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ZOOM PROGRAM

BACK TO WORK AFTEER COVID-19: Are You Prepared?

FACULTY

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Christine Malafi chairs the Corporate department at Campolo, Middleton & McCormick, LLP, which was recently recognized by Forbes as a Top Trusted Corporate Law Firm in America. Her practice focuses on mergers and acquisitions, corporate governance, routine and complex transactions, labor and employment issues (including sexual harassment prevention policies and training), and other business matters, as well as municipal, insurance coverage, and fraud issues. She routinely represents buyers and sellers in multimillion dollar transactions (from technology companies to manufacturers to healthcare businesses) and serves in a general counsel role for many of the firm's internationally-based clients.



Christopher M. Valentino, Esq. is Office Managing Principal of the Long Island, New York office of Jackson Lewis P.C. He represents companies in matters relating to traditional labor, equal employment opportunity, employment litigation and related matters.

Mr. Valentino has extensive experience in all matters relating to EEO compliance and workplace laws and is a frequent speaker at management education programs. Since joining Jackson Lewis in September 2000, he has regularly counseled clients in the development and implementation of preventive labor and employee relations programs and has represented management with respect to union organizational drives and in proceedings before the National Labor Relations Board, the federal and state courts and other federal and state administrative agencies, as well as in the area of collective bargaining, contract administration and arbitration.

In addition to his traditional labor expertise, Mr. Valentino also focuses on counseling employers on reductions-in-force, personnel decisions, the administration of employer policies and procedures, disability management in the workplace, restrictive covenants, substance abuse testing in the workplace, the development of employee handbooks, employment applications and related matters.

Mr. Valentino also has conducted hundreds of management training seminars on topics including maintaining a union-free environment, avoiding litigation, avoiding discrimination and sexual harassment; effective management interviewing, documentation and evaluation skills; and, compliance with the Americans with Disabilities Act and FMLA.

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Advising Clients on Issues for Reopening Businesses in New York

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Phased Plan To Reopen New York

- New York Forward
- Decision to reopen has been made and will occur in phases, and on a regional basis.
- At least 2 weeks in between each phase.
- 10 Regions: Capital Region; Central New York; Finger Lakes; Long Island; Mid-Hudson; Mohawk Valley; New York City; North Country; Southern Tier; Western New York.
- The Governor's office has created the New York Forward Advisory Board, which will help shape the state's reopening policies.

Phased Plan To Reopen New York

Phase 1

- Construction, manufacturing, wholesale trade, select retail for curbside pickup only, agriculture, forestry, fishing

Phase 2:

- Professional services, finance and insurance, retail, administrative support, real estate, rental and leasing

Phase 3:

- Restaurants and food services

Phase 4:

- Arts, entertainment, recreation, education

7 METRICS

- Seven metrics are being used to determine movement between phases
- Two overall themes – monitoring new infections and healthcare capacity

1.

Decline in total hospitalizations: Based on CDC recommendations. When a region experiences a 14-day decline in the hospitalization rate. Calculated using three-day rolling average.

2.

Decline in deaths: A region must experience a sustained decline in the three-day rolling average of daily hospital deaths over the course of a 14-day period. Regions that have seen few deaths will satisfy metric if three-day rolling average of daily new hospital deaths have never exceeded 5.

3.

New Hospitalizations: Conditioned on the occurrence of fewer than 2 new hospitalizations per 100,000 residents, measured on a three-day rolling average.

7 METRICS

4. Hospital bed capacity: A region must have 30% of their hospital beds available.
5. ICU bed capacity: A region must have 30% of their ICU beds available.
6. Diagnostic testing capacity: Average daily diagnostic testing over the past 7 days must be sufficient to conduct 30 tests per 1000 residents per month.
7. Contact tracing capacity: Number of contact tracers in each region must meet thresholds set by the Department of Health, in collaboration with the Johns Hopkins University School of Public Health and Vital Strategies (Bloomberg).

Additional Points

- All businesses are required to implement and affirm guidelines as well as have a written re-opening safety plan (Governor's website). Guidelines follow safety precautions – social distancing, PPE, hygiene and cleaning, communication (close contact log), health monitoring, etc.
- Testing/Tracing/Isolation: testing will continue to be ramped up, contact tracing will become a significant part of our lives, and there may be isolation facilities: places to send people who are positive so that they need not go home and risk infecting their families.
- Regional “control rooms” to closely monitor data points and metrics associated with reopening. The Governor referred to this concept as a “circuit breaker.”
- Governor Cuomo talked about the role of county governments in coordinating with the state and federal government with respect to testing, monitoring, etc. Each region is responsible for coordinating (and advertising) testing, presenting plans to the state for isolation facilities, and appointing an oversight institution for the “control room” concept referenced above.

