

# Reopening: Returning to the Workplace & Employment-Related Issues

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# Agenda for Today

1. Employee and Customer Safety
2. Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues
3. Reduced Compensation, Scheduling & Staffing
4. Paid Time Off, Sick, and Other Leave Laws
5. Employee Benefits Considerations
6. Litigation Flashpoints

# The Landscape – You Need A Plan

- State/Local Restrictions
  - Updates and virtual events available at [www.dwt.com/COVID-19](http://www.dwt.com/COVID-19).
- Gradual Phases
  - [Sample plan](#) produced by Lear
- Anticipate Significant Anxiety and Reluctance
- Be Flexible, Adaptive, and Innovative
  - [DWT Checklist for Reopening](#)
  - [USDOL website brainstorming RTW ideas](#)
- Mitigation Is Necessary and Often Expensive

# Panelists



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# Employee and Customer Safety

*Joseph Hoag*

# Employee and Customer Safety



- This is a moving target!
- Creating a safe—and compliant—work environment
  - Changes to physical layouts and structures (“engineering controls”)
  - Changes to policies and practices (“administrative controls”)
  - Personal protective equipment (“PPE”)
- “At the front door”—inquiries and testing
  - Options
  - Privacy
  - Procedures
- When something goes wrong—notifications



# Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

*Michael Goettig*

# Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Anything other than  
an immediate return  
to *status quo ante* ...



Potential for legal claims



# Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

## Option 1: Allow employees to self-select

- Depending upon industry, demand may not be what it once was
- Resumption of operations may be gradual
- Personnel demands may operate at less than capacity
- Employees choose to return or stay home
- Be flexible within reason

# Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

## Option 2: Use clear, legitimate criteria

- Focus on key positions/functions and staffing needs rather than specific individuals
- Selection based on **non-discriminatory** factors
  - Seniority
  - Particular skill set
  - Best performers
  - Team that works well together

# Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

- Under either option, be aware of the potential for disparate treatment
- **DON'T** assume
  - Woman with school-aged children would prefer to stay home
  - Older worker would prefer to stay home
  - Employee who complained about working conditions would prefer to stay home
- **DO** assume that you will have to explain/defend every reinstatement decision

# To-Do List



- Post FFCRA Notice
  - [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- Develop FFCRA Leave Request Form
  - <https://www.dwt.com/blogs/employment-labor-and-benefits/2020/04/ffcra-leave-documentation>
- Be Prepared to Extend FFCRA Leave
  - **“Southern California Tire Company to Pay Back Wages After Denying Paid Sick Leave To Worker Whose Doctor Ordered Coronavirus Quarantine”**
  - <https://www.dol.gov/newsroom/releases/whd/whd20200429>



# Reduced Compensation, Scheduling & Staffing

*Laura Heckathorn*

# Wage/Hour Considerations

## Reduction in Pay

- Agreements
- Exempt versus nonexempt issues
- Notice may be required

## Increase in Pay: “Special” or “Hazard Pay” or Bonus Payments

- “Patriot Pay” not here (yet)
- Regular rate issues
- Bonuses to salaried employees should not appear to be withheld wages

## Compensable Time Issues

- Pre-shift health screenings
- Donning and doffing PPE
- Washing hands

## Expense Reimbursement Health Screening/PPE

- Remote work expenses

# Furloughs and Layoffs Revisited

- WARN and Mini-WARN
  - If triggered, employer must provide 60 days' written notice to employees and certain agencies before a “plant closing” or “mass layoff”
  - Is the “unforeseen business circumstance” (or similar mini-WARN statutes) exception still applicable?
- Selection criteria
  - “New” protected characteristics to consider
  - COVID-related staffing decisions
    - Voluntary and/or involuntary exit program
      - *ADEA release requires 7 day revocation period and group layoffs under the OWPBA requires 45 day waiting period*



# **Paid Time Off, Sick, and Other Leave Laws**

*Angela Vogel*



# Sick Time, Leave and PTO Overview



## ■ State and Local Sick and Safe Time

- Medical issues for employee or family member
- Quarantine and isolation, and care for family member
- School/place of care for children closures
- Workplace closures
- Emergency Rules may be in place (stay current)
- Be flexible with use of sick time

## ■ Reinstatement

- Does rehire trigger reinstatement of sick time bank?
- Does prior employment count towards eligibility period for use?



