

RETURNING TO THE WORKPLACE DURING THE CORONAVIRUS PANDEMIC

Beginning in March 2020, most states throughout the United States began locking down. They halted all non-essential business activity in an effort to curb the spread of the coronavirus and to reduce stress on the health care system. Several states moved to reopen their economies in May, while others are taking more gradual steps to re-engage. As we plan for a safe re-entry to the workplace, there are many considerations for employers to keep top of mind. This is a brief overview touching on the chief concerns, but does not encompass all that may be required for your workplace to reopen.

CREATING A "NEW NORMAL"

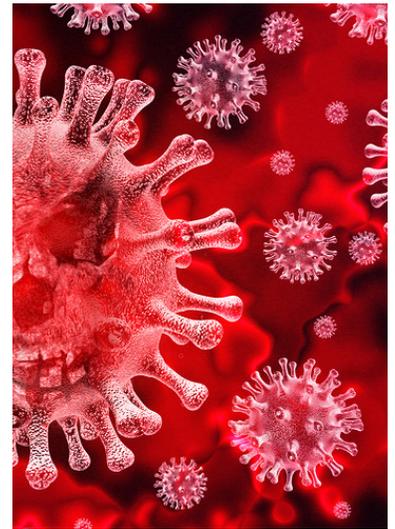
About half of American workers are now working from home, but polls show a majority do want to return to the office. They are looking to their employers to establish detailed protocols to both keep them safe and to foster a productive environment in the "new normal." This should start before the office reopens, and must be clearly communicated to employees before they arrive.

First, look to expert advice to determine safety procedures. The Occupational Safety and Health

Administration (OSHA) recently released a publication entitled "Guidance on Preparing Workplaces for COVID-19," found at <https://www.osha.gov/Publications/OSHA3990.pdf>. This can serve as a blueprint toward creating a response plan to prevent and identify viral infection in the workplace. It will likely take most workplaces several weeks to create and launch a detailed action plan, so such discussion amongst leadership and other stakeholders (for example, unions) should be underway now, if reopening is to successfully occur after June 1.

Next, examine your company's sick time policy and make changes where necessary. In the past, employees often felt compelled to come into the office when they weren't feeling well, even if they were advised to stay home. In the COVID era, such behavior is potentially dangerous to themselves and others, and can no longer be permitted.

Advise employees to exercise extreme caution if they are feeling unwell, particularly if they are suffering a fever exceeding 100 degrees



We welcome your comments and suggestions regarding this issue of our Viewsletter. For more information, please contact your Account Manager or visit our website at www.mma-mi.com.

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Fahrenheit and/or respiratory and gastrointestinal symptoms, any of which could indicate a COVID infection. Further, if they live with someone experiencing these symptoms, or they are needed to provide care for an ill family member, they should also consider remaining at home. Ensure that your policy does not punish them for taking this time off, including financial ramifications, if they are unable to work from home. It would be prudent to provide paid sick time in such situations, and not to impose an annual cap on sick days taken for COVID-related reasons. Keep in mind that employees may be out of the office for a while, as they are advised to remain at home for at least 72 hours after symptoms and fever abate (without the use of fever-reducing medication).

Depending on your industry and the requirements of state and local government, employers may need to offer personal protective equipment (PPE), most commonly in the form of face masks. Make sure a supply of the necessary PPE is consistently on hand for staff, and for visitors if you allow them into the workspace. Consider creating a “re-entry package” that is mailed to employees’ homes in advance of the reopening, to include an initial supply of masks as well as information on your sick time policy and information on the steps you are taking to keep the workplace free of infection.

While this is a challenging time for everyone, it also presents a unique opportunity for employers to show genuine care and consideration for employees and their families, which may increase overall job satisfaction and loyalty amongst staff.

OPENING THE DOORS - SLOWLY

By preparing employees beforehand, you may be able to prevent some from coming to the office if they or their families are not entirely

DID YOU KNOW

Many employers are changing rewards strategies in response to the COVID-19 pandemic:

- 7% plan to reduce 2021 merit increases
- 25% delaying 2020 merit increased
- 17% plan to freeze pay
- 7% are rescinding 2020 merit increases
- 16% are reducing incentive pay
- 24% are instituting pay reductions
- 14% plan to make no changes

Source: Rewards in Uncertain Times, Mercer – April 2020

well. Those who do arrive must be screened in some fashion, in order to remain in the workplace that day. The level of screening may be determined by local government and/or building management, but it is best to err on the side of caution.

