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Employment Law Considerations in Reopening the New York Workplace in the Wake of the COVID-19 Pandemic

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Overview

As New York phases out its stay-at-home orders, non-essential businesses will begin to reopen. Although the timing and extent of these modifications to New York's stay-at-home orders are uncertain, employers should devise a proactive return-to-work plan to ensure a safe and smooth reopening. The White House has issued guidelines for reopening non-essential businesses, placing the onus on states and local governments to determine their preparedness to limit COVID-19 exposure in businesses and workplaces. Federal guidelines and state executive orders will require employers to implement comprehensive return-to-work policies and procedures. This advisory is designed to help employers chart a path through the maze of civil, medical and legal guidelines towards a successful reopening. The most suitable path for each employer will depend on its location, industry and size as well as its employees' individual circumstances.

Employers should take a three step approach, which involves (1) determining the applicable legal standards for COVID-19-related issues, (2) designating a committee that can make company-wide decisions regarding the implementation of the return-to-work policy, and (3) devising a return-to-work policy or manual.

A Multi-Step Approach to Reopening the Workplace

STEP 1: Determine Applicable Legal Standards

- **State and Local Executive Orders and Guidelines**

An employer's ability to reopen depends upon the easing of stay-at-home orders. Employers should familiarize themselves with the requirements and timelines for reopening set forth in any applicable federal, state and local laws or orders. New York State's stay-at-home order was effectuated by Executive Order 202.8, dated March 20, 2020 (the "**Order**"). The Order is generally updated every 30 days, but may be adjusted, rescinded or extended on a more immediate basis in consideration of COVID-19-related conditions on the ground.

New York State has been reopening non-essential businesses in four phases, as follows:

1. Phase One: construction, manufacturing and wholesale supply chains, retail (curbside or in-store pickup/drop off only) and agriculture
2. Phase Two: professional services, retail, administrative support and real estate rentals and leasing
3. Phase Three: restaurants and food services
4. Phase Four: arts, entertainment, recreation and education

As of July 6, 2020, New York is in Phase Three of the State's reopening plan. We encourage employers to keep track of any updates to the Order and contact their legal advisors to stay abreast of all legal developments prior to reopening their businesses.

In addition to state or local executive orders, employers should be mindful of a host of other federal, state and local laws and guidelines that may be triggered by their employees' return to the workplace amid the ongoing COVID-19 pandemic.

- **The U.S. Occupational Safety and Health Act ("OSHA")**

OSHA, a U.S. federal law designed to help ensure employees' safety and health, has established standards and protocols concerning the use of personal protective equipment ("**PPE**") for employees whose jobs directly and continuously expose them to COVID-19.

Hazard Assessments

Under OSHA, an employer must assess its workplace to determine whether COVID-19-related hazards are present or likely to be present, and (if so) use PPE. While the assessment should cover the entire workplace, the hotspots for potential COVID-19 exposure would likely include common areas such as elevators, elevator banks, hallways, restrooms, pantries, kitchens, open-air offices, conference rooms, shared offices and shared equipment and supplies. Given the infectiousness of COVID-19 and the communal nature of physical workplaces, most businesses should require the use of PPE upon reopening.

PPE Selection

Once an employer assesses the workplace and determines that there are COVID-19-related hazards, the employer must select and require each employee to use the types of PPE that will protect him or her from COVID-19 exposure. Employers must provide the PPE at no cost to their employees and ensure that the PPE properly fits each employee. Employers should post their selection of certain types or models of PPE or email their selection to employees working from home. While employees may opt to provide their own PPE, employers remain obligated to ensure the adequacy, fit and sanitation thereof. Permitting employees to provide their own PPE may be an expedient workaround for disruption in supply of PPE and enable employers to stock up on PPE for employees who cannot provide their own. Return-to-work policies should communicate standards for selection, maintenance and hygiene of employee-provided PPE.

The U.S. Centers for Disease Control ("**CDC**") recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. The CDC has indicated that wearing a cloth face covering does not, however, replace the need to practice social distancing. In the workplace, the CDC recommends employers to encourage workers to wear a cloth face covering at work if the hazard assessment has determined that they do not require an N95 respirator or medical facemask for protection. It may be advisable to require employees who handle mail, shared office equipment, catered or delivered meals or the like to wear gloves when performing such work.

