

ADVISORY

Legal Issues with Returning to Work



Businesses reopen, employees head back to work, and all now face significant challenges under the “Safer at Home” framework. The new reality of doing business in the face of a pandemic presents nuanced and previously unforeseen liability risks for businesses and employers. Businesses seeking to reopen must be mindful of a host of legal issues, liability risks, and compliance concerns.

KEY LEGAL ISSUES

Employer Compliance. As businesses reopen and employees are recalled to the workplace, significant compliance and liability concerns arise. Many employers are covered by federal nondiscrimination statutes, and businesses’ current health and safety policies may run afoul of new mandates. Even a good faith effort to protect the general workforce may result in impermissible discriminatory actions. Employee accommodations, leave requests, contracts for employment, and collective bargaining agreements all carry with them significant compliance concerns.

Pursuant to the Safer at Home order, state agencies and authorities have been directed to issue additional COVID-19-related employment guidance.

The Colorado Civil Rights Division has been directed to provide guidance addressing COVID-19-related discrimination in the workplace.

The executive director of the Colorado Department of Public Health and Environment (CDPHE) has been directed to issue temporary rules (i) to ensure employer-provided sick leave coverage and (ii) to ensure Vulnerable Individuals are not in danger of losing unemployment insurance eligibility for refusal to return to work in environments that are demonstrably unsafe due to COVID-19.

Employee Sickness. The biggest and most immediate risk your business faces is people getting sick in your company’s office. In such instances, it will be critical for your company to coordinate with the local health department both to get



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a handle on the outbreak itself and to demonstrate a responsible and proactive effort that will hopefully help you avoid a forced closure. On the legal side, it will be important for you to carefully document the efforts the company has undertaken to sanitize the place of business and maintain social distancing. Consider keeping a log of third-party violations as well, e.g., note the unmasked delivery driver and the vendor who fails to use a sanitation station. These violations raise insurance coverage concerns and may affect whether sickness will entitle the employee to workers' compensation.

Renegotiating Contracts. The novel coronavirus pandemic created the most abrupt economic disruption in history. Many businesses immediately sought to exit from existing contracts. Some waited for more guidance about the future. Almost every employer will need to adjust or renegotiate at least some existing contracts. Contract drafting and negotiation in the age of coronavirus will be especially tricky as the parties will need to bargain carefully over who pays when performance is interrupted due to mandatory quarantines or stay-at-home orders. The concept of *force majeure* may have applied early on, but contracts negotiated now will need to include a clause specifically addressing interruptions caused by, or resulting from, the coronavirus pandemic.

Worker's Compensation and Insurance Coverage. If your company is among those reopening for business soon, you should consider whether the company has insurance coverage that will apply in the event that an employee or a third-party acquires COVID-19 at the workplace post-opening and threatens to or brings legal action against your business. In some states, workplace transmission of COVID-19 is considered an occupational illness; in other states, it is not. Be sure to confirm with your company's insurance companies or brokers whether any of your company's other insurance policies, including commercial general liability, errors and omissions, and directors and officers policies, will cover liability arising from COVID-19. The best strategy for limiting potential liability is strict adherence to the applicable public health orders.

Protecting an Employee's Privacy. Your company should consider how it will preserve its employees' privacy as it potentially collect data related to tracking, tracing, and testing with respect to COVID-19. You should be sure to obtain meaningful consent and be clear about why the company is collecting data, what the data will be used for, and how long the company will keep the data. As a best practice, companies should collect the minimal amount of data possible and ensure there are reliable security safeguards in place to protect employee data from disclosure including hacking attempts. Your company should not share an employee's data or health status without that employee's prior consent. If a state or federal law requires that data be shared, only share what is legally required.

QUESTIONS

Please reach out to any member of [our team](#) with questions about how to reopen businesses consistent with state and local requirements.

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