Before entering the building or office, employees should be asked to assess their personal health and their exposure to others, which could have increased their risk for infection. Remember, many carriers of the coronavirus show no obvious symptoms, so such a tool should go beyond asking questions that solely pertain to the employee’s personal health in that moment. The Centers for Disease Control and Prevention (CDC) has a comprehensive self-checker at <https://www.cdc.gov/coronavirus/2019-ncov/index.html>. Johns Hopkins Medicine also offers one at <https://www.hopkins-medicine.org/coronavirus/covid-19-self-checker.html>. You could use these self-checkers as templates for developing your own checklist.

It is also wise – and may be required – to take employees’ temperatures before allowing them to work onsite. The Equal Employment Opportunity Commission (EEOC) has confirmed that doing this on a nondiscriminatory basis,

with the results treated confidentially, is permissible. The temperature checks should ideally be performed non-invasively, as with a touchless thermometer, and by a trained medical professional. Social distancing precautions should still be taken, so multiple temperature screening stations may be needed at some workplaces.

Employees who pass the health screening may be allowed into the workplace, on a staggered basis. Changes must be made to the space before they return, in order to reinforce adequate social distancing and to avoid having too many people in the space at once. Cubicles and work stations may have to be resituated and redesigned; similarly, it may be wise to control traffic by designating aisle ways as one-way. Access to common areas, such as the office kitchen, will need to be managed to avoid crowding. Additional PPE, such as more complex face masks, should be distributed in the workplace if that level of protection is needed.

YOUR QUESTIONS

- Q.** Unfortunately, we had to institute a pay cut for our employees due to the business downturn related to the stay at home order in Michigan. I am now concerned with how it might affect the affordability test under the ACA's shared responsibility or pay or play mandate.
- A.** The salary reductions prompted by the COVID-19 pandemic may affect the affordability of your health plan but it depends on how you test for affordability:
- **Federal Poverty Level (FPL)** – The FPL is determined annually and is unchanged by the COVID-19 pandemic. If you pass affordability on the FPL, the reduced wages will not have an impact on affordability.
 - **W-2** - The W-2 affordability test is done at yearend. Affordability is tested against the adjusted gross income reported in box 1 of the W-2. The pay cut will definitely impact the W-2 affordability test. In addition, if an employer does not cut pay but lays off employees for several months without pay, this will also affect the W-2 affordability test. The layoff will result in a reduced adjusted gross income.
 - **Rate of Pay** – The rate of pay affordability test is designed to be done at the beginning of the plan year. The test for hourly paid employee is based on the rate of pay times 130 hours/month. Salaried employees are tested based on their monthly salary. The only time the test needs to be redone during the year, is if the employee's rate of pay is reduced. In this situation, the employer would need to retest the 20% lower rate of pay to see if the affordability test passes. If at some point later in the year, if you are able to return to the pre-Covid wages, if you passed on the reduced wages, you do not have to retest when pre-Covid-19 wages are restored.

To avoid potential penalties under the ACA, employers that do not use the FPL to test affordability may need to analyze the impact of layoffs or pay cuts on affordability in terms of the ACA pay or play penalties.

Two of the best ways to prevent coronavirus infection are also fairly simple – frequent, correct hand washing and the proper sanitization of surfaces. Employees should be given instructions on hand-washing, as a reinforcement of behavior, and provided with easy access to hand sanitizer throughout the workplace. Cleaning and sanitization will be trickier. The normal janitorial crew probably does not have the necessary supplies or training to handle the kind of deep cleaning that will be required. Employers should look into contracting with other providers for such disinfection and sanitization. This type of cleaning must be done frequently, perhaps daily.

DON'T FORGET EMPATHY

Even after reopening, not all employees may be prepared or feel comfortable returning to the workplace for various reasons. Some may be caring for children whose schools or day care centers remain closed. Others may be at elevated

risk for health complications due to age or preexisting conditions, and want to remain more physically isolated to protect their health. Those who rely on public transportation may prefer to avoid it for some time.

