



Armstrong
Teasdale

Addressing (Re-) Onboarding Risks in a Phased Reopening

May 8, 2020

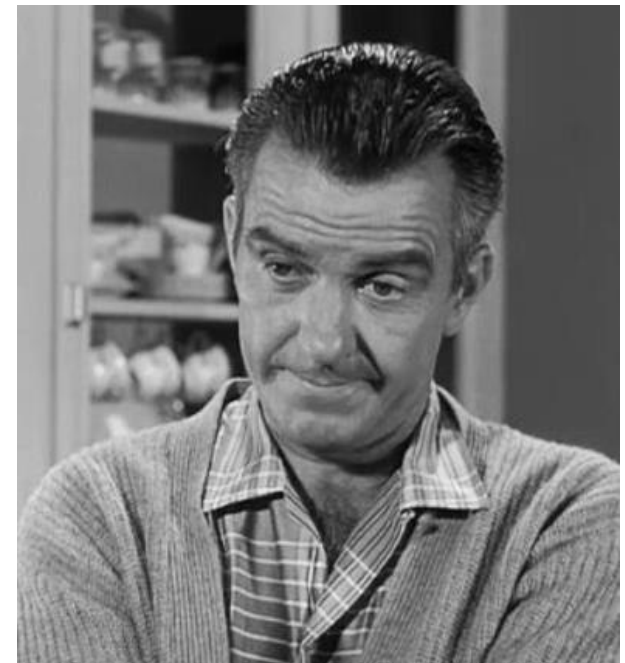
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Discrimination in a Phased Reopening

- An employer must abide by anti-discrimination and anti-retaliation laws in making employment decisions in a reopening
 - Utilize objective criteria in decision-making if feasible
 - Seniority, etc.
 - Comply with CBA or other recall policies
- Avoid paternalistic decision-making
 - Age
 - Disability status
 - Race
 - Associational status



Discrimination in a Phased Reopening

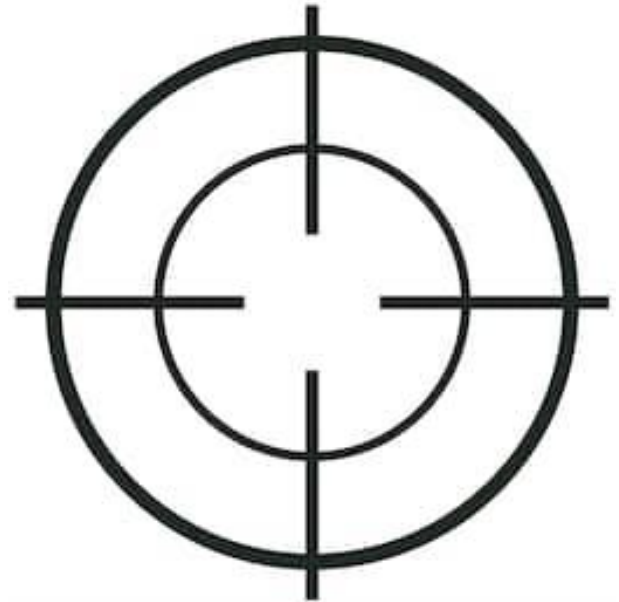
- **Disparate Treatment Discrimination (Intentional)**
- **Disparate Impact Discrimination (Unintentional)**
 - Does application of neutral criteria disproportionately impact a protected group?
 - “Job related and consistent with business necessity” defense

Dealing with “High-Risk” Employees

- The CDC identifies “high risk” to include: age 65+, chronic lung disease, moderate to severe asthma, serious heart conditions, diabetes, kidney disease, severe obesity, etc.
- Consider providing reasonable accommodations for high-risk employees:
 - Modified work schedule, changed location of work, elimination of marginal job duties, erecting barriers
 - Consider a leave of absence either as an accommodation or under the FMLA, if applicable
 - Require a doctor’s note

Dealing with “High-Risk” Employees

- EEOC Technical Assistance allows an employer to exclude an employee from the workplace if working would constitute a “direct threat” that cannot be eliminated by reasonable accommodation
 - Direct threat is a high standard
 - Cannot be based on “high-risk” status alone
 - Requires individualized assessment
 - Consider duration of risk, likelihood of harm, imminence of harm, location of employer
 - Solicit medical advice



Is the Employee Entitled to Remain off Work?

- **EFMLEA:** unable to work or telework because employee caring for child whose school, place of care or child care provider unavailable
- **EPSLA:** unable to work or telework because employee is:
 - subject to a quarantine or isolation order
 - advised by a health care provider to self-quarantine
 - experiencing COVID symptoms and seeking a medical diagnosis
 - caring for individual subject to quarantine order or individual advised by health care provider to self-quarantine
 - caring for child whose school, daycare, etc. is unavailable
- **FMLA:** unable to work because of a “serious health condition”

Does the Employee Want to Return to Work?

- Fear of contracting COVID-19
- Enhanced unemployment benefit
- Forcing an employee to return to work
 - Jeopardizing employee's safety
 - "Interfering" with enhanced unemployment benefits
 - Potential to create an adversarial relationship
 - Unhappy employees call OSHA, Health Department, etc.
 - Reinforces importance of compliance with OSHA, CDC guidance



Whistleblower Liability

- An employee who complains about unsafe working conditions or failure to comply with legal obligations may be a “whistleblower” protected by anti-retaliation provisions
 - OSHA
 - NLRB
 - Public policy exception to the employment at will doctrine
 - Workers Compensation Act



Harassment Liability

- Be vigilant to protect against harassment based on national origin or any other protected status
 - “Chinese virus”
 - “Wuhan lab accident”
 - “Chinese government withheld information”

New Employees Hired During WFH

- DHS's virtual review option is for 60 days from the date of the DHS notice (until May 19, 2020) or within 3 business days after the termination of the issued national emergency, *whichever comes first*
- If DHS does not extend virtual review then employer must resume physical inspection of documents within three business days of hire or rely on agent/authorized representative

New Employees Hired During WFH

- **Expired documents on or after March 1**
 - After May 1 – may satisfy List B document but only for 90 days if expired *if* the issuing agency has not auto-extended the document
 - Expired driver's license acceptable if the state has announced an auto extension-enter the expiration date and COVID-19 Ext. Attach copy of State's DMV notice of extension
 - USCIS internal operations continue so employees should use the customer service / email to contact USCIS

New Employees Hired During WFH and Returning to Office

- Employer must physically inspect the documents after *normal operations resume*
- Examination must be within 3 business days of returning
- Complete I-9 by indicating the date of the physical inspection and who conducted the inspection
- Prior to returning to work provide employee notice of this requirement

Current Employees Working from Home

- **Employees working remotely**
- **Employees returning but who did not work due to lack of work**
 - Continuing employment?
 - Rehire?
 - Re-verify Form I-9
 - Complete new I-9

Contact Information



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