Employer Verification

An employer is required to verify that the workplace hazard assessment has been performed through a written certification that identifies the workplace areas evaluated, the person certifying that the assessment was performed and the hazard assessment date(s). The certification should identify the hazard that was assessed (COVID-19) and should be titled "Certification of Hazard Assessment."

Training

An employer is required to provide training to each employee who is required to use PPE regarding the following:

- when it is necessary to wear PPE;
- what PPE is necessary to protect against COVID-19;
- how to properly put on, remove, adjust and wear PPE;
- the limitations of PPE protection against COVID-19; and
- the proper care, maintenance, useful life and disposal of PPE.

OSHA's General Duty Clause

OSHA's general duty clause requires employers to provide each employee with employment and a place of employment, free from recognized hazards that are causing or are likely to cause death or serious physical harm. An employer is to devise return-to-work protocols that protect the occupational safety and health of employees from the potentially fatal and highly infectious nature of COVID-19 in community settings such as the office. Such protocols should be implemented in a reasonable and non-discriminatory manner.

- **Americans with Disabilities Act ("ADA") – Determining Whether Employees are Safe to Return to Work**

Once the stay-at-home orders are eased and employers implement OSHA-compliant protocols to limit inherent COVID-19-related hazards at the physical workplace, returning employees pose a continued health threat to each other and to visitors. Understandably, many employers may be considering certain screening measures to ensure that employees are safe to return to work and prevent transmission of the virus throughout the returning workforce.

COVID-19 Screening of the General Workforce

The ADA prohibits employers from discriminating against employees who have a physical impairment that substantially limits one or more major life activities (or employees who are perceived by others as having such an impairment). Pursuant to U.S. Equal Employment Opportunity Commission ("**EEOC**")[1] guidelines, since employees with the virus pose a direct threat to other employees' health, employers may administer a COVID-19 test to detect the presence of the virus before permitting employees to re-enter the workplace. An employer must take basic steps to ensure that tests are accurate and reliable. In furtherance of this, an employer may review the U.S. Food and Drug Administration's guidelines on COVID-19 testing at https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2. The EEOC cautions employers to be cognizant of potential false-positives or false-negatives arising from COVID-19 tests. Employers should be aware that mandatory testing is not a substitute for social distancing, hygiene and other best practices to limit the virus's transmission.

During the pandemic, an employer also may take its employees' body temperature prior to their entry to the workplace. Employers who choose to implement temperature checks should take great care to ensure the confidentiality of test results and should be mindful that some COVID-19-positive employees may not exhibit a fever. Furthermore, preliminary activities (such as mandatory temperature checks, or the donning of PPE) may be compensable under the U.S. Fair Labor Standards Act ("**FLSA**"). Employers should consult with their human resource specialists and legal advisors to determine whether the time employees spend waiting to have their temperature checked is compensable.

As an alternative to COVID-19 testing or temperature checks, employers may require employees who were absent from the workplace during the pandemic to provide a doctor's note certifying their fitness to return to work. In practice, this option may slow workplace reopening, as healthcare providers may be unavailable due to the pandemic. Alternatively, employers may ask employees to respond to a questionnaire certifying their fitness to return to work.

ADA-Specific Protocols for Employees Who Have COVID-19 or Call in Sick

Upon reopening, an employer will inevitably encounter employees who do not come to work and report that they are ill. So long as COVID-19 is an ongoing concern, an employer may ask employees who call in sick if they are experiencing virus symptoms (including fever, chills, cough, headaches, shortness of breath and/or sore throat). Employers should protect any information provided by such employees as a confidential medical record in accordance with the ADA. Moreover, an employer may require employees to stay home or leave work immediately if they test positive for COVID-19 or openly exhibit fever or other symptoms associated with COVID-19.

[1] The EEOC is the federal agency responsible for enforcing the ADA and other workplace anti-discrimination laws.