These are all valid concerns, and employees should be accommodated as much as possible. If it does not adversely affect the business, then employees can be allowed to continue working from home. This benefits the employer as well – it may create greater employee satisfaction, and also reduce the risk of employees spreading the coronavirus in the workplace.

The pandemic will not end when most states reopen for business. The health crisis is ongoing, and to date, there is no sure-fire treatment regimen or vaccine. The measures we take now, including face masks, social distancing and the avoidance of large gatherings, are likely to continue throughout the year and possibly beyond. The possibility

of additional periods of lockdown cannot be overlooked. Therefore, it is imperative that employers move carefully and thoughtfully during the reopening process, and be prepared to pivot as necessary. The success of your business operations, and the wellbeing of your employees, depend on your ability to adapt to an uncertain future.

THE CORONAVIRUS AND EMPLOYEE BENEFITS – FOCUS ON ANNUAL ENROLLMENT

Most employers have historically struggled with engaging employees in their benefits plans. Employees often show little interest in reading their benefit guides, or in participating in wellbeing programs. They do not fully understand the ramifications of their elections. Various strategies and tactics have been deployed over the years, but often with little lasting effect.

TREND TIDBITS

Mercer reports the following 2018/2019 health plan cost for large employer (500 or more employees):

- \$ In 2018, Mercer reports annual cost of PPO plans at \$13,178 per employee; it increased 3.1% in 2019 to \$13,580.
- \$ In 2018, Mercer reports annual cost of HMO plans at \$12,235 per employee; it increased 7.8% in 2019 to \$13,186.
- \$ In 2018, Mercer reports annual cost of CDHPs with HSAs at \$10,481 per employee; it increased 3.7% in 2019 to \$10,870.

Source: 2019 National Survey of Employer-Sponsored Health Plans, Mercer

The ongoing coronavirus pandemic may provide a unique opportunity to change that. People are concerned about how testing and treatment will be covered if they develop symptoms of COVID-19. They are worried about the financial impact on them and their families if they are unable to work due to quarantine or illness. They may also be interested in addressing health issues that could make them more vulnerable to complications if they do become infected with the virus. Employers should tailor their benefit programs and communications to address this new situation, to better educate employees on how to make the best choices for their physical, mental and financial health.

HEALTH PLANS

Too often, employees will open their annual enrollment materials and look first at the contributions, and make their decisions based solely on that. They have little knowledge of what they're actually electing, and what their out-of-pocket costs may be should they require extensive and complicated care.

Employers may want to consider providing a separate communication that specifically addresses the coronavirus and the medical plan options. For example, show what the costs would be for testing and treatment, to include the copays

for office visits, urgent care, emergency room, hospitalization and prescription drugs. Don't forget telemedicine, if that's part of your health plan. It's also wise to include information about the mental health benefits, as employees and their families may need support in dealing with anxiety surrounding a COVID-19 diagnosis.

Try to make this document one page (or two pages, double-sided) for easy reference. Add the customer service phone numbers for the medical plan options, as well as contact information for the local health departments.

Stress in this communication that selecting a medical plan is one of the most important decisions employee can make for their overall health. Look not only at the premium contributions, but also at what you could pay at the time you receive treatment. Be sure to consider that the plan offers sufficient coverage to meet a variety of medical needs. For example, an employer may include a "skinny plan" that is low-cost, but provides little more than preventive care benefits. If an employee is concerned about having adequate coverage for COVID-19 treatment, such a plan will be insufficient.

Telemedicine has become extremely popular since March 2020, especially as many providers cannot see patients in the office for routine care during the state lockdown. This is a great time to promote telemedicine if it is covered by your plan, and to emphasize that these visits provide, in many cases, comparable care to an in-person visit, both now and after the lockdown ends.

EMPLOYEE ASSISTANCE PROGRAMS (EAP)

Most employers offer an EAP, either as a stand-alone benefit or through their life or disability policy. While many EAPs can assist with a variety of life issues, the ability to speak with a counselor 24/7, or to have a specific number of free visits with an EAP network provider, makes this benefit a great resource for those needing short-term mental or behavioral health counseling.

