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PRACTICAL STEPS AND ISSUES TO CONSIDER WHEN IMPLEMENTING A SUCCESSFUL RETURN TO BUSINESS PLAN AS A RESULT OF COVID-19

As restrictions relating to the COVID-19 pandemic begin to lift across the country, employers are planning for their employees' return to business and preparing for "the new normal." In doing so, employers are entering uncharted territory. This guidance addresses some of the most common issues that employers must be prepared to address in developing a successful return to work plan as a result of COVID-19.

QUESTION 1: WHEN SHOULD EMPLOYEES RETURN TO THEIR PHYSICAL WORKSPACE?

ANSWER: It depends. Clearly, a "one-size-fits-all" approach will not work in this context. For example:

- For employers with locations in multiple states, not all shelter-in-place orders across the country will lift at the same time or in the same manner.
- Employers with the ability to provide more separation among employees in their physical workspace will have more flexibility than those with employees working closely together in confined areas.
- Employees covered by collective bargaining agreements must also be considered before implementing changes to work schedules, hours, pay, and duties.

QUESTION 2: HOW SHOULD EMPLOYERS DETERMINE WHO SHOULD RETURN TO WORK?

ANSWER: In making this decision, focus on the safety of your employees and the needs of your business. For example:

- Which employees are ***essential*** to return to work first, given their unique job duties?
- Which employees are ***unable*** to effectively perform their essential job functions from home?
- Are some employees able to continue working from home for a reasonable period of time?
- Are any employees ***volunteering*** to return to work first?

In selecting employees to return to work, also remember to focus on legitimate, non-discriminatory criteria, and ensure that your selection criteria does not have a disparate or inadvertent impact on certain protected classes in your workforce. Employers ***should not use*** age, disability status, or other protected statuses in selecting employees to return, regardless of whether the CDC or other governmental authorities have identified individuals of certain ages or individuals with certain health conditions as being at a higher risk of contracting or recovering from COVID-19.

QUESTION 3: WHAT PRACTICAL SAFETY STEPS SHOULD BE IMPLEMENTED *BEFORE* EMPLOYEES RETURN TO WORK?

ANSWER: Each workplace is unique and poses different risks associated with contact with the public and co-workers, which of course changes potential exposure points. However, the following practical steps should be considered, in consultation with medical and scientific authorities:

- Establish a COVID-19 response team or coordinator, who can lead mitigation and safety efforts and communicate procedures and expectations with employees.
- If anyone has been in the facility in the last 14 days, the facility should be disinfected, with emphasis placed on common areas, common touch points (e.g., door knobs, light switches, key pads, shared equipment, tables, countertops, phones, keyboards, toilets, faucets, etc.).
- Install clean air filters.
- Implement social distancing rules (i.e., remain 6 or more feet apart).
- Consider procedural and physical changes to the workplace to accomplish social distancing, such as reconfiguring the workplace to provide greater distance, installing barriers or separators where possible, utilizing available space to spread out employees, staggering work shifts, reducing number of employees at the facility at any one time, and reducing common area traffic by instituting a one-in, one-out rule.
- Continue to minimize face-to-face contact as much as possible by continuing the use of virtual communications.
- Make hand sanitizer readily available, including at all entrances, and provide disinfectant for private work surfaces.
- Encourage regular and consistent hand washing.
- If the risk of exposure of employees to COVID-19 is high (particularly where there is large amounts of face-to-face contact with the public), provide personal protective equipment, such as masks, and establish rules of use.
- Establish a cleaning routine that cleans high-touch areas several times per day and all other surfaces daily.
- Establish procedures to follow in the event an employee tests positive for COVID-19, including procedures to follow if the employee begins to show symptoms while on site, contact tracing at work, and sanitation of areas where the employee worked or was present.
- Establish clear rules that employees are not to report to the worksite under any circumstances while experiencing symptoms of COVID-19.
- Evaluate whether certain employees can begin to or continue to work from home and still accomplish their essential job functions in a productive manner.
- Where telework is productive, consider utilizing it to reduce the number of individuals on site.
- Consider implementing routine testing of employees, as outlined in other sections of this update.

