COVID-19 HR and Employment Law Issues

July 29, 2020

Presentation to
Rotary Club of Beaumont

Littler

Presented by

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Agenda

- State and local reopening orders
- Return to work considerations
- Termination Issues
- Workers' Compensation and Civil Liability
- COVID-Related Unemployment Compensation and Leave, including the Families First Coronavirus Response Act (FFRCA)

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State and Local Reopening Orders

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Can You Reopen? The Open Texas Plan

- First took effect April 27, 2020, most recent order issued July 2nd – most notably requiring face coverings statewide with limited exceptions
- Executive Orders permit ***Essential Services*** to continue operations.
- Executive Orders permit ***Reopened Services***, under certain conditions including occupancy restrictions.

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Texas Governor's Minimum Standard Health Protocols

TEXAS Health and Human Services

Texas Department of State Health Services

John Hellerstedt, M.D.
Commissioner

☑ **CHECKLIST FOR ALL EMPLOYERS AND EVENT ORGANIZERS**

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This checklist is for businesses and entities that fall into a category of business type without a more specific minimum standard health protocol on this website. Those businesses and entities should follow the protocols relevant to operations of the business or entity. All employees and customers must wear a face covering (over the nose and mouth) wherever it is not feasible to maintain six feet of social distancing from another individual not in the same household or, for those engaging in physical activities outdoors, wherever the individual is not able to maintain a safe physical distance from others not in the same household.

The following are the minimum recommended health protocols for all businesses and other entities choosing to operate in Texas. Employers may adopt additional protocols consistent with their specific needs and circumstances to help protect the health and safety of all employees, contractors, and customers.

Last updated July 3rd

https://open.texas.gov/

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State vs. Local Orders

- Generally, the Governor's Orders provide the floor, so counties or cities may impose additional requirements so long as they are not inconsistent with the Governor's Orders
- Since most recent surge of cases, Governor has given back some control to the local governments
  - For example, on July 2nd the Governor prohibited certain outdoor gatherings in excess of 10 people, unless the mayor or county judge approve of the gathering, and such approval can be made subject to additional conditions or restrictions

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Return-to-Work Considerations

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Creating A Safe Work Environment:

Businesses That Choose To Reopen Must Comply With Numerous Requirements

Have a Safety and Health Return to Work Plan

- Create one to address the myriad of issues you will need to determine before allowing employees to return
- Train managers and supervisors on the plan and ensure the are ready to answer questions and concerns from employees
- Employees must be made aware of the policies and must be held accountable if not following them
- Plan will involve safety, risk management, human resources, and legal

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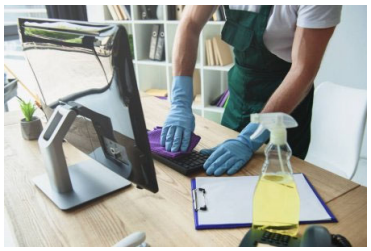
Preparing Physical Workspaces for Employee Returns

OSHA - Employers Must Provide Safe & Healthy Workplace for Employees

- Screening before entry
- Social Distancing
- Sanitation/Decontamination
  - At least every shift, commonly touched items more often
  - Shared items decontaminated between users



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Preparing Physical Workspaces for Employee Returns

OSHA - Employers Must Provide Safe & Healthy Workplace for Employees

- Increase ventilation
- Policies to ensure workers do not come to work sick
- Face Coverings or PPE
- Signage to reinforce changes
- Distancing, wash hands, cough/sneeze etiquette, face covering

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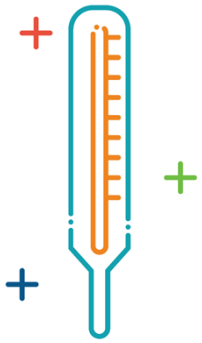
Screening

- Verification that person does not pose a heightened risk of exposure
  - Verbal assurance or written/electronic form
  - Signage
  - Temperature Screen – at home or workplace
    - Logistics & avoiding creating a medical record
  - Testing for virus or antibodies
    - Limitations & risks



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Social / Physical Distancing

- Telework is still preferred
- Reconfigure workstations & other areas to ensure 6 feet separation
- Stagger start times
- Add a shift to reduce number of workers present at same time

