

LABOR RELATIONS

Expert Analysis

Return to Work: Testing and Tracing?

As states begin to allow businesses to reopen amid the COVID-19 pandemic, employers now face difficult decisions about when and how to reopen their doors in a way that keeps their employees and clients safe while also protecting employee rights. Much of the focus of employers to date has been on implementing policies and procedures for social distancing and preparing physical worksites. This article addresses other important legal considerations for employers related to COVID-19 testing and vaccinations, as well as contact tracing in the workplace, which implicate various federal, state and local laws and may trigger rights and obligations under the National Labor Relations Act (NLRA).

Testing

In considering whether they should be testing employees for COVID-19 before employees are permitted to enter the worksite, many employers are asking whether they are legally required to do so and whether they are legally permitted to do so. The Occupational Safety and Health Administration (OSHA), the Center for Disease Control and Prevention (CDC) and the Equal Employment Opportunity Commission (EEOC) recently have issued guidance on preparing



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workplaces to minimize potential exposure and transmission of COVID-19, including guidance on testing for COVID-19. In addition, New York state has issued guidelines for the reopening of non-essential businesses, which require that employers conduct daily employee health screenings for COVID-19.

OSHA's "Guidance on Preparing Workplaces for COVID-19" (OSHA Guidance) points to existing OSHA standards,

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including the General Duty Clause at §5(a)(1) of the Occupational Safety and Health Act (OSH Act), which requires employers to provide each worker "employment and a place of employment

which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. §654(a)(1). While the OSHA Guidance does not explicitly advise employers to test employees before they enter the workplace, it states: "Prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers, customers, visitors, and others at a worksite." See OSHA Guidance available at <https://www.osha.gov/Publications/OSHA3990.pdf>.

The CDC's "Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020" and "COVID-19 Employer Information for Office Buildings" (CDC Guidance) state that "[e]mployers are responsible for providing a safe and healthy workplace." As to testing, the CDC Guidance specifically advises employers at least to consider conducting daily in-person or virtual health checks, such as symptom and temperature screening, before permitting employees to enter the workplace. The CDC further recommends that, if implementing in-person temperature checks, employers use barrier or partition controls or PPE to protect the screener. See CDC Guidance available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

The EEOC's "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"

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(EEOC Guidance) provides that employers may administer COVID-19 testing to employees before they enter the workplace. While under the Americans with Disabilities Act (ADA), an employer may not require medical testing or make medical inquiries unless the examination or inquiry is “job-related and consistent with business necessity,” the EEOC Guidance recognizes COVID-19 testing meets this standard because an employee with COVID-19 in the workplace poses a direct threat to the health of other employees. According to the guidance, employers also may administer temperature checks and inquire about testing, diagnosis, symptoms and whether an employee has had contact with someone who has been diagnosed with or is exhibiting symptoms of the virus. The EEOC cautions, however, that employers should consider the reliability of testing and that it is not a substitution for observing infection control practices. In addition, all medical information obtained from the employee through testing or employer inquiry must be kept confidential, and maintained separately from the employee’s personnel file in compliance with the ADA. See EEOC Guidance available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Notably, the New York State Department of Health’s “Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency,” issued May 28, 2020 (NY Guidance), *requires* employers that operate in office spaces to conduct mandatory daily health screening assessments for employees and, where practicable, visitors. This screening may be performed remotely or on site and requires completion of a questionnaire that determines whether, during the prior 14 days, an employee or visitor has experienced symptoms of, or has tested positive for COVID-19, or has been in close

contact with someone who has or is suspected of having COVID-19. The NY Guidance sets forth in detail the circumstances in which employees who have tested positive, have symptoms and/or have been in close contact with a person with COVID-19 are required to quarantine for 14 days before returning to work. See NY Guidance available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>. If the employee is critical to the operation or safety of an office, pursuant to current CDC guidance, the employee may be able to return to work

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sooner upon receiving two negative test results, at least twenty-four hours apart, using an approved testing procedure.

Vaccination

Looking ahead, many employers also are considering whether to encourage or even require employees to receive a COVID-19 vaccine once available. Neither OSHA, the CDC nor the EEOC has issued guidance specifically addressing whether employers may require a COVID-19 vaccination. However, past OSHA and EEOC positions as to whether employers may require employees to receive a flu vaccine may be instructive.