Whenever an employee calls in sick or is told to stay home due to COVID-19, the employer should carefully follow the paid leave requirements and protocols of the U.S. Families First Coronavirus Relief Act ("**FFCRA**"), state and local earned sick and paid family leave laws, the employer's leave and paid-time-off policies and the terms and conditions of any employment agreement. Robinson Brog's April 2020 advisory as to federal and New York State / New York City paid sick and family leave may be found here (which April 2020 guidance is subject to regulatory updates from time to time, and noting that COVID-19-related emergency laws are subject to change).

Special Considerations for High-Risk Employees

Although employers may generally require its employees to show up to work once the stay-at-home orders are lifted, employers may have additional obligations under the ADA relating to the return of employees who are at greater risk from COVID-19 due to age or preexisting health conditions.

The ADA generally requires employers to provide reasonable accommodations to employees with disabilities. Employers must offer to modify the work environment or how the job is done to remove obstacles preventing disabled employees from performing work they could otherwise do with some accommodation. These barriers may be physical (such as community workspaces, high traffic areas or shared equipment or tools) or procedural (how to perform essential job functions, such as mandatory interaction with customers, visitors, patrons or other employees).

Generally, a high-risk employee must inform his or her employer that an accommodation is needed (which results in the opening of an "interactive process" between the employer and employee); but if the disability is obvious or known to the employer, the employer may be obligated to initiate the discussion. An employer may be proactive and ask its employee to privately request any disability-related accommodations the employee may need upon his or her return.

The cooperative dialogue between an employer and its disabled employee regarding the provision of accommodations is centered on whether the disability is recognized by the ADA and the reasons why an accommodation is necessary. An employer should carefully document every communication or action taken during the interactive process, and maintain resulting medical information in accordance with applicable law. The EEOC has suggested that at the onset of the interactive process an employer ask its employee about (1) the nature of the disability; (2) how the disability creates a limitation; (3) how the requested accommodation will effectively address the limitation; (4) whether another form of accommodation could effectively address the issue, and (5) how a proposed accommodation will enable the employee to continue performing the essential functions of his or her position.

If the disability is not obvious or previously documented by the employee, an employer may require that the employee provide reasonable documentation from a healthcare provider establishing that the disability is recognized by the ADA and describing the condition's

functional limitations. If the employee is unable to provide sufficient documentation after multiple requests by the employer, the employer may deny the accommodation request.

An employer may deny an accommodation request from an employee who is able to perform the job's essential functions or participate in the job activities in an equally effective manner as employees without disabilities. Alternatively, an employer may deny an accommodation request if the accommodation would prevent the employee from performing the job's essential duties, is primarily for non-disability reasons, would pose a direct threat to other employees' health or safety or would impose an undue hardship on the employer's operations (and there is no alternative accommodation).

When considering an accommodation request, an employer also should consider the essential functions of the employee's job (which may be listed in the original job posting, offer letter or employment agreement), and may reject a proposed accommodation if it renders the employee unable to perform those functions. For instance, if a high-risk employee must be in the physical workplace to perform his or her essential job functions, working from home may not be a reasonable accommodation. Once a proposed accommodation is rejected, the employer should offer reasonable alternative accommodations (so that, in the above example, the employer could offer to change the affected employee's work environment by erecting barriers to ensure proper social distancing). If the employer has sufficient office space, it may offer to move the affected employee from a communal office space to an individual office. If there are sufficient preventative measures in the office, but the high-risk employee is fearful of commuting to the office, an employer may offer a more flexible or staggered schedule so the employee may avoid taking public transportation during peak hours. Alternatively, the employer may decide that subsidizing the high-risk employee's transportation by taxi or car service is an effective and less burdensome accommodation. Generally, leave is not a reasonable accommodation for employees who must be at work to perform their essential job functions.

The second most common basis for denying a requested accommodation is because it poses an undue hardship (significant difficulty or expense) for the employer. The requested accommodation may pose an undue hardship if it is difficult to acquire certain items that would reduce the employee's risk of exposure, a reduced workforce makes it significantly more difficult to offer staggered work hours or temporary assignments, or the accommodation would prevent other employees from doing their jobs. The "significant expense" basis for rejecting an accommodation is likely available only to employers that lost all or a substantial amount of their income due to COVID-19.

