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Nashville Area Chamber of Commerce presents:

# Business Re-Entry – What Should Employers Be Considering Before Opening Doors?

May 19, 2020 10:30 a.m. – 11:30 a.m.

*Presenters:*     *Chuck Mataya, Esq.*  
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# Business Re-Entry – What Should Employers Be Considering Before Opening Doors?



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# Agenda

- Developing a Plan for Re-opening
- Communication Tips
- Screening Considerations
- Paycheck Protection Program

# Developing a Plan

- State and Local Orders/Guidelines – Reopening Should Be Consistent with State and Local Orders
- CDC Guidelines – Recently Released Flow Charts for Reopening Workplaces
  - Updated often
  - Changes often
- OSHA Guidelines
  - Many are specific to a type of workplace
  - Many keep changing
- Apply to your workplace
  - Safety is top consideration
  - What is right for one place may not work for another

# CDC Guidelines

- CDC website
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- CDC Guidance
  - First Step: Is reopening consistent with state and local guidelines, and is workplace ready to protect high-risk employees?
  - Second Step: Are recommended health and safety practices in place?
    - healthy hygiene,
    - hand washing,
    - mask?
    - intensified cleaning,
    - social distancing



# CDC Guidelines

- CDC Guidance (Cont.)
  - Third Step: Is ongoing monitoring in place?
    - Checking for Signs and Symptoms
    - Encouraging anyone who is sick to stay home
    - Monitor employee absences
- Why Important?
  - OSHA general duty clause
  - Common law duty to provide a safe workplace

# OSHA Guidance

- OSHA's General Duty Clause, Section 5(a)(1), requires employers to provide employees with a
  - “workplace free from recognized hazards likely to cause death or serious physical harm”
- Moving target
  - Judged by what you know **or should know** about the hazards
  - What you and other employers do or can do to manage that risk
  - State of the Act changes; so does your duty
- Common law duty to provide a safe workplace also applies
  - Similarly impacted by changing knowledge of hazards
  - What you and other employers do or can do to manage that risk

# OSHA Guidance - continued

- Steps All Employers Can Take to Reduce Workers' Risk of Exposure to COVID-19
  - Develop an Infectious Disease Preparedness and Response Plan
  - Prepare to Implement Basic Infection Prevention Measures
  - Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate
  - Develop, Implement, and Communicate about Workplace Flexibilities and Protections
  - Implement Workplace Controls
  - Follow Existing OSHA Standards

# OSHA Guidance - continued

- Follow hierarchy of controls methodology
  - Best way to control a hazard is to systematically remove it from the workplace, rather than relying on workers to reduce their exposure
  - When not possible to eliminate the hazard, most effective protection measures are (listed from most effective to least effective):
    - Engineering controls
    - Administrative controls
    - Safe work practices, and
    - PPE

## OSHA Guidance - continued

- Last updated on May 6, 2020
- Updated strategies and recommendations for employers responding to COVID-19, including those seeking to resume normal or phased business operations:
  - Conducting daily health checks
  - Conducting a hazard assessment of the workplace
  - Encouraging employees to wear cloth face coverings in the workplace, if appropriate
  - Implementing policies and practices for social distancing in the workplace
  - Improving the building ventilation system
- A table outlining the engineering controls, administrative controls, and personal protective equipment (PPE) that employers may use to help prevent the spread of COVID-19 in the workplace

# Different Guidance for Different Industries

- Healthcare industry guidance from CDC
  - Framework for Non-COVID-19 Care
    - <https://www.cdc.gov/coronavirus/2019-ncov/hcp/framework-non-COVID-care.html>
  - Ten Ways Healthcare Systems Can Operate Effectively during the COVID-19 Pandemic
    - <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ways-operate-effectively.html>
- Healthcare Provider Checklist
  - <https://www.cdc.gov/coronavirus/2019-ncov/hcp/hcp-personnel-checklist.html>
- Steps Healthcare Facilities Can Take
- Healthcare Facility Guidance
- Mitigating Staff Shortages

