



interactive dialogue

Labor and Employment Group Webinar

The Phoenix Rising: Managing Your Company's Recovery Without Getting Sued

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Phoenix Rising: Managing Your Company's Recovery Without Getting Sued

While businesses anticipate the recovery, many employees do not.

We're experiencing the most significant mass trauma since 2008. For many of us, this is the most significant business event we have experienced.

What are the implications of returning to work? Will there be a "new normal"?

And how will employees adapt – or refuse to adapt?

Dorsey & Whitney was the first law firm to have an employment law Interactive Dialogue going into COVID-19 on March 4 – join us as we anticipate return and recovery.



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Goldstein's Law – Now More Than Ever

Don't Be a Jerk!

- COVID-19 and subsequent societal shutdown are unprecedented.
- Our legal system is based upon precedent.
- In the absence of precedent, our legal system—and human nature—resorts to concepts like “good faith.”
- Before COVID-19 PR considerations had already begun to overtake legal/liability considerations.
- In a world where “good faith” is paramount, PR considerations *are* legal considerations.

What are you allowed to do under your local Stay at Home or equivalent Order?

- **Are you an “Essential Business”?**
 - Most likely candidates: food, logistics, businesses supporting essential businesses.
 - Retail that is in part essential is entirely essential unless non-essential part is physically separate.
- **Does your Stay at Home Order allow for Minimum Basic Operations? If so, what does that allow?**
 - Most likely candidate: employees necessary to allow other employees to telework.
- **If you are “Essential,” does that mean business as usual?**

What are you allowed to do under your local Stay at Home or equivalent Order?

- **How has your state or local government been enforcing the Stay at Home Order?**
 - Does enforcement guidance tell enforcers to start with a warning/discussion?
- **What are the PR consequences of pushing the envelope?**
 - Don't be that company accused of putting profits ahead of worker welfare.

How do you keep your employees safe and demonstrate that you are doing so?

- **The CDC and local health recommendations are a *minimum, not an aspirational goal.***
- **Most stay at home orders require even *essential businesses* to meet these minimum guidelines.**

“Essential businesses are prohibited from operating under this Proclamation unless they establish and implement social distancing and sanitation measures established by the United States Department of Labor’s Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf> and the Washington State Department of Health Workplace and Employer Resources & Recommendations at [https://www.doh.wa.gov/Coronavirus/workplace.](https://www.doh.wa.gov/Coronavirus/workplace)”

How do you keep your employees safe and demonstrate that you are doing so?

- Figure out what and who you *need* in the office and then determine what are the *maximum practicable* safety measures you can take.
 - CDC says 6 feet distance, but can you do 15?
 - Can you limit each worker to his or her own space with no overlap?
 - Can you disinfect all touched surfaces daily? Twice a day?
 - Can you do more but thinner staggered shifts?

How do you keep your employees safe and demonstrate that you are doing so?

- Figure out what and who you *need* in the office and then determine what are the *maximum practicable* safety measures you can take.
 - Can you screen employees for COVID-19 symptoms at the beginning of their shifts?
 - Can you set up a system for temperature checks and a notification system for people who may have been exposed?
 - Can you mandate that employees be tested for COVID-19?
 - Yes, the EEOC granted permission to employers to test employees for COVID-19 before they enter a work site without running afoul of the ADA.

How do you keep your employees safe and demonstrate that you are doing so?

- **Communicate** in detail the steps you are taking and highlight that you are going over and above what health officials are requiring and recommending.
 - Show your employees that you are taking important steps to keep them safe.
 - Have such communications ready for state and local agencies tasked with enforcing Stay at Home restrictions on essential businesses.
 - The best way to win a fight over workplace safety is not have it in the first place!
 - Clearly communicating the measures you are taking makes it harder to paint you as the bad guy.

How do you keep your employees safe and demonstrate that you are doing so?

- **What do you do about employees who refuse to come in to work because they are afraid of catching COVID-19?**
 - If you've followed our advice so far, you are at least halfway there.
 - Listen to concerns and take them seriously.
 - Be familiar with emergency orders creating new obligations.
 - *E.g.* Gov. Inslee's April 13 Proclamation re: High-Risk Employees.
 - Must provide high risk employees with ability to utilize PTO.
 - Must provide health coverage.
 - Cannot terminate high risk employees for "exercising their rights under this Proclamation."

How do you keep your employees safe and demonstrate that you are doing so?

- **What do you do about employees who refuse to come in to work because they are afraid of catching COVID-19?**
 - For non-high risk employees, you can require them to come into the office if you are complying with Stay at Home and other orders.
 - **BUT, beware tricky claims.**
 - Fear of COVID-19 *alone* is not enough.
 - Underlying psychological disabilities? PTSD diagnosis?
 - Whistleblower retaliation if employee complains of safety violations?

What about employees who take advantage of the crisis?

- **Employees may use this crisis to avoid their own longstanding performance issues or to extort a settlement. What do you do?**
 - **See Goldstein's law.** If you have consistently demonstrated good faith, if you have taken all reasonable steps to keep your employees safe, you can start from a position of strength.
 - **Don't rail at, ridicule, or utilize any snark, even if you think an employee is acting in bad faith.**
 - **Don't abandon your HR best practices, double down on them.**
 - Document, document, document.
 - Investigate claims and concerns.
 - Don't let performance problems slide.

What types of lawsuits should employers expect to face as they re-open operations?