Don't wait until annual enrollment to promote your EAP. Employees tend to forget about this benefit, and it's notoriously underutilized. Keep the EAP front and center for your staff by providing regular communications directly from the vendor.

VOLUNTARY BENEFITS

Many employers offer employees voluntary plans such as accident, critical illness and hospital indemnity insurance. The hospital indemnity plan, in particular, could pay a benefit if a covered person is hospitalized due to COVID-19, which should be highlighted in the materials.

However, a different benefit may be paid out under these policies if a covered person is simply tested for COVID-19, regardless of the resulting diagnosis. Often such plans include a wellness or health screening benefit, where a set amount is paid out if the individual undergoes a

specified preventive care screening, like an annual physical or mammogram. Testing for COVID-19 is now considered preventive under the Affordable Care Act, so a covered person could collect the screening benefit for undergoing this test. This should be pointed out in the benefit materials, as it is easily overlooked.

WELLNESS PLAN

If you provide a wellness plan to employees, increase communications on how it can help participants improve their health, particularly with regard to overweight, high blood pressure and high blood sugar levels. Such conditions

have been implicated in the worst COVID-19 complications, so protecting and improving one's health may now be, quite literally, a case of life and death. That may sound dramatic, but it's also an effective way to get employees' attention.

Stress that your wellness plan will provide employees with the tools and support to take control of their health, in a time when many of us feel vulnerable and powerless. Focus on wellness as a way to keep strong, both physically and mentally, and as one of the best ways to deal with the new health challenge before us.

LIFE AND DISABILITY BENEFITS

Employees tend to pay little attention to life and disability benefits, but there may be greater concern now about providing their families with financial protection, in light of the pandemic.

For the benefits offered on a voluntary basis, you may want to check with your insurers to see if they would agree to a one-time "true open enrollment" during the next renewal. This would permit your employees to elect voluntary

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TECHNICAL CORNER

The COVID-19 pandemic has forced most employers to reconsider the role technology plays in their organizations. Many employers did not have a work from home policy pre-COVID-19. These employers needed to create one quickly as state after state issued stay home orders. Employers are now seeing some employees work very effectively from home.

The fact is, that even when states reopen, the virus will remain in the community. Employers will need to consider how to reopen safely. They may choose to allow employees to work from home to maintain a more socially distanced workspace for those that need to go into the office. If an employer has not developed a work from home policy, they certainly should formalize a policy to set forth expectations when working from home.

Consider including the following in a Work From Home policy:

- **Consider eligibility** – will some employees work from home on a regular basis?

Will work from home be based on employee requests because of need? Will only individuals in certain areas be allowed to work from home (because their work can be done remotely)? Will you require employees to have one or two year's experience before you will allow them to work from home (presumably because they need time in the office to learn your organization and become independent in their position)?

- **Address costs** – employees may have to incur costs to set-up a work from home space. Will your organization fund the reasonable business-related expenses to set up a work from home space? If so, define exactly what expenses you will reimburse (if any) and what approval process will be needed.
- **Security Protocols** – What steps will you require for employees to secure their work information while at home? What technology require-

ments may the employee need? What steps will be required to physically secure company information?

- **Work Expectations** - Set the expectations in regard to working from home. For example, employees should work their required hours per day. Employees should be accessible electronically throughout the workday. Employees should follow all company procedures and policies. Employees should refrain from using drugs or alcohol during work hours when working from home.

The COVID-19 pandemic has shown most organizations that employees can work from home effectively. It may be in an organization's best interest to allow certain employees to continue to work from home until treatments and vaccines can be developed for COVID-19.

MMA

life and disability coverage, up to a certain dollar amount, without providing proof of good health (some restrictions may apply). This would allow them to have some level of coverage, in the event their application would otherwise be denied for health reasons.

Employers frequently offer some level of life and disability coverage at no cost to employees. Talk up these benefits in the materials, and remind employees of their value. Having sufficient life coverage can

keep survivors financially afloat. Disability coverage can allow the employee to maintain a reasonable standard of living in the event he or she cannot work for an extended period of time, or becomes totally disabled.

