EMPLOYER CONSIDERATIONS TO SUCCESSFULLY REOPEN A BUSINESS

Wednesday, April 29, 2020
Webinar Format

- All Lines Muted
- Q&A
- Webinar Will Be Recorded
- Slides Will Be Shared With All Participants
Things are changing rapidly. We are working extremely hard to keep up with all that is happening. This webinar is based on available information as of April 29, 2020, but everyone must understand that this webinar is not a substitute for legal advice. If there are questions about the information contained in the presentation and how it applies to your business, then you should contact your legal counsel. This presentation is not intended and will not serve as a substitute for legal counsel on these issues. Given the complexity and rapidly changing landscape, you must consult with your legal counsel on these issues.
Introduction

- Liability concerns of re-opening
- Utah statute/possible federal statute
- Following CDC/OSHA/state and local health directives/industry directives limits risks
- Outline topics to be covered in webinar
Create a Plan

Susan Baird Motschiedler
Create a Plan – Overarching Considerations

- Tone from the Top
- Communication
  - Frequency
  - Type (written, oral, team meetings, policies)
  - To Whom
- Documentation
  - Assign to specific employees
  - When/How decisions made
  - Confidentiality concerns
  - Records of attendance
Create a Plan – Overarching Considerations

- Resources and Guidance Available
  - Federal: CDC, OSHA, EEOC,
  - State/Local: State, County, City orders, health department guidance
  - Industry and Trade Guidance

- Create Additional Policies/ Review Existing Policies
  - Families First Coronavirus Response Act leave policies
  - Review existing sick policies, emergency plans, remote work policies
  - Protocol for cleaning
  - Protocol for employee, vendor, or customer COVID-19 positive tests
Create a Plan – Physical Space

Physical Space

- Walk through workplace from parking to office
  - Cleaning and spacing concerns
- Identify high traffic/congregation areas
  - Elevator, kitchen, breakrooms, bathroom, secretaries desks, stairwells, copier and supply room, etc.
- Identify spacing concerns
  - Desk/cubicle spacing; office spacing; work floors; stairwells
Create a Plan – Physical Space

- Create protocol for addressing issues
  - Barriers where contact unavoidable (checkouts, ordering, secretary stations)
  - One person at a time, one way aisles, one person assigned to
  - Cleaning protocols and supplies
    - Wipe down after use – copier, kitchen, bathroom, etc.
    - Hire additional cleaners during day
    - Employees responsible for own space, phone, keyboard, etc.
  - Placement of safety items and disposal for safety items
  - Remove knick-knacks, unused furniture, things you have to clean
- No open grazing, buffets, candy bowls
- Involve landlord/other involved parties
Create a Plan – People

Employees/Vendors/Customers

- Who will come back
  - Volunteers, business groups, stagger based on job duties, guidance, etc.
  - Discrimination concerns
  - Application to Vendors/Customers

- When
  - Job Duty function
  - Guidance from authorities
  - Installation of safety measures
Create a Plan – People

- Employees/Vendors/Customers
  - How
    - Staggered schedules – different days, hours, etc.
  - What will be Required
    - Testing and/or notification of exposure
    - Safety gear – face covering, gloves, cleaning requirements
    - Training/Daily Communication
    - Spacing
  - How manage a positive COVID-19 test or exposure
    - Quarantine, doctors note
Create a Plan – Communication

- To Whom?
  - Employees, Vendors, Customers, Landlord

- How/Frequency
  - Frequent and regular training
  - Documents – policies, regular written communication, signage
  - Oral communication – safety huddles, team discussions, phone calls.

- Include guidelines for disciplining non-compliant employees
  - Consistency in application
Create a Plan – Training

- To Whom?

