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6 Burning COVID-19-Related Legal Questions for 2021

Experts answer pressing coronavirus questions that will impact the workplace in the year ahead.

By Jathan Janove, J.D. | March 11, 2021

Editor's Note: The American Rescue Plan Act (ARPA), (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/president-biden-signs-american-rescue-plan-addresses-nation.aspx) signed after this article was written, broadly impacts the topic of employee leave. ARPA has many requirements, as described in this Society for Human

Resource Management (SHRM) summary of provisions related to the workplace. (https://advocacy.shrm.org/wp-content/uploads/2021/03/American-Rescue-Plan-Act-FINAL-6.pdf)

Thanks to multiple vaccines, the coronavirus pandemic should be on the wane later this year. COVID-19 may eventually go away, but the challenges it has created and will continue to create for employers won't. Managing a workforce in these troubling times will remain difficult. *HR Magazine* assembled a group of five attorneys to answer pressing COVID-19-related questions that will impact the workplace in the year ahead.

1. How should an employer respond to an employee who resists returning to onsite work due to fear of contracting the coronavirus?

"It depends on why your employee is afraid to return to work," says Mark Tolman, an attorney with Jones Waldo in Salt Lake City. If an employee fears contracting COVID-19 because of an existing health condition, he explains, the employee may be eligible for leave under the Family and Medical Leave Act (FMLA) or an accommodation such as remote work under the Americans with Disabilities Act (ADA).

For example, crowds and public spaces may be triggers for an employee with an anxiety disorder, and such fears may be exacerbated by the coronavirus threat. Consider also an employee with a chronic health condition, such as asthma or diabetes, who is at a higher risk of developing a severe COVID-19 infection. FMLA-covered employers should start the leave process with eligible employees by providing the FMLA's Notice of Eligibility and Rights and Responsibilities forms. The employer also should initiate the ADA's interactive process to determine if the employee's condition qualifies as a disability under the ADA and if the employer can provide an accommodation without undue hardship.

Tolman observes that an employee may also fear returning to work because a serious health condition places a family member at a higher risk of developing a severe COVID-19 infection. In this case, he recommends following your FMLA process to determine if the employee needs leave to care for the family member. However, an ADA accommodation isn't required in this situation. According to the Equal Employment Opportunity Commission (EEOC), "The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated."

Finally, Tolman notes that there may be instances when an employee does not have a mental or physical impairment but is generally afraid of contracting COVID-19. In these situations, he advises, the employee has no federal protection and an employer can compel the individual to return to work upon threat of discipline. But Tolman recommends "an empathetic approach that alleviates fear, such as by educating your employees about the safety standards the company has adopted or providing flexible working arrangements, such as telework, whenever possible."

2. What are the key points related to leave associated with COVID-19?

The Families First Coronavirus Response Act (FFCRA) became effective April 1, 2020, and applied to leave taken through Dec. 31, 2020. The FFCRA requires that certain covered employers provide eligible employees with paid sick leave or expanded family and medical leave related to the COVID-19 pandemic.

According to guidance from the Department of Labor issued Dec. 31, 2020, an employer is not required to provide FFCRA leave after Dec. 31, 2020; however, it may voluntarily decide to do so. Additionally, the Consolidated Appropriations Act, 2021, extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided by employers until March 31, 2021.

Sarah Phaff, an attorney with Constangy Brooks LLP in Atlanta, recommends that employers continue to monitor changes related to the pandemic and seek updated guidance from an attorney in their state. She notes that employers may encounter issues as they work through the interactive process with employees in evaluating possible accommodations under the ADA. The EEOC has released ADA-related guidance as part of its overall communications about COVID-19-related issues.

Phaff also reminds employers that some states mandate paid sick leave and provide COVID-19-related leave protections and requirements. Employers with multistate operations should regularly check for the latest news on applicable state laws regarding employee leave. Because the laws and guidance related to COVID-19 are frequently updated, employers should also periodically seek guidance from attorneys licensed in states where they operate.

3. Can employers require employees to receive a COVID-19 vaccine or show proof that they have already been vaccinated?

Yes. “Employers may lawfully require employees to take a COVID-19 vaccination or to show proof that they already have,” says Eric Mackie, an attorney with Ogletree Deakins in Chicago. That stems from recent guidance from the EEOC and the employer’s requirement under the Occupational Safety and Health Act to ensure a safe and healthy work environment.

