

BACK TO “NORMAL?” TIPS ON REOPENING YOUR BUSINESS AFTER COVID-19 (PART 2 OF 2)

In the first part of this article series, we discussed the importance of developing and implementing policies to maintain a safe working environment. Here are some additional tips to consider when reopening your business.

Be mindful of permissible health screenings and questions.

To reduce the spread of the virus to others within the workplace, it is essential that employees who are sick or may be sick, stay at home. Employers should be aware, however, that the Americans with Disabilities Act (ADA)—which applies to employers with 15 or more employees—and the North Dakota Human Rights Act—which applies to all North Dakota employers with one or more employees—limits employers from certain disability-related inquiries and medical examinations. To assist employers in navigating these disability-related issues, the Equal Employment Opportunity Commission (EEOC) has issued detailed guidance on what questions employers may (and may not) ask of employees and what other steps employers are allowed to take to ensure workplace safety during this pandemic.

The ADA permits employers to make disability-related inquiries and conduct medical exams if they are job-related and consistent with business necessity. Employers may exclude employees with medical conditions that pose a direct threat to the health or safety of others and cannot be reduced with reasonable accommodation. As a result, employers are allowed to ask employees entering their facilities if they are experiencing symptoms of the virus. The list of symptoms is growing, but employers may rely on CDC or other health authority guidance on what symptoms are associated with the disease. Employers may also take the temperature of employees or, if they have the resources, may administer a COVID-19 test to employees returning to work, provided that the test is accurate and reliable. If an employer takes these steps, it should do so consistently with the workforce to avoid any argument of disparate treatment to a particular protected class.

Employers should further remember that when gathering information through these inquiries and exams, they are required to maintain the confidentiality of any medical information they receive about employees. If any medical information has been documented, this information must be kept separate from the employee's personnel to assure its confidentiality.

Be prepared to continue flexible working arrangements and schedules.

Even though states are beginning their reopening efforts, employers very likely will not be able to bring back their entire workforce into the office all at once for a number of reasons. For example, a fully-operational workforce may not be possible to maintain the proper distance between employees in light of the CDC's guidance on social distancing. Additionally, employees may be hesitant to return to the office, given the fear of possibly exposing themselves due to an underlying condition or family members within their household who are vulnerable. Employees may also have continuing obligations at home to care for others who are sick or unable to attend school or daycare.

Given the inability to bring back all employees at once, employers should consider flexible working arrangements for employees. This flexibility may include allowing employees to continue to work from home or permitting employees to work alternative schedules to avoid contact with others in the office, such as working after hours or weekends. If flexibility is conducive to the employee's position, the employee and employer should discuss and document the arrangement.

Under some circumstances, flexibility with a working arrangement may also be necessary as a reasonable accommodation for an individual with a disability. For instance, if an employee has a mental illness that is exacerbated by COVID-19, allowing the individual to continue working from home may be a reasonable accommodation. Employers faced with accommodation requests should engage in the interactive process with the employee to determine whether the requested accommodation is reasonable and whether it would accommodate the employee's disability.

Be wary of risky decisions when bringing back employees.

If employers were faced with furloughing or laying off employees and will soon begin staggering the reintroduction of employees into the office, employers should be mindful of their decisions of who they are allowing to return and when. Employers could potentially expose themselves to liability if they choose a certain person or group of individuals to return over another.

For instance, if an employer decides to bring back a group of employees who were under the age of 40 perhaps because they are less at risk for developing complications from COVID-19, there could be a disparate impact based on age, which is a protected class. Similarly, there could be disparate treatment against an individual based on an actual or perceived disability if an employer believes that she has an underlying condition that makes her vulnerable to COVID-19 and excludes her from call-back on that basis. An employer may further face a charge for discrimination based on race or national origin if it makes a decision to bring back a Caucasian employee as opposed to an Asian employee because of a stigma related to the virus.

To avoid potential discrimination claims, employers should carefully review the demographics of their decisions. Employers should strive to treat similarly situated employees equally and ensure that they have legitimate business reasons for who they intend to call back or who they don't.

Disclaimer: These materials are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. Use of and access to these materials does not create an attorney-client relationship between the Vogel Law Firm and the user or browser. The opinions expressed at or through these materials are the opinions of the individual author and may not reflect the opinions of the Vogel Law Firm or any individual attorney. Under no circumstances shall the Vogel Law Firm have any liability to you for any loss or damage of any kind incurred as a result of the use of the information or your reliance on any information provided.