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Returning to Work in 2021: COVID & Vaccinations Raise EPLI Liability Questions

At the beginning of the COVID-19 pandemic, employers moved quickly to develop and implement remote work-from-home protocols to protect employees. Almost a year since it all began, employers are starting to develop return to work plans. Well-known finance giants, Goldman Sachs and JPMorgan Chase, are delaying their return after initially attempting to bring workers back near the end of 2020 only to send many workers home again after employees tested positive for the virus. Other large companies including Ford, Google, Facebook, and Target, have also stated that they'll postpone return-to-office dates until at least summer 2021.[4] As restrictions loosen or expire and vaccines slowly roll out, employers that start bringing employees back to the office will be faced with an increased risk of COVID-19-related Employment Practices Liability (EPL) claims.[1] Smart employers will proactively evaluate return to work plans from both a legal and insurance perspective to ensure they are protecting business operations and employee health.

Guest Contributor

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With COVID-19 still surging in the U.S., many employers are delaying a return to the workplace until at least summer 2021.[4]

LEGAL CONSIDERATIONS FOR BRINGING EMPLOYEES BACK TO WORK

As the pandemic and vaccination landscapes evolve, there is greater opportunity for legal exposure around returning to work as employers strive to balance regulatory compliance and respect for the individual rights of employees with business needs. Employers must comply with a broad range of employment laws and guidelines from regulators including the EEOC, CDC, OSHA, and the ADA. Because regulations vary between jurisdictions and at state and federal levels, employers would be wise to consult with legal counsel to ensure that return to work plans adhere to employment law as well as pandemic guidelines.

Whether companies begin bringing employees back now or later in 2021, the primary exposure on many minds is the risk of contracting COVID-19 at work. Legally, employers can reduce this risk by screening employees with temperature checks and symptom-related health questions. This is reasonable within the pandemic environment because the CDC and state/local health authorities have acknowledged the community spread of COVID-19.[2] Per the ADA, employers can also require and administer COVID tests as long as it is "job related and consistent with business necessity" because the admittance of COVID-positive employees to the workplace directly threatens the health of others.[2] The ADA also allows an employer to bar employees from the workplace if they refuse to answer symptom-related questions or undergo a temperature check. If the welfare of employees is a business necessity, then any employee that refuses COVID testing is essentially displaying conduct inconsistent with the employer's business needs, and the employee may be terminated or alternatively, sent home until a negative test is produced. In addition, employees that cross state or other jurisdictional lines during their commute to the workplace can be required by the employer to stay in company-provided housing/hotels to avoid crossing state lines as a condition of any non-contractual at-will employment. Such an arrangement does not necessarily implicate any employment laws because it's considered a term or condition of employment.

In addition, any employer relying on the COVID screening and testing process to help protect their workforce should be diligent in documenting screening question answers and temperature readings. It's also important to store all medical information separately from personnel files to limit access to confidential information, as failure to do so could result in an EPL claim. Upon screening, employers may remove employees experiencing symptoms in alignment with EEOC guidance and must comply with OSHA record-keeping and reporting obligations in order to evaluate alleged COVID-related claims. Whether or not a claim falls under EPL, GL, or Workers' Compensation, will depend on the specific facts of each claim. Generally, Workers' Compensation doesn't cover routine community-spread illnesses; however, pandemic circumstances have made jobs that aren't typically considered hazardous more dangerous for workers. Those deemed essential including healthcare workers, grocery store staff, and mass transit operators are at a high risk of exposure to COVID in the workplace, but this doesn't guarantee that infection would be covered under Workers' Compensation.[6]

THE LINE BETWEEN CONVENIENCE AND ACCOMMODATION

As employers work to reduce the likelihood of EPL, Workers' Compensation, or bodily injury claims, confusion remains around addressing employee accommodation requests. Recent research found that 73% percent of U.S. employees polled fear that returning to the workplace could endanger their personal health.[4] Many employees are scared to return because vaccines aren't widely available and U.S. COVID cases continue to rise. However, employers should keep in mind that fear does not require an accommodation. If an employee doesn't have a disability resolvable by remote work, the employer isn't required to continue allowing work from home. The fact that an employer temporarily enabled employees to work remotely in order to protect them from COVID-19, or otherwise chose to permit remote work, doesn't mean the job's essential functions have changed, that working from home is always a feasible accommodation, or that telework doesn't cause undue hardship for an employer. The ADA does not require the employer to refrain from restoring all essential duties upon returning to the worksite.[2]

