Best's Insurance Law Podcast

Avoiding COVID-19 Claims When Returning to the Workplace - Episode #167

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Insurance Professional Resources.*

We're pleased to have with us today attorney Tom McCally from the law firm Carr Maloney in Washington, DC. Tom is a partner in the firm with over 25 years of litigation experience across a multitude of industry groups.

He is the practice group leader for the firm's employment and labor law practice, with his areas of expertise including employment and labor law, complex litigation, class actions, multidistrict litigation or MDL, civil rights, nonprofit, and religious institutions practice.

He has also been lead council in scores of federal and state court trials. Tom, thanks very much for joining us today.

Tom McCally: Thank you, John. I'm looking forward to it.

John: Today's discussion is how COVID-19 will impact the workplace environment and returning to work processes. Tom, for our first question, what role does the ADA, ADEA play in the COVID-19 crisis?

Tom: Sure. As we return to work in the country, what we're expecting to see is a triggering of ADA and ADEA issues as employers struggle with the return to work. What we're anticipating and have been seeing are well intentioned employers issuing well intended actions that run afoul of the ADA and ADEA.

Turning to the ADA, the Americans with Disabilities Act, for example we're having employers, although they think they're doing the right thing, they're excluding some employees from the workplace out of concern for their health or safety. That could run afoul of the ADA.

Now, what can an employer do as the employees return that is permitted under the EEOC guidelines? You can ask them about their exposure history and/or whether or not they have tested positive. You can ask them if

they've been caring for anyone or in close proximity to someone who has tested positive. That is permitted by the EEOC and under the ADA.

You can also, and this is within the EEOC guidelines, they're allowing employers to take temperature of returning employees.

I would caution everything we're going to cover today is not a one size fits all. You have to let your actions in the return to work process be governed by the realities of your workplace.

But on the taking of temperature, we are not recommending that for most employers, because there's a host of regulatory issues you have to be concerned about. Number two, who is going to make a decision? What's a high temperature or low? Number three, who are you going to do it, unless you hire a licensed nurse or something like that?

Another way to handle this is just ask the employees as they return to work if they're feeling OK or not. If they're not feeling well, have them go home. It's as simple as that. If there is a concern and you think someone is not well, yet they refuse to go home, you can insist they go home.

Under the ADA, the COVID-19 virus is considered a direct threat. What that means is a direct threat is a defense to an employer for actions it may take towards or against someone with a disability or perceived disability.

Because the employer has reason to believe they are ill, sending them home with pay or having them continue to telework is the best course of action to take, rather than risk exposure.

In terms of the information you gather during this return to work process, those are medical records in the eyes of the law and under the ADA. So, those should be kept in separate files.

If you do take temperatures and you're recording that information, that information about an employee should be kept in a separate file, away from their HR records. Again, an ADA requirement and something you don't want to run afoul of.

In terms of the ADEA and other similar statutes, what we have with people returning to work who may be over 40, that's what the ADEA protects. We know that the CDC has indicated and the epidemiological studies have shown that individuals over the age of 60 are at greater risk.

So, you want to be careful not having a well-intended policy, like having your older workers not return to work come back to bite you. If an employee is ready to return to work, they should be permitted to return to work, regardless of their age.

Even though it may be a higher risk for them, you don't want to have the employer subvert the employee's wishes to return, because they do have the right to return, unless they've been exposed or have been near someone who's exposed or have tested positive.

The same would apply to physical conditions under the ADA, the Americans with Disabilities Act. People with underlying health conditions have also been shown to be more susceptible to the COVID-19 virus.

Again, if the employee wants to return to work, you must let them return to work absent exposure or taking care of someone who has been exposed.

If those employees are having issues and they may not want to return to work, then you should engage in the interactive process with them. What does that mean? It simply means asking questions.

If you have an employee with an underlying health condition or just someone over the age of 60 who is not comfortable returning to work, engage in the interactive process that you utilize under the ADA and talk to them about what options are available.

Again, it's important for employers to remember when you're talking about accommodations, especially in this time, it's not one size fits all. So, there are many options. You can have employees continue to telework. An employee who may not have teleworked, you can offer that to them.

Altered work schedules. They could come in at off hours or staggered days, staggered weeks, things like that, to cut down their commuting time and/or their potential exposure in the office.

You can also suggest that they work in different areas, if the particular area of your office or workplace has a lot of people. Perhaps they could be given an area that is not quite as crowded.

Those are some of the issues you have to be aware of with ADA and ADEA issues as the employees return to the workplace.

John: Tom, what do employers need to know about dealing with other forms of discrimination or harassment during COVID-19 and returning to work?

Tom: The biggest thing to remember here is just because we've been working virtually does not mean the employment laws have been suspended.

There are numerous press reports circulating around about relationships between employees beginning, because they're now Zooming or they're on conference calls constantly, and they're actually having more interaction than they might in a normal workplace.

The key here is inappropriate behavior, inappropriate comments, jokes, pictures, etc. can just as easily be sent around virtually, as they can in the office, and such things as suggestive comments during a call or a Zoom meeting, something like that.

The other thing we're seeing is discrimination against Chinese and Asian employees because of the origins of the COVID virus. You want to be attentive to that, make sure there's no jokes or things like that circulating.

What we recommend as a best practice is employers should emphasize to their employees adherence to the workplace policies, the anti-discrimination laws, whether they're working remotely or have returned to work.

I would remind everyone, you can also conduct a virtual investigation if need be, if there is a complaint.

