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ALERT

ALERT - COVID-19 - It's time to return to work. Now What?

Employers throughout California are currently, or will soon be, addressing the next phase in employee management – i.e. do I bring my employees back to work and, if so, how do I do it? Like every issue that has come up with COVID-19, this too is uncharted. Did you reduce hours? Did you furlough employees? Did you lay-off employees, but then received a Paycheck Protection Plan loan under the CARES Act ("PPP loan")? Do you have employees over the age of 65, employees with underlying health issues or employees with young children at home who are out of school and daycare? These questions raise concerns for both employees and employers and there is not one right answer or a one-size-fits-all answer.

Can you Provide a Safe Environment ?

In some instances, employers may be able to continue operating with a remote workforce. In other cases, remote working has placed a strain on efficiency and productivity. The question, if you are in a county where you have been given the green light to resume "normal" operations, is whether you can provide a safe workplace under the Occupational Safety and Health Act ("OSHA").

OSHA has suggested that in bringing employees back into the workplace, employers first evaluate how to keep employees safe. With that, OSHA has published certain general guidelines. First, employers should assess the level of risk of COVID-19 exposure for its employees, i.e., low or medium as opposed to high risk categories, like healthcare delivery and support, medical transport, etc.). Additionally, employers should train employees about and enforce rules regarding proper workplace sanitation and hygiene (e.g., washing hands for 20 seconds and using hand sanitizer). Employers should provide employees with personal protective equipment ("PPE") (face coverings, etc.), for use in the workplace. Next, assess and implement, if necessary, administrative controls such as cessation of nonessential activities, staggering shifts, limiting customer access, social distancing and encouraging sick workers to stay home. Also, assess and implement engineering controls such as physical barriers, and/or partitions. Finally, employers must take seriously and investigate any employee concerns regarding unsafe working conditions or workplace hazards.

Employers should be prepared to be able to demonstrate their good faith efforts to reduce or eliminate COVID-19 hazards in the workplace.

Can you Re-open your Business ?

At this point, there exist orders, laws, ordinances, rules and guidance being issued by the federal government, the state and individual counties that are not always entirely consistent. In determining whether your business may reopen, and bring employees back into the workplace, you must consider all of the orders that are applicable to your business.

On March 19, 2020, Governor Gavin Newsome issued an executive order that ordered all individuals living in the State of California to stay home except for essential needs (the "Executive Order"). The Executive Order, however, exempted activity necessary to maintain critical

infrastructure sections. Guidance was issued outlining those sectors of the workforce that were considered "essential". These included portions of healthcare and public health, emergency services, food and agriculture, energy, water and wastewater, transportation and logistics, communications and information technology, government operations, critical manufacturing, financial services, chemical, defense industrial base, industrial, commercial, residential and sheltering facilities. We expect additional guidance from the Governor's office by Friday, May 8, 2020, outlining how certain retail, manufacturing and logistics businesses will be able to reopen. This is part of the "Stage 2" opening. Importantly, however, counties may choose to continue more restrictive measures past May 8, 2020, despite the State moving from the more restrictive shelter-in-place mandate, "Stage 1", to a less restrictive "Stage 2".

In Contra Costa County, the Contra Costa Office of Health issued a new order on April 29, 2020, effective May 3, 2020, which extended shelter in place orders through May 31, but eased some restrictions ("CCC Order")[1]. This included expanding the definition of "essential businesses" which allows certain businesses to reopen. Under the CCC Order, if certain specific safety protocols are met, all construction projects and real estate transactions can resume. Outdoor businesses can also begin operating. These include wholesale and retail nurseries, landscapers and gardeners. Recreational facilities that do not involve shared equipment or physical contact may also resume.

Although the CCC Order is generally consistent with the Executive Order, businesses are cautioned to utilize the stricter of the two (2) orders when determining whether they are permitted to reopen.

You may Safely Reopen and You're Permitted
to Reopen, so how do you bring back your employees ?

A lot of employers were faced with the difficult decision of transitioning employees off of their payroll in an effort to maintain minimal business operations during the stricter shelter in place orders. Whether you were an essential business or not, most businesses were forced to make some modification to how they would operate. Federal guidance suggests that in returning from those adjustments, businesses should be opened in phases depending on their ability to adhere to guidelines intended to limit the transmission of COVID-19. If a phased return is implemented, the same guidelines regarding evaluating business need and utilizing non-discriminatory procedures will be paramount.

