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# COVID-19: What Will Our Workplaces Look Like When the Economy Reopens?

by Mark R. Goodman

A FREEBORN & PETERS LLP CLIENT ALERT

ABOUT THIS CLIENT ALERT

This Client Alert discusses what mitigation steps we can be required to take or otherwise should adopt in our workplaces as stay at home orders are modified.

"Germany Plans to Start Reopening Economy." The April 16, 2020 edition of the Wall Street Journal used this headline to introduce an article about the loosening of restrictions that were imposed in mid-to-late March aimed at reducing the spread of the coronavirus and the COVID-19 disease. Chancellor Merkel announced a decision to allow smaller non-essential stores to open the week of April 20th, with schools to restart in stages in early May. The article also reported that Volkswagen AG would reopen certain of its European factories in late April, using precautions such as staggered work times and closing corporate cafeterias. An article on that same page described the reopening of primary schools in Denmark, operating under strict rules to limit the spread of the coronavirus.

On April 16th, the Trump Administration issued guidelines for reopening the U.S. economy, using a three phase approach. The first phase would allow the reopening of businesses, including restaurants, gyms, and places of worship, after (i) evidence of a downward trend of reported new infections over a two week period and (ii) evidence that the local hospital and health care system has adequate capacity to handle COVID-19 patients and has a robust testing system in place for health care workers. Any business reopening would be conditioned on the use of strict social distancing guidelines. Those social distancing guidelines include the six foot distancing and sanitation protocols with which we are all familiar and other physical distancing protocols. The plan also suggests that vulnerable people (those over 65 years old and people with underlying health conditions that weaken their immunities) remain at home during this first phase. The President's guidelines emphasize that it is up to state and local officials to make the final decisions on when and how to gradually modify stay-at-home orders and allow businesses to reopen on some basis.

In Illinois, Governor Pritzker announced on April 16th that Illinois will work with six other Midwestern states to coordinate how and when stay-at-home orders can be modified. The factors that states will look at in deciding how and when to modify those orders include:

- Sustained control of the rate of new infections and hospitalizations;
- Enhanced ability to test and trace;
- Sufficient health care capacity to handle resurgence; and
- Requiring best practices for social distancing in the workplace.

In Illinois, it looks at is three of those four factors may have already been or soon will be satisfied. The number of new infections reported on a daily basis appears to be flattening if not declining, and the number of open hospital beds, open ICU units, and unused ventilators appears to be adequate to handle any resurgence of COVID-19 cases. The best practices for mitigation steps to minimize the spread of the virus are by now well known. What is unclear in the Governor's plan is what level

of "enhanced" ability to test and trace will need to be available before he and other state governors will feel confident enough to allow at least some businesses to reopen.

Employees and business owners in Illinois are anxious to get back to work. Workers are losing jobs and losing income because of furloughs, layoffs, and the difficulty of and limitations on working from home. Businesses in Illinois are losing revenue and many are shuttering – and all too many of those may never re-open. Stay-at-home orders are imposing economic, physical health, mental health and other social costs on citizens. Illinois tax revenues are plummeting because businesses can't operate.

Balancing these social and economic costs against the public health challenges presented by the spread of the coronavirus and the human suffering cause by COVID-19 will be a challenge for any politician who is contemplating either lifting or modifying a stay-at-home order. These considerations will also be a challenge for businesses that want to continue to provide the goods and services that our society needs and wants while protecting the health of its employees, suppliers, and customers.

Now is the time to start the discussions about when and how businesses of all types in Illinois can re-open after the first waive of the coronavirus pandemic passes. This discussion includes what legal restrictions the State of Illinois and its political subdivisions can and should impose on our economy and our society and what legal guidelines and other best practices employers should follow.

**Background on Illinois Stay-at-Home Order**

On March 9, 2020, Governor J.B. Pritzker declared a state of emergency in Illinois due to the spread of the novel coronavirus and the COVID-19 disease. On March 20th the Governor issued a "stay-at-home" order that requires all non-essential businesses to essentially shut down (except to the extent that its workers can work from home, and except for "minimum basic operations" necessary to preserve inventory, plant and equipment, process payroll and enable workers to work from home). The order also prohibits all travel within the state except for "essential travel," which includes things like going to the grocery or pharmacy and engaging in other "essential activities." Essential activities include caring for others, going to the doctor, or going for walk or to a park.

The order also allows a broad swath of business considered to be "essential" to continue operations, but imposes restrictions on the manner in which those businesses operate in order to try to prevent the spread of the virus among employees and customers. The order laid out "Social Distancing Requirements" for essential businesses that remained open.

The March 20th stay-at-home order originally was effective from March 21st through April 7th (by its terms the order was effective "for the remainder of the duration of the Gubernatorial Disaster Proclamation, which currently extends through April 7, 2020"). The Governor issued a second disaster declaration on April 1st, and on that same date extended the prior stay-at-home order through April 30th.