- Daily Team Meetings/Safety Huddles
  - Reminders regarding safety issues – constant training
  - Issues that have arisen
  - Opportunity for Employees to discuss feedback and tips

- Documentation
  - policy receipt, training, and topics covered and attendance at trainings and daily huddles
Following Relevant Guidance

Liz M. Mellem
Follow Relevant Guidance

Your reopening plan should account for, and follow, relevant guidance:

- Centers for Disease Control and Prevention (CDC)
  - CDC has guidance on social distancing and cleaning standards, among others

- Occupational Safety and Health Administration (OSHA)
  - OSHA has significant and extensive regulations and guidance regarding safety of workers and the workplace

- State and Local Guidance – varies widely by location
CDC Guidance

- Identify a workplace coordinator to oversee your COVID-19 plan
- Frequent cleaning and disinfecting of workspaces
  - CDC has a list of over 300 approved cleaning products to use
- Train your employees on how to store and use disinfectants
- Increase social distance between employees and customers
OSHA Guidance and Regulations

OSHA’s information can be both general and industry specific

- Be sure to check whether there are industry-specific guidelines that apply: [https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim](https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim)

- Some general standards for all businesses:
  - Follow existing OSHA standards (including for PPE and chemicals for cleaning)
  - Develop policies and procedures for prompt identification and isolation of sick individuals
  - Develop, implement, and communicate about workplace flexibilities and protections,
  - Implement workplace controls
Montana’s Reopening Plan

- Governor Bullock’s April 22nd directive allows for a phased reopening.
  - Montana is currently in Phase One – schools can decide whether to reopen on May 7; bars, restaurants, breweries can reopen on May 4 for limited service.
  - Employers should have policies and procedures regarding (1) social distancing and protective equipment for workers; (2) temperature checks and/or symptom screening; (3) testing, isolating, and contact tracing in collaboration with public health authorities; (4) sanitation; and (5) use and disinfection of common and high-traffic areas.
  - Encourage telework and implement staggered/alternative shift scheduling.
Facemasks (OSHA Has Two Categories)

Mark A. Wagner
PPE

- A loose-fitting mask that is not intended to filter air (e.g., surgical masks, bandanas, home-made masks)

- Subject to the OSHA PPE Standard 29 C.F.R. § 1910.132
  - PPE (e.g., face coverings) “shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of . . . environment . . . encountered in a manner capable of causing injury . . . through . . . inhalation . . .”
  - Employee-owned: employer is still responsible to assure its adequacy, including proper maintenance and sanitation of such equipment.
PPE

- Must perform a hazard assessment (in writing and certified).
- Must consider alternative options to protect employees (e.g., plastic barriers between workers or workers and customers).
- Must identify and provide appropriate PPE for employees.
- Must train employees in the use and care of PPE.
- Must clean and replace PPE as needed.
- Must create a plan that is periodically reviewed.
Respirator

- Filters the air
  - Close fitted to user’s face with no gaps
  - Examples: n95 masks and above (n99, n100, powered air purifying, etc.)

- Subject to the [OSHA PPE Standard](https://www.osha.gov/pls/oshaweb/owadisp.showoscstand.html).


  - “shall be provided ... when ... necessary to protect the health of such employee. . . .”
Respirator

- Must establish and maintain a respiratory protection program:
  - In writing
  - Including required worksite-specific procedures and elements for required respirator use.
  - Administered by a suitably trained program administrator
  - Includes the following elements, as applicable:
    - Procedures for selecting respirators for use in the workplace;
    - Medical evaluations of employees required to use respirators;
    - Fit testing procedures for tight-fitting respirators;
    - Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
Respirator

- Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and maintaining respirators;
- Training of employees about hazards faced;
- Training of employees in proper use; and
- Procedures for regularly evaluating the effectiveness of the program.
Voluntary vs. Required (It Makes a Difference)

- If PPE is Voluntary
  - No additional requirements, even if employer pays for or provides the masks.
  - Employer should tell employees, preferably in writing, that the masks are not required, and that wearing one is voluntary.

- If PPE is Required
  - Employer must meet the requirements of the OSHA PPE Standard.
Voluntary vs. Required (It Makes a Difference)

- If Respirators Are Voluntary
  - Employer must meet only the “Voluntary Use Requirements” of the OSHA Respiratory Protection Standard.
    - Must determine that respirator will not cause their own hazards (e.g., snagging in machinery).
    - Must provide employee with “Information for Employees Using Respirators When Not Required Under the Standard.”
    - Must make sure masks that are used are clean and in good repair.