Certain businesses were able to weather the storm by reducing employee hours. This, in some instances, allowed the business to operate at a decreased capacity while allowing employees to receive partial unemployment. As we move into Stage 2 and the CCC Order continues to be modified to expand the essential businesses that may resume operations, employers may be in a situation where they can start increasing hours. In increasing employee hours, employers should be looking to evaluate business needs and consistently offering additional available hours to those employees where the need is arising. Additionally, employers should provide their employees with at least one (1) week notice before increasing employee hours.

Furloughed employees are those employees that performed no work for the business for a specified period of time, but were not laid-off, i.e., they remained an employee on payroll or benefits purposes and were not provided a final paycheck, etc. So long as the intent at the time of the initiation of the furlough was to return the employee to work, and the furlough lasted less than six (6) months, written notice should be sent to all returning employees, at least one (1) week prior to the expected return date, informing them that they are being recalled to the workplace. In some instances, an employee may opt not to return, may wish to utilize a leave entitlement or may have a personal issue that prohibits their ability to return. The more notice that you can provide to an employee before recalling them from a furlough, the more time both the employee and employer will have to plan for a return to work.

Where employees were laid-off and an employer now wishes to bring them back, employers will be required to proceed with the hiring process that they set forth in any applicable policies and procedures manual. In some instances, employers may have policies that allow for the re-hire of an employee within a certain period of time without the need for all of the pre-employment procedures utilized for a new hire, i.e., pre-employment drug tests, background checks, etc. If not, employers may wish to proceed with their normal hiring process or may wish to create a truncated process for the situation in question. Importantly, employers must utilize the same process for all employees that were laid-off and rehired. Problems can arise if an employee being rehired is required to be subjected to all pre-employment procedures and others are not.

When bringing employees back to work, whether from reduced hours, furloughs or layoffs, an employer needs to put together a plan that objectively assesses the business' needs in relation to the responsibilities of each of its employees in order to determine and put in place a structure of returning employees to work. Just as plans to reduce hours, furlough and layoff were done consistently, returning employees to work needs to be evenhanded, based on legitimate business needs and nondiscriminatory.

New laws and Returning to Work

Even with a plan in place, employers will need to consider the implications of legislation passed over the course of the last seven (7) weeks will have on both employees and employers. This includes the passage of the Families First Coronavirus Relief Act ("FFCRA") in March 2020. Under the FFCRA, the Emergency Paid Sick Leave Act ("EPSL") and Emergency Family and Medical Leave Expansion Act ("FMLA Expansion Act") were created. Both currently expire on December 31, 2020 and, therefore, may impact returning employees to work prior to that date. Employees that are being asked to return to work may still have entitlements to one or both of these leaves.

EPSL provides a full-time employee with eighty (80) hours of paid leave for six (6) specified reasons. [*See*, Families First Coronavirus Response Act, March 20, 2020 [FFCRA].] Among such reasons is allowing the use of EPSL for an employee that is subject to a Federal, State or local quarantine or isolation order related to COVID–19. As stated above, California is still subject to a state wide shelter in place order and numerous counties have extended their shelter-in-place requirements until the end of May. Therefore, employees may request EPSL believing that they have not been authorized to return to the workplace.

The FFCRA also created the FMLA Expansion Act. Under the FMLA Expansion Act, an employee that is unable to work (or telework) due to a need for leave to care for their child if the school or place of care has been closed, or the child care provider is unavailable, due to COVID-19, is entitled to up to twelve (12) weeks of leave. [*See*, Families First Coronavirus Response Act, March 20, 2020 [FFCRA].] Under both the Executive Order and CCC Order, most schools and daycare centers are not yet permitted to open. This places employees with young children asked to return to work in an untenable situation of choosing between caring for their children and their job. Employees that have not already utilized this twelve (12)-week leave entitlement, may request it as soon as an employer sends notice that the employee is to return to work. Failure to provide the leave could give rise to claims for retaliation, among others.

Additionally, under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), employees that were laid-off or furloughed may feel that the benefits they are receiving under state unemployment and the federal enhancement to unemployment, make remaining out of work more lucrative than returning to work and potentially becoming ineligible for state and federal unemployment benefits. This is an individualized analysis, but something many employers are already finding themselves facing. (See below regarding employees refusing to return to work.)

