Preparing For Re-Entry: Key Considerations For Returning Employees To The Workplace Amid The COVID-19 Crisis

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On April 16, 2020, the White House issued "Opening Up America Again," federal guidelines to reopen the U.S. economy through a three-phase approach. State and local governments are also beginning to create their own frameworks to gradually lift stay-at-home orders, with important differences in each locality. In turn, employers should take steps now to prepare for reopening their physical workplaces and returning employees to work in offices and other facilities when it is appropriate to do so.

This Client Alert highlights preliminary legal, practical and policy considerations and action items for employers in preparation for restarting operations based on current knowledge. COVID-19 guidance changes rapidly. Please consult with your Goodwin Employment team for the most up-to-date advice as you prepare to return employees to work.

1. BE PROACTIVE IN ASSESSING WORKPLACES AND MAKING MODIFICATIONS TO REDUCE COVID-19-RELATED RISKS

Engage in Active Planning. Before reopening any physical workplace, of paramount concern to employers will be reducing workplace risks for employees and other individuals who may be exposed to COVID-19 as a result of onsite operations of a business. Employers should rely on guidance from the Centers for Disease Control and Prevention (the "CDC"), the Occupational Safety and Health Administration ("OSHA"), state and local authorities, and orders and rules regarding best practices for workplace safety. Initial action items include:

- *Establish a COVID-19 Re-entry Task Force.* Employers should consider creating a multi-disciplinary task force to prepare for and to monitor the reopening of physical workplaces. Members of such a task force should include members of the human resources and legal teams (or outside counsel if the employer does not have in-house counsel), persons responsible for facilities, operations and safety, and selected managers, as well as non-supervisory employees from different segments of the employee population.[1] The task force should have a chair who is an effective leader and has experience with project management and execution. The team should be highly functional and nimble so that it can meet often and pivot as necessary to adjust to the ever changing landscape associated with COVID-19. The task force should coordinate with relevant landlords and property management companies to determine any restrictions on modifying the physical workspace. Ultimately, the task force should be responsible for considering re-entry issues and developing workplace specific approaches to re-entry action items, including those raised in this Client Alert.

- *Conduct a Risk Assessment.* The Occupational Safety and Health Act (the "OSH Act") requires employers to provide employees with a workplace free from "recognized hazards that are causing or likely to cause death or serious physical harm." In light of that obligation, employers should consider conducting a COVID-19-specific risk assessment of their physical work environments under OSHA's Guidance on Preparing Workplaces for COVID-19, available here. In conducting the risk assessment, employers should classify the exposure risk level of the various roles in the workplace in accordance with the OSHA Guidance and take appropriate steps to protect workers with medium, high, and very high exposure risk jobs. The OSHA Guidance recommends minimum standards for each employee risk level, but employers may choose to

implement more stringent protections, particularly if their workplaces are in locations with significant community spread or other risk factors. Employers may also wish to review the CDC's "Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19", available here, even if they do not have "critical workers," as the CDC has identified these measures as mitigating the risk of transmission by those potentially exposed to COVID-19, as well as "Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings (Interim Guidance)" available here, which includes new information relating to asymptomatic persons with laboratory-confirmed COVID-19.

Protective Coverings, Personal Hygiene and Cleaning. Employers should strictly comply with all applicable safety requirements. In addition, based on regulatory guidance and the nature and location of their workplaces, employers may consider requiring employees to wear protective coverings, provide hygiene guidance and review cleaning procedures, even if not otherwise required by law or order. For example:

- *Protective Coverings.* Protective coverings can include masks and face shields, gloves and coveralls.

- *Hygiene.* Employers are advised to encourage and to consider requiring certain hygiene practices, such as frequent hand washing, coughing and sneezing etiquette, proper tissue disposal, use of hand sanitizers, and use of disinfectant wipes in their personal work space.

- *Cleaning Procedures.* Review existing cleaning procedures and consider enhancements, particularly for common areas.

