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REOPENING OHIO:
A legal toolkit for businesses amid COVID-19 changes

Ohio COVID-19: Stay Safe Ohio order

On April 30, 2020, Ohio Department of Health Director Dr. Amy Acton signed and extended Ohio's stay-at-home order until May 29, 2020, called the "Stay Safe Ohio Order." The order keeps the stay at home order in effect but permits certain business sectors to resume operations. Under the guidelines provided by the order, different sectors of the economy are scheduled to resume operations, provided they follow additional protocols and guidelines as applicable to the business. Even businesses originally defined as essential in the previous order, must follow the new set of guidelines.

On April 27, 2020, Ohio Governor Mike DeWine outlined his administration's plan for a phased in reopening of Ohio's economy, previewing what would eventually be included in the order. He announced protocols that apply to all businesses, as well as industry-specific operating requirements. The administration provides several resources for businesses on its coronavirus website. Industry specific requirements can be found here.

May 1, 2020 – Additional health care procedures: All health procedures that do not require an overnight stay, including dentists and veterinarians, may resume. Elective health care procedures had been halted to allow health care facilities to stockpile enough personal protection equipment (PPE). Other health care services may resume as long the health care provider follows the requirements in the order. In addition, telehealth services should still be utilized whenever possible. Elective surgeries that require overnight stays will be authorized to resume at a later date. For more, please read the article from our Health Care group.

May 4, 2020 – Additional manufacturing, distribution and construction: Previously considered non-essential manufacturing, distribution and construction may resume operations. Most manufacturers, related distributors and members of the supply chain were considered essential businesses or operations under the previous order. The order specifies that manufacturers that

did not meet the criteria for essential business or operation may resume operations on May 4, 2020. All manufacturers will be required to follow the protocols in the order (see below).

May 4, 2020 – General office operations: Additional general office functions may also resume May 4, 2020. Offices must observe social distancing and require employees to utilize face coverings. The order provides a detailed checklist for general office settings to follow, including staggered start times for employees, required hand washing of employees and establishing a maximum capacity. Businesses should also encourage employees to continue to work from home when possible.

May 12, 2020 – Retail and consumer business: According to the order, consumer and retail-oriented businesses are authorized to reopen on May 12, 2020. However, retail and consumer businesses that restrict their operations to curbside pickup, delivery and appointment-only (limited to 10 customers at any one time) may reopen May 1, 2020, at 11:59 p.m. Retail and consumer businesses that provide essential services or products were already operating. All retail and consumer businesses that are operating must now require all employees and customers to use face coverings, maintain social distancing of six feet and install barriers where appropriate. More details on requirements for retail businesses can be found here.

The order also includes the continued closure of K-12 schools, daycares, restaurants and bars (carry out and delivery excluded), salons, barbers, physical fitness facilities, entertainment and other businesses. These businesses are allowed to maintain minimum business operations as defined similarly in the previous orders. This includes maintaining inventory and preserving equipment, processing payroll, and engaging in activities necessary to facilitate remote working and other activities designed to preserve the value of the business.

The order also maintains the ban on gatherings of over 10 people until May 29, 2020.

Social distancing requirements

The order also reminds all businesses, including those businesses engaged in Minimum Basic Operations, that each must follow the Social Distancing Requirements, including when possible:

- designate six-foot distances with signage, tape or other means for employees and customers in line;
- hand sanitizer and sanitizing products should be readily available for employees and customers;
- separate operating hours for vulnerable populations; and
- a facility should post online the best way to access the facility and continue services by phone or remotely.

General protocols for all businesses

The newly-signed order also includes the general protocols Governor DeWine announced on Monday. Those include:

- Required facial coverings for employees and businesses should allow customers/clients to wear face coverings while in the establishment. Businesses must require all employees to wear facial coverings, except for one of the following reasons:
  - facial coverings in the work setting are prohibited by law or regulation;
  - facial coverings are in violation of the documented industry standards or the business's documented safety policies;
  - facial coverings are not advisable for health reasons;
  - when the employee works alone in an assigned work area; or
  - there is a functional (practical) reason for an employee not to wear facial covering in the workplace.
- Employees should make their own personal daily health assessments to determine if they are fit for duty. Assessments should include taking temperature to monitor for fever, as well as watching for cough or trouble breathing.

- Maintain good hygiene including hand washing and social distancing.
- Clean and sanitize workplaces throughout the workday and at the close of business (or in between shifts).
- Limit capacity to meet social distancing guidelines.
- Establish a maximum capacity.
- Utilize appointment setting with clients/customers when possible.
- Differences from prior orders

In many ways, the new requirements and protocols provided in the order are similar to what was required of essential businesses. Under the previous order, essential businesses and operations still needed to follow social distancing requirements, and the essential business checklist included maintaining space between employees and sanitizing workplaces.

