Preparing for Protesters to Return to Work: Employer Do's and Don'ts

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Mass protests in the wake of the killing of George Ficoyd have raised concerns among public health professionals that the proximity of the protestors to each other – and the shouting and chanting typical of protests – could lead to a spike in COVID-19 cases. At the same time, many experts also recognize that racism itself is a public health issue that exacerbates the effects of COVID-19, and that motivates protesters to mobilize despite the risk of infection.

For employers, this situation coincides with the reopening of workplaces in many states and the expectation that employees will report to work. Employees and employers are concerned about whether those employees who are taking part in protests risk infecting their coworkers with COVID-19.

These are the key issues for employers to consider in responding to these concerns:

Follow the Organization’s Return-to-Work Plan
Every employer should have a return-to-work plan that sets forth its COVID-19 workplace safety policies, including protocols for responding to employees experiencing symptoms of or diagnosed with COVID-19 and:

- employee health and wellness checks;
- social-distancing measures;
- the use of personal protective equipment;
- enhanced cleaning and sanitation;
- recommended hygiene in the workplace; and
- restrictions on non-essential business travel.

Consistent with such a plan, if the employee who has been engaged in protests is experiencing symptoms of COVID-19 (per the Centers for Disease Control (CDC), cough, fever, chills, muscle pain, shortness of breath or difficulty breathing, headache, fatigue, congestion or runny nose, sore throat, nausea or vomiting, diarrhea or new loss of taste or smell), or has tested positive for COVID-19, they need to stay home from work and should consult with a health care provider.

If the employee has been tested for infection or intends to get tested before returning to work, and has been told by a health care provider to quarantine, they must await the results of the testing before they return to the workplace. The employee would return to the workplace at the time provided for in the return-to-work plan.

Consider Eligibility for Leave or Paid Time Off
If the employer is covered by the Families First Coronavirus Response Act and the employee is not an exempt health care provider or emergency responder, the employee would be eligible for up to 80 hours of paid sick leave if (1) the employee is subject to a federal, state or local COVID-19 quarantine or isolation order; (2) unable to work because the employee has been advised by a health care provider to self-quarantine for a reason related to COVID-19 (either because the employee has, or may have, COVID-19 or is particularly vulnerable to COVID-19); or (3) if the
employee is experiencing symptoms of COVID-19 (as identified by the CDC) and is seeking a medical diagnosis.

Other local and state laws also may provide for leave in the event of illness or suspected infection, and employees may be eligible for paid time off under the employer’s policies. For purposes of leave eligibility, it is immaterial how the employee contracted the COVID-19 infection, and employees who engage in protests should be afforded the same leave opportunities as their non-protesting co-workers.

**Do Not Retaliate Against the Employee**

Some states and cities have laws that specifically prohibit employers from retaliating against employees who engage in political action. Here are a few examples:

- **California:** Employers are prohibited from making or adopting rules or policies intended to control or influence (by threat of discharge of employment) the political activities of an employee. Employees are entitled to lost wages as a result of demotion, suspension, discharge or other discipline because of lawful conduct occurring outside of the workplace during non-working hours.
- **New York:** It is unlawful for employers to discriminate against employees for engaging in political or recreational activities outside of working hours, off of the employer’s premises and without use of the employer’s equipment or other property, if such activities are legal.
- **South Carolina:** It is a misdemeanor for an employer to discharge an employee because of the exercise of political rights and privileges guaranteed to every citizen.

Other states that prohibit retaliation and/or discrimination based on political activity include Colorado, Louisiana, Minnesota, Missouri, Nebraska, Nevada and Utah. Some localities, such as Seattle and Madison, WI, also have laws prohibiting such retaliation and/or discrimination.

Note that each of these laws defines political activity differently and not all definitions explicitly encompass protesting. For example, New York’s off duty conduct law defines “protected” activities to include, among other activities, (i) political activities, such as running for public office or campaigning for a candidate for such office, or fund-raising for the benefit of a candidate, political party or political advocacy group; and (ii) legal recreational activities, broadly defined to include virtually all non-compensated leisure time activity. This arguably includes protesting. In California, courts have held that advocacy of forcible or violent conduct does not qualify as protected “political” activity.

While some laws may protect employees from retaliation, they do not absolve employees from violating workplace policies. For example, an employee who arrives late to work, leaves work early or uses company resources for their protest or political activity (such as using office materials to make signage), may be subject to discipline if that conduct violates the employer’s policies and it is the employer’s practice to discipline for that type of conduct. Similarly, an employee whose protest activity violates their employer’s code of conduct may also be subject to adverse or disciplinary action. Employees can also be subject to disciplinary action if their political activity interferes with the workplace or the operations of the business. For example, an employee who is absent from work as a result of being arrested while protesting could face disciplinary or adverse action if their absence interrupts business operations except as otherwise prohibited by local or state law. Employers should tread carefully and consult legal counsel before disciplining an employee for activities or absences related to protesting.

**Avoid Regarding the Employee as Presenting a Higher Risk Of Infection**

The Americans with Disabilities Act (ADA) and many state disability discrimination laws prohibit employers from discriminating against employees because they are “regarded as” having a serious health condition. Plus, under the ADA, the direct threat requirement is a high standard. Current EEOC guidance on this issue instructs that an employer would not be permitted to force “high risk” workers who test negative for infection or are otherwise asymptomatic to stay home unless the employer can establish after an individualized assessment that the risk of substantial harm cannot be reduced or eliminated by reasonable accommodation. (See Section G-4 of EEOC’s *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*). Therefore, absent symptoms of COVID-19 or a positive test for infection, employers should not take steps to keep employees out of work on the suspicion that, due to their conduct (whether it is protesting, interacting with large groups of friends, or some other activity that would
put them in close contact with potentially infected individual(s), they are at “higher risk” for developing or causing infection.

With tensions still high and a presidential election approaching in November, employers should anticipate that some of their employees will be engaging in protests and other political action in the coming months that will put them in close proximity with other people. Employers can minimize the risk of infection in the workplace by strictly enforcing their return-to-work plans in a nondiscriminatory manner, affording employees any leave or other paid time off for which they are eligible and not retaliating against or making assumptions concerning the risks presented by employees who do engage in protests.

This return-to-work checklist provides a helpful overview of the myriad issues employers need to consider as they prepare to reopen workplaces.