Skadden

Four Questions on Directors' Minds as the World Returns to Work

The extent to which employers can require vaccinations and testing will shape the reopening process. Employers also worry about potential COVID-related liabilities.

- Employers will likely be allowed to require vaccinations and/or testing in most cases.
- Most employees can be required to return to work.
- Workers' compensation and new shield laws offer employers some protection from liability if employees contract COVID-19 at work.
- State laws and circumstances vary widely, and exceptions to the employment laws mean there are few cut-and-dried answers.

Your company is ready to recall employees to the office and plants. What can you do to protect them and your company's operations from new COVID-19 outbreaks?

These questions are front of mind for boards and managements as the world returns to something closer to normal. Here's a rough roadmap to some of the most common issues businesses face.

The answers come with several important caveats: Laws vary by state, so the legality of measures and requirements will depend on the locale, as well as the particular circumstances. With little established law in the area, evolving medical knowledge and changing health advisories, companies will need to revisit the issues regularly to stay abreast of new developments.

1 Can you require all employees to be vaccinated and require proof?

On December 16, 2020, the federal Equal Employment Opportunity Commission (the EEOC) issued guidance implying that employers are permitted to require employees to be vaccinated before returning to work, subject to several exceptions. Many states and local jurisdictions follow federal law and guidance. Some provide greater protections for employees.

The EEOC sidestepped the issue of whether employers can mandate vaccines that have received only "emergency use authorization" from the Food & Drug Administration — the present status of all three

vaccines approved in the U.S. (from Pfizer, Moderna and Johnson & Johnson). Any company considering mandatory vaccination policies should consider the risk that the vaccine does not receive final approval. If an employee suffers significant side effects from a required vaccination, the employee may seek to hold the employer responsible. In that event, the employer will be on firmer ground if the required vaccine receives full approval.

Even with fully approved vaccines, employers may have to accommodate employees or potential employees who are unable to receive the vaccine due to a disability or sincerely held religious belief.

Once employers can mandate vaccinations, they may also require proof of vaccination. However, under the Americans With Disabilities Act (ADA), this information should be treated as a "medical record" and must be maintained separately from personnel records. In addition, employers should avoid asking questions that may lead to inadvertent disclosure of other sensitive medical information.

2 Can you require all employees to show proof of a negative test or submit to regular tests on the job?

Generally yes, provided that any mandatory medical test is "job related and consistent with business necessity," as required under the ADA. Employers may choose to administer or require tests because an individual with the virus will pose a direct threat to the health of others. The EEOC guidance says such testing may be administered before employees are first permitted to reenter the workplace and/or periodically thereafter. Employers must proceed cautiously with any testing program, however, so as not to violate the restrictions imposed by the ADA and the safety requirements of the Occupational Health and Safety Administration.

Given the effectiveness of the vaccines, some employers may choose to test only unvaccinated employees.

All testing must be conducted in a nondiscriminatory manner. Note that employers may be legally required to pay nonexempt employees on an hourly basis for the time spent undergoing mandatory testing.

3 If someone contracts COVID-19 in the office upon returning, what potential liability does an employer have?

If COVID-19 is treated as a protected occupational disease or injury under workers' compensation statutes, most tort claims against employers would be barred by workers' compensation statutes. Typically, there is a high threshold to bring a work-related injury suit outside a state's workers comp regime. In New York, for example, the employer must have committed an intentional tort or fraudulent concealment.

Some states are considering or have already taken steps to create a rebuttable presumption that an employee who has been working contracted COVID-19 while at the workplace, which would bring the claim under the workers' compensation regime and bar other actions.

Similarly, family members of employees who contract COVID-19 would have difficulty showing causation. For example, in May, a federal judge in California dismissed a suit brought by a spouse against her husband's employer for her COVID-19 infection. The court held that the state's workers' compensation law barred her claims, and that the employer's duty to provide a safe work environment did not extend to nonemployees.

It is possible that a customer might assert an attenuated claim against a business if the customer can prove he or she caught the virus on its premises. But, again, it would be difficult for a plaintiff to prove that the illness was caused by interaction with the business.

Finally, some states have passed shield laws in order to protect businesses from liability unless plaintiffs can show a heightened level of fault, such as "actual malice" or "deliberate" wrongdoing.

4 If an employee is not comfortable coming back to the office, can you fire them?

Generally speaking, an employer can terminate employees who refuse to return to the office. However, any such policy must be applied even-handedly to prevent allegations of discrimination based on protected characteristics, such as disability under the ADA or religious beliefs. For example, if the employee has an underlying medical condition, the employer may be required to make accommodations under disability laws or the federal Family and Medical Leave Act.

Employers should also consider any employment or collective bargaining agreements that may impose limitations on an employer's ability to fire an employee or could impose significant costs for doing so.

One final twist to be aware of: If a number of employees collectively agree not to go to the office because of safety concerns, the activity could be considered a "concerted activity" or as going "on strike" under the National Labor Relations Act, even if the employees are not represented by a union. This means that the activity could be protected by federal labor laws.

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