**Legal Basis for the Order**

The Governor's stay-at-home orders were issued pursuant to the powers given to him by the Illinois Emergency Management Agency Act. In particular, the March 20th order states that it was issued pursuant to "the powers vested in me as the Governor of the State of Illinois, and pursuant to Sections 7(1), 7(2), 7(8), 7(10), and 7(12) of the Illinois Emergency Management Agency Act." That Act (20 ILCS 3305) gives the Governor the power to implement various provisions of the Act in the event of a "disaster." A "disaster" as defined in Section 4 of the Act includes not only natural disasters such as tornados or flooding and acts of terrorism or rioting, but also specifically includes an "epidemic" and an "imminent threat of illness of health condition form the appearance of a novel infectious agent or biological toxin …." There is no doubt that the effect of the coronavirus and the threat of COVID-19 disease qualifies as a "disaster" under this Act.

Under the Sections cited in his executive orders, upon the declaration of a disaster, "the Governor shall have and may exercise for a period not to exceed 30 days the following emergency powers …." While this Act by its terms (Section 3) states that that Act does not limit the powers granted to the Governor under the Illinois Constitution or by common law[1], it is clear that by its terms the Governor's powers under this Act can be exercised for no more than thirty days after the declaration of an emergency. However, nothing in this Act prevents the Governor from issuing multiple, successive disaster declarations (assuming that a "disaster" is continuing). In fact, Governor Pritzker has already issued two emergency declarations related to the coronavirus (one on March 9th and a second on April 1st).

The stay-at-home provisions of the Governor's order appears to be based on Section 7(8) of the Act. That section includes among the Governor's powers the power to "control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein." Governor Pritzker's order appears to be based on the premise that the power granted under this provision of the Act is broad enough to give him the power to determine what

1 The law does also may not limit whatever powers political subdivisions and local officials (which may vary between home rule municipalities and other political subdivisions) may have to issue stay at home orders or otherwise set conditions for businesses to re-open and operate while the coronavirus threat continues.

businesses can and cannot remain open, and how a business's "premises" can be used.[2]

**Social Distancing Requirements For Essential Businesses**

The Governor's stay-at-home order includes social distancing requirements for "essential businesses" that remain open (and for "minimum basic operations" for other businesses). Those provisions of the order require that businesses take the kind of protective measures with which we now are very familiar - including "maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands."

The order also requires that businesses take "proactive measures" to comply with Social Distancing Requirements, "including where possible:

1. Designate six-foot distances. Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
2. Hand sanitizer and sanitizing products. Having hand sanitizer and sanitizing products readily available for employees and customers;
3. Separate operating hours for vulnerable populations. Implementing separate operating hours for elderly and vulnerable customers; and
4. Online and remote access. Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely."

In addition to these required mitigation steps, many businesses have taken additional steps, such as requiring certain workers to wear masks and disposable gloves, checking workers' temperatures before each shift, eliminating break periods to reduce gathering of employees and having workers work in shifts to reduce congestion.

**What Mitigation Steps Can be Required When Stay-at-Home Order is Modified or Lifted?**

**Government Mandate of Continuing Mitigation Steps**

Under Section 7(8) of the Illinois Emergency Management Agency Act, the Governor has the power for a period not to exceed thirty days after a disaster declaration to control the movement of persons within the disaster are and the "occupancy of premises" in that area. If the power to control the "occupancy of premises" includes the ability to require non-essential businesses to severely limit their operations and require essential services to comply with prescribed mitigation steps, then that power may also include the ability to impose conditions on any business in order to re-open during the disaster.

Those mitigation steps would no doubt include the social distancing requirements contained in Governor Pritzker's previous orders. Additional requirements presumably could be customized for the type of business involved – the steps that are reasonable to impose on a restaurant, a gym or a hair salon might not be reasonable to impose on a manufacturing factory, a clothing shop, or a golf course. However, what are the limitations on government's power to impose such mitigation steps?

Clearly there would need to continue to be a "disaster" in order to allow the state to exercise its police powers to protect citizens from the disaster. Could the state declare that the disaster is continuing for some areas of the state but exclude other areas of the state from that declaration, such as counties that have reported no new or very few new infections? We think that the answer is "yes,' and such more limited geographic limitations are exactly what the Act contemplates.[3] Can the Governor under the Act declare that a disaster continues to exist if only a few new cases of infection have been reported? The flexibility or lack thereof to declare a disaster is an open question. While we expect that courts will grant the Governor a great deal of deference on these questions, the Governor's powers under the Act are not unlimited (even if we cannot at this time define where those limits lie). The more reasonably tailored the requirements are in response to the current and future public health threat, and the more the required mitigation steps balance the public health concerns with the other social and economic concerns of the citizens, the better the chance that courts will view them as a reasonable exercise of the powers under the Act and under the Illinois Constitution and common law.

