



FREE FOR C2HR MEMBERS

THE Re•Entry Journey
WEBINAR SERIES

**Employment Law:
Preparations & Considerations**



FREE FOR C2HR MEMBERS

THE Re•Entry Journey

WEBINAR SERIES

May 12

Strategizing the Return of Your Workforce

May 14

Rethinking Workspace Design & Logistics

KNOWLEDGE CENTER AT C2HR.ORG

Why Working From Home Is So Exhausting

Social Isolation and the Coronavirus

What Will Work Look Like After COVID-19?

Why HR Should Plan Now for Post-Pandemic Future

5 Things to Prepare in a Post-Pandemic Return to the Workplace

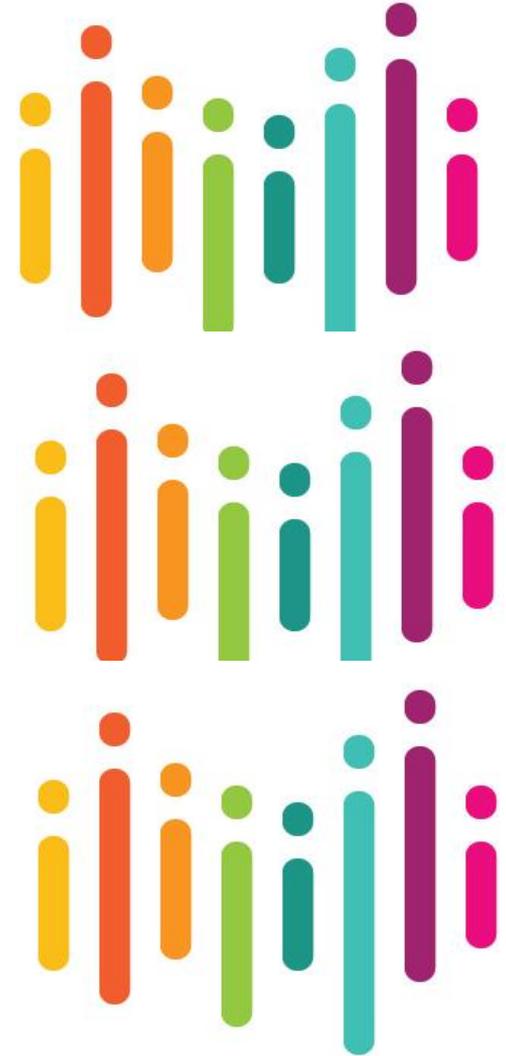
Now is the Time to Have a Clear Internal Communications Plan

The Coronavirus Crisis Doesn't Have to Lead to Layoffs

Today's Free Webinar Made Possible by the
Generous Support of the C2HR Champions:

THE **CABLECENTER**

Charter
COMMUNICATIONS





BARBARA HOEY

CO-CHAIR
(212) 808-7628
BHOEY@KELLEYDRYE.COM



MARK KONKEL

