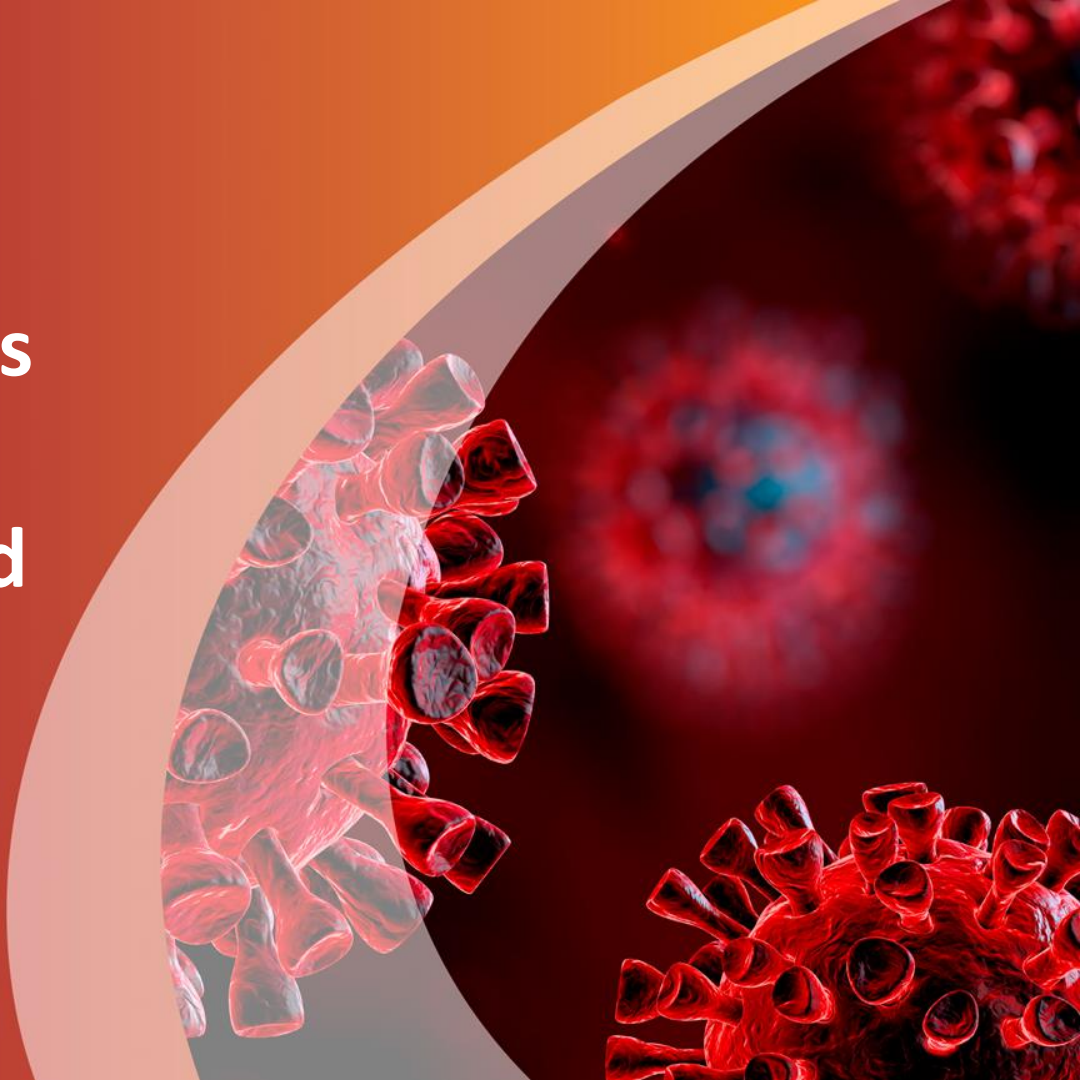




What If Your Business Is Essential, But Your Employees Are Afraid to Report to Work?

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Framing The Discussion

- Businesses fought hard to be deemed “essential” and allowed to continue to operate during pandemic
- Growing trend of employees refusing to work during COVID-19 pandemic
- Legal context and risks associated with disciplining employees for refusal to work
- Scope of employer’s obligation to provide a safe work environment
- Enforcement and available remedies
- Creative solutions
- Risk mitigation strategies

Why Employees May Be Refusing to Work

- Employee/family members have COVID-19 and/or COVID-19 related childcare needs
- General fear of contracting COVID-19 in the workplace
- Perception of unsanitary work environment
- Failure to satisfy specific employee requests

Risks Associated With Employee Discipline

- Family & Medical Leave Act (FMLA)
- Families First Coronavirus Response Act (FFCRA)
- National Labor Relations Act (NLRA)
- Americans with Disabilities Act (ADA)
- State law wrongful discharge claims
- Occupational Safety & Health Act (OSHA)/state equivalents

