Employers' Reopening Checklist

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Businesses are reopening and workers are returning who had been teleworking, furloughed, or fired. Employers are feverishly trying to solve unprecedented legal and logistical challenges to strike the best balance between saving lives and saving businesses. Complying with a myriad of employment laws, rules, and regulations was complicated before the Covid-19 pandemic; now, it is exponentially more daunting. Here are some important pitfalls to avoid and tips to follow for employers as they cautiously transition.

Safety is Job One

Employers are legally obligated to maintain a safe work environment. Every day, they must closely monitor and comply with federal, state and local governmental Directives, Guidelines and Recommendations for businesses considering reopening to ensure their workers return to a safe environment. The Department of Labor's Occupational Safety and Health Administration will surely bring enforcement actions under OSHA's "general duty clause." Private lawsuits have already been filed against meatpacking plants and emergency injunctions mandating immediate compliance with OSHA and CDC safety rules have been issued almost immediately. Employees will file a wave of workers' compensation claims if they become ill on the job. Employers will need all of their ingenuity to conduct proper employee testing and screening, deny access to employees with symptoms, supply protective equipment, refit workstations, stagger schedules, use 4-day work weeks and Saturdays, continue teleworking, permit returns to be voluntary, limit workplace occupancy levels, and spread out and disinfect work spaces.

The OSHA general duty clause.

Section 5(a)(1) of the Occupational Safety and Health Act, requires that each employer furnish
to each of its employees a workplace that is free from recognized hazards that are causing or likely
to cause death or serious physical harm.

All the following elements are necessary for OSHA to prove a general duty clause violation:

1) The employer fails to keep the workplace free of a hazard to which its employees were exposed.
2) The hazard was recognized.
3) The hazard was causing, or was likely to cause, death or serious physical harm.
4) There was a feasible and useful method to correct the hazard.

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Judge dismisses Missouri lawsuit over meat worker safety

A judge has dismissed a lawsuit against a Missouri meatpacking facility over employee safety

By
JIM SALTER Associated Press
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O'FALLON, Mo. -- A federal judge dismissed a lawsuit filed on behalf of employees at a rural Missouri meatpacking facility, ruling that oversight of how the plant adheres to guidance aimed at slowing the spread of the coronavirus falls to the Occupational Safety and Health Administration, not the courts.

U.S. District Judge Greg Kays issued his 24-page ruling Tuesday in favor of Smithfield Foods. A lawsuit on behalf of workers at Smithfield's pork processing plant in Milan, Missouri, sought an injunction requiring the plant to abide by federal guidelines. The lawsuit accused Virginia-based Smithfield of not doing enough to protect workers from the coronavirus.

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Are Essential Workers Entitled to Workers' Compensation for COVID-19?

As of right now, there's no clear answer as to whether essential employees, even those who are on the frontlines of patient treatment, and their surviving families would be entitled to workers' compensation benefits. Guidance specific to COVID-19 exposure and workers' compensation is determined by each state's workers' compensation board, which operates independently of one another with its own rules and regulations.

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Insurance

Employers should immediately secure Employment Practices Liability Insurance ("EPLI") in anticipation of an onslaught of lawsuits.

They should sue their carrier if their claims for business interruption damages under their commercial property "all risk" insurance policies are denied.

Insurance brokers may be liable for not properly advising their clients to obtain adequate business interruption insurance or explaining the pitfalls of co-insurance.

Paycheck Protection Program (PPP) Loan Forgiveness. Use it or Lose it

PPP loan proceeds can be used for payroll costs, rent, interest on mortgage and debt obligations, utility payments, and refinancing, but at least 75% must be spent on payroll costs.

Loss of forgiveness occurs if there is a reduction in the amount paid to each employee over the eight-week period or a reduction in the number of employees.

Payments made to someone unwittingly reclassified as an “independent contractor” do not count towards forgiveness.

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FLSA Overtime and Wage claims.

With widespread, employers need to be ever more vigilant in meeting their obligation to keep accurate time records. The obligation to pay all overtime and minimum wage is not excused during a pandemic.

An employee must be paid if his/her meal break is less than 30 minutes of uninterrupted private time.

If employees paid minimum wage must start buying their own equipment/materials, employers may get sued for failing to pay full minimum wage.

If employers conduct temperature checks or require the donning of protective gear before employees are allowed to start work, and the gear is taken off before they leave the premises, that time is compensable.

Some exempt employees may start performing so many more non-exempt duties than before that they lose their exempt status and becoming entitled to overtime. They need to be reclassified, their hours recorded, and be paid overtime. When they return to doing their exempt duties and re-qualify as being exempt, the basis should be documented.

