Hedge Fund Law Report
An Acuris company

hflawreport.com

March 25, 2021

CORONAVIRUS PANDEMIC

Critical Employment Law Considerations for Office Reopenings

By Vincent Pitaro, *Hedge Fund Law Report*

With the continuing rollout of vaccines and more widespread adoption of preventive measures, there appears to be some light at the end of the coronavirus tunnel. Employers considering bringing employees back into physical office environments face a disparate array of federal, state and local rules and guidance affecting workplace safety and operations.

To help navigate those treacherous waters, a recent Seward & Kissel program examined the current federal, state and local legal landscape; screening, testing and response protocols; vaccinations; employee reluctance to return to the office; and workplace claims and litigation. The program featured partners Mark D. Kotwick and Anne C. Patin, along with counsel Julia C. Spivack. This article examines the key takeaways from their presentation.

See "Regulatory and Employment Concerns for Managers Reopening Their Offices" (Aug. 6, 2020).

Legal Landscape

Federal Guidance With Few Mandates

Several federal agencies are helping to shape the response to the coronavirus pandemic, Patin said:

- The Occupational Safety and Health Administration (OSHA) requires employers to ensure that the workplace is free from recognized hazards that are likely to cause death or serious harm. It has issued non-enforceable guidance but has not prescribed any specific pandemic-related procedures.
- The Centers for Disease Control and Prevention (CDC) has provided thorough information on cleaning and disinfecting. It highly recommends that all workers wear masks but has not issued any mandates.
- The Equal Employment Opportunity Commission (EEOC) has issued guidance on the types of virus-related questions that employers can ask employees and on complying with federal anti-discrimination laws during the pandemic.

The recent federal relief package extended unemployment benefits through March 14, 2021, Patin added. The requirement for partially paid childcare leave under the Families First Coronavirus Response Act expired on December 31, 2020, but employees might still have the right to unpaid leave under the Family and Medical Leave Act (FMLA).

State and Local Laws

New York, New Jersey and Connecticut have issued similar minimum standards or guidelines for office reopening, Patin noted. They cover physical distancing; personal protective equipment (PPE); hygiene and cleaning; communication and training; testing; tracing; and tracking. All guidelines require employers to adopt coronavirus preparedness plans that set forth their policies and practices. State and local agencies have the power to enforce those requirements. Even though the federal and local requirements do not provide a private right of action, it is prudent to follow all guidelines and recommendations to alleviate employee concerns.

Various laws also provide for leave for coronavirus-related illness, both for employees and ill family members, Patin continued. For example, the New York, New Jersey and Connecticut sick-leave laws; the FMLA; and paid sick-leave laws all provide for leave to take care either of the employee him- or herself or of sick relatives.

Testing, Reporting and Response

Screening Questions and Testing

Many state-mandated protocols include daily health screening for each employee who is returning to the office, Spivack explained. Many employers use phone-based apps to ask a group of mandatory coronavirus screening questions, including whether the employee has:

- experienced any coronavirus symptoms within the past 14 days;
- been in contact with someone known to have the coronavirus; or
- tested positive for, or been diagnosed with, the coronavirus.

Employers may, but are not required to, measure body temperature, Spivack added. Taking temperatures raises logistical issues, including where and when to test; who administers the test; how to protect the tester; and how to respond if a person does have a fever.

Employers may require employees to be tested for active coronavirus infection, however they may not require antibody testing, Spivack continued. Viral tests are of limited utility because they only provide a snapshot of an employee's condition, and an employee could contract the virus between the date of the test and the date of return to work. In light of those issues, the CDC is not recommending that employers require testing before employees return to work.

All of those tests and protocols are only permissible with respect to people who are actually returning to the office, Spivack stressed. An employer is not permitted to ask screening questions or require testing of remote workers. An employer may bar an employee who refuses to answer questions from the workplace, but a better approach is to ask why the employee is not participating in screenings. The employer may be able to allay employee concerns by explaining its policies and practices. If an employee lies on a questionnaire, he or she may be subject to disciplinary action.