However, there are some distinct new requirements for the businesses allowed to reopen. The most notable change is the order's requirement that employees wear facial coverings. This was not previously required by any of the orders issued by the governor or the Ohio Department of Health. The order does not mandate that customers, guests or visitors to business need facial coverings but strongly recommends them.

The order imposes social distancing requirements on operating businesses, including asking businesses to limit capacity to achieve proper distancing. Previous guidance from the administration mentioned capacity should be limited to 50 percent of the fire code permitted maximum capacity, but the order language only requires that a maximum capacity be established. The order also asks businesses and operations to stagger shifts and breaks to achieve proper social distancing. Businesses may need to individually assess how this, combined with the new requirements for staggering shifts and breaks, could impact productivity and operations.

There is also a new mandatory reporting requirement of suspected exposure or cases to the local health department.

Finally, while the travel restrictions in the order appear similar, the language regarding self-quarantine for out-of-state travelers, with an intent to remain, has changed. An out-of-state traveler, with an intent to remain, is asked to self-quarantine for 14 days, unless they are entering the state for critical infrastructure or health care workforce purposes.

Enforcement

The order states that new protocols will be enforced by the local health departments and local police, similar to previous orders. A violation of the order is a second degree misdemeanor, punishable by a fine of up to $750 and up to 90 days in jail.

Conclusion

The administration developed the protocols and guidelines contained in the order in consultation with businesses that were operating under the previous orders restricting economic activity. The resulting protocols are intended to represent the best practices developed by currently operating businesses and should permit increased operational capacity, while protecting public health.

Please review these requirements closely, as some are new, mandated requirements that may impact your operations.

Additional information can be obtained on the Ohio Department of Health's coronavirus webpage.

RestartOhio in full swing

RestartOhio, the state's reopening plan during the COVID-19 pandemic, is in full swing, and Governor DeWine announced reopening dates for restaurants, bars, hair salons, nail salons and barber shops. In addition, the Ohio House and the Ohio Senate held session on May 6, 2020, and continue to introduce COVID-19-related legislation. Here are some highlights of recent announcements.

Reopening of restaurants and bars

- Governor DeWine announced guidelines for restaurants and bars, which can begin reopening for outside dining on May 15 and inside dining on May 21.
- Tables of customers will need to be kept, at a minimum, six feet apart. A restaurant cannot sit more than 10 people at a table.
- Employees will be required to wear a mask, unless a safety exception applies, and perform daily symptom assessments.
- Customers are encouraged to wear a mask and not enter if symptomatic.
- Open congregate areas in bars and restaurants will remain closed. However, the businesses may use those areas to spread their tables out to accommodate the social distancing requirement.
- Businesses should contact the local health department about suspected cases or exposures.

Reopening of hair salons, day spas, nail salons, barbershops and tanning facilities

- Governor DeWine further announced guidelines for hair salons, day spas, nail salons, barbershops and tanning facilities to resume business operations on May 15.
- Personal service businesses must ensure six feet between customers or install barriers.
- Employees will be required to wear a mask unless an exception applies and perform a daily symptom assessment.
- Customers are encouraged to wear a mask and not enter if symptomatic.
- Personal service businesses must contact the local health department about suspected cases or exposures.
- Businesses must discontinue customer use of self-service refreshments, magazines and other non-essential items in the waiting area.
- Only clients and caregivers may enter the establishment.

Budget cut details

- Governor DeWine and Office of Budget and Management Director Murnieks announced more details regarding the $775 million in General Revenue Fund (GRF) cuts, including a breakdown by agency. (See our short summary of the budget cuts announced by Governor DeWine.)
- Non-GRF budget cuts of $352 million were also announced.
- We are still waiting on details regarding how the cuts will be implemented at the agency level.
- April's tax revenues were $866.5 million below estimates.

Tort liability

- Senate President Obhof and Speaker Householder both commented that their chambers would prioritize tort liability for businesses reopening during the pandemic.
- Representative Diane Grendell introduced House Bill 606, which grants civil immunity to a person who provides services for essential businesses and operations for injury, death or loss that was caused by the transmission of COVID-19 during the period of emergency declared by Executive Order 2020-01D, issued on March 9, 2020, and to declare an emergency. H.B. 608 is scheduled for its first hearing in House Civil Justice Committee next week with a possible substitute bill.
- Senator Matt Huffman introduced Senate Bill 308, which grants civil immunity for health care and service providers during a declared disaster. Senator Huffman offered sponsor testimony on this bill in the Senate Judiciary Committee on May 6. This bill also intends to provide civil immunity for businesses against exposure claims from employees or patrons of the business. Chair Eklund of the Senate Judiciary Committee stated the bill will receive another hearing mid-May.

