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STRATEGIC PERSPECTIVES—Counseling the small business owner on re-opening for business

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As general counsel to businesses under 250 employees, the top coronavirus question we hear in our small/mid-sized practice is shifting from how to acquire capital through federal and state loan programs to how to reopen in the face of the continuing COVID-19 uncertainty. Counseling clients in this context can be challenging to even experienced attorneys. Clients will mostly want to ask questions about social distancing, teleworking, COVID-19 testing, and the like. Exposure planning is critical, but astute counsel will broaden the client's focus.

More than ever, clients also need their trusted counsel to listen non-judgmentally to their fears and encourage taking the next right steps for the client's unique circumstances. When clients are overwhelmed with demands on their time and attention for deep thinking, client counseling can be streamlined by the attorney using a checklist and developing areas of responsibility tailored to the client's bandwidth and budget. This article highlights the many areas of employment law that effective counsel will want to address.

Leadership sets the tone

Before hitting send on the re-opening announcement to staff, we advise owners to pull together their re-opening team. This may be the business's leadership team, supplemented by key players in human resources, sales and marketing, facilities/operations, and other areas that are essential to generating work and staffing to get the work done. Encourage clients to expect—and embrace—divergent thinking in these private meetings before plans are made public.

The first order of business is to be clear about what the team wants to accomplish in re-opening. Nothing will be business as usual.

- Will the business focus on certain product or service lines more than others?
- Is now the opportunity to launch a new or modified service to better meet market demands?

- Are there significant COVID-19 related constraints that must be managed, overcome, or worked around?

Articulating the purposes early in the re-opening process allows those purposes to become the touchstones for choosing among competing priorities and driving effective decision-making. Sharing those purposes with employees can also generate loyalty and a “can-do attitude,” characteristics to counter the effects of ongoing stressors that virtually every employee now faces outside of work.

The second order of business is to take a moment to acknowledge that the reopening process is more likely to be like the experience of riding the waves than flipping a switch. Businesses have long created contingency plans for natural disasters—typically there is a trigger and a re-entry plan that ramps up. Now, if there’s any certainty, it is that the trajectory of COVID-19 disease incidence and therefore the measures taken to control its spread will not be linear for the next one to two years.

Invest in compliance

Regardless of industry, most small businesses need to address core labor issues and evaluate what additional industry-specific concerns should be addressed. Both valid and specious employment claims are already on the rise due to a combination of new laws, economic pressures, and a tight job market.

1. Refresh supervisor training. We put supervisor training at the top of the list because well-informed supervisors are the “eyes and ears” and the employer’s day-to-day spokespeople for success with employees. Remind supervisors of the company’s “open door policy” if there is one. Every supervisor should understand the basics of:

- coaching and motivating employees for high performance
- managing attendance and leave
- recognizing and reporting bias, discrimination, and harassment
- documenting and managing performance
- addressing employee conduct and discipline consistently

Many states have mandated sexual harassment training since the #MeToo movement surfaced. If this training has not been implemented, now is the time.

2. Adapt leave policies for the new (temporary) laws. As the country moves from crisis through a sustained pandemic, ignorance of new laws like the Families First Coronavirus Response Act and Paycheck Protection Program will not be excusable. Counsel should carefully vet any assertion that the client believes it is exempt from compliance.

Employers need to update Employee Handbooks, physically post and electronically distribute required notices to employees, and adapt methods of communication for timely and effective attendance tracking, submission and approval of leave requests, and maintaining confidentiality of leave requests, which may contain health information. If the employer doesn't have a robust employee portal, new leave forms should be easily accessible as fillable-PDF forms that both the employee and manager can sign digitally. HR or payroll will need to properly track and compensate sick leave and family leave in different ways to withstand scrutiny by the Department of Labor and potential public audit if the employer accepted government loans.

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3. Set expectations for wage-hour compliance. Whether non-exempt employees are onsite or remote, employers must become crystal clear about their expectations for scheduled work time, timekeeping, meal and rest periods as required by state and local law, and whether off-schedule work is permitted without advance permission. In environments requiring new or expanded expectations of changing clothing, handwashing, and/or more personal protective equipment other than simple masks and gloves, the employer should address whether donning and doffing is work time, especially if employees have to wait their turn, for example to access a limited number of handwashing stations.

When teams are comprised of exempt and non-exempt employees, informing exempt employees of current policies for non-exempt employees can head off misunderstandings before they occur. Be prepared to explore client concerns that they would like to offer reasonable flexibility to employees, yet they worry about being taken advantage of or that inconsistency will open the door to legal risk.

4. Self-audit employee classifications. We usually advise employers to conduct a self-audit of employee classifications under the Fair Labor Standards Act every year and under attorney supervision every three years. In the current flux of working conditions, we are advising all clients to review every position that has experienced a change in hourly rate or salary, change in duties, or re-alignment of role to another team or department.

Update the job descriptions, not only for documentation purposes, but as a vehicle for communication with the employee. Ensure that the new FLSA salary threshold of \$35,568 annually or \$684 weekly is actually being paid given that many employers have implemented creative, ongoing cuts in salary or work time, as well as furloughs.

5. Hire with care. As the pandemic continues, employers should not be surprised to experience elevated needs for hiring new staff to replace workers who fall ill or drop out of the workforce.

Many smaller employers rely heavily on manual processes for screening candidate submissions and in-person interviews. Seize the conversion to digital submissions as an opportunity to upgrade application forms for “ban the box” laws, which prohibit a prospective employer from making inquiries about an applicant’s criminal background before a designated point in the selection process.

Every person who participates in screening, interviewing, or checking references should be oriented to how the employer judges qualifications and “fit,” and the EEOC guidelines on permissible questions and bases of decision-making, as well as how to respond to voluntary disclosures of age, health, disability, veterans status, and other classes protected by federal, state, or local laws. A growing number of cities and counties have expressly articulated more protected classes than the federal laws, including gender identity.

6. Onboard virtually. Effective onboarding sets the tone for a successful employment relationship and is particularly critical if a new employee does not have the benefit of coming to a fully-staffed workplace to learn the culture and daily routines. Onboarding activities must be adapted without cutting corners that lead to greater risk. For example, even though the employee handbook may be shared and acknowledged electronically, be sure someone orally highlights non-discrimination, open door, and other employee relations topics and gives the employee an opportunity to ask questions.

Further, the U.S. Department of Homeland Security has announced that any employer which is operating fully remotely may review I-9 documentation via email, fax or videoconference during the national coronavirus emergency. In-person review is deferred until May 19 or within three business days after the termination of the national emergency, whichever comes first. To avail itself of this option, the employer must be operating fully remotely, must document each employee’s remote onboarding and telework policy, and must enter COVID-19 in box 2 of the I-9 form. There is no change to the number or types of documentation required.

7. Revisit onboarding after breaks in service. If an employee was temporarily furloughed or laid-off and then rehired, decide which parts of onboarding should be updated based on reduction or break in service. Prime candidates for review are state requirements for new hire reporting, background checks, I-9 verification, W-4 forms, emergency contact forms, and re-enrollment forms for health benefits, insurance plans and retirement plans. Employees are likely to ask whether waiting periods can be waived, whether they should get preferences related to seniority and length of service, and whether prior leave balances will be reinstated.

Marshall the evolving legal and public health landscape

Lawyers counseling businesses about re-opening have an added challenge: They themselves are inundated with new substantive statutes, regulations, executive orders, and guidance, which is being issued daily at every level of government. It is a steep learning curve, and one which shows no sign of abating. Our role as legal counselors is to translate highly technical and nuanced information into understandable language and educate our clients on how the puzzle

pieces fit together in the client’s jurisdictions. This synthesizing role is particularly sensitive when clients operate in multiple jurisdictions or draw their workforce across state and county lines.

8. Avoid “benign” discrimination. Most clients recognize that they shouldn’t explicitly make hiring and employment decisions on the basis of age, sex, pregnancy, disability, race, national origin, or other protected classes. That said, in their efforts to promote safety and protect employees from COVID-19 itself, employers and supervisors may fall into the trap of treating higher-risk employees differently or denying opportunities for working hours, assignments or work requiring travel to, say, employees who are primary-caregivers for their children whose schools and day care providers are closed. Remind clients that discrimination can be proven by both direct evidence and disparate treatment. When in doubt, encourage an attorney-client privileged disparate impact review.