See "Best Practices for Fund Managers to Mitigate Litigation and Regulatory Risk Before Terminating Employees" (Feb. 9, 2017).

Reporting and Response Duties

There may be different state and local reporting requirements in the event an employee tests positive for the coronavirus, according to Spivack. Generally, however, if an employee reports symptoms or tests positive while working at the office, the employer must:

- isolate the employee;
- ensure he or she is wearing a mask; and
- send the employee home, preferably not via public transit.

The employer should also seek to learn the source of the infection. If it happened at work, the employer may have to alert its workers' compensation carrier. It should also alert potentially exposed employees on a confidential and no-names basis; the employer must not disclose the identity of the infected person. An employer's coronavirus response plan should designate someone to serve as a conduit for information about coronavirus status issues.

Any individual who had close contact with an infected employee will have to isolate, Spivack added. If the individual is asymptomatic, isolation may run from 10 to 14 days from exposure, depending on the jurisdiction. If the person exhibits symptoms or tests positive, the person must isolate in accordance with local requirements.

In addition, the employer must clean and sanitize the office, which may entail closing the office for a short period, depending on when the infected employee was last there. The CDC recommends waiting at least 24 hours to minimize the risk to cleaners. The employer should permit the infected and exposed employees to return to work following their isolation periods in accordance with applicable guidance.

An employee required to isolate after contracting or being exposed to coronavirus might be entitled to paid leave under state or local law, Spivack added. For example, in New York, an employee could be entitled to mandatory paid sick time, paid family leave or disability insurance. The federal law that provided for mandatory sick leave pay has expired, but the employee's job may still be protected.

See "Fund Managers Should Use a Checklist to Ensure a Privacy Compliant Return to Work" (Nov. 12, 2020); and our three-part series on facilitating a privacy compliant return to work: "Relevant Laws and Guidance" (Jun. 18, 2020); "Policies and Protocols" (Jun. 25, 2020); and "Contact Tracing and Fund Manager Considerations" (Jul. 9, 2020).

Vaccinations

Employer-Mandated Vaccination

Under updated EEOC guidance, and subject to certain limitations and exceptions, employers may require employees to be vaccinated or require proof of vaccination, Spivack said. Some proposed legislation, including in New York, could require vaccination if herd immunity is not being achieved.

Asking employees disability-related questions implicates the Americans with Disabilities Act (ADA), Spivack cautioned. Simply asking for proof of vaccination is not likely to elicit information about an employee's disability status. On the other hand, if an employer

wants to ask why an employee has not been vaccinated, the requested information must be "job-related and consistent with business necessity," she explained. The employer must have a reasonable belief, based on objective evidence, that the employee's ability to perform an essential job function will be impaired by a medical condition or that the employee could pose a direct threat to others. If an employee requests an accommodation to the vaccination mandate, and the need for the accommodation is not obvious, the employer may ask why the accommodation is needed.

OSHA recommends that employers continue to use both PPE and distancing – even after employees have been vaccinated, Spivack noted. For the time being, most employers are likely to encourage and incentivize vaccination but not require it, she opined. They are concerned that mandating vaccination could hurt employee morale.

Exceptions to Employer-Mandated Vaccination
Employees who refuse to be vaccinated based on a disability or a sincerely held religious belief are entitled to accommodations under applicable law, Spivack noted. Under current guidance, if an employee opposes vaccination for any reason other than disability or religious belief, the employee is not entitled to request an accommodation.

If an employer requires vaccination and an employee raises one of the two permitted objections, the employer must engage in an "interactive process" with the employee to learn the nature of the objection and explore if there is a reasonable accommodation that would allow the unvaccinated employee to return without imposing undue hardship on the employer. Such accommodations might include providing additional PPE; erecting barriers; reconfiguring the workspace; or changing shifts or job structures. A case-by-case analysis is necessary.