# Different Guidance for Different Industries

- Manufacturing Workers and Employers
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>
- Focus for manufacturing guidance
  - Create a COVID-19 assessment and control plan
    - Worker infection prevention recommendations based on [hierarchy of controls](#)
    - Preferred approach:
      - Eliminate a hazard or processes;
      - Install engineering controls; and
      - Implement appropriate [cleaning, sanitation, and disinfection](#) practices to reduce exposure or shield workers
      - Administrative controls
        - » changes to the way people work

# Different Guidance for Different Industries – cont.

- Engineering controls
  - Reconfigure communal work environments
    - Workers are spaced at least 6 feet apart
    - Changes in production practices may be necessary in order to maintain appropriate distances among workers
  - Modify the alignment of workstations
  - Use physical barriers to separate workers, if feasible
    - Strip curtains
    - Plexiglass
    - Similar materials
- Heating, ventilation, and a/c changes
  - Don't let fans blow from one worker directly at another worker
  - No personal cooling fans
    - But heat hazard responsibility



## Different Guidance for Different Industries – cont.

- Place handwashing stations or hand sanitizers
  - 60% alcohol
  - Multiple locations
  - Encourage hand hygiene
  - Use touch free stations, if possible
- Add additional clock in/out stations, if possible
  - Spaced apart
  - Consider alternatives such as touch-free methods
  - Consider staggering times for workers to clock in/out
- Remove or rearrange chairs and tables
- Gets very detailed

## Different Guidance for Different Industries – cont.

- Administrative Controls
  - Promote social distancing
  - Modify production or assembly lines
  - Stagger workers across shifts
- CDC recommends wearing cloth face coverings
  - In addition to social distancing
  - Or when social distancing not possible
- Educate and train workers and supervisors about how they can reduce the spread of COVID-19

## Different Guidance for Different Industries – cont.

- Communication and training should
  - Easy to understand
  - Be provided in languages appropriate to workforce
  - Be at appropriate literacy level; and
  - Include accurate and timely information about:
    - Signs and symptoms of COVID-19
    - Risks for workplace exposures
    - How workers can protect themselves
    - Proper [handwashing](#) practices
    - Use of hand sanitizer stations
    - Cough and sneeze etiquette; and
    - Other routine infection control precautions

## Different Guidance for Different Industries – cont.

- CDC Posters available/required
  - <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc>
  - Post in all languages common to worker pop
  - Post at
    - Entrance to workplace
    - Break areas
    - Locker rooms, and
    - Other workplace areas where likely to be seen
- Gets very detailed

# Communicating the Plan

- Very important to have a communication plan
- Employees may be
  - Scared about returning
  - Ignorant of infection mitigation processes
  - Obstinate about following plan/rules
  - Less than incentivized
    - Some are getting more on UE than paycheck
  - Unaware of new rules and policies
- What can an employer do?

# Tips for Communication of Return to Work Plan

- Be positive
  - Welcome employees back
  - Show excitement about the development
- Publish the new policies and procedures
  - Emphasize the purpose is to protect employees
  - Promote Production and return to normalcy
- Explain that employee safety is paramount
  - Will follow OSHA and CDC rules
  - Don't promise absolute safety
  - Use CDC and OSHA to support your statement
  - When possible, use the actual posters and print medial from CDC site

# Tips for Communication of Return to Work Plan

- Explain what you have done to protect them, e.g.,
  - Cleaning
  - Disinfection
  - Changes in workplace
  - Staggered schedules
- Explain the process for Screening
  - Survey/questionnaire of symptoms
  - Temperature
  - Use private area to extent possible
  - Explain what will be done is screening shows problem

# Tips for Communication of Return to Work Plan

- Follow the OSHA and CDC guidelines, but tailor to your workplace
- Remember the typical CDC recommendations
  - Signs and symptoms of COVID-19
  - Social Distancing
  - How workers can protect themselves
  - Proper handwashing practices
  - Use of hand sanitizer stations
  - Cough and sneeze etiquette; and
  - Other routine infection control precautions



