

Can an Employer Fire Workers Who Are Scared to Return to the Office?

By Allen Smith, J.D.

March 1, 2021

More employers are requiring employees to return to the office. If employees refuse, can they be disciplined or terminated?

"If the employee is just generally scared of the virus, as many of us are, even as understandable as that fear may be, the employee is unlikely to have a legally defensible excuse for refusing to work," said Janell Stanton, an attorney with Wagner, Falconer & Judd in Minneapolis. "In that case, discipline including termination may well be appropriate."

She added, "It really cannot be stressed enough that employers should consider all reasons the employee might refuse to come into work before taking that step."

Ask whether the employee has an underlying medical condition that would make him or her contract COVID-19 more easily or suffer a more serious form of the virus if contracted, she said, and consider whether the employee has valid concerns that your company is not taking necessary safety precautions to prevent the spread of the virus in the workplace. "In either of these instances, employers must be cautioned against terminating an employee, as it could give rise to discrimination or retaliation claims," Stanton noted.

Ryan Vann, an attorney with DLA Piper in Chicago, said an employer may consider discipline as long as it isn't making the missteps described above and isn't overstepping any accommodation obligations under the Americans with Disabilities Act (ADA) and state equivalents.

Bear in mind that the Biden administration recently said laid-off individuals who turn down work because of COVID-19 safety concerns may be eligible for unemployment benefits (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-refuse-unsafe-work-unemployment-benefits.aspx).

In addition, an employer might choose to consider whether an employee lives with someone who is at high risk for contracting COVID-19. The ADA does not require reasonable accommodations for employees in these cases, but many employers are nonetheless trying to accommodate workers in such circumstances, according to Eve Klein, an attorney with Duane Morris in New York City.

Remote Work Versus Leave of Absence

Telework is one possible ADA accommodation for an employee with a disability, but it's not the only option.

For some employers, remote work remains feasible and a reasonable accommodation option for some positions. "However, for many employers, there are naturally going to be some employees who cannot do their jobs from home," Stanton said.

Employees who have a legitimate high-risk condition might be granted a leave of absence as an accommodation if telecommuting isn't an option. The Equal Employment Opportunity Commission (EEOC) has taken the position that leave because of a disability should be a second-to-last resort with termination as the last resort, said Robin Shea, an attorney with Constangy, Brooks, Smith & Prophete in Winston-Salem, N.C.

Adults of any age with the following conditions are at increased risk of severe illness from the virus that causes COVID-19, according to the Centers for Disease Control and Prevention:

- Cancer (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#cancer>).
- Chronic kidney disease (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#chronic-kidney-disease>).
- COPD (chronic obstructive pulmonary disease) (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#copd>).
- Down syndrome (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#downsyndrome>).
- Heart conditions, such as heart failure, coronary artery disease or cardiomyopathies (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#heart-conditions>).
- Immunocompromised state (weakened immune system) from solid organ transplant (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#immunocompromised-state>).
- Obesity (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#obesity>).
- Pregnancy (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#pregnancy>).
- Sickle cell disease (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#hemoglobin-disorders>).
- Smoking (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#smoking>).
- Type-2 diabetes mellitus (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#diabetes>).

"Depending on the job market and skill set of the workforce, it may be preferable to allow employees to take a leave of absence rather than terminating and trying to replace employees who refuse to come to work—especially where help is on the way, as Dr. Anthony Fauci has described current vaccine rollouts," Vann said.

Don't assume a leave of absence is the only option, however, or overlook the interactive process for identifying a reasonable accommodation, if needed. This conversation should proceed as quickly as possible, the EEOC notes in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*.

An employer may not require a qualified individual with a disability to accept an accommodation, the guidance notes. "If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, she or he may not be qualified to remain in the job," the EEOC states.

As far as offering employees who refuse to come to work a leave of absence that is not covered by employer policy or any applicable federal, state or local law, "the employer could definitely open up a can of worms," Stanton cautioned. "If one employee is allowed to go out on a discretionary leave of absence, other employees are bound to know and request the same privilege. Denying the leave to one employee and allowing it for another can open up an employer to claims of disparate treatment, especially if the employees belong to different protected classes."

"A request to work remotely or to take a leave of absence, if deemed necessary by the employer or employee, will come down to whether the employee is eligible for remote work or leave based upon traditional disability accommodation laws," said Jill Kahn Marshall, an attorney with Reavis Page Jump in New York City. "A leave of absence should not be a slippery slope if provided as an accommodation under appropriate circumstances."

Approving leave for specific time periods that are periodically reviewed is an important check-and-balance on the system when granting leaves of absence, said Ann Murray, an attorney with Nelson Mullins in Atlanta. "If leaves are extended, it is important to consider how benefits are impacted and when applicable state law may disregard the leave of absence and deem the employee to have been terminated," she said.

Corporate Mindset and Empathy

Marshall noted that despite the burdens of the pandemic, many of the same employee relations issues, such as fielding requests for disability accommodations, remain HR professionals' primary focus. "The context may be different because of the pandemic, but employers should rely upon the same principles that helped guide them" through difficult staffing decisions prior to COVID-19, she said.

In a joint e-mail, Howard Schweitzer, CEO of Cozen O'Connor Public Strategies Practice Group in Washington, D.C., and Mike Schmidt, an attorney with Cozen O'Connor in New York City, stated, "Employers need to plan and create appropriate policies and protocols to account for the once-in-a-century issues" continuing into 2021. At the same time, businesses need to maintain "a corporate mindset that also allows for flexibility, compassion and accommodation under certain circumstances to effectively balance the employer's right to operate its business productively and [maintain] employee morale and rights under applicable laws."

With vaccines, "the choices employers face may be far less indefinite than in the past," Vann said. "With that knowledge, many employers can be more flexible in the short term in making working arrangements."

HR DAILY NEWSLETTER

News, trends and analysis, as well as breaking news alerts, to help HR professionals do their jobs better each business day.

Feedback

CONTACT US (WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX) | 800.283.SHRM (7476)

© 2021 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

Disclaimer (www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer)