



Risk Control

Reopening the Workplace: Employment Law Considerations

Mitigate the Risks of Discrimination, Harassment and Retaliation

As state shelter-in-place restrictions are relaxed, employers are making plans to reopen physical work locations. COVID-19, however, has radically changed the landscape of employment risks. Laws, regulations and guidance are changing rapidly as the situation continues to evolve. While employers must consider safety and health issues as they create policies and protocols to enable workers to return to the physical workplace, they must also be mindful to avoid the many employment law pitfalls that exist.¹ This guide highlights some employment risks an employer may encounter upon returning its workforce to the workplace.

One of the first steps an employer must take is to determine which federal, state and local laws, regulations and guidance apply.² Guidance from the Center for Disease Control and Prevention (CDC)³ and the Occupational Safety and Health Administration (OSHA),⁴ as well as individual state and municipal laws, regulations and guidance, should be consulted. Note that laws, regulations and guidance are rapidly changing, and therefore require consistent monitoring. Employers are strongly encouraged to consult with an experienced employment attorney rather than try to tackle this extremely complex and technical undertaking unaided, and certainly before implementing any new employment policy and/or protocol. Consider designating a point person or a task force for the purpose of liaising with your attorney and implementing his or her recommendations.

Layoffs, Furloughs and Recalls

When recalling employees back to the workplace, many employers will bring back their employees in phases. Employers should consider implementing or continuing telework where it is feasible, and create or modify teleworking policies if necessary.⁵ Employers should determine the order in which employees will return to the

physical workplace based on objective business needs, which should be documented to guard against claims of discrimination and retaliation. Employers should not base decisions upon an employee's membership in a protected class, such as race, age, disability, gender, pregnancy, national origin, color or religion.

¹ CNA's Beyond HR® (www.cnabeyondhr.com) offers complimentary valuable resources to eligible CNA Employment Practices Liability (EPL) policyholders. Links to all COVID-19 related materials, such as sample policies, articles, and podcasts, have been placed on a COVID-19 page. This page may be accessed from the home page, after logging in, by clicking on the "COVID-19" button on the right side of the page. Eligible EPL policyholders can register for access to Beyond HR by clicking on the "Register" button and following the prompts to enter information.

² Littler Mendelson, Bouncing Back – List of Statewide Return to Work Protocols, at <https://www.littler.com/publication-press/publication/bouncing-back-list-statewide-return-work-protocols>, last viewed 5/12/20.

³ Centers for Disease Control and Prevention, Coronavirus 2019 (COVID-19) General Business Frequently Asked Questions, at <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>, last viewed 5/13/20.

⁴ OSHA COVID-19 Resource page, <https://www.osha.gov/SLTC/covid-19/>, last viewed 5/13/20.

⁵ OSHA, Guidance on Preparing Workplaces for COVID-19, at <https://www.osha.gov/Publications/OSHA3990.pdf>, last viewed 5/12/20. See also, Beyond HR, The Telecommuting Basics Employers Need to Consider, <https://www.cnabeyondhr.com/article.htm?id=11346>.

Employers should conduct a disparate impact analysis to ensure that the manner in which employees are recalled does not have a disparate impact on a protected class. Similar considerations should be taken into account if, in the future, the employer decides to furlough, lay off or terminate employees.⁶

Employers Must Be Mindful of the ADA and Similar State Laws

On May 7, the Equal Employment Opportunity Commission (EEOC) updated the document entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws,” to clarify that employers may not exclude employees from returning to work, or take any other adverse action, solely because the employee has a medical condition which the CDC has identified as potentially making that employee more susceptible to becoming severely ill if he/she becomes infected with COVID-19.⁷ The EEOC also notes that an employer is not required to accommodate an employee with underlying health conditions unless the employee requests an accommodation. However, if an employee requests an accommodation, an employer must conduct an individualized analysis to determine whether the employee’s disability poses a direct threat to his/her health, and whether that threat can be reduced or eliminated by a reasonable accommodation. The employer must base this determination on reasonable medical judgment about the employee’s particular disability, and not the disability in general.⁸ Employers are advised to consider a variety of factors, such as “the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.”⁹

