October 13, 2020

LAW BUSINESS TECHNOLOGY
BUSINESS TECHNOLOGY LAW
TECHNOLOGY LAW BUSINESS
THE RECORDER
daily at www.therecorder.com
An ALM Publication

Return to Work Is a Double-Edged Sword

"'At-will' is almost meaningless these days. Yes, employers can require that workers show up for work, but they must also be especially mindful of accommodating employees who raise nonspurious concerns," says Sonya Goodwin of Sauer & Wagner in Los Angeles.

By Sonya Goodwin

The state of California, along with the rest of the country, is reopening—in fits and starts. Those who still have jobs face the prospect of returning to unsafe workplaces. Companies still in business are trying to figure out how to stay above water financially while complying with ever-changing health and safety mandates.

Even though law firms have suffered along with the rest of the business world—many have downsized substantially during the pandemic—there is no shortage of work for employment attorneys. The list of potential actions by workers against their employers is growing to unprecedented levels. But there are strategies that can forestall the avalanche of claims.

For employees, return to work is generally nonnegotiable. As "at-will" employees, they face the prospect of termination if they don't show up when required. Assuming the employer has complied with state and local safety ordinances and standards, fear of reentering the workplace is not a sufficient reason to stay home. That being said, reasonable accommodation of an employee's disability or medical condition may be warranted or appropriate, and failure to provide it may be grounds for legal action.

Employees with medically diagnosed comorbidities can ask for accommodation from their employers, which could include continuing to work remotely, if possible. Additionally, workers may seek accommodations for depression, anxiety, or other psychological disorders caused by the pandemic. Until the end of the year, the Families First Coronavirus Response Act (FFCRA) also provides paid sick leave for employees of most companies with less than 500 employees, and a new California state law requires the same for most employees not covered by the FFCRA—assuming they haven't already availed themselves of this benefit—who are subject to quarantine or infected with COVID-19 themselves, who need to care for family members subject to quarantine, or whose children can't return to school or daycare because of COVID-19.

Many employees are returning to offices, shops and warehouses that flout prevailing safety guidance. Coworkers are standing too close, mask wearing is sporadic, and cleaning is cursory at best. The federal government has provided almost no guidance to businesses about how to protect their workplaces. OSHA has invoked the "general duty clause" that requires employers to maintain

Sonya Goodwin, partner at Sauer & Wagner of Los Angeles (Courtesy photo)

safe workplaces. In doing so, it has failed to designate an emergency temporary standard, which would have allowed regulators to issue citations or fines for violations during the coronavirus and would have required employers to submit their workplace-safety plans to OSHA.

California, in contrast, has promulgated pandemic-specific workplace safety guidelines. These include the wearing of face masks in public spaces and industry-specific mandates such as checklists for offices, manufacturing and shopping centers. Employees who return to a workplace that looks or feels unsafe can and should speak up. If their concerns are not addressed,

they should contact CalOSHA for an investigation of the employer's safety practices.

For employees requesting accommodations or observing safety lapses, the most important step will be documentation. Any hint that discrimination, harassment or retaliation could be a partial motivating factor for discipline or termination affords the employee both leverage and tactical options.

Employers, on the other hand, now find themselves with unique challenges: How to terminate or layoff workers and minimize the risks of being sued by disgruntled employees? How to ensure compliance with evolving safety ordinances? What was once a routine downsizing is now fraught with special considerations. Did the terminated employee take medical leave because of COVID? Did she complain about workplace safety?

"At-will" is almost meaningless these days. Yes, employers can require that workers show up for work, but they must also be especially mindful of accommodating employees who raise nonspurious concerns. As required by state law, businesses must create return-to-work plans that spell out such details as how many employees can be physically present in a designated area, when and where masks must be worn, where hand-washing stations or sanitizers will be situated.

If, or when, a worker contracts COVID-19, companies must now timely notify employees and public health officials. AB 685, signed into law by Gov. Gavin Newsom on Sept. 17, adds the following section to the Labor Code:

6409.6. *(a) If an employer or representative of the employer receives a notice of potential exposure to COVID-19, the employer shall take all of the following actions within one business day of the notice of potential exposure:*

(1) Provide a written notice to all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19 in a manner the employer normally uses to communicate employment-related information. Written notice may include, but is not limited to, personal service, email, or text message if it can reasonably be anticipated to be received by the employee within one business day of sending and shall be in both English and the language understood by the majority of the employees.

(2) Provide a written notice to the exclusive representative, if any, of employees under paragraph (1).

(3) Provide all employees who may have been exposed and the exclusive representative, if any, with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws, including, but not limited to, workers' compensation, and options for exposed employees, including COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, or negotiated leave provisions, as well as anti retaliation and antidiscrimination protections of the employee.

(4) Notify all employees, and the employers of subcontracted employees and the exclusive representative, if any, on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

In a parallel development, OSHA has now updated its pandemic guidance for employers to require businesses to tell the agency about COVID-19 hospitalizations and fatalities caused by workplace exposure to the virus. They must report a worker's COVID-19 death if it occurred within 30 days of the employee's exposure to the virus on the job.

Lawsuits already filed against employers are the tip of the iceberg. Despite a presumption in California that COVID-19 is a workplace injury covered by workers compensation for some employees, employers statewide could soon face waves of negligence, discrimination and retaliation claims. Given the confluence of court closures and diminished jury pools, expect to see a huge increase in arbitrations, mediations and settlements of workplace complaints. Plaintiffs who would once have held out for high jury verdicts now have reason to accept less money sooner. No one wants to wait four or five years for an award from a business that may no longer exist.

Sonya Goodwin, *partner at Sauer & Wagner of Los Angeles, represents employees and employers in a range of claims, including wage and hour violations, discrimination, harassment, retaliation, wrongful termination, defamation, intentional infliction of emotional distress and breach of contract.*