If, at the end of the interactive process, no reasonable accommodation is available, the employer can prohibit the employee from returning to work, Spivack said. Prior to terminating an employee for noncompliance, however, the employer should consider whether the termination is governed by any other applicable employment-related laws. To date, there have not been any fully litigated vaccine refusal cases, and it remains to be seen what arguments employees will make. For example, in one widely publicized incident, a Brooklyn server was fired by the restaurant at which she worked because she refused a vaccine based on her concern about its potential impact on her fertility.

See our three-part series on best practices for employee discipline: "Developing a Framework That Fosters Predictability in the Face of Inconsistent Laws" (Feb. 8, 2018); "Investigating and Documenting" (Feb. 15, 2018); and "Ensuring a Fair Process" (Feb. 22, 2018).

Requests to Continue Working From Home

Some employees may ask to be permitted to continue working from home as an accommodation under the ADA, Patin said. Although federal courts usually do not consider remote work to be a reasonable accommodation, in one recent case, an employee with asthma was permitted to continue working from home in the short term. Moreover, recent EEOC guidance provides that employers are not automatically required to permit remote work.

Nevertheless, even in situations in which remote work does not constitute a reasonable accommodation, employers are considering the effect on employees' morale of returning to the office and whether it is essential to require them to return.

If an employee does request an accommodation, the employer must engage in the interactive process to evaluate whether the employee's health condition keeps him or her from performing the job's essential functions and whether remote work would pose an undue hardship, Patin stressed. If an employer does grant an employee an accommodation to work from home, the employer is not required to permit other employees to work from home unless they, too, request and qualify for an accommodation. Both an employee's request for an accommodation and the employer's decision must be kept confidential, Spivack advised. An employer cannot avoid the accommodation process by only requiring employees who are not pregnant and who do not have a disability to return to the office, Patin said. That would be discriminatory.

Employers that decide to continue remote operations have a host of other issues to consider, Patin added. Those include:

- navigating the taxation regimes of multiple states;
- maintaining appropriate workers' compensation coverage;
- preventing discrimination and harassment, which do not go away in the remote environment; and
- maintaining access to technology and confidentiality.

See "OCIE Risk Alert Highlights Concerns Associated with Coronavirus Pandemic" (Sep. 10, 2020).

Workplace Claims and Litigation

Workplace Safety Claims

OSHA; the CDC; and state and local agencies have all issued non-binding guidance on workplace safety, Kotwick explained. Although "there are a lot of reasons to comply with those recommendations," an employee generally cannot sue an employer for failing to follow that guidance, he said. To date, OSHA has not mandated any specific coronavirus-related measures beyond the general duty to maintain a safe workplace. Even if OSHA were to mandate such measures, only OSHA would have the authority to enforce them.

An employee's claim based on contracting the coronavirus on returning to the office or having an adverse reaction to a vaccine would probably be based on the employer's alleged negligence, Kotwick said. In most states, however, workers' compensation laws block those types of private negligence claims. An employee's primary recourse would be to file a claim with the state workers' compensation board. Most workers' compensation laws have exceptions for intentional torts or gross negligence. Aggrieved employees typically try to fit claims within those exceptions but face a very high bar. For example, to bypass New York's workers' compensation regime, an employee must prove that the employer intended to cause the complained-of harm.

It remains to be seen whether coronavirus-related claims will be covered under workers' compensation laws or whether those laws will bar employee claims, Kotwick said. A significant hurdle will be proving that an employee actually contracted the disease at work. For purposes of workers' compensation

claims, some states are establishing a rebuttable presumption that, if an employee is required to return to work and then becomes ill, the employee contracted the coronavirus at work. The presumption does not, however, create a private right of action.

A second hurdle will be proving that the coronavirus constitutes a covered workplace injury or a disease resulting from the nature of the employment, Kotwick added. The coronavirus does not fit neatly into either category, although some healthcare workers might be in a better position to make that argument. On the other hand, if an employer requires vaccination and an employee has an adverse reaction, the employee would be in a stronger position to assert that the claim is incident to employment.

