

Ledgers and Law: Beyond Face Masks: HR and Employment Considerations During and After a Pandemic

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The world is not the same since we left our places of employment in March at the beginning of the COVID-19 pandemic. As employees return to their workplaces or continue working remotely,

employers should, of course, be thinking about their safety. But, there are other important things to consider such as brand and company reputation as well EEO considerations. Rae Vann, a labor & employment shareholder at Carlton Fields and vice president at Core Triangle, a Carlton Fields subsidiary that provides human resources and risk management consulting to private and public companies, will share what employers should be doing now and what has changed permanently as a result of the pandemic.

About Ledgers and Law: Lessons From the Trenches

Ledgers and Law: Lessons from the Trenches brings experienced business and legal leaders together to discuss current topics at the intersection of tax, law, and business. Ledgers and Law is co-hosted by Kevin McCoy, shareholder at Carlton Fields, and Chris Rux, Assurance Partner and Healthcare & Life Sciences Industry Practice Leader at Cherry Bekaert.

Transcript:

Introduction: Welcome to Ledgers and Law: Lessons from the Trenches where we bring experienced business and legal leaders together to discuss current topics at the intersection of tax, law, and business. And now, please welcome your hosts, Kevin McCoy of Carlton Fields and Chris Rux of Cherry Bekaert.

Kevin McCoy: Hello. I'm Kevin McCoy, a shareholder and litigator at the law firm Carlton Fields.

Chris Rux: And I'm Chris Rux, an audit partner and the Healthcare and Life Science Industry Practice leader at the accounting advisory firm, Cherry Bekaert.

Kevin McCoy: Our topic today is HR and employment considerations before, during, and after a pandemic. Specifically, we're going to talk about the things that are on folks' mind, employers in particular, as their workforce is returning to the office and some of their workforce is staying at home or engaging in flexible schedules and what considerations need to go into the best practices for dealing with those two contingents.

Our guest is my law partner, Rae Vann. Rae is a shareholder in Carlton Fields' Labor and Employment Practice group. She is also vice president of Core Triangle, a wholly owned subsidiary of Carlton Fields that provides HR risk management consulting for private and public companies. Welcome, Rae.

Rae Vann: Thanks, Kevin. I'm happy to be here.

Chris Rux: Rae, thanks for joining us. I'm really excited to hear your perspective on a lot of these issues which I think are really pertinent to the employers out there. So just to kind of kick it off, I guess my first, you know, question would be, what is your perspective on the employer's obligations in terms of safety of employees in the event that, you know, one of the employees does actually test positive for COVID when we're all going back to work?

Rae Vann: Thanks, Chris, for that question. I will just say at the outset before answering that question that it's really important for employers to be mindful of the fact - employers and employees - to be mindful of the fact that the world's just not the same as it was when we left the workplace back in March. There obviously have been many things to have affected us, both at work and at home. And businesses really ought to take a step back to make sure that their company culture has not been negatively impacted or will be negatively impacted in terms of how they ramp back up. Think about culture and brand reputation in addition to the top of mind priority of keeping, as you said, employees as well as clients and customers safe.

So in terms of an employee who returns to work who is sick, an employer should have at this point put into place strict protocols with respect to health and safety. Right? And that ideally would have happened and been spearheaded by a multi-disciplinary team including occupational health folks, HR, compliance, legal, and so forth. So at this point, now that employees are coming back, the question is how those health and safety policies and procedures are being implemented.

One of the first things that an employer will have done, hopefully, as part of its health and safety procedures COVID-related is to put into place some time of check or scan or procedure to ensure that they're not letting into the workplace any workers who have symptoms or who report having possibly been exposed. That process, if it's applied properly, will immediately flag anybody who is sick or has symptoms and that person should be sent home. There is categorically unless and until he or she can return to the workplace with documentation that the individual is no longer infected.