If an employer determines that the employee’s disability poses a direct threat to his/her health, the employer may not exclude the employee from the workplace unless the employer determines, through the interactive process, that a reasonable accommodation cannot be provided which would permit the employee to perform the essential functions of his/her job. Accommodations may include additional or enhanced protective measures, such as erecting a barrier that separates the employee from others or a temporary modification of work schedules which decreases contact with coworkers or the public. If there are no accommodations available, an employer must consider telework, leave or reassignment, perhaps to a different job or location which may be safer for the employee to work. An employer is not required to provide a particular reasonable accommodation if it poses an “undue hardship,” which is something that poses “significant difficulty or expense.” Consideration may be given to whether current circumstances create “significant difficulty or expense” in acquiring or providing certain accommodations, in light of the facts of the particular job and workplace.¹⁰

An employer’s obligation to accommodate extends to its employees’ mental disabilities as well as physical disabilities. Employees with psychiatric conditions such as anxiety disorders, obsessive-compulsive disorder and post-traumatic stress disorder may be entitled to an accommodation. Whether an employee with a psychological impairment is a qualified individual with a disability will depend upon whether the impairment substantially limits one or more of the employee’s major life activities, and whether the employee can perform the essential functions of his/her job, with or without accommodation. If an employee is a qualified individual with a disability, the employer should engage in the interactive process to determine if a reasonable accommodation is available. The [Job Accommodation Network \(JAN\)](#) is a useful resource which can assist in determining whether an employee is a qualified individual with a disability and/or in the reasonable accommodation process.¹¹

Exercise Caution to Avoid Retaliation

Employers should exercise caution before taking adverse action against any employee who tests positive for COVID-19, requests sick or family leave, and/or expresses concerns about workplace health and safety. Someone who tests positive for COVID-19 may be disabled under the ADA or state disability laws, and protected from discrimination and retaliation. Federal laws such as the Family First Coronavirus Response Act (FFCRA) and the Family Medical Leave Act (FMLA) prohibit retaliation against employees who request sick or family leave under those laws, as do some state leave laws. Various federal and state whistleblowing laws may protect employees who raise concerns about workplace health and safety. And if an employee brings concerns about workplace health and safety on behalf of him/herself and other employees, those actions may be considered protected concerted activity under the National Labor Relations Act (NLRA), which protects all employees, unionized or not, from retaliation for engaging in protected concerted activity.¹² Employers must therefore tread carefully when contemplating terminating or disciplining an employee who falls within one of these categories.

Screening for COVID-19 Symptoms

Employers are required to furnish “a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”¹³ Employers should consider implementing policies and procedures to reduce workers’ exposure to COVID-19, such as encouraging social distancing and frequent handwashing. Employers may also want to consider

⁶An employer’s collective bargaining agreement and/or its duty to bargain also may be implicated. See Labor Issues Concerning COVID-19 and Government “Stay at Home” Orders, at <https://www.laboremploymentlawblog.com/2020/03/articles/national-labor-relations-board/labor-covid-19-government-stay-at-home/>, last viewed 5/27/20.

⁷What You Should Know About COVID-19 and the ADA and Rehabilitation Act, at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=, last viewed 5/13/20.

⁸After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided. Id., questions D4 and D5.

⁹Id., question G.4.

¹⁰Id., questions D9-11.

¹¹The Job Accommodation Network (JAN), www.askjan.org.

¹²29 U.S.C. § 157, et seq.

¹³29 USC 654(a)(1), at www.osha.gov/laws-regs/oshaact/completeoshaact, last viewed 5/13/20.

some form of screening of workers prior to entering the premises. In fact, some state and local laws and regulations may require employers to do so.¹⁴ Screening may assist in reducing the spread of the virus and may also help make employees and customers feel more comfortable about the company's efforts to maintain a safe workplace. If screening will be conducted, an employer should establish a written policy which includes the reason for and nature of the screening, who will conduct it, whether the information collected will be maintained, and, if it is to be maintained, assurance it will remain confidential.

If an employer decides to screen employees for COVID-19, it must be done in compliance with the Americans with Disabilities Act (ADA), state disabilities laws and other laws. Before permitting employees to enter the physical workplace, employers may take steps to determine if each employee has COVID-19, including temperature screening, responding to questions regarding symptoms and/or diagnostic testing for active COVID-19 infections.¹⁵ Temperature screening and/or diagnostic testing conducted by an employer present many difficult logistical and legal issues.¹⁶ Some may be mitigated by permitting employees to self-report their temperatures, and reserving diagnostic tests only for those who have symptoms. Decisions on how to screen should take into consideration the company's unique circumstances, including its industry, location and employees' job duties. Employers should consult with an employment attorney for guidance regarding COVID-19 screening requirements and options. If an employer decides to screen employees, consideration should also be given to screening contractors, vendors, clients, customers, guests or any other non-employees who may enter the workplace.

