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The New York Workplace and COVID-19 - Getting Back To Business (Part I)

In the wake of COVID-19, New York employers rapidly reduced their workforces, effectively shutting down countless businesses across the State. Recently, the federal government unveiled a three-phase plan to reopen the economy. The federal government made clear that "we are not opening all at once, but one careful step at a time." As the federal government and New York State determine how and when businesses can resume operations, we can finally see a light at the end of the tunnel. The good news is that employers around the State can begin looking towards re-opening and planning accordingly. However, this process is not without potential hazards.

While businesses are eager to resume operations, employers should take advantage of this time to address the needed steps to adjust to the new workplace. As the world has changed in the last few months, and new legislation has directly impacted employers nationwide, spending time preparing now can help businesses transition back into operations more smoothly and limit otherwise unavoidable disruptions.

Take Advantage of this Time to Update Policies and Practices

The first, and likely the easiest step for an employer to take now is to update its policies and practices.

Employee Handbooks

Due to the numerous changes to the law, employers should first review and assess their Employee Handbook and their current policies to ensure compliance with the new federal and New York State laws. Even if an employer recently updated their handbook prior to the pandemic, further revisions are likely needed addressing statutes such as the Families First Coronavirus Response Act and New York's Paid Leave Law. The handbook updates should also include New York's Permanent Statewide Paid Sick Leave Law, which was passed weeks ago, and goes into effect in September 2020. In addition to revising and updating all policies, employers should also ensure they comply with the numerous posting requirements associated with the new statutes referenced above.

Among the various recommended updates to Employee Handbooks is the inclusion of policies addressing social distancing mandates and personal protective equipment for delivery drivers and client-facing workers. Both of these are now mandated by recent executive orders issued by the Governor. Business owners should also be giving thought to whether they want to include other COVID-19 related policies, such as a self-reporting policy for employees with COVID-19 symptoms.

Training

With new policies or changes to existing protocols, the forward-thinking employer should consider training its staff to ensure all employees are aware of what is expected upon their return. For instance, it is likely that returning employees will have many questions about their return. Therefore, to ease the transition back, a training session conducted beforehand, via Zoom or other method, to discuss all new policies, paired with an opportunity for employees to seek clarification, may be advisable.

Along those lines, employers should not lose sight of their other training obligations, such as the annual sexual harassment training required for New York employers. If that has not been done in a while, the gradual return to work may provide the ideal opportunity for employers to satisfy this annual obligation.

Wage and Hour Compliance

Employers should dedicate some time to reviewing their exempt and nonexempt employee status to ensure compliance with applicable minimum wage and overtime laws. Specifically, an employee whose salary may now change, or whose duties may be modified, may or may not be properly classified as exempt. In other words, an employee misclassified as exempt may create significant potential liability for business owners, while an employee classified as non-exempt, who otherwise fits into one of the exemptions, may be unnecessarily costing a business owner money that he or she would not otherwise have to pay.

Business owners should also make sure that all employees are provided with the appropriate wage notices upon their return to work. For example, if employers reduced employees' pay temporarily during the Governor's stay-at-home order, employers should determine whether the reduction remains in effect. Should the decision be made to restore an employee's compensation level, either now or in the near future, employers should have their employees sign a new and corrected wage notice. Employers should also make sure that the pay stubs accompanying each payment to an employee reflects the correct information. Not complying with this rule could violate New York State's Wage Theft Prevention Act.

Employers should also take time to consider whether employees used their paid time off during the COVID-19 crisis and give consideration as to how any remaining unused time off can be used. Under New York law, unless otherwise specifically addressed in the company's employee policies (i.e. forfeiture provision), accrued benefit time is considered wages and cannot be taken away from the employee. Thus, if the employee did not use any paid time off during the crisis, the time remains available to the employee. Employees looking to avoid losing unused time may all rush to use their time upon their return to work or at another time before the end of the year. Therefore, business owners may want to address that issue now, and implement policies that control when employees can use their time so that returning employees all do not seek to take time off during the same limited window. Employers may also wish to consider whether employees may be allowed to carry over unused 2020 benefit time to 2021.

Other Documents

Employers should take this opportunity to ensure that all appropriate documentation is contained in employees' personnel files, including I-9 documentation, wage notices, receipt and acknowledgement of employee handbook, health insurance notices, and W-4 forms.

Websites

Employers can also use this time to consider updating their websites to ensure compliance with website accessibility laws. This is particularly important for companies who may have closed their onsite businesses during the COVID-19 outbreak and instead directed customers to their websites for online sales and services. While business owners naturally seek to have more online traffic to their websites, businesses should be aware that plaintiff's attorneys may also be visiting and analyzing them to determine if they are fully compliant.