Kevin McCoy: Rae, I have a follow-up on that. So, you talk about the policies and procedures. How important is it for employers, as they're developing these procedures that hopefully they already have in place, to be documenting what they are doing along the way and documenting the employee by it? You know, I hate to sound lawyerly, but the use the phrase "papering the file" in terms of the employees and acknowledging procedures and acknowledging that they'll abide by procedures, how does that play into this entire dynamic for employers to be protecting themselves?

Rae Vann: Yeah, that's very important, both from a risk mitigation perspective but also from an employee relations perspective, right, because employees are going to want to make sure that their employers are doing everything within their power and authority to keep everyone safe and protected. Right? So, part and parcel of that is making sure that employees understand what the policies are and agree to abide by those rules. Now, there is an opportunity going back to work post-

COVID for employers to take a look at their existing policies and make sure that they're revised appropriately to address the new health and safety protocols, the new safe distancing measures, and everything else that's been put into place with respect to COVID, but also have been revised and modified to address any new federal, state, or local requirements that have been imposed in response to COVID. That all adds up to a perfect opportunity to redistribute the policies and require employees to acknowledge that they have read and understand what's expected of them.

Kevin McCoy: So it sounds like there's two things that come out of that: there's the good in terms of a written policy from the employer perspective because they are actively thinking about this, but the policy could actually be a tool to communicate with employees and let employees know that there's been thoughtful decisions made about their safety as part of the buy-in process, if I'm hearing you right.

Rae Vann: That's right. That's right. And, you know, it's really important not to overestimate, or overstate I should say, the importance of communications. And these communications should take different forms. Right? In addition to the written policies, there ought to be a process in place whereby managers and supervisors have an opportunity to verbally reinforce the rules and the expectations both in formal and in informal meetings and also incorporate a discussion about these policies into dedicated or standing training programs. Right? These are new procedures, these are new expectations, new rights that employees and employers are all going to have to become accustomed to as they're returning to work. So it's really important to have a multifaceted communication strategy out the gate.

Chris Rux: So, right, as a follow-up to that specifically, I mean, we're in professional services, my firm is professional services. We have clients, we go onto client sites. What would you recommend in terms of protocols to communicate to our employees about the safety at our client sites if they do need to go there? Frankly, that's a concern of mine personally.

Rae Vann: Right, and, you know, that's a really interesting issue that we're going to have to see how it plays out. But, you know, a best practice is to make sure that there's some understanding before any employee approaches another worksite with that employer or that vendor or customer that they are following all the rules, you know. Federal, state, and local health and safety authorities have issued guidelines and, you know, have requirements in place with respect to what employers are supposed to do to maintain the health and safety of their workforces. So, it is incumbent upon employers to make sure that they are on the same page with respect to what is expected of them and then communicate that to the employees as well. If an employee shows up at a vendor or customer site and is not asked to undergo a screening, as an example, that might be a red flag to that employee that that employee should feel free to communicate that to his or her primary employer which then can follow up directly.

Kevin McCoy: It sounds like, Rae, the old adage of you're only as strong as your weakest link applies in that scenario where you can go through all of this process for your own shop and for your own four walls, but then the employer goes out into the world to do the business of the company and if others aren't adhering to that, it puts the organization at risk nonetheless.

Rae Vann: Absolutely. And that's part of the reason why there's been some talk among lawmakers and some business groups about, you know, whether there should be some type of immunity protection, right, protection of businesses against COVID infection claims. Right? There is no failsafe means of confirming whether or not an individual was exposed or became infected by someone in any particular workplace or at church or at a grocery store or a restaurant or whatever have you. So, under those circumstances, the idea of protecting employers from liability from liability for COVID exposure and claims that stem from that make sense. But, as I think we've said throughout this discussion, employers still are responsible for complying with those health and safety mandates and using reasonable care to protect workers, customers, vendors, or clients. But, I guess my point is that you're correct; there's nothing that can be done to 100% guarantee the health and safety of employees with respect to potential exposure to COVID. We just, we haven't gotten there yet as a society. We're not at a place where we're able to trace and track infection and potential exposure to that degree.