Physical Changes to Offices and Worksites. Employers should conduct a risk assessment of existing worksites in light of OSHA's guidance and consider changes that will reduce possible exposure to COVID-19. Subject to tenant or other property use restrictions, options may include:

- *Creating Barriers.* Installing plexiglass or other solid screens or dividers may be an attractive option, particularly for employers with open concept office plans where employees sit in close proximity to one another.

- *Reconfiguring Space.* Some employers may be able to move desks and workstations to create more distance between onsite workers.

- *Limiting Equipment Use.* To the extent practicable, employers may prohibit the sharing of equipment and devices.

Social Distancing Rules. Develop a concrete plan to maintain recommended social distancing including by:

- *Limiting Gatherings.* Employers may consider utilizing in-office videoconferencing, postponing (or conducting virtually) planned conferences, "all hands" or other large meetings, and limiting seating in breakrooms and cafeterias.

- *Adjusting Schedules.* Employers may also consider "staggered shifts" – i.e., having employees report to work at different times or on alternating days so as to limit the number of employees arriving, leaving or working on premises at the same time. Break and mealtime schedules may be established to reduce the number of employees in breakrooms and cafeterias or other common areas at any one time.

- *Commuting and Travel.* Employees who commute to work by public transportation and employees who travel may face heightened exposure risks that employers should consider mitigating through rules and/or support.

2. REVIEW AND MONITOR PUBLIC HEALTH GUIDANCE

The CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019, available here, provides up-to-date guidance on reducing the risk of transmission in the workplace. The CDC guidance and OSHA risk assessment can assist employers in taking basic steps to reduce the risk of COVID-19 exposure in the workplace. The CDC guidance and other public health guidance is updated periodically and may be revised to include further recommendations for employers, above and beyond those identified here.

3. REVIEW AND UPDATE EMPLOYMENT POLICIES

Over the course of the pandemic, federal, state and local governments have implemented COVID-19-specific legislation, guidance and regulations regarding employee leaves of absence and other workplace matters. In light of this, employers should:

- *Review Policies and Consider Modifications.* Before returning to work, employers should review their employment policies with respect to sick leave, family and medical leave, employee leaves of absences, teleworking, vacation and paid time off to ensure both compliance with applicable law and practicability in the post-COVID-19 workplace. For example, employers that maintain flexible (i.e., non-accrual) paid time off policies may want to consider limiting the available number of consecutive days of paid time off or temporarily suspending such policies in light of new laws that provide for paid time off and because some employees may prefer not to return to the workplace for many months.

- *Consider COVID-19-Specific Laws and Regulations.* The Families First Coronavirus Response Act (the "FFCRA"), signed into law on March 18, 2020, provides for paid leave for a variety of reasons related to COVID-19. Goodwin's March 19, 2020 and April 7, 2020 Client Alerts summarizing key provisions of the FFCRA and its accompanying regulations are available here and here. Note that the FFCRA's employee leave provisions apply to private employers with fewer than 500 employees as well as some public employers.

- *Create a COVID-19 Policy Resource.* Employers may consider creating a COVID-19-specific addendum to their employee handbook for use during the pendency of the crisis. Policies to consider include requiring employees to report illness, workforce contact tracing and special accommodations for vulnerable employees (even if not otherwise disabled).

- *Review Employee Leave Requests and Tracking Procedures*. Employers should also ensure that their employee leave policies clearly state the process by which employees may request time off so that any grants or denials of such requests are made in accordance with applicable law and that any time off is tracked. Tracking time off is particularly important with respect to time off taken under the FFCRA, for which employers may seek refundable tax credits from the Internal Revenue Service.