Five Steps for Safely & Successfully Re-Opening Workplaces



- Develop a Return to Work Plan
- Implement Pre-Placement Protocols to Ensure Safe & Lawful Return to Work
- Implement Policies & Practices to Address New COVID-19 Operating Realities
- Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work
- Begin Preparing for a Potential Second Wave of COVID-19 Infections (Pandemic Planning)

Advising Clients on the Five Steps for Safely & Successfully Re-Opening the Workplace

Whether clients are able to re-open their workplace this week, next week, or next month, they should plan for it now. The range of workplace, compliance, and business issues to deal with will be much different than before businesses shut down or paused operations. The following five points serve as a guide as to how best to re-open while mitigating business and compliance risks.

Developing a Return to Work Plan

a. Identify Individuals Who Will Be Brought Back to Work

- Consider phases – do any state or local mandates limit or impact the reopening of the facilities – may be different rules for different places.
- Ask your clients: Who will you choose? Use neutral selection criteria, consider disparate impact to avoid potential claims of discrimination.
- Consider which employees can or should continue to work remotely. Be careful – no assumptions!
- Data privacy
- Wage and hour – recording of time
- Workers' Comp
- CBA considerations?
- Consider whether WARN is triggered by those furloughed who are not returning
- Consider work share programs
- Consider new size – legal compliance (FMLA)

Developing a Return to Work Plan

b. Establish Return to Work Dates

c. Develop and Use Written Employee Communications

- Address an employee's position/role, pay rate, work schedule, proposed start date, forms to be completed, pre-placement testing/screening, consequences of not responding.
- At-will disclaimer.
- Comply with any state law requirements regarding advance written notice of pay changes and/or required pay rate notices.
- Non-compete? Arbitration? Class action waiver?

Developing a Return to Work Plan

d. Identify and Procure Supplies Required For Safe Operations

- PPE – masks and gloves – amounts, cleaning, storage, disposal
- Wipes, sanitizers, disinfectants, etc.

e. Determine Potential Need to Change Workspaces

- Structural changes
- Relocation of workspaces and equipment
- Social distancing markers
- Shared surfaces and objects (ex. the coffee machine)

Implement Pre-Placement Protocols to Ensure Safe & Lawful Return to Work

a. COVID-19 Related Protocols

- Types of Screening/Testing
- Methodology
- Identify personnel/vendors to conduct
- Develop protocols – procedure & handling of “medical records”

b. Non-COVID-19 Related Protocols

- Drug testing
- DOT Certifications
- I-9 Compliance
- Training/Retraining – remember the harassment prevention requirements?

c. Compliance with Additional State/Local Orders

- Daily briefings

Implement Policies & Practices to Address New COVID-19 Operating Realities

- a. Off-Duty Activities
- b. Off-Site Work Activities
- c. Fitness For Duty
- d. Modified Work Practices to Enhance Social Distancing
- e. Personal Protective Equipment (PPE)

Implement Policies & Practices to Address New COVID-19 Operating Realities

f. Infection Control

- Placement of hand hygiene products
- Regular disinfection protocols (desks, common items)
- Cleaning log
- Close Contact log

g. Reasonable Accommodation

h. Statutory/Policy Leave Obligation

Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work

a. An Employee's Health, Contacts or Behaviors Raise Safety Concerns

- Employee becomes ill or symptomatic
- Employee has close contact with individual with confirmed or suspected COVID-19 infection
- Employee engages in high risk behavior or activities (e.g. mass gatherings, travel)

b. Employees Request Leave to Care For Dependent Minors Whose School or Place of Care Are Closed or Childcare Provider Are Unavailable

Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work

- c. Employees request leave because they live with an individual in a vulnerable population
- d. Employees are capable but unwilling to work from home in compliance with the Company's social distancing policy
- e. Employees are incapable of working from home but also unwilling to be physically present at work due to COVID-19 related concerns
- f. Employees are asked to report to work but prefer to and are capable of working from home due to COVID-19 related concerns or other reasons

Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work

- g. Employees share rumors or concerns of employees or customers being sick
- h. Employees request information about another employee's health condition
- i. Employees engage in collective or other protected activity to raise concerns about the return to work or workplace
- j. Non-exempt employees are emailing and/or working outside normal business hours

Begin Preparing Your Clients for a Potential Second Wave of COVID-19 Infections (Pandemic Planning)

- a. Develop “lessons learned” from first COVID-19 shut-down. Consider surveying managers and/or front-line employees
- b. Review technology to enhance and improve remote work capabilities, including privacy and security issues
- c. Cross-train employees
- d. Expand, develop or leverage geographically diverse work populations and suppliers

Begin Preparing Your Clients for a Potential Second Wave of COVID-19 Infections (Pandemic Planning)

- e. Expand products or service offerings that do not require customer on-site presence
- f. Procure appropriate sources of PPE
- g. Explore additional or different insurance to support business interruption and employee wage protections
- h. Consider strategies for potential furloughs, closings, or reduction in force
 - Revisit former notices, communications – ensure they comply with any new requirements
 - Consult any state/local updated orders

