

LEGAL UPDATES

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Return-to-Work Issues in Wisconsin: The Reopening Begins

Even as fans ask when, if ever, will the Milwaukee Brewers season begin and will the Packers and Badgers even kick off in the fall, with or without fans, on May 11 Andrea Palm, Secretary-Designee of the Department of Health Services, issued the most recent in the series of Executive orders, allowing the opening of stand-alone or strip mall-based retail stores. In person shopping is limited to five customers at a time and the order mandates that such establishments practice social distancing.

Even with that modest beginning, businesses which have suffered partial or complete closure as a result of the COVID-19 pandemic and state or local emergency orders wonder when and how they will reopen. Wisconsin's Safer at Home Emergency Order was issued seven weeks ago, and an extension of the order was published by on April 16, 2020, largely continuing the restrictions on personal and work activity. While many applauded the extension, others protested, and a lawsuit challenging the authority to extend such an emergency order was heard by the Wisconsin Supreme Court on May 5, with a decision imminent.

In the meantime, employees have been furloughed, hours reduced, or jobs eliminated on a long-term basis. According to an article published by the *Milwaukee Journal Sentinel*, some are predicting an unemployment rate of nearly 27% in Wisconsin because of the coronavirus pandemic. This compares to a February 2020 unemployment rate of 3.5%. The Wisconsin Department of Workforce Development indicated that there were over 313,000 weekly claims for unemployment for the week beginning April 25, compared to only 26,352 claims in that same week in 2019. Businesses and the public are anxious to shift the focus to reopening of these businesses and reengagement of employees.

Wisconsin emergency order, "Badger Bounce Back," signed by Secretary-Designee Palm on April 20, 2020, describes a phased approach to reopening the economy based on markers of recovery and readiness, which has now begun. Phase One allows gatherings of up to 10 people and limited reopening of restaurants. Phase Two allows gatherings of up to 50 people with significant easing of restrictions on restaurants, bars and non-essential businesses. Phase Three begins a full swing back into nearly unrestricted market activities, while still practicing heightened personal and facility vigilance.

According to a report published on May 8 by the USA Today Network, the state is experiencing positive trends in the number of influenza-type illnesses, COVID-like illnesses, the percent of tests that are positive, and COVID-19 cases among health care workers, which are among the measures called for by the Badger Bounce Back plan. In addition, specific Reopen Guidelines were issued by Governor Evers's administration on May 8 to help businesses in creating and refining reopening plans. Specific protocols were offered for a variety of industries, including Agriculture, Construction, Entertainment/Amusement, Gym & Fitness Centers, Hair & Nail Salons, Hospitality/Lodging, Manufacturing, Professional Services, Restaurants, Retail, Transportation and Warehouse/Wholesale Trade. General Guidelines were also published.

In the meantime, Wisconsin's largest business lobby, Wisconsin Manufacturers and Commerce, has developed and is now lobbying for its own phased in plan for return to work. Termed the "Back to Business" plan, it identifies specific regional risk factors which would be addressed on a platform using an algorithm to determine the risk for individual businesses.

Whenever the broader reopening of the state is allowed, there will be changes affecting the employer/employee relationship. According to a Society For Human Resource Management poll during the first week of April, 19% of the respondents had already decreased pay rates and another 20% were considering that measure, and 15% of the organizations had permanently cut headcount with no intent to rehire. Further, for those who rely upon incentive pay or commission pay plans, there may be very significant changes in income, unless those plans are addressed.

It is with that in mind that we offer a few tips for employers who are making changes in staffing and the compensation and benefits provided to their employees:

1. Any changes in employee rates and benefits should be effective prospectively.
2. Layoffs, terminations and reductions in hours or compensation should be announced clearly and confidently, and if such changes are on a scale that triggers the State Plant Closing Law or Federal Warn Act, such impact must be taken into account.

3. The basis for and impact of such changes should be reviewed against laws prohibiting discriminatory intent or impact;
4. Policies that are changed should be changed in writing, distributed to employees in a form that they can understand, and include the caveat that the employer continues to retain its right to make further policy changes at its discretion.
5. To the extent that employees have employment contracts or work under a Collective Bargaining Agreement (“CBA”), employers must carefully review the agreements or the CBA to determine if any change can be made unilaterally or only after joint agreement among the parties.
6. If unilateral changes in employment agreements must be made, and are therefore likely to be challenged by claims of breach of agreement, employers must determine whether a defense of Frustration of Purpose might be employed. Create the necessary record to demonstrate that the purpose of the employment agreement has been so frustrated with the impact of the Covid-19 epidemic, that the basic assumption (an income stream from which compensation can be provided) upon which the contract was founded can no longer be achieved.
7. Return-to-work plans must incorporate the potential that at-risk employees may have a right under the Americans with Disabilities Act to demand reasonable accommodation before returning to work. In many instances, this may be part of a phased return where certain employees are able to continue work at home or incorporate other remote work opportunities, or workplace adjustments are made related to reporting times, entrances, timeclock procedures, proximity to other employees, and other safe work practices.
8. Review the guidelines offered by the Evers Administration, as well as the Husch Blackwell alerts regarding a return-to-work strategy and initial considerations for returning to work, and incorporate that advice into your plans.

While there is an uncertainty introduced by emergency orders, lawsuits and phased back-to-work practices, planning for the certain eventual return to work will be the essential difference between your organization’s robust recovery or continued difficulties to engage in the marketplace.

Contact us

If you have further questions or require more information regarding this update, please contact Tom Godar, Tom Shorter or your Husch Blackwell attorney.

COVID-19 Return-to-Work Resource

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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.