



July 24, 2020

Rice University Town Hall – “Returning to Work: Legal Implications for Businesses During a Pandemic”

Presented by:  **PHILLIPS KAISER**

This presentation is designed to provide information to you — not to create an attorney-client relationship that does not already exist. None of these materials is offered, nor should be construed, as legal advice. Accordingly, nothing about your receipt of this presentation or information (including if you provide us with confidential information) or any communication with Phillips Kaiser or any of its attorneys regarding the same will establish an attorney-client relationship with Phillips Kaiser, or any of its attorneys that would preclude Phillips Kaiser or any of its attorneys from representing others with interests adverse to you in this or any other matter.

Contents

1 Risks to Employers

2 Mitigating Risk

3 Managing Risk

Risks to Employers

Walmart Wrongful Death & Negligence Suit



Walmart

- ▶ One of the highest-profile COVID-19-related legal actions was filed by the estate of a former Chicago-area **Walmart** employee who contracted COVID-19 and later died.
 - The employee's estate alleges that he contracted the disease at work and seeks damages under theories of wrongful death and negligence.
 - The estate also alleges that Walmart was negligent in protecting its workforce from infection by failing to follow CDC guidance.

Class Action Lawsuits



Celebrity
Cruises



- ▶ A number of class action lawsuits have already been filed in connection with COVID-19. These include:
 - A class action lawsuit filed by crewmembers of 14 cruise ships against **Celebrity Cruises, Inc.**, alleging that the company negligently failed to protect them amid the COVID-19 outbreak.
 - Three class action lawsuits filed by the New York State Nurses Association against the **New York State Department of Health, Montefiore Medical Center** and **Westchester Medical Center**, respectively, for failing to adequately protect healthcare workers as they treated an influx of COVID-19 patients.
 - A shareholder class action alleging that **Norwegian Cruise Line Holdings Ltd.** and certain board members and executives made false statements about COVID-19 in public filings and press releases.

Whistleblower Retaliation



- ▶ Examples of single-plaintiff actions involving allegations of whistleblower retaliation by an employer include:
 - Two single plaintiff actions brought by former nursing home employees for whistleblower retaliation.
 - A single plaintiff action brought by the Broward Sheriff's Office's union president against the **Sheriff of Broward County, FL**, alleging that he was suspended for voicing concerns that the sheriff's office was not providing deputies with proper equipment to protect themselves from COVID-19.

State and Local Decision

- ▶ State governors and local officials will decide when businesses in individual states will be allowed to reopen
- ▶ As of May 7 every state other than Arkansas, Iowa, Nebraska, North Dakota, South Dakota, Utah and Wyoming has issued a form of stay-at-home order requiring non-essential businesses to cease in-person operations. The states that did not issue stay-at-home orders have nevertheless all imposed limited orders restricting specific types of non-essential businesses. All states will need to rescind or modify their respective orders to enable a full return to work

White House Framework – Guidance for When / How to Reopen

- ▶ On April 16, 2020, the White House issued “[Guidelines: Opening Up America Again](#)”
 - These include criteria for how state and local officials, employers and individuals should approach reopening segments of their communities
 - Recommend a three-phased approach to reopening
 - “Gating Criteria” for first phase includes:
 - ▶ 14-day downward trajectories in influenza-like illnesses and COVID-19 cases
 - ▶ Non-crisis care treatment of all patients
 - ▶ Having a “robust program” for testing “at-risk” healthcare workers
- ▶ Guidelines are not binding on states

Reopening Orders Status

- ▶ The scope of businesses permitted to reopen and the process for doing so vary.
- ▶ All states permitting business to reopen require compliance with protective guidelines, typically including:
 - Implementing enhanced sanitation practices, including regular hand washing and cleaning, as well as use of PPE for certain services
 - Requiring businesses to maintain social distancing of 6 feet whenever possible, and comply with an occupancy limit ranging from 10%-50% of maximum legal occupancy