When evaluating requests for continued or new accommodations, employers must guide employees through an interactive process to determine who truly needs alternate work arrangements. Working from home because it's more convenient for an employee is considered a change in terms and conditions of employment and can implicate EPLI, but employers aren't required to accommodate. Employers are only required to attempt to accommodate employees that present medical documentation confirming the need for accommodation due to a disabling medical condition. Outside of such a need, employees can be terminated for job abandonment if they refuse to return to the workplace. In addition, the ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member. For example, an employee without a disability is not entitled to work remotely as an accommodation in order to protect a disabled family member from potential COVID-19 exposure.[2]

EPLI can also be implicated when trying to bring disabled employees back to the worksite. Employers should attempt to accommodate employees deemed at significant risk if exposed to COVID-19, by allowing work from home if the essential functions of the role can be performed remotely. If such an accommodation is possible, employers can reassess accommodation needs once cases diminish and vaccinations increase. However, if an employee has a job that requires him or her to be at the workplace, and the essential functions of the job cannot be performed remotely, termination can be considered and would be likely. The ADA never requires an employer to eliminate an essential function as an accommodation for a disabled individual.[2] However, even if the employer follows established case law, an EPLI claim would be expected.

Widespread vaccine access in the U.S. is expected by summer 2021.[3]

EMPLOYER LIABILITY AROUND COVID-19 VACCINATION

Employers that choose to bring employees back earlier in 2021 are open to even greater liability if employees return before the COVID-19 vaccine is widely available. Many articles floating around the internet suggest that employers can require their workforce to be vaccinated. However, the fine print usually includes the disclaimer that employers cannot compel an employee to be vaccinated if it's against that employee's religious beliefs, would cause harm, or exacerbate a medical condition. Vaccination can be required by an employer and is not considered a medical exam. However, pre-screening questions may elicit information about a disability; therefore, the employer must show that pre-screening questions are "job-related and consistent with business necessity."[2]

Employers can require that healthy individuals without religious objection or disabling conditions be vaccinated in order to protect their workforce because protecting the health of others is a legitimate, non-discriminatory reason to require vaccination. If an employee cannot receive the COVID-19 vaccine due to a disability or sincerely held religious belief or practice, and no reasonable accommodation is possible, it is lawful for the employee to be excluded from the workplace. However, it doesn't mean automatic termination for the worker. Employers must first determine if any other rights apply under EEO laws or other authorities.[2] This gives employers some leeway in a gray area because there is no available case law from the last pandemic to provide guidance. However, brokers and employers should anticipate a rise in disability and religious objection claims on EPLI policies.

It is also likely that EPL claims will be generated if employers condition employment on vaccination. Some employees are already upset about being asked to return to work, but requiring employees to put something in their bodies is a much harder sell. From a legal perspective, it's likely that the EEOC will side with employees who have pre-existing conditions that may be exacerbated by the vaccine's side effects. The religious beliefs argument will also open up Pandora's box, making it a perfect time for employers to prepare for these types of EPL claims by clearly documenting why vaccination is required and how employees are advised of vaccination requirements.

LOOKING AHEAD: INCREASE IN EPL CLAIMS & CHANGING CONDITIONS

An uptick in EPL claims is expected as employees allege wrongful employment-related practices around COVID-19. The EPLI policy may be triggered by allegations of wrongful termination, discrimination against a member of a protected class, harassment, or employee privacy rights violation including unlawful disclosures of an employee's confidential medical information. If an employee is fired because of a COVID-19 diagnosis or out of fear that he or she may have the virus, a claim of discrimination could be filed against the employer. Claims may also arise based on alleged employer negligence toward implementing policies and procedures that safeguard employee health.[1] For example, an employer's inability or unwillingness to situate employees in separate offices, stagger the return to work, or provide PPE may implicate EPLI. If employees allege the creation of a hostile work environment or report feeling unsafe because of their objection to vaccination or a lack of protective measures, such claims may also fall under EPL.