FMLA/FFCRA, 29 U.S.C. § 2601 *et seq.*

- Employees have a statutory right to leave
 - For their own serious health condition (which would include COVID-19)
 - To care for a family member with a serious health condition
 - Employee is subject to federal, state, local quarantine order
 - Employee has been asked to self-quarantine by health care provider
 - For new childcare needs tied to COVID-19
- Unlawful to retaliate against employees seeking or taking such leave
- Available remedies include back pay, compensatory and punitive damages, and attorneys' fees

NLRA, 29 U.S.C. § 151 *et seq.*

- Section 7 of the [National Labor Relations Act](#), 29 U.S.C. § 157
- Employees have the right “to bargain collectively through representatives of their own choosing, and to engage in **other concerted activities** for the purpose of collective bargaining **or other mutual aid or protection . . .**”
- Protection extends to union and **non-union** employees
- Includes refusal to work based on perceived unsafe working conditions
- Violation of Section 8(a)(1) to terminate or take adverse action against employees for engaging in protected concerted activity
- Remedies include reinstatement and back pay

ADA, 29 U.S.C. § 12101 *et seq.*

- Requires reasonable accommodations for employees with a disability
- Employees with respiratory or immunodeficiency disorders may be considered disabled
- Temporary leave can be a reasonable accommodation
- Unlawful to deny reasonable accommodation or discriminate based on disability
- Remedies include back pay, compensatory and punitive damages and attorneys' fees

State Wrongful Discharge Claims

- An exception to “at-will” employment under state law
- Elements vary under state law
 - Most require that public policy be reflected in state statute that does not provide its own remedy for a violation
 - Some require that the violation relates to a statutory right provided by statute
 - Some require that employer’s conduct is actually a violation of law
 - Others only require that an employee have a good faith belief that the employer’s conduct is unlawful
- Available damages include back pay and compensatory and punitive damages

Is the Workplace Safe?

OSHA's General Duty Clause – Prevailing Standard

- No standard specifically addressed to transmissible diseases
- General Duty Clause, 29 U.S.C. § 654(a)(1), fills the void
- Did the employer fail to keep the workplace free of a hazard
 - to which employees were exposed;
 - which was recognized by the employer;
 - that caused or was likely to cause death or serious physical harm; and
 - for which a feasible and useful method to correct the hazard existed
- California Caveat: Aerosol Transmissible Diseases Standard
- Also: State/local orders impose requirements (tracking CDC guidance, etc.)

Personal Protective Equipment (PPE)

Is the Employer Obligated To Provide PPE?

- Based on a hazard assessment of a given job or occupation
- Standards found at 29 C.F.R. Part 1910, subpart I, including:
 - General Requirements (§ 1910.132)
 - Eye and face protection (§ 1910.133)
 - Respiratory protection (§ 1910.134)
 - Not to be confused with face masks
 - Written program required where use of respirators is deemed necessary
 - Certain requirements apply to *voluntary* use

Prohibition on Retaliation

- OSH Act § 11(c), 29 U.S.C. § 660(c), prohibits retaliation against an employee for engaging in protected activity. For example:
 - Raising concerns internally about workplace safety conditions
 - Reporting safety concerns to OSHA
 - Reporting an occupational illness to OSHA
 - In some limited circumstances, refusing to work (based on a good-faith belief that an imminent danger exists)
- Enforcement:
 - Upon complaint, OSHA will seek to resolve, with the right to file a complaint on employee's behalf in federal district court

Guidelines Everywhere

CDC/WHO

- People are infectious before they are symptomatic
 - In some cases people are infectious and never become symptomatic
- CDC is reevaluating PPE guidelines
- N95 or surgical masks are not necessary for employees (should be reserved for healthcare workers)
 - Masks for workers that will cover their nose and mouths to prevent “healthy” people infecting others through droplets
- Implement procedures to handle symptomatic employees and protect other employees at high risk while preserving personal information
- Open windows to increase ventilation
 - [CDC Resources for Businesses & Employers](#)
 - [WHO: Guidance for schools, workplaces & institutions](#)

Thinking Outside the Box

- What if there is no convenient access to soap and water?
 - Hand sanitizer with at least 60% alcohol
 - Soapy water in a bucket can suffice
 - DO NOT use a bleach solution on hands (particularly a homemade one)
- Open windows to increase ventilation
- Social distancing by time
 - Use timers at work stations to allow droplets to dissipate
- SARS-CoV-2 is more stable on plastic and stainless steel than on copper and cardboard ¹
 - Consider how best to use sterilizing agents if supplies are limited

¹

N van Doremalen, *et al.* Aerosol and surface stability of HCoV-19 (SARS-CoV-2) compared to SARS-CoV-1. *The New England Journal of Medicine*. DOI: 10.1056/NEJMc2004973 (2020).

How to Mitigate Risk?

- Ensure on-going compliance with applicable health and safety standards
- Communicate with and educate employees about implemented safety measures
- Document compliance with CDC and related guidance
- Understand and promptly address individual employee concerns
- Accommodate employees with disabilities where appropriate
- Consider leave, “hazard” pay, and other operationally feasible options

Questions

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