- **Can you be sued for not taking adequate precautions against COVID-19/if your employee catches it?**
 - **OSHA: “High Risk” vs. “Moderate Risk” – E.g. Healthcare vs. Retail**
 - “All other formal complaints alleging SARS-CoV-2 exposure, where employees are engaged in medium or lower exposure risk tasks (e.g., billing clerks), will not normally result in an on-site inspection.” April 13 OSHA Interim Enforcement Response Plan for COVID-19.
 - **Negligence claims?**
 - The causation problem.
 - Workers’ compensation immunity.
 - Still, don’t be stupid.
 - **Fraudulent concealment – (e.g. Cal. Lab. Code 3602)**
 - “Where the employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer’s liability shall be limited to those damages proximately caused by the aggravation.”

What types of lawsuits should employers expect to face as they re-open operations?

- **Can an employee sue for race discrimination linked to COVID-19?**
 - Yes.
 - Any statement you make that in any way links a person’s race to a COVID-19 related employment decision is a lawsuit waiting to happen.
 - Differentiate between travel to hotspots and ancestry/national origin.
 - Beware culture wars in the workplace exacerbated by the present crisis.
 - We all hoped that the crisis would bring us together. It hasn’t been consistently working out that way.

What types of lawsuits should employers expect to face as they re-open operations?

- **Can you be sued for not rehiring someone you laid off or furloughed?**
 - Be aware of any local emergency orders or regulations.
 - *E.g.* Gov. Inslee's April 13 proclamation regarding high-risk employees.
 - **Any decision regarding whether to hire or rehire someone is subject to a discrimination and/or retaliation analysis.**
 - **Is the employee in a protected class (e.g. over 40, race, gender)?**
 - **Did the employee engage in protected activity (e.g. complain about safety in the workplace)?**
 - **If yes, you need a legitimate non-discriminatory/non-retaliatory reason for not rehiring the person if they are seeking to be rehired.**

What types of lawsuits should employers expect to face as they re-open operations?

- **Can you be sued for firing someone who complains?**
 - Yes.
 - **Anyone who complains about safety in the workplace or about some form of disparate treatment has engaged in “protected activity.”**
 - **Proving that a termination was unrelated to a recent complaint is difficult.**
 - **The National Labor Relations Act, protects employees’ ability to discuss issues of mutual concern in the workplace, like safety or pay. Even non-union employees!**
 - **Employers need to focus on clear rules regarding insubordination. Employees can complain, but they cannot seriously disrupt the workplace.**
 - **When disciplining, focus on the disruptiveness of the behavior, not the content of the complaint.**

What types of lawsuits should employers expect to face as they re-open operations?

- **What about all of the new COVID-19 family and medical leave?**
 - FFCRA < 500 employees, < 50 employee exemption?
 - **Emergency Paid Sick Leave**
 - Up to 80 hours of paid
 - 100% pay up to \$511/day for personal reasons
 - 66% pay up to \$200/day for caregiver responsibilities
 - **Extended Paid Family & Medical Leave**
 - 12 weeks of FMLA if unable to work due to childcare responsibilities if schools/daycare closed
 - Up to 10 weeks paid (66% regular rate, up to \$200/day)
 - **Local Gap Filler – E.g. San Francisco Ordinance**
 - **Beware Retaliation Claims – The Force Field Effect**
 - **No Work/No Leave – but see San Francisco Ordinance**

What types of lawsuits should employers expect to face as they re-open operations?

- **What else might you be sued for?**
 - **Wage and hour claims related to new safety procedures**
 - Temperature checks
 - Donning and doffing PPE
 - Remote work training
 - Training on new safety procedures
 - **WARN Act claims**
 - Did a recent small layoff put you over the threshold (90 day lookback)?
 - Is your “temporary” furlough going to last more than 6 months?
 - **Some other creative claim we haven’t thought of?**
 - Demonstrable good faith is your best defense!

What are you doing to pivot?

The current crisis will create opportunities as well as hardships. Ask yourself the following questions:

- What does your company do? What is it good at?
- What are the current needs that have arisen because of the COVID-19 crisis?
- How can you translate your company's abilities, talents, and skills to those needs?

What are you doing to pivot?

Example:

- My company has a strong internal logistics operation to ship its own products.
- Demand is down.
- Can I offer those logistics capabilities to other companies that are seeing a spike in demand?



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Questions

If you have questions, you are welcome to follow-up directly with the presenters or call on your trusted Dorsey contact.



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Mike started his career as a client, not a lawyer. He represented the same company where he worked in management, thus “walking both sides of the street.” As a lawyer, Mike had devoted his practice to practical, results-oriented advice and litigation representation in situations where the law, facts or business risks are ambiguous.

Mike’s practice is devoted to the areas of employment law, agriculture and cooperative law, and in the food and agriculture industries. He has litigated employment and labor issues across Washington and California and advised across the United States. Throughout his career, a substantial part of Mike’s practice has been representing agriculture and food-based companies. He acts as outside general counsel in that industry, handles corporate governance, and manages complicated domestic and international transactions.

On the business side, Mike developed Dorsey’s LegalMine Document Review Solution from concept to operation. He has also held leadership roles as Office Head for Seattle (where he negotiated a large office move, and the office was named one of Washington’s Best Workplaces) and as co-head of the Labor & Employment and other practice groups.



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Aaron brings a decade and a half of experience to companies' quirkiest, thorniest, and most complex employment issues. Aaron also works with companies to develop policies and practices that are engines for business growth and that reflect the culture and values of the companies he represents. When Aaron's clients are faced with litigation, he aggressively pushes their cases forward to an efficient resolution.

Aaron advises businesses and provides litigation expertise on all employment related matters, from trade secret disputes and non-competition agreements to discrimination and harassment claims, under Oregon, Washington, and federal law. Aaron represents clients before the Oregon Bureau of Labor and Industries, the Washington Human Rights Commission, the Washington Department of Labor and Industries, and the federal Equal Employment Opportunity Commission.

Aaron represents companies in a wide variety of industries including, banking, financial services, computer software, semiconductor fabrication, retail, and medical supplies.