Reopening the ‘New’ Workplace:
Avoiding Employment and Safety Issues During the COVID-19 Crisis

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Complying with Government Directives

- Roadmap to Safely Reopen Indiana (Executive Order 20-26)
- Keep in mind
  - State-by-State
  - Local restrictions – i.e., Mayor Hogsett’s plan for Marion County and the City of Indianapolis
What does the Governor’s Order Require?

- Phased Approach (five stages) – currently in Stage 3
- Employers must develop a plan to implement measures and institute safeguards to ensure a safe work environment
  - Must address an employee health screening process
  - Enhanced cleaning and hygiene measures
  - Social distancing
  - CDC and IOSHA guidelines
- Seek Counsel or Other Resources for Interpretation
  - Indiana - Critical Industries Hotline, for business and industry questions only: 877-820-0890 or covidresponse@iedc.in.gov
Consider Actual Company Needs

– *Don’t Move Too Fast* - Just because you can reopen, that does not mean that everyone should return to the workplace

– *Productivity* - Some employees may be just as productive while working remotely

– *Essential Sectors First* - Essential job functions that cannot be conducted remotely should be first priority for returning to the workplace
Consider a Phased Approach

- Different types of phased approaches for returning to work:
  - Prioritize essential sectors first
  - Allow employees to return on a voluntary basis
  - Alternate schedules or stagger shifts
  - Have specific employees serve as a “skeleton staff”

*Of paramount importance is good communication. The safer the employee feels about being in the workplace, the more likely he or she will embrace returning to the workplace.*
Change the Way You Do Business

Four Important Safety Changes

• Eliminate Unnecessary In-Person Meetings

• Restrict Third Party Visits

• Restrict Unnecessary Travel

• Enforce Social Distancing Policies
Specific Types of Employees

• Employees impacted by school and child care closures

• Employees who depend on public transportation (high risk COVID areas)
  – Offer incentives such as parking reimbursement or single occupancy ride shares
  – Allow employees to shift their hours to commute during less busy times

• Employees who are at higher risk for severe illness
Employees at Higher Risk for Severe Illness

- Recent CDC Guidelines
  - COVID-19 creates higher risk for severe illness for older adults (over 65) and people with “serious underlying medical conditions”
  - Chronic lung disease, severe asthma, serious heart conditions, immunocompromised systems, severe obesity (BMI 40 or higher), chronic kidney disease (dialysis), liver disease
  - CDC encourages employers to “support and encourage options to telework if available” and offer such workers duties that “minimize their contact with customers and other employees”
Employees at Higher Risk for Severe Illness

- Recent EEOC Guidelines (which are updated constantly)
  - **ADA Considerations** – generally employers cannot make disability-related inquiries except under limited circumstances, such as where there is a “direct threat” – a significant risk of substantial harm to self or others even with a reasonable accommodation
  
- **COVID-19 Pandemic Standards (which have been triggered for now)**
  
  – Relaxes certain ADA standards during a pandemic and allows employers to make certain inquiries to maintain a safe workplace.
  
- **What to do with this information?** Depending on circumstances (which differs for each person), may need to engage in interactive process and provide a reasonable accommodation of telework where available
Recalling Temporarily Laid Off Employees

- **Business Needs** - Consider the business necessity and the Company’s finances

- **Documented Criteria** - Use objective criteria and avoid discrimination issues – make recall decisions based upon job functions, business needs and documented criteria.

- **Reprocessing** - Reprocess employees correctly
What if the employee refuses to come back?

• The big players:
  – National Labor Relations Act
  – Families First Coronavirus Response Act
  – Americans with Disabilities Act
    o Be careful with the ADA – you can open yourself up to liability if you refuse to recall certain workers out of concern for their health

• Unemployment considerations
  – Not eligible if the employee refuses “suitable work”
  – Some states have said workers who refuse to work can continue to collect benefits if they are at a higher risk for severe illness
Track Benefits Correctly

- FFCRA Benefits (E-Paid Sick Leave and E-Family Medical Leave)
  - Benefits may be triggered depending upon changes to workforce or the circumstances of a particular employee
- Unpaid FMLA (serious health condition)
- Company Additional Leave Policies and Accrued Benefits
- No retaliation for leave requests and use!
Return to Work Protocol & Procedures

• Employers should implement and enforce infection control practices and procedures
• Employers should inform employees of the safety or prevention measures they have taken
• Employers should provide employees with the protocols that employees are expected to follow
• Employers should provide employees RTW training
Health Screening & COVID Testing

- Employers may test employees before they enter the workplace to determine if they are infected with the virus
- Employers must ensure that tests are accurate and reliable
- Request that employees entering the workplace self-monitor and report any COVID-19 symptoms – certifications
- Employees to notify supervisor and go home
- Keep employee medical records in a separate file
Taking Temperatures

- Employers can measure employees’ body temperature
- Temperature check options
- Notify employees of temperature screening in advance
- If testing is done onsite, how to maintain social distancing for employees waiting to be tested
- Send any employee home with an elevated temperature
What if an employee displays symptoms or tests positive for COVID-19?

