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**GETTING A HEAD START ON BUSINESS RE-OPENING PLANS:  
Considerations for Employers**

While detailed regulations for the re-opening of New Jersey businesses have not yet been announced by Governor Murphy, employers can expect that the work environment will operate much differently than it did prior to the COVID-19 pandemic once work closure restrictions are lifted. Employers should prepare in advance by developing a return-to-work plan which addresses various employment related issues. Here are some key areas for consideration for employers regarding employees' return to work:

**IN-OFFICE / TELEWORK:** Employers whose workforce transitioned to telework during the work closure period must now consider whether they will require all of their employees to return to work on site or permit continued telework for certain employees. Depending upon the nature of the employee's work, and in an effort to reduce the amount of staff on site to encourage social distancing, this may result in employers developing a hybrid approach to in-office work, where certain staff employees come into the office on one or a few days a week, while working remotely the remainder of the week, or employees are brought back in alternating weeks, or by departments, on a staggered basis. Employers will also need to consider whether employees will return in phases to promote less staff on site during the work day.

**REINSTATEMENT OF FURLOUGHED / LAID OFF EMPLOYEES:** Employers that had to conduct furloughs and layoffs may be in a position to reinstate staff. The restoration of staffing levels is particularly important for those employers who received the Paycheck Protection Program (PPP) loan under the Coronavirus Aid, Relief and Economic Security (CARES) Act, since the loan forgiveness component of the plan applies to employers who fill positions that were impacted due to the pandemic. If the employer fails to restore its full-time employees or equivalent wages to the amount represented at the time of the loan origination request by June 30th, the amount of loan forgiveness under the PPP may be reduced. So employers are cautioned to take steps to ensure appropriate staffing levels so as not to risk the loan forgiveness portion of the PPP.

Furloughed employees who are called back to work but who refuse to return will not be able to continue to collect unemployment benefits. Employers who conducted layoffs should consider whether it will rehire laid-off staff. If employers need to terminate furloughed employees for economic reasons, or want to hire new staff instead of re-hiring laid off staff, such decisions should be undertaken with the advice of legal counsel to address any risk factors which may arise from such actions.

**RETURN PHASES:** Since there may be restrictions upon an employer mandating that all employees return to work at the same time, employers must evaluate which employees will be asked to return to work first. There should be a plan to identify the employees whose work has not been well suited to telework, or is most necessary to pressing business needs, and bring those employees back in the first phase. Continued efforts must be made to ensure these employees have limited interaction with others

in the work space, including vendors. Social distancing must be required and enforced. Until such time as businesses fully re-open, employers should continue to assess the work space and staffing for return phases. Employers will also be encouraged to continue to provide the option of teleworking to the extent possible, since such action encourages social distancing.

**WORK SPACE:** Social distancing will continue to be required, so employers will need to consider how to reconfigure their work space accordingly. To the extent office space becomes excessive due to reduced staffing on site for a prolonged and indefinite period of time, some employers may seek to modify their office space arrangements and end their office space leases in exchange for smaller office space. Alternatively, other employers may decide their work space is not large enough to accommodate social distancing needs, and seek larger office space.

**WORK POLICIES:** Employers should implement written policies or amendments which address:

- Paid Time Off – including as applicable, PTO under the Families First Coronavirus Response Act (FFCRA) Emergency Paid Sick Time and Family and Medical Leave Act expansion, along with any modification to existing paid time off (i.e., unaccrued personal days, vacation time);
- Mandatory social distancing;
- Required personal protective equipment, e.g., face masks in the office;
- Telework requirements and expectations;
- Workplace safety, cleaning and disinfecting requirements;
- Self-monitoring and reporting requirements for employees with flu-like or COVID-19 related symptoms;
- Enforcement of existing workplace harassment, discrimination and retaliation policies related to COVID-19.

**EMPLOYEE SCREENING:** According to recent guidance issued by the Equal Employment Opportunity Commission (EEOC), screening of employees for COVID-19 will not violate the Americans with Disabilities Act (ADA), provided that the testing is reliable, job related, consistent with business necessity, and issued to employees across the board. This is a developing area about which there are no definitive guidelines as of yet, although temperature screening has been the most commonly used procedure used thus far. Employers are also considering implementing a screening questionnaire related to COVID-19; however, employers are reminded that any such information obtained from employees is confidential consistent with any and all other medical information. Additionally, the questionnaire cannot be so broad as to inquire into other medically related areas, which could implicate potential violations of the ADA.

**EMPLOYEE ACCOMMODATION:** Employers may be faced with an employee stating they are not comfortable returning to work or have a medical issue that makes them more susceptible to health risks arising from COVID-19. Employers will be required to address such a request for accommodation in the form of a leave of absence or permission to telework, in the same interactive manner it would consider any other request for accommodation, including weighing whether the request will cause the employer undue hardship. According to the EEOC, economic impact due to COVID-19 may be considered an undue hardship for the employer. Medical documentation should also be required for any such accommodation request.

**EMPLOYMENT LITIGATION:** Due to employment actions that had to be taken by employers resulting from the economic impact of the COVID-19 pandemic, employers may see a rise in employee complaints in the following areas:

- Wage and Hour claims for unpaid wages due to inaccurate time tracking or changed exemption classifications;
- Discrimination or wrongful termination claims arising from employee selection for furlough, lay off, or return to work;
- Investigations arising from claims of discriminatory or unlawful employment action; employee misconduct during telework calls or video meetings;
- Department of Labor audits for wage claims, including claims of wrongful denial of paid time off;
- Claims for wrongful denial of paid leave time under the New Jersey Paid Sick Leave Act, the Families First Coronavirus Response Act, and the Family and Medical Leave Act;
- Workers compensation, negligence or OSHA claims arising from employee's allegation that employer failed to maintain a safe working environment or otherwise take actions to mitigate exposure risk, exposing employee to COVID-19 in the workplace;
- Whistleblower claims by employee claiming retaliation for raising concerns about the workplace and COVID-19 related risks;

Any and all relevant information and documentation relating to any employment actions taken by the employer during the COVID-19 period should be compiled and maintained in the event needed to defend against such COVID-19 related litigation.

The Firm's employment attorneys are available to answer any questions or if you require assistance as you consider your business re-opening plan, and will provide further information on any future applicable regulations relating to the lifting of work closure restrictions as they are communicated by the state and federal government.

To discuss any of this please contact one of the attorneys below:

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