Discrimination Claims

The EEOC and state and local agencies continue to enforce antidiscrimination laws, Patin cautioned. Thus, employers must be on the alert for discrimination, harassment and retaliation associated with the coronavirus. "Remote work is no excuse for discrimination or harassment," which can still occur over remote technology, she said. The pandemic does not change the application of discrimination laws, Spivack agreed.

Employers should be on the lookout for coronavirus-related manifestations of discrimination, such as discriminating against high-risk groups or blaming people of a particular religion or nationality for the virus. In addition, employers should not:

- discriminate for a benevolent reason, such as excluding people over 65 or people with disabilities from the workplace to protect them;
- fail to engage in the interactive process for accommodation requests;
- grant requests for discriminatory reasons; or
- retaliate against complaints.

See "Despite Challenges, Survey Finds Compliance Processes Have Remained Effective During the Pandemic" (Sep. 17, 2020); "HFLR Program Looks at Recent Developments and Trends in Employment Law Relevant to Fund Managers" (Jul. 26, 2018); and "Four Recommendations for Hedge Fund Managers Designed to Minimize Risk and Damage from Employment Discrimination Lawsuits" (Oct. 11, 2012).

Liability Shields and Waivers

Some businesses have been lobbying for liability shields for fear of a flood of litigation by customers and employees who become ill, Kotwick noted. Most litigation to date has concerned reasonable accommodation, discrimination, retaliation and other similar employment issues; insurance disputes; and civil rights claims. There has not been much personal injury or wrongful death litigation because most of those claims are being handled through the workers' compensation system.

The Republican-led effort to create a federal-level shield has failed, and a shield is unlikely to be adopted by the Democrat-controlled administration and Congress, Kotwick added. Many states have enacted some coronavirus-related liability protection. Some laws are very broad and protect all businesses. Others are limited to particular businesses or industries. Regardless, most only address wrongful death, personal injury and unsafe working condition claims. They do not protect against discrimination or retaliation claims.

Most also carve out intentional misconduct and gross negligence.

Prospective liability waivers and agreements not to sue for damages are widely used in business, but waivers between employers and employees are generally held to be unenforceable as against public policy, Kotwick explained. Even enforceable employment-related waivers cannot extend to gross negligence or intentional conduct; workers' compensation claims; or the duty to maintain a safe workplace. In New York, waivers of wrongful death claims are prohibited, and pending legislation would void employment-related coronavirus negligence waivers.

An employer's best defense is to try to cooperate with employees to create a safe working environment, Kotwick advised. Requiring employees to return to work while also requiring them to sign waivers could discourage them from returning; undermine trust and morale; and lead to bad press.

There are many things employers can do to protect themselves short of requiring liability waivers, such as:

- being proactive by implementing reasonable and good faith measures in accordance with CDC, OSHA and local guidance;
- documenting those efforts and a return-to-work plan;
- being transparent with employees so they know what to expect;
- monitoring for compliance with policies and procedures; and
- monitoring for changing guidance and adapting policies accordingly.

"Employers who actively engage with employees and show genuine concern for their wellbeing, in my experience, are less likely to be sued," Kotwick added. An employer that is sued for coronavirus-related injury or death should "treat it seriously." It might be possible to have the case dismissed under the state workers' compensation law. If a motion to dismiss fails, the case will turn on the facts, including the measures the employer implemented and whether the employee complied with them. If an employer takes reasonable steps and complies with applicable guidance, it will be hard for employees to pursue litigation successfully, he opined.

See "HFLR Webinar Explores Legal and Compliance Employment Trends, Including Compensation, Staffing, Diversity and the Pandemic's Impact" (Oct. 15, 2020); and "Morrison & Foerster GC Studies Gauge Outlook for Economic Reopening" (Jul. 9, 2020).