

Re-“Open for Business” – COVID-19 Issues for the Pennsylvania Public Employer

With many public employers now halfway through the second full month of being partially open, many have settled into a balance. For some, that balance included a complete cessation of activities. For others, it took the form of partial layoffs of employees or even the permanent layoff of employees. Still others have weathered through the storm without making changes to their operations. Regardless of the path that your municipality has taken on this journey, you probably have started to look forward and that probably means thinking about what a re-opening/recall of employees might look like.

The first question each public employer may ask is “is it safe to bring back any employees”? Regardless of whether you are located in a red or yellow county for purposes of the Governor’s re-opening plan, there will be risks in bringing employees back. Your municipality can take some steps to try to mitigate against the risks, but you probably will not be able to eliminate them completely.

Regardless of the current color classification of your county, in looking forward, a common attitude for many Pennsylvania public employers is a mix of concern and curiosity over a central question: What will a “return to work” look like for our municipality? Chances are, it will not closely resemble the environment that was left behind in mid-March. Your most valuable tools in this process will be preparation and communication. As you begin the re-opening process, you must have a plan in place to implement your re-opening strategy. Separately, you will need to ensure that employees are aware of and understand the steps which you have taken, as doing so will go a long way to alleviating the obvious concerns about returning. Here are some responses to questions that you may have and general considerations to bear in mind when formulating a plan:

1. **Who will return and when?** The first question to consider is should we recall any employees? In some cases, work can be performed in a similar manner remotely avoiding the risk of workplace issues. However, assuming that your municipality concludes that it is safe, prudent and beneficial to open and to recall employees, which ones should be recalled and when? To begin, consider starting with any employees who fit into two categories: (1) employees that cannot work remotely; (2) employees whose physical presence is necessary to provide public services for the municipality. What types of employees do you need in order to re-open? The answer to that question may vary from municipality to municipality. In some cases, it may be IT, infrastructure or HR professionals. In other cases, it may be management or a specific department. From there, employers must plan for when rank-and-file employees will return. As employers contemplate who should come back first, employers must document their plan to insulate themselves to the largest extent possible from employment claims involving the process. This includes documenting the legitimate, non-discriminatory reasons for choosing which employees to recall or return to work and the decision-making process. Examples of legitimate, non-discriminatory reasons may include factors such as operational needs, documented past performance issues or even seniority. Avoid the appearance of relying on any protected characteristic, such as pregnancy, age, race, religion, national origin, etc. as a basis for personnel decisions. Employers in a unionized environment must also be cognizant of any collective

bargaining agreement that dictates or restricts who can return first. In addition, public employers should recognize that they may not refuse to recall or rehire older employees or pregnant employees, or any employee previously accommodated for a disability under the ADA, based upon a speculative fear that they are at a higher risk of having complications from COVID-19.

2. ***What changes to the workplace itself should we consider?*** Public employers, some of whom are strapped by declining revenues, seeking to resume some type of normal operations and recall employees will need to make an investment of time and money to prepare the workplace for resuming operations. Mitigation of the risk of COVID-19 infection in the workplace will be neither quick nor easy and will take several forms. First, employers should have a plan in place before employees return for a deep cleaning of all surfaces with which employees will come in contact. This plan should not only include an initial cleaning, but follow-ups for: (1) routine cleaning and disinfecting; and (2) additional deep cleaning in cases of employees either testing positive for COVID-19 or displaying symptoms consistent with it.

Next, screening steps should be taken as employees arrive back in to the municipal facility. Under normal circumstances, such steps might be inconsistent with statutes such as the Americans With Disabilities Act (“ADA”). However, in light of the pandemic declaration, employers have the discretion to take certain steps to ensure that employees do not constitute a direct threat to the workforce.

One of the first steps is to ensure a system of screening employee’s temperatures as a condition of entry into municipal facilities. Policies should be created which establish a maximum (and minimum) temperature under which an employee will be admitted to the facility. Temperatures can be checked using digital temperature scanners. Secondary screening should be included for employees whose initial screen above or below the accepted levels, as to ensure that initial screens are not the result of exertion of other factors. As noted above, given the pandemic, temperature screenings are permitted medical tests under the ADA. However, employers should remember they have an obligation to maintain confidentiality as to the results of the temperature screenings. Such policies should also identify who does the testing, when it is done and where. Appropriate protective equipment should be provided to the screening personnel, as well as appropriate training and instruction.

In addition, separate policies should be issued requiring any employee who experiences symptoms consistent with COVID-19 (fever, chills, headache, dry cough, shortness of breath, body aches or loss of taste or smell) to immediately report them to the employer. Upon receiving such a report, the employee should be instructed not to report to work or be sent home. Likewise, in light of the pandemic declaration, employers may currently ask employees if they have recently experienced any of the above symptoms and, if so, may send the employee home or direct them to remain home. Before implementing them, the policies should be reviewed by your solicitor or labor counsel. Depending upon the content of the policies, they may require some level of bargaining with regard to unionized employees.

Once an employee is admitted to the municipal facility/building, employers must have procedures in place regarding other mitigation steps. This could include face masks to be worn at all times while working or interacting with others (unless it genuinely interferes with the performance of duties or creates a separate safety issue). Although the April 6, 2020, Order from the Pennsylvania Secretary of Health requires the use of masks in businesses, public employers were not subject to that portion of the Order. Regardless, public employers should also consider whether or not they will provide masks to employees or simply require use by employees.

Separately, hand sanitizer and, if possible, sanitizing stations should be installed for use by employees. Concerns about social distancing from co-workers may arise when a larger group of employees is reporting to work at the same time. For this reason, perhaps consider staggered shifts. Employees must also be given the resources to sanitize their workspaces separate from the facility-wide cleaning which occurs. If possible, employers may wish to consider installing temporary partitions between work areas and/or between work areas and public areas. In addition, you should consider how you effectuate social distancing in common areas, such as hallways, bathrooms

and break/lunch rooms. You may consider one-way traffic areas or blocking off areas in order to create space for employees while also encouraging social distancing. Although it may be challenging in smaller municipalities, employers should ensure to the largest extent possible that they do not identify the person who has a presumptive or confirmed positive COVID-19 test. Your municipality should also consider establishing a communication infrastructure to address COVID-19 infection. This will assist you in determining with whom an employee has come in contact in the event that the employee is sick or has a positive COVID-19 test result, so that they can be advised to take any necessary precautions.

As a final point to potential changes in the workplace, by now, you may have heard a great deal about antibody testing, and you may be wondering about its role in the re-opening process for public employers. Antibodies are blood proteins that are produced in response to the body fighting off an infection. There have been suggestions that the presence of antibodies in a person indicates that he/she had the coronavirus recently and, therefore, developed immunity to it. Thus, the person may be safer in the work environment or in cases where potential exposure to COVID-19 may be higher.

Based upon this, some employers have sought to require antibody testing for employees. Before doing so, employers should understand that the ability to compel an employee to submit to antibody testing is largely a function of what change in operations an employer may make after reviewing such results and how accurate the tests are. For instance, if an employer can show that it might staff differently based upon the testing results and/or assign employees who test positive for antibodies to more environments in which they may encounter the coronavirus, that may be helpful in showing employees are more safe, and, therefore, mandatory testing is appropriate. However, the second aspect of the inquiry is the accuracy of the testing, as well as the science underlying antibodies. Many products currently advertise accuracy levels above 95%. When those products have been tested, however, the real accuracy has been determined to be closer to 20%. Likewise, there is no certainty as to whether the presence of antibodies means a person is immune to coronavirus and/or for how long any such immunity might last. Public employers should be exceptionally careful in relying upon antibody testing to make personnel decisions.

3. ***What if we have employees who refuse to return to work?*** Your municipality should be prepared to address issues with employees who refuse to return to work. Some may not wish to return out of a genuine concern about getting sick or because they currently do not have appropriate childcare available, while others may be making more money receiving unemployment. Much like everything else associated with COVID-19, there are few one-size-fits-all solutions.

For the employees who express concern about becoming infected upon return, there are two things to consider. First, ensure that your municipality has taken all the steps that it can (cleaning, mitigation, screening, PPE, etc.) to ensure the safest possible workplace. Second, under the Americans With Disabilities Act, employers have an obligation to make reasonable accommodations in certain instances. This requirement is triggered if it is demonstrated that the employee's duties pose a threat of infection (either by itself or because of an underlying health condition) over and above the baseline threat posed to all employees. In other words, if an employee asserts that he/she does not wish to return because of safety, these concerns must be considered, and a determination must be made as to whether or not the position (or an underlying condition) makes the employee more vulnerable to COVID-19 infection than other employees. If so, an accommodation may be required. For employees who have childcare concerns, depending upon their positions and duties, they may be eligible for expanded Family and Medical Leave under the Families First Coronavirus Response Act.

4. ***How will a return to work change the way that we address employee issues?*** In some cases, things will be similar to what they were, but in others, your municipality will need to adapt to the changing environment. Discipline should be administered the same as it was before COVID-19. However, employers should make sure to take this opportunity to remind employees (whether they are reporting to work or working remotely) of the expectations that

the employer has for them. Obviously, if they are teleworking, productivity may not be at optimum levels. Nonetheless, employers need to stress what employees are required to do in either status. Likewise, employers should remind teleworking employees that such an arrangement is temporary and due solely to COVID-19.

Notwithstanding this, some approaches to issues may need to be modified. For instance, requirements of producing doctor's notes after a prolonged absence. In many cases, it may be impractical or impossible for a person to obtain an appointment and/or a note. In some instances, such as when a genuine doubt exists about the employee's ability to perform his/her duties, documentation and/or a physical examination should be required. Likewise, attendance expectations may need to be reconsidered. Clearly, in the past some employers viewed sick leave usage as a potential lack of dedication to the employer. That mindsight must change by necessity. If employees are sick, they need to be directed to stay home and be reminded that employers support them in doing so.

There is no debate that things have changed since the onset of the coronavirus pandemic. Resuming full operations and recalling employees is one step in an ever-evolving process. However, public employers must understand that, in order to effectively recall employees, significant amounts of work are going to be required. Only through investing the time and money into this process, can employers try to create an effective plan to return to the workplace.