QUESTION 4: WHAT IF AN EMPLOYEE WITH AN UNDERLYING HEALTH CONDITION REQUESTS AN ACCOMMODATION, SUCH AS LEAVE FROM WORK OR WORK FROM HOME, BECAUSE OF HIGHER RISKS ASSOCIATED WITH COVID-19?

ANSWER: The employer's response will depend upon the circumstances, but generally, employers who are subject to the Americans with Disabilities Act ("ADA") or an equivalent state or local law requiring the accommodation of individuals with disabilities must engage in the interactive process to determine whether the individual is entitled to an accommodation and what reasonable accommodation can be provided that would permit the employee to perform the essential functions of the job. Although each circumstance will be unique, in light of the pandemic, we generally recommend a flexible, conservative approach that favors accommodation.

There is no comprehensive list of disabilities or impairments that make a person at higher risk of adverse consequences if infected with COVID-19. However, according to the CDC, the following impairments create a higher risk: heart disease, diabetes, lung disease or asthma, a weakened immune system, kidney disease, and cirrhosis. Note that COVID-19 is likely not a disability under the ADA because it is believed to be transitory and to have a limited impact on major life activities in ordinary circumstances. However, if another underlying health condition exists that is a disability under the ADA, then accommodation needs to be explored via the interactive process.

QUESTION 5: WHAT KIND OF ACCOMMODATION MUST EMPLOYERS PROVIDE TO EMPLOYEES WITH HIGHER RISKS ASSOCIATED WITH COVID-19?

ANSWER: It depends. As with all accommodation discussions, after learning of an employee's request or need for an accommodation, the first question to the employee should be: ***How can we help you?*** This straightforward question will then prompt and guide the discussion.

If the requested accommodation can be easily provided, then provide it. If it is more involved or difficult, weigh the request with other potential options, which might include teleworking, temporary restructuring of marginal job duties, temporary transfers to a different position, modifying a work schedule or shift assignment, reconfiguring workspaces to reduce risk, or even leave from work.

If an employee has been successfully teleworking and performing essential job functions since state health directives and restrictions have gone into place, and which are now being relaxed, it may be difficult to claim that teleworking is not a reasonable accommodation. In evaluating an accommodation, remember that an accommodation is not reasonable if it requires the elimination of essential job functions. However, in such instances, leave from work may need to be provided as an accommodation.

Finally, it is generally advisable for employees to prompt specific discussions of the need for accommodation related to underlying health risks and COVID-19, not employers. Employers can generally raise these issues and encourage employees with concerns to make a request, but an employer who prompts a specific discussion with an employee because the employer believes the employee has an underlying health condition runs an increased risk of creating a "regarded as disabled" claim under the ADA.

QUESTION 6: MAY AN EMPLOYER ADMINISTER A COVID-19 TEST TO DETECT THE PRESENCE OF THE VIRUS BEFORE PERMITTING EMPLOYEES TO ENTER THE WORKPLACE?

ANSWER: The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19, because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Even if testing is available, however, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from the CDC or other public health authorities, and periodically check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test.

Additionally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not later acquire the virus.

Based on guidance from medical and public health authorities, employers should still require—to the greatest extent possible—that employees observe infection control practices (e.g., social distancing, regular handwashing, and other measures) to prevent transmission of COVID-19.

QUESTION 7: WHEN MAY AN EMPLOYER MEASURE THE BODY TEMPERATURE OF EMPLOYEES?

ANSWER: Generally, measuring an employee's body temperature is a medical examination. However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature during the COVID-19 pandemic. However, employers should be aware that some people with COVID-19 do not have a fever.

QUESTION 8: IN LIGHT OF THE COVID-19 PANDEMIC, WHAT OTHER HEALTH-RELATED INFORMATION CAN EMPLOYERS ASK EMPLOYEES TO PROVIDE?

ANSWER: Employers can ask employees to provide the following information in light of the COVID-19 pandemic:

- A positive result for, or other diagnosis with, COVID-19.
- Symptoms of infection with COVID-19 (e.g., fever of or over 100.4°F, cough, shortness of breath, sore throat).
- Body temperature to determine fever.
- "Close contact" (as defined by the CDC) with any person who has tested positive for, or has otherwise been diagnosed with, COVID-19 infection within the preceding 14 days.
- Whether the employee has been asked to self-quarantine by a health official within the preceding 14 days.

For more information on the EEOC's pandemic guidance, please visit the EEOC's website at: https://www.eeoc.gov/facts/pandemic_flu.html. Updates and changes are being made periodically, so information must be verified on a regular basis.

QUESTION 9: IF AN EMPLOYER REQUIRES ALL EMPLOYEES TO COMPLETE A DAILY TEMPERATURE CHECK OR HEALTH SCREENING BEFORE ENTERING THE WORKPLACE, WHAT STEPS SHOULD THE EMPLOYER FOLLOW?

ANSWER: Employers should consider the advantages, disadvantages, and limitations of screening and testing before deciding what is appropriate for which jobs, when to start it, and when it is no longer needed. These measures should help prevent the spread of COVID-19; however, note that many people who shed the virus never exhibit any symptoms, and others who test negative one hour may be shedding the virus days or even hours later. In either case, employers should implement screening and testing uniformly for employees who are similarly-situated (e.g., same job, those who work within close proximity to others, etc.) to avoid claims of disparate treatment.

Daily screening and temperature testing require thoughtful preparation, including the following:

- Appropriate communication to employees of protocols;
- Selection and training of personnel to conduct the tests;
- Appropriate PPE for those administering the tests;
- An appropriate site or tent conducive to accurate testing (so that unduly cold or hot temperatures do not distort the testing results);
- Procurement of required thermometers (preferably, touchless) and other supplies;
- Appropriate screening site signage, including requiring use of masks by those waiting in line and social distancing rules;
- Privacy screens;
- Protocols for messaging to those deemed unfit to work, including information on testing and follow-up communication with the employer, a one-way path for their exit back to their vehicles so they do not infect others en route, and consideration of the means by which they can get home or to a doctor without undue risk they will infect others;
- Follow-up protocol with those sent home because of test results; and
- Maintenance of confidentiality of screening and test results.

QUESTION 10: WHAT TESTING AND SCREENING INFORMATION MUST EMPLOYERS KEEP CONFIDENTIAL?

ANSWER: According to EEOC guidance and various privacy laws, employers must maintain temperature checks, COVID-19 test results, and responses to health screening questions as confidential medical records. Employers also are discouraged from disclosing the name of an employee who is exhibiting symptoms of COVID-19 or who has tested positive for COVID-19 to other employees. However, an employer may disclose the name of an individual who has COVID-19 to a public health agency responsible for maintaining such information.

QUESTION 11: MUST EMPLOYEES BE COMPENSATED FOR THE TIME SPENT WAITING DURING A HEALTH SCREENING BEFORE THEY BEGIN WORKING?

ANSWER: Generally, screening and testing is on the clock and should be conducted in a manner that permits social distancing. Employers who are screening and testing personnel before they start work will need to design an efficient process so that employees do not wait in long lines (or stand too close to each other) to complete the process. For example, some employers may choose to set up reporting stations in open air tents close to the building entrance. Employees may step behind a screen out of view of co-workers to have their temperature taken and to indicate orally whether they have a "yes" answer to any health screening questions. Those who are cleared proceed immediately to the entrance to clock in thereafter. Employees' report time should be recorded and, to the extent they waited in line prior to clocking in, their start time should be adjusted accordingly.

