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Legal Counsel to Employers and Schools

COVID-19 UPDATE

Client Advisor

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On April 28, 2020, Governor Baker announced the extension of the state's non-essential business closures and stay-at-home advisory to May 18, 2020. The order had been set to expire May 4. At the same time, Baker announced the formation of a Reopening Advisory Board whose task it is to begin planning for the state's reopening and what that process will look like. Three days later, on May 1, Governor Baker issued an order requiring all residents to wear a face mask or covering when in public places where they cannot socially distance. "I think we all believe that as part of the strategy around some sort of reopening, people are going to need a mask or a face covering if they're going to be close to people. You can't always stay six feet away," the governor said. In addition to wearing masks, there are several other safety measures that are being recommended as you begin developing a plan for an eventual return to work.

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A. Preparing to Return To Work

Although Massachusetts' Stay-at-Home Advisory was extended until May 18, many cities and towns are beginning to discuss plans to return their employees to work with appropriate and effective safety precautions in place. Already, some cities and towns have instituted measures to screen the health of their essential employees, including temperature checks and employee health questionnaires. These measures may become more commonplace as restrictions are eased, and businesses and municipal offices in the Commonwealth begin to reopen.

Below we have outlined some of the most recent guidance and best practices on how to safely transition employees back to the workplace. We note, however, that at this time, the Centers for the Disease Prevention and Control (CDC), the Equal Employment Opportunity Commission (EEOC), and the Occupational Health and Safety Administration (OSHA) have yet to issue guidance relating to specific procedures on how to conduct these screenings. As such we

recommend that you consult with our office for additional guidance prior to instituting any screening protocols.

1. Employee Temperature Checks/Screenings and Questionnaires

May an employer conduct temperature screenings or checks of employees before they are allowed to enter the workplace?

Yes, according to updated EEOC guidance issued on March 18, an employer may take the temperature of an employee before allowing the employee into the workplace. Generally, taking an employee's temperature is considered a medical examination under the Americans With Disabilities (ADA) Act and would not be permitted unless the examination is "job-related and consistent with business necessity." However, the EEOC guidance states temperature checks as a result of the COVID-19 outbreak are permissible as an employee with COVID-19 would constitute a "direct threat" to the health of others in the workplace.

Who should conduct the temperature screenings? What kind of thermometer should be used?

It is best to have a nurse or other trained medical professional conduct the temperature screening. If a nurse or trained medical professional is not available, then the employer should designate a management official to conduct the checks after receiving necessary training from a nurse or medical professional. Any training provided to management officials conducting temperature checks should be documented to the greatest extent possible.

Depending on the availability of equipment, the employer should ideally conduct the testing in the least invasive way possible by using a thermometer that does not require direct contact between the temperature taker and the employee or any exposure to bodily fluids (e.g. forehead scanner). Alternatively, employers should consider the use of disposable thermometers. If such equipment is not available, an employer should ensure the thermometer is properly and thoroughly cleaned and disinfected prior to each use.

Because of the increased risk that a temperature taker may be exposed to COVID-19, the temperature taker must be equipped with appropriate personal protective equipment (PPE), such as gloves, face masks, face shields, gowns, etc. The temperature screening of employees should be conducted individually and in a private environment to eliminate privacy concerns.

Where and when should temperature screenings take place?

This remains an area that is a little unclear. From a privacy and safety perspective, it would seem unwise to have everyone line up at the front door waiting to be tested before starting their day. That said, guidance from the CDC issued on April 8, says that "Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility." Employers and their representatives should take an employee's temperature as privately as possible and keep the identity of any employees with fevers confidential. Staggering employee start time may help. Another option would be for employees to take their own temperatures before coming to work, report the information to the employer, and require that they stay home if they have a fever.

What happens if an employee reports or has a fever?

The CDC defines a fever for purposes of determining whether someone is exhibiting COVID-19 symptoms as a temperature at or above 100.4 degrees Fahrenheit. Any employee who has a temperature at or above 100.4 degrees Fahrenheit should be sent home and not be allowed to enter the workplace.

Some individuals with COVID-19 do not have a fever; an employer may still send an employee home if he or she exhibits and/or reports other symptoms associated with COVID-19. A fever is just one possible symptom, and temperature checks are just one of a variety of tools employers can use to help prevent and control the spread of the virus.

What other health screening methods are available?

Since not all those infected with COVID-19 have a fever, employers may provide a self-screening questionnaire to employees prior to entering the worksite that will allow employees to report if they are experiencing any COVID-19 related symptoms, or confirm that they are not. If the questionnaire is administered in conjunction with a temperature screening, the nurse or temperature taker should visually examine employees for common COVID-19 symptoms while conducting the screening.

What happens if an employee refuses to submit to a temperature screening or questionnaire?

The employer should develop as part of its screening protocols how it will treat employees who refuse to submit to temperature screening or answer questionnaires. Generally, an employee who refuses to be screened should be sent home and may have to use paid leave for their absence. As discussed below, the consequences, including possible disciplinary action, of refusing to submit to screenings should be clearly set forth in any notice to the Union.

What is an employer's obligation regarding the results of the temperature screenings and questionnaire answers?

An employer must treat the results of the temperature checks, screenings, and questionnaires as confidential medical documentation under the ADA. This documentation must be kept separate from an employee's personnel file.

2. Employees Who Tested Positive

When can an employee who has tested positive for COVID-19 or is suspected to have COVID-19 return to work?

According to the most recent CDC guidance, individuals who have tested positive for COVID-19 or have COVID-19 symptoms may discontinue self-isolation under the following conditions:

- At least three (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 or shortness of breath); **and** at least seven (7) days have passed since symptoms first appeared; or

- Resolution of fever without the use of fever-reducing medication **and** improvement in respiratory symptoms (e.g. cough or shortness of breath) **and** negative results of an FDA authorized molecular assay for COVID-19 from at least two upper respiratory swab specimens collected over twenty-four (24) hours apart.

Can employers require employees who test positive for COVID-19 to be tested prior to returning to work?

Yes, according to EEOC guidance issued on April 23, employers may choose to administer testing to determine if employees have COVID-19 prior to entering the work site. As discussed above, the testing is a medical examination considered “job-related and consistent with business necessity” in light of the COVID-19 outbreak. The EEOC states that the employer should ensure that testing is accurate and reliable. Again, the results of these tests constitute confidential medical examination under the ADA.

Do we have to provide notice to the union about health screenings?

Yes, the employer will have to provide notice and engage in implementation bargaining regarding temperature and health screenings with the union or employee organization. We recommend that the employers clearly state the screening thresholds and the implications of those screenings (e.g. employees being sent home) or refusal to be screened when providing notice to the union. As always, we recommend consulting your respective collective bargaining agreements.

DESE: Updates on Competency Requirements for the class of 2020

On April 28, the Board of Elementary and Secondary Education voted to temporarily modify the competency determination requirement for current high school seniors as a result of the COVID-19 crisis. The modified requirement allows seniors who have not passed one or more of the high school MCAS test to earn the required competency determination through successful completion of a relevant high school course in that subject.

The competency determinations for each subject are outlined below:

- English Language Arts/Mathematics: The school district must certify that the student earned credit in the 2019-2020 school year for a course aligned to the curriculum in the relevant subject matter and the student demonstrated competency in that subject. For students who were not enrolled in a course in the needed subject area during the school year, the Department of Elementary and Secondary Education will examine relevant coursework for which the student received credit in previous years, as identified by the school district.
- Science and Technology/Engineering: The school district must certify that the student earned credit for a course aligned to the curriculum in the relevant subject area and the student has demonstrated competency in one of the four tested disciplines (biology,

chemistry, introductory physics, and technology/engineering) in either the current school year or a prior school year.

C. DESE: Updates on Remote Learning

On April 24, DESE released further guidance regarding remote learning, following its initial guidance issued in March. The recent guidance further defines the recommended elements of a quality remote learning program, including a focus on teaching content standards most critical for student success at the next grade level, and encouraging school districts to move all students toward successful engagement in remote learning, with a focus on addressing fundamental needs.

While the guidance is not intended to be a comprehensive model for remote learning, it encourages districts to take some of the following steps toward strengthening remote learning:

- Develop a system for identifying and supporting students not effectively engaged in remote learning;
- Prioritize meaningful interactions between educators and peers by for example, holding regular teacher “office hours” or individually calling students to check on their well-being;
- Offer opportunities for enrichment, exercise, and play through remote learning; and
- Ensure that remote learning is accessible to students through streamlined communication.

The remote learning update also includes a guide for elementary and secondary schools for prerequisite content standards critical for success in English language arts, math, science, and history/social studies. The link to complete DESE guidance can be found here: <http://www.doe.mass.edu/covid19/learn-at-home.html>

D. UPDATE: Police and Fire Unions Seek Chapter 41, Section 111F Coverage for COVID-19 Related Absences.

On April 30, 2020, the House continued the reporting date for H. 4611 until June 1, 2020 (pending concurrence). In the Senate, S. 2602, a motion was made that it “ought not to pass” under Joint Rule 10. Joint Rule 10 has to do with the limit on time for reports of Committees. Following that a motion was made to suspend rules after which the bill was Recommended to the committee on Public Safety and Homeland Security.

UPDATE: H4631-An Act Relative to State Employees Performing Core Functions

There has been no further update regarding H. 4631, *An Act Relative to State Employees Performing Core Functions* since the joint hearing held (electronically) on April 21, 2020.

E. COVID-19 Postings on NMP Website

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website (www.nmplabor.com). Also, our attorneys continue to be available by email, telephone and video

conference to answer any questions and provide any advice. The following is a list of the new materials added to our website since our last Advisor:

- Governor Baker Extends Stay-at-Home Advisory Until May 18
- Graduation Requirements for Class of 2020
- Massachusetts Orders Mandatory Face Coverings

If you have any questions or would like to discuss the information above in more detail, please feel free to contact:

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