When denying a requested accommodation, an employer must continue to engage in the interactive process and consider alternative accommodations that would be reasonable and effective. An employer may choose among multiple reasonable accommodations, so long as the chosen accommodation is effective.

While an employer cannot require its employee to accept a reasonable accommodation, if the employee refuses to return to work or perform work following the employer's offer of a reasonable and effective accommodation, the employer may consider the employee unqualified for the position and take appropriate disciplinary action.

Finally, reasonable accommodations can be permanent or temporary. An employer may stipulate that the accommodation will end on a specific date or upon changes in the stay-at-home orders. An employer should update proposed expiration dates for the accommodation on an as-needed basis, in accordance with the COVID-19 circumstances.

Confidentiality of Medical Information

The obligation that an employer keep employees' medical information confidential can pose a significant challenge to an employer who learns that an employee has COVID-19 or COVID-19-related symptoms. There may be a heightened obligation to inform other employees that they may have been exposed to the virus, while maintaining the sick employee's confidentiality. An employer can balance its obligations by designating a representative (such as a resources manager) to interview the sick employee to procure a list of people with whom the employee had close workplace contact (within six feet for a prolonged period of time, with "prolonged" considered to mean more than a few minutes or 10 minutes (depending on the source)) within the past 14 days. The representative should notify employees who came into contact with the sick individual, without disclosing the individual's identity. An acceptable notification may be as follows:

> "an individual in our office has [tested positive for COVID-19] [reported COVID-19 symptoms] and indicated that he or she came into close contact with you over the past couple of weeks. If you are at the office, please prepare to leave as quickly as possible and to self-isolate, monitor your health for any symptoms and visit your doctor. You may be eligible for paid COVID-19 leave under applicable federal or state law or paid time off pursuant to your employment manual. Please let us know how we can support you during this time."

Even if employees can guess who is sick, the employer is prohibited from revealing or confirming the sick employee's identity. When the employee's co-worker(s) learn of his or her potential illness, they should report it to their supervisor, who, in turn, should notify the designated representative. In any case, the employer should take precautions to ensure that as few people as possible learn the sick employee's identity.

An employer also must abide by certain recordkeeping requirements when it comes to the array of medical information that is collected, both regularly and relating to COVID-19 (including COVID-19 test results, temperature check results, medical documentation submitted in connection with a reasonable accommodations request, fitness for duty certifications and other sensitive medical information provided by employees who report COVID-19 or related symptoms). An employer should keep medical records separately from the employee's personnel file to limit access to such information. If an employer chooses to store medical records electronically, it should ensure that the files are password-protected and that the file name does not reveal employee identities.

STEP 2: Designate A Return-to-Work Committee

An employer should form a committee or point person that can make company-wide decisions regarding business reopening matters. Senior management, human resources, IT and office managers should be included in the process as each of these departments plays a key role in policy making, day-to-day operations and interacting with employees. The return-to-work committee would be responsible for devising, communicating, effecting and evaluating reopening protocols. The reopening team should identify a COVID-19 workplace coordinator who will be responsible for taking complaints, reports or updates about employees' potential exposure, relating to COVID-19 issues and their workplace impact. The designated coordinator should also be responsible for receiving requests for accommodations from disabled or high-risk employees. Since any reopening will likely turn on whether the building facilities are up and running, the reopening team should work with building staff to ensure that the reopening plan is feasible. Employers may need to adjust their return-to-work plans to synchronize them with any building reopening policies.

STEP 3: Devise A Return-To-Work Policy

- **Return-to-Work Policies Should Be Flexible**

Return-to-work policies or manuals will help employers and employees navigate the uncertainties of the COVID-19 pandemic. Any return-to-work policy should be adaptable to the constantly evolving dynamics of the pandemic, the employees' health and safety and the employer's operational needs.