Overtime policies can prohibit employees from working overtime without prior written supervisory authorization, and employees can be disciplined for violations, BUT, all overtime actually worked must be paid, even if it was in violation of the policy.

An employer who violates the Families First Coronavirus Response Act, and fails to make the mandated payments to employees who qualify for the Covid-19-related leave, can be sued under the FLSA for a "minimum wage" violation.

Lastly, if the salary of a Highly Compensated Employee is reduced below the minimum level, the exemption may be lost.

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Beware the Whistleblower and Avoid Retaliation in all of its forms

Employees will have a lot to complain about! An employee who objects to an employer violating a law, rule or regulation and who suffers an adverse employment action as a result, may bring a claim for retaliation and can recover damages and attorneys' fees under Florida's private whistleblower statute. Fla.Stat. Section 448.101.

Similarly, employees who are retaliated against for making claims for overtime (even orally), workers compensation relief for an injury on the job (like being infected in an unsafe workplace), discrimination, harassment, or hostile work environment, leave under the regular Family Medical Leave Act ("FMLA") or are denied benefits under the recent emergency FMLA under the Families First Coronavirus Response Act, or for discrimination, may also have retaliation claims—where they can seek recovery of the wages they lost.

Under current circumstances, an employer may get sued for not bringing back an employee from a furlough, layoff or reduction of pay if that employee had previously complained or objected to an employer's legal non-compliance. With the ever-growing list of legal requirements facing employers, employees won't run out of complaints and will sue if they suffer any adverse employment action.

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Few employers (including non-union employers) realize that they may become liable for retaliation under the National Labor Relations Act ("NLRA") if they discipline employees for complaining about working conditions, because it may be deemed to be interference with that employee's protected right to participate in concerted protected activity. An example may have occurred two weeks ago, when Amazon fired, a worker who protested about unsafe workplace conditions due to concerns over Covid-19. Employers need to be VERY careful, now more than ever, whether, how and why they may take any adverse action against an employee (including, but not limited to, for example, not bringing the employee back from a furlough, layoff or reduction of pay). Now is the time to review whistleblower policies and establish hotlines in place to facilitate timely reporting, have thorough investigations conducted and avoid any retaliation.

For example, Amazon retaliated against, and fired, a worker who organized over Covid 19.

Avoid *Qui Tam* Claims Under the False Claims Act

Employers, especially those with government contracts, should ensure that they do not expose the Company to a claim that can be made by an employee (or stranger) under the Federal False Claims Act (a/k/a *Qui Tam* claims), or state or local equivalents, i.e., a lawsuit brought by a private citizen (whistleblower) against a person or company who is believed to have violated the law in the performance of a contract with the government or in violation of a government regulation (e.g., Medicare reimbursement regulations or the Internal Revenue Code provisions), when there is a statute which provides for a penalty for such violations. The lawsuit is filed under sea land the government can decide to take over the case and prosecute it with all of the resources available to the government.

The person who brings the lawsuit to help the government collect damages against the wrongdoer Company is awarded a percentage of the government's recovery (15-30%) plus attorneys' fees. In today's disrupted business environment, disgruntled employees may be apt to turn in an employer who may have used falsified information to defraud the government in its obtaining PPP loans or forgiveness of the loans for example.

Employers should focus on compliance and investigate any complaints or irregularities.

Discrimination Based on Potential Bias in Rehiring

Employers may get sued for mishandling which employees get asked to return to work. For example, if an employer decided not to bring back right away older workers, or those with pre-existing underlying conditions who are deemed more susceptible to infection, or pregnant workers, the employer could unwittingly be setting itself up to an age, gender, and/or disability discrimination claim. Those who had previously taken leave under the new Families First Coronavirus Response Act ("FFCRA"), and were not brought back, could bring a retaliation claim.

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U.S. civil rights agency says employers *can* test workers for COVID-19

(Reuters) - The U.S. agency that enforces civil rights laws against disability discrimination said on Thursday that companies can test employees for COVID-19 before permitting them to enter the workplace as long as the tests are accurate and reliable.

The Equal Employment Opportunity Commission (EEOC) last month said employers may take workers' temperatures without violating the the Americans with Disabilities Act (ADA), but Thursday's guidance appears to authorize a broader array of testing options.

The commission said mandatory medical testing, which is generally prohibited by the ADA, is allowed if it is "job related and consistent with business necessity."

Applying that standard, the new guidance allows employers to take steps to determine if employees entering the workplace have COVID-19, the illness caused by the novel coronavirus, because the virus poses a "direct threat" to the health of others.

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As testing and screening methods are implemented, contact-tracing and other immune-identifying techniques are used, discrimination-related claims may explode, particularly regarding individuals who have tested positive for COVID-19. Some who are the presently positive will be excluded. Others with pathogens showing they had been positive, may be welcomed back.