- ▶ Federal regulatory regimes provide guidance to help employers identify risk levels in workplace settings and determine what control measures to implement
 - OSHA’s “[Guidance on Preparing Workplaces for COVID-19](#)” provides guidance regarding classifying worker exposure risk, steps to reduce workers’ risk of worker exposure and specific guidance for different worker exposure risk levels. OSHA has also provided industry-specific [guidance](#) and [alerts](#).
 - CDC has released numerous [guidance documents](#) related to returning to work, self-isolation and reducing the risk of exposure.
 - EEOC has released [guidance documents](#) that address employers’ responsibilities under the Americans with Disabilities Act (ADA), including with respect to employee screening for COVID-19 symptoms such as fever

How you implement the state orders, federal guidance, and other workplace strategies depends on the nature of each workplace

	STATE ORDERS	FEDERAL GUIDANCE
Modifying the Physical Workplace	▶ States have required an increase in physical space between workers and customers (e.g., maintaining at least 6 feet between people), reduction of seating in waiting areas and other areas within establishments	▶ For certain workplaces, OSHA recommends physical modifications such as installing physical barriers such as clear plastic sneeze guards, installing drive-through windows for customer service, or high efficiency air filters
Infection Control Measures	▶ Common elements include routine cleaning and disinfecting surfaces, requiring hand washing, providing sanitation products and staying at home if sick	▶ OSHA and CDC have similar recommendations as state orders
Social Distancing	▶ Generally require maintaining social distancing of 6 feet between customers, where possible; reduce occupancy/capacity limits ranging from 10% to 50% of maximum legal occupancy; and limit access to common areas	▶ White House, OSHA and CDC recommend the continued enforcement of social distancing, reconfiguration of workplaces, and limitations on common area access
Remote Work	▶ Generally provide that employers consider establishing remote work options where possible	▶ White House, OSHA and CDC recommend that employers should implement remote work options where appropriate
PPE	▶ Some states require that all employees wear face coverings, while others have generally limited the requirement to workers in specific industries	▶ OSHA requires employers to conduct a hazard assessment of the workplace, and, where necessary, provide workers with PPE selected based on the hazard to the worker as a result of the worker’s specific job duties
Screening and Testing	▶ Many return to work orders require that employers screen their employees for signs of illness	▶ EEOC guidance confirms that employers may screen their workforces for COVID-19 symptoms

Overview

- ▶ Workers' compensation insurance is state-specific and principally covers personal injuries sustained while at work.
 - Generally speaking, employees infected with COVID-19 will likely face difficulty in establishing that infection occurred on the job unless the infection was “characteristic of employment” and that there was no alternative means of exposure.
 - Healthcare workers and first responders may be more successful in establishing workers' compensation claim because they might more effectively demonstrate a nexus between infection and exposure (i.e. infection was characteristic of employment).
 - States have begun to amend workers' compensation statutes to specifically list COVID-19 transmission as a covered injury for certain high-risk medical jobs.
 - Some states have also enacted policies establishing a presumption that essential workers infected with COVID-19 contracted the virus on the job, thereby entitling them to workers' compensation. These include: AK, AR, CA, FL (with respect to a subset of state employees), KY (with respect to all essential workers, including, e.g., grocery workers), MI, MN, MO, ND, and WI.
 - NB: If an employee brings a successful workers' compensation claim, the employee's potential recovery would be limited to any such claim due to exclusivity provisions (and the employee would therefore be barred from bringing additional civil claims for the injury against the employer in court).



Overview

- ▶ For “essential businesses” that have continued to operate and for businesses that are beginning to resume operations, concerns about liability and exposure have taken center stage.
- ▶ The two main threats to employers are **private litigation** and **governmental intervention/investigation**.
 - Employees who become infected may sue an employer under the theory that the employer was liable for causing the infection, failed to provide a safe workplace, or placed the employee in harm’s way.
 - Employees also may allege “whistleblower” claims for retaliation after complaining about an employer’s failure to maintain a safe workplace or adhere to applicable governmental mandates.
 - Governmental agencies such as OSHA also could investigate and levy fines and penalties against companies for failure to follow published guidelines and regulations.
 - Plaintiffs have already filed numerous lawsuits and government agencies are beginning to investigate claims of employer wrongdoing.

