4 COVID-19 Legal Questions You Should Answer

By Jathan Janove, J.D.July 31, 2020 SHRM

When it comes to HR legal issues these days, it's all coronavirus all the time. For the HR professional, navigating this seemingly endless and ever-changing legal maze can be quite daunting. Which issues are most important? What questions must I get answered? Where should my primary attention be?

I asked prominent employment law attorneys from around the country to share their "favorite" COVID-19-related legal question and to offer a suggestion or two on how to address it. Here's what they had to say.

1. We've provided telework to our employees in response to COVID-19. Will that set a precedent for the future when an employee seeks telework as an accommodation under the Americans with Disabilities Act (ADA)?

According to Mark Tolman, an attorney with Jones Waldo in Salt Lake City, "it depends." Tolman explained that it is entirely plausible that in post-pandemic times, an employee seeking telework as an ADA accommodation will point to the effectiveness of remote work during the pandemic as evidence that onsite work is not essential or that

telework does not impose an undue hardship. "As a practical matter, if your recent experience with telework is that it has been effective—that teleworkers have been able to productively accomplish all essential job duties—such evidence likely will be used in the future to show that telework should be provided for an employee when necessary to accommodate a disability."

However, if you've provided telework strictly out of pandemic necessity—and at the sacrifice of some essential duties—Tolman said the mere provision of telework now should not prevent you from arguing later that onsite work is essential or that telework imposes a hardship. He suggested three actions HR professionals should take to better support an employer's position that onsite work is required in the future:

1. When providing telework in response to COVID-19 concerns, notify employees in writing that telework is provided only in response to the pandemic and that the company understands that its employees will not be able to perform all of the essential functions of their jobs while working remotely.
2. When employees return to onsite work, notify them in writing that the company looks forward to the resumption of all their essential job functions.
3. Review and revise job descriptions for onsite employees. If onsite work really is essential to a particular job, explain why such work is essential in the job description.

2. If schools don't reopen in the fall or follow a hybrid model with in-person and remote learning, what leave will employees be entitled to?

With the continued rise in coronavirus cases and uncertainty regarding whether and in what manner schools will reopen in the fall, attorneys Rita Kanno and Diane Waters of Lewis Brisbois, in San Diego and Dallas, respectively, believe it is critical for employers to understand the evolving leave entitlements under federal, state and local law. "Under the federal Families First Coronavirus Response Act [FFCRA]—which applies to employers with fewer than 500 employees—there are two 'buckets' of leave available for school or place-of-care closures or child care unavailability related to COVID-19: emergency paid sick leave and expanded family and medical leave. An employee can use both buckets for this type of leave, but only for up to a total of 12 weeks of leave."

Kanno and Waters noted that to be eligible for this leave, another "suitable individual," such as a co-parent, co-guardian or the "usual child care provider" must not be available to provide the care the child needs.

Some school reopening plans are generating new questions. For example, if a school opens for in-person instruction but an employee voluntarily chooses the remote learning option for his or her child, is FFCRA leave available? According to Kanno and Waters, generally speaking, no. "In order to be eligible for FFCRA leave, the physical location

where the child receives instruction or care must be closed. If, however, the school is operating at reduced capacity to comply with social-distancing guidelines, such that the employee's child has no choice but to receive remote learning, or if the school uses a hybrid model where in-person instruction is only provided on certain days of the week, FFCRA may be available."

Kanno and Waters recommended that employers plan ahead by facilitating discussions with their employees to learn how school reopening plans may impact their work schedules; whether remote work is or remains an option; and whether any added flexibility to their schedules, such as working around the school day or taking intermittent leave, may provide adequate solutions. "Good communication can go a long way toward reducing anxiety and finding creative solutions that enable employees to remain productive while taking on the added role of at-home educator."

3. Our company has adopted a mandatory work-from-home policy in response to the global COVID-19 pandemic. What are best practices for compensating employees for the expenses they have incurred as a result of working from home?

The shift to remote work, which for many employees is a requirement rather than an employer-offered convenience, presents the question of whether employers must reimburse employees for expenses incurred while working at home. According to Eric Mackie, an attorney with Ogletree Deakins in Chicago, some states require employers to reimburse employees for expenditures incurred by the employee in direct consequence of the discharge of his or her employment duties. Mackie also noted that under the Fair Labor Standards Act and its implementing regulations, employers are generally required to reimburse expenses incurred if those expenses would result in compensation below the federal minimum wage.

To minimize litigation exposure, Mackie said, employers should evaluate their employee expense reimbursement practices and refine or develop legally compliant policies. "Such policies could include, for example, a requirement for advance approval for any expenses over a specified amount. In all cases, effective communication and clear guidelines are key."

4. Can I tell employees who are over age 65 to stay home from work for their own protection?

According to Jacqueline Cookerly Aguilera, an attorney with Morgan, Lewis & Bockius in Los Angeles, the answer is no. She noted that initially, the Centers for Disease Control and Prevention (CDC) said people over age 65 were at high risk for developing severe illness from COVID-19. Now, the CDC uses an age gradient, meaning that the risk for

severe illness increases with age—the older the person, the greater the risk (e.g., those in their 70s are at greater risk than those in their 50s). "Regardless, an employer should not exclude an older employee from the workplace merely because the employee is at a greater risk for serious illness than a younger employee—even if the reason is to protect the employee."

The Equal Employment Opportunity Commission has advised that employers excluding employees from the workplace on the basis of age are in violation of the Age Discrimination in Employment Act. However, certain state and local sick-leave laws may require an employer to reasonably accommodate an employee who requests an accommodation for COVID-19 reasons based on age. "But even absent state or city laws," Cookerly Aguilera said, "I nonetheless recommend that employers offer to accommodate any employee who may be more susceptible to serious illness from COVID-19, either by allowing them to telework or, if that's not possible, providing them unpaid leave."