

Returning to Work in a Pandemic: What Employers Need to Know

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Restrictions are lifting, businesses are reopening, and corporate counsel face a slew of novel legal considerations as they guide their companies through post-lockdown operations.

During a May 14 webinar for the Research Triangle Area Chapter of the Association of Corporate Counsel, my partner, labor and employment attorney Ken Gray, addressed questions related to everything from employee privacy and working conditions to the Paycheck Protection Program. During the course of a fast-paced hour, he discussed common situations his in-house counsel are dealing with now, and concerns that are likely to arise soon.

Addressing Fear in your Workforce

Many workers are worried about catching the coronavirus, creating a new challenge for employers.

Recently, Ken received a call from a manufacturing client. An employee wrongfully believed that a worker on the same production line had tested positive for the virus. As a result, more than two dozen workers walked off the job before quitting time, and worse, indicated they wouldn't be coming back the next day.

The company had anti-COVID-19 measures in place. However, fear and gossip are hard to combat. The workers had heard that a family member of an employee on a **separate production line** tested positive. The company shut down that line, sent workers home, and set about cleaning and sanitizing the equipment.

But what should it do about the workers who walked off the job from the original line? Any employer's first response this kind of situation should be communication, Ken says.

"You're going to have a lot of people with fears," he empathized. "Some of them are well-founded; some of them are not. What we need to do is clear up the things that are not well-founded."

In this case, that meant correcting misinformation and explaining how the manufacturer was responding—by sending people home temporarily, sanitizing equipment, and so forth.

This often requires back-and-forth communication, so that employers can understand what employees are afraid of, and then respond appropriately; that interactive process should be documented.

If, after all that, the employee still refuses to return to work, disciplinary action may be appropriate.

Treating Fear as a Disability

Ken declared, "Unjustified fear is not a disability that must be accommodated under the Americans with Disabilities Act." However, he notes that how employee concerns are treated may need to vary from one person to the next.

Some people may be more vulnerable—and legitimately more fearful—due to underlying health conditions. In that case, the employer might make reasonable accommodations. For example, if someone has an underlying health condition that makes COVID-19 more dangerous, allowing that them to work from home—especially if that person has already been doing that—might be an appropriate accommodation.

"We have set a precedent by allowing so many people to work from home," Ken says. "I might suggest that the employer allow this person to continue working from home, and we see if we can find somebody else to do the limited duties that are required to be in person at the worksite."

Or, employees could be granted additional unpaid time off before being required to return to work.

Reasons Employees Might not Return to Work

Fear of being infected with COVID-19 is not the only reason an employee might not want to return to work.

Some employees may be unable to return to work because they must care for someone who is sick or in a high-risk group, or have young children who are still out of school

There are times when employers might **require** employees to work remotely. For example, someone whose spouse is a front-line worker and, therefore, at greater daily risk of becoming infected, might be asked to stay home.

How an organization handles these situations may depend on how big it is. Employers with less than 500 employees may be required to provide up to two weeks of paid sick leave and up to an additional 10 weeks of paid Family and Medical Leave Act leave after that.

"Certain companies with less than 50 employees can exempt out in limited circumstances," Ken notes. "Medical practices can exempt specific employees from being subject to the paid sick leave and paid FMLA."

There are reports of employees refusing to return to work because they're making more money under enhanced unemployment benefits Congress has approved. In those cases, however, employers can terminate workers who don't come back.

"[Companies] are sending out notices to employees saying, 'We're reopening and expect you back at work on X date,'" Ken says. "If you say, 'No,' then we're going to notify the [Employment Security Agency] that there's a job available for you, and you have refused that."

Workplaces During the Pandemic

Though employers are reopening their doors, they still have multiple pandemic-related concerns.

Ken suggests, for example, that companies could take employees' temperatures. If employees have a fever, employers can send them home. Businesses are also able to mandate employees, as well as customers and members of the general public, wear face masks while on the premises.

"I think it will be a best practice to have masks in every location where you're dealing with any visitors," Ken

says. Not having face masks available for employees, particularly when dealing with the general public or visitors, could create potential legal liability if someone gets sick.

Companies need to be careful if they collect any personal health data. Ken suggests that, for temperature checks, don't record the data. Just take the reading and, if there's a fever, send the worker home.

Some people are required, as part of their jobs, to interact with the public and work in spaces that might be prone to COVID-19 infection. For example, one client is in the business of conducting home inspections, and wants to understand the risks of sending out inspectors.

Ken says, in this case, companies can still require employees to work, even if they are worried about COVID-19. But, first they must communicate with the employee about those concerns and explain how company policies address them. Company policy should probably provide the worker with appropriate personal protection equipment (PPE) and require it to be used.

Despite the shifting workplace and the threat of new liabilities, it's not clear yet if Congress will provide employers additional liability protection.

Ken says companies could ask customers to sign liability waivers. Those can, at a minimum, deter potential litigation. But such waivers could also create concerns for customers, so businesses should weigh their options carefully. Employee liability waivers, on the other hand, don't offer any extra protection.

Paycheck Protection Program Questions

PPP loans have been one of the federal government's highest-profile responses to the pandemic-induced economic slowdown. Ken notes that in addition to certain expenses and regular payroll costs, PPP loan proceeds can also be used to pay hazard pay and bonuses to employees — subject to the \$100,000 per year salary cap.

"Let's say we get near the end of the eight weeks and we need to use up more of that money in a way that is permissible for forgiveness," he says, "Remember, subject to the annualized \$100,000 cap, bonuses and hazard pay count."

Even with the extra funding from a PPP loan, some businesses may still need to lay off employees. Can they lay off workers after the eight-week period their PPP loan covers if that ends prior to June 30? Ken said, "Maybe.

The law is unclear, but if your company laid people off, then brought them back after getting a PPP loan, you might be better off waiting until June is over to make any reductions, Ken says.

"The PPP legislation says that if you did lay folks off, you have until June 30 to bring them back and not be penalized," Ken says. "Out of an abundance of caution, I would suggest loan recipients delay taking separation action until after June 30th, unless we get additional guidance from the SBA."

For more information about PPP loans, employment law related to the coronavirus and related issues, visit our regularly updated resources for COVID-19 page.

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