Litigation Actions

- ▶ Employees infected with COVID-19 may seek to prove that the infection occurred at the workplace and the employer was responsible. These claims will likely center on theories of negligence or gross negligence.
 - On a negligence or gross negligence theory, employees could claim the employer:
 - Failed to properly maintain a safe workplace;
 - Failed to take proactive steps when it knew of workplace risks or infections;
 - Mised or misinformed its workforce; or
 - Engaged in other actions or inactions that rendered employees susceptible to COVID-19.
- ▶ “Whistleblower” retaliation claims are also possible if employees are disciplined or discharged after raising concerns about insufficient protective measures.

Government Investigations

- ▶ Businesses that fail to adhere to appropriate safety measures could be subject to fines and penalties from OSHA and/or its state-level equivalents.
- ▶ OSHA occasionally has sought to pierce the corporate veil to impose individual liability on owners, directors, officers, and managers of corporate employers in egregious situations.



Defenses

- ▶ The primary defenses to negligence-based claims is to show that a plaintiff or class of plaintiffs cannot directly establish workplace COVID-19 transmission or that, if the worker contracted the disease at work, the employer took reasonable steps to protect the health and safety of the employee. This defense is particularly relevant in light of the declared pandemic, which means that transmission is widespread in the community.
 - The key is to establish the lack of a sufficient nexus between infection and any specific employer conduct.
- ▶ In response to a whistleblower retaliation claim, an employer may consider raising the defense that any adverse employment action was unrelated to the alleged whistleblower complaint. Alternatively, an employer may have been unaware of the alleged whistleblower complaint.

Risk Mitigation Strategies

- ▶ Employers should ensure they act reasonably and take steps to ensure a safe and sanitary workplace in accordance with applicable best practices and governmental regulations and guidance.
- ▶ Contemporaneous documentation of these actions is critical to aid in the defense of any future actions or investigations.
- ▶ Employers should also take proactive steps to mitigate risk of COVID-19 transmission and to emphasize employee safety, including developing, documenting, and communicating policies and communications strategies that align with best practices.
- ▶ Employers should consider proactive mitigation measures such as seeking class action waivers, ensuring sufficient liability insurance to protect directors and officers, and obtaining releases from any terminated employees in exchange for severance payments.
- ▶ Careful consideration, including consulting with outside counsel, should be given before taking adverse action against an employee or group of employees who have complained about deficiencies in safety measures or compliance with agency guidance.

Liability Shield Legislation

- ▶ Federal and state officials have been pushing for expansive liability shield legislation in recent weeks.
- ▶ While no details have been released, the proposed legislation would potentially prohibit employees or third parties from suing companies based on alleged workplace COVID-19 transmission. Carve outs for things like deliberate intent to injure or gross negligence are likely.
- ▶ If passed, this legislation could provide employers with significant comfort that they would avoid private litigation so long as they took active steps to ensure worker safety. At this point, however, employers should operate under the assumption that such protections are not forthcoming.

Mitigating Risk

Modifying the Workplace; Screening and Testing

Modifying the Physical Workplace

- ▶ Employers should refer to CDC and OSHA guidance, as well as state and local orders, to identify potential reconfigurations of the work environment that the employer may consider. These may include:
 - ▶ Redesigning or retooling the workspace to provide increased space between employees (or between employees and customers) to reduce the risk of virus transmission (e.g., drive-through windows for customer service, remote or curbside delivery, and use of multiple entrances to reduce traffic)
 - ▶ Installing physical barriers between employees and customers (e.g., clear plastic sneeze guards)
 - ▶ Implementing motion-control/touchless doors and other devices (e.g., contactless paper towel dispensers in restrooms) to reduce transmission
 - ▶ Examining breakrooms and other spaces where employees congregate to determine if retooling, relocating or closure is warranted
 - ▶ Installing designated and easily accessible hand washing/sanitization stations for workers, customers and work-site visitors
 - ▶ Evaluating modifications to workplace ventilation and filtration systems to reduce the spread of virus particles
 - ▶ Providing visual cues (e.g., markings on floors, walls and interfaces) to indicate safe distances to workers and/or customers
 - ▶ Designating either a permanent barrier (e.g., wall or designated room) or temporary barrier (e.g., plastic sheeting) for use in isolating anyone suspected of having COVID-19
-

