COVID-19 and the Workplace: Top Lessons Learned

By Cindy M. Cieslak

SINCE MARCH 2020, many of our lives, both personally and professionally have been turned upside down due to the COVID-19 pandemic. In the summer of 2021, I wrote about the unique challenges I faced leading the Young Lawyers Section as chair during an entire bar year engulfed by the pandemic, and I also spoke at the virtual Connecticut Legal Conference with other employment law attorneys in a seminar entitled, "COVID-19 and The Workplace: How Far We Have Come, Where We Are, and Where We Are Heading." We have learned several lessons as it relates to the workplace while navigating the pandemic the past couple of years. Thus, as we head into another winter of the pandemic, it is prudent to revisit some of the top lessons learned.

1. The COVID-19 Pandemic Is Not Over!

The COVID-19 pandemic was (and continues to be) a quagmire in the field of labor and employment law. The variety of issues confronted, particularly in the litigation context, is expansive and constantly changing.

Exposure to liability is everywhere. An employer's decisions, particularly around issues of leaves of absence or termination, carry heightened weight in the COVID-19 and post-COVID-19 employment landscape. Although most employers have embraced change and made significant improvements to their policies and practices over the past several years, workplaces must continue to evolve. It is important for attorneys and employers to maintain flexibility, stay up-to-date with various guidance and mandates, and amend policies as needed.

2. Implementation of Best Practices for the Workplace Are Good for Both Employers and Employees

Certain considerations should be made for the protection and well-being of an employer's most important asset: its employees.

Even with uncertainty around COVID-19, other viruses, and any other emergencies, pre-pandemic standards remain valuable: good practices around reasonable accommodations and the interactive process help to avoid pitfalls. Furthermore, employers should set out clear expectations regarding employee conduct and performance, and further, employers should uniformly enforce their policies. Deviation from acceptable standards, non-compli-

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ance with federal, state, and local laws, as well as guidance from the Equal Employment Opportunity Commission ("EEOC"), and inconsistent applications of COVID-19 workplace policies are a recipe for disaster both from a legal standpoint as well as a workforce morale standpoint. Documentation of all decisions and matters arising in the workplace is a good practice.

First, employers should emphasize their commitment to safety and slowing the spread of COVID-19. They should continue to clean, disinfect, and follow the Center for Disease Control's (CDC) guidelines as it relates to health and hygiene. Additional cleaning services may be necessary depending on the type of workplace. Employers should continue to encourage employees who feel unwell to remain home. Where possible, employers may be able to lessen the burden of an employee being out of work if they offer some flexibility to employees to be able to work from home. In the event that an employee tests positive for COVID-19, employees should inform their employers. If an employer receives notice of a positive test, employees should follow CDC guidelines to take precautions, including isolation and masking, so as not to spread the virus. In areas of high transmission, employers should continue to encourage appropriate social distancing and may consider the use of masks and barriers, or teleconferencing software, to limit close contact among employees and members of the public.

Second, in conjunction with emphasizing commitment to safety and worker health, employers should review personnel policies to determine if any updates or modifications are necessary. In some areas, a policy may need to be amended due to a legal mandate, whereas employers may have some latitude and discretion with respect to other policies. Indeed, during the height of the pandemic, many employers discovered that their sick leave policies were incompatible with a pandemic, and thus, changes to these policies were necessary (or may still be necessary for some employers) to ensure that sick leave policies are flexible (where possible), non-punitive, and consistent with law, as well as public health guidance. Moreover, employers will want to ensure that employees are aware of and understand such sick leave policies, including any eligibility requirements or conditions.

Third, employers and employees should remain open to dialogues about various issues, especially those that may involve a discussion of potential reasonable accommodations for sincerely held religious beliefs or disability. This may include, *inter alia*, vaccine requirements and job functions.

For example, with respect to vaccines, the EEOC has suggested that employers can mandate that employees receive vaccines; however, an employer does not have to require employees to be vaccinated. Indeed, not all industries or employers may deem it necessary to require vaccination of their employees. Further, other considerations come into play when evaluating a vaccination policy. Certain states have adopted laws broadening the scope of exemptions or otherwise limiting an employer's ability to require vaccination of its workforce. Additionally, if the workforce is unionized, an employer must negotiate over its mandatory vaccination policy.

To the extent employers require employees to receive a COVID-19 vaccine, paid time off should be provided to employees in order to obtain the vaccination and/or recover from its side effects. Moreover, where an employee requests a reasonable accommodation of a qualified disability under the Americans with Disabilities Act (ADA) and similar state laws, or sincerely held religious belief, an employer must engage in the interactive process to determine whether a reasonable accommodation can be provided. Accommodations may include, but are not limited to: relocation of the employee's work area, providing personal protective equipment, continuing to work remotely, requiring regular testing, or transfer to another position and/or location.