Complying with WARN Act in Any New Wave of Layof

In the Fall, when experts predict a new wave may hit, and a new wave of layoffs ensure, larger employers could face liability for failing to provide proper notice under the federal Worker Adjustment and Retraining Notification, or "WARN Act", which requires employers with 100 or more employees to give at least 60 days' notice before closing or laying off a certain number of workers and provide demographic information on the workers impacted. Employers who fail to comply may have to pay back pay and penalties.

Unemployment/Re-Employment Assistance and Re-Onboarding Issues

Some furloughed employees may be receiving more in **unemployment** (with the $600 per week federal supplement under the CARES Act) than they would have been paid if they returned to work full-time. They employees may refuse to return to work when recalled. Employers have the right to fire workers who don't have a valid reason for not returning. That can lead to loss of benefits in some states. To encourage returns, some employers are deciding to increase pay above what the employee would have received staying on unemployment, especially if the employer wants PPP loans forgiven. In other instances, employees are concerned that if they earn a little money on the side, their unemployment benefits may be stripped, but that doesn't seem it will end up being case in most instances.

When responding to Unemployment claims, employers should be careful to avoid misstating that they laid off
Workers "because of" the Covid-19 virus, that could lead to a retaliation claim. To the contrary, it's ok to say they were laid off because of the effect of the pandemic on the business.

Employers would be prudent to **re-onboard** correctly. If an employee was previously terminated, the employer should be sure to fully re-onboard the employee, have the employee re-enroll in insurance benefit plans, and re-sign Employee Handbooks, mandatory arbitration agreements, and restrictive covenant agreements, etc. as if they were a brand new employee.

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Family Medical Leave ("FMLA") Notice of Eligibility and the Americans With Disability Act ("ADA") Interactive Process

Under the **FMLA**, if the employer knows or has reason to know an eligible employee has a **serious health condition** or may qualify for leave, the employer has an affirmative obligation to provide the employee with formal written Notice of Eligibility and Rights & Responsibilities.

Under the **ADA**, if the employer knows or has reason to know an employee has a **disability or regards the employee as having a disability (physical or emotional),** the employer has an affirmative obligation to engage in the **"interactive process"** to determine if a reasonable accommodation must be provided to the employee, unless the employer can prove that providing the accommodation sought by the employee would work a hardship on the employer's business.

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The Potential Immune-based Workforce and Privacy and HIPAA Issues it Would Create

A more robust re-opening process may require something akin to an immune-based workforce as its base. Dr. Fauci has stated that we may need to adopt such a program in the U.S., at least for frontline workers. Our medical experts state that we'll first need to know the degree to which the virus has affected our society, and how many people may have developed immunities, so we can plan intelligently. We don't yet have sufficient testing capabilities or a system we can implement and monitor to determine who might be healthy and eligible to return to work. We're nowhere near set up to do contact tracing, which would be necessary as well

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Questions abound, with few answers being provided at this time. Would employers be allowed to gather, control and access that information? Would the system be centralized and who would ensure the data would be safeguarded and free from being misused? All that may expose the employer to claims for Invasion of Privacy and HIPAA violations for failure to protect Protected Health Information.

Will employers be provided broad general statutory immunity for themselves so they can't get sued by employees who get sick after returning? Would individual waivers from liability be enforceable or ruled to be void as against public policy? What is the usefulness of having employees sign a formal **ACKNOWLEDGMENT, WAIVER OF LIABILITY, RELEASE, COVENANT NOT TO SUE, ASSUMPTION OF RISK, AND INDEMNITY AGREEMENT RELATING TO CORONAVIRUS/COVID-19** as a condition to return to work?

There won't be enough legislators, rule makers, and officials available to handle the administration of such a vast and intrusive system, nor will there be enough attorneys, judges, or juries to deal with the explosion of anticipated litigation it could engender.

Conclusion

Employers are, and will remain, right dab in the middle of these unchartered waters. There are credible predictions of a second surge occurring tied to the current reopening process, and of a third wave in the Fall that might be worse than what we have experienced thus far. The reports from areas overseas that have reopened are mixed at best. No vaccine is in sight, although, it has been reported that the US Food and Drug Administration plans to announce an emergency-use authorization for *remdesivir*, a drug that has been fast-tracked.

For an indeterminate period, employers need to carefully prepare their workplaces, implement technology, adopt policies and procedures, consult with experienced legal counsel, and monitor federal, state and local government laws, orders, regulations, guidelines and recommendations, especially EEOC, OSHA and CDC websites.

Now, more than ever, employers need to make the most of their entrepreneurial skills and financial wherewithal to strike the right balance between personal and business survival.

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