OSHA has indicated that although employers may require employees to receive the influenza vaccine, employees who object to such requirement for health reasons may be protected under §11(c) of the OSH Act, which prohibits retaliation against employees

for exercising certain rights under the OSH Act. See “Standard Interpretations: OSHA’s position on mandatory flu shots for employees,” available at <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

Similarly, the EEOC’s previous guidance on pandemic preparedness in the workplace, which was updated in response to COVID-19, advised employers to consider encouraging—rather than requiring—employees to receive a flu vaccine, as employees may be exempt from a vaccine requirement based on a disability under the ADA or a sincerely held religious belief under Title VII of the Civil Rights Act. If an employee notifies an employer that an employee’s disability or religious belief prevents the employee from receiving a flu vaccine under the ADA or Title VII, respectively, the employer must provide a reasonable accommodation barring undue hardship. See “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” available at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

At this point we do not anticipate significant variance from this guidance with respect to a COVID-19 vaccine.

Tracing

Many employers are now deliberating whether to require employees to use technology—in particular, contact tracing apps—in an attempt to minimize transmission of COVID-19 at their workplaces. Indeed, the NY Guidance states, “As a best practice, [employers] may offer optional tracing and tracking technology (e.g., Bluetooth enabled mobile applications) to streamline contact tracing and communication process among their workforce and others.” Although OSHA, the CDC and the EEOC have not specifically addressed use of contact tracing apps in the workplace, the available guidance highlights the importance

of identifying those diagnosed with COVID-19 and identifying and notifying those with whom a potentially infectious individual has come into contact.

Several technology companies have been working to develop digital contact tracing apps. Some apps communicate an individual's location and medical information to a centralized source (i.e., the employer), while others directly notify individual users if they have come in close contact with someone who has tested positive for COVID-19. Employers should consider the impact contact tracing apps have on employee privacy rights. To the extent employers receive and store medical information collected by the apps and inform other employees of possible exposure, employers must ensure all medical information is maintained in a confidential manner in accordance with the ADA.

Further, employers should be mindful of state privacy laws to ensure use of contact tracing apps complies with applicable law. Although workplace privacy laws vary by state, many states, like New York, restrict employers from video recording employees in locations where the employee has a reasonable expectation of privacy, such as restrooms and locker rooms. Additionally, certain states, including California, have privacy laws with specific employee notification, disclosure and consent requirements. Moreover, the use of contact tracing apps may implicate state off-duty conduct laws if the apps collect the employee's location information while outside of the office. For example, in New York, employers are prohibited from taking adverse action against employees for their "legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property." 18 N.Y. Labor Law §201-d.

Finally, employers should take care to implement all workplace safety measures, including any testing and contact tracing,

in a non-discriminatory manner to avoid running afoul of the ADA, as well as other federal, state and local anti-discrimination laws.

Labor Matters

The implementation of testing, vaccination and tracing policies and procedures in the workplace may trigger certain rights and obligations under the NLRA, even with respect to employees not represented by a union. In particular, employers should be cognizant of the protections afforded to many employees engaging in protected concerted activity under §7 of the NLRA, which provides employees with the right "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." Subject to certain exceptions, employees may be engaging in protected concerted activity if employees, for example, collectively raise concerns over workplace health and safety, or collectively object to contact tracing technology. Under §8(a)(1), an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in §7.

In addition, implementing testing, vaccination and/or contact tracing requirements may trigger an employer's duty to bargain in union workplaces. On March 27, 2020, the General Counsel for the National Labor Relations Board (NLRB) released a memo providing summaries of cases in which the NLRB previously addressed the duty to bargain in emergency situations.

Most relevant to this discussion is *Virginia Mason Hospital*, 358 NLRB 531 (June 25, 2012), in which a hospital unilaterally implemented a policy requiring nurses who did not receive a flu vaccine to either wear a facemask or take antiviral medication. The NLRB affirmed the administrative law judge's finding that the union waived its right to bargain over the decision to implement the policy by agreeing to the management-rights clause in the

applicable collective bargaining agreement (CBA). The management rights clause gave the employer the right to "determine the materials and equipment to be used" and to "implement improved operational methods and procedures." Notably, the administrative law judge had rejected the hospital's defense that it also did not have to bargain with the union because the hospital was required to implement the policy pursuant to CDC regulations and guidance, as the CDC regulations at that time permitted healthcare institutions to exercise discretion as to when a nurse was required to wear a facemask.

This decision highlights the importance of reviewing any CBAs in effect and consulting with counsel before implementing any new health and safety policies in response to COVID-19, particularly in light of the relatively loose guidance federal agencies have provided in certain areas such as testing and tracing employees.

As more and more businesses across the country are getting the green light to reopen, we expect guidance in the areas of testing, vaccinating and tracing employees to continue to develop and change. Employers are advised to consider these difficult issues and stay current with federal, state and local developments in these areas. We expect that employees will be doing the same.