However, employers do not have to accommodate employees when it would cause an undue hardship (*i.e.*, significant difficulty or expense) or direct threat; but these are not easy standards to satisfy. To evaluate whether an employee's refusal to vaccinate may create a direct threat, employers should look at: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm and whether a reasonable accommodation can be provided to reduce the risk. Specifically, medical documentation will play an important role in evaluating potential reasonable accommodations; however, medical inquiries should be job-related and consistent with business necessity. As it relates to a vaccination mandate or policy, employers should keep in mind that prescreening questions are medical inquiries when the vaccine is administered by the employer or contracted by the employer, except where voluntary. Further, if an employee refuses to answer the questions, and thus does not receive a vaccine, retaliation against the employee is generally prohibited. Again, this is going to be an area where documentation is key to the decision-making process and preservation of the reasons for the outcome.

Furthermore, if an employer asks why an employee did not get vaccinated, that inquiry may elicit health information, which in turn, would constitute a medical inquiry, and it also may lead to discussion of a medical condition which may or may not require a reasonable accommodation. Accordingly, it is important for employers to always treat medical information, including proof of vaccination, as confidential information and maintain such documentation separate from the employee's personnel file. Such information should not be released, except on a "need-to-know" basis to appropriate supervisors and higher-level employees.

As it relates to vaccines, it is generally a best practice for employers to strongly encourage employees to get vaccinated, unless the industry requires otherwise. Employers may offer incentives to get vaccinated; however, employers should proceed with caution. Larger incentives might cause employees to feel pressured to disclose private medical information. Employers should con-

sider flexible time off policies for employees who choose to get vaccinated.

Employees may also have some hesitation with returning to the physical workplace, and the reasons therefore must be explored in order to determine an appropriate result, depending on the jurisdiction and circumstances: is it a generalized fear or some other specific reason that might require the employer to engage in the interactive process or otherwise accommodate the employee, such as disability, pregnancy, or some family-related reason? Employers may consider designating a point person or ombudsman, who has received proper training, to whom employees may raise concerns regarding health and safety, including requests for reasonable accommodations. Moreover, employers should ensure that any training such point-person or ombudsman receives is updated regularly as the circumstances of the pandemic or other world events evolve.

If remote work was permitted during times of high transmission rates, the temporary telework/remote work experience could be relevant to consideration of whether a work-from-home accommodation request is reasonable. Indeed, we may see a shift away from court rulings that previously held that attendance at work was an essential function of most positions. The period of providing telework/remote work because of the COVID-19 pandemic could serve as a trial period that showed whether or not an employee with a disability could satisfactorily perform all essential functions while working remotely. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process. If the remote work did not prove conducive, the employer should be prepared to articulate and demonstrate how it was not.

If an employer determines that remote work is feasible, whether as a reasonable accommodation or otherwise, the employee and employer should discuss what tools, equipment, and resources are necessary to successfully perform the job remotely. Furthermore, the employer should determine the location of the remote worker to ensure that, when required, it is following all state and local laws within that jurisdiction, including laws relating to paid time off, medical leave, expense reimbursements, etc.

Where employers have a split workforce, i.e., where some employees work in a physical workplace and other employees work from home, employers should ensure that they are treating these two groups of employees in an equitable manner. Such efforts will raise employee morale and productivity, as well as lower the likelihood of a complaint that alleges discrimination or unequal treatment.

Employers may also want to consider other best practices unrelated to reasonable accommodations, which more generally support employee well-being. As stated above, amendments to policies and practices may be appropriate at this time, and further, an employer should consider reviewing its employee benefits to determine if it may benefit from offering employees various well-being initiatives, programs, promotions, resources, services, etc.

The bottom line? Now is a great time for employers to evaluate policies, practices, and actions to ensure they are job-related and consistent with business necessity and otherwise in compliance with applicable laws and regulations. In taking this step, however, both employers and employees should be mindful of the EEOC's guidance that "[a]n employer's concern for an applicant's well-being—an intent to protect them from what it perceives as a risk of illness from COVID-19—does not excuse an action that is otherwise unlawful discrimination." COVID-19 has presented new challenges to equity in the workplace, especially for older workers, workers with disabilities, women, and workers who are parents and caregivers, so attention to detail and documentation remains valuable.

3. Technology Is Our Friend, and It Can Be Used in All Industries

During the height of the pandemic, the legal industry saw virtually every meeting, training, and hearing swiftly switch from in-person to online. Even though restrictions have been lifted, many judges and lawyers continue to hold remote or virtual hearings, depositions, and meetings.

Other industries, which never before utilized online technology to conduct business, meetings, and trainings, were placed in a position where they had to adapt. While remote work is not preferred or feasible in every setting or industry, we have learned that certain types of business can be conducted just as effectively, and oftentimes more efficiently, via online teleconference and meeting technology. Accordingly, we should continue to use technology that promotes efficiency and productivity where and when appropriate.