- **Determining How to Return to the Workplace**

An employer's return-to-work policy should set forth specific protocols for how the employer's office(s) will reopen, including provisional timelines for reopening and limitations on the number of employees permitted to return at a given time. New York is expected to ease stay-at-home orders in a staggered or phased approach, with (for example) the first order easing restrictions on the non-essential workforce allowing only a particular percentage of employees to return to the office (e.g., first 25%, then 50%, and so on), and then over time allowing the full workforce. Employers should begin assessing its operational needs, its workplace and its employees' circumstances to develop the most suitable reopening plan. As part of this, an employer should examine the physical layout of its offices and its ability to implement proper social distancing protocols upon reopening. Adjusting workspaces or erecting physical barriers to prevent close physical contact may require certain employers to reopen at a slower pace than would otherwise be possible.

An employer also should consider its operational needs when determining how to reopen. With a staggered reopening, an employer has the freedom to choose reopening plans that best suits its operational requirements. For instance, an employer may choose to implement schedule rotations, pursuant to which a certain percentage of its employees report to work on a rotating basis on particular days or weeks until restrictions are further eased. Alternatively, an employer determine that a particular group of employees should return during the first stage of reopening if

they cannot effectively perform their essential job functions remotely or their physical presence in the office is needed to support the employees who are required to work remotely. Employers may also consider making the initial return to the office voluntary, so that low-risk employees or those eager to return to the office may do so during this initial stage. In any event, an employer should continue to implement flexible work-from-home policies.

- **Determining Who Should Return-to-Work**

An employer's determination as to which employees should return to work should be based on a balancing of factors, including employer operational needs, employee health and safety, the existence of high-importance employees, certain employees' ability to continue working remotely, and the population of employees who are at greater risk from COVID-19. Employees who have tested positive for COVID-19 or experienced COVID-19-related symptoms should only be allowed to return following a period of self-isolation or quarantine (and perhaps after a positive antibody test). An employer should consider reviewing the office layout and bringing back groups of employees in a manner that will lessen close contact in the office.

- **Preventative Measures for Employees Who Are Asked to Return to Work**

Once an employer has decided how it is going to reopen and who will return to the office, it must next determine how to prevent returning employees from introducing COVID-19 to (or spreading COVID-19 among) the returning workforce (and integrate this into its return-to-work policy). Such determination necessitates an evaluation of the returning workforce, their interactions outside the office (i.e., transportation or travel) and the workplace environment. As to a protocol for preventing the introduction or spread of COVID-19 among returning employees, an employer must describe and communicate its requirements for COVID-19 testing, temperature checks, health questionnaires, fitness-for-duty doctor's notes and/or self-certifications. It also should emphasize that an employee must stay home if he or she is sick or has symptoms of COVID-19.

The New York City Health Department recommends that an employee who arrives to work with COVID-19 symptoms or feeling under the weather or becomes sick while at work should be sent home immediately. Moreover, an employee who has been out sick should not return until (1) at least 14 days have elapsed since the symptoms started, (2) the employee has no fever for at least three days without the use of fever-reducing medication (such as acetaminophen or ibuprofen) and (3) the employee's overall illness has improved.

This section of the return-to-work policy should inform an employee of the company's leave policies, as well as special coronavirus paid leave benefits available under federal and state law. An employer may consider relaxing leave policies to allow employees to stay home until they are well. This may include requiring such employees to take unpaid leave once their coronavirus sick leave or paid time off is exhausted. In accordance with EEOC guidance, an employer may require employees who missed work due to illness to undergo a COVID-19 test or provide a doctor's note certifying the employee's fitness to return to work (although the employer should consider that lack of access to or supply of COVID-19 tests may impede

employees' ability to obtain a negative COVID-19 test; and healthcare providers may be unable to provide a doctor's note in a timely fashion). Most employees with COVID-19 will experience mild symptoms and can recover at home for the period of self-isolation.

- **Travel to the Office**

Employers should encourage employees to avoid communal commuting methods in which COVID-19 exposure is likely. An employer whose employees must use public transportation might consider implementing staggered or flexible work hours to allow employees to avoid rush-hour commuting. Local employees should be encouraged to walk or bike to work if possible. Moreover, an employer should confer with building management to ensure that safe practices are implemented when utilizing elevators. There should be a limited number of occupants per car and employees should be required to wait for the next car if social distancing cannot be maintained. Mask wearing should also be encouraged.

