

Legal Pitfalls Loom For Employers Reopening Post-Pandemic

By **Vin Gurrieri**

Law360 (April 22, 2020, 10:27 PM EDT) -- As states edge toward reopening their economies, experts say businesses that restart operations will face a slew of legal dangers and logistical challenges as they bring back employees who have been teleworking or sitting idle during the novel coronavirus pandemic.

Over the past week, the Trump administration and numerous state governments have begun laying the groundwork to loosen restrictions that were put in place to slow the spread of COVID-19. Those constraints forced many businesses to either close or shift to telework, and left tens of millions of workers who weren't deemed essential unemployed or working off-site.

But even after they get the green light to resume normal operations, businesses for the most part are expected to ramp things up slowly while making sure to provide a safe work environment during the outbreak and comply with a wide range of legal mandates.

"We're in a lot of new territory here," said Lindsay Burke, co-chair of Covington & Burling LLP's employment practice. "I don't think any employers in modern history have had to return to operations in the middle of a global health crisis. And so we're really trying to navigate some new areas of risk and concern."

David Schwartz, global head of the labor and employment group at Skadden Arps Slate Meagher & Flom LLP, said the firm is "now getting questions from clients on this topic," as companies start looking ahead to what needs to be done.

"It's been crisis mode for a lot of employers saying, 'How do we survive?'" Schwartz said. "And now, people are starting to see the light at the end of the tunnel and thinking about, 'What does this post-pandemic world look like?' and, 'How do we get back to running businesses?'"

Here, Law360 looks at a few of the issues that employers will encounter as they start prepping to reopen.

Potential Bias in Rehiring

Aside from startups, businesses generally hire and onboard a few employees at a time on a rolling basis as needs arise. But one of the immediate challenges employers will face as they reopen is having to rehire or reintegrate most or all of their labor force at the same time.

That sort of mass rehiring presents numerous potential problems, including the possibility that workers are brought back in a discriminatory way, particularly if they return in waves instead of all at once, attorneys say.

For example, should an employer decide to allow only younger workers to come back right away but tells older workers considered more susceptible to infection to stay home, it could run headfirst into an age discrimination claim. If pregnant workers are prevented from returning right away, a pregnancy bias claim could be on the table.

Alice Jump of Reavis Page Jump LLP said employers will have to go through a process of trying to balance fairness toward all employees on issues of health, saying that transparency and having a rational basis for any hiring or onboarding decisions will be key to guarding against bias claims.

"I think the issue is to try and keep your eye on the nondiscrimination ball, if you will," Jump said. "Make sure you're doing it in a way that's not going to give rise to people claiming that you're doing it for not-legitimate and discriminatory reasons."

Forcing Workers Back Too Soon

Instead of requiring workers to come back the minute businesses reopen their doors, Burke said it might be wise for employers to instead consider giving them a choice to stay home.

"We, as a general matter, have been advising that it might be a good idea to try to begin the process voluntarily," Burke said. "We think the return-to-workplace process is going to take a long time for a variety of logistical and health reasons — the lack of available testing and things like that."

"But it can also mitigate risk if employees are given the choice to return when the employer wants to begin reopening the work site," she continued. "And doing so voluntarily will also mean that they'll have a smaller number of employees in the workplace and that will give them an opportunity to test out some of the processes that they probably will want to follow."

Those new processes may include employee screening measures or other safety precautions recommended by public officials to identify COVID-19 symptoms, along with social distancing.

"Taking this one step at a time as a gradual process is not only operationally beneficial, but it's also the right thing to do to try to get it right," Burke said.

Shortchanging Workplace Safety

While voluntary callbacks may be one way of reintegrating workers, it is just a piece of the larger puzzle employers have to put together when bringing them back into the fold. Other pieces include making sure that any directives from the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration are not being ignored, according to Carolyn Rashby, an employment lawyer based in Covington's San Francisco office.