Begin Preparing Your Clients for a Potential Second Wave of COVID-19 Infections (Pandemic Planning)

- i. Revise budgets including forecast for revenue and expenses
- j. Revisit wellness and health offerings to respond to employee physical, mental, and emotional health needs
- k. Determine temporary practices to implement regarding travel restrictions, more aggressive social distancing practices, sanitation, other efforts to minimize exposure/spread

Anticipated Litigation Issues

Cases Already Filed

- Lawsuit filed in Illinois against national retailer by estate of former employee alleging:
 - Negligence/wrongful death – failed to implement policies/training, sanitize, follow social distancing, provide protective equipment.
 - Failed to follow CDC guidance.
- NY Nurses' Union filed 3 lawsuits against NY DOH and hospitals in NY, alleging:
 - Failure to provide impermeable gowns and other PPE to cover RNs bodies; not properly training RNs redeployed from hospital units; inadequate provision of safe working conditions for high-risk employees, including pregnant RNs.
 - Seeking an injunction to enforce Governor Cuomo's directive of April 13 that each direct care nurse be given at least one N95 respirator daily, and failure to provide sick leave forcing nurses to come to work sick.

Disability and Leave of Absence Management

- ADA accommodations must still be made for employees working from home.
- Remote work: attendance policies and standards tested as people come back to the workplace.

Is attendance an essential function of the job?

- “Regarded as disabled claims.” No clear guidance yet as to whether COVID-19 is a disability under the ADA.

Families First Coronavirus Act

- Whether employee should have received the PSL or the EFMLA.
- Whether employees were selected for furloughs or layoffs because they were likely to need leave.
- Whether employers were entitled to invoke first responder or healthcare provider exemption.
- Whether employers correctly applied the 500-employee threshold for exemption from requirements by adding employee from subsidiaries, affiliates, or parent companies.

Privacy, Data, and Security

- Increases in remote work and the use of online, cloud-based technologies will lead to increased claims.
- A class action recently filed in California alleged under the CCPA that a video conferencing company failed to safeguard the personal information of its users.
- Proposed class: “all persons and businesses in the U.S.” whose personal information was collected or disclosed to a third party “upon installation or opening of the app.
- Employers should carefully review all procedures and platforms used to support remote work, both to avoid class action lawsuits and to protect the Employer’s proprietary information.

Wage and Hour – Considerations for Non-exempt Employees

- To avoid off-the-clock claims for employees working remotely, ensure that rules are clear, conduct is monitored, and reporting is accurate.
- Ensure that pay reductions for non-exempt employee do not fall below federal or state minimum wage levels.
- When increasing hours, be aware of the daily overtime requirement and seventh day rest requirements that exist in some states.
- When changing pay rates, be aware of state-level notification requirements.
- Predictability pay – some jurisdictions require schedule change premiums if sufficient notice is not given.
- Reimbursement of expenses.

Wage and Hour – Considerations for Non-exempt Employees

- When businesses furlough salaried employees, consider the pay week and be deliberate about the day they leave.
- Ensure that salary reductions do not fall below minimum requirements at both federal and state levels.
- When reclassifying employees from exempt to non-exempt, make sure they know the rules applicable to non-exempt employees.
- Examine what exempt employees are doing and ensure they still meet the duties test under the exemption.

Discrimination, Harassment, and Retaliation Claims

- When implementing furloughs, reorganizations, and layoffs, carefully consider and document selection criteria and implementation so that decisions can be well supported. These decisions may be challenged.
- Make sure your agreements comply with OWBPA and the exhibits to your group severance agreements are accurate and have been tested under privilege for disparate impact.

WARN Act

- Many employees are furloughing people and intending to bring them back within 6 months. However:
- What happens if a business does not bring them back and does not provide the required 60-day notice?
- Will a business be able to avail itself of the “unforeseen circumstances” exception?
- When should the employer have foreseen that a furlough would last beyond 6 months?
- Be prepared to litigate:
 - What was happening in the country and economy.
 - What the company knew and when it knew it.
 - What guidance was coming from CDC and the government.
 - What was the media saying about the continued closures.
 - Internal C-suite discussions.

COBRA

- COBRA Notices – whether they comply with the statute.
- Many companies are intending to keep furloughed employees on benefit plans and offering to pay premiums. However:
 - Good intent does not mean that the employee is still covered.
 - Consult with a benefits attorney to ensure furloughed employees can be covered or whether COBRA notices must be issued. Employers will face massive exposure if employees are denied coverage after falling ill.

Preventative Practices

- Protect the workforce:
 - Implement policies and procedures
 - Disseminate information based on CDC and stat DOH guidance for best practices
- Continue to follow anti-discrimination protocols:
 - Job loss decisions
 - Accommodation/leave requests
- Require employees to engage in preventative behavior
- Assess availability of remote work environments
- Have a plan for addressing exposure
- Crisis management: non-legal issues/public relations

Questions ?



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