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Labor & Employment

LEGAL UPDATES

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Colorado Reopening Order Excludes a Significant Number of Employees and Imposes Additional Obligations on Employers

OTHER STATES ARE LIKELY TO FOLLOW

Starting Monday, April 27, 2020 and lasting for thirty (30) days, Colorado Governor Jared Polis's "Safer at Home" Executive Order goes into effect as part of a phased plan designed to allow Coloradans to begin to return to work. The Governor had indicated last week that he would issue this Order, and it was no surprise that the Order permitted non-critical businesses to allow fifty percent (50%) of their employees to return to the workplace beginning May 4, 2020, subject to social distancing protocols.

What was not expected, however, were the limitations on employers and discretion given to employees under the Order. It exempts, seemingly without exception, a significant portion of Colorado's workforce—anyone over age 65 and persons with moderate or severe health conditions—from returning to in-person work. It also requires employers to accommodate "to the greatest extent possible" employees who are parents with "childcare responsibilities" and employees who live with "vulnerable" persons. These restrictions and provisions apply to all employers, whether designated as critical or non-critical.

The Order also expands the amount of paid sick leave certain employers must pay under Colorado's Health Emergency Leave with Pay ("Colorado HELP") rule. The Order further provides that vulnerable employees will remain eligible for unemployment benefits if they refuse to return to "COVID-19-related

demonstrable, unsafe working conditions.”

Thus, while the Order purports to open the door to begin filling Colorado workplaces again, it then to a large degree constrains employers looking to re-open.

Vulnerable Employees

Giving many employees the right to decide whether to return to work, the Order states “vulnerable” persons “cannot be compelled to perform in-person work for any business or government function....” “Vulnerable” employees are defined as persons:

65 years and older;

having chronic lung disease;

having moderate to severe asthma;

having serious heart conditions;

who are immunocompromised;

who are pregnant; or

determined to be high risk by a licensed healthcare provider.

In addition, the Order directs employers to accommodate “to the greatest extent possible” employees in two additional categories:

those “with childcare responsibilities” (which is undefined); and

persons living in the same household as a “vulnerable” person.

Employers must accommodate such persons by promoting telecommuting, other remote work options, flexible schedules, or using other means. Hopefully some employees’ childcare issues may begin to lessen starting May 4, when childcare facilities are permitted to reopen if they are following requirements under the Order.

Colorado HELP and Federal Emergency Paid Sick Leave

The Order directs the Colorado Department of Labor and Employment (CDLE) to again amend the Colorado HELP rule to provide additional emergency paid sick leave coverage. While Colorado HELP originally provided only four (4) days of leave with full pay, employees may now qualify for fourteen (14) days of paid leave at up to two-thirds the employee’s pay, in three situations:

1. when a worker has tested positive for COVID-19;
2. when a worker has COVID-like symptoms, or
3. when a worker has been directed to quarantine or isolation due to COVID-19 concerns.

With this change, emergency sick pay under Colorado HELP is more in line with emergency sick leave provided under the federal Families First Coronavirus Response Act. However, unlike FFCRA which only applies to employers with less than 500 employees, Colorado HELP applies to Colorado employers of any size in a variety of industries including leisure and hospitality, food services, retail, real estate sales and leasing, offices and office work, elective health services, personal care services, food and beverage manufacturing, childcare, education, home health care, nursing homes, and community living. Thus, some large Colorado employers not covered by FFCRA must now provide up to two weeks' paid leave to their eligible employees, not merely four (4) days.

Questions for Employers

The Order raises several vexing questions for employers, including:

What actions can employers take to verify an employee is truly vulnerable or lives with a vulnerable individual without raising privacy concerns?

What does the Order mean that employees with childcare responsibilities or who live with a vulnerable person must be accommodated to “the greatest extent possible”? Is that standard substantially more onerous than the “reasonable accommodation” standard that employers are accustomed to for disabled employees, or is it similar? Does an employer’s burden factor into the analysis?

What does it mean to accommodate “workers with childcare responsibilities” when a large majority of the workforce has a child or children out of school, and often more than one spouse or partner shares in those responsibilities?

Are employees deemed “vulnerable” under the Order now eligible for FFCRA paid sick leave merely because they are now “subject to a ...local quarantine or isolation order related to COVID-19”?

When can employment be terminated for a refusal to come to work when an employee claims COVID-19-related unsafe working conditions?

What enforcement mechanisms will apply to violators of the Order?

While many Colorado employers are subject to local shut-down orders that remain in effect for at least another week (such as most of the Denver metropolitan area), they should take the Order's directives into account in their business reopening plans. Other employers have less time, such as non-critical retail businesses and personal services which are allowed to begin opening to the public on May 1.

Employers in all states must keep a close eye on their states' reopening plans, and should plan accordingly. Many states are utilizing a similar phased approach, and similar provisions already appear in the reopening orders of Washington state. As many states' current orders are set to expire on April 30, they may choose to implement the Trump Administration's Guidelines for Opening Up America Again, which encourages employers to "strongly consider special accommodations" for vulnerable employees such as the elderly, those with serious underlying health conditions, and the immuno-compromised.

Contact Us

If you have further questions or require more information regarding this update, please contact Stacey Bowman, Chris Ottele or your Husch Blackwell attorney.

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.