The EEOC has explained that the “vaccination itself is not a medical examination” within the meaning of the ADA and therefore is not prohibited or limited by it. However, Mackie cautions employers that pre-screening questions likely to elicit information about a disability may implicate the ADA. (Asking why an employee has not been vaccinated against COVID-19 is an example.)

“Employers may ask such questions only if they are job-related, consistent with business necessity and no more intrusive than necessary,” he says. Mackie also notes that the ADA’s “job-related and consistent with business necessity” restriction does not apply to vaccine programs administered by third parties, such as medical providers, with whom the employer does not contract.

The EEOC has clarified that employers may require vaccinations for employees who indicate an inability to receive a vaccination due to a disability. However, the employer would need to show that the unvaccinated employee would pose a direct threat due to a significant risk of substantial harm to the health or safety of that individual or others, and that such risk cannot be eliminated or reduced by reasonable accommodation.

Similarly, employers must provide reasonable accommodations to employees who decline to be vaccinated due to a sincerely held religious belief, Mackie notes, unless providing an accommodation would pose an undue hardship under Title VII of the Civil Rights Act, which prohibits discrimination based on religion.

“Despite having the right and strong justifications for doing so,” Mackie says, “employers should carefully consider whether to adopt a policy requiring employees to take the COVID-19 vaccine.”

While employers may typically require employees to receive other vaccines, such as the flu vaccine, the COVID-19 vaccines bring unique considerations because they are available only under an emergency use authorization from the U.S. Food and Drug Administration and have not garnered full approval, Mackie notes. He suggests that employers consider offering incentives, such as

bonuses or discounts on health insurance premiums, to encourage employees to receive the vaccine voluntarily. “Voluntary vaccination programs do not run afoul of the ADA or Title VII,” he says.

WORKFORCE ISSUES

According to a February 2021 Society for Human Resource Management (SHRM) survey, **52% of U.S. workers** said they would choose to never return to their worksite and instead telework permanently if given the option.

An average of **1.5 million people** a month missed work in 2020 because of their “own illness/injury/medical problems,” according to a *USA Today* survey—45% more than was usually reported over the past 20 years.

40% of U.S. employees will probably not or definitely not get the COVID-19 vaccine when it becomes available to them, according to the SHRM survey. Of those, 70% said they would not get vaccinated even if their employer required it.

4. Can employers restrict employees’ off-duty conduct?

Employees, feeling hopeful that the pandemic is coming to an end or simply experiencing quarantine fatigue, will inevitably start returning to pre-pandemic activities despite the potential danger of doing so. An employer’s ability to restrict such activity depends on the conduct in question and the state in which the employee resides, according to Jacqueline Cookerly Aguilera, an attorney with Morgan Lewis in Los Angeles.

“In general, at-will employers can terminate employees for any reason or no reason,” she says. But “employers must still comply with federal, state and local laws protecting employees from adverse employment actions based on certain protected characteristics or activities, including engaging in certain types of off-duty conduct.”

Aguilera explains that employers may be prohibited from terminating or disciplining employees for, among other things, attending religious or political gatherings or caring for a sick family member, even if that means traveling out of state. “Personal travel is particularly challenging,” she says. “While most state and local jurisdictions have not mandated travel restrictions, several have issued strong advisories recommending against travel [other than essential travel] and/or advising travelers to self-quarantine for 14 days upon their arrival or return.”

Aguilera suggests that employers address travel in their pandemic policies and require employees to disclose personal travel plans, self-quarantine for a time and/or test negative for COVID-19 before returning to the worksite. Employers that require employees to self-quarantine before returning to the workplace should check state and local laws to see if employees must be paid for some or all of that time off, she notes.

“Pandemic policies should also educate employees about how to avoid exposure to COVID-19 and include screening requirements, including temperature checks, that employees must comply with each day before entering the workplace,” Aguilera says, adding that concerns about rising positivity rates would likely outweigh any privacy concerns when implementing such policies. “Employers should apply their pandemic policies consistently and impartially to all employees,” she notes.

Employers will be unable to fully control employees’ off-hours activities, Aguilera says. However, they can minimize risks to other employees by implementing sound policies that are consistent with local, state, and Centers for Disease Control and Prevention guidance; encouraging employees to socially distance at all times; and reminding employees of their shared responsibility to maintain a safe and healthy workplace for all.