# EEOC and COVID-19

- EEOC issued updated **FAQs** and **Guidance**
  - Last update May 7, 2020
- **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**
  - <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- **EEOC FAQs on COVID and ADA**
  - <https://www.eeoc.gov/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# Important EEOC Notes

- Screenings for COVID, even a survey, constitute medical inquiry
- Typical rules apply to medical inquiries under ADA.
- Must be:
  - Job related and consistent with business necessity
  - Generally tough standard to meet
- Right now, EEOC has stated that testing/inquiries are permitted
  - EEOC has stated employers can ask employees if they are experiencing symptoms of COVID-19
  - EEOC has stated employers can take employees' temperatures
  - EEOC has stated employers can test employees for COVID-19
  - COVID-19 constitutes a “direct threat” to others
- CDC and local health agencies make it DT
  - This could change
  - Follow what's happening

# Important EEOC Notes

- Can do tests but
  - Should ensure tests are accurate and reliable
  - May review guidance from the U.S. Food and Drug Administration
  - CDC
  - Other public health authorities
  - Check for updates
- May consider incidence of false-positives or false-negatives associated with a specific test
- Must keep results confidential (can disclose to public health authorities)
  - Temp tests
  - Surveys
  - Diagnostic tests
    - Inconsistency re: results
      - May report positive tests to DOH
      - Contractor or temp staffing may report positives to employer
    - Should, **but can't**, divulge to other employees

# Other Employment Laws Still Apply

- OSHA
- Anti-discrimination laws, such as Title VII, ADEA, ADA, FMLA
- FMLA
  - FFA
- FLSA – payment for waiting to be tested/have temperature taken?
- NLRA
- State Laws
- Almost all employment laws have anti-retaliation element

# Tough Situations

- Most vulnerable employees
  - Don't want to come in
    - ADA?
    - FFA
    - FMLA
  - Want to return, but you don't want them
- Employees in quarantine
  - Have the virus
  - May have the virus
- Employee too scared
- Employee too comfortable at home

# Screening Employees

- Survey/questions -
- Temperature
- Molecular
- Serological
- Have plan for those testing “positive”

# Survey

- Self reporting
- Oral
- Written
- Follow symptoms of COVID-19
  - Fever (over 100.4) or chills/shaking with chills
  - Sore throat
  - Cough
  - Headache
  - Muscle pain
  - Shortness of breath or difficulty breathing
  - Recent loss of taste or smell

# Temperature

- Nurse is best, but can be any trained employee/vendor
  - Document training
- No contact thermometer/scanner best
- Where to have the test administered?
- Consider PPE for those taking the temp
- How employees will get the test
  - Wait in line?
  - Social distancing?
- CDC threshold = 100.4 degrees Fahrenheit
  - What now?
    - More specific tests?
    - Quarantine 14 days – REMEMBER THE FFCRA
    - Return if fever-free for 3 days
    - No other symptoms
- Keep results confidential



# Molecular tests

- Look for signs of an active infection
- Usually involve taking a sample from back of the throat with cotton swab
- Doctor then sends the sample off for testing
- Sample will undergo a polymerase chain reaction (PCR) test
  - Detects signs of the virus's genetic material
- A PCR test can confirm a diagnosis of COVID-19
- Can only help diagnose current cases of COVID-19
- Cannot tell whether had the infection and recovered
- Sites throughout TN
  - <https://www.tn.gov/health/cedep/ncov/remote-assessment-sites.html>

# Serological tests

- Detects antibodies the body produces to fight the virus
- Antibodies are present in anyone who has recovered from COVID-19
- Usually a blood sample
- Can detect cases of infection with mild or no symptoms
- Tests are not quick
- Usually 21 days or so after first sign of symptoms

# Potential Issues with Furloughed Employees

- Technically, a furloughed employee is not same as laid off employee
  - Employee w/
    - Reduced hours and
    - Reduced comp
  - Can still be adverse employment action
  - Can still trigger WARN Act requirements
- Furlough for hourly, nonexempt
  - Just pay for the hours worked
  - No FLSA problem
- Furloughed salaried/exempt employee
  - Can be FLSA problem
  - If not administered properly
    - Salary basis

