



# Getting Practices Back to “Normal”: HR Best Practices and Legal Compliance Issues

Kim Korando, Partner at Smith Anderson

Dee Brown, Advisor at HR Experts

JUNE 4, 2020

# Agenda

1. **Strategy for Returning to Work—The Three Rs of Recovery**
2. **Recalling Employees**
3. **Receiving Unemployment Benefits**
4. **Refusal to Return to Work**
5. **Safety and Health**



# Strategy: The Three Rs of Recovery

- » Reopening
- » Recalibration
- » Resilience



## STRATEGY FOR RETURNING TO WORK

# Reopening

» Follow the three **Ws**, regardless of risk level or screening process:

- **W**ear a face covering
- **W**ash your hands
- **W**ait six feet apart
- **S**et up workstations six feet apart

## STRATEGY FOR RETURNING TO WORK

# Reopening

- » Temperature screenings and symptom questionnaires
  - Helpful, but no foolproof method currently exists
  - Virus-spread exists through those who are asymptomatic
  - Be safe and require all employees to comply with the three **Ws**

# Reopening

- » Stay connected with employees every step of the way.
  - Help them feel safe when returning to the office.
  - Frequent communication with your employees is imperative during this time.
  - Let them know what the organization is doing to keep them safe and healthy.
  - Tell them any changes you are planning.
  - Give them advance notice of reopen dates so they can prepare.

# Recalibration

- » Be mindful of the individual rather than issuing a blanket policy.
  - Policy issues like sick leave, vacation time, PTO, and performance expectations will require a more personal touch.
  - Individual circumstances should and must be considered to alleviate employee anxiety and fear.
  - Let employees know you see them as individuals and use their unique circumstances to update your decision tree and policy implementation.

# Recalibration

- » Think in terms of shorter timeframes, not long-term planning.
  - We are still in the midst of a global pandemic.
  - Leadership should put in place 30-, 60-, and 90-day plans before focusing on annual or five-year plans.
  - There's no doubt the new normal will continue to require frequent pivots.
  - For now, focus on where you are today, tomorrow, and next week.



# Resilience

» Balance empathy with productivity.

- Many employees are comfortable working at home now.
- Most will experience hesitation, fear, and anxiety about returning to the office.
- Consider a new operating model that balances compassion with desired business outcomes.
- Some find that remote work allows for less hours in the chair but more productive, creative, and engaged employees.
- Explore how each role in your organization can best achieve both productivity expectations and employee wellness.
- Employee well-being is now a critical business strategy.

# Resilience

- » Make the best fact-based decisions but keep asking for feedback.
  - Make informed recovery decisions based on the data you possess.
  - Be prepared to pivot quickly as new information emerges.
  - Include information gleaned from frequent check-ins with your employees.
  - Keep in mind that experts say we will feel the mental and emotional effects of the pandemic as far as six months down the line, if not longer.
  - Understand that moving forward, all decisions will be made through the COVID-19 lens.

# Recalling Employees



## RECALLING EMPLOYEES

# Recall Notice

» Should include:

- Safe work and related policies
- Schedule and pay
- Notice to stop filing weekly UI certification
- Consequences for failing to report as requested

## RECALLING EMPLOYEES

# Recall Notice

» Should not include:

- Language that could be interpreted as promises or commitments as to job security or otherwise alter at-will employment

## RECALLING EMPLOYEES

# Exempt Staff

- » Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.
- » Physicians are not subject to any salary requirements. Deductions from the salary or pay will not result in loss of the exemption.

# Pay Reductions

- » Non-exempt employees: Pay rate reductions are permitted with proper notice (must pay no less than minimum wage)
- » Exempt, salaried non-physician employees: Temporary reductions or variations in pay based on amount of work can result in loss of exemption (consult counsel)

RECALLING EMPLOYEES

# Pay Reductions

- » Refer to “Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues”

<https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>



# Receiving Unemployment Benefits



# Recall and Unemployment

- » UI is generally available when out of work, hours are reduced, or pay is reduced for qualifying reasons.
- » Recall can impact eligibility or amount received.
- » Notify employees to stop filing UI weekly claim.
- » Continuing to file the weekly UI claim is fraud.

