

## The Virtues And Vices Of Voluntary Attendance Policies In The COVID-19 Era

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The COVID-19 pandemic has forced employers to scramble to find novel responses to new workplace challenges, and one such innovation has been the recent rise in voluntary attendance policies. Although these policies often improve employee morale and ease administrative burdens, they run the risk of creating significant problems if administered improperly. For example, they could alter the at-will employment relationship and limit your ability to conduct equitable and fair layoffs should economic conditions further deteriorate.

For these reasons, you should take care to understand the benefits of this recent trend and the surrounding law and potential pitfalls so you can successfully implement a voluntary attendance policy in your own workplace.

### What Are Voluntary Attendance Policies And Why Are They Emerging?

The rationale behind voluntary attendance policies is straightforward. In the wake of COVID-19, employers and employees are dealing with a host of previously unforeseen issues, including the burden of school shutdown orders, the fear of contracting the disease in the workplace, the inability to make payroll in light of the economic downturn, and a general lack of work.

As a result, some employers have begun implementing temporary voluntary attendance policies, informing their workforces that employee health and safety are top priorities for their organization in light of the COVID-19 pandemic. In general, these policies typically

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outline a set period of time in which certain employees — generally hourly — will be permitted to voluntarily cease work and stay home without fear of traditional consequences (i.e. termination, discipline, adverse performance reviews, etc.).

The benefits of these policies have been notable, as employers have been able to increase morale by mitigating the need for layoffs, reduce crowded workplaces and the associated risks that come with social distancing challenges, and provide employees with the flexibility to stay home and care for children. Once implemented, these policies have also afforded employers breathing room to determine if workflow needs can still be met at current staffing levels. Businesses can have some more time to determine if layoffs may still be necessary to preserve the financial integrity of the organization. In the short term, the solution seems perfect.

### What Are Potential Downsides?

Unfortunately, many employers have not anticipated the potential risk of implementing a voluntary attendance policy in their own workplace. Specifically, when implemented improperly, voluntary attendance policies come with a colorable risk of exposing employers to prospective breach of “implied-in-fact” contract claims. If employees who availed themselves of the policies ultimately find themselves on the wrong side of an economically motivated layoff, it could spell legal trouble for the employer who tried to do the right thing.

The crux of the problem turns on the at-will nature of the employment. While at-will provisions are generally outlined in employee handbooks and policies, the California Supreme Court aptly summarized the problem in a pivotal case when it said that “cases in California and elsewhere have held that at-will provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer’s contrary intent, particularly where other provisions in the employer’s personnel documents themselves suggest limits on the employer’s termination rights.” This sentiment isn’t just true in California – it’s been similarly echoed by all but 13 states across the country.

As a result, by implementing a voluntary attendance policy, you run the risk of having courts interpret the policy as evidence of your “contrary intent” to create an “implied-in-fact” contract protecting employees who chose to avail themselves of the policy. As a result, if economic hardships worsen and layoffs ultimately became necessary, terminating those employees who elected to use the voluntarily attendance policy and stay at home carries the parallel risk of drawing a breach of “implied-in-fact” contract claim.

### Where Do We Go From Here?

Despite the potential risk, voluntary attendance policies can provide significant value for your organization if implemented properly. Apart from the boosts to employee morale and administrative flexibility, these policies also mitigate against the hidden costs associated with layoffs, such as lost



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productivity or the expense of recruiting, rehiring, and retraining during the eventual economic rally.

Accordingly, it is important to understand how to implement these policies effectively, while avoiding the potential pitfalls. To do this, there are few key tips to keep in mind:

- First, avoid written guarantees against termination. The case law is generally clear that “implied-in-fact” contract claims only arise when there is some form of evidence of an employer’s intent to modify the at-will relationship by imposing some limitation on the employer’s right to terminate, with or without cause. In the context of voluntary attendance policies, some employers inadvertently undermine the at-will relationship with their employees by including express guarantees that the employees “will not be terminated” or “retaliated against” for utilizing the policies. In doing so, however, these types of guarantees provide the very evidence of “contrary intent” that courts generally look for.
- Second, make sure to clearly reaffirm the at-will relationship that exists with your employees. This can be done by including one or two additional sentences as a part of the policy roll-out that expressly informs employees that nothing associated with the policy change does, or should be interpreted as, altering or modifying the at-will relationship. Remind your workers in writing that any at-will relationship may only be changed by a signed writing executed by both the employee and a company representative. In doing so, you can mitigate against the argument that the policy itself should be interpreted as evidence of your “contrary intent” to modify the at-will relationship.
- Third, if layoffs ultimately become necessary, rely on termination criteria that are different than an employee’s use of the voluntary attendance policy. This is because even if a court does interpret the policy as creating an “implied-in-fact” contract, the employee must still show that you breached the contract by terminating the employee because they utilized the policy as opposed to some alternative reason. For that reason, you should identify and articulate the alternative legitimate bases to guide layoffs, such as essential need to the organization, seniority, work demands, performance, etc. — making sure to appropriately document the same.

Ultimately, these are just some of the best practices to consider. In many cases, a voluntary attendance policy may not adequately address the unique problems or concerns posed to an organization by the sudden emergence of COVID-19. In other cases, this type of policy could be exactly what your employees need.

Whatever your company’s position, make sure you move deliberately. Don’t act without considering the unforeseen consequences of a hastily sent company-wide email that could have far-reaching implications. A consultation with your labor and employment counsel to walk through these concerns will be well worth it before you embark down this new path.



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### Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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