

## Member's Quarterly

Winter 2021 Edition

## Feature

## COVID Lessons for Employers

*What a journey this has been!*

While a solution to the COVID health crisis remains far from certain, there are some legal lessons that most employers can take away from the impact associated with the pandemic. This is especially important given the second wave, society getting back to the "new normal" (whatever that is), the opening of schools and a more serious shutdown (as frightening as that sounds). In other words, we could be living with this threat for a very long time, even after a vaccine is developed.

Ultimately, employers should be taking the time necessary to assess what worked well during the pandemic and what needs to be addressed or adjusted going forward to deal with our "new normal". Here are my key legal takeaways and lessons learned based upon what we have seen over the past number of months.

- 1. Adopt and maintain health and safety protocols that continue to mirror current COVID based standards, including the way work is scheduled and performed in order to maximize social distancing.** The reality is that these health and safety standards make good sense both from a workplace culture and economic perspective. They also inspire the confidence of your workforce. In addition, thought should be given to improved sick leave arrangements. Employees who are sick often come to work because they cannot afford taking necessary time off. We have learned that employees who come to work in situations where they may be contagious could have a dramatic impact on the overall operation, especially if a quarantine becomes necessary. Therefore, enhanced sick leave arrangements are a great investment in the business.
- 2. Develop the flexibility you need to manage your workforce.** First and foremost, adopt contracts and policies that provide for the express right to lay off your workforce and provide for temporary breaks from active service should the need arise. Without these provisions, employers still face the possible claim of constructive dismissal. I would suggest that the contractual provisions be extended to a broader group of employees beyond hourly staff which are traditionally the focus of temporary layoff provisions. If there is a concern in extending the provisions to management, then limit the ability to lay off to pandemics and events that are unforeseen.
- 3. Speaking of contractual provisions, develop language in your contracts that permits changes to duties and schedules** generally, especially in times such as these. Most of the constructive dismissal claims we have seen during the shutdown were not based upon the layoff itself. They have been based upon changes employers have had to make to positions, duties and schedules given operating requirements which arose because of the pandemic and the effects the pandemic has had on reopening a number of businesses. By the way, it is not easy to amend agreements for existing employees. You will need to be mindful of the issue of "consideration" for the changes to be binding.
- 4. On the issue of recall from layoff, develop clear protocols that deal with the expectations on return once a recall notice is issued.** Employees should understand clearly the ramifications of failing to respond to a recall notice within a specific time frame. Define those time frames in advance. Explain the consequences of failing to return without a justifiable reason. Many employers struggled with this issue as their companies began to open up — they simply could not get some employees back to work.



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- 5. Challenge yourself to develop innovative and flexible remote work solutions.** This involves building appropriate technology capability, as well as developing workplace policies that define key expectations for things such hours of work (overtime rules still apply), productivity and confidentiality. This also involves thinking through strategies to maintain workplace culture and fully engaging the workforce. Zoom can be your best friend — learn how to fully engage it.
- 6. Keep the lines of communication open with your employees.** We are all in this together and having well-informed employees who are comfortable going to their employer with questions and concerns will increase employee confidence and productivity.

We are definitely not through this yet and there will be new challenges and issues to face going forward with a return to work, the complete opening up of the economy and our society. Employers who learn from experience, fully explore their options and plan for future possibilities will be in the best position to adapt and succeed.

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