4. CONSIDER EMPLOYEE TESTING AND MONITORING

The lifting of stay-at-home orders will likely precede the disappearance of COVID-19. Testing is a centerpiece of the Opening Up America Again framework. Many employers are considering options for testing and monitoring employees for the presence of the COVID-19 virus and/or for resulting antibodies, subject to substantially increased availability of tests. Under the Americans with Disabilities Act ("ADA"), disability-related inquiries or medical examinations of current employees are limited to fitness for duty inquiries and other inquiries that are "job-related and consistent with business necessity," including to determine if an employee will pose a "direct threat" of harm due to a medical condition. Under recent Equal Employment Opportunity Commission ("EEOC") and CDC guidance, the COVID-19 pandemic creates a sufficient risk to permit widespread testing based on the direct threat standard. As a result, employers may ask certain disability-

related inquiries and require certain medical testing during the COVID-19 pandemic without violating the ADA. However, confidentiality and privacy rights as well as anti-discrimination protections must be considered.

Confidentiality and Employee Privacy. Regardless of the method of employee testing or monitoring, such testing or monitoring raises a myriad of considerations under state and federal confidentiality and privacy laws.

- *The ADA.* Any medical information gathered from employee or applicant screening, including body temperature checks, is subject to ADA confidentiality requirements, which means, among other things, that such information must be maintained in separate medical files and disclosure must be limited.

- *State-Specific Privacy Laws.* Employers should review applicable state-specific privacy laws, particularly in light of any proposed testing method's invasiveness. Certain states, including California, may require additional safeguards, such as a statutory disclosure notice before testing. Privacy laws generally require a balancing between the individual's right to privacy and the employer's legitimate interests, including an interest in protecting the health and safety of employees and the public.

- *Disclosing Information.* If an employee has COVID-19 or related symptoms, an employer may (i) identify the name of the employee to applicable supervisors and managers on a need to know basis with respect to employee job restrictions and reasonable accommodations (with instructions to keep the employee's name confidential) and (ii) interview the employee to identify the individuals with whom the employee had contact, which will allow the employer to conduct social tracing to determine whether any other employees may have been exposed to COVID-19 through the employee. If the employer learns that other employees may have been exposed, then the employer should notify those employees of their potential exposure without disclosing the infected employee's identity. The CDC recommends that employers instruct such employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure, which is available here.

- *Coworker Reports.* If a coworker reports to the employer that another employee has COVID-19 symptoms, the employer should approach the potentially affected employee and attempt to verify the report before taking any action, such as sending the employee home or requiring testing. The rights of the reporting employee and the potentially exposed employee must be considered.

Body Temperature Monitoring and Other Tests. Taking an employee's body temperature and requiring an employee to submit to a swab, blood or saliva test as part of COVID-19 screening are all involve "medical examinations" under the ADA. The EEOC guidance expressly permits temperature checks during the COVID-19 pandemic and, while the EEOC has not expressly addressed other types of medical examinations related to COVID-19, viral and antibody tests would presumably be permissible based on the same rationale. Regardless of what testing methods an employer adopts, several considerations apply:

- *Consistency in Selecting Employees for Testing.* Employers must ensure that any employee monitoring, screening or testing is conducted in a non-discriminatory manner with respect to protected categories such as age, national origin, pregnancy, and religion. Any decision to test or screen employees must be made consistently across a job category or categories.

- *Wage and Hour Considerations.* Employers should consider the wage and hour implications of employee testing. For example, non-exempt employees should be paid for any time being tested or spent waiting to be tested. Employers should also be aware that the cost of any testing will likely be the employer's responsibility.

- *Establish, Communicate and Adhere to Clear and Uniform Standards.* If employers choose (or are required, as is the case currently in some jurisdictions) to monitor employee body temperatures, employers should

clearly communicate to employees in writing the temperature check procedure and screening threshold –as well as the consequences of failing a temperature check – in advance of implementing the policy. Employers should set and apply uniformly an objective cutoff for what constitutes an elevated temperature, guided by medically recognized definitions of "fever" from the CDC (100.4°F or 38 °C) or other public health authorities. On-site temperature checks should be conducted by properly trained personnel (or a qualified, hired third-party) outfitted with appropriate personal protective equipment and utilizing a consistent mechanism to ensure consistent results. Employers should similarly be prepared to perform such checks and screening of vendors and other visitors to their workplaces.

