

Idaho State Bar
Commercial Law and Bankruptcy Section CLE
June 1, 2020

Returning to Work after a Pandemic: Employment Law Considerations

1. State and/or Municipality Orders
 - a. Constantly changing and do not always align with Federal guidance
2. Getting Back into Compliance
 - a. I-9
 - b. Drug Screening
 - c. Background Checks
 - d. Numerous state/federal waivers
 - e. Others?
3. Adapting to the “New Normal”
 - a. Face Coverings
 - i. “CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain . . . especially in areas of significant community-based transmission”
 - ii. What is your organization going to require?
 - iii. Use caution with terminology
 1. Face Mask
 2. Face Covering
 3. PPE
 - iv. Americans with Disabilities Act and Accommodations
 1. Deaf employees
 2. Claustrophobia, etc.
 - v. Religious Accommodations
 1. Traditional face coverings
 2. Beards for religious purposes
 - vi. Policy Considerations
 - vii. Financial Aspect
 1. Employee v. Employer
 - a. Purchase face covering
 - b. Launder face covering

- b. Testing before Return to Work
 - i. Equal Employment Opportunity Commission has expressly said employers are permitted to test employees for COVID-19 before allowing them into the workplace.
 - 1. COVID-19 constitutes “direct threat” to other employees under ADA, which requires that mandatory medical tests be “job related and consistent with business necessity”
 - ii. Accurate, Reliable and Consistent
- c. Employee Temperature Checks
 - i. Equal Employment Opportunity Commission allows it (same rationale as testing before return to work)
 - ii. Questions about validity of information (not all COVID-19 patients have a fever)
 - iii. Considerations
 - 1. What to do if somebody has a fever?
 - a. Paid time away from work
 - b. Unpaid time away from work
 - 2. Who should administer the testing?
 - 3. Confidentiality/Privacy Implications?
 - iv. Is waiting in line for temperature check before a shift compensable time?
- d. Other thoughts/considerations (not necessarily legal considerations)
 - i. Phased return to work
 - ii. Staggered shift times
 - iii. Common spaces in the office
 - iv. Directional hallways
 - v. Break/meal areas
 - vi. Elevators
 - vii. Cleaning practices
 - viii. Conference room etiquette
 - ix. Prepared for a second “surge”
 - x. Work from home a new normal?