

Bringing Them Back: Questions for HR from Returning Workers

By Nancy Cleeland

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As employees begin to return to their workplaces after weeks under COVID-19 stay-at-home orders, they will have questions. After all, the world changed suddenly because of the deadly coronavirus pandemic and so have employees' expectations and fears. Be prepared by considering these six things employment attorneys and human resource experts say workers will want to know right from the start.

1. Do I have to come in?

The short answer is yes, with caveats, said Brett Schneider, an employment law attorney with Weiss Serota Helfman Cole & Bierman in Boca Raton, Fla. "What we've been advising clients is 'You have the right to order your employees back to work. If they have accrued leave, they can burn that. Otherwise, if the employee has no special rights and you need them in order to operate, you could take action if they refuse. You could fire them.' "

But that's not the only possible response, Schneider noted. "There's the legal answer and the practical answer," he said. "Keep in mind, for some people this has taken an emotional toll. They're afraid; they're grieving. If you have long-standing loyal employees, you should try to handle those situations with compassion and see things from their perspective."

Indeed, employers are generally being flexible about bringing their people back, especially if the employees have been successfully working from home, are in a vulnerable population or have to take care of homebound children. "It's not always cut and dried," said Jennifer Flanagan, a Rochester, N.Y.-based HR services manager with Oasis, a Paychex Company. "If you have a star performer, you want them to keep them, even if you have to wait. Remember, in the previous environment, you fought tooth and nail to find the right kind of talent."

In restaurants and other lower-wage industries, employers are facing a more vexing situation: Some workers don't want to return to work because they're earning more money on enhanced unemployment benefits. Vanessa Matsis-McCready, assistant general counsel and director of HR for Engage PEO, an HR services provider headquartered in Hollywood, Fla., said she's been surprised by the extent to which this is happening, given high unemployment levels at the moment. In such cases, she said, employers can let it be known that a refusal to return is a resignation.

She said that to help employers avoid possible claims in the future, her organization has been "been guiding clients to document that they offered [the employee an opportunity to return to work], and the person rejected it."

"Either put it in writing or memorialize it with a witness," she explained. "It's important that it gets documented."

Fear of the virus is on the mind of most employees being called back, Matsis-McCready said. "One of the things that comes up in both essential businesses and reopening businesses is people will say, 'I'm afraid to bring [the coronavirus] home to my family!' There, the answer from HR is to try to assuage them, talk about the cleaning and disinfecting they're doing, staggering shifts, changing physical layouts. I've seen a lot of creativity. The HR person has to have a conversation and learn what the person needs. Depending on where you are, most people will have that concern, and you want to respond with understanding and have a real business reason for bringing them back. And you have to be consistent about it.

"That's different from someone saying, 'I'm afraid to come back because I'm immunocompromised,' " she added. "In that scenario, you should go through the [Americans with Disabilities Act] process and find out if they need accommodations. It could be a special mask, telecommuting or a leave, depending on the situation."

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

2. How will you keep me safe?

With a pathogen as contagious and lethal as the coronavirus that causes COVID-19, employees will rightly want to know how they will be protected. Essential businesses such as grocery stores (www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/coronavirus-boom-and-bust-across-retail.aspx) and food processing plants (www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/safety-in-a-tough-spot-how-to-prevent-coronavirus-spread-in-a-crowded-meat-packing-plant-.aspx) have been learning as they operate, while temporarily shuttered businesses have the relative luxury of reconfiguring physical layouts and processes to minimize exposure before reopening.

To reassure employees that their health is a priority, communicate all the safety steps being taken, starting with a clear justification for reopening or bringing employees back to the office in the first place, said Flanagan, whose organization, Paychex, still has 98 percent of its 15,000 employees working remotely. "As a company, we re-evaluate that on a consistent basis," she said. "What we're trying to do is establish what will be in the best interest of employees and what's going on in the U.S."

Schneider at Weiss Serota Helfman Cole & Bierman recommended updating employee handbooks or adopting new policies that spell out from the start the expectations and responsibilities for employees and employers.

Each worksite is unique and will have different solutions for keeping employees appropriately distanced, but there are some common approaches (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workspaces-Evolve-to-Allow-Physical-Distancing.aspx), such as marking off 6-foot spacing with carpet or tape, designating hallways and stairways as one-way, adding Plexiglas barriers at workspaces and propping open doors to eliminate the need to touch handles. Employers should also inform returning workers of enhanced cleaning and sanitizing (https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html?deliveryName=USCDC_2067-DM26911) being done, and reiterate the importance of frequent hand-washing, minimal face touching and staying home when sick.