9. Follow the CDC guidance for businesses and employers. The CDC continues to regularly update its interim guidance for employers of preventing the spread of COVID-19 in the workplace, planning for community transmission, and avoiding stigma or discrimination when assessing COVID-19 risk. Multiple documents are available to plan, prepare, and respond for different types of workplaces and customer interfaces. While these guidelines do not have the force of law, they have quickly shaped employer practices for cleaning and disinfection, social distancing, not allowing sick employees or customers into the workplace, isolation spaces if an employee or customer becomes sick while in the workplace, and travel guidance.

Employers that sent their workforce home early in the pandemic may now be implementing changed guidance and may have a greater need to educate employees and address instances where employees are not following new or different protocols. A re-opening team should also assess whether they can procure necessary cleaning supplies in the quantities needed.

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10. Pay attention to the local and state orders. Given the patchwork of municipal, county, and state public health orders, each employer will face different constraints based on their location and possibly the residences of their employees. Clients may need to be educated that these orders are an exercise of the “police powers” of the state, that employer violations can result in criminal charges and civil penalties, and that requiring employees to flaunt the law may spur litigation and bad press against the employer.

The most common topics to investigate are stay-at-home or lockdown orders, “essential” businesses, limits on the number of people who may gather, travel restrictions, requirements for face coverings, and orders targeting certain industries.

11. Brush up on occupational safety and health. The Occupational Safety and Health Act imposes a general duty to provide a safe workplace. The salient OSHA standards for COVID-19

include personal protective equipment, blood-borne pathogens, and exposure to hazardous chemicals used in cleaning and disinfecting. OSHA has recently issued COVID-19 specific guidance on these issues, some tailored to discrete industries, as well as guidance on when COVID-19 is considered an occupational disease which must be recorded.

While certain industries like construction and food processing are highly attuned to OSHA safety measures, reporting and inspections, others are less familiar with these requirements and may need more exploration of coverage and compliance needs with federal law or state counterparts, many of which impose different or higher standards than the federal law. Some state OSHA agencies are inundated with worker complaints regarding the most basic of COVID-19 protection measures.

Ride the inevitable waves

By now, most lawyers have read the emerging scientific news that the COVID-19 pandemic may linger for one to three years. Alongside this “lengthening” of the curve, the media is filled with coverage of the political, social, and economic pressure to re-open. In any event, businesses should prepare for re-closing, and for one or more partial contractions before complete stabilization.

12. Learn and Improve. Employers should revisit what worked and what they would do differently if the business has to scale down or close again. As much as innovation may have occurred on the fly, there is now some breathing room to assess results and make course corrections.

13. Solidify the contingency options. While the first wave of lockdowns was unpredicted and thus many employers were caught off guard with the unprecedented scope of the crisis, there is time to button up before the next indication that an individual business may need to close because of a more local or even site-specific outbreak. Planning techniques include monitoring for an up-tick in absences, cross-training for redundancy in all positions, identifying core or essential positions, implementing telecommuting agreements (or at least having a template ready), and developing scheduling alternatives in case greater social distancing is needed or there are not enough employees available.

14. Beware of the WARN Acts. Most small business clients, and indeed some lawyers, will not be aware of the Worker Adjustment and Retraining Notification Act (WARN Act), which offers protection to workers, their families, and communities by requiring covered employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. Many states have similar laws or executive orders with different thresholds and notification schemes. The purpose of such laws is to prevent workers, their families and state officials from large, unexpected layoffs which the employer intends or can foresee.

WARN violations are enforceable through civil penalties, backpay and benefits which can add up to considerable sums for a cash-strapped business. The issues to probe for when counseling clients are the employer’s headcount at the time of the cuts, whether cuts are temporary or

permanent, the length and extent of temporary furloughs, and the likelihood that returning employees will be furloughed again and in what timeframe.

Can we do this? Yes, we can!

In our practice serving employers with headcounts under 250, we find there is a broad range of available time and talent to tackle such an ambitious agenda. The value of a one-hour conversation to the client is to educate and help the client prioritize:

- What areas can be accomplished in-house or with counsel's minimal review after the client has done the leg-work?
- What work requires a level of skill or sophistication best met by counsel?
- What areas are best done with the protections of attorney-client privilege?

Whatever balance is struck, lawyers add value to their client's business by providing the analytical framework alongside logical, pragmatic and science-based strategies which meet the client's purposes for re-opening, support financially viable business operations, and manage risk proactively.

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