

Ask the Attorney: What employers should know about recalling workers



Bickford

BY NATALIE CHANDLER, EDITOR

Employers reopening in the COVID-19 pandemic face a variety of legal issues, including what to do when employees don't want to return, whether they can require them to self-quarantine and how to handle a transition to a remote workplace. Employment attorneys Mag Bickford and Kathy Conklin in the New Orleans office of McGlinchey discuss the Top 5 questions they are hearing from clients, and their answers to each.

What if an employee is fearful and refuses to return to work?

Bickford: The bottom line is, that's a question that needs to be analyzed under a couple of different laws. For example, if the National Labor Relations Act allows people to collectively complain about safety issues and other terms and conditions of employment. However, that standard is a much more stringent one than, "I'm afraid that I could possibly be exposed to someone and could get this (virus)." It may or may not apply depending on the severity of the risk and likelihood of infection.

The Occupational Safety and Health

Administration has considerations that are similar that say we can't force someone to work in an environment that is unsafe and has a realistic threat of physical harm. Those are two statutes that come into play.

Conklin: Also consider if employees have exhausted their rights under the Families First Coronavirus Response Act. Employees can get certain periods of paid leave, and employers can get a refundable tax credit to apply towards that salary but it's during a limited time.

Bickford: Once you look at all the applicable laws, you have to look at the individual. You can't make a blanket rule, but assuming there are no legal protections, then of course you can require them to return to work and if they refuse to, termination may be appropriate.

Conklin: If they have a condition that is truly a disability, then an accommodation might be required, maybe they need to work from home or receive another accommodation. But if people are just afraid to come back to work, that's not enough.

If I terminated employees prior to April 1 and businesses are now reopening, what are my legal obligations?

Bickford: San Francisco is in process of passing a law that says if I let anyone go during the COVID crisis, then I have a legal obligation to rehire them in certain forms. It would not surprise me if we see addition-

al jurisdictions passing a similar law. So I think employers have to pay close attention to what are the legal obligations for recall in this particular COVID reality that we have now.

Conklin: If you are in a jurisdiction that does not have a law, you have to be mindful of discrimination laws. You can't discriminate in your recall. You couldn't choose only the men and not the women, for example.

My employee says they are entitled to continuing family and medical leave under the Families First Coronavirus Act because their child is out of school/daycare due to COVID issues and they have to stay home to take care of them.

Bickford: Employers want to know, do I hold their job? Can I force them to put their child back in camp? Under the Families First Coronavirus Act, there is a benefit with a new kind of FMLA: When kids are out of school or daycare and people need to stay home, it allows for up to 10 weeks for paid leave in a formula with several variables. You really can't force a parent to send their child back to a camp or daycare during this period, and this law applies to the end of the year, so this will be an ongoing obligation.

What if I saw my employee on the news at a protest and they were not wearing a face mask? Can I ask them to self-quarantine?

Conklin: You need to analyze whether this is a legitimate health concern or the concern is being raised for discriminatory reasons, which isn't legal.

Bickford: Seeing someone without a mask might not be enough to give you a reasonable fear of exposure. I don't think you can make employment decisions based on that observation.

Conklin: I'm afraid employers may be using it as subterfuge for discriminatory actions based on political differences. It's a high bar to determine if it's truly a reasonable request to ask someone to quarantine in that situation. It has to be carefully analyzed. You can't assume they were exposed just because you saw them without a mask. Employers have to be careful not to discriminate against employees in protected classes.

How do I transition to a remote workplace?

Bickford: In mid-March, many employers sent their employees home to work and most employers didn't have much of a remote work policy. None of us ever envisioned we would be in this scenario. People were scrambling to try to make it work. Now we have to think about we need to draft a meaningful remote work policy in case this is ongoing, or in case we see a resurgence of cases. How do people continue to work at home? Do they take a lunch, are they expected to stay at their desk from 9 a.m. to 5 p.m., are there fluid working arrangements, what is the communication strategy, how do people stay in touch, how do we monitor timekeeping to make sure people are paid properly? Those issues are more difficult to handle in a remote work environment. It's important we take this time where we've had the experience and come up with a policy that can be adaptable going forward. There is no textbook policy for what we have lived through. This new policy must be a very fact-dependent policy and should reflect the company's culture is and what the expectations are. It isn't something you Google and find a policy there to implement. It needs to be carefully thought out.