

MEMORANDUM

DATE: May 7, 2020

RE: Update regarding Plan to Re-Open

This morning Governor Brown revealed her plan to re-open Oregon. The plan (https://govsite-assets.s3.amazonaws.com/2pRIAJbhRBuSTm0Iqy6p_Reopening-Oregon-Details-on-Restarting-Public-Life-and-Business.pdf) outlines a phased approach to re-opening, with some child care facilities, retail stores, restaurants, bars, gyms and salons reopening as early as May 15th. Large gatherings are banned through September.

If nothing else, the Governor's plan makes clear that Oregon will not be returning to business as usual anytime soon, and that each step in the process will be driven by public health considerations. Accordingly, we expect the Oregon Health Authority to issue additional guidance and requirements for businesses as the re-opening plan expands. In the meantime, as you contemplate the next steps for your business, keep in mind the following:

Employees May be Reluctant to Return to Work

Currently employees who refuse to return to work out of a simple fear that they might catch COVID-19 are generally not protected by the various state and federal leave laws. Instead, an employee is entitled to legal protection only if (i) the employee is experiencing COVID-like symptoms and is actively seeking a diagnosis; (ii) the employee suffers from a condition that makes the employee COVID-vulnerable; (iii) the employee is caring for an individual who fits within one of the two categories above; or (iv) the employee needs to remain home in order to care for their child because the child's school or place of care has been closed due to COVID-19.

NOTE: Because the Oregon Health Authority is empowered to impose additional workplace restrictions as Oregon re-opens, this analysis may change. For example, as part of its effort to contain the virus the OHA may permit employees who are at high risk to stay home.

In addition, some employees may be reluctant to return because they are receiving generous unemployment compensation benefits. The Employment Department recently issued a set of FAQs that address the rights of employees who cannot or do not return to work (https://www.oregon.gov/employ/Documents/Employer_Resuming_Operations-FAQs.pdf). In a nutshell, an employee will be permitted to continue receiving unemployment benefits only if the employee:

- Is ill with COVID-19;
- Has been potentially exposed to COVID-19 and is subject to a mandatory quarantine period;
- Is staying home to care for a family member, or other person they live with or who they provide care for, who is suffering from COVID-19 or subject to mandatory quarantine;
- Is unable to work because they have to stay home to care for a child due to the closure of schools, child care providers, or similar facilities due to COVID-19;
- Has been asked to work when it would require the employee to act in violation of a mandatory quarantine or government directive; or
- Is unable to work because the employee has been advised by a health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to or spread of COVID-19

Employees may also refuse to return to work and continue receiving unemployment benefits if the employer does not follow social distancing guidelines issued by government and public health officials.

If an employee refuses to return to work and does not qualify for leave as outlined above, the employer is encouraged to notify the Employment Department. Employees who do not qualify for benefits and refuse an offer to return to work would be required to repay any benefits they were not entitled to receive.

Employers can screen employees for COVID-related conditions

Normally an employer's ability to conduct medical examinations and inquiries is limited. However, because of the risks related to community spread of COVID-19, the EEOC now permits employers to:

- Ask sick employees if they are experiencing symptoms of COVID-19 (e.g., fever, cough, chills, shortness of breath, sore throat), and send sick employees home;
- Take employees' temperatures (according to the CDC, individuals with body temperatures of 100.4 degrees or higher should self-isolate);
- Require employees to undergo COVID-19 testing (at the employer's expense); and
- Require a medical release to return to work

For employees with underlying health conditions that may make them more susceptible to COVID-19, employers currently may not ban those employees from the workplace unless they pose a direct

threat to others. Instead, employers must reasonable accommodate those employees whenever possible.

Employers Must Provide a “Safe” Workplace

As we mentioned in a prior post, employers are required to provide all employees with a safe workplace. Both OSHA and OR-OSHA have clarified that requirement to include the specific COVID-related steps employers must take, depending on the level of risk to employees. In addition, Governor Brown’s plan requires the widespread use of face masks and strict distancing measures, and some businesses may be required to ask patrons COVID-related screening questions. To avoid legal exposure, employers should review and implement those and the following other guidelines, as necessary:

- OSHA: <https://www.osha.gov/Publications/OSHA3990.pdf>
- OR-OSHA: <https://osha.oregon.gov/Pages/re/covid-19.aspx#scope>
- Governor’s Resources: <https://govstatus.egov.com/or-covid-19>
- OHA: <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/1e2342C.pdf>
- Worker’s Compensation: <https://www.saif.com/employer-guide/coronavirus-and-workers-compensation.html>
- CDC: <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc>
- EEOC Pandemic Preparedness: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- EEOC COVID-19 and ADA: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Controlling the risk of exposure to COVID-19 will be an important part of every employer’s back-to-work plan. Assume your decisions will be scrutinized by your employees, patrons and government officials, and plan accordingly. To that end, keep the following in mind:

- Social distancing and prevention hygiene will continue to rule. Create a record of your efforts to clean the workplace prior to the return of your employees. Have personal hygiene equipment and supplies available, encourage employees to use them and document those efforts.
- Evaluate the need of your employees’ physical presence. Consider policies allowing employees who are concerned about returning to continue working remotely. There will be an inevitable influx of informal complaints (and possible legal claims) by concerned employees who believe a physical return to work is unreasonable. Similarly, consider

policies that provide an outlet for employees to voice concerns about any aspect of returning to work so that you can evaluate them as early as possible.

- Consider efforts to separate the physical spaces that employees occupy. Document any changes/efforts made to increase the physical space between employees.
- If you are able to clean the workplace using EPA-approved disinfectants against COVID-19, do so. If not, review the CDC's suggested alternatives and follow them as closely as practicable.
- For workspaces and devices that must be shared between multiple employees, consider a cleaning regime to be completed by each employee following their use of the space or device (keyboard, phone, etc...).
- Many trade groups are devising industry-specific best practices. These practices may be used in future litigation as evidence of what was "reasonable" for the industry, and should be reviewed and considered as part of your return-to-work plan.

REMEMBER: All of the decisions you make will be viewed through the lens of "reasonableness" and, unavoidably, hindsight. A thoughtful approach to reopening will provide a significant advantage over those who simply return to work as soon as permitted and without consideration of risk or a review of past practices. Evaluating the costs versus benefits of changing the way you operate, and documenting your efforts to keep customers and employees safe, is time well spent.

For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.