Screening and Testing

- ▶ No single screening criteria can accurately identify COVID-19 infection, so employers should consider creating a screening program that addresses all symptoms of COVID-19 (e.g., fever, shortness of breath, new loss of taste or smell, muscle pain, chills, etc.) as well as risk factors (e.g., recent exposure to others with COVID-19)
 - ▶ Screening programs can be implemented in a number of ways (e.g., employees attest they don't have symptoms or risk factors of COVID-19, third-party mobile screening, etc.)
 - ▶ Implement a safe and consistent procedure that is applied consistently across the workforce (and consider application to customers/visitors)
 - ▶ Ensure that any differences in screening or testing across groups of employees (and others trying to enter the workplace) are supported by documented business justifications
 - ▶ If conducting temperature screening, consider implementing a policy that sets a threshold over which employees and visitors will not be permitted to enter the workplace (the CDC considers 100.4 degrees Fahrenheit to indicate a fever)
-

Infection Control Measures; Social Distancing

Infection Control Measures

- ▶ Discourage workers from coming to work if they are sick or have any symptoms of illness (e.g., fever, cough or shortness of breath)
 - ▶ Develop and maintain regular housekeeping practices, such as routine scheduled cleaning and disinfecting of surfaces, equipment and other high-contact points of the work environment
 - ▶ Promote frequent and thorough hand washing and respiratory etiquette (e.g., covering coughs, sneezing into elbows) through use of policies and procedures or signage around the worksite
 - ▶ Discourage workers from using another worker's equipment (e.g., phone, desk, office or other work tools) when possible
 - ▶ Inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure
 - ▶ Distribute contact information to all employees so that employees can notify the appropriate workplace administrator if employees believe they have been exposed to, or have symptoms of, COVID-19
 - ▶ Consider minimizing face-to-face contact between those known to be at higher risk for serious illness
-

Social Distancing

- ▶ Consider establishing flexible work hours (e.g., staggered shifts) and other methods to increase physical distance among workers and others at the worksite
 - ▶ Encourage workers to maintain at least 6 feet of separation from other workers, where possible
 - ▶ Consider limiting the number of people who enter the worksite (e.g., prohibiting non-essential visitors, limiting workplace total occupancy at one time)
 - ▶ Consider minimizing the number of employees present in a given location by pooling and rotating tasks (e.g., some employees can work remotely while others take on-site responsibility), limiting the number of attendees at in-person meetings, remodeling workflows to emphasize virtual meetings and generally avoiding large gatherings
 - ▶ Consider limiting or eliminating non-essential travel, work-sponsored recreational activities, workshops and training sessions
 - ▶ Consider encouraging workers to avoid public transportation, or otherwise try to avoid rush-hour crowding on public transportation where possible
-

Remote Work; PPE

- Remote Work**
- ▶ Consider establishing flexible worksites and hours (e.g., telecommuting)
 - ▶ Consider utilizing a Virtual Private Network (VPN) or other secure method of encrypting transmitted data and ensure that employees exclusively use such a connection when working remotely
 - ▶ Consider implementing a multi-factor authentication process when providing access to any areas of a network that contain especially sensitive information
 - ▶ Consider confirming with insurance providers that telework arrangements would not create exclusions under applicable insurance policies
 - ▶ To the extent remote work is implemented, consider policies and procedures to address common work related items (e.g., work hours, call and email responsiveness, etc.)
-