QUESTION 12: CAN EMPLOYERS DISCIPLINE EMPLOYEES FOR REFUSING TO DISCLOSE REQUESTED HEALTH-RELATED INFORMATION OR FALSELY REPORTING IT?

ANSWER: It depends. Such situations must be evaluated on a case-by-case basis depending upon the particular facts and circumstances of each situation. In most instances, there will be no clear-cut answers. However, *generally speaking*:

- If an employee refuses to provide their employer with the requested health-related information outlined above, the employer would be within its rights to discipline the employee on a prospective basis (i.e., only after employees have been clearly informed of the policy/practice regarding discipline for refusal to disclose appropriately requested COVID-19 health-related information).
- If an employer can definitively confirm that an employee has intentionally falsely reported (or knowingly withheld) to their employer the information outlined above, then the employer would be within its rights to discipline the employee, again only on a *prospective* basis after employees have been informed of the policy/practice.

In both of these scenarios, the employer should clearly document the situation and the factual basis for the disciplinary action taken. Additionally, both of these scenarios must be handled with the utmost care and scrutiny given the factual nuances that will clearly exist. Employers are strongly encouraged to visit with their usual employment law counsel *before* making such determinations.

QUESTION 13: DOES AN EMPLOYER HAVE AN OBLIGATION UNDER OSHA TO RECORD CASES OF COVID-19?

ANSWER: Yes. OSHA's interim guidance provides that employers are responsible for recording cases of COVID-19, if: (1) the case is a confirmed case of COVID-19; and (2) the case is work-related pursuant to OSHA regulation. Because of the difficulty of determining whether employees with COVID-19 contracted the virus at work, OSHA will not require employers to make the work-related determinations for COVID-19 cases except where: (a) there is objective evidence that a COVID-19 case may be work-related; and (b) the evidence was reasonably available to the employer. Employers of workers in the healthcare industry, emergency response organizations, and correctional institutions must continue to make work-relatedness determinations, pursuant to OSHA regulations.

For more information on OSHA's enforcement guidance for recording cases of COVID-19, see: https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

QUESTION 14: WILL AN EMPLOYEE COMPLAINT TO OSHA OF WORKPLACE COVID-19 EXPOSURE, WITHOUT MORE (SUCH AS FATALITY OR IN-PATIENT HOSPITALIZATION), RESULT IN AN ON-SITE OSHA INSPECTION?

ANSWER: Probably not. Complaints alleging exposure to COVID-19, where employees are engaged in medium or lower exposure risk tasks (e.g., billing clerks) will not normally result in an on-site inspection. In such cases, OSHA Area Offices will use the non-formal procedures for investigating alleged hazards.

QUESTION 15: UNDER WHICH OSHA STANDARDS MIGHT A COVID-19-RELATED VIOLATION BE CITED?

ANSWER: Under OSHA, employers generally have a duty to provide a place of employment free from recognized hazards. Violations may be found under OSHA where an employer fails to furnish a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were not protected from the hazard of contracting the virus that causes COVID-19.

Under OSHA's Interim Enforcement Response Plan (dated April 13, 2020), employers should be particularly mindful of the following OSHA standards in light of the COVID-19 pandemic:

- Recording and Reporting Occupational Injuries and Illness (29 CFR § 1904)
- General Requirements - Personal Protective Equipment (29 CFR § 1910.132)
- Eye and Face Protection (29 CFR § 1910.133)
- Respiratory Protection (29 CFR § 1910.134)
- Sanitation (29 CFR § 1910.141)
- Specification for Accident Prevention Signs and Tags (29 CFR § 1910.145)
- Access to Employee Exposure and Medical Records (29 CFR § 1910.1020)
- The General Duty Clause of the OSH Act, Section 5(a)(1)

QUESTION 16: HAS OSHA ISSUED ANY WRITTEN GUIDANCE SPECIFIC TO PARTICULAR INDUSTRIES?