"Employers also need to make sure that they're following all appropriate guidance from the CDC, OSHA [and] state and local authorities," Rashby said. "The voluntary piece is an important first step, but it's also critical for employers to give those employees a safe workplace to return to."

Michelman & Robinson LLP partner Richard Reice, who leads the firm's employment practice, said the overriding legal duty employers have to maintain a hazard-free workplace derives from the Occupational Safety and Health Act.

If employers fall short of meeting that obligation, litigation may not be far behind, according to Reice.

"If an employer is grossly negligent, then they may face employee lawsuits for failure to maintain a safe work environment," Reice said. "In the normal course, employers are shielded from employee lawsuits as a result of the workers' compensation laws, but there are exceptions to those laws. And one could assume that if an employer is grossly negligent — failing to take any steps to mitigate coronavirus in the workplace — that could fall under an exception and they could be susceptible to lawsuits."

The issue of workplace safety is also one that has the attention of AFL-CIO President Richard Trumka, who on Tuesday called on government leaders to adopt several protective measures before the country attempts to return to normal.

Those measures include "clear and enforceable" health and workplace safety standards from the U.S. Department of Labor, a "massive increase" in personal protective gear and COVID-19 testing for workers, and stronger protections against retaliation if people refuse to work because they fear being exposed to the virus.

"The rush to open without the proper protection for workers will lead to an explosion of the disease, many more dead and another shutdown," Trumka said during a call with reporters. "We must put safety first."

Reice believes that employers are going to have to look at their workplace "holistically" to ensure they are providing a safe environment as much for practical reasons as legal ones.

That includes thinking about who they are letting in, how social distancing can be maximized and how to manage the workforce given the likelihood that employees may fall ill.

"There are going to be a lot of issues that employers are going to have to face — and they're going to have to face them not only for their own viability but to convince their employees that they're doing everything they can to maintain a safe work environment," Reice said.

Health Screening Missteps

Among the ways businesses may try to ensure workplace safety is by taking employees' temperature, a practice the U.S. Equal Employment Opportunity Commission greenlighted in recently updated pandemic preparedness guidance, or asking employees if they have COVID-19 symptoms.

But Burke warned that if employers are planning to do any sort of diagnostic testing on workers, there is a wide array of regulatory requirements they must pay attention to before beginning.

"If the employer is thinking about doing diagnostic testing, they need to be aware that there is a regulatory landscape around the conducting of tests," Burke said. "So they need to make sure that they follow regulatory guidance, and that can include using qualified health care workers to conduct some tests."

Moreover, if businesses are taking workers' temperature and recording it in any way, that information is legally required to remain confidential, and businesses have to tread carefully to avoid overstepping any legal bounds, according to Rashby.

"For temperature testing and questionnaires, confidentiality would be the key issue, as well as not trying to seek information that the employer is not allowed to request," Rashby said.

Inflexible Work Arrangements

Upon reopening, employers may also find themselves scrambling to keep up with social distancing mandates that some locales may still have in place even after government restrictions are eased.

To counter that, businesses may opt to change their physical worksite so that it doesn't get too crowded, such as by altering office layouts or adding plastic screens in retail stores. But if that's not enough, they may go further and consider nontraditional work arrangements that would have gotten the cold shoulder before the pandemic hit.

In an effort to promote social distancing, some businesses may allow employees to stagger their shifts, such as by letting some workers start their day at 7 a.m. while others start at noon. Other employers may experiment with different workweeks, such as by letting some employees work four-day weeks or letting employees take a weekday off and instead work on a Saturday, attorneys told Law360.

"Employers are going to be very conscious about things that you just took for granted before like start times," Schwartz said. "I don't know that you'll have the same sort of 9-5 [hours] initially at a lot of places. I can see employers having staggered or overlapping start times and end times so there's less pressure on commuting systems, [and] limiting the number of people in the office at any particular time."

--Editing by Breda Lund and Jill Coffey.