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After working from home, lawyers turn to implications of return-to-work policies

by Michelle Leach

Midlands lawyers isolated several potential vulnerabilities associated with the transition back into the workplace, and with the isolating nature of the pandemic.

“Employers often struggle with the extent they can, and are required, to address the mental health concerns of their employees,” said Kathryn A. Dittrick, partner at Fraser Stryker. “Especially during this time when many employers still have a majority of employees working from home, it is extremely difficult to assess the mental health needs of employees and to determine if they need assistance.”

Productivity almost always declines from untreated mental issues, jeopardizing an employee’s job.

“Quite frankly, these concerns have increased drastically during the course of the pandemic, mainly as a result of employees largely working from home,” she said. “When employees are physically reporting to work, it is easier to detect if the employee is suffering from a depression, anxiety, or other mental condition.”

Plus, employee assistance program (EAP) info is usually readily available in the physical workplace. Legally, some mental illnesses may constitute a “disability” under the Americans with Disabilities Amendments Act.

“If a depression, anxiety, or other mental illness is severe enough to constitute a ‘disability’ under the ADA, this triggers an employer’s duty to provide reasonable accommodations to the employee, if doing so would enable the employee to perform the functions of his or her job and not pose an undue hardship on the employer,” she said.

Accommodations, for instance, include leave of absences or other time off for treatment.

Dittrick recommended that employers enroll in a strong EAP run by a third-party provider. And don’t

be afraid to discuss an employee’s wellness with the employee.

“Our society tends to have a hyper-focus on privacy and confidentiality, and loses sight of the fact that employers are legally required to engage in the interactive process with employees to determine if and what type of reasonable accommodation may be required to enable the employee to perform the job,” she said.

Employees, don’t be embarrassed to ask for help.

“Most working Americans experience varying levels of stress, anxiety and depression, even if they don’t always rise to the level of a ‘disability’ under the law,” she said. “While employers are not legally required to accommodate mental wellness issues if the condition does not rise to the level of a disability, they are going to have a more content and productive workforce if they go above and beyond what the law demands.”

When asked about the latest workplace legal concerns that have arisen since December, Goosmann Law Firm Attorney Kelsey Heino said companies are now facing backlash when requesting employees to return to the brick-and-mortar office, get vaccinated or otherwise return to a more “normal” work schedule and environment.

“Companies must keep in mind that the end goal is to keep good employees,” she said. “While it may be frustrating to allow flexibility for those still not comfortable returning to pre-COVID operations, it’s generally in the company’s best interest to do so if it will not harm business.”

Consider the cost of seeking and training new employees, which is often significantly higher than the likely minimal difference in produc-

tivity between a work-from-home employee and in-office staff.

“Of course, if your business needs people on site to function, that analysis may shift in favor of a more stringent return-to-work policy,” Heino said.



Moland

She encouraged employers to work with respective attorneys to set up trainings on issues that were brought to light during COVID.

“Was there significant tension in your office over racial justice or the election? Consider a refresher on the company’s harassment, discrimination and social media policies,” she said. “Did employees or HR struggle with entering time appropriately while working from home? Conduct a training on the [Fair Labor Standards Act].”

Having good policies in place that employees understand will make for a less stressful 2021.

“As more employees transition back to work in the offices in 2021, employers will need to continue to be mindful of their obligations under the ADA and OSHA, and other employment laws,” said Eric W. Tiritilli, a partner with Lamson Dugan and Murray’s business department. “Another topic employers will likely grapple with in 2021 is the COVID-19 vaccine and its implications for the workforce.”

He also referenced diversity and inclusion in the workplace as an important topic.

Previously, Tiritilli highlighted employee privacy (related to COVID-19 issues) and record-keeping obligations, as well as employers’ obligations under the Families First Coronavirus Response Act.

Year-on-year, McGrath North Attorney Abigail M. Moland said client questions have shifted to “return-

to-work” issues, such as maintaining safe workplaces, employee vaccinations and Americans with Disabilities Act accommodation issues.

“Employers are also reaching out with questions related to (and in anticipation of) major shifts in labor and employment priorities under the Biden administration,” she said. “We are starting to see a shift in labor and employment enforcement priorities under the Biden administration, including the Protecting the Right to Organize Act (PRO Act) and other labor-activity we are monitoring closely.”

Partly, Moland said the firm anticipates increased organizing activity among unions.

“The current environment has presented some novel issues of which employers should have on their radar,” she said, referencing both personal protective equipment and vaccine-oriented guidance, as well as protection and accommodation of LGBTQ+ employees.

Moland also mentioned that the firm has seen “significant enforcement activity” from the Department of Labor over the last year, regarding how to properly calculate and factor in non-discretionary bonus payments to avoid wage and hour liability.

“We anticipate an increase in litigation and administrative charges with employees returning to work and with the transition back to the ‘new normal’ in the workplace,” she said. “We have also seen many issues arise with seemingly benign return to work decisions as well as an increase in employee anxiety and mental health-related issues impacting their ability to return to work.”

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