ANSWER: OSHA has issued the following industry-specific guidance:

- Meat and Poultry Processing (enforcement) (April 28, 2020)
- Meat and Poultry Processing (joint OSHA-CDC) (April 26, 2020)
- Construction (April 21, 2020)
- Manufacturing (April 16, 2020)
- Package Delivery (April 13, 2020)
- Retail (April 8, 2020)
- General workforce (March 2020)

Additional industry-specific guidance is available at: https://www.osha.gov/SLTC/covid-19/controlprevention.html

QUESTION 17: WHEN AN EMPLOYEE IS RECALLED TO RETURN TO WORK, WHAT EFFECT DOES AN EMPLOYEE'S REFUSAL TO RETURN TO WORK HAVE ON THE EMPLOYEE'S RIGHT TO UNEMPLOYMENT BENEFITS?

ANSWER: It depends on the state in which the employee works as well as the employee's health status and reason for refusal.

In ***Nebraska***, the Department of Labor has provided guidance that an individual who does not return to work when there is available work could be potentially disqualified from receiving unemployment insurance benefits. Moreover, an employee who quits his or her job due to fear of exposure to COVID-19, absent advice from a health care provider, will not be considered to have good cause for quitting, which is required to obtain unemployment benefits. An employee who does not return to work when there is available work or who quits his or her job without good cause, but collects unemployment benefits, may be required to repay such benefits and will be subject to a 15% penalty, disqualification from receiving future benefits, forfeiture of income tax refunds, criminal charges, and potential jail time. Employees who return to work in Nebraska, but work reduced hours, may still qualify for benefits, and such employees should continue to file weekly claims with the Nebraska Department of Labor.

In ***Iowa***, the Department of Workforce Development has stated that an employee's fear of exposure to COVID-19 is an insufficient reason for an employee to not be at work. If an employer is taking steps to create a safe workplace, including providing extra wash stations, additional sanitation, PPE such as masks or gloves, or following social distancing recommendations, an employee who quits employment will probably not be eligible for unemployment benefits. However, if an employer fails to follow safety measures and OSHA guidelines as recommended by state or federal governments for the employer's industry, then the employee may be eligible to receive unemployment benefits. If an employee provides information from their doctor requesting a reasonable accommodation for an underlying medical condition and the employer cannot provide the accommodation or otherwise provide a safe working environment, the employee will probably be eligible for unemployment benefits if he or she quits or if the employer refuses to continue their furlough.

Additionally, employees who return to work in Iowa but work reduced hours may still qualify for unemployment benefits; therefore, such employees should continue to report wages earned each week and make weekly claims for benefits. If an employee decides on their own that they do not to return to work when instructed, the Iowa Department of Workforce Development will consider the employee's decision to be job abandonment, which will disqualify the employee for unemployment benefits. Iowa has directed employers to complete a Job Offer Decline Form for employees who have refused legitimate job offers, which is available here: https://www.iowaworkforcedevelopment.gov/job-offer-decline-form-employers.

In ***Colorado***, Governor Polis issued a Safer at Home Executive Order on April 26, 2020, which prohibits employers from compelling vulnerable individuals to perform in-person work. For purposes of the Executive Order, the term "vulnerable individual" includes all individuals who are 65 or older, individuals with chronic lung disease or moderate to severe asthma, individuals who have a serious heart condition, individuals who are immunocompromised, pregnant women, and individuals who are determined to be "high risk" by a licensed health care provider. If a vulnerable individual refuses to report for in-person work when called by an employer, such individual will not be disqualified from receiving unemployment benefits. Colorado's Safer at Home Executive Order also directs employers to accommodate workers with childcare responsibilities and workers who live in the same household as a vulnerable person to the greatest extent possible by promoting telecommuting or other remote work options, flexible schedules, or other means. If an individual who has childcare responsibilities or who lives in the same household as a vulnerable individual refuses to report for in-person work when called by an employer, such individual will likely not be disqualified from receiving unemployment benefits.

