security issues

☐ Determine if telecommuting is possible for certain employee positions and limit access to the workplace to only essential employees (if possible)

☐ Implement flexible work hours, such as staggered schedules/shifts and meal/break times, to avoid overcrowded work areas and minimize congregating among employees

☐ Require employees to remain at least six (6) feet apart in the workplace (to the fullest extent possible)

☐ Post signage reminding employees of social distancing requirements

☐ Encourage use of videoconferences or teleconferences in place of in-person meetings

☐ Prohibit handshaking and any other physical contact

☐ Prohibit sharing of equipment such as phones, headsets, desks, printers, microwaves, refrigerators, etc.

☐ Prohibit sharing of food and utensils

☐ Reconfigure workstations, conference rooms and reception/waiting areas (e.g., space out seating, leave every other workstation vacant, install partitions)

☐ Reconfigure restrooms (e.g., convert communal restrooms to single-user restrooms, close certain stalls or urinals and/or restrict occupancy)

☐ Install floor markings to ensure employees are separated by at least six (6) feet (especially if working on an assembly line)

☐ Require employees to walk down hallways in one direction (if possible)

☐ Limit the number of persons in elevators at any given time

☐ Close or limit access to common areas, such as employee break rooms

☐ Install automatic door openers

☐ Install plexiglass or other protective barriers where appropriate

☐ Designate and use a separate entrance and exit (if possible)

☐ Consider limiting third-party access to the workplace

☐ Decrease the amount of time visitors spend in reception or other waiting areas

☐ Impose limitations on non-essential business travel, comply with CDC guidelines for post-travel quarantine and consider other precautions, such as COVID-19 testing or working from home for a period of time following travel

11. ADDRESSING EMPLOYEE HEALTH AND SAFETY CONCERNS

☐ Designate a company official to handle employee concerns

☐ Advise of open-door policy and encourage employees to report health and safety concerns

☐ Communicate regularly and often with employees and provide multiple means for employees to raise issues

☐ Train supervisors on addressing health and safety concerns, protected concerted activity and recognizing signs of union activity

☐ Investigate claims and respond promptly and appropriately to employees

☐ Ensure workplace rules comply with the National Labor Relations Act

☐ Implement and enforce non-retaliation policies—employees have a right to raise concerns about the safety of their workplace, report unhealthy or unsafe working conditions, or join together to protest your actions or perceived inaction

☐ Consult with labor counsel in response to employee protected concerted activity and/or union organizing efforts

☐ Review applicable collective bargaining agreement provisions in anticipation of potential strike, slowdown, walkout or picketing (if unionized employer)

12. SATISFYING REPORTING OBLIGATIONS

☐ Review reporting obligations under OSHA

‣ OSHA recordkeeping requirements mandate that covered employers record certain work-related injuries and illnesses on OSHA 300 log

‣ Consider whether COVID-19 illnesses arose from the workplace (e.g., if the employee was infected as a result of performing work-related duties)

‣ Consult OSHA's Enforcement Guidance for Recording Cases of COVID-19 (https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19)

☐ Review reporting obligations under state workers' compensation laws

‣ Employees may have the right to file a claim

‣ Review workers' compensation policy and coverage

‣ Monitor developments concerning potential workers' compensation liability for workplace exposure to COVID-19

13. LOOKING AHEAD

☐ Keep communicating with employees

☐ Continue to regularly monitor developments, government orders and administrative guidance

☐ Document measures taken in response to the COVID-19 pandemic

☐ Create a pandemic preparedness and response plan going forward

☐ If a vaccine for COVID-19 becomes available…

‣ Educate employees about the vaccine

‣ Consider making the vaccine available at no cost to employees and offering employees leave to obtain the vaccination

‣ Consult with counsel regarding whether you may require employees to be vaccinated for COVID-19

For more information about this alert, please contact:

Jason B. Jendrewski
✉ jjendrewski@foxrothschild.com
☎ 212.878.7952

or any member of the firm's national Labor & Employment Department.

Fox Rothschild LLP
ATTORNEYS AT LAW
foxrothschild.com