Earlier in the pandemic – around May and June – claims were based on layoffs, but that will now evolve as the pandemic closes in on the 12-month mark. Workers Compensation claims may also increase in industries without remote work alternatives such as manufacturing or meat packing facilities. It may be that locations such as New York that have maintained more rigorous protective measures, will actually see fewer EPL claims while a higher number of claims may be generated in places like Florida and Texas where the focus has generally remained on economic momentum. Claims will be heavier in places that haven't imposed strict shutdown rules because employees will have more legitimate fear as businesses re-open.

As claims start to hit, it's anticipated that EPL carriers' first line of defense will be an attempt to bounce claims to GL policies based on bodily injury exclusions. While EPL carriers aren't yet attaching specific COVID exclusions, they are applying layoff or reduction-in-force exclusions, which existed prior to the pandemic. However, if plaintiffs' attorneys

find a loophole to trigger EPL, it's expected that EPL carriers will begin to attach broad COVID exclusions or avoid an exclusion in favor of modest defense costs supplements in the future. An uptick in severity or frequency of EPL claims will also likely extend the current hard market and drive an increase in rates.

The average cost of defending or settling employment law cases is $160,000.[7]

HELPING EMPLOYERS MITIGATE RISK AS EPL CLAIMS RISE

Employers can help reduce the risk of claims by engaging in an interactive return to work process and putting proper preventative measures in place to ensure their workplaces are as safe as possible. Return-to-work safety measures might include implementing employee health and safety policies, developing clear exposure response plans, providing personal protective equipment (PPE), detailing cleaning procedures, establishing physical distancing measures like staggered shifts and lunch/rest breaks, rotating weeks in the office with remote work, rearranging workstations to increase separation, and implementing one-way traffic patterns throughout the workplace. Companies can also clearly define customer and/or visitor contact protocols and consider using video or telephone conferencing instead of in-person client meetings.[5]

It's also important to plan how and when employees will return to the worksite in an orderly and controlled manner. Bringing all employees back at once could be overwhelming and possibly unsafe. Businesses should consider a phased-in approach using seniority or other nondiscriminatory factors for selection, make schedule changes to provide the greatest level of protection to workers, and consider allowing high-risk employees to keep working from home or remain on leave until they are comfortable returning.[5] Employers that are unable to continue accommodating alternate work arrangements due to hardship, should contact an employment law attorney for guidance on how to work through the process and develop applicable policies and procedures. Regardless of their chosen path, employers should thoroughly document the return to work plan, interactive process, and employee responses, keeping in mind that the way this pandemic is handled will inform the response to future outbreaks.

BOTTOM LINE

COVID-19 offers new challenges for employers and employees as they begin returning to the workplace. Vaccinating hundreds of millions of people is likely to take months, and presents employment practice issues in itself.[3] Employers bringing employees back during the pandemic have a duty to maintain a safe workplace, proactively understand their legal obligations to protect employees, and engage in an interactive process. Part of employer due diligence also includes reviewing EPLI policies to assess coverage.[1] Whether coverage is available for COVID-19-related claims depends on the EPL policy's specific provisions and the facts of the individual claim.[1] Companies should be aware that because there is no current pandemic case law, plaintiff's attorneys will take advantage of the situation until there is sufficient guidance available.

Employers would be wise to consult with legal counsel specializing in employment law to navigate complex EEOC, OSHA, ADA, and CDC guidelines in this new environment. Those wary of adding the additional cost of collaborating with legal experts to the ledger, should keep in mind that working with counsel to create and implement sound return to work plans is ultimately far less expensive and time consuming than defending a claim in court. Companies without adequate EPL coverage should also partner with a trusted insurance professional to evaluate coverage options. Market capacity still exists, but underwriters are scrutinizing these accounts. Agents should contact their CRC Group producer to learn more about how we can help clients protect against possible EPL exposures as businesses start returning to the workplace.

Contributors

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About Mayer LLP

Mayer LLP originated from a group of experienced, like-minded attorneys who saw an opportunity to combine their energy, skill, and entrepreneurial spirit to create a place where the client's interests are always the top priority. At Mayer, we take a team approach that gives clients access to the attorneys whose experience and background best match your needs. We offer the business acumen and legal expertise needed to maximize clients' opportunities, minimize risks and exposure and aggressively protect our clients' interests. Areas of practice include: Business and Corporate, Labor and Employment and Litigation.

ENDNOTES

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