- *Consider Developing Self-Reporting Procedures.* Employers should also consider setting up systems for employees to self-report their body temperature before reporting to work, along with any other symptoms indicative of COVID-19 infection. Employers who elect to require employees to be tested at work must be acutely aware of privacy issues.

- *Determine Responses to Employee Refusals to Be Tested.* If an employee refuses to undergo a temperature check or other COVID-related test, the employer may bar the employee from the workplace. However, employers should ask about the reasons for the refusal in the event that there is a health-related or religious reason for the refusal or if more information or reassurances concerning confidentiality would be helpful.

- *Maintain Confidentiality of Test Records.* Employers may maintain a log of temperature checks or test results, but any COVID-19-related medical documentation must be kept separate from regular personnel files per ADA rules that require that employers must keep protected medical information confidential.

- *Track Developments in COVID-19-Related Guidance.* Employers should be aware that COVID-19 guidance changes rapidly, and at a certain point the risk of infection with COVID-19 may no longer be deemed a "direct threat" justifying widespread body temperature monitoring or other testing.

Health Screening Inquiries. In addition to taking body temperature readings or requiring viral or antibody testing, employers may make inquiries of employees. Those who make inquiries for an employer should consider the limits on permissible inquiries.

- *Inquiries About an Employee's Symptoms or Vulnerabilities.* Employers may ask employees who report feeling sick at work (or who call out sick) questions about their symptoms to assess their risk of having COVID-19. Employers may also consider proactively making COVID-19-related inquiries of their employees on a regular basis (e.g., at the start of each work day). Such inquiries could be in the form of a written/electronic questionnaire and may include questions such as, "Are you experiencing COVID-19 symptoms?" and "Have you been in close proximity to anyone who has been diagnosed with COVID-19 or who has COVID-19 symptoms?" Of course, an employee's confidential medical information elicited from these questions must be treated confidentially under the ADA, and any employment action taken based on the answers to any inquiry must be non-discriminatory.

- *Inquiries About an Asymptomatic Employee's Vulnerabilities.* According to the EEOC, for so long as the COVID-19 pandemic remains severe, employers may have sufficient objective evidence to reasonably conclude that certain employees will face a direct threat of death or serious harm if they contract COVID-19. Only in this circumstance may employers make disability-related inquiries of asymptomatic employees to identify those at higher risk of complications. The Opening Up America Again guidelines identify "vulnerable individuals" [2] and state that employers should consider "special accommodations" during the first two phases of the plan. In light of this, an employer may consider including in a health screening document an invitation for employees who qualify as vulnerable individuals under the Opening Up America Again guidelines to self-identify so that the company may consider special accommodations for such employees

during the pandemic.

- *Inquiries About Contacts with Others.* Employers may also ask employees whether they have been in close proximity to anyone diagnosed with or exhibiting symptoms of COVID-19. Employers should not ask specifically about whether family members have COVID-19, as such inquiries may violate the Genetic Information Nondiscrimination Act.

- *Inquiries About Activities.* Employers might consider asking employees whether they have followed social distancing protocols, avoided large gatherings, washed their hands often and covered their mouth and nose with a cloth face cover when around others in public. When making inquiries about activities outside work, employers should be aware that some state laws prohibit taking an adverse employment action against an employee for engaging in lawful activities outside of work. Privacy laws may also be implicated.

- *Inquiries of Applicants.* Employers may also screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as all employees in the same job category are subject to the same screening requirements.

