Wisconsin Supreme Court Strikes Down COVID-19 Safer-at-Home Order: Considerations for Wisconsin Employers

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Last month, Wisconsin Department of Health Services (DHS) Secretary-Designee Andrea Palm issued Emergency Order No. 28 (the "Safer-at-Home Order") requiring Wisconsinites to remain at home, not travel, and close all businesses declared not "essential." Violators were subject to imprisonment, a fine, or both. On May 13, 2020, the Wisconsin Supreme Court ruled, in a 4-3 decision, that the Safer-at-Home Order is unlawful, invalid, and unenforceable, effective immediately.[1]

From a practical standpoint, the court's decision does not change much for the many Wisconsin businesses that were able to safely continue their essential operations while the Safer-at-Home Order was in effect. Those employers will continue paying close attention to applicable federal, state, and local laws, orders, and safety guidance as they continue to operate through the COVID-19 pandemic.

Those employers that were forced to shut down all or parts of their operations have a range of other factors to consider in determining whether to reopen, and if so, the extent and speed with which they will reopen.

Pay Attention to Local Orders

While the Safer-at-Home order is no longer in effect, several localities, including Dane County, Milwaukee County, Brown County, La Crosse County, Rock County, Kenosha County, the City of Milwaukee, the City of Appleton, the City of Racine and at least 18 other cities have passed their own health orders, which include significant business operating restrictions. The Wisconsin Supreme Court's decision did not address and does not impact those local orders, which for now means that other counties and municipalities can be expected to follow suit. Employers always need to ensure that a return-to-work plan complies with any existing, applicable local health orders and, if any new statewide orders are issued, those orders as well.

Consider all Resources

Once the ability to lawfully operate under any applicable orders is confirmed, there remains a host of employment law and public health issues that employers will need to address as they develop and implement return-to-work plans. Moreover, different industry sectors may have drastically different requirements and guidelines to follow in connection with their physical return to work. There is simply no "one-size-fits-all" approach to returning to work and that makes the process all the more challenging for employers.

Legal requirements and recommended health and safety practice guidance is changing almost daily, so it is very important for employers to keep up with the latest developments. As an example, Wisconsin employers electing to reopen should review the Wisconsin Economic Development Commission's Reopening Guidelines, which include industry-specific advice for protecting employees and the public.

1 The court did not invalidate the portion of the order that closes K-12 schools.

Recalling Furloughed Employees

Some employers may determine that they cannot return all employees to the workforce. Some employers may need to recall employees on a slower timeline depending on demand, social distancing imperatives, and the timeline for production. Others may want to recall everyone, but may need to revisit the terms of employment. When evaluating these issues, employers should consider their obligations under their agreements and policies, including any collective bargaining agreements. Employers should also consider potential adverse impact and the wide range of anti-discrimination laws when selecting who to return from furlough.

Worksite Cleaning

Before reopening, employers should review U.S. Centers for Disease Control and Prevention (CDC) guidance on cleaning and disinfecting their facilities. The CDC has also published specific cleaning guidance to assist employers, available here.

Engineering and Administrative Controls

Before reopening, employers should consider whether to implement additional engineering or administrative controls in the workplace. Many employers may be encouraged (if not required) to continue with teleworking options as long as feasible. The CDC and the Occupational Safety and Health Administration (OSHA) have provided some guidance on engineering and administrative controls in the workplace that may help in combating the spread of COVID-19. Such controls include high-efficiency air filters or other devices for increased circulation, filtration, or ventilation. Additionally, employers may want to consider increasing the percentage of outdoor air that circulates into the workplace ventilation systems. Employers should implement controls that are practical, feasible, and effective in their specific workplaces.

One common administrative control employers should consider is enhanced social distancing. Some social distancing measures that employers may want to consider include:

- Split shifts;
- Placed markers indicating proper social distancing in any areas where employees may line up or congregate;
- Staggered meal and rest breaks;
- Designated meal and rest break areas;
- Limiting the number of employees permitted in meetings/confined spaces;
- Putting up shields or barriers to prevent employees from being exposed to someone else's respiratory droplets;
- Alternating work stations;
- Removing seats in communal areas to provide additional personal space; and
- Reorienting work points to avoid employees directly facing each other.

Employers should try to implement what is feasible and practical for each specific workplace. Part of this determination depends on whether there are industry-specific considerations that must be accounted for, including whether federal, state, or local authorities have issued requirements or guidance governing any such industries.

