WEISS SEROTA
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MEMORANDUM

To: Clients, Colleagues and Friends

From: Labor and Employment Division
Weiss Serota Helfman Cole & Bierman, P.L.

Date: May 21, 2020

RE: COVID-19 Return to Work Guidance

As you are likely aware, state and local stay-at-home orders are being lifted and many businesses are preparing to reopen or increase operation. However, because COVID-19 remains a health threat, businesses preparing to reopen are faced with a new set of challenges and must learn how to operate effectively in a changed world. Below are responses to various frequently asked questions regarding reopening in the COVID-19 environment.

1. Can I require my employees returning to the workplace to submit to COVID-19 testing? Yes. The Equal Employment Opportunity Commission (EEOC) has announced that employers may test employees for COVID-19 before allowing them into the workplace. However, given that there is insufficient access to wide-scale, publically available COVID-19 testing, it may not be feasible for employers to require their employees to undergo testing before returning to work. In the meantime, employers may take other steps, such as taking employees' temperatures and prohibiting employees with a fever of 100.4 ºF or higher from entering the workplace.

2. If I have an employee that had COVID-19, can I require a doctor's note and/or a negative COVID-19 test result before they return to the workplace? Yes, employers may request either documentation. However pursuant to guidance from the United States Centers for

Disease Control and Prevention (CDC), *neither* is actually required to discontinue isolation for individuals with confirmed (or suspected) COVID-19. According to CDC guidance, individuals that were infected may discontinue isolation (and hence return to work) under either a symptom-based strategy *or* a test-based strategy:

Symptom-based strategy:

- At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and,
- At least 10 days have passed *since symptoms first appeared*.

Test-based strategy (contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing):

- Resolution of fever without the use of fever-reducing medications and
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), and
- Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least 2 consecutive respiratory specimens collected ≥24 hours apart (total of 2 negative specimens).

3. What if an employee refuses to consent to health testing? If an employer's policy requires an employee to submit to health testing before returning to work, the employer may generally bar an employee from the workplace until required testing is conducted.

4. Can I require my employees to observe infection control practices (e.g., regular hand washing and social distancing protocols)? Yes.

5. Can I require my employees to wear face masks? Yes. Because the Coronavirus epidemic has caused a severe shortage of N95 filtering face respirators, employers who require their employees to wear loose fitting cloth face masks (referred to as personal protective equipment, or PPE) should provide masks to their employees. Under the OSHA PPE Standard, which applies to cloth face masks, if an employer *requires* employees to wear cloth mask, the employer must perform a hazard assessment, consider other options for protection

(such as installing barriers between workers or workers and customers), train employees in the use and care of PPE, clean and replace PPE as needed, and create a plan that is periodically reviewed. However, if the employer allows the employees to *voluntarily* wear a cloth mask, none of these rules would apply. Even if the employer procures the masks and provides them to its employees, it can still be a voluntary program. In this case, employers should advise employees, in writing, that wearing the mask is voluntary and not required.

6. How else can I protect my employees who are returning to work? During the current pandemic, healthy workspaces are those that effectively incorporate cleanliness, social distancing, physical barriers, and education. Employers should ensure that their offices are being cleaned routinely, with frequently touched surfaces cleaned more often than normal. If possible, employees' work areas should be spaced out 6 feet or more and employees should be reminded to practice social distancing at all times (i.e. even on breaks and in the lunchroom). Barriers such as gloves, masks, and even the installation of physical partitions between workspaces can help limit the spread of communicable disease. Communicate both your expectations and your plans for helping to support a healthy environment.

7. What policies need to be updated as employees return to work? Employers should consider the sufficiency of their existing policies. Some policies (i.e., ADA, FMLA, PTO, and workplace safety policies) may need to be modified to ensure that they comply with newly enacted laws. For example, the Families First Coronavirus Relief Act (FFCRA, in effect from Apr. 1, 2020 to Dec. 31, 2020), which includes paid leave provisions for employees impacted by COVID-19, applies to all public employers and all other employers with fewer than 500 employees. Employers should also consider revising their remote and telework policies to reflect recent changes. Some employers are preparing interim addendum to their handbooks and employee manuals to address the quickly changing work environment.

8. How do I handle employees who refuse to return to the work due to fear of exposure? Employees, particularly those over age 65 and those with compromised immune systems, are understandably nervous about returning to work outside of the home where they will be

exposed to others. If telework/work from home is a possibility, it should be offered. However, there is no legal requirement for an employer to allow an employee to work from home. If an employee refuses to return to work and telework is not an option, employers should first consider whether the employee qualifies for emergency leave under the FFCRA, such as Emergency Paid Sick Leave (EPSL) or Emergency FMLA (E-FMLA). EPSL provides that employers may take up to 2 weeks of paid sick leave if they have COVID-19, have been advised to self-quarantine due to COVID-19, are experiencing symptoms of COVID-19 and are seeking a diagnosis, are subject to a federal, state, or local quarantine order related to COVID, are caring for another individual related to COVID-19, or are caring for their son or daughter because their school or place of care is closed to COVID-19. E-FMLA provides employees (who have been employed for at least 30 days) with up to 12 weeks of FMLA leave when they are unable to work or telework due to the need to care for their son or daughter who's school or place of care is closed due to COVID-19. Otherwise, employers should consider whether an employee has any PTO which he/she can use to account for their time out of work. If the employee does not qualify for FFCRA leave and/or uses up the leave, and otherwise does not have any accrued PTO available, employers are permitted to terminate employees who refuse to come to work. However, employers should consider the practical side of this issue and determine how such a decision could negatively affect the morale and overall functioning of their businesses. In addition to telework, employers should consider the possibility of alternative work arrangements (such as staggered shifts) which may help employees feel more comfortable.

