

Business Unusual: Operating in a Post-COVID-19 World

Suzanne Decker, Miles & Stockbridge, Moderator
Kathryn Widmayer, UMMS
Stephanie Baron, Kirsten Eriksson, Veronica Jackson
Miles & Stockbridge
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Where We Are/Planning Ahead

- Whether your business has remained operational (either in person or remotely) or you are starting to plan to reopen your face-to-face operations, there is no “business as usual.”
- Even when stay-at-home orders are lifted or modified, things are unlikely to immediately return to “normal” or pre-COVID-19 conditions.
- There are many new or modified regulations and employer obligations.
- Purpose of today’s presentation is to provide guidance around what employers should be doing and/or planning for now in order to conduct in-person operations while the pandemic is ongoing.

Topics We Will Cover Today

- Health Screening and Privacy Issues
- OSHA Obligations and Reporting, Personal Protective Equipment and Social Distancing
- Compensation, Leave and Recall Issues



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Health Screening and ADA/Privacy Issues

Health Screening Requirements

Employers should screen employees for COVID-19 each day before allowing them to begin work.

This may include:

- Taking employee temperatures;
- Interviewing employees to confirm whether they are experiencing symptoms;
- Confirming if employees have been recently exposed to someone who has COVID-19.

These requirements may apply not just to employees but all who enter your workspace – customers, vendors, etc.

Health Screening Concerns

- Who will be responsible for the health screening?
- How will you obtain necessary equipment?
- How can you screen and maintain social distancing?
- COVID-19 testing specifically
 - When would an employee have to be tested?
 - Will there be sufficient tests available?
 - Who will bear the costs?

Health Screening Privacy

- Health screening information is confidential medical information.
- Disclosure must be on a need-to-know basis.
- **BUT** – balancing employee privacy interests vs. employee safety concerns
 - “Need-to-know” may include employees who have been exposed
 - Disclosure without identifying sick employee

Health Screening and the ADA

- The EEOC usually limits medical tests and inquiries to situations where there is a business need to know or a “direct threat.”
- EEOC has indicated that health screening is permissible given the pandemic.
 - Can take employee temperature and inquire about symptoms
 - Can send sick employees home
- EEOC says you can require fitness for duty/doctor’s clearance note before returning employee to work, but must keep in mind the challenges of getting such documentation during pandemic.
- Employees with disabilities related to or impacted by COVID-19 may be entitled to reasonable accommodation in the workplace.



OSHA Obligations and Reporting, Social Distancing and PPE

OSHA Obligations

OSHA's General Duty Clause requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

Many industries have regulatory requirements which are the subject of employee discontent, especially in health care, nursing care and death industries. Unions have been particularly active in these areas and with groups of grocery and service workers.

Many states have their own safety standards which impose similar obligations.

OSHA Obligations

Perform a Hazard Assessment – determine level of risk job by job.

- Implement basic infection prevention measures.
- Implement workplace controls as appropriate:
 - Engineering (HVAC, sneeze guards)
 - Administrative (Infectious Disease policy, scheduling, training)
 - PPE (if required) and cleaning supplies
- Communicate about flexibilities/protections.

Social Distancing in the Workplace

- Likely that CDC and other agencies will continue to recommend (and even require) social distancing in the workplace.
- Consider what it means for your workplace if employees are expected to work at least six feet apart and not gather in large groups.
- Options might include:
 - Rearranging office space
 - Alternating remote work days
 - Limiting in-person meetings and interactions
 - Buying equipment or furniture to further segregate employees
- Business travel

OSHA Reporting

Under OSHA's recordkeeping requirements, employers are responsible for recording confirmed cases of COVID-19 if:

1. the case is work-related; and
 - (1) the case involves death, days away from work, medical treatment beyond first aid.

Given widespread community transmission, employers can assume not work related unless you are in health care, emergency response, or correctional institution (must make determination in each case); or there is objective evidence such as high number of employees in your office infected at once

Masks and PPE

- CDC and most states are now recommending (and some are requiring) that everyone wear a mask or face covering when outside the home. Likely that this will be continued in Phase 1.
- Employees will likely be required to wear at least some of the time they are at work.
- If employers require masks, they may be required to provide training, cleaning and replacement.