DeWine announces more Ohio reopenings

On May 14, 2020, Governor Mike DeWine announced that childcare providers may reopen on May 31. Childcare providers will have increased cleaning and sanitizing requirements, and class sizes will be reduced. Playground and outdoor activities will be permitted, but field trips will not be allowed. Additionally, Lieutenant Governor Jon Husted announced several other reopenings, including that day camps are permitted to open on May 31, with new safety guidelines and protocols being announced on May 15. Ohio BMVs will reopen on May 26, but the administration is still urging Ohioans to utilize online BMV services. Campgrounds may reopen on May 21. Horse racing may resume on May 22, but spectators are prohibited. However, the administration noted that racinos and casinos cannot yet reopen.

The administration also announced that several fitness and recreational activities may reopen or resume activities on May 26:

- Gyms and fitness centers
- Limited contact or no-contact sports leagues and activities (a working group is still developing protocols for contact sports and activities like soccer or lacrosse)
- Pools that are regulated by a local health department (not waterparks or amusement parks)

New protocols and guidelines for these reopenings will be posted on https://coronavirus.ohio.gov.

The House and Senate continued working on legislation aimed at protecting health care workers and businesses against liability during COVID-19. On May 12, 2020, the House Civil Justice Committee held a first hearing on House Bill 606, and the committee adopted a substitute version of the bill. Chair Hambley indicated the bill will receive a second hearing next week. A similar bill, Senate Bill 308, received its second hearing in the Senate Judiciary Committee on Wednesday. A substitute version of the bill was adopted as the working document. Several witnesses provided proponent testimony, including several of the business groups, such as the Ohio Association of Retail Merchants, Ohio Hospital Association, Ohio Alliance for Civil Justice and Ohio Chamber of Commerce. The bill was starred for a vote, but Chair Eklund did not call for a vote on the bill. Therefore, another hearing on the bill will likely occur soon.

Ohioans Protecting Ohioans order issued

On May 20, 2020, Ohio Department of Health Director Dr. Amy Acton issued a revised Director's Order that rescinded or amended parts of the "Stay Safe Ohio Order" that has been in effect since April 30. Dr. Acton also signed an "Urgent Health Advisory: Ohioans Protecting Ohioans."

Governor Mike DeWine, while previewing these actions in his May 19 press conference, stated, "we are now moving from orders to strong recommendations. This is a new phase in our battle against the virus." Below is a summary of the impact of collective actions taken by the administration.

The existing protocols and guidance for businesses, including the industry specific operating requirements, remain in effect. Also still in place is the ban on gatherings of 10 people or more and maintaining six feet of social distancing. The new order continues to stress the importance of good hygiene, including the washing of hands.

While the administration, under previous orders, imposed limited restrictions on travel, the new order lifts restrictions on nonessential travel. However, the governor emphasized that while nonessential travel is permitted, it is still discouraged. Travelers coming from out-of-state are no longer strongly asked to self-quarantine for 14 days. Still remaining in effect is the prohibition on travel into the state for those who have tested positive for COVID-19 and have not recovered, those who are presumptively diagnosed with COVID-19, and those who are exhibiting the symptoms identified in the screening guidance available from the CDC and the Ohio Department of Health. These individuals are prohibited from entering the state of Ohio unless they are doing so under medical orders for purposes of medical care, are being transported by emergency medical services EMS, are driving or being driven directly to a medical provider for the purpose of initial care, or are a permanent resident of Ohio.

In addition, the administration issued a "Camp Safe Ohio Order" with protocols for campgrounds that may reopen on May 21.

The governor urged at-risk Ohioans to stay at home as much as possible and called on all Ohioans to continue practicing virus precautions, even as the state continues lifting restrictions.

On May 19, Governor DeWine also announced that the Bureau of Workers' Compensation (BWC) will distribute at least two million non-medical face coverings to Ohio employers that are covered by the BWC.

Business Reopening Check-list

STEP 1: EVALUATION

Evaluate the sector-specific operating requirements and the protocols for getting back to work released by the governor.

- Manufacturing, Distribution & Construction
- Consumer, Retail & Services
- General Office Environments
- Responsible Protocols

STEP 2: DETERMINATION

Determine what policies and procedures will be required to re-open.

- What work from home policies are appropriate?
- What changes need to be implemented to your workspace?
- What other policies need to be implemented?
  - Social distancing
  - PPE
  - Temperature checks and symptom monitoring
  - Testing, isolation and contact tracing
  - Sanitation
  - Disinfection of high-traffic areas
  - Business travel

STEP 3: DEVELOPMENT & IMPLEMENTATON

Develop and implement plans for the reconfiguration of the physical environment to support social distancing practices and to procure necessary PPE and other supplies.