John: Tom, employers must provide employees with a safe workplace. So, how do you do this with respect to COVID-19 and avoid potential OSHA or worker's compensation related claims?

Tom: This is probably the most important question here.

This is an uncharted landscape. So we don't know what kind of claims are going to be brought. We don't know what novel ideas or theories the plaintiffs' bar might come up with to address a perceived injury or harm to someone.

The advice we're giving is the best thing you can do is to constantly check the CDC guidelines and guidance for the return to work. If you go on their website, they have charts and lists of what they recommend for safety precautions in the workplace.

They have three categories. One is none to minimal, the second is minimal to moderate, and the third is substantial.

My recommendation is you try to follow of them, understanding one size does not fit all, and you make it tailored to your workplace. I could see down the road, in a deposition, an employer being deposed based on the CDC guidance, and whether or not they complied or tried to comply with it.

So, that's number one. Number two, you always need to check your state and local guidance about the COVID-19 virus and return to work issues.

Unlike any other type of employment issue that we've dealt with of late, the state and local jurisdictions, even just individual cities, are putting out their own rules and guidance. Be aware of those and check those regularly as well.

Again, it's not one size fits all. OSHA has been slow to put out guidance on the COVID virus. Workers comp always applies. Whether or not someone could establish exposure in the workplace as to anywhere else in their life is an open question. And how workers comp would address that, we're going to start seeing those claims come in.

But the bottom line, OSHA requires you to provide a safe workplace. Workers comp can hold you liable. And if the plaintiffs' bar can take a claim outside of the comp protections, then you're in civil court as well.

So the best practice is follow the CDC guidance and guidelines with what they recommend. Number two, check your state and local requirements. That's about the best you can do as best practices to protect yourself as the employer from liability.

I would also add, if there is someone exposed in your office, or they tell you they have been living with someone who was exposed, or they test positive, follow the CDC guidance on what you should do about that employee not coming to work, the duration they should stay out of work, and the requirements to return.

I'm not going to go through those now. They're on the CDC website. And they will be changing, more likely than not. So, you want to stay abreast of those.

John: Tom, what about waivers?

Tom: That's been a hot topic of conversation. I don't think it's a good idea, number one they're probably not going to be enforceable, because as a general statement of common law contracts, you can't waive future unknown possibilities. I think they would be subject to challenge.

Number two, they might be used against the employer in litigation, trying to argue an inference that you knew you couldn't provide a safe workplace. That's why you wanted to get the waiver signed.

Third, workers comp is not really going to acknowledge a waiver, because these are statutory rights enforced by state and local jurisdictions, typically, as well as OSHA. So, I don't think waivers are worth the time and energy that's going to be required to have them prepared and executed.

What I would recommend, have your employees sign an acknowledgement and receipt of your company's best practices and/or policies regarding COVID-19 and the return to work.

Every employer should be preparing a statement about return to work and what the new workplace is going to look like for the time being, what precautions the employer is taking.

Those should be communicated to your employees. I can't emphasize the importance of that type of communication. Then once that's out there, have them send an email acknowledgement of receipt, or a signed receipt, something along those lines. I think that is a much better course to go than a waiver.

John: Tom, what concerns are there about compliance with wage and hour laws?

Tom: Once again, just because we're working virtually doesn't mean the wage and hour laws have been suspended.

The areas employers can run into problems, most importantly with overtime. Because we're working virtually, people get used to working all hours of the day and night. Employers and employees have to remember all work has to be compensated.

So if you have an hourly employee working all hours, working weekends, working through their lunch, that could put the employer in an overtime situation.

For salaries employees, let's say you furloughed some salaried employees. Employers have to be aware that if that employee is furloughed, if they do any work, no matter how de minimis during a week of that furlough, you're going to have to pay them for that full week of pay.

Or it could be a full day of pay, depending on the facts and circumstances and your local state laws.

But it's important to remember, if employees are out on furlough, they're not to be contacted. They're not to do work. It should be a true end of the working relationship in terms of asking them to do anything, until they come back from their furlough.

Something the employers can do, and we would recommend, remind everyone of the wage and hour requirements. Remind your hourly workers and your managers that you have to get pre-approval for overtime.

If you have salaried employees out on furlough or leave, don't ask them to do anything. Otherwise, you could run afoul of the wage and hour laws.

John: Tom, does FMLA still apply?

Tom: Yes, FMLA applies, and it's been beefed up by the FFCRA. So in addition to your FMLA leave, we now have portions of it paid for. So for anyone who has been exposed, has tested positive, or is caring for someone who has been exposed, they're entitled to 80 hours of leave at full pay, at a cap at $511 per day.

Second category under the FFCRA, if an employee cannot come to work because they have to take care of a child due to the closure of school or daycare, they're entitled to 80 hours of leave at two-thirds pay, with a cap at $200 a day. Then there's an additional 10 week extension of that.

So, they could be out up to 12 weeks at two-thirds pay with a cap of $200 a day. That would run concurrently with their normal FMLA leave under the federal law. If you're in a state or local jurisdiction with FMLA laws, you have to check those to make sure they don't provide greater protections, and comply with those as well.

Always remember if someone is out on this leave, it's protected. They're entitled to return to their prior position or a similar position, and you can't retaliate against them for taking that leave.

John: Tom, thank you so much for joining us today.

Tom: Thank you, John. It was a pleasure.

John: That was attorney Tom McCally from law firm Carr Maloney in Washington, DC. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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