Masks and PPE – Challenges

- Who will be responsible for supplying and paying for masks and PPE?
- Shortages of equipment
 - “Do it Yourself” options
- What if employees want to wear their own?
- What if employees refuse to wear the mask/PPE?

Compensation, Leave and Recall Issues

Compensation

- Must employees be paid for time spent in health screening each day?
- Can I reduce pay?
 - Notice requirements, FLSA salary exemption issues
- Can I pay more – hazard pay, retro bonuses, attendance bonuses?
 - May impact overtime calculation for non-exempt employees
- Hourly employees working from home
 - “all in a days’ work” concerns, timekeeping, breaks

Sick and Vacation Leave

- Many employees will have exhausted all paid time off during furloughs and/or leave.
- How will you handle planned vacations, illness and holiday time throughout remainder of the year?
 - Additional PTO
 - Leave without pay
 - Deny time off
- Mandatory state and local paid sick leave laws
 - If employees have exhausted all PTO but not technically had opportunity to utilize for “sick and safe leave” purposes – are you obligated to provide that additional time?
 - Restoration of paid sick leave upon re-instatement
 - Watch for new laws

FFCRA – EPSL and EFMLA

- Employees remain eligible for FFCRA until December 31, 2020
 - Under/over 500 due to layoffs/rehiring – snapshot at time leave requested
 - Employees unable to be recalled due to FFCRA qualifying reason
 - EFMLA – 30 days on payroll prior to layoff/furlough
- Will lack of summer camp count for EFMLA?

ADA and FMLA

- FMLA claims may increase – particularly due to mental health conditions such as anxiety and depression
 - EFMLA time counts against 12 weeks of FMLA
 - Difficulties in obtaining doctors' certifications
 - “serious health condition” requires in-person visit to doctor
- Increased requests for remote work
 - Undue hardship under ADA may be more difficult now – but employer still gets to choose preferred accommodation if more than one effective accommodation
 - Teleworking policies – more important than ever

Discrimination Claims

ADA

- Is COVID-19 a disability?
- Improper medical inquiries
- Regarded as Disabled – improper assumptions
- Failure to Reasonably Accommodate

Age Discrimination

- Workers over 60/65 at increased risk

Recall Issues

Unemployment reporting

- Employees who were terminated - new hire reporting
- Employee who refuses recall – report to state unemployment.

Process

- Handbook policy
- CBA
- Objective business-related criteria – beware discrimination/retaliation risks

Potential Ongoing Employee Concerns – Fears

Employees may be concerned about working in the office.

Employers will need to determine the reason for the hesitancy:

- Underlying medical issue of employee – may need to engage in interactive process to determine if reasonable accommodation is required.
- Concern about becoming ill and infecting a family member with whom employee resides who has an underlying condition
 - Not covered by regular FMLA
 - But may be entitled to FFCRA Emergency Paid Sick Leave – up to 80 hours of paid sick leave – if family member has been advised to self-quarantine because of the underlying condition.
- Generalized fear of getting sick

Practical Takeaways

- Even if you're not currently operating in person - begin planning NOW for eventual return to office.
- Consider what your workplace will physically look like and how you will acquire any new equipment or furniture.
- Determine what PPE you will provide employees and how to obtain it.
- Consider providing additional training to employees on social distancing, PPE, non-discrimination and expectations around reporting of health issues.
- Be alert to new guidance or publications issued by federal, state and local authorities on rules for return to work.
- When in doubt – call your counsel! These are complicated and ever-changing issues!

Questions?



Stephanie K. Baron
sbaron@milesstockbridge.com
410 385-3463



Suzanne W. Decker
sdecker@milesstockbridge.com
410 385-3417



Kirsten M. Eriksson
keriksson@milesstockbridge.com
410 385-3583



Veronica Jackson
vjackson@milesstockbridge.com
410 385-3499

Firm Overview

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Miles & Stockbridge P.C.

www.mslaw.com

Twitter: @mstockbridgelaw

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