• Send the employee home immediately
• Ask the employee to identify those with whom he or she had “close contact” in the 48-hour period prior to experiencing symptoms
  – Confidentiality is key!
• Decide to quarantine or self-monitor
• Deep clean the workplace
Social Distancing Considerations

• Analyze workplace modifications required to maintain social distancing
• Consider new workspace layout or physical barriers between work stations
• Consider new working time arrangements
• Improve ventilation
• Consider use of face coverings
Sanitation and Hygiene

• Promote proper handwashing and hygiene
• Advise employees not to shake hands, fist bump, etc.
• Provide cleaning supplies in common areas and at work stations throughout the facility
• Hand sanitizing stations in common areas and throughout the work place
Communication is Key!

• Provides guidance and direction for everyone

• Creates a sense of security and peace of mind

• Open dialogue to avoid potential claims
Protective Measures for Safety & OSHA Precautions and Guidelines

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OSHA Enforcement

- OSHA does not have a specific standard for infectious disease or pandemic preparedness/response.
  - But, OSHA can use the general duty clause
- Other standards may apply:
  - Personal Protective Equipment (PPE) requirements, such as eye/face, respiratory, and hand protection (29 CFR 1910.132-134, 138)
  - Sanitation/housekeeping requirements (29 CFR 1910.141)
  - Access to employee medical and exposure records (29 CFR 1910.1020)
  - Bloodborne pathogens (29 CFR 1910.1030)
  - Hazard communication (29 CFR 1910.1200)
  - Injury and illness recordkeeping and reporting (29 CFR Part 1904)
OSHA’s Initial Interim Enforcement Response Plan for COVID-19
April 13, 2020

• Inspections of COVID-19-related complaints of workplace hazards limited to high and very high risk jobs/workplaces
  – E.g., hospitals treating COVID-19 cases, first responders, biomedical laboratories, etc.

• Otherwise area offices were to use rapid response investigations (RRI)

• On-site inspections were to be done virtually to the extent possible, limited in-person enforcement activity
OSHA’s Updated Interim Enforcement Response Plan for COVID-19
May 26, 2020

• OSHA authorized area offices to resume regular on-site inspection planning in geographic areas where infection rates are declining.
  – Continue using non-formal phone/fax investigations or RRI where OSHA has historically done so (i.e., to address complaints)
OSHA’s Updated Interim Enforcement Response Plan for COVID-19
May 26, 2020

• In geographic areas experiencing sustained elevated community transmission or resurgence of infection rates, area offices to:
  – “Continue prioritizing COVID-19 fatalities and imminent danger exposures for inspection. Particular attention for on-site inspections will be given to high-risk workplaces, such as hospitals and other healthcare providers treating patients with COVID-19, as well as workplaces with high numbers of complaints or known COVID-19 cases.”
OSHA’s Updated Interim Enforcement Response Plan for COVID-19

May 26, 2020

• In geographic areas experiencing sustained elevated community transmission or resurgence of infection rates, area offices to:
  – Conduct remote inspections where resources limited (defer on-site until resources allow)
  – Use RRI if resources substantially limited, develop program to conduct monitoring inspections for sites where no on-site or remote inspection done
  – Continue using non-formal phone/fax investigations instead of on-site in industries where doing so can address the hazard(s)
Return to Work Considerations

• Review CDC/OSHA guidance for Manufacturing Workers and Employers
  – Available at: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html
Return to Work Considerations

• Communication with employees is critical
  – Educate employees on workplace reentry, operating, and health and safety protocols
  – Encourage open line of communication with response team or point person(s)
  – Provide training on relevant safety issues, and frequent reminders on safety and health protocols

• Be cognizant of potential for retaliation claims when making personnel decisions
Return to Work Considerations

• Conduct hazard assessment of the workplace and job tasks to determine risk levels and necessary precautions

• PPE selection and provision
  – What PPE must employers pay for?
  – What type of masks to use?
    o Voluntary versus mandatory?
    o Determine whether a written respiratory protection plan is necessary
  – PPE cleaning protocols
  – Employee training
  – What to do if you encounter supply issues
  – Enforcement of PPE requirements is critical
Return to Work Considerations

- Consider other administrative or engineering controls that may be necessary to protect workers and enforce social distancing
  - Physical barriers
  - HVAC/ventilation adjustments, maintenance schedules, etc.
  - Adjust fans to avoid cross-contamination of workspaces
  - Adjustments to traffic patterns in tight office spaces
  - Move or modify alignment of workspaces along assembly lines
  - Use markings and signage to emphasize protocols and worker positioning
  - Add handwashing or sanitizer stations
Return to Work Considerations

• If an employee becomes infected:
  – Remove from the workplace
    o If you are in critical manufacturing sector, can use heightened precautions to keep infected, asymptomatic employees at work
  – Disinfect pertinent areas
  – Trace pre-diagnosis contacts with coworkers, provide notice, implement quarantines
  – Determine whether any OSHA recordkeeping obligations exist
    o All employers must make a reasonable and good faith effort to determine whether an infection is work-related
    o Follow OSHA’s published guidelines, document the analysis of each case
Thank You!

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