Face Coverings, Temperature Checks and Health Screening

Employers may need to develop procedures and protocols regarding the distribution and donning of face coverings. Policies implementing face covering requirements may mandate that employees use face coverings provided by the employer and/or allow employees to purchase or make their own face coverings. In addition, employers implementing face coverings should also consider including protocols detailing how to properly wear, safely don and doff, and maintain these face coverings. Temperature checks and health screenings can also play a key role in workplace safety, but present a host of practical challenges. The provision of face coverings, temperature checks and health screening will likely also touch on potential reasonable accommodation issues (as well as other legal issues), which must also be considered.

Preparing for Exposure in the Workplace

It is likely that once the worksite reopens, employers will again be faced with employees who develop symptoms of COVID-19, test positive for COVID-19, are clinically diagnosed with COVID-19 ("presumptive positive"), and/or have been in close contact with a presumed positive or confirmed COVID-19 individual. Employers should "think ahead" and develop a thorough exposure control plan, which identifies what steps to take for different exposure scenarios including: (1) whether an employee needs to self-quarantine; (2) whether the employer needs to conduct a contact tracing assessment to determine if others should be isolated or quarantined; and (3) how to implement appropriate cleaning protocols.

It is essential to have an exposure control plan in place before a potential exposure occurs. Additionally, employers should prepare for and have procedures in place on how and when to record and/or report a confirmed case of COVID-19 in the workplace pursuant to OSHA standards.

Accommodation and Leave Requests

If an employee cannot work (either at the worksite or remotely) or is limited in their ability to work because of an underlying health condition, the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA), as well the Wisconsin Fair Employment Act (WFEA) and Wisconsin Family and Medical Leave Act (WFMLA), likely protect the employee. Therefore, if an employee requests to remain at home or refuses to return to work because of their condition, an employer should treat that request or refusal as a request for accommodation under the ADA and equivalent state or local laws. Such a request triggers the employer's obligation to engage the employee in the interactive process.

In addition, employees of businesses with fewer than 500 employees may also qualify for two workweeks of emergency paid sick leave (EPSL) under the Families First Coronavirus Response Act (FFCRA). Under the

FFCRA, a health care provider must advise that the employee quarantine or self-isolate because they are particularly vulnerable to COVID-19, but no documentation from a health care provider can be required. Rather, the employee must only affirm that a health care provider advised them to quarantine or self-isolate. If an employee seeks EPSL for this reason, the employee is eligible to receive EPSL paid at 100% of the employee's regular rate or the applicable minimum wage (whichever is higher), up to a cap of $511/day or $5,110 total. Per IRS guidance, an employer will receive a dollar of tax credit toward its payroll tax obligation for every dollar it pays the employee in EPSL benefit.

Under the FFCRA, employees may be entitled to protected time off and pay because a child's school or place of care is closed or their childcare provider is unavailable. The FFCRA provides two forms of protection for this purpose. First, an employee may be eligible for leave through EPSL. Second, an employee may also be eligible for leave through the Emergency Family and Medical Leave Expansion Act (EFMLEA). As discussed above, EPSL provides for up to two weeks of time off. Unlike situations where EPSL is taken for the employee's own health-related situation, EPSL taken to address childcare obligations is paid at two-thirds the employee's regular rate or applicable minimum wage (whichever is higher), up to a cap of $200/day or $2,000 total. In addition, the EFMLEA provides employees up to 12 workweeks of leave. The first two weeks of leave are unpaid (unless the employee elects to use EPSL or other paid time off the employee may have available). The last 10 weeks are paid at two-thirds the employee's regular rate or applicable minimum wage (whichever is higher) up to a cap of $200/day or $10,000 total

Don't Forget about the National Labor Relations Act

The National Labor Relations Act and National Labor Relations Board are alive, well, and functioning, albeit with limits on in-person activities. This has caused some delays in processing petitions, unfair labor practice charges, and conducting hearings.

The COVID-19 "protest" has been a cable news staple, including social media attacks and limited work stoppages aimed at the policies and practices of major (and, in most cases, non-union) employers, even though some of those employers were among the first in the nation to implement paid leave, premium pay, social distancing, temperature screens, and other measures designed to recognize, reward, and protect their workers. These activities may or may not be protected by the NLRA, but union and non-union employers need to consider the possibility when fashioning a response.

In addition, unionized employers have carefully reviewed their collective bargaining agreements and potential bargaining obligations under the NLRA in mapping out their COVID-19 response. These considerations continue to apply as employers consider and implement return-to-work plans.

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Check in with Legal Counsel if and as Needed

Reintroducing employees back into the workplace will require employers to juggle multiple logistical, emotional, and legal concerns. Because COVID-19 will impact employment for the foreseeable future, it is anticipated many employees will be reluctant to return, even after states and municipalities have approved reopening plans. Employers with questions about any of these issues should consult counsel.

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