## RECALLING EMPLOYEES

# Notification to State Agency

- » Attached claims employers can report recall or increase in hours.
- » Nonattached claims employers could report to state agency.
- » Provide UI notice that employees have not returned to work.
- » Provide UI the dates work became available.
- » UI will review and determine the employees' eligibility.

# Refusal to Return to Work



# Reasons for Refusal

- » Economic (UI pays more)
- » Family care obligations (FFCRA and FMLA)
- » Health restrictions (ADA/FMLA/EPST)
- » Safety concerns (OSHA)
- » Government order prevents return (state or local order)

REFUSAL TO RETURN TO WORK

# Family Care Obligations

» FFCRA expanded FMLA

- Coverage (< 500 employees)
- Eligibility (employees with at least 30 days service)
- Healthcare provider exemption or < 50 employees
- Benefits (childcare leave due to COVID-19 school/childcare closure)

REFUSAL TO RETURN TO WORK

# Family Care Obligations

## » FMLA

- Coverage ( $\geq 50$  employees)
- Eligibility ( $\geq 12$  months service, worked  $\geq 1250$  hours in last 12 months,  $\geq 50$  employees in 75-mile radius)
- Benefits (leave to care for spouse, child, or parent with serious health condition)

REFUSAL TO RETURN TO WORK

# Family Care Obligations

- » UI for failure to return to work
  - State law governs
  - May qualify for COVID-19-related inability to return



REFUSAL TO RETURN TO WORK

# Health Restrictions

- » ADA duty to reasonably accommodate (15 or more employees)
- » FMLA leave due to employee's own serious health condition
- » EPSL paid sick leave for certain COVID-19-related absences

# Safety and Health



# Health Screenings (ADA, FSLA)

» Practice **may**:

- Ask employees calling in sick whether they have COVID-19 symptoms
- Require employee temperature check or COVID-19 (virus, not antibody) test before, during, and/or after work
- Compensate for time spent waiting/during test (must pay them)
- Require employees who report COVID-19 symptoms to stay home and require doctor's note before returning to work
- Ask employees to report travel activities

# Health Screenings (ADA, FSLA)

» Practice **may not:**

- Disclose any employee health information (including COVID-19 symptoms, diagnosis, or test results) to employees, supervisors, or others (sole exception: public health officials)
- Ask employees whether they have a medical conditions that makes them vulnerable to COVID-19 complications

# Vulnerable Workers (Age/Medical Conditions) (ADA)

- » Limitation on ability to impose unwanted restrictions on employees
  - Individual direct threat analysis required
  - Even if a direct threat exists, reasonable accommodation mitigation must be considered
- » Employee request for reasonable accommodation
  - Identification and evaluation of requested accommodation through interactive process is required

# Safe Workplace Precautions

- » Review local, county, and state government ordinances to determine whether such ordinances will impact your process
- » Train staff on new policies and procedures
- » OSHA Guidance Healthcare: <https://www.osha.gov/SLTC/covid-19/healthcare-workers.html>

# Safe Workplace Precautions

- » OSHA requirements apply to preventing occupational exposure to SARS-CoV-2
- » Among the most relevant are:
  - Personal Protective Equipment (PPE) standards
  - General duty clause
  - Bloodborne pathogens standard (go-by)
  - COVID-19 is a recordable illness

# Safe Workplace Precautions

- » COVID-19 is a recordable illness if:
  - A confirmed case of COVID-19, as defined by the CDC;
  - Work-related as defined by 29 CFR § 1904.5; and
  - Involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.
- » Medical offices are generally exempt, but they must report death, hospitalization, or some other serious illnesses/injuries to OSHA  
<https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>



# Questions?