Other than the individuals listed above, in Colorado, whether an individual who quits or refuses to return to work over fear of exposure to COVID-19 will be eligible for unemployment benefits is a case-by-case determination. The Colorado Department of Labor and Employment issued

an emergency rule setting forth factors that will be considered when determining whether such a worker will be entitled to unemployment benefits, including:

- the objective level of risk to the health or safety of the individual by either remaining in the workplace or accepting the offer of work;
- the level of risk to the health or safety of the individual which would normally be present within the industry in the absence of a COVID-19 pandemic;
- the particular vulnerability of the individual to COVID-19 as determined by commonly held medical professional standards; and
- the particular vulnerability to the COVID-19 virus, as determined by commonly held medical professional standards, or any other person physically living at the residence of the individual quitting or refusing work.

At the ***federal level***, in addition to state unemployment insurance benefits, employees may be eligible for unemployment benefits of up to $600 per week in federal ***Pandemic Unemployment Assistance*** through the end of July 2020. The U.S. Department of Labor has provided guidance that an individual receiving unemployment compensation must act upon an offer of suitable employment, and that "[b]arring unusual circumstances, a request that a furloughed employee return to his or her job very likely constitutes an offer of suitable employment that the employee must accept." Accordingly, employees who refuse to return to work when recalled by the employer will likely be ineligible to continue receiving federal unemployment assistance, unless the employee could identify some other qualifying circumstance outlined in the CARES Act.

Employers should ensure they are familiar with the laws and guidance for states in which they have employees surrounding eligibility for unemployment benefits of employees who refuse to return to work when recalled by the employer. Moreover, employers must comply with safety guidelines and requirements as established by local, state, and federal government agencies to ensure employees are provided a safe workplace upon recall by the employer. Employers should consult with employment law counsel before making decisions regarding employees who refuse to return to work upon the employer's recall or who have stated an intent to quit work based on fear of exposure to COVID-19.

QUESTION 18: CAN AN EMPLOYEE CLAIM ENTITLEMENT TO WORKERS' COMPENSATION BENEFITS IF THE EMPLOYEE CONTRACTS COVID-19?

ANSWER: This is a yet-unresolved issue, and the answer will depend on underlying circumstances and state specific law.

In Nebraska, for example, an "occupational disease" is defined as "only a disease which is due to the causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and excludes all ordinary diseases of life to which the general public is exposed." Thus, whether a COVID-related workers' compensation claim is compensable may depend on whether an industry has a higher rate of exposure and/or whether the worker can prove the disease was contracted in the workplace or as a result of conditions of his or her employment or work environment. We recommend taking steps in anticipation of claims (outlined below).

If an employee is required to self-quarantine or medically quarantine, the employee is likely not entitled to Nebraska workers' compensation benefits because there is no compensable injury or occupational disease, under the definitions in the Nebraska Workers' Compensation Act.

QUESTION 19: WHAT STEPS SHOULD BE TAKEN IF AN EMPLOYEE SUBMITS A WORKERS' COMPENSATION CLAIM OR EXPRESSES A BELIEF THAT COVID-19 WAS CONTRACTED IN THE COURSE OF EMPLOYMENT OR IN THE WORKPLACE?

ANSWER: Employers are encouraged to consider the following course of action in anticipation of workers' compensation claims being made.

a. Document, document, document.

Shelter-in-place orders, mandates, business closures, safety precautions and hygiene recommendations are changing rapidly. Employers should maintain a running or "real-time" document reflecting what decisions have been made about workplace safety on a given block of time. Be prepared to explain, even years in the future, what precautions were being taken and why.

Document what authorities were communicating to the public and, in turn, what was being communicated directly to employees.