The coronavirus pandemic has rocked American society to its core, and we have yet to reach the other side. It is highly likely that we will continue to be reacting to it as most employers prepare for renewals during 2020. As difficult as this

situation is, the pandemic provides a rare opportunity to grab employees' attention regarding their benefits. Take an especially thoughtful and tailored approach to your communications this year, as you may find employees more receptive and prepared to learn more. *MMA*

LIABILITY LESSONS

EMPLOYMENT PRACTICES TRENDS IN EEOC ENFORCEMENT AND LITIGATION

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If you are wondering whether your business has an exposure to employment-related claims, look no further than the 72,675 charges of workplace discrimination received by the United States Equal Employment Opportunity Commission (EEOC) in 2019. In the past year alone, the EEOC recovered over \$486 million for victims of workplace discrimination in both the private and government sectors. Significantly, that nearly half billion-dollar figure reflects merely the recoveries on behalf of employees, it does not account for the time and expense the business itself expended in defending such claims.

The EEOC recently released its Fiscal Year 2019 Enforcement and Litigation Data, which provides a detailed overview into the charges of workplace discrimination the agency received over the past year. The data provides pertinent insight into the employment charges and lawsuit trends, which is important to note internally from a human resources and cultural perspective, as well as from a loss mitigation and risk management perspective.

The most recent data indicates that the most frequently asserted charges continue to be retaliation claims, followed by disability, race, and sex claims. Retaliation accounted for 53.8% of all charges filed in 2019, which is an increase from the prior year.

While there is a tendency to think of employment-related claims under the broad label of sexual harassment, the breakdown demonstrates that claims on the basis of sex are just one of many charges received by the EEOC. In fact, this year charges based on sexual harassment actually decreased by 1.2% from the previous year. While last year charges based on sex were the second most frequent claim, this year it is the fourth most frequent, behind retaliation, disability, and race. Although sexual harassment does continue to account for a significant percentage, the EEOC noted a large impact of the #MeToo movement in the prior 2018 fiscal year, which may have played a part in the significant number of sexual harassment and retaliation charges.

The types of charges the EEOC received during the most recent 2019 fiscal year include the following bases alleged, in descending order of total charges: Retaliation; Disability; Race; Sex; Age; National Origin; Color; Religion; Equal Pay Act; and Genetic Information. When the EEOC refers to "charges" it is reflecting the number of individual filings. This is due to the fact that individuals often will allege multiple bases of discrimination within an individual charge filing.

The statistics for the most recent fiscal year, which ended on September 30th, 2019, also provide detailed breakdowns of EEOC charge by state. The EEOC data for Michigan provides that, similar to the national statistics, retaliation also accounts for the highest percentage of total charges in Michigan. The next highest percentage of charges in Michigan are age and race based charges.

The EEOC is responsible for specifically enforcing federal laws and statutes which prohibit employment discrimination in the workforce on the basis of Race, Color, Sex (which includes gender, pregnancy, and sexual orientation), National Origin, Disability or Genetic Information. Individual states such as Michigan also often has its own state statutes that prohibit employment discrimination, which can be more protective to employees than federal laws.

For business owners, it is of course ideal to have a workplace free of discrimination. However, the statistics above demonstrative that is not the reality. Employment-related lawsuits are pervasive for both small businesses and large corporations and create a major liability from both a financial and cultural perspective. It is imperative that every business understand how to mitigate loss within the organization from a training perspective; but also from a risk transfer standpoint.

One of the most effective methods for a business to transfer that risk is through Employment Practices Liability insurance. Employment Practices Liability insurance can provide coverage for claims made by employees for allegations such as discrimination, harassment, and wrongful termination, amongst others.

Too often, business owners focus on the fact that in their opinion they would “win” in litigation against an employee and therefore they do not appreciate the necessity of insurance coverage. However, it is the defense costs and time exerted in litigation that is often overlooked. Employment related claims are both time consuming and costly to defend. Whether or not you are ordered to pay a judgment is independent of the significant expenditure that goes into the legal expenses and attorney’s fees in defending a claim. Employment Practices insurance is available to provide coverage not only for judgments, but the legal defense of such claims and valuable resources so that your business does not need to endure the risk alone.

Source: www.eeoc.gov



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