WOMBLE BOND DICKINSON

FAQ

Return to Work: Employment Considerations

On May 13, 2020, Womble Bond Dickinson attorneys Mark Henriques, Beth Tyner Jones and Richard Rainey held a webinar discussion on employment considerations as companies reopen for business. These are the some of the most frequently asked questions we have received on this topic to date.

1 Our retail business is re-opening. Two of our employees indicate that they are reluctant to return to work. What can the employer do if they refuse to return to work?

Employers can allow employees to work remotely, take paid or unpaid leave, or offer to place the employee on a voluntary furlough.

Generally, employees cannot refuse work because of a potentially unsafe workplace, unless the employee believes he or she is in imminent danger, under OSHA. In the absence of imminent danger, a refusal to work could be grounds for disciplinary action, including termination. However, employers should consider the employee's reason for refusal. If an employee is deemed high risk by the CDC due to age or underlying medical condition, the employee could be entitled to FMLA, as a serious health condition, or to accommodations under the ADA, as a disability. Employers should review recent guidance released by the EEOC concerning COVID-19 in the workplace and the ADA (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws). If two or more employees refuse to return to work based on a "reasonable good-faith belief" that the working conditions would be unsafe, the employees could be entitled to protection under the NLRA. An employee could also be entitled to paid leave under the Families First Coronavirus Response Act (FFCRA), or any applicable state or local law, if the refusal is due to one of the provided COVID-19 reasons. While, employers should educate employees on the steps it has taken to reduce the risk of contracting COVID-19 in the workplace, if an employee continues to refuse, the employer can allow employees to work remotely, if possible; use any accrued paid time off; take unpaid leave; or offer to place the employee on a voluntary furlough.

Employers should note that a refusal to return to work could amount to the employee losing unemployment benefits. Some states are seeking to find ways to allow employees to remain eligible for benefits, when the refusal is based on a true safety concern in the workplace. Yet, a number of states have indicated that a refusal to return to work for fear of catching COVID-19, would make the employee ineligible for benefits. For example, in South Carolina, workers who refuse to return to work will lose their unemployment benefits in the week they turn down the offer, barring unusual circumstances. While in North Carolina, workers who refuse to return to work for one of the COVID-19 related reasons, provided by the Department online, will remain eligible for benefits.

2 Should employers engage a third-party to take employees' temperatures daily when re-entering the workforce or is it alright for other employees to conduct the temperature screenings?

The first question employers should be considering is whether it will require taking employee temperatures at all. Temperature taking will not provide blanket protection from COVID-19 cases in the workplace. In one study, only 30% of hospital patients who tested positive for COVID-19 had a temperature. Temperature screening may give employees a false sense of security, resulting in less precaution in other areas.

If an employer nonetheless elects to administer temperature checks, a best practice is to appoint a medical professional to administer the temperature check. However, this is likely not realistic or practical for most companies in the midst of a pandemic. For companies that cannot engage a medical professional to conduct such tests, an alternative approach is to require employees to self-administer tests at designated workplace locations and show the reading to a test facilitator, who is maintaining an appropriate distance and who will determine if the temperature is elevated. Finally, a company can designate an employee who is not a medical professional to conduct temperature checks, but it is important to ensure that the employee receives proper training, is wearing personal protective equipment, is using a no-touch, accurate thermometer, and understands the relevant confidentiality considerations, including requirements under the ADA to keep documents containing the results of temperature screenings confidential. In addition, employers should check any local or state temperature screening requirements that may apply to them.

3 We are about to re-open and several employees indicate that they cannot return to work because schools and day cares are not open. What can the employer do?

If the employee's role does not permit the employee to work remotely, employees should consider taking leave.

Under the Families First Coronavirus Response Act (FFCRA), full-time employees of "covered employers" (private employers with fewer than 500 employees) are eligible for two weeks of paid sick team for certain reasons related to COVID-19, including caring for a child whose school or daycare is closed. In addition, full-time employees who have been employed for at least 30 days by their employer are entitled to an additional ten weeks of paid family leave at two-thirds of the employee's regular rate of pay to care for a child whose school or daycare is closed. Part-time employees of covered employers are eligible for leave for the number of hours that they are normally scheduled to work over the leave period.

An employer cannot force an employee to use provided or accrued paid vacation, personal, medical, or sick leave before taking the two weeks of paid sick leave available under FFCRA. However, if the employee takes the additional ten weeks of paid family leave, the employer may require that the employee take leave that would be available to them (such as PTO) concurrently with the paid family medical leave.