- If Respirators Are Required
  - Employer must meet the OSHA Respiratory Protection Standard (above)
Temporarily Relaxed Standards

- March 14, 2020: Temporary suspension of annual fit-testing requirement for health-care workers so long as certain conditions are met.
- April 3, 2020: Temporary suspension of limits on use and reuse of n95 face masks beyond manufacturer recommendations if certain requirements are met.
Determining Whether to Require or Permit . . . and What?

- **Health Care** Respirators should be required (and certainly allowed) for workers likely to encounter persons with COVID-19 infections.

- **General Industry (Non-Health-Care)** CDC says PPE and respirators are least-effective protection because they are subject to user error. That said, voluntary PPE or respirators should be considered, and are recommended in settings where social distancing is difficult.
Some jurisdictions have specific requirements (e.g., Illinois, Michigan, Nebraska, New Jersey, New York, Rhode Island, and certain cities and counties in California, Connecticut, Florida, Hawaii, and Maryland).

- Utah – Utah Leads Together 2.0 Phased Guidelines

Check industry guidelines and best practices, if applicable.

Some leeway might need to be given for ADA reasonable accommodations (e.g., medical restrictions) or religious accommodations (e.g., religious garb).
Screening for COVID-19

Christina M. Jepson
Screening for COVID-19

- Taking temperatures to screen for fever
- Asking about symptoms
- Asking about potential exposure
Screening for COVID-19

- Normally these actions would not be allowed at work except in very unusual circumstances
- A pandemic is an unusual circumstance
- The CDC recommends screening
- The CDC, federal government, and state governments say employees with symptoms should not come into the workplace
- These are only tools—an employee can have COVID-19 and not have a fever, not have other symptoms, and not know about exposure
Taking Temperatures and Screening for Symptoms

- Should keep a log of
  - Either all temperatures or all temperatures above the threshold
  - Any COVID-19 symptoms
  - Any exposure
- Information must be kept confidential
- Separate file
- Only shared on a “need to know” basis
Taking Temperatures and Screening for Symptoms

- Temperature taking and screening must be non-discriminatory
  - Can’t just screen people over a certain age
  - Can’t just screen people with underlying conditions
  - Must check everyone’s temperatures
  - Must screen everyone for symptoms and exposure
Taking Temperatures

- Set a criteria
  - The CDC says that anyone with a temperature of 100.4 has a fever
  - Employers have used cutoffs from 100 to 100.4
  - If someone is at or above the cutoff, they should not come to work until cleared
Screening for Symptoms

- Symptoms
  - Always changing—stay informed
  - CDC
    - Cough
    - Shortness of breath or difficulty breathing
  - Or at least two of these symptoms:
    - Fever
    - Chills
    - Repeated shaking with chills
    - Muscle pain
    - Headache
    - Sore throat
    - New loss of taste or smell
  - Anyone with symptoms should not come to work until cleared
Screening for Exposure

- Exposure
  - Close contact with someone who tested positive for COVID-19 in the last two weeks
  - Tested positive for COVID-19
  - Anyone with a positive test or exposure should not come to work until cleared
  - Travel to a high-risk area—14 day quarantine
Taking Temperatures and Screening

- How will temperatures be taken and screening be conducted
  - At home before reporting to work
  - At work
Temperature Taking at Home

- If employees will take their temperatures and report their symptoms from home, you need to do training on how it will work.

- You need to make sure all employees have access to working thermometers and equipment for screening (computers, apps, telephones, etc.).

- Procedure for calling in and reporting temperatures and answering questions:
  - Taking a photo
  - Taking a temperature on Zoom or FaceTime
Temperature Taking at Work

- Who will take the temperatures?
  - Employee take their own temperatures at work
  - Someone at work with medical training
  - Hire people to come on site
  - Someone at work who is trained
  - Provide PPE for those who take and masks for those having their temperature taken
Temperature Taking at Work

- Thermometers
  - Start early to procure thermometers, supplies for cleaning thermometers, masks, cones, and other supplies
  - Preferably contact free
  - If not, must sanitize between each use
Temperature Taking at Work

- Issues to keep in mind
  - Maintaining social distancing
  - Minimizing crowds
  - Cleaning equipment
  - Cleaning high touch areas
  - Industry guidelines
  - CDC and other health guidelines
Temperature Taking at Work

- Options
  - Outside of the workplace--CDC recommendation that screenings be conducted before entry to a workplace. Physical distancing applies.
  - Drive-thru screening process--traffic controls, signs and markings
  - A trailer or other temporary structure in the parking lot
  - Inside the facility--wash hands, hand sanitizer, physical distancing, tape, parking cones, set up “lanes” on the floor
Screening – Failure to Pass

- Failure to pass
  - When employee will be allowed to return to work
  - Procedures for returning to work
  - Whether remote work is available
Screening – Failure to Pass

Follow-up

- Determine if employee was tested and result
- Determine if employee obtained medical advice indicating a likely COVID-19 diagnosis
- Notify appropriate individuals with whom employee had contact in accordance with CDC guidance, confidentiality considerations under the ADA and state law
Screening – Failure to Pass

Return to work procedures.

- Employees with a fever or other symptoms should **not** return to work until the following criteria are met:
  - The employee certifies in writing that the employee is fever-free and has been **completely** symptom free for at least three (3) days; **AND**
  - At least seven (7) days have passed since the later of the onset of symptoms that led to the employee being sent home or a positive COVID-19 test.

OR

- The employee provides documentation from a medical provider confirming that the employee can return to work, that the employee had a negative test for COVID-19 (if testing is available), and that any lingering symptoms, if applicable, are not the result of a contagious illness.
Screening Procedures

- Once you have decided on a plan and procedure
  - Put a written policy in place---we can help
  - Choose a facilitator to run the program
  - Communicate clearly to employees in advance so there are no surprises
  - Train facilitators, testers, and employees
  - Do a dry run
Temperature Taking, Symptom Screening and Exposure Screening

- Other issues
  - Compensation for screening time
  - Refusing to be tested or provide answers
Testing

- EEOC Guidance: Employers may take steps to determine if employees entering the workplace have COVID-19.

- “[A]n individual with the virus will pose a direct threat to the health of others.”

- “Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”

- Medical Tests must be:
  - Job related
  - Consistent with business necessity

- Where failure to test poses a direct threat to employees, testing should be done.
Testing Considerations

- Employers should ensure that tests are accurate and reliable.
  - FDA
  - Local Health District
  - CDC
  - Continually check for updates

- Recognize testing limits
  - False positives
  - False negatives
    - Any test provides a snapshot of one moment in time for employee

- Not a replacement for other measures

- Compensate hourly employees for time spent on testing
When An Employee Tests Positive* (Employee Welfare)

- Be human; empathize
- Follow CDC guidance
  - Isolate employee; send employee home for 14 days
- Assure the employee that you will not reveal their identity within the workplace
- Cooperate with local officials
  - EEOC guidance updated as of 4/9/20 – you may disclose the identity of the employee to a public health agency.

*Assume those employees with pending test results or those who were exposed to a Covid-19 positive, are positive
When an Employee Tests Positive (Business Continuity Planning)

- Do you have a plan to quickly test all employees?
- Are you already working remotely?
- Did you institute staggered shifts so that everyone is not exposed at once?
- Decide whether you need to close for a period of time for cleaning – individual circumstances may dictate
- Do you have a plan for those employees who may not be able to go home if they are exposed at work?
  - Do employees have immunocompromised individuals at home
When an Employee Tests Positive (Legal)

- Is it possible to determine where employee contracted the virus – if known, was it at work?
  - If yes, check state workers’ compensation law
  - Notify workers’ compensation carrier
  - Record the incident in OSHA log

- Is the employee eligible for sick leave benefits, have a accrued leave?

- Does your short-term disability policy apply?