Chris Rux: And, Rae, gosh, I wish we were at that place. It would be a much happier America, I would think.

Kevin McCoy: Chris, you run an office where, you know, you have highly trained professionals who are out doing business for clients. I imagine you're still dealing with some folks who are working from home or looking at flexible schedules. What are some of the issues as an employer that are on your mind as folks are looking at these alternative arrangements in the current COVID, post-COVID time period?

Chris Rux: Yeah, I mean, I think one of the biggest things that comes to mind - let me backtrack. I apologize. The majority of our workforce is still working from home, and one of the biggest things that comes to mind to me about kind of the risk there is with information security. You know, we deal with a lot of very sensitive data including medical data, whether that relates to HIPPA or whatnot. And having employees at home not within the, you know, our four walls where we know that data is protected, it does give me a little bit of pause there. But, you know, at the end of the day I think, and Kevin you can disagree if you want, but I think that's going to be the - I hate the term - but the new normal is that there's going to be a significant amount of our workforce nationwide and especially in the professional services arena that's going to be working from home. So, that's a concern of mine is that data security.

Kevin McCoy: Is that something that employers need to be looking at when we talk about these policies not only for the return of workers but those that are going to be staying at home and building these policies out? Is that an element that employers should be looking at or, frankly, have already looked at in maybe the last five months since the world kind of went underground?

Rae Vann: No question about it, Kevin. And, Chris, you're absolutely right. This time and with seemingly the entire world transitioning at least in some point in time to a remote workforce, the risk of cyber-attacks and cyber incidents and cybercrime, frankly, have increased exponentially for sure. And, Kevin, to your point one of the reasons why it will have been important for businesses to have established a multi-disciplinary COVID response or action team is to have someone from IT involved in the process of building out or refining their IT cyber security policies and procedures to address these very things. You know, there are a number of best practices that employers will want to be thinking about in this space, again not only to minimize risk of inadvertent or unintentional disclosure of confidential information but also to minimize the risk of affirmative attacks and cybercrimes. Right? So, your IT folks will know exactly, or should know exactly what needs to happen here. You got to make sure that the system is up to date, that all of the necessary patches have been applied to the remote work system that you have in place, and that activity, suspicious and otherwise, is reasonable monitored and can be addressed immediately. Here again, so important to constantly communicate with your employees. Remind them regularly to be on the lookout for malware, fishing scams, all of the more sophisticated strategies that cyber criminals are pursuing, especially in this remote workforce or workplace to try to get at confidential information and company trade secrets through email or through social media and things like that.

Also important to make sure that your supervisors and managers also know what to look for. Right? So really it comes down, again, to planning and executing those plans and communicating those plans and strategies and expectations to your workforce. Does that make sense?

Kevin McCoy: Absolutely.

Chris Rux: It does.

Kevin McCoy: Absolutely. Rae, as somebody who does HR, ADA, EEO types of issues and consults on that on a daily basis, what do you see as the biggest sea change in terms of an HR or employment relations aspect of the pandemic? I mean, if you had to put your finger on one thing that you say this has changed forever, what would you say that is that employers need to be giving a close look at?

Rae Vann: That's a great question. So, aside from workplace flexibilities, which is a big one just in terms of the availability of work from home and flexible work schedules and things like that, I think there are some important EEO considerations for employers to be mindful of, especially with respect to individuals with disabilities. So the Americans with Disabilities Act is the chief federal law that

prohibits discrimination on the basis of disability but under the ADA in addition to prohibiting discrimination, employers also have an affirmative obligation to provide reasonable accommodations to individuals with disabilities who need them in order to perform their jobs effectively. So, this question of reasonable accommodations is an important one. There are going to be individuals with disabilities who may face significant added health risk as a result of potential exposure to COVID. And who may, as a result of that, seek workplace accommodations to minimize that risk. Right? Employers have to understand their obligations with respect to considering reasonable accommodations and then also understand what they are or aren't required to do in response to a request for an accommodation.