- PPE**
- ▶ Consult state and local return to work orders that may have detailed PPE requirements which could vary depending on the nature of a particular business
 - ▶ Conduct a hazard assessment and select the PPE required based on the hazard to the worker and what would be needed to keep workers safe performing their specific jobs (e.g., gloves, goggles, face shields, face masks and respiratory protection)
 - ▶ Obtain adequate supplies of PPE and train workers in their use (e.g., when to use PPE, what PPE is necessary, how to properly put on, use, and take off PPE, how to properly dispose of or disinfect, inspect for damage, and maintain PPE, and the limitations of PPE)
 - ▶ Ensure that PPE, in accordance with Federal and state requirements, is consistently and properly worn when required, regularly inspected, maintained and replaced as necessary, properly removed, cleaned, stored and disposed of as applicable to avoid contamination of self, others or the environment
 - ▶ Review and determine the applicability of potentially relevant OSHA and/or state health and safety agency standards and regulations, including those with respect to PPE, respiratory protection, eye and face protection, hand protection and exposure to potentially infectious materials
-

Developing, Documenting and Communicating Policies

Policies and Procedures Preparation

- ▶ Inform and encourage employees to self-monitor for signs and symptoms of COVID-19
- ▶ Implement procedures for employees to report when they are sick or experiencing symptoms of COVID-19 and for isolating people suspected of having COVID-19
- ▶ Review employment policies and practices to ensure compliance with applicable law and public health guidance
- ▶ Consider feasibility of existing practices in the post-COVID-19 workplace (e.g., flexible policies that permit employees to stay home to care for sick family members)
- ▶ Make copies of policies and procedures easily accessible to the workforce

Employee Engagement

- ▶ Communicate the existence of new/revised policies and procedures to the workforce
- ▶ Provide training, education and informational material about business-essential job functions and worker health and safety, including proper hygiene practices and the use of workplace controls (including, where necessary, PPE)
- ▶ Provide prior notice of any screening program to the workforce and others visiting the worksite, and explain that screening is one of a number of measures aimed at preventing exposure
- ▶ Communicate to workers that those with symptoms or other risk factors of COVID-19 will be asked to return or remain at home

Review Benefit Plans

- ▶ Review benefit plan terms to confirm proper treatment of returning workers and those that do not return
 - ▶ Review 401(k) and pension plan terms and consult with counsel as necessary to determine whether any service or break-in-service rules could impact returning employees' eligibility to participate or vesting or benefit accrual
 - ▶ For health benefit plans, determine whether an employee will be considered a "continuing employee" or a "rehired employee" for purposes of coverage under the plan's terms and the Affordable Care Act
 - ▶ Consider working with insurers to determine whether there can be any waiver of applicable waiting periods, actively-at-work requirements, or evidence of insurability requirements for welfare benefit plans
 - ▶ Employers with multiemployer pension plan obligations who furloughed or terminated employees should consult with counsel regarding any potential withdrawal liability implications
-

Managing Risk

What happens if...Employee Tests Positive; Others Exposed

Employee Tests Positive

- ▶ **If not at work** (or if the employee tests positive away from work), the employee who has tested positive or is presumed positive should be excluded from entering the workplace until cleared per one of the below strategies for returning to work
- ▶ **If symptoms are experienced at work**, ask the employee to notify her supervisor and self-isolate in a location away from others (e.g., isolation room) until the employee can be removed from the worksite
- ▶ **Strategies for Returning to Work** (CDC Guidance for Non-Healthcare Facilities & Non-Critical Workers)

Symptomatic Individuals	Asymptomatic Individuals
<ul style="list-style-type: none"> - Symptom-based strategy: <ul style="list-style-type: none"> ▶ At least 3 days (72 hours) have passed since recovery, defined as the resolution of fever without the use of fever-reducing medications, and there is an improvement in respiratory symptoms (e.g., cough, shortness of breath) <u>and</u> ▶ At least 10 days have passed since symptoms first appeared - Test-based strategy: <ul style="list-style-type: none"> ▶ Resolution of fever without use of fever-reducing medications <u>and</u> ▶ Improvement in respiratory symptoms (e.g., cough, shortness of breath) <u>and</u> ▶ Negative results from at least 2 consecutive FDA-authorized COVID-19 tests collected ≥ 24 hours apart (total of 2 negative specimens) 	<ul style="list-style-type: none"> - Time-based Strategy <ul style="list-style-type: none"> ▶ 10 days have passed since the date of the first positive COVID-19 diagnostic test assuming the relevant employee has remained asymptomatic - Test-based Strategy <ul style="list-style-type: none"> ▶ Negative results from an FDA authorized COVID-19 test from at least two consecutive respiratory specimens collected ≥ 24 hours apart (total of 2 negative specimens)