- Facility readiness: Conduct a comprehensive assessment of any physical buildings, and evaluate what changes are necessary to support physical distancing and other safety practices.
- Procurement: Consider the additional service, materials and activities necessary to facilitate a return to the workplace, such as enhanced cleaning, temperature screening, supplies of PPE (e.g., hand sanitizers, wipes, gloves, masks, etc.), touchless technologies and more.

Reopening business amidst COVID-19: No one-size-fits-all approach for managing employment law risks

As states continue to announce plans to reopen businesses, employers face a number of operational and employment issues that can lead to legal exposure if not handled properly. Below are some key issues and concerns employers are grappling with as they develop plans to safely reopen and manage the return of their workforce.

Health and safety considerations

A primary concern for employers as they begin to reopen businesses is the safety of their employees. The Occupational Safety and Health Administration (OSHA), which requires employers to maintain a safe work environment, and the Center for Disease Control (CDC) have issued the following recommendations.

Actively encourage employees to stay home if they are sick.

Discourage workers from sharing phones, desks, offices, and other work tools and equipment when possible.

- Reconfigure physical workspaces by rearranging workstations to space out employees; place barriers between workspaces; close or modify common areas and high-touch surfaces.
- If feasible, establish alternating days or staggered shifts to reduce the total number of employees in a facility at a given time.
- Provide appropriate training regarding business-essential job functions and worker health and safety, including proper hygiene practices and the use of any workplace controls, including personal protective equipment (PPE).
- Limit face-to-face meetings and encourage the use of videoconferencing.
- Provide appropriate PPE, if available, such as face coverings and gloves.
- Promote frequent and thorough hand washing and cough etiquette.

Additionally, a number of states have issued return to work plans or orders with extensive safety requirements. For example, Ohio's reopening plan sets forth specific requirements related to distancing, staggered attendance and daily symptom assessments. It also requires that employees, with limited exception, wear protective face coverings. Violations of state orders can result in civil penalties or even criminal charges. Therefore, employers should closely review the reopening requirements for the state(s) in which they operate and develop a plan to ensure compliance.

Temperature checks, symptom inquiries and COVID-19 testing

Since the start of the pandemic, Equal Employment Opportunity Commission (EEOC) guidance regarding health-related inquires and employer testing has evolved to give employers significantly more latitude than normally permissible. The EEOC has indicated that it is permissible for employers to:

- take employee temperatures or require employees to conduct self-checks;
- ask employees if they are experiencing COVID-19 symptoms, such as fever, chills, cough, shortness of breath or sore throat;
- send employees home if they display symptoms of COVID-19;

- require employee's to obtain a doctor's note certifying their fitness for duty because such inquiry would not be considered disability-related under the Americans with Disabilities Act (ADA);
- administer COVID-19 testing to employees before they enter the workplace.

Before taking temperatures or doing any diagnostic testing, employers should consult with counsel to ensure compliance with all state and federal regulatory restrictions. The types of questions asked and the types of tests used can trigger confidentiality, privacy, collective bargaining, workplace safety and other employment requirements.

Whistleblower claims

In recent weeks, there have been several highly publicized incidents of employees claiming that they are being forced to work in unsafe environments or that they have been retaliated against for reporting health and safety concerns related to COVID-19. As a result, on April 8, 2020, OSHA issued a statement "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic." Employers should carefully review and comply with the evolving COVID-19-related restrictions and safety measures and provide regular communications to employees about the steps they are taking to keep the workplace clean and safe. Employers should also encourage employees to internally report any health and safety workplace concerns immediately and train managers on how to respond to complaints.

Layoffs, reductions and discrimination claims

In order to absorb the economic impact of the COVID-19 pandemic, employers have implemented and continue to evaluate reductions in salaries or hours, furloughs and layoffs. To avoid potential discrimination claims, employers should base these decisions on well-documented, objective business considerations and criteria and form a committee to choose who is selected for furloughs or layoffs when possible. Employers should also keep in mind alternative options, such as SharedWork programs, which allow employers to reduce hours by as much as 50 percent while their employees collect partial benefits to replace a portion of their lost wages. Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal government is covering these unemployment benefits costs through December 31, 2020, for states (which includes the majority) with SharedWork programs.

Requests to continue at home arrangements

Even with safety measures in place, employers should expect that some employees may ask to continue work from home arrangements for a number of reasons, including fear and anxiety related to COVID-19 or lack of childcare.

While generalized fear of COVID-19 in the workplace is not a disability, the fear could be a symptom of a covered disability under the ADA. Therefore, before denying an employee's request to continue to work from home because they are afraid of contracting the virus, employers should engage in the interactive process by asking questions to determine if the employee has a disability under the ADA. As part of the interactive process, the employer should discuss workplace protocols that are in place to reduce the risk of COVID-19. If the employee still refuses to return to work, the employer may require a medical certification. Given the current burden on medical providers, employers can provide a temporary accommodation on an interim basis while awaiting receipt of medical documentation.

Additionally, while states are issuing plans for reopening businesses, most states have closed schools for the remainder of the school year and have not yet reopened daycares or announced plans for summer camps. Employees who need leave to care for children because of school and daycare closures may be eligible for expanded FMLA or sick leave under the Families First Coronavirus Response Act (FFCRA) or for pandemic unemployment assistance under the CARES Act. Some cities and states have also enacted new leave laws to address COVID-19 concerns.

To create a balance between protecting an employee's rights, and potential business disruption, employers should remain flexible when possible and notify employees that dialogue will be ongoing. When practical, a voluntary or gradual return to work process could also help curtail issues and concerns.

Conclusions

Many initial workplace legal assessments and recommendations that preceded or were provided during the stay at home orders will apply to the reopening stage of the pandemic. However, as we begin a new normal, employers should be aware there is no "one size fits all" approach to safely and effectively bring employees back to the workplace. Companies navigating the complexities of state and federal employment laws related to COVID-19 should consult with counsel to ensure legal compliance and minimize exposure.

COVID-19 Update: EEOC approves testing employees for coronavirus before returning to work

As state officials are beginning to implement plans to safely phase out stay-at-home orders, employers are evaluating various ways to prevent the transmission of COVID-19 as employees begin returning to the workplace. On April 23, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance that expands an employer's ability to protect its workforce by allowing employers to test employees for the presence of COVID-19.

In a previous publication, we discussed considerations for employers who choose to take their employees' temperatures before allowing them to report to work. Now, the updated EEOC guidance provides employers with assurance that going a step further by implementing COVID-19 testing is also lawful under the Americans with Disabilities Act (ADA).

As the EEOC explains, any mandatory medical test of employees must be "job related and consistent with business necessity" in order to comply with the ADA. Applying this standard to the COVID-19 pandemic, the EEOC guidance states that employers may choose to administer COVID-19 tests to employees before they enter the workplace to determine if they have the virus "because an individual with the virus will pose a direct threat to the health of others."

Employers must ensure, however, that the tests are reliable and accurate. The EEOC recommends that employers review guidance from the U.S Food and Drug Administration about what may or may not be considered safe and accurate COVID-19 testing, as well as guidance from the CDC and other public health authorities. In addition, the EEOC cautions employers to consider the possibility of false positives or false negatives and that a negative test does not mean an employee cannot contract the virus later.

Finally, the EEOC emphasizes that employers should continue to implement other measures to the greatest extent possible to prevent the transmission of COVID-19, such as social distancing, frequent handwashing and disinfecting common areas.

Employers interested in implementing mandatory COVID-19 screening should consult with legal counsel. Although the EEOC's guidance approves of testing employees for the virus under the ADA, there other important employment law implications that should be considered, such as employee confidentiality and wage and hour issues.

ODJFS provides online form to report employees who quit or refuse to return to work because of COVID-19

As Ohio begins to open businesses, many employers are developing plans to safely reopen and manage the return of their workforces. Among the various issues employers must consider is what to do when an employee quits or refuses to return to work because of concerns related to COVID-19 and then applies for unemployment compensation benefits.

Generally, when employees quit or refuse an offer of work without just cause, they may become ineligible for unemployment benefits. Further, if the offer of work is refused in order to continue receiving unemployment benefits, an individual may even be found to have committed fraud on the state unemployment insurance system.

To address these potentially fraudulent situations, the Ohio Department of Jobs and Family Services (ODJFS) created an online form for employers to report employees who quit or refuse to return to work specifically because of COVID-19. Employers can visit the ODJFS website to fill out a report.

If an employee threatens to quit or refuses an offer of work due to safety concerns, or because of an alleged disability, it could be considered "just cause" under unemployment compensation laws. Accordingly, employers should ensure that they are following the most recent CDC and OSHA guidance regarding workplace safety and engage in the interactive process with an employee to determine whether a reasonable accommodation can be made before requiring the employee to return to work.

EEOC provides COVID-19 return to work guidance for high risk workers as Ohio governor urges they stay home

On April 30, 2020, Ohio Governor DeWine announced the "Stay Safe Ohio Order." Like many other states, Ohio's new order allows more workplaces to resume operations but also urges individuals at a high risk of severe illness from COVID-19, "including elderly people and those who are sick," to continue to shelter at home.

How should employers call employees back to work who, due to age or certain high-risk conditions, are also being urged to continue to stay home? As part of its guidance on federal employment laws and the pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) recently provided more direction for employers on this issue.

First, the EEOC clarified that, as in any scenario, it is the employee's obligation to inform their employer of the need for an accommodation due to a medical condition. The employer must then engage in the interactive process to assess whether the employee has a disability under the Americans with Disabilities Act (ADA) and if that disability can be reasonably accommodated.