Under the ADA, medical exams and disability-related inquiries are permitted only if they are job-related and consistent with business necessity. The EEOC notes that employers may test for COVID-19, ask questions about symptoms and/or take an employee's temperature to determine if the employee has contracted COVID-19, as an individual with the virus would pose a direct threat to the health and safety of others. The EEOC cautions, however, that screening must be done in a way that is accurate and reliable, and suggests that employers consult with CDC, FDA and other public health agency guidance. The EEOC also notes that some individuals who are infected may not have fevers or exhibit symptoms.

Although an employer may ask employees if they are experiencing COVID-19 symptoms before returning to the workplace, the employer cannot ask unrelated medical questions.

During the pandemic, ADA-covered employers may ask medical questions relating to COVID-19 symptoms as identified by the

CDC, other public health authorities and reputable medical sources. These sources should be consulted for guidance on emerging symptoms associated with the disease, as additional symptoms may be identified.

If an employer chooses to screen employees, it must be done in a consistent, non-discriminatory manner. An employer should not single out any person or group, even if that group is in a heightened risk category, unless there is a legitimate business reason for doing so. For example, screening only employees who are over 60 years old or have a disability could be a violation of the Age Discrimination in Employment Act (ADEA), the ADA and/or similar state and local laws. An employer should screen either all employees or a specific group of employees based upon job duties or some other legitimate business reason.

Some employees may refuse to answer questions, have their temperature taken or submit to a COVID-19 test. In this situation, an employer should attempt to ascertain the reason for the employee's refusal. If the refusal is based upon a sincerely held religious belief or a disability, the employer may have an obligation to engage in the interactive process to determine if a reasonable accommodation can be provided that is not an undue burden to the employer.

Employers should also be aware that the time employees spend during the screening process, such as filling out questionnaires or having their temperature checked, may be compensable. COVID-19 screenings are similar to security screenings, which may be considered compensable time in certain states. Employers should review federal and state wage and hour laws to determine what constitutes paid time.

Establish Protocols For Individuals Suspected of Having, or Testing Positive for, COVID-19

Employers must establish protocols for situations in which an employee is suspected of having COVID-19 or tests positive for COVID-19, and for alerting employees who may have been exposed.¹⁷ Employers should ensure that the identities of those who test positive are kept confidential. Return to work protocols for individuals who are suspected of having, or test positive for, COVID-19, should also be established. Employers should review their leave policies to ensure that they have been updated to reflect the relevant laws that have been recently enacted in response to the pandemic. Employees who suspect that they have, or test positive for, coronavirus, may be entitled to leave under the FMLA, Family First Coronavirus Response Act (FFCRA) or state leave laws.¹⁸

¹⁴ Ogletree Deakins, Orders and Guidance to Screen Employees for COVID-19 and to Provide Protective Measures, <https://ogletree.com/app/uploads/covid-19/COVID-19-Employee-Screening-and-Protective-Measures-Requirements.pdf>, last viewed 5/14/20.

¹⁵ What You Should Know About COVID-19 and the ADA and Rehabilitation Act, at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=, last viewed 5/13/20.

¹⁶ See Guerrerri, Vin, Law360, Wages, COVID-19 Tests Pose Hurdles as Employers Reopen, at https://www.law360.com/articles/1270095/wages-covid-19-tests-pose-hurdles-as-employers-reopen?nl_pk=e48614dd-9c84-497d-bc9c-6d6df4cc5752&utm_source=newsletter&utm_medium=email&utm_campaign=special, last viewed 5/12/20 and FisherPhillips, <https://www.fisherphillips.com/resources-alerts-6-factors-employers-must-consider-when-taking>, last viewed 5/14/20.

¹⁷ Cozen O'Conner, Employer Checklist for Responding to a Positive COVID-19 Test, at <https://www.cozen.com/news-resources/publications/2020/employer-checklist-for-responding-to-a-positive-covid-19-test>, last viewed 5/14/20.

¹⁸ Gordon & Rees, Employer Considerations in the Wake of COVID-19, at <https://www.grsm.com/publications/2020/employer-considerations-in-the-wake-of-covid-19>, last viewed 5/13/20. See also Beyond HR,® Family First Coronavirus Response Act (FFCRA) podcast, <https://www.cnabeyondhr.com/vault/podcast-play.cfm?id=38>

Privacy Considerations

If an employer decides to screen and keep test results, temperature readings, questionnaires about symptoms and/or other medical information, the information should be kept confidential, in a file separate from the employee's personnel file, pursuant to the ADA's requirements for confidentiality of medical information. State medical records privacy laws should also be consulted.