5. Can an employer be held liable if an employee who contracted the virus at work spreads it among relatives at home?

“Probably not,” says Mackie of Ogletree Deakins. “Employees alleging secondary exposure liability face big hurdles requiring them to show, among other things, that the employer’s failure to protect workers from COVID-19 caused a household relative to contract the virus.”

Mackie cites a case against Amazon in which New York warehouse workers and their relatives claimed the company failed to take proper precautionary measures and therefore put the employees and their family members at risk of contracting COVID-19. Specifically, the complaint accused Amazon of culpability in the death of an employee’s relative. A New York court dismissed the lawsuit, holding that “a private action for public nuisance cannot be maintained where the injury is so general and widespread as to affect the whole community.” The court also noted that Amazon is not the source of COVID-19.

Nevertheless, Mackie notes, this question has not yet been conclusively resolved, and courts are still considering whether and to what extent employers can be held liable for secondary COVID-19 exposure. “Employers should, of course, take appropriate measures to protect their workers from workplace exposure,” he says.

6. What are best practices for managing remote employees?

Managing remote employees presents several challenges in, for example, performance management, wage and hour compliance, and leave management.

“Employers must review policies and procedures to determine whether any modifications are needed to address the unique challenges posed by remote work, including integration of the technology platforms and communication tools being used to facilitate this type of work arrangement,” says Diane Waters, an attorney with Lewis Brisbois in Dallas. Effective communication is critical in establishing trust, and managers may need to be more purposeful in how they check in with employees to motivate and engage staff, monitor employee performance, and engage in social interaction.

Waters recommends that employers establish a solid framework to ensure employee accountability by clearly defining the expected work schedule, performance metrics, time-keeping procedures, timeliness of communication, and adherence to company policies and procedures in the remote environment. Adherence to company policies and procedures might include standards of conduct, leave management, and protection of confidential company information and trade secrets. “To ensure a comprehensive approach, implementing a written remote-work or telecommuting policy is a recommended best practice,” Waters says.

She adds that the key consideration for employers when monitoring remote workers’ hours is whether, through reasonable diligence, the employer had actual or constructive knowledge that compensable work was being performed. One way to demonstrate reasonable diligence is to develop written time-keeping policies and procedures so employees can accurately record hours worked, including unscheduled hours. Although the onus may be on employees to utilize an employer’s reasonable time-keeping procedures, project and performance management platforms and communication tools increasingly provide managers with greater visibility into employee productivity. Waters also recommends that managers be trained on how to identify and report unscheduled work and consistently enforce company standards.

Jathan Janove is a former employment attorney who writes for SHRM on how to inject greater humanity into HR compliance.

Illustration by Koren Shadmi for HR Magazine.

KNOW YOUR TERMS

The Americans with Disabilities Act (ADA) requires employers with 15 or more employees to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment unless doing so would cause an undue hardship. Following a reasonable accommodation request, employers must engage in an interactive process with the employee to determine whether there are ways to allow the employee to perform the job without overburdening the employer. Accommodations may include job restructuring, leaves of absence, modified or part-time schedules, modified workplace policies, modified equipment, or reassignment to a vacant position.

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take 12 weeks of unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. FMLA leave can be taken intermittently, either in blocks of time or on a reduced schedule if medically necessary. To be eligible for FMLA leave, an employee must 1) work for a covered employer, 2) work 1,250 hours during the 12 months prior to the start of leave, 3) work at a location with 50 or more employees at that location or within 75 miles of it, and 4) have worked for the employer for 12 months.

Unlike the ADA, which covers numerous possible reasonable accommodations, including a leave of absence, the FMLA is only a leave entitlement. Also, employers can claim that meeting accommodations under the ADA would cause an undue hardship; employers don't have that defense under the FMLA.

The Families First Coronavirus Response Act (FFCRA) provides businesses with tax credits for wages paid to employees who took qualified leave under the FFCRA. Employers that were also covered by the FMLA prior to April 1, 2020, have had to evaluate the interplay between an employee's expanded family and medical leave under the FFCRA and his or her FMLA leave. For example, eligible employees who are incapacitated by a serious health condition such as COVID-19 that results in severe health complications, or who are needed to care for covered family members who are incapacitated by a serious health condition, may be eligible for leave under the FMLA. —J.J.