Second, although an employer can prohibit employees with COVID-19 symptoms from entering the workplace because they present a direct threat to coworkers, the analysis is different when dealing with a potential "direct threat to self." The EEOC explained that even if an employer is concerned about an employee's health, "the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies

as potentially placing him at 'higher risk for severe illness' if he gets COVID-19." Under the ADA, such action is not allowed unless the employee's disability poses a 'direct threat' to his health that cannot be eliminated or reduced by reasonable accommodation.

The EEOC explained further that the direct threat assessment cannot be based solely on the condition being on the CDC's list. The determination must involve an individualized assessment based on "reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence." Employers are to weigh factors like the severity of the potential harm to the worker, the likelihood the employee might be exposed to COVID-19 and the potential impact of any protective measures the employer is taking to protect the workforce as a whole.

Even if an employer concludes that an employee's return to work would be a direct threat to their health because of COVID-19, the employer's obligation does not stop there. Employers must then determine if an accommodation could mitigate the risk. Some potential accommodations listed by the EEOC include leave, reassigning a worker to a different job that allows them to work in a role where they are less likely to contract COVID-19, and allowing the employee to telework, which is also encouraged by the Stay Safe Ohio Order.

Conclusions

The direct threat standard is tough to meet. Employers should proceed with great caution before taking any type of unilateral employment action against high risk employees out of concern of COVID-19. Instead, employers should focus on providing information to all employees regarding state and federal recommendations, including those concerning high risk individuals, as well as information regarding the safety measures that the employer is implementing, and allow individuals to self-identify and make a request for accommodation if necessary.

Balancing state recommendations for high risk individuals with an employer's legal duty to not discriminate based upon age or disability will require careful consideration on a case by case basis.

Governor DeWine and Ohio BWC to further defer employer premiums

On May 28, 2020, Governor Mike DeWine announced that the Ohio Bureau of Workers' Compensation (BWC) will be further deferring employers' premium installments. To ease the continuing financial impact on Ohio businesses due to the COVID-19 pandemic and to encourage businesses to focus on safety, the BWC is deferring installment payments for June, July and August to September 1, 2020. State fund employers will have the option to defer their monthly premium payments with no financial penalties or lapses in coverage.

All billing for self-insured employers will remain the same and all assessment payments must be on time, or they will be considered late. If employers are able to follow the normal installment payment scheduled due dates, such payments may still be submitted. The BWC previously deferred installments for March, April and May until June 1, 2020.

Visit the BWC's COVID-19 page for further information regarding the agency's efforts to ease the impact of COVID-19.

Need face coverings for your workers? Two million face coverings are headed to Ohio employers

On May 19, 2020, Ohio Governor Mike DeWine announced a plan called "Protecting Ohio's Workforce – We've Got You Covered." The plan will send at least two million face coverings to employers across the state in an attempt to weaken the impact of the ongoing COVID-19 pandemic on the safety and health of Ohioans.

The Ohio Bureau of Workers' Compensation (BWC) will fund the initiative from its existing budget, with no impact to Ohio employers' premiums, and has already begun distributing the non-medical-grade face coverings. Public and private employers participating in the State Insurance Fund will receive a package from the BWC containing at least 50 face coverings free of charge. Shipments will target employers covered by the workers' compensation system that are in good standing and report payroll to the bureau.

Got masks? Ohio Manufacturing Alliance knows where to get them!

As part of the Responsible Restart Ohio program, all employees are required to wear face coverings in the workplace (with exceptions). However, businesses have been struggling to find them. Through the Ohio Emergency Personal Protective Equipment (PPE) Makers' Exchange, Ohio manufacturers can produce and provide organizations in the state of Ohio with PPE. A variety of PPE can be purchased directly from the Exchange, including faceshields, hand sanitizer, cotton face masks and cotton swabs for testing.

Ohio Governor Mike DeWine's requirement for wearing facial coverings applies to all employers and employees at Ohio workplaces, with exception in the following circumstances when wearing a facial covering is:

- prohibited by law or regulation;
- a violation of documented industry standards;
- not advisable for health reasons; or
- in violation of the business's documented safety policies.

However, face coverings are not required for employees who work alone in an assigned work area or if other practical reasons prohibit it. If any of the above exceptions apply, written justification must be provided upon request.

OSHA has also released a poster and video demonstrating how to properly wear facial coverings at work. Further business reopening guidance can be found in the Ohio Department of Health's COVID-19 checklist.

SBA releases Paycheck Protection Program (PPP) loan forgiveness application and interim final rule

On May 15, 2020, the Small Business Administration (SBA) and Department of the Treasury released the much anticipated Paycheck Protection Program (PPP) loan forgiveness application. Shortly thereafter, on May 22, 2020, the interim final rule regarding the process for applying for and obtaining loan forgiveness was also released.