4. We Must Look to the Future

As previously stated, an employer's most important asset is its workforce, *i.e.*, humans. Protecting employees is an integral part of a business's prosperity. Therefore, employers must continue to be mindful of their "post-pandemic workplace" and invest in the future of their workforce. Even once we are able to officially say the pandemic is over, viruses, emergencies, and natural disasters will arise in the future. Thus, in order to be as prepared as possible, employers should continue to evaluate health and hygiene practices, whether remote work is feasible and/or preferred, and whether they are prepared for future emergencies. Employers must continue to review, update, and revise policies to adapt to changing circumstances.

We patiently await the outcomes of current so-called "COVID-19 lawsuits," which may clarify some ambiguities and become instructive with respect to some of the policies and considerations

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Wellness

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lowed for our feeling, then what? When you face an unpleasant situation, what do you do? Do you focus on the unpleasant situation or finding a solution? If there isn't a solution, do you focus on the situation, the lack of solution, or do you shift to something else? When you hit a dead end, are you frustrated and hopeless? Or do you see your journey down this path as a learning opportunity and look to try another path? We are not in control of events, but we are in control of what we pay attention to, how we respond, and whether we continue forward or stop. We can create a world of excitement, curiosity, learning, opportunities, and hope or we can create one of fear, hardships, barriers, and despair. This is our choice, our power.

Victor Frankl famously noted: "When we are no longer able to change a situation, we are challenged to change ourselves." I hope that you join me and rise to the challenge, cultivate an IRAC mindset through continual practice, and create that better world for yourself! ■

NOTES

1. Satterfield, J. M., Monahan, J., & Seligman, M. E. P. (1997). Law school performance predicted by explanatory style. Behavioral Sciences and the Law, 15, 95-105.

DE&I

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Diversity, Equity, and Inclusion Committee co-chair Salihah R. Denman provided closing remarks for the Summit, thanking those who attended, stating, "With your help, our diversity, equity, and inclusion efforts will move forward." She pointed to the CBA Future of the Legal Profession Scholars Program as one of many important projects being undertaken to increase diversity in the legal profession.

Thank you to the presenters and Diversity, Equity, & Inclusion Summit Committee members for organizing an interactive and engaging event and to all our sponsors for making the event possible. ■

Top Lessons Learned

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addressed above, including: whether vaccines can and should be mandated; whether COVID-19, "long COVID," and complications of pre-existing conditions which were caused by COVID-19 qualify as a disability under Americans with Disabilities Act and corresponding state law; whether work-from-home accommodations will be more often considered a "reasonable accommodation" by the courts; whether certain expenses incurred by employees who work from home, such as cost of equipment and household utilities, must be reimbursed by employers; what other work-related activities constitute on-the-clock work versus off-the-clock work, such as requiring testing or checking emails from home; and whether COVID-19-related injuries are compensable claims under the Worker's Compensation Act. What remains clear, however, is that employers and employees must continue to have open conversations about these matters. An employer's focus on employees' needs, desires, well-being, and engagement have substantial impacts on employees. Despite the pandemic, it is important that we, as humans in a workforce, are professional, appreciate others' efforts, and recognize the hard work of the members on our team. ■

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Housing Matters

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fice-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-12D.pdf.

10. In April 2022, the Washington Post reported that rents in Hartford County increased 10.1% since 2019. By comparison, of the counties that make up New York City, the largest increase was in Brooklyn at a 2.8% increase. Abha Bhattarai, Chris Alcantara and Andrew Van Dam, *Rents are rising everywhere. See how much prices are up in your area*, WASH. POST, April 21, 2022, www.washingtonpost.com/business/interactive/2022/rising-rent-prices.

    In 1960, 11.9 percent of Connecticut renters paid over half of their income on housing costs. That number steadily increased over time. 58 years later, in 2018, 21% of renters paid over half of their income on housing costs. Over the next two years, that number exploded to 26.9% of renters paying over half of their income towards housing costs in 2020. Connecticut saw a nine increase over 58 years, versus a six percentage increase in 2 years. One might imagine what the 2022 data will show. PARTNERSHIP FOR STRONG COMMUNITIES, HOUSING IN CT 2022, (Jan. 2022), https://www.pschousing.org/sites/default/files/Housing%20in%20CT%20finale%202.2022.pdf.
11. Camila Vallejo, *In Connecticut, rental vacancy rates are the lowest in the U.S., leaving renters with few options*, CONN. PUBLIC, August 26, 2022, www.ctpublic.org/news/2022-08-26/in-connecticut-rental-vacancy-rates-are-the-lowest-in-the-u-s-leaving-renters-with-few-options

Young Lawyers

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erly understand the intricacies of a case or close a complex transaction. We do not shy away from the tough conversations in those situations. It's time we start putting in the hard work and make that same effort for each other. Our profession will be better for it. ■

President's Message

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the old short calendar system. Mentors of old taught us how to be lawyers and the long-gone short calendar motion practice was our playground to earn our litigation stripes. We cannot fail our younger lawyers. Together we can create an efficient calendar that helps to lay the foundation for successful litigation careers. ■

NOTES

1. www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/how-judiciary-is-helping-younger-lawyers-close-the-experience-gap
2. *Id.*
3. *Id.*