Resuming Operations

In addition to updating policies and protocols, employers should also be mindful of the process by which employees return to work and who is selected to return.

When deciding whether to re-hire employees or bring workers back from furlough, employers should take the needed steps to avoid potential discrimination claims. Specifically, employers should refrain from simply selecting at random which workers are asked to return to work. Rather, employers should take into consideration facially neutral criteria that support the re-hiring/reinstatement decisions being made. For example, employers should be mindful of factors, such as: (a) whether there is a collective bargaining agreement at issue that dictates how employees should be reinstated; (b) what are the needs of the workplace; and (c) what are the specific skillsets and/or performance histories of the employees needed. What should not be a factor considered by the employer is

the individual's age, gender, national origin, race, disability, or membership in any protected class. Employers should also not decide against re-hiring employees because of prior COVID-19 diagnosis or because they may have at one time filed a complaint of harassment or discrimination.

Moreover, employers should not withdraw or postpone a job offer simply because of an individual's age or pregnancy status. Although these individuals may be considered "at risk" for COVID-19, failure to rehire them may result in liability.

Preventing the Spread of COVID-19, And the Possible Claims of COVID-19-Related Discrimination and Harassment

While all employees may be excited for the chance to flee their "home office" and return to their friends and colleagues in an office setting, employers cannot lose sight of applicable federal and state directives, like social distancing. The Governor is requiring each business and industry to have a plan to protect employees and consumers, to make the physical work space safer and to implement processes that lower risk of infection in the business. All employers must therefore develop a plan to bring employees back in a manner that will help reduce the risk of spreading COVID-19. For example, employers may want to consider bringing employees back to work in phases to initially limit the number of employees in the workspace. Other options may include staggering employees' shifts, scheduling employees to work in the office or workspace on a rotating basis, or installing plexiglass or dividers between workstations. Employers may also consider allowing employees with the ability to telework until the employer can safely bring all employees back into the workspace. In the office, employers are reminded that they should have sanitizer available for employee use and should have a protocol in place to keep common areas and surfaces clean.

Employers may also wish to provide their employees with an ADA-compliant employee survey in the event that further absences are needed in light of the pandemic. Please keep in mind, however, that there are restrictions on the survey. None of the questions are permitted to be disability related and the survey should be structured so that the responding employee gives one yes or no response to the entire survey at the bottom. If employers wish to utilize such a survey, it should be crafted by labor counsel.

Although the hope is that COVID-19 will not spread through businesses, employers should be prepared in the event an employee exhibits symptoms and/or receives a confirmed diagnosis of COVID-19. To further help reduce the chance of COVID-19 in the newly opened workplace, the Equal Employment Opportunity Commission has determined that employers may measure employees' temperatures on a daily basis, provided that confidentiality is maintained. In other words, such information should be maintained on separate forms and separate from an employee's personnel file. An employer may also measure an employee's body temperature if an employee exhibits symptoms. Employees who appear to have symptoms, like a fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, or the loss of smell or taste, should immediately be separated from other employees, customers, and visitors, and should be sent home. Employers may ask employees who report feeling ill or who call in sick if they are exhibiting influenza-like symptoms, and should maintain all information about the employee's illness as a confidential medical record in compliance with the law. If an employee receives a COVID-19 diagnosis, employers must be mindful of reporting obligations under Occupational Safety and Health Administration laws.

As there have been significant developments in the federal and New York laws as a result of COVID-19, employers should also ensure that they are providing any statutorily-required time off to employees. Covered employers have new obligations under federal and New York State law to provide qualified employees leave under the Family and Medical Leave Act, the Families First Coronavirus Response Act, and the New York Paid Leave Law.

Employers should consider special accommodations for personnel who are members of a "vulnerable population," such as the elderly or people with underlying conditions like obesity, asthma, and chronic lung conditions. Employers should also assess accommodation requests from employees with mental illnesses whose conditions have been exacerbated by COVID-19. When reviewing any requests for accommodation from employees, employers are reminded to engage in the interactive process to determine whether a reasonable accommodation can be offered that does not cause an undue hardship on the employer. Employers in New York City are required to document this interactive process, which is commonly referred to under New York City law as the cooperative dialogue.

Finally, reports indicate that there has been an increase in pandemic-related harassment. As such, employers should also enforce anti-discrimination and harassment policies for pandemic-related harassment due to national origin, disability, race, or other protected characteristics.

We will continue to keep you apprised of any further developments impacting the workplace, and are available to answer any questions and provide additional guidance to help you navigate the ever-changing landscape of the laws during the COVID-19 pandemic and its interplay with any other local, state or federal laws. For more information, please contact an experienced member of KD's Labor & Employment Law Practice Group.

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