Employers should discontinue non-essential business travel to locations with ongoing COVID-19 outbreaks. Leisure travel to such areas should also be strongly discouraged. Employers may be exempt from providing coronavirus sick leave to employees who fall ill as a result of non-business travel to a country with a CDC COVID-19 travel warning. Such employees must use the employer's regular paid time off; and employers should consider requiring employees returning from areas with COVID-19 outbreaks to self-quarantine for 14 days upon their return. The CDC's travel warning levels may be checked at https://www.cdc.gov/coronavirus/2019-ncov/travelers/.

- **Creating a Safe and Healthy Environment in the Workplace**

This return-to-work policy also should focus on establishing policies and protocols for social distancing in the workplace. Implementing these practices may require employers to alter the workplace's physical layout to prevent close contact between employees, customers and/or clients. The following is a list of strategies suggested by the CDC:

- Implement flexible worksites (e.g., permit employees to work from home if possible) and / or flexible work hours (e.g., rotating schedules or staggered shifts).
- Modify communal workstations or "bullpens" to increase space between employees.
- Modify office assignments (particularly with respect to shared or communal offices) to maintain sufficient physical distance between employees.
- Increase physical space between employees and customers (e.g., by building temporary partitions to separate customers from cashiers or receptionist desks, as the case may be).
- Modify open-air offices (i.e., cubicles or hallway secretary desks) to reduce close contact between employees, including the erection of partitions.
- Use signs, tape marks or other visual cues, placed six feet apart, to indicate where to stand when physical barriers are impossible.

- Close or limit access to common areas (e.g., pantries, kitchens, conference rooms, lounges or seating areas).
- Postpone non-essential in-person meetings and ensure that social distancing protocols are in place for essential meetings; and consider delivering seminars, trainings and similar services remotely (by phone, video or webcast) to the extent possible.
- Implement one-way hallways to limit employees passing by each other when moving through the workplace
- Prohibit non-essential events or other informal gatherings.
- Encourage employees to avoid handshaking or other physical contact.
- Adjust business practices to reduce close contact with customers, for example by taking consultations by videoconference or using curbside pickup and delivery.
- Avoid taking payment by cash.
- Allow employees to use alternative methods to punch-in (such as email or other remote reporting methods) to limit shared use of pens and other office equipment.
- Require the use of face masks in any communal area.
- Require the use of gloves when handling shared office equipment, tools or deliveries.
- Implement protocols for contactless distribution of mail, packages or other office deliveries.

Employers also should provide the tools and materials necessary to maintain employee and visitor hygiene. This should include posting signs or posters encouraging hand hygiene and instructing employees to regularly wash their hands with soap and water for at least 20 seconds. Employers also should place hand sanitizer stations in strategic areas of the workplace, such as elevator wells, entrances, reception areas, restrooms, common areas and other high-trafficked areas. Posted materials should include instructions regarding coughing and sneezing etiquette.

Finally, an employer should implement routine cleaning and disinfecting protocols in accordance with CDC guidelines (which are available at https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html), and may wish to communicate to employees its cleaning and disinfecting protocols to reassure its employees returning to the workplace.

- **Stay Up-to-Date on Prevailing Legal and Medical Standards Relating to COVID-19 and the Workplace.**

An employer's initial return-to-work plan may be rendered obsolete by new COVID-19-related executive orders or medical guidance (or by changing conditions on the ground_. Employers should monitor COVID-19-related news and evolving legal guidelines and be prepared to update or amend its COVID-19 employment policies as circumstances evolve.

Consult Your Advisor

Robinson Brog is working with its clients to address various coronavirus-related matters in the employment, benefits, litigation, bankruptcy, estate planning, tax and corporate/ commercial arenas. For advice regarding the impact of the coronavirus pandemic on you, your business or your matter, please do not hesitate to reach out to your primary Robinson Brog contact. If you have any questions regarding this alert, please contact one of the authors below or the other attorneys on the COVID-19 coronavirus response team or the Robinson Brog attorney with whom you regularly work.

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