

Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part One: Navigating the Legal Risk of Return

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Employment

Whether a company is an essential business or is expecting to reopen in the coming months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to work, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

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2. Considering Screening Measures for Employees Returning to Work ([Part Two](#))
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Navigating the Legal Risk of Return: Conflicting Orders, Waivers, and Potential Claims

As a threshold issue, many employers will want to consider the risk that they will be subjected to claims by employees when resuming operations based on an employee's potential exposure to COVID-19 in the workplace. Such claims could theoretically arise no matter when operations resume if a vaccine is not widely available, but most employers cannot afford to wait until that time to recall employees to the worksite.

What Key Liabilities Should We Be Concerned About?

Generally speaking, employers are protected from liability for injury or illness to employees arising out of the scope of employment by the workers' compensation regime, a system governed by state law; workers' compensation is typically the exclusive remedy for tort liability against employers. In recent months, some states have amended their workers' compensation laws to provide a presumption of coverage for certain types of employees, and particularly

essential employees, who contract COVID-19. However, in some jurisdictions, an employer found to have acted negligently in maintaining a safe workplace may lose the protection of workers' compensation. For example, pursuant to the Occupational Safety and Health Act (OSHA), employers have a "general duty" to maintain a safe working environment. Although there is no individual cause of action under OSHA, a violation of OSHA, such as a failure to follow specific OSHA rules for personal protective equipment, could be used in some jurisdictions to establish "negligence per se" in a wrongful death or injury action or might result in an "intentional" action by the employer that could void workers' compensation protection for the employer.

Can Negligence Arguments Be Made by Employees?

Negligence arguments could be based on other circumstances. For example, employers may find that they are subject to multiple different orders impacting their ability to resume on-site operations, particularly if they operate in several jurisdictions. The federal government may also issue guidance that conflicts with state or local shelter-in-place or stay-at-home orders.

Employees who feel they are forced to return to work too early—an argument that could be bolstered by citing to conflicting guidance on the safety of doing so or by asserting that the employer failed to follow the appropriate governmental order—may seek to hold their employer liable at any time if they contract COVID-19 after returning to work.

Should Employees Be Asked to Sign Waivers Upon Return?

Employers may wonder whether, to limit liability, they can ask employees to sign advance waivers of liability before bringing them back to work. Prospective waivers of claims by employees in favor of their employers are generally considered void as against public policy because of the unequal bargaining power of the parties, and are typically unenforceable. Moreover, employees cannot be asked to waive their access to their workers' compensation benefits. Independent contractors, on the other hand, can be asked to sign waivers; most contracts between employers and contractors already contain indemnification provisions in favor of the employer.

What Role Should Health Authority Guidance Play?

The most effective way for employers to mitigate risk is to closely track and follow health authority guidance concerning safe workspaces (including the [Centers for Disease Control's interim guidance](#) concerning critical infrastructure workers) and follow the guidance most applicable to the physical location where employees will work—generally state or local guidance—to determine when the workplace should reopen.



As we will discuss in more depth in our next installment, employers are advised to adopt measures to promote a safe and healthy work environment, and communicate with employees about the safety measures the employer is taking, which could include, for example:

- implementing prescreening procedures for employees attending work;
- adopting social distancing measures in the workplace; and
- revising policies concerning schedules, leave, and telework.

Any Other Advice As We Consider Reopening?

Based on the challenges set forth above, many employers may find it easier to adopt a gradual and flexible return-to-work process if feasible, including an “opt-in” process where employees are clearly notified that the decision to return is theirs. Employers in some locations may also want to consider whether to provide commuting stipends or benefits to enable employees to avoid public transit in commuting to the worksite.

Finally, employers are advised to establish a committee of key stakeholders (including executive, human resources, and legal representatives) to follow updates and changes in guidance and try to ensure consistency across operations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Employment practice:

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