Be prepared to explain how that "real-time" document was maintained in the event that an employee argues, with the full benefit of hindsight, that there was a lapse in precautionary measures being taken in a given time period.

b. Designate a point person on these issues.

Identify an individual and a back-up person (or a team) who will be able to speak to the documentation maintained by the employer. The designee should continually monitor CDC guidance, OSHA guidance, and recommendations by the Nebraska Department of Health and Human Services and any local authorities.

c. React swiftly to claims.

Should you receive a claim, swift action and detailed documentation will be key. Immediately coordinate with your workers' compensation carrier or third party administrator. Confirm who will investigate the claim.

d. Commence a prompt investigation of claims.

Ensure the investigation will elicit the following information from the employee, without delay. The employee should be asked to identify:

- the first date of any symptoms experienced;
- all places visited in the prior two weeks, including all persons with whom they have come in contact;
- the name of every person who could speak to, or potentially recall, the person's whereabouts for the prior two weeks;
- whether the employee, or any member of their immediate family or person with whom they have sheltered-in-place, has travelled anywhere outside their community in the prior two weeks;
- whether the employee is aware of having come into contact with anyone experiencing respiratory symptoms, fever, cough, body aches, or other flu-like symptoms in the prior two weeks; the person investigating the claim will want to return again to the

employee in another two weeks to ask this again, given the incubation period of the virus; and

- why the employee believes the virus was contracted in the workplace and the basis for that belief, even if it is unsubstantiated hearsay.

e. Know the rules.

Ensure you know and understand your internal procedures and your carrier's unique requirements, if any, for COVID-19 claim submission, and be prepared to promptly follow them. Some carriers and third party administrators have implemented specific task forces for COVID-19 work-related claims. Also, be sure to mention COVID-19 prominently in any accident or first report of injury.

QUESTION 20: HAS THE IRS ISSUED GUIDANCE REGARDING THE VARIOUS TAX CREDITS AVAILABLE UNDER THE FFCRA AND CARES ACT?

ANSWER: Yes. The IRS has issued FAQs regarding the tax credits available to private employers under the FFCRA, which are available here. The IRS has also issued FAQs regarding the employee retention credit available to employers under the CARES Act, which are available here. Further, the IRS recently issued drafts of Form 941 and the related instructions for the second quarter of 2020, which discuss both types of credits.

QUESTION 21: CAN EMPLOYERS ALLOW FOR A MIDYEAR ELECTION CHANGE BY THE EMPLOYEE UNDER THE EMPLOYER'S CODE SECTION 125 CAFETERIA PLAN, TO ADDRESS AN EMPLOYEE'S CHANGE IN CHILDCARE?

ANSWER: In the last few months, many employees changed their dependent care assistance program election under employers' Code Section 125 cafeteria plans because their daycare provider closed due to the COVID-19 pandemic. Now, as many daycare providers begin to reopen and employees want to start sending their children back to the daycare provider, employees can potentially make another midyear election change to address employees' change in childcare, if the employer's Code Section 125 cafeteria plan has been drafted broadly to allow for midyear election changes.

Many Code Section 125 cafeteria plans are drafted to mirror the Internal Revenue Service rules and to permit midyear election changes to dependent care assistance program election when there is a change in the cost of dependent care, a change in the hours of care, or a change in the child care provider. Notably, however, no election change is permitted if the change in the cost of dependent care involves a dependent care provider who is a relative of the employee.

Employers should review the terms of their Code Section 125 cafeteria plan to confirm what election changes are allowed for a dependent care assistance program. Employers should also keep in mind that, while the Code Section 125 cafeteria plan election change rules are fairly expansive for dependent care assistance program elections, the opportunities to change a health flexible spending account election midyear are more limited.

We will continue to provide updates on these issues as they evolve. In the meantime, if you have any questions regarding employment issues arising the impact of COVID-19, please reach out to a member of Cline Williams' Labor and Employment Law Section at www.clinewilliams.com.

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