COVID-19 SERIES WRAP UP: A Discussion of Emerging Issues and The Latest Legal Guidance

May 21, 2020
DEVELOPING A RETURN TO WORK PLAN:
• What’s new?
• What’s next?
• Final thoughts
WHAT’S NEW?
Open Texas Plan

- Governor’s report issued 4/27/20
  - minimum standard health protocols/checklists
  - industry-specific guidance for some industries
Open Texas Plan

• Guidance frequently added and updated
  – stay informed: [https://gov.texas.gov/organization/opentexas](https://gov.texas.gov/organization/opentexas)
Open Texas Plan

• Train all employees on cleaning/disinfection, hand hygiene and respiratory etiquette

• Screen employees before coming into the business
  – Send home employees with listed symptoms
EXPOSED PERSONS IN THE WORKPLACE
Exposed Employees, Customers, Vendors, Visitors

- **Primary:** Exhibiting symptoms of COVID-19 or tested positive for COVID-19.
- **Secondary:** Has been in the presence of a person with primary exposure.
- **Tertiary:** Has been in the presence of a person with secondary exposure.
Primary Exposure – Action Steps

- Send the employee home for at least 14 days from last possible exposure and advise to seek medical treatment.
- **Texas guidance**: employee may return to work when all three of the following criteria are met
  - At least 3 days have passed since recovery (i.e. no fever)
  - Employee has improvement in respiratory symptoms
  - At least 7 days have passed since symptoms first appeared
Primary Exposure – Action Steps

- Clean and disinfect work areas – CDC and OSHA guidance.
- Notify appropriate employees, vendors, customers. Do not mention name of individual.
- Recommended: Notify public health authorities for further information if employee is a “confirmed” case.
Secondary Exposure – Action Steps

- If living in same household with a person with primary exposure, send the employee home for at least 14 days from last possible exposure and advise to seek medical treatment. (Texas guidance is the same)
- Clean and disinfect work areas – CDC and OSHA guidance.
- Optional: Notify public health authorities for further information if relative is a “confirmed” case.
Tertiary Exposure – Action Steps

- Instruct all employees to:
  - Frequently clean hands by using soap and hot water or, when a sink is not available, use alcohol-based hand sanitizer.
  - Use disinfectant wipes to clean door handles and surfaces before you touch them.
  - If you have cloth or paper face masks available to you, please wear one to work every day, as recommended by the CDC.
  - Avoid close contact with your colleagues, remaining at least 6 feet apart wherever possible.
Just yesterday, OSHA reversed its April 10, 2020 announcement that most employers wouldn’t be required to track workplace COVID-19 cases.
OSHA Reporting

• Employers that maintain OSHA injury/illness logs must record COVID-19 cases that are work-related
  − Agency acknowledges work-related determination will be difficult
• Will resume in-person inspections for medium/low risk areas
• In high risk areas, remote investigations may continue under some circumstances.
COVID-19 is a recordable illness if

- There is a confirmed case of COVID-19, as defined by CDC
- The case is work related as defined by 29 CFR § 1904.5
- The case involves 1 or more of the general recording criteria in 29 CFR § 1904.7
- Death, days away from work, restricted work, medical treatment beyond first aid, loss of consciousness, significant injury or illness.
Labor Relations
Can we get a history lesson in 60 seconds or less?
Labor Relations

NLRA
1935
Now can you address the current state of the union?
State of the Union
Why does the NLRA apply to non-unionized employees?
The NLRA protects employees.
Protects concerted activity
Subject must be terms and conditions of employment
Remains in effect during pandemic
What issues might cause employees to explore concerted activity?
Increased Union Activity

- Safety/PPE
- Hazard Pay
- Furloughs/Layoffs
- Paid/Unpaid leave
Increased Union Activity

• Wages
• Benefits
• Staffing
• Resources
Increased Union Activity

- Training
- Fairness
  - Discipline
  - Promotion
  - Scheduling
What does concerted activity look like?
Labor Relations

- Refusal to work
- Protests
- Strikes
- Walk outs
Labor Relations

- Complaints, demands
- Social and other media
- Video/Recording of working conditions
- Solicitation
Labor Relations

• No protection for activity that is:
  – Unlawful
  – Violent
Labor Relations

• NLRB will generally protect criticism of employer’s COVID-19 response

• Narrow exceptions
  – certain “disparaging attacks” calculated to harm company
  – certain “egregious or opprobrious” misconduct
  – certain “disloyal” behavior
  – maliciously false statements
Labor Relations

What can we do about it?
Labor Relations

• Communicate – listen
• Resolve issues
• Maintain credibility
• Provide accurate and timely information
Labor Relations

- Anticipate concerted activity
- Map out practical responses
- Ensure compliance with all guidance from CDC, OSHA, etc.
- Ensure compliance with all other laws
Labor Relations

What can’t we do about it?
Labor Relations

DO NOT

• Threaten
• Interrogate
• Threaten
• Spy
Did any of the recent legislation in response to the pandemic affect labor relations?
• Notable strings attached to lending program for mid-size U.S. businesses include:
  - Honoring CBAs (page 523); and
  - Remaining “neutral” in any union organizing effort (page 524)

• Strings do not apply to SBA loans under Paycheck Protection Program
WHAT’S NEXT?
What’s Next

What labor relations issues should we expect to see in the new normal?
What’s Next

• More virtual organizing
  - Low cost
  - Effective in reaching mass groups quickly
  - Consistent with physical distancing climate
What’s Next

• Mail ballot elections
• Collective bargaining by teleconference
• Arbitrations by teleconference
What’s Next

What labor organizing themes do we anticipate?
What’s Next

- Income inequality; COVID-19 pay increases should be retained
- Paid sick leave should be adopted, continued or applied more broadly
- Safety measures (temperature checks, antibody testing) and hazard pay should be standard
What’s Next

- Safety nets are needed for laid-off or furloughed employees
- Expanded use of telework and remote work arrangements
FINAL THOUGHTS
Final Thoughts

• Fluid situation requires **knowledge**, so:
  - Seek information
  - Study information
  - Identify red flags
  - Seek help when necessary
Final Thoughts

- Fluid situation requires **flexibility**, so:
  - Be willing to change
  - Implement change
  - Embrace change
Final Thoughts

• Fluid situation requires **endurance**, so:
  - Stay in shape
  - Maintain balance
  - Be confident in your ability to cross the finish line
Final Thoughts

• Fluid situation requires
  – Knowledge
  – Flexibility
  – Change
  – Stamina
What if an employee refuses to return to work?
Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.