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COVID-19 EMPLOYEE-RELATED LEGAL RISKS

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JAN-MAR 2021 ISSUE



www.corporatedisputesmagazine.com

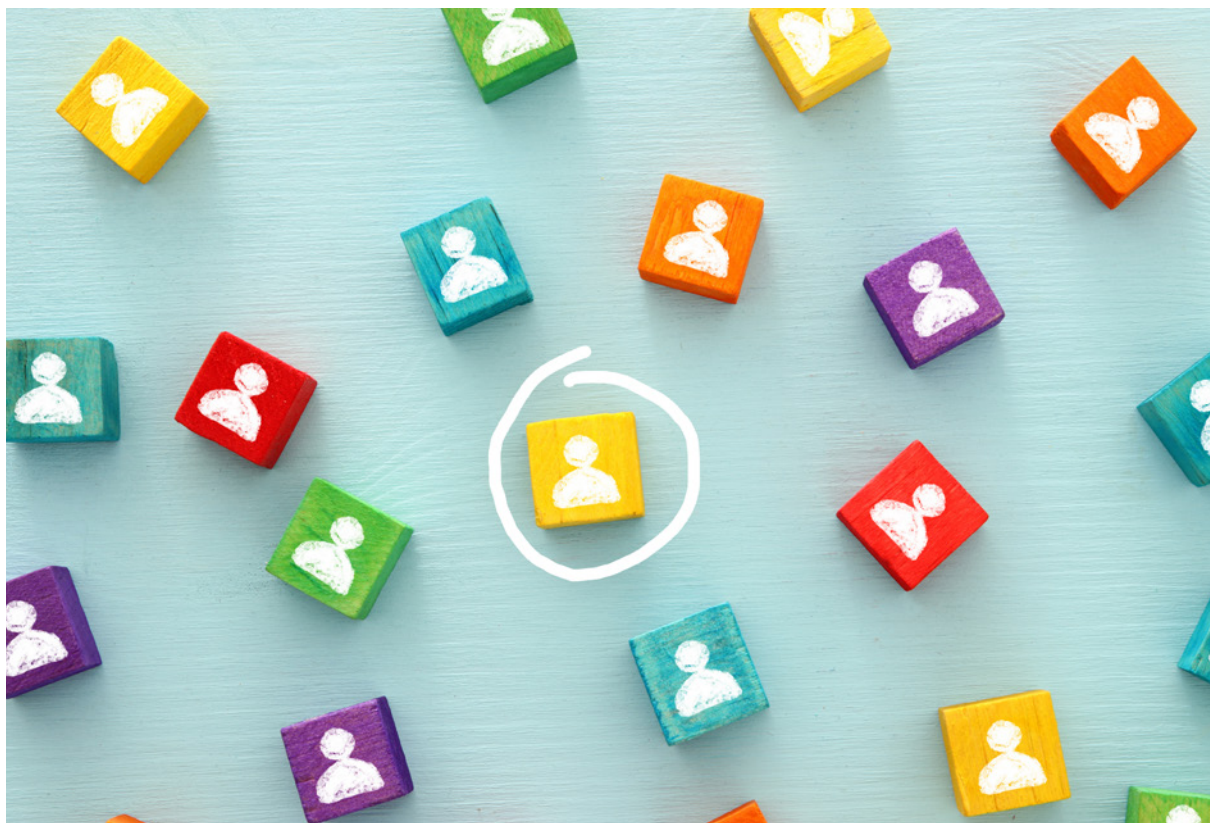
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MINI-ROUNDTABLE

COVID-19 EMPLOYEE-RELATED LEGAL RISKS



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William C. Martucci practices nationally in business and employment litigation, with a focus on complex class action (employment discrimination and wage-and-hour, including California) litigation, as well as high-stakes executive disputes, whistleblower matters and unfair competition. Widely regarded as an exceptional trial lawyer and innovative policy strategist, Chambers USA: America's Leading Lawyers for Business notes, "Bill Martucci is worth having on any dream team for litigation and policy issues".

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Charles A. Rosebrough concentrates his practice in business litigation, where he handles matters at all stages from initial client counselling to preparation for appeal. Before joining Shook, he was a law clerk for the Hon. Laura Denvir Stith, Judge of the Supreme Court of Missouri. During law school, he was a judicial extern for the Hon. Kurt S. Odenwald, Judge of the Missouri Court of Appeals for the Eastern District.

CD: Could you provide an overview of the extent to which employers are working toward resuming 'normal' operations amid the coronavirus (COVID-19) pandemic? In what ways is this likely to differ from pre-pandemic practices?

Martucci: There is a new normal after coronavirus (COVID-19). Companies – large companies – discovered they can operate with a majority of their employees working from home. The pandemic exposed weaknesses in employers' leave, workers' compensation and human resource abilities. Many companies took a financial hit, leading to furloughs, layoffs and other means of preserving liquidity. As the promise of a vaccine looms and businesses grow more comfortable with remote work, the big question employers must face is: what was good about the pre-COVID brick-and-mortar office environment, and what can be left behind? For most, the new normal includes reduced office space. Employers invested substantially in laptops and personnel to make remote work possible, and, having successfully functioned that way for eight months, they feel prepared to integrate that working model into standard practice going forward. Many employers are increasing human resource departments to help handle the onslaught of COVID-related Equal Employment Opportunity Commission (EEOC) regulations and assist employees who

struggle with mental health or family issues while working from home.