"The biggest thing here is communication," Matsis-McCready said. "You might get questions like, 'Will I be working with the full house?' Most employers are staggering shifts so that doesn't happen. What about meetings? Most employers will be videoconferencing, even in the office.

"Discussing to the extent practical any new health and safety policies and sick-time policies is vital. If you can help people feel comfortable about coming back, it will be easier for them to say yes. Understand that, as much as people want to work, they're very scared. Being aware of that and being flexible and patient is more important than ever. That's why the role of HR is so important, having someone who understands the importance of consistency, compassion and flexibility."

[Members-only webcast: What Employers Need to Know About the CARES Act and FFCRA
(www.shrm.org/learningandcareer/learning/webcasts/pages/0420griffinmcmanus.aspx)]

3. Does the company have the right to ask about my health history and take my temperature?

Employers are allowed to ask about coronavirus-related symptoms and take the temperatures of employees (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-coronavirus-temperature.aspx) under guidance from the Equal Employment Opportunity Commission (EEOC), and some states now require it. The EEOC also permits employers to mandate that employees be tested for the virus (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-employers-can-screen-for-covid-19.aspx) before entering work under certain circumstances, Schneider said, although that hasn't been much of an issue because tests aren't yet widely available.

"We represent a lot of local governments, and a lot of my clients, especially police and fire [departments], have been fully operational all along," Schneider said. "For the most part they have implemented temperature taking, and some even discussed a requirement of having a negative COVID test to return to work. Whatever you do, the key thing is that you can't selectively enforce it."

If temperature taking at the workplace is mandated, the time spent being tested and waiting for a test is considered part of the workday, and the process should be well thought out to eliminate crowding, Matsis-McCready said. "Some employers are putting up tents outside the entrance to provide distance," she said. "You need to be ready for people to have some method of tracking when they got there so they can be compensated."

4. Will everyone wear a mask? Do I have to wear one?

With the Centers for Disease Control and Prevention now recommending that individuals wear face masks (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>) "to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others," many employers are making face coverings part of the work uniform (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Do-Your-Employees-Need-to-Wear-Face-Masks-During-Coronavirus-Pandemic.aspx), especially for jobs that require physical proximity. Employers may or may not be required to pay for the masks, depending on the circumstances and the state law involved (<https://www.pillsburylaw.com/en/news-and-insights/face-mask-covid-19.html>). "As a practical matter, they probably should since it's a more efficient way to ensure people use them," Schneider said.

5. What happens if I get sick? Will I get paid for time off? What if someone in my family gets sick and I have to care for him or her?

To be prepared for these questions, employers need to fully understand state laws and federal programs adopted as the virus has spread in recent weeks. "It's been a trial by fire over the last 30 days for essential businesses, learning and applying these new rules," Flanagan said, referring in particular to the Families First Coronavirus Response Act (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-third-set-coronavirus-questions.aspx) (FFCRA), which provides paid sick leave for people affected by COVID-19, as well as paid emergency family leave in limited circumstances. "It's allowed employees who've had symptoms to benefit from the new leaves that are in place, while also allowing businesses to survive and preserve their cash flow."

Flanagan also noted that the pandemic has changed workplace cultures around working when sick: There's no question anymore that employees who are ill need to leave. "That was never a thing before," she said. "As a country, we're going to be looking at taking sick time differently than we did before."

6. What if a co-worker gets sick? How will I know? Will you do tracing?

The answer is crucially important for controlling outbreaks but also legally challenging. Employers must balance their obligations to keep workers safe under the Occupational Safety and Health Act with employee privacy rights under the Americans with Disabilities Act (ADA), which restricts employers from sharing personal health information of an employee, and the Health Insurance Portability and Accountability Act (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/protect-the-privacy-of-employees-with-coronavirus.aspx), which protects medical information received through a health plan.

Matsis-McCready said many employers are being proactive about tracing contacts if temperature testing uncovers a fever or an employee calls in sick with COVID-19. "They're keeping it confidential, but when they find out someone does have it, the employer is finding out who they worked with and sending them home," she said. "That type of communication helps people feel more comfortable about coming

back."

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