- Have you sufficiently documented efforts and trained employees? Overcommunicate at each stage & train
Testing, Isolating & Contact Tracing*

- Execute Plan for Testing All Employees or those with close contacts
- Execute Contract Tracing Plan
  - Did you have a sign in/sign out policy?
  - Did you reduce or eliminate shared or communal workspaces?
- Notify other employees; advise them to quarantine
- Engage Local Authorities; Coordinate with Health District
- Establish a timeline for when

* Employers are not epidemiologists but should train on this
“Idaho’s rebound from COVID-19 and our path to prosperity start with employee and consumer confidence, which leads into business stability and growth, and eventually promotion and attraction.”

- Governor Brad Little
Status of Reopen in Idaho

- Governor’s Guidelines for Opening Up Idaho
  - 4 Stage Plan
  - Official announcement tomorrow, but plan on May 1.
  - All Stages – maintain physical distancing, restrict non-essential business travel, identify strategies for addressing ill employees
  - Stage 1 Employers:
    - Continue to encourage telework whenever possible
    - Return employees to work in phases **IF physical distancing, personal protections and sanitation are feasible.**
  - Places of worship, daycares, organized youth activities may open, subject to conditions.
Status of Reopen in Idaho

- Guidance released today for all businesses:
  - Establish 6 foot social distancing protocol
  - Identify how business will adequately sanitize, etc.
  - Identify how business will provide services limiting close interactions with patrons
  - Identify strategies for addressing ill employees, exposures, closures, etc.
  - On a case-by-case basis, include other practices such as screening for illness and exposure upon entry to work
  - Businesses may require, and it is encouraged, that employees, vendors and patrons wear face coverings as a business practice.

- Specific industry guidance expected at each Stage.
Protecting Vulnerable Persons

Christina M. Jepson
Vulnerable Persons

- Vulnerable persons
  - Employees
  - Those who live with employees

- Vulnerabilities
  - 60 or older
  - Immunosuppressed or compromised
  - Heart disease, lung disease, kidney disease, cancer, diabetes, asthma, lupus, rheumatoid arthritis, cystic fibrosis, Crohn’s disease, AIDS/HIV

- List is always changing—stay informed
Vulnerable Persons

- The federal and state mandates/recommendations provide that employers should protect vulnerable employees and their family members
  - Utah going from red to orange on May 1. Orange means moderate risk for everyone and high risk for those who are vulnerable to the virus.
  - Those who are vulnerable should still practice “extreme caution”
  - “Employees who are considered vulnerable individuals should continue to self-quarantine. Special accommodations for these employees should be made in the workplace if they are unable to work from home.”
Vulnerable Persons

- The law limits what you can do
  - Treating someone 60 or older differently (without a request) could be age discrimination
  - Treating someone who is pregnant differently (without a request) could be pregnancy discrimination
  - Treating someone with an underlying condition differently (without a request) could be disability discrimination
  - Asking someone about their underlying conditions could violate the ADA
Vulnerable Persons

- So how can you protect employees and their family members
  - Continue teleworking to the extent possible
  - Allow flexibility to the extent possible
  - If possible, use a volunteer program for coming back to work
  - Ask a series of questions with a single yes or no answer—not required to disclose reason
  - Let employees know that they can request an accommodation under the ADA or your own policies—teleworking, extra cleaning, extra social distancing, changing work, changing schedule
  - Consider whether FFCRA (Response Act) coronavirus leave applies
ADA Accommodations

- Employees can self-disclose disabilities and request accommodations
  - Employers must engage in the interactive process with employees who request reasonable accommodations, determine if they have a disability under the ADA, and accommodate the request if doing so would not create an undue hardship for the employer’s operations.
  - Employers should also engage in a similar process with vulnerable employees as the government has requested
  - Examples: designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between coworkers whenever feasible;
Refusing to Work

What if an employee refuses to work?

- Proceed cautiously
- Talk to the employee
- Listen for potential requests for ADA accommodations
- If there is no ADA issue and the employee is simply “scared” you can take action
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Presenter Contact Information

Sean A. Monson
smonson@parsonsbehle.com

Susan Baird Motschiedler
smotschiedler@parsonsbehle.com

Liz M. Mellem
amellem@parsonsbehle.com

Mark A. Wagner
mwagner@parsonsbehle.com

Christina M. Jepson
cjepson@parsonsbehle.com

Amy A. Lombardo
alombardo@parsonsbehle.com
Thank You