Potential Exposure Cases

- ▶ **Considerations After Confirming a Positive Employee**
 - Employers should consider asking infected employees (and visitors) to identify all individuals with whom they had “close contact” (i.e., generally within 6 feet) for a “prolonged period of time” at the workplace, including during the 48-hour period before onset of symptoms
 - Employers should consider sending home all employees who worked closely with infected employee to ensure infection does not spread

Reporting and Recording

- ▶ Employers should carefully evaluate any reporting or recording obligations under OSHA and other relevant state and local regulations
- ▶ To the extent possible, and in compliance with the ADA and potentially other data privacy regulations, do not disclose the names of individuals presumed or confirmed to be positive for COVID-19 to other employees. Results should be shared purely on a need-to-know basis and only when such disclosure is necessary to protect against the threat of exposure to coronavirus or as otherwise required by law. The ADA requires that any documented results be recorded in a separate record, outside of the employee’s personnel file

What happens if...Employee Refuses to Return to Work; Requests Working Remotely

Employees generally cannot refuse to come to work because of garden-variety fear and anxiety

Employee Refuses to Return to Work

- ▶ Consider OSHA and state agency guidance as well as state labor law with respect to employees who refuse to return to work because of safety concerns
 - Employers **cannot retaliate** against employees who express concerns about workplace safety during the COVID-19 pandemic
 - However, while employees have a legal right to refuse dangerous work, if the employee's concerns are not reasonable (and absent the need to provide a reasonable accommodation), the employer may insist that the employee report to work and may take appropriate disciplinary action, including termination of employment, if the employee fails to report to work*
- ▶ If employees express common concerns as a group, or one employee speaks on behalf of a group, it may be considered protected activity under the National Labor Relations Act ("NLRA") (applies to unionized and non-unionized employees)
- ▶ If an employee is collecting unemployment insurance and refuses an offer of reemployment, the employer may be required to notify the unemployment insurance agency
 - Mere fear to return to work without a credible underlying condition or additional reason that makes a worker objectively more vulnerable to the spread of COVID-19 is not sufficient reason to stay home from work and collect unemployment insurance
 - Unemployment insurance enforcement may not be immediate, and current benefits are generous, so consider whether supplemental incentives may boost acceptance / attendance rates

Employee Asks to Continue Working Remotely

- ▶ Determine whether employee is requesting a reasonable accommodation or merely expressing a preference
- ▶ If employee is requesting a reasonable accommodation and is a qualified individual with a disability (as defined under applicable federal, state or local laws) or a "vulnerable individual" under the "Opening Up America Again" guidelines:
 - Consider whether requested accommodation represents an undue hardship
 - ▶ Undue hardship means "significant difficulty or expense" to the employer
 - If the employee's request to continue working remotely is not rooted in reasonable safety concerns, and absent the need to provide a reasonable accommodation, the employer may insist that the employee report to work in person (be sure to consider state orders and federal guidance related to working remotely)
 - If an employee's concerns are not reasonable (and absent the need to provide a reasonable accommodation), employers may deny working remotely and may take appropriate disciplinary action, including termination of employment, if the employee fails to report to work*
- ▶ **Employees with disabilities that put them at a high risk for complications of COVID-19 may request telework as a reasonable accommodation**
 - Employees with preexisting mental illness that has been exacerbated by the pandemic may also be entitled to a reasonable accommodation (absent undue hardship)



Phillips Kaiser PLLC
9800 Richmond Ave #595
Houston, Texas 77042
www.phillipskaiser.com

Gregory L. Phillips
713-955-2741
gphillips@phillipskaiser.com