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Face Coverings

- Mandatory in Texas, with limited exceptions
- Different types
  - Cloth
  - Surgical masks
  - Respirators (i.e. N95)
- Other considerations
  - Mandating respirators requires full OSHA respiratory program
  - Accommodations for employees who cannot wear face covering

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EEOC Guidance

The EEOC has issued guidance specific to the COVID-19 pandemic, including:

- Employer symptom inquiries
- Separate medical files
- Interactive process

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

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OSHA Guidance on COVID Cases

- **Employers are responsible for recording cases of COVID-19, if**
  - The case is a confirmed case, as defined by the CDC;
  - The case is "work-related," as defined by OSHA regulations; and
    - Hard to determine, but if there is an outbreak at your workplace, may be work-related (e.g., the meatpacking plants)
  - The case involves one or more of the general recording criteria set forth in the OSHA regulations (e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid or loss of consciousness)

  See https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

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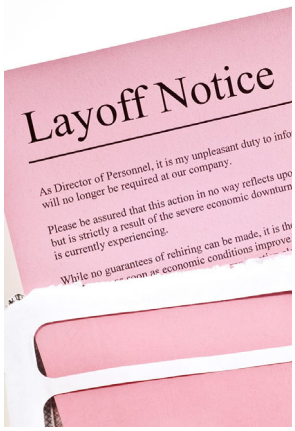
Termination Issues

Advance Notice Layoff Obligations – WARN Act

- Worker Adjustment and Retraining Notification Act ("WARN Act") requires 60-day notice of certain plant closings and mass layoffs for employers with 100+ full-time employees.
- WARN notice required for "mass layoffs"— 50 or more employees constituting 1/3 of the workforce at a site or facility OR 500 or more employees.
- WARN notice also required if employer closes facility or discontinues operating unit affecting 50 or more employees.
- Temporary layoffs less than six months don't count.
- Many states (not Texas) have mini-WARNS requiring additional notice.



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Severance Agreements and Releases – Tread Carefully

Older Workers Benefit Protection Act (OWBPA)

- For employees 40 and over if offering severance in exchange for a release of claims
  - Requires specific language in the release and
  - Form with detailed decisional unit data
- Seek legal guidance. It is minefield, and errors may render the release of age discrimination claims invalid.

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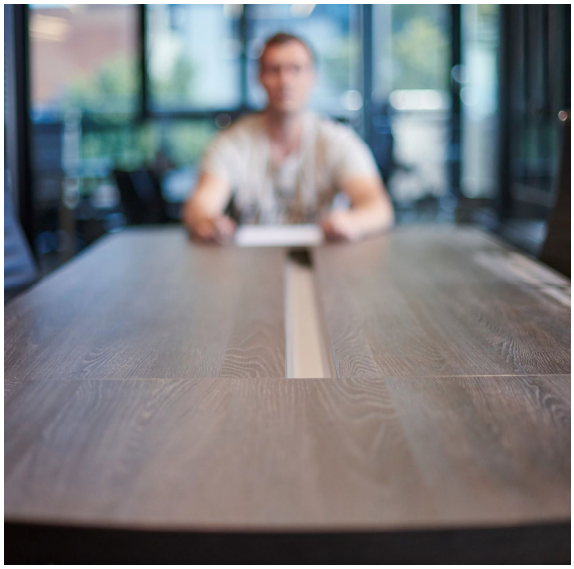

Workers Compensation and Civil Liability

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Workers Compensation and Civil Liability

- Beware COVID-19-related claims in recalling employees to the workplace
  - We're seeing more cases being filed in state and federal courts
- Workers Compensation: Intentional refusal to comply with minimum health and safety protocols may put your workers compensation coverage at risk
- Civil Claims:
  - Workplace safety, for not providing protective equipment, staggering shifts, limiting contact with customers, etc. (beware of tort lawsuits attempting to circumvent workers compensation exclusivity bar)
  - Wage and hour, for not paying for COVID-19 related worktime (symptom, temperature checks, remote work)
  - Retaliation, for complaining about workplace safety or refusing to perform an illegal act
  - Discrimination, for disproportionately recalling certain employees, and not those in protected class