The CARES Acts also created stimulus packages for employers. This includes the highly publicized Paycheck Protection Program. The Paycheck Protection Program provided small businesses an opportunity to garner SBA loans from approved financial institutions that may be forgiven if certain requirements are met. [*See*, The CARES Act and Small Businesses, March 31, 2020 [CARES Acts].] Although we are still waiting for specific loan forgiveness guidance, we know that loan forgiveness will be dependent on the use of the PPP loan for qualifying expenses during the eight (8)-week period after receipt of the loan. This, of course, provides an employer incentive to bring employees back to work as soon as the employer receives a PPP loan. Essentially, an employee's paycheck could be paid entirely by the potentially forgivable PPP loan. However, as stated above, returning employees to work requires considerations of business needs and a consistent, nondiscriminatory procedure. Jumping to re-hire employees without such considerations could give rise to claims based on the failure to evenhandedly administer the return of employees.

Employees Refusing to Return to Work

Employees may refuse to return to work for numerous reasons – e.g., the employee has a higher risk for developing severe symptoms if they contract COVID-19, the employee fears for their health or the health of household members, the employee is unable to obtain childcare for minor children, or other reasons related to COVID-19. Clearly communicating with employees will be imperative in the effort to alleviate anxiety and fear, and/or develop an accommodation that addresses an employee's individual needs.

Generally, the Americans with Disabilities Act ("ADA") does not provide an employee with a general right to refuse to return to work due to a disability. Failing to return to work is a complete refusal to fulfill the essential functions of the job. Moreover, a generalized fear of COVID-19 is not, at this point, a covered disability. However, where an employee does have a recognized disability, engaging in the interactive process with the individual employee is warranted. In fact, whether a covered disability or not, it would behoove an employer to engage in the "interactive process" with the employee to discuss any reasons or concerns which she/he has in regard to returning to work. The interactive process is merely the communication between the employee and employer to determine how to allow the employee to return to work.

What about employees that are refusing to return to work without a stated reason, but presumably due to the fact that they are earning a sufficient income while receiving state and federal unemployment? First, guidance has been issued by the U.S. Department of Labor finding that "barring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept." This, of course, plays into the cornerstone of unemployment benefits, i.e., the inability to find suitable work.

Importantly, on May 4, 2020, the SBA issued a new set of frequently asked questions ("FAQs") and included the question of whether a laid-off employee's refusal to return to work, even after an offer to rehire, will reduce the loan forgiveness amount for a PPP loan. The U.S. Department of Treasury answered this question stating that under the "*de minimis*" exemption from the CARES Act, laid-off employees can be excluded from the loan forgiveness reduction calculation if the borrower offers to rehire the employees (for the same salary/wages and same number of hours), and the employees decline the offer. The SBA's new guidance further reminds employers to advise employees that they may forfeit their eligibility for unemployment compensation benefits if they refuse an offer of rehire.

In order to trigger this exemption, employers must properly document each employee's refusal to return to work. Specifically, employers must be able to provide proof of a good faith, written offer of rehire, and the employee's rejection of that offer.

Although this is great news for employer's concerned about the impact that an employee's refusing to return to work will have on PPP loan forgiveness, the use of the de minimis exemption remains uncertain. It is unclear how the exemption will apply where an employer alters the terms and conditions of employment in extending a rehire offer; for example, where an employer reduces pay rates or scheduled hours for returning employees. Additionally, the SBA may not excuse widespread refusals if they dramatically impact the employer's average full-time employment numbers. The SBA is expected to issue an "interim final rule"[2] that will, hopefully, provide further guidance.

Further Employer Considerations

With the constantly changing landscape, employers may also want to consider the possibility of obtaining employer's liability insurance ("EPLI"). Such insurance could provide coverage for retaliation, harassment or discrimination claims. Although we are hopeful that claims do not arise out of the uncharted territory we all have had to wade through, plaintiffs' attorneys have made it clear that they are watching how employers handle their employees through these times.

Additionally, in situations where employees are not returning to work, employers may wish to consider the severance option. Severance payments have been included as one of the permissible categories of payments to employees for which PPP loan may be utilized. Employers, however, should be cognizant of how dismissing an employee could impact the forgiveness calculation that utilizes the number of full-time equivalent employees.

If you have any questions or would like to discuss your specific situation, please feel free to reach out to us.

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[1] The CCC Order covers everyone living or working in the counties of Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara, as well as the City of Berkeley.

[2] An "interim final rule" is merely a rule issued, in this case by the SBA, that can be subject to comments at the time the rule is promulgated. An interim final rule allows an agency to act within a specified time shortly after the law takes effect. It allows the agency to provide further guidance on the law.

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