Employers who conduct temperature screens should also be mindful of state biometric information and other privacy statutes which may apply. For example, in California, an employee's temperature screening likely constitutes personal information, and therefore temperature screening may trigger the employer's obligations under the California Consumer Privacy Protection Act (CCPA) if the employee is a California resident and the organization is subject to the law. Although pursuant to AB25 most of the personal information collected in the employment context is exempt from the CCPA, employers must still provide notice to their employees regarding the categories of personal information to be collected.¹⁹ And, if the exemption is not amended or renewed, it will expire on January 1, 2021, in which case all of the CCPA's provisions will apply to the collection of personal information in the employment context. This will require the disclosure of information spanning the twelve month period preceding the receipt of the request for information, which will probably include information collected regarding coronavirus.²⁰

In Illinois, employee temperature screening may implicate the Illinois Biometric Information Privacy Act (BIPA).²¹ Although temperature screenings performed by a handheld thermometer or scan may not fall within the definition of biometric information, many new technologies are available which use biometrics either to identify an individual before his/her temperature is taken or to obtain temperature readings. If the temperature screening process triggers BIPA, an employer will need to comply with its policy and notice requirements, which include providing written notice and obtaining written consent prior to collecting the information.²²

Guard Against Discrimination and Harassment

The EEOC and some state and local fair employment practices agencies have commented on an increase in reports of discrimination against Asian-Americans and individuals of Asian descent. Employees who test positive for COVID-19, have disabilities, are older or have family care responsibilities may also face discrimination and harassment. Employers should guard against all types of discrimination and harassment, and consider providing additional anti-discrimination and anti-harassment training to employees and managers. Managers should be trained to recognize

discrimination and harassment when it occurs, and know how to elevate such matters to the appropriate person or department, even if incidences are not reported by employees.

Communication and Training

Employers should communicate with employees frequently, providing them with information regarding the health and safety measures that the employer is putting in place in light of COVID-19. Often, litigation results from miscommunication or a lack of adequate communication. It is in the employer's best interests to provide information to its employees far enough in advance that the employees have time to digest the information and prepare to return to the workplace. Consider providing training to employees regarding the company's policy regarding infectious diseases (and consider implementing such a policy if one does not exist) and the measures the employer has taken to protect its employees. Managers should be trained to understand the company's obligations with respect to COVID-19 health and safety protocols, as well as anti-discrimination, anti-retaliation and other relevant laws.

Conclusion

Employers must be mindful of the myriad of employment risks implicated in reopening the physical workplace. Steps should be taken to help mitigate these risks and defend against discrimination and retaliation claims. Consultation with an experienced employment attorney during all phases of returning employees to the physical workplace is highly recommended.

IMPORTANT NOTICE TO CNA EPL POLICYHOLDERS

Eligible policyholders who purchase Employment Practices Liability (EPL) insurance from CNA may access **BeyondHR**[®], the CNA management liability risk control platform. COVID-19 materials, including articles, podcasts and model policies and forms, may be accessed on the home page, after logging in, by clicking on the red "COVID-19 Resources" button on the right side. Beyond HR also provides online, trackable training modules, including training modules on the topics of discrimination and harassment prevention, as well as civility in the workplace, which can assist an employer in maintaining a work environment free from discrimination and harassment.

¹⁹Gordon & Rees, Employer Considerations in the Wake of COVID-19, at <https://www.grsm.com/publications/2020/employer-considerations-in-the-wake-of-covid-19>, last viewed 5/13/20. See also Beyond HR@ Family First Coronavirus Response Act (FFCRA) podcast, <https://www.cnabeyondhr.com/vault/podcast-play.cfm?id=38>

²⁰2019 Cal. Laws ch. 763.

²¹Cal. Civ. Code § 1798.130(a).

²²740 ILCS 14/10

²³740 ILCS 14/15(a), (b). See also [Link to LL's BIPA article]

²⁴Message from EEOC Chair Janet Dhillon on National Origin and Race Discrimination During COVID-19, at <https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19>

²⁵Beyond HR® Model Virus, Bacteria and Disease Control Policy, <https://www.cnabeyondhr.com/vault/document.htm?id=210&type=policy-docs&lang=en>