9. Given the end of the academic school year and the start of summer, can employees still seek leave under the FFCRA in order to care for their child? Yes, if summer camps are closed due to COVID-19. The FFCRA includes leave (Emergency Paid Sick Leave and Emergency FMLA) for an employee who is unable to work because they must care for a child whose school, place of care, or childcare provider is unavailable due to the COVID-19 public health emergency. DOL regulations define "place of care" broadly as any "physical location in which care is provided" while the employee works, including, for example, preschools, day care facilities, respite programs, summer camps, and summer enrichment programs. However if summer camps are open, an employee cannot quality for FFCRA (based upon

this provision) because they refuse to send their child to the camp based upon a fear of COVID-19.

10. I have employees who have told me of their intent to travel for the 4th of July. Can I prohibit them from doing so? Yes. There is no legal prohibition on an employer prohibiting or restricting employee travel. However, employers may want to consider the latest CDC travel guidance. Presently, the CDC has issued Level 3 travel restrictions for much of the planet. Travelers are recommended to avoid all nonessential travel to China, Iran, UK and Ireland, and most European countries. Anyone who has traveled to one of these countries in the previous 14 days will not be allowed to enter the U.S., so it is unlikely that employees will be heading to one of these destinations. For all other remaining travel destinations, the CDC recommends that travelers avoid nonessential international travel and travelers are recommended to self-quarantine for 14 days after returning. For any individual who claims to have plans to travel to one of these locations, you are free to inquire how they plan to handle this restriction because they cannot return to work for 2 weeks afterward.

11. What if, after the return to work, an employee gets COVID-19? Will I have to close? In most cases, you do not need to shut down your facility. First, determine a list of individuals that that were in close contact (<6 feet) with the infected employee for at least 10 minutes or more, during the time the infected employee was symptomatic and 48 hours beforehand. These exposed individuals should stay home for 14 days, telework if possible, and self-monitor for symptoms. Second, other employees should be informed of their possible exposure to COVID-19 in the workplace (without specifically identifying the infected individual) to maintain confidentiality as required by the ADA. Third, employers should conduct a thorough cleaning of the area where the infected employee worked. Otherwise, critical infrastructure workplaces should follow the CDC's "Guidance on Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19."

12. What are my OSHA responsibilities in light of COVID-19? The U.S. Occupational Safety and Health Administration (OSHA), which sets industry health and safety standards for a variety of job fields,

monitors and inspects work environments and may fine an employer for violations. Since the COVID-19 pandemic began, OSHA has seen a record increase in unsafe workplace complaints. To help lessen the potential of an employee complaint, OSHA inspection, and/or fine, we recommended that employers (1) develop a COVID-19 response plan (which is in line with CDC recommendations regarding hygiene and social distancing), (2) consider options for limiting close contact in the workplace (such as staggered shift schedules and/or a phased reopening plan), (3) prepare an employee screening plan (i.e. daily temperature checks), (4) determine whether employees will be required to wear PPE, and (5) establish a protocol for handling confirmed COVID-19 cases within their workplace. Given the increased number of OSHA complaints, OSHA has stated that in response to safety complaints regarding low-risk workplaces (i.e. non-medical facilities) OSHA will conduct remote inspections and rely upon employers to investigate the alleged condition and make any necessary corrections or modifications.

13. Will I be liable to employees who claim that they caught COVID-19 at my workplace? To the extent that COVID-19 is considered an occupational injury or illness covered by the workers' compensation statutes, any tort claim for compensatory damages asserted directly by an employee against their employer, either in an individual capacity or on behalf of a class of employees, is likely to be barred. However, the question of whether COVID-19 will meet the definition of an occupational injury or illness is a fact-specific inquiry, which Florida courts have yet to decide. Plaintiffs are likely to seek creative approaches in an effort to circumvent the workers' compensation bar on such claims. To minimize their potential liability, employers should develop appropriate procedures to address the risk of COVID-19 in their workplaces and more specifically, should comply with all guidance by provided by the CDC, DOL, and state and local officials. Preventative steps taken by an employer now may help to the employer later by demonstrating that it satisfied a duty of reasonable care (and may discourage employees from filing suit in the first place). Such steps will also help decrease the potential of fines by OSHA.

The information contained in this document does not constitute legal advice. If you have questions about the matters discussed, please feel free to contact any of our labor and employment lawyers.