Aside from ADA issues and reasonable accommodations issues are just general discrimination issues. There were some cases and some issues that arose early on into the pandemic with respect to the origins of the pandemic and people attacking certain ethnic groups based on some perception that their ethnic group or their country of origin is or was to blame. So that's another thing that employers have to sort of think about and be mindful of as people come back into the workplace. Remember a lot of folks, many workplaces have been remote and employees have not had an opportunity to engage together physically. So, to the extent that there may be coarsened social discourse happening at work around these issues, it's important to be mindful of those and to prepare for them.

And then, you know, finally - and then this goes back to flexible work and things like that - to the extent that schools haven't reopened or have gone to, you know, all virtual learning for the upcoming school year or daycare centers aren't open and available, there is a possibility that those caregiving responsibilities will fall more harshly on certain groups, women for instance. And so employers need to be mindful of that they recognize in their policies that possibility and ensure that the application of those policies are not having a disproportionately negative impact on women or any one particular group from an EEO perspective.

Kevin McCoy: You know that's an excellent point, Rae, and one that I think maybe gets lost if you don't keep it front of mind because it's so easy to move forward and think everything's fine just because this is working for you. But your labor force, especially as you've explained it, you know, if there are states or counties or areas where your labor force can't get back in and that disproportionately impacts, for example, women in your office and now they're not having accommodations to facilitate their participation I could see how, not that it's deliberate necessarily but because there's just not consciousness around it that it can happen even when it's not deliberate. So I think that's an excellent point and one that everybody needs to keep front of mind. We're almost out of time today but I think we have time for one last question. Chris, is there anything else that is front of mind for you on these topics?

Chris Rux: Yeah. On these topics I think one thing that, Rae, I'd like to just get your thoughts briefly is it seems like there's a very common theme here: it's education and training of our people, if you will, to do the right thing and act in the right way and manner. Any thoughts there on what's a good protocol to - hopefully people have started to think through this - but really how to get this out, you know, kind of quickly and effectively?

Rae Vann: Yes, I think that as we said at the onset having written policies available and in place is helpful. Now whether every employee reads every page of the revised policy manual that you send out, you know, that's questionable, right? But highlighting specific policy statements or areas that folks need to focus on is important and communicating that in a personal way, right, via email, their manager or supervisor or even the business line president or an executive sending out emails saying, "Hey, this is important to us because you're important to us. This is not about us avoiding our responsibilities. Quite to the contrary. We are doing everything we can to make sure that everyone is safe." Right? It's engaging in that dialogue in a way that speaks to the policy but also breathes life into it so that your employees and workforce are invested. Right?

Kevin McCoy: Yep. That's great.

Chris Rux: Yep, No. I think you said it perfectly, that engagement. Engagement with the employees and the employers I think is imperative, in my opinion, especially in this time. Most of us have been working from home for a long time and as we come back together just making sure that that engagement together so that everyone understands that we are one team striving for a collective goal.

Rae Vann: Right. It's all designed to show, not just tell, employees how these measures are intended to work and why it's important culturally.

Kevin McCoy: Well, this has been fantastic. I tell you, every time we do one of these I learn more, that's the point, and things that you need to think about, things that you need to plan for and ways to go about it because there's a lot bundled up here, including things that you just need to stop and kind of put yourself in someone else's shoes as much as anything else. So, I have to say, Rae and Chris, I appreciate your time today. This has been educational for me. I hope you all enjoyed it. I very much appreciate you taking time out of your day to talk and thank you very much.

Chris Rux: Absolutely. Likewise. Enjoyed it.

Rae Vann: Thank you.

Kevin McCoy: All right. Well, thank you all for listening. You can get this content. It will be available on the Carlton Fields website and the Cherry Bekaert website. And we appreciate everybody's time

today and look forward to future podcasts and collaboration with Cherry Bekaert and Carlton Fields. Thanks, everybody.

Presented By



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