

5 things to consider if an employee refuses to return to work

Barbara D'Aquila, *The National Law Journal* — August 04, 2020

Now is not the time to guess what the law requires or to be unprepared. Litigation risks are real, and employee, public and investor reactions to bad decisions can be costly.

COVID-19 continues to rage as U.S. employers struggle with returning employees to the workplace. When governments mandated shutdowns, many nonessential businesses quickly pivoted to remote work. With some governments now permitting “reopening” and others “pausing,” difficult questions abound, including how to handle employees reluctant or unwilling to return to the workplace. Recent COVID-19 surges are exacerbating the decision-making process. Although not all-inclusive, you, as the employer, should do five things.

1. Follow applicable law

Comply not just with COVID-19-specific legislation, regulations and legally enforceable government orders, but also with preexisting employment-related laws (e.g., anti-discrimination, Occupational Safety and Health Act, and wage-and-hour laws). Consider government and medical guidance, such as [guidance from the Centers for Disease Control](#), reviewing the sometimes helpful Q&As. Recognize that you may be held to a standard of complying with such guidance, or that you may want to use it to defend your actions. Before taking adverse action, be certain the employee has no legal basis for refusing to return. Don't forget most employment laws also have anti-retaliation provisions.

2. Pay attention to what's happening at the time

Don't return COVID-19 symptomatic or positive employees to the workplace, but establish a defensible protocol on when the employees can return, considering [CDC](#) and other government and medical guidelines. Watch COVID-19 numbers in your [workplace jurisdiction\(s\)](#). Significant spikes warrant protocol reconsideration to ensure plans are rational, reasonable and justifiable. Because COVID-19 is unpredictable, be ready to pivot, reacting quickly with a temporary workplace closure(s) or appropriate new protocol.

3. Educate the reluctant employee

Be prepared to deal with the reluctant employee. If no legal obligation prevents you from requiring that employee to return to work, nevertheless listen to the employee's concerns. Provide appropriate education on your return-to-work measures, as they may alleviate concerns. Be kind and sensitive. These are difficult, stressful times. Consider collateral factors (e.g., employee morale, loss of a valuable employee who quits rather than returns). Before taking action, ensure you are on solid legal ground and warn of all consequences should the employee not return so that the employee can make an informed decision.

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4. Recognize when you cannot compel a return and when you must allow a return

Pay attention to applicable federal, state and local laws. Don't forget federal and state occupational safety and health laws require an employer to provide a safe workplace. [Federal Occupational Safety and Health Administration guidance](#) provides an employee may refuse work that involves "a risk of death or serious physical harm" where: (1) the employee requested and the employer failed to eliminate the danger; (2) the employee acts in "good faith" because of a genuine belief of "an imminent danger"; (3) a "reasonable person" would likewise conclude "real danger of death or serious injury" exists; and (4) with the urgency, insufficient time exists to correct the hazard "through regular enforcement channels[.]"

Comply with anti-discrimination obligations. You may need to allow an employee with a legally cognizable disability to work remotely (or stay home without working) as a reasonable accommodation. Consult available COVID-specific government information, such as the [Equal Employment Opportunity Commission's Q&A technical assistance](#). Also, even if not legally enforceable, consider satisfying a governor's order(s), such as [Minnesota's order](#) that "[a]ny worker who can work from home must do so." If a CDC high-risk (age 65 or older or with certain medical conditions) employee wants to return, as the [EEOC's Q&A technical assistance](#) notes, you must permit return. The employee must be allowed to work unless you can show that a legally cognizable disability posing a "direct threat" to the employee's health exists and it cannot be "eliminated or reduced" with any "reasonable accommodation." The "direct threat" burden is not easy to establish; don't invoke it without competent medical and legal support

5. Proceed reasonably and defensibly

Don't reopen without solid plans, such as a COVID-19 Infectious Diseases Preparedness Procedures and Response Plan. Cover contingencies, establish protocol and train employees. If a collective bargaining agreement exists, comply with contractual obligations. Unions have strong return-to-work views. For example, the [AFL-CIO](#) believes employees should have a "say" in decision-making; decisions must be based on "worker safety and sound science"; and in addition to "strong, clear and enforceable workplace health and safety standards," you must have adequate personal protective equipment, widespread, reliable testing, contact tracing, removal and wage payment for exposed workers and strong anti-retaliation protections.

If the entire workforce will not return at the same time, make [legitimate, nondiscriminatory decisions](#), being as objective as possible. Consider [appropriate factors](#), including specific skills, tenure, performance and other legitimate business considerations. Get competent legal and medical advice. Be fair and consistent. Employees, shareholders and government regulators expect it. Discrimination, retaliation and other claims often arise when an employee feels less-favorably treated than others. Remember, employees increasingly use social media and other avenues to call out an employer's conduct, including in the COVID-19 arena. Consider all external pressures, and make smart decisions. Bad publicity can have significant adverse consequences.

In short, proceed with caution. Now is not the time to guess what the law requires or to be unprepared. Litigation risks are real, and employee, public and investor reactions to bad decisions can be costly.



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