# Sick Time, PTO and Leave Overview



- Washington's Governor Inslee issued a Proclamation protecting High Risk employees:
  - "High Risk" based on CDC guidance (65 or older or have underlying medical conditions)
  - Employees can use available PTO or can apply for unemployment if they do not wish to come to work with offered accommodations
  - Employees have *reinstatement rights*
  - ***Employers must maintain health insurance*** for high-risk employees for duration of leave period (even if the employees have exhausted PTO)
  - Anticipate that other states may take similar measures

# Sick Time, PTO and Leave Overview



- **Family Medical Leave Act**
  - Unpaid, available for *serious health condition* of employee or family member
  - Employee eligibility:
    - Works at site with 50 or more employees within 75 miles;
    - Employed by same employer for at least 12 months;
    - Worked at least 1250 hours during prior 12 months for employer;
    - *12 months of employment do NOT need to be consecutive months.*
- **FFCRA** – in effect until December 31, 2020
  - Paid Sick Time
  - Paid leave for school/place of care closures

# Sick Time, PTO and Leave Overview

## ■ Paid Family Medical Leave

- Many states have Paid Family and Medical Leave Programs (or unpaid leave laws)
- Typically available for *serious health condition* of employee or family member
- Leave could also be necessary to underlying condition (vs. COVID-19)
- Review eligibility requirements
  - Does prior period of employment impact eligibility?
- Job Protections/Reinstatement Rights
  - Laws may require notice if not reinstating employee
  - Does prior period of employment impact rights?
- Review benefits continuation requirements





# Employee Benefits Considerations

*Jeff Belfiglio*

# Employee Benefits Considerations

- Just a reminder to consider how returning employees will be treated under retirement and welfare plans
- Generally immediate participation in 401(k) plan but expect new elections
- If health coverage was not maintained, employers may waive waiting period
- Recent guidance gives employees extended period to elect COBRA for any gap in coverage
- Separate webinar upcoming on May 18th



# Litigation Flashpoints

*Emilio Gonzalez*



# Litigation: Win the Moral High Ground

- Affirmative Narrative: The employer as thoughtful, caring and fair
- “Fair” Wins Over “Legal”
- Mine Field Even If You’re Fair & Diligent



# Litigation: Flashpoints

## Discrimination

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- Who keeps working from home?
- Remote work—a reasonable accommodation?
- Is pandemic pretext for terminations and selective re-hiring?
- Disciplining employees who take leaves

## Harassment & Retaliation

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- Misdirected fear may lead to hostility or unreasonable expectations re workplace health & safety

## Wage & Hour

- Monitoring overtime and breaks
- Extra time getting to work
- Extra equipment and reimbursements
- Misclassification

# Litigation: Pandemic Lawsuits

- ***Jones v. Eastern Airlines LLC*** (Pennsylvania). Executive alleges she was fired for trying to take time off under the Families First Coronavirus Response Act to care for her school-aged child
- ***Kristopher King v. Trader Joe's East, Inc.*** (Kentucky). Employee alleges he was fired for voicing concerns on a private Facebook page about his employer not doing enough to protect him from the COVID-19 exposure
- ***Verhines v. Uber Technology, Inc. & Rogers v. Lyft, Inc.*** (California). Uber and Lyft drivers allege they are being unlawfully denied benefits available to employees because they have been misclassified as independent contractors
- ***Siers v. Velodyne Lidar*** (California). Employees allege violation of federal and state WARN Acts because employer had planned to eliminate jobs before pandemic but used it as pretext to fail to provide proper notice
- ***Burr v. Carnival Corp.*** (Florida). Performers demand payment, per a written contract, for all performance gigs cancelled with less than two-weeks' notice

# Litigation: Additional Lawsuits to Watch

- *Molchun v. Royal Caribbean Cruises Ltd.* (Florida)
- *Scott v. Hooters III Inc.* (Florida)
- *Toney Evans, Special Administrator of the Estate of Wando Evans v. Walmart Inc.* (Illinois)



# QUESTIONS

# Additional Resources

- [Rolling Reopening: Planning for Employment-Related Issues](#), by Jeffrey B. Youmans, Joseph P. Hoag, and Michael J. Killeen
- [COVID-19 Checklist for California Employers Reducing Labor Costs](#), by Aaron N. Colby, Laura D. Heckathorn, and Marissa Franco
- [Governor Inslee Extends Employment Protections to "High-Risk" Individuals Through June 12, 2020](#), by Jordann Hallstrom, Katharine Tylee Herz, and Christine C. Hawkins
- [New Guidance Relaxes ERISA Deadlines, Other Benefit Plan Requirements Pursuant to CARES Act](#), by Dipa Sudra, Jeff Belfiglio, Hrishi Shah, and Stuart Harris

For additional resources, please see [DWT's COVID-19 & the CARES Act Resource Page](#)

# Upcoming Webinars

- **Washington Reopening: Returning to the Workplace & Employment-Related Issues** (Thursday, May 07, 2020 from 11:00AM–12:00PM PT)
  - Register [here](#).
- Additional state/topic-specific webinars on these issues will be announced. Keep an eye out for our invitations or visit the [virtual events](#) on our website for additional details.

# Thank You



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