CD: In light of these changes brought on by COVID-19, what potential employee-related legal risks might employers need to address?

Rosebrough: For employers, there are three big areas of increased risk. First, correctly navigating employee leave, safety and testing requirements under the Families First Coronavirus Response Act (FFCRA), the Occupational Safety and Health Administration's (OSHA) guidelines and the Americans with Disabilities Act (ADA), has proved a challenge. Overwhelmingly, employers are concerned with their employees' health and safety. Second, employers are concerned with correctly calculating hours and paying for employees working from home. Accurately capturing work from hourly employees helps maintain the appropriate exemption status under the Fair Labor Standards Act (FLSA). And, keeping in close contact with remote employees allows employers to pay for the reasonable business expenses of a home office, a requirement in some states. Finally, employers want to know their tort and workers' compensation liability from exposure to COVID-19. Employers want to know whether they face liability if their employees give COVID-19 to a client or third party, and they want to know if they face workers' compensation

liability if their employees contract COVID-19 in the office.

CD: To what extent might companies need to amend their business policies and procedures to reflect this new reality?

Martucci: Without a doubt, employers need to revisit their remote work policies to account for COVID-19. Many employers' remote work policies focused on 'reasonable accommodations' under the ADA or on short term working arrangements during family emergencies. Now, in light of COVID-19 and an increasingly large remote workforce, employers need standard language and considerations that are not strictly tied to these old circumstances. In addition to remote work policies, many states are beginning to require employers have written notification and safety guidelines, which give employees and state agencies a clear picture of the steps employers are taking to ensure a disease-free workspace. Employers should check with their attorneys to see if they need to be posting notifications of COVID-19-related leave policies, notifying their workers' compensation insurance about positive tests, or filling out Form 300s for OSHA.

CD: When employees transition back to a workplace environment, what should companies do to minimise related legal risks and liabilities?

Rosebrough: There are many steps an employer must take before it can comfortably bring back an onsite workplace. First and foremost, the employer

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*Charles A. Rosebrough,
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needs to be mindful of its employees' health and safety. The employer needs to ensure proper airflow in the office, proper distancing of employees, and proper mask and faceguard procedures are in place. These precautions will not only protect employees but protect employers from increased workers' compensation claims and any potential tort liability. Second, the employer should ensure its locality has no governing 'stay at home' orders on the books. Many cities and municipalities are reissuing 'stay

at home' orders to combat the rising infection rate for COVID-19. Employers should be careful they are not violating any orders by reopening the office. Finally, employers should be careful of company morale. While the employer may be able to create a safe environment and there may be no legal restrictions on bringing employees back to the office, there may well be good business reasons for delaying the transition. Many schools and day-cares are still closed, meaning many employees are providing childcare themselves. Other employees are simply cautious of COVID-19 and may choose to quit rather than return. A wise employer would consider these factors as well in reintegrating the office space, in addition to legal risks.

CD: What steps should companies take to deal with employees who may resist returning to work due to COVID-19-related concerns? What legal risks could arise in this scenario?

Martucci: Employers should be cautious about forcing employees back into the workplace too soon. For one thing, some employees may be more susceptible to catching COVID-19 and may therefore be eligible for a "reasonable accommodation" under the ADA. Other employees may qualify for

FFCRA leave by caring for a qualifying individual who has COVID-19. But even if an employer is on strong legal ground to force an employee to come into the workplace – which may well be the case – employers should still be cautious. Employees who are present in the workplace against their will are more likely to be litigious. They are also more likely to publicly undercut the employer's policies

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and lower morale. If an employer truly wants to bring its employees back, it should ensure there are no relevant leave policies permitting time off, no relevant accommodations under the ADA, no relevant executive orders from the local government, and no relevant policies the employer is using unfairly. If all these aspects line up, then an employer can request its employees return. But again, such a policy should be undertaken with caution.

CD: What essential advice would you offer to companies on taking necessary measures to safeguard their employees' wellbeing – both in the workplace and remotely? What kinds of processes should be introduced to assist HR teams and other managers to reduce legal risks accordingly?

Rosebrough: The Centers for Disease Control and Prevention (CDC) regularly provides suggestions for employers trying to create and maintain a safe workplace. Businesses that want to implement certain safety precautions – mask orders, removing public gathering spaces such as coffee machines or water coolers, and staggering employees' in-office time – should check with the CDC's guidelines for help. The CDC has detailed FAQs that answer practical questions like: "What testing does CDC recommend for employees in a workplace?" Once an employer has a list of safety measures it would like to use, the employer should check with counsel to make sure all precautions are compliant. Some common pitfalls of overly zealous precautions are violating the ADA's prohibition on certain medical testing and failing to pay for employees' reasonable business expenses, such as testing costs and time spent being tested.

CD: With no end to the pandemic in sight, how do you envisage the employer/employee dynamic developing in the months ahead? How important will it be for companies to regularly monitor and update their practices to manage ongoing legal risks?

Martucci: Now more than ever, employers need to be in close contact with their employees. As COVID-19 rages, employees are left wondering where they will be working, and sometimes, if they will be working at all. To give these employees the certainty they need, employers should be regularly updating their remote work, leave and safety policies. Information is changing rapidly. CDC guidelines on the viability of antibody testing, temperature taking and social distancing are still being updated. In response, employers need to be monitoring these agencies closely to make sure their communications with employees are accurate and up-to-date. **CD**