Fitness for Duty Certifications. As an alternative or accompaniment to a test request, employers may also require that an employee provide a Fitness for Duty Certification from a doctor before returning to the workplace. As a practical matter, there may be a delay in an employee's ability to get a doctor's appointment immediately after a stay-at-home order is lifted. According to both EEOC and OSHA recommendations, employers should therefore consider accepting other, less time-intensive certifications, such an email or form from a local clinic certifying that the employee has tested negative or completed a 14-day quarantine.

Employee Monitoring Through Tracking Devices. To ensure social distancing and track potential exposures, employers might consider requiring employees to (i) download a smartphone "app" that will notify the employee if the employee has been in contact with an individual who has COVID-19, and (ii) inform the employer if the employee receives such a notification. However, such apps –the first of which are expected in mid-May 2020 – will likely have limitations, such as insufficient participation in the larger population and false positives. Wearable tracking devices, which are also being marketed to employers to assist with contact tracing within the workplace, may be of more utility. Employers can also conduct social tracing "live" by interviewing positive, presumptively positive or symptomatic employees to determine employee contacts.

5. ENSURE EFFECTIVE COMMUNICATION AND PROMPTLY RESPOND TO EMPLOYEE CONCERNS AND REQUESTS

Employers can expect employees to have questions and concerns upon their return to work. During this preparatory period, employers should ensure that concerns can be elevated and dealt with effectively and efficiently.

Effective Communication and Posting Requirements. During this transitional period, "tone from the top" is crucial, and employers should communicate regularly and often with employees about both the company's steps to reduce exposure and employee rights and obligations.

- *Health and Safety Requirements.* Employers should be clear about their health and safety expectations, including body temperature monitoring, hand washing, mask and glove use and other hygienic measures. Employers should consider posting reminders throughout the workplace, including explicit hand-washing requirements in restrooms, social distancing reminders in conference rooms, disinfection instructions in break areas and kitchens and OSHA's "Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus," available here.

- *Reporting Concerns and Investigating Complaints.* Employers should also make sure that employees know how to file complaints, report concerns and request reasonable accommodations. Employers should consider designating a specific individual to receive COVID-19-related inquiries and complaints, as well as making sure relevant policies contain clear reporting instructions. Employers should be cognizant that the pandemic has created the potential for increased bias, discrimination and harassment based on national origin, race, ethnicity and disabilities. As always, employers should ensure they are prepared to investigate and address such complaints and situations promptly and effectively.

- *Posting Requirements.* The transitional period is also a good time for employers to ensure that they are meeting OSHA, Department of Labor and other required state and local employee notice and posting requirements, especially with respect to workplace safety and sick leave. In particular, covered employers under the FFCRA must post a notice of the law's requirements in a conspicuous place on their premises. This posting obligation can also be satisfied via posting the notice on the employer's intranet or emailing it to employees.

Requests for Continued Remote Work. Employers may well receive many requests for continued remote work arrangements after stay-at-home orders are lifted and employers call their employees back to the workplace.

- *Qualified Individuals with a Disability.* It is possible that many employees, including those with and without a disability, may request to continue working remotely for various reasons. In general, under the ADA, only a qualified individual with a disability is entitled to a reasonable accommodation that allows the employee to perform the essential functions of the job. Thus, an employer should first determine whether the employee requesting the accommodation is a qualified individual with a disability. Employers should be aware that under certain state and local equal employment opportunity laws, the obligation to reasonably accommodate a disability can be triggered more easily than under the ADA due to more expansive definitions of "disability."

- *Undue Hardship and Essential Functions.* As with any accommodation request, employers should consider whether the requested accommodation constitutes an undue hardship on the company or waives an essential function of the employee's job duties.

- *No Need to Automatically Grant Remote Work.* Employers who required employees to work remotely during a stay-at-home order do not need to automatically grant remote work as a reasonable accommodation to disabled employees who request to continue telecommuting once the workplace reopens. Such requests will remain subject to a reasonable accommodation analysis. What was a necessary restriction on work may not be a reasonable accommodation once the workplace has returned to regular onsite operations.

- *Consider Renewed Telework Requests.* However, the experience of working remotely may affect judgments about whether essential job functions can be performed while working remotely. Employers should consider renewed requests for remote work that may have been denied prior to the COVID-19 pandemic and evaluate whether the stay-at-home period demonstrated that the employee could perform the essential functions of the job remotely.

- *Pregnant Employees.* Absent a qualifying disability, employers are not required to allow older or pregnant employees to telework due to potentially greater risk of complications due to COVID-19. However, under certain state and local laws, such as the Massachusetts Pregnant Workers Fairness Act, the New York City Pregnant Workers Fairness Act, the New York State Human Rights Law, the California Fair Employment and Housing Act and the California Pregnancy Disability Leave Law, employers do have an obligation to engage in an interactive process with a pregnant employee to determine an effective, reasonable accommodation to allow the employee to perform the essential functions of the job while pregnant or

experiencing a pregnancy-related condition. Further, as noted above, "elderly" employees (and possibly some pregnant employees) may be considered "vulnerable individuals" under the Opening Up America Again guidelines, and will be recommended to stay at home through Phase 2 of that framework.

- *Vulnerable Individuals.* As noted above, "elderly" employees and employees with certain health conditions are considered "vulnerable individuals" under the Opening Up America Again guidelines and employers are strongly encouraged to provide "special accommodations" through phase two of the re-entry program.

- *Mental Illness and Employee Fears.* Further, while a preexisting mental illness which has been exacerbated by the COVID-19 pandemic (e.g., anxiety, obsessive compulsive disorder) may require a reasonable accommodation, employees cannot refuse to come to work because of garden-variety fear and anxiety. Under the OSH Act, employees may only refuse to work if they believe they are in "imminent danger." As a practical matter, it is unlikely that a stay-at-home order would be lifted in the event that COVID-19 still posed an immediate threat to employee safety.

- *Employee Assistance Programs (EAPs).* Recognizing that employees may be returning to work with heightened anxiety, during periods of mourning and/or under financial pressures, employers who maintain EAPs should consider generally republishing or posting information regarding their programs to remind employees of such available, confidential resources.

Employee Complaints. Individual employees or groups of employees may have concerns about how their employer is handling the re-entry process.

- *Elevating Concerns.* Employers should ensure that they have clearly communicated workplace health and safety, reasonable accommodation and other relevant policies, and that those policies provide a clear method for employees to report concerns. As noted above, employers should also consider specifying an individual to whom COVID-19-related concerns and complaints should be elevated.

- *Labor Law Considerations.* The NLRA protects employees who take action "with or on behalf of other employees" concerning the terms and conditions of their employment. Therefore, groups of nonsupervisory employees in both unionized and nonunionized workplaces may have the right to refuse to work in conditions that they reasonably and in good faith believe to be unsafe, even if they are mistaken. Employers may not retaliate against employees who engage in such protected concerted activity. Such employees need not be paid if they choose not to work, but they may not be fired for a refusal that is part of protected concerted activity.

- *Engage Employees.* Employers should encourage employees to raise questions or concerns and, to ensure consistency of approach, employers should designate a task force member to engage in dialogues with employees.

The requirements, obligations and best practices associated with bringing employees back to the workplace vary by jurisdiction and industry. Employers should monitor federal, state and local agency guidance and consult with employment counsel and other experts as needed during the re-entry process.

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Please visit Goodwin's Coronavirus Knowledge Center, where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

[1] As with any arrangement to solicit employee input on terms and conditions of employment, employers should be careful not to be drawn into negotiations concerning employment terms with committees established by the employer, as doing so could raise issues under Section 8(a)(2) of the National Labor Relations Act

("NLRA"), which prohibits employers from dominating or interfering with the formation or administration of any labor organization.

[2] "Vulnerable individuals" are elderly individuals or individuals with serious underlying health conditions including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

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