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COVID-Related Unemployment Compensation and Leave

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The Federal CARES Act and Impact on Unemployment

- Federal Pandemic Unemployment Compensation Program (FPUC)
  - Raises minimum payment across the board by $600 / week through July 2020
  - Employees must be eligible for at least $1 of state benefit to be eligible for $600 FPUC benefit
- Pandemic Emergency Unemployment Compensation (PEUC)
  - Extends benefits for 13 weeks beyond what allowed by states through 2020 (Texas: 26 weeks)
- Pandemic Unemployment Assistance (PUA)
  - Allows self-employed or gig workers and independent contractors to apply
  - May qualify even if ineligible for state unemployment benefits
  - Must be unable to work due to COVID-19 reasons
- Exceptions
  - Employees eligible to telework are not eligible
  - Workers receiving benefits under some other program—such as FFCRA—not eligible

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Overview of FFCRA Paid Leave Provisions

NOTE: FFCRA Leave is When there is Work Available to be Performed, But the Employee is Unable to Work for Certain, Specified COVID-19-Related Reasons

- **Emergency Paid Sick Leave ("EPSL")**
  - No eligibility requirements—immediately upon hire
  - Up to 80 hours (~ first 10 days)
  - 6 different reasons
  - Full pay or 2/3 pay (depending on reason)—subject to monetary caps
- **Expanded Paid FMLA ("FMLA+")**
  - Must be employed 30 calendar days (no year of service, no 1,250 hours, no 50-in-a-75-mile-radius)
  - Up to 12 weeks (~ days 11-60)
  - 1 reason only—school closure/childcare unavailability
  - Weeks 1 -2 unpaid by this provision
  - Weeks 3 – 12: 2/3 pay—subject to monetary caps

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For What Reasons May an Employee take EPSL

Employee is unable **to work *or telework*** because:

1. Employee subject to a quarantine or isolation order related to COVID-19
2. Employee advised by a health care provider to self-quarantine because of COVID-19
3. Employee experiencing symptoms of COVID-19 and is seeking a medical diagnosis
4. The employee is caring for an individual subject or advised to quarantine or isolation
5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precaution (like FMLA+)
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

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Highlights of DOL Q&A Guidance https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Q #21: May FCCRA leave be taken intermittently at an employee's usual worksite?

A: Only if the qualifying reason is school closures or childcare unavailability and the employer agrees.

Q #23-27: May FCCRA leave be taken if the employer closes the worksite (and there is no work for the employee)?

A: No.

Q #28: If the employer reduces an employee's scheduled hours, may the employee take FCCRA leave for the hours no longer scheduled to be worked?

A: No, because the employee is not prevented from working those hours by a qualifying reason, even if the reduction is related to COVID-19.

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Key Takeaways

- For those who have COVID-19 symptoms or refuse to comply with applicable government orders:
  - Ensure they do **not** return
- For those who express hesitation or refuse:
  - Consider whether they may be legally protected
    - But be ***very*** cautious about assuming they are
  - Consider whether they may qualify for leave
  - Consider whether they qualify for unemployment compensation
  - Consider whether they can telework or have a flexible schedule
  - Consider other accommodations
- For those who refuse or cannot be accommodated:
  - Consider risks of discrimination or retaliation claims
  - Ensure the return of all company property

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Littler COVID-19 Resources - www.littler.com/coronavirus

Littler's COVID-19 Task Force

Littler's COVID-19 Task Force is here to help employers confront the workplace challenges related to the global spread of the novel coronavirus. With years of experience counseling clients worldwide on workplace safety and health, leave and accommodation, policies and procedures and other employment and labor law issues, our international team of attorneys can provide practical advice and strategies for these challenging times.

Littler OnDemand

Littler can provide you with access to affordable and informed advice through Littler onDemand. Experienced LoD Counsel are available to triage your inquiries and are backed by the collective knowledge of Littler's 1,500+ attorneys around the world, including more than 150 attorneys who comprise Littler's COVID-19 Task Force.

Littler OSHA Toolkit

Comprehensive Safety and Health Return to Work Toolkit, including guidelines for employers to safely return employees to work, an employee-facing document that implements the guidelines, and numerous Addendums and Template Forms to assist in the return to work-process.

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