If the employee is not eligible for FFCRA-provided leave, and does not have any employer-provided leave, the employer may offer to place the employee on a voluntary furlough or unpaid leave; however, it is important to remember that doing so might affect the employee's ability to obtain unemployment benefits.

4 If an employee contracts COVID-19 while working, is that a compensable illness under workers' compensation laws?

It depends on whether COVID-19 is seen as an occupational disease (such as asbestosis or heavy metal poisoning) or an ordinary disease of life (such as flu or common cold). This inquiry will generally be very industry specific. If COVID-19 is seen as directly related to the workplace, then employees could qualify for Workers' Compensation. Many states have passed laws, regulations, executive orders or rules that create a rebuttable presumption that a COVID-19 diagnosis is presumed to be a covered disease. Most states that have enacted this presumption have limited it to first responders and medical providers. However, the list of occupations for which this presumption applies vary from state to state. Covered occupations have included funeral personnel, grocery store workers, pharmacy workers, social service employees, and jail/prison personnel. Some states who have enacted very broad presumptions have already been legally challenged or are likely to face challenges. Examples of these broad presumptions include establishing presumptions for: (a) all workers who were deemed to be crucial employees by other executive orders, or (b) all employees who worked on-site (not telecommuting) in any industry within 14 days of a COVID-19 diagnosis.

Given that this topic is very state specific, please check the latest developments for your state. As of early May, legislation has been proposed in North Carolina and several states have addressed this question in some way including Alabama, Alaska, California, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Utah, Vermont, Washington and Wisconsin.

5 Do we have to provide face masks for our employees? If so, what kind should be provided?

While employers within the healthcare arena may be required to provide employees with PPE such as respirators (e.g., N95 masks), only those employers in states and localities that have recently enacted directives obligating employers to provide face masks or other cloth face coverings to their employees are required to do so. Such employers do not need to, and should not, provide N95 or other filtering face piece respirators to their employees, which are currently reserved for workers in the healthcare field. Instead, those employers should provide masks made out of readily available

material, such as cloth face coverings. Given the evolving nature of the COVID-19 pandemic, employers should review and stay up to date on CDC, OSHA, and state and local guidance and requirements regarding the provision of face masks and other face coverings. If the employer decides to require employees to wear face masks, we recommend that the employer also make masks available to employees.

6 What if an employee will not wear a face covering or mask and we are requiring them at our business?

An employer's actions will depend on the reason for refusal. Refusal based on a medical condition or religious belief could trigger protection for the employee under the ADA and Title VII. Employers will want to work with employees, where possible, to provide any necessary accommodations including a temporary change in work assignment or providing temporary leave. Refusal could also be based on potential bias, for example minorities have been suspected of criminal activity when wearing face coverings. In this case, employers will want to try to minimize the employee's concern and risk, by working to provide coverings, including those similar to medical masks or posting notices to inform visitors that all employees are required to wear face coverings. However, if an employee is refusing to wear a face covering, for no protected reason, the employee should not be permitted to work and be advised of potential disciplinary action for failing to adhere to work guidelines.

Employers should explain to employees the recommendations by the CDC and OSHA and any requirements under state or local order. For example, currently face coverings are recommended for use in all retail establishments in North Carolina, but some counties have made face coverings a requirement.

7 What can I ask my employees about their health and COVID-19?

The ADA permits employers to ask employees about symptoms and medical information if the employee poses a "direct threat" to the health and safety of the workplace and if the inquiry is directly related to the perceived threat. Employers can ask their employees if they are experiencing any of the symptoms of COVID-19 (such as fever, cough, sore throat, aches, etc.). Employers can also require that employees who test positive for COVID-19, or who live in a household with someone who is experiencing the symptoms of COVID-19, disclose that information so that the employer can take the appropriate steps and notify any close contacts of the sick employee. Any medical information that the employer receives about an employee should be kept in a separate medical file, as required by the ADA.

Employers should be careful not to disclose to other employees the identity of any employee who tests positive for COVID-19 or the specifics about that employee's medical situation. However, there are two exceptions to this rule. Pursuant to EEOC guidance, an employer should disclose the employee's identity to public health officials, and contractors or staffing agencies that have placed a sick individual in another employer's worksite should disclose the employee's identity to the other employer.

If you would like to receive COVID-19 alerts, updates and webinar invitations, please click here.

Contacts

Beth Tyner Jones, Partner
e: beth.jones@wbd-us.com
t: +1 919.755.8177

Richard Rainey, Partner
e: richard.rainey@wbd-us.com
t: +1 704.331.4967