As noted in a prior alert, there are many benefits of PPP loans, which include, subject to certain limitations, loan proceeds that may be forgiven up to an amount equal to the total spent on the following items during the first eight weeks of the loan term: (i) payroll costs, (ii) interest on mortgages, (iii) rent and (iv) utilities. Additionally, principal and interest payments are deferred for 12 months after funding. As a result, there has been significant demand for these loans among small businesses.

There has also been much consternation and anxiety among borrowers and lenders regarding the loan forgiveness process, and the application and rule provide some much-needed clarity.

Below are some highlights regarding new information provided in the loan forgiveness application and interim final rule regarding loan forgiveness:

- Payroll costs that count toward the amount forgiven must be paid and incurred in the 56-day period (eight weeks) commencing on the date the loan was disbursed to the borrower. A borrower may elect to use an alternative 56-day period only for payroll costs that commence on the first day of the borrower's pay cycle following disbursement of the loan. Payroll costs are considered paid on the day paychecks are disbursed and incurred on the day the wages are earned.
- For owners/self-employed individuals, the compensation that counts towards loan forgiveness is capped at an amount no greater than 8/52 of such person's 2019 compensation and, in any case, $15,385.
- The full-time employee reduction rule, which reduces the amount of loan forgiveness if a borrower reduces its number of full-time employees during the covered period, will not apply in circumstances in which (1) the borrower made a good-faith written offer to rehire an employee during the 56-day covered period and such offer was rejected by the employee or (2) employees during the 56-day covered period were fired for cause, voluntarily resigned or voluntarily requested a reduction in hours.
- There has been no change to the requirement that a borrower utilizes at least 75 percent of the loan proceeds for payroll costs, and the application contains a certification regarding the same.
- The application and rule also provide clarity regarding the impact of any reduction in compensation of more than 25 percent for any employee (comparing the first quarter of 2020 to the covered period), which may result in a reduction of the loan forgiveness amount.
- Lenders have 60 days from the date a complete application is received to issue a decision to the SBA regarding the forgiveness amount, and the SBA then has 90 days after receipt of the lender's decision to review the application for forgiveness, make its determination and fund the amount forgiven (plus interest) to the lender.
- The borrower must retain all documentation submitted in connection with its application for loan forgiveness for at least 6 years.

The application and rule do not provide additional detail regarding the documentation required to support the loan forgiveness application. Instead, it refers borrowers to Section 1106(e) of the CARES Act, which provides that a borrower must submit the

following documentation with its application for forgiveness (and without such documentation, forgiveness will not be granted):

New and updated guidance has been frequently released by the Treasury and SBA, sometimes multiple times each week, since the program commenced in early April. The interim final rules and other guidance include a Frequently Asked Questions document that has been updated multiple times since it was initially issued in early April. All of this activity bears continual monitoring by businesses that have received or are still considering PPP loan assistance.

1. documentation verifying the number of full-time equivalent employees on payroll and pay rates, including:
   a. payroll tax filings reported to the Internal Revenue Service; and
   b. state income, payroll and unemployment insurance filings;
2. documentation, including canceled checks, payment receipts, transcripts of accounts or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations and covered utility payments;
3. a certification from a representative of the eligible recipient authorized to make such certifications that:
   a. the documentation presented is true and correct; and
   b. the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation or make covered utility payments; and
4. any other documentation the SBA determines necessary.

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5 issues to consider if your customer files bankruptcy

As industry observers anticipate an increase in bankruptcy filings resulting from the COVID-19 pandemic, it is important for creditors to understand the risks that arise in dealing with a distressed business. Below are five issues that may arise if your customer files a Chapter 11 bankruptcy.

1. **Executory contracts.** If you have an executory contract with the debtor that has not been terminated as of the petition date, you will need to continue to perform your obligations under the contract. Importantly, this obligation to perform continues, even if the debtor was in default at the time the case was filed. The debtor is given time (usually by the time the plan of reorganization is approved) to determine whether to assume or reject contracts. Pending the debtor's decision on assumption or rejection, creditors are entitled to be paid for what they supply post-petition but cannot terminate the contract based on a pre-petition default. If you suspect that a distressed customer is considering filing a Chapter 11, evaluate whether there are justifications to terminate the contract prior to the bankruptcy and whether that is the best business decision in light of the circumstances.
2. **Goods delivered within 20 days of the petition date.** A supplier may be entitled to an administrative expense priority for the value of any goods received by the debtor in the ordinary course of business within the 20 days preceding its bankruptcy filing. To qualify for an administrative claim, the goods must have been delivered directly to the debtor, and the administrative claim must be requested by motion in the case. The administrative claim, if allowed, must be paid upon approval of the plan of reorganization. If a supplier delivered goods to the debtor immediately prior to the bankruptcy filing, consult with legal counsel to evaluate your rights to assert an administrative expense claim.

3. **Reclamation.** Under both the UCC and the Bankruptcy Code, a seller has the right to stop goods in transit or to reclaim goods under certain circumstances. Before the filing of a bankruptcy, the right of reclamation is governed by Sections 2-702, 2-703 and 2-705 of Article 2 of the UCC. If the buyer files for bankruptcy before a seller's right to reclaim its goods has been established, the seller must comply with section 546(c) of the Bankruptcy Code to enforce its reclamation rights. The process to reclaim under section 546(c) is more specific than the process under the UCC and requires a written reclamation demand. Also, be aware, the bankruptcy court may enter an order establishing specific procedures for dealing with reclamation claims. As soon as you learn that a customer has filed bankruptcy (or that a filing is imminent), determine the status of recently shipped goods and evaluate whether it is appropriate to assert a right of reclamation.
4. **Critical vendor.** Once a debtor files Chapter 11, it is not permitted to pay any pre-petition debts, except through a confirmed plan of reorganization. However, in certain cases, the court may grant the debtor special authority to pay the pre-petition claims of vendors deemed to be of critical importance to the debtor's ongoing business. In these cases the debtor is given authority and discretion to induce the continued cooperation of key vendors through partial or full payment of their claims. Certain strings may be attached, and careful consideration must be given to all of the terms and conditions before entering into a critical vendor agreement. If you are not initially selected for critical vendor status, raise the issue with your business contacts at the debtor and evaluate what leverage you might have to become a selected "critical vendor."
5. **Preference exposure.** To most creditors the most infuriating aspect of bankruptcy law is the right of the debtor to take back payments made to a creditor within the last 90 days before the filing date, even where the debtor has a large delinquent balance. But the right to recover these so-called preference payments is not absolute. (For more information regarding preference claims and defenses, read one of our recent publications.) If you find yourself the target of a preference claim, be certain to properly track service of the complaint and alert your legal counsel in time to file an answer.

While a customer's Chapter 11 filing is usually not a welcome event for a supplier, make the most of a bad situation by knowing and protecting your rights.

Federal Guidelines

On April 16, 2020, President Trump announced his "Opening Up America Again" guidelines, which present a proposed phased approach to reopening the country. The guidelines are intended to mitigate "the risk of resurgence" and protect "the most vulnerable" and are designed to be "implementable on a statewide or county-by-county basis" at the discretion of each state's governor.

To begin implementing the guidelines, states must first meet a series of "gating" criteria, which includes a "[d]ownward trajectory of documented cases within a 14-day period" or a "[d]ownward trajectory of positive tests as a percent of total tests within a 14-day period (flat or increasing volume of tests)," as well as increased hospital preparedness.

If the gating criteria are met, states may proceed to a phased opening. At all phases, employers are encouraged to:

- Develop and implement appropriate policies regarding:
- Social distancing
- PPE
- Temperature checks and symptom monitoring
- Testing, isolation and contact tracing
- Sanitation
- Disinfection of high-traffic areas
- Business travel

Below is a summary of the phase protocols related to employers.

Phase one - Employers

- Continue to encourage telework whenever possible and feasible
- Return to work in phases if possible
- Close common areas where personnel are likely to congregate
- Minimize non-essential travel
- Strongly consider special accommodates for personnel who are of a vulnerable population
- Large venues (e.g., sit-down dining, movie theaters, sporting venues, places of worship) may operate with strict physical distancing protocols
- Elective surgeries may resume, as appropriate, on an outpatient basis
- Gyms may open with strict physical distancing and sanitation protocols
- Bars remain closed

Phase two – Employers

- Continue to encourage telework whenever possible and feasible
- Close common areas where personnel congregate
- Non-essential travel may resume
- Strongly consider special accommodations for personnel of a vulnerable population
- Large venues (e.g., sit-down dining, movie theaters, sporting venues, places of worship) may operate under moderate physical distancing
- Elective surgeries may resume, as appropriate, on out-patient and in-patient bases
- Gyms may reopen with strict physical distancing and sanitation protocols
- Bars may reopen with diminished standing-room occupancy where applicable and appropriate

Phase three – Employers

- Unrestricted staffing of worksites may resume
- Large venues (e.g., sit-down dining, movie theaters, sporting venues, places of worship) may operate under limited physical distancing
- Gyms may reopen with standard sanitation protocols
- Bars may operate with increased standing-room occupancy where applicable

About Bricker & Ecker

With 150 attorneys and six offices in Columbus, Cleveland, Cincinnati, Dayton, Marietta, Barnesville and Lebanon, Bricker & Eckler is one of Ohio's leading law firms. Bricker represents a wide variety of clients, with particular strength in the health care, public sector, financial services and energy industries in Ohio and beyond. Connect with Bricker online by visiting our blogs, Twitter, Facebook and LinkedIn.