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Ten Initial Considerations for Businesses Returning to Work

We are now seeing the beginning of a significant change in shelter-in-place orders. Some jurisdictions are retaining or enhancing shelter-in-place restrictions, but for the first time since the COVID-19 crisis emerged, others are moving towards loosening them.

Over the next few weeks, employers and businesses evaluating a return to work will face a complex patchwork of legal requirements and tricky practical considerations. In response, Husch Blackwell is launching a new series of Return-to-Work (RTW) articles that frame and present the key issues and explore the emerging best practices. True to our industry focus, many will be targeted to specific industries. This initial document gives all employers an overview of key issues at their broadest scope.

1. As a non-essential business, how will I know when I am legally permitted to reopen, and do I have to re-open?

Unfortunately, businesses are going to face a complex, perhaps even bewildering, patchwork of legal requirements. Many have focused on the president's Opening Up America Again Guidelines, issued April 16. But those are truly guidelines, having no force of law, and depend on each area reaching certain milestones in fighting the virus; in other words, they will take time to implement. Additionally, the healthcare emergency authority in our legal system is decentralized, with most authority placed in the hands of state, county and local public health officials. Each of those persons will make individual decisions for their jurisdictions.

To help guide clients through this patchwork, Husch Blackwell will continue to provide daily updates on legal requirements on its webpage that catalogs state-by-state guidance.

Once cleared by authorities to reopen, there is no obligation to do so. Public health officials can close businesses in a health emergency but cannot mandate when and under what circumstances a business reopens.

2. Should I open all at once or gradually?

This is workplace specific, but many employers will use a gradual approach, bringing back first those employees performing important functions that cannot be done from home. Many will start with part-time Return-to-Work to reduce density. For example, some will have a Monday-Tuesday team and a different Wednesday-Thursday team. For most, we expect working from home to evolve toward Return-to-Work over time.

3. My business is in multiple states; can I reopen in all places at the same time?

Legally, yes, but practically, this will be a challenge. Because of the decentralization of our system, a national approach will mean you can open only when the last jurisdiction in which you operate permits reopening. Most businesses will adopt a Return-to-Work strategy that is site-specific.

4. Do I have liability if I reopen and an employee gets COVID-19?

Certainly, plaintiffs' lawyers will see workplace illnesses as an opportunity, so all employers and businesses must be cautious. Many states have established a presumption for first responders and medical personnel that COVID-19 illnesses are workplace-caused, and therefore subject to workers' compensation.

The best defense to liability is a well-crafted, comprehensive Return-to-Work plan that is vigorously carried out on a daily basis. Indeed, many regulators (such as OSHA) have signaled that they will look favorably on employers who make their best, serious, good-faith efforts to address hazards and keep workers safe.

5. What goes into my Return-to-Work plan?

Every workplace is different, but you should consider at least the following ideas:

Keeping people at least six feet apart and being creative in how you do it, including space configurations, traffic patterns, using shifts to reduce density, etc.

Rigorous cleaning and sanitizing

Testing, if available

Making masks mandatory or encouraging employees to wear masks

Eliminating common food/snacks/coffee service

Preventing employees with fevers, coughs or other illness indicators from coming to work

Responding quickly and effectively to isolate exposed areas and people when a worker becomes sick

6. What about liability to visitors?

The same liability concerns you have as to employees apply to visitors (except workers' compensation). We expect most businesses to restrict visitors to only essential ones such as suppliers and maintenance workers, and bar family members, friends and other non-essential visitors for many months.

7. I share space with other tenants; how do I deal with that?

This is complicated, and your approach must be tailored to each facility. Before reopening, we suggest you have a dialogue with your landlord regarding safety in common areas, and the discussion should include at least the following: cleaning and sanitizing, traffic patterns and building access. Husch Blackwell's real estate team will address this in detail in a report next week.

8. Is employee privacy at issue?

Depending on your Return-to-Work plan, it certainly could be. We see employers considering testing, temperature taking and contact tracing, for example. These tools can promote safety but must be implemented to maximize privacy and comply with HIPAA and other laws.

9. What if employees refuse to return, citing safety concerns?

This is tricky, because forcing an employee to return can increase liability and harm morale. On the other hand, no business can effectively operate if every employee has a veto over showing up for work. We favor a gradual approach, with some latitude for individual comfort initially. But at some point, enforcing the employee's responsibility to report for work as directed will be necessary.

10. What about federal issues under the CARES Act and other federal programs?

As noted above, most Return-to-Work decisions will be made at the state and local levels, but the federal government continues to be the source of funding and is issuing guidance under the CARES Act and other Federal programs daily, especially as they pertain to the SBA loan programs.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an

unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.