# Returning Laid Off Employees

- If CBA, must follow contract process
- May be making more money now on UE
  - May not want to lose that status
  - Especially if hourly nonexempt returning w/ reduced hours
  - If refusing to come back to work, may be voluntary quit that disqualifies for unemployment
- Benefits may be impacted
  - Depends on Plan
  - # hours worked
  - Don't forget the ACA
- Return for RIF can present discrimination risks
  - Seniority easiest to defend
  - Needs of employer may dictate otherwise

# Paycheck Protection Program

- \$349 billion in Paycheck Protection Program (PPP)
  - Coronavirus Aid, Relief, and Economic Security (CARES) Act
  - As of May 6, 2020
    - More than 2.4 million loans
    - Worth more than \$183 billion
- PPP loan
  - Up to \$10 million
  - Many applied incentivized by potential for loan forgiveness
- Applicant needed to meet all criteria for loan forgiveness
  - At least 75% of loan must be used by the recipient for payroll purposes
  - Remaining amount must be used for
    - Utility payments
    - Rent and/or mortgage interest

# Paycheck Protection Program

- After reports that many PPP recipients were not the small businesses intended for
  - U.S. Treasury Secretary Steven T. Mnuchin and U.S. Small Business Administrator Jovita Carranza
  - April 28 statement that loans over \$2 million would be subject to strict review to ensure qualification
- Certification:
  - All PPP borrowers needed to
  - Many started giving the loan proceeds back
- Safe Harbor issued – Deadline now May 18, 2020
- Deemed all PPP borrowers of less than \$2 million certifications were made in good faith
- In other words, no more need to sweat over whether or not their applications met the "necessity" criteria.
- **It also extended the "safe harbor"** for no-questions-asked loan returns to May 18. This is basically for borrowers of above \$2 million, or smaller borrowers who have concerns about their applications other than the aforementioned "necessity" criteria

# PPP Forgiveness

- A PPP loan may be forgiven, in whole or in part, if
  - Loan money spent on permitted expenditures
  - All employees are kept on the payroll for eight weeks following loan origination date
  - Don't have to use all proceeds in the eight-week period,
    - but no forgiveness for any funds that are spent afterwards
  - Loan forgiveness is limited to the loan principal plus accrued interest
- Tax purposes, forgiven loan amounts are excluded from gross income
  - But associated expenses are not deductible

# PPP Forgiveness

- Expenses included in loan forgiveness (non-payroll items capped at 25% of loan proceeds):
  - Payroll costs (as defined by the CARES Act)
  - Mortgage interest payments (for buildings purchased before Feb. 15, 2020)
  - Rent payments (for leases dated before Feb. 15, 2020)
  - Utility payments (electricity, gas, water, transportation, phone, and internet for agreements dated before Feb. 15, 2020)
  - Additional wages paid to tipped employees
- Qualifying payroll costs include employee compensation in the form of:
  - Salaries (but not more than \$100,000 for an employee)
  - Wages
  - Tips
  - Commissions
  - Employee benefits
  - Health insurance premiums
  - Retirement benefits
  - State and local taxes assessed on compensation
- But must **exclude Social Security and Medicare taxes. Also, paid sick leave and paid FMLA required under Families First Coronavirus Response Act are not included.**



# PPP Forgiveness

- **Reduction in salary/wages and headcount**
  - Allowable forgiveness reduced if there is a decrease during the eight-week period
    - Of more than 25% of total salary or wages for any employee
    - Compared to the most recent full quarter they were employed before company received the PPP loan
    - Don't count any employee who had salary or wages higher than \$100,000 in 2019
  - Allowable forgiveness reduced for any decrease in the number of FTE employees by comparing
    - Average number of monthly FTE employees employed during the eight-week period after receive loan with either
      - the average monthly FTE level for Feb. 15 through June 30, 2019, or
      - Jan. 1 through Feb. 29, 2020
  - **Won't be penalized for any reduction occurring between Feb. 15, 2020, through April 26, 2020, if the reduction is eliminated by June 30, 2020**

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