WESTERN NEW YORK
THE DAILY RECORD
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Advocate's View: Top 5 COVID-19 issues for employers to consider in the summer of 2020

By: Stacey A. Trien June 17, 2020 0

Stacey Trien

As we reach the three-month anniversary of the COVID-19 Pause requirements in New York State, this is the time for employers to conduct an audit of their policies to ensure compliance with new requirements. These are the top five COVID-19 issues for employers to consider as we enter the summer of 2020.

1. **Business Safety Plan**

In just the past few weeks New York has transformed from entirely "on pause" except for essential businesses, to a multi-phase re-opening plan by region. If you currently have any employees working on-site in New York state, you are required to create a written Business Safety Plan and certify compliance online.

The fine for failing to prepare and adhere to the Business Safety Plan is $1,000.00 per incident (and the New York State on Pause website has a handy link to "file a complaint against your employer or place of work" or to "file a complaint about a business, location or incident in your community"). Creating and following the Safety Plan will also provide some liability protection in the event that the employer is the subject of a claim for COVID-19 related damages by employees, customers, clients, or visitors.

The State provides a template Business Safety Plan for each industry online at forward.ny.gov. Every employer is required to utilize the template applicable to its industry and customize the policy to meet your particular physical

location and staffing needs.

Every employer that is "open" is also required to read and affirm compliance with the state's guidelines for their particular industry online. The forward.ny.gov website has a link for each industry sorted by the opening phase, and an owner of each company is required to complete a simple form, and certify that: "I am the owner or agent of the business listed. I have reviewed the New York State interim guidance for business re-opening activities and operations during the COVID-19 public health emergency and I affirm that I have read and understand my obligation to operate in accordance with such guidance." This is accomplished by completing the online form and clicking Submit.

Generally the safety plans contain industry-specific requirements such as personal protective equipment (PPE), a maximum number of employees and/or customers, and for some industries a log identifying all persons who entered the business for contact-tracing purposes and a log detailing cleaning and disinfecting schedules.

The written plan should be strictly followed, and any changes in protocol should be revised in the written plan. The plan should advise employees to provide any suggestions as to how to improve the plan to a safety plan administrator. Encouraging an open dialogue with employees increases the likelihood that they will voice concerns internally (rather than reporting to the state via the website link mentioned above). Having your administrator reach out to employees to ask for their opinion as to how the plan is working, and to seek suggestions as to how it can be improved, is another way to encourage a productive dialogue.

2. **New Required Notices**

There are several coronavirus-related laws that require employers to post new notices. If some or all of your workforce is working remotely, the notices should be distributed by email and posted at the job site.

You should post your Business Safety Plan, and/or send it by email to employees.

If you have 500 or less employees, you are required to post the provisions of the federal COVID-19 related paid leave laws under the Emergency Paid Sick Leave Act (providing 80 hours of sick leave) and the Emergency FMLA Expansion Act (providing 90 days of paid leave to take care of a minor child due to school or childcare closure). At this time, these laws remain in effect through December 31, 2020. If employees are working remotely, this should be distributed by email. The U.S. Department of Labor provides a poster for employers at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

3. **Medical Records Policy**

In the COVID-19 workplace, employers are now responsible for maintaining various records related to their employees' health which should be treated as confidential medical records. Under the Americans With Disabilities Act ("ADA"), the employer must maintain medical records in a file that is separate from the employee's personnel file.

The state's model Business Safety Plans require employers to conduct daily health screenings of employees to ask if they have any COVID-19 symptoms, which may be performed by a questionnaire and/or temperature check. Any records regarding employee health screenings should be treated as confidential medical records.

If an employee seeks leave for COVID-19 related reasons, the employer should engage in a dialogue with the employee and request copies of relevant medical records. Those records should also be maintained as confidential medical records.

If an employee tests positive for COVID-19, the employer is required to report this to the County Health Department, which will provide instructions as to contact tracing and possible quarantine and testing requirements for employees. Other than as required by the County Health Department, the employer must maintain the confidentiality of the sick individual's medical condition and medical records. This generally means that the employer will advise other employees who may have had contact of the fact that an employee tested positive, without revealing the identity of the sick individual.

4. **Record Retention**

Documents and records indicating that the employer has complied with COVID-19 protocols will be crucial in defending against a variety of potential claims by employees, clients, customers, and visitors. Employers should

make and maintain records of their Business Safety Plan, sign-in/attendance logs, cleaning logs, and any emails and other documentation related to any COVID-19 related leave.

If any employees request paid leave under the Emergency COVID-19 leave laws, the employer should obtain a written statement from the employee as to the reason why they are seeking leave and maintain that statement in their personnel file (or medical records file if the document contains medical information).

Generally employers in New York are required to maintain employee records for six years. If the employer intends to utilize the tax credits afforded by the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act, the IRS requires that employers retain all relevant documentation for at least four years.

5. **Protocol to Decide Which Employees to Bring Back From Leave**

An employer that is re-opening should formulate a strategic plan to determine which employees it will bring back to work and whether to hire new employees.

If an employee is on paid leave for COVID-related reasons under the state or federal Paid Sick Leave Act, the Emergency FMLA Expansion Act, or on regular FMLA leave, they are on "job-protected leave," meaning they are generally entitled to come back to the same or an equivalent job when the leave period ends. There are some exceptions to this requirement, for example if the entire worksite was closed and there is no position, or if the employer has less than 25 employees and can prove substantial financial hardship, but even in those instances the employer is usually required to make reasonable efforts to re-hire the employee and to contact the employee if a position becomes available. An employer cannot fire an employee for taking this type of paid leave, or it may be liable for retaliation.

Workers who are on furlough or who were laid off or terminated generally are not entitled to this type of job protection (unless they have protections under a collective bargaining agreement or other employment contract). When considering which of those employees to bring back, employers should ensure they are not discriminating on the basis of a protected class, including disability, age, race, national origin, religion, gender, sexual orientation, or gender identity.

An employer cannot refuse to rehire employees who are considered to be in a high-risk category with respect to COVID-19, including workers who are 65 or older, have a pre-existing condition, or are pregnant. Failing to rehire employees because they are in one of these categories, or refusing to allow them to work on site, would constitute discrimination under state and federal employment discrimination laws. While an employer may offer those

employees the voluntary option to telework or to stay on furlough status, it cannot refuse to re-hire the employees simply because they are at a higher risk.

An employee with a physical or mental health condition that puts them at a higher risk for COVID-19 complications may be entitled to an accommodation for their disability, which could include altering job duties, telework, or unpaid leave. The employee must request an accommodation, and the employer may require medical documentation to support the request. If the request is valid and will not cause substantial hardship to the employer, the employer will be required to provide the accommodation.

According to recent EEOC guidance, the employer's duty to accommodate only applies to physical or mental disabilities under the ADA, there is no similar requirement to provide accommodations to older people under the Age Discrimination in Employment Act. This means that if an employee asks to stay home because they are over 65 and at higher risk, the employer is not required to comply with that request (unless the employee also has a qualifying physical or mental disability, in which case they may be entitled to an accommodation). An employer may voluntarily offer to provide this type of accommodation to older employees, but they are not legally required to do so.

Stacey E. Trien is a partner with the Rochester law firm of Adams Leclair LLP, where she concentrates her practice in civil litigation with an emphasis on employment law and contractual disputes. She can be reached at strien@adamsleclair.law or through the firm's website at www.adamsleclair.law.