2 The three word phrase "occupancy of premises" apparently is being interpreted broadly to include not only the ability to dictate who can or cannot occupy a premise during the disaster, but also how the premises can be used, the manner in which others can visit the premises and the other particulars governing how a business operates. While we do not believe that phrase has been interpreted by Illinois courts, in a recent case challenging the Pennsylvania Governor's stay-at-home order, the Pennsylvania Supreme Court held that the same phrase used in a similar statute included the ability to order non-essential businesses to close. Friends of Danny Devito v. Wolf, No. 68 MM 2020 (Pa. Sup. Ct., Middle District, April 13, 2020).

3 As of April 16th, about a third of the counties in Illinois had two or fewer reported positive tests for COVID-19, and over ten percent of the counties reported no infections.

If a disaster exists and the Governor exercises his Section 7 powers, what are the limitations on the ability to control or condition the movement of persons in the disaster area and the ability to control or condition the occupancy of premises in that area? It is easy to see situations where required mitigation steps could clash with civil rights of individuals and businesses. Certain steps mandated to protect older or susceptible employees and customers could be attacked as impermissible age discrimination or discrimination based on disability. Imposing stricter requirements on certain municipalities or townships where the spread of COVID-19 is continuing at a high rate could be attacked as improper discrimination if that those orders disproportionately affect certain ethnic or racial minorities. Mandating that employers and businesses take the temperatures of employees or customers or gather employee information on underlying health conditions such as diabetes or hypertension may be viewed as an improper violation of privacy. We expect that courts will use a strict scrutiny test when examining whether the state requirements conflict with civil rights, and will in such instances require that the state requirements be narrowly crafted to serve important public health goals without unduly violating protected civil rights.[4]

**Employer/Business Ability to Impose Mitigation Steps**

Just as most businesses have to date used common sense and best practices in addressing steps to protect employees and customers, we expect that businesses will continue to take common sense steps after stay-at-home order are modified or lifted. This will, however, require a balancing of steps to avoid unduly exposing employees and customers to spread of the virus (and avoid exposing the business to resulting liability) against the impact those steps may have on employee or even customer privacy or other rights. Can an employer require older workers to stay home or to take special precautions? Can an employer inquire whether an employee has underlying conditions that make exposure to the coronavirus more dangerous to them? Can a business require employees and customers to have their temperature taken before entering the business premises?

The Occupational Safety and Health Administration ("OSHA") has prepared some very useful and well thought out guidelines for workplace protections. The recommended steps differ on whether a job is classified as very high risk (e.g. health care workers performing intubation on known or suspected COVID-19 patients), high risk (e.g. health care workers and medical transport workers exposed to known or suspected COVID-19 patients), medium risk (persons with contact to persons who may be infected or to the general public in areas of ongoing transmission, such as schools, high volume retail setting, etc.) and low risk (those jobs that do not require expose to persons know or suspected to be infected or in close contact with the public). The specific recommendations include engineering controls, administrative controls, safe work practices and the use in some situations of personal protective equipment.

The Equal Employment Opportunity Commission has prepared some very useful guidance for employers on the types of inquiries they can make of employees with regard to COVID-19 in light of existing anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act.

For a more detailed discussion of employment law and privacy law considerations that businesses must weigh, please refer to the following two client alerts prepared by Freeborn's labor and employment attorneys and by our privacy and information security lawyers.

We expect that Governor Pritzker and local authorities will look to this existing guidance when fashioning conditions to allow Illinois businesses to reopen. Complying with the OSHA workplace protection guidelines, subject to the EEOC guidance, and using other common sense measures suitable and perhaps customized to a business's particular situation, are the kind of creative and narrowly crafted conditions that should be discussed now in order to allow the Illinois economy to recover soon. These conditions could include requiring a salon to space out customers and requiring the use of masks and gloves, requiring places of worship to only use every third pew or to require prayer rugs to be separated, requiring restaurants to remove or only use half of their seating, and requiting all businesses to continue to disinfect premises and continue to require the other hygiene steps (e.g. frequent hand washing) that are proven to slow the spread of the virus. Given that over two-thirds of the Illinois Covid-19 cases are in Chicago and Cook County, re-opening the Illinois economy on a regional basis where the number of Covid-19 cases are lower would permit these mitigation steps to be tried under conditions where tracking and tracing would be more practical. It is not too soon to start detailing the conditions that will shape our workplaces when the stay-at-home orders are modified.

**If you have any questions, please contact Mark Goodman or visit Freeborn's COVID-19 webpage for more information as this situation develops.**

4 The Constitutional limitations on the exercise of a state's police powers during a disaster are beyond the scope of this article. A useful general discussion of the scope of state police power in the event of public health emergencies and the Constitutional and other legal limitations thereon can be found here.

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Mark has three decades of experience advising the insurance industry on corporate, regulatory and transactional matters. He has represented a wide range of clients in complex, high-profile matters, including insurance holding companies, insurers, producers, agents and brokers, and managing general agents. He also advises non-traditional sellers of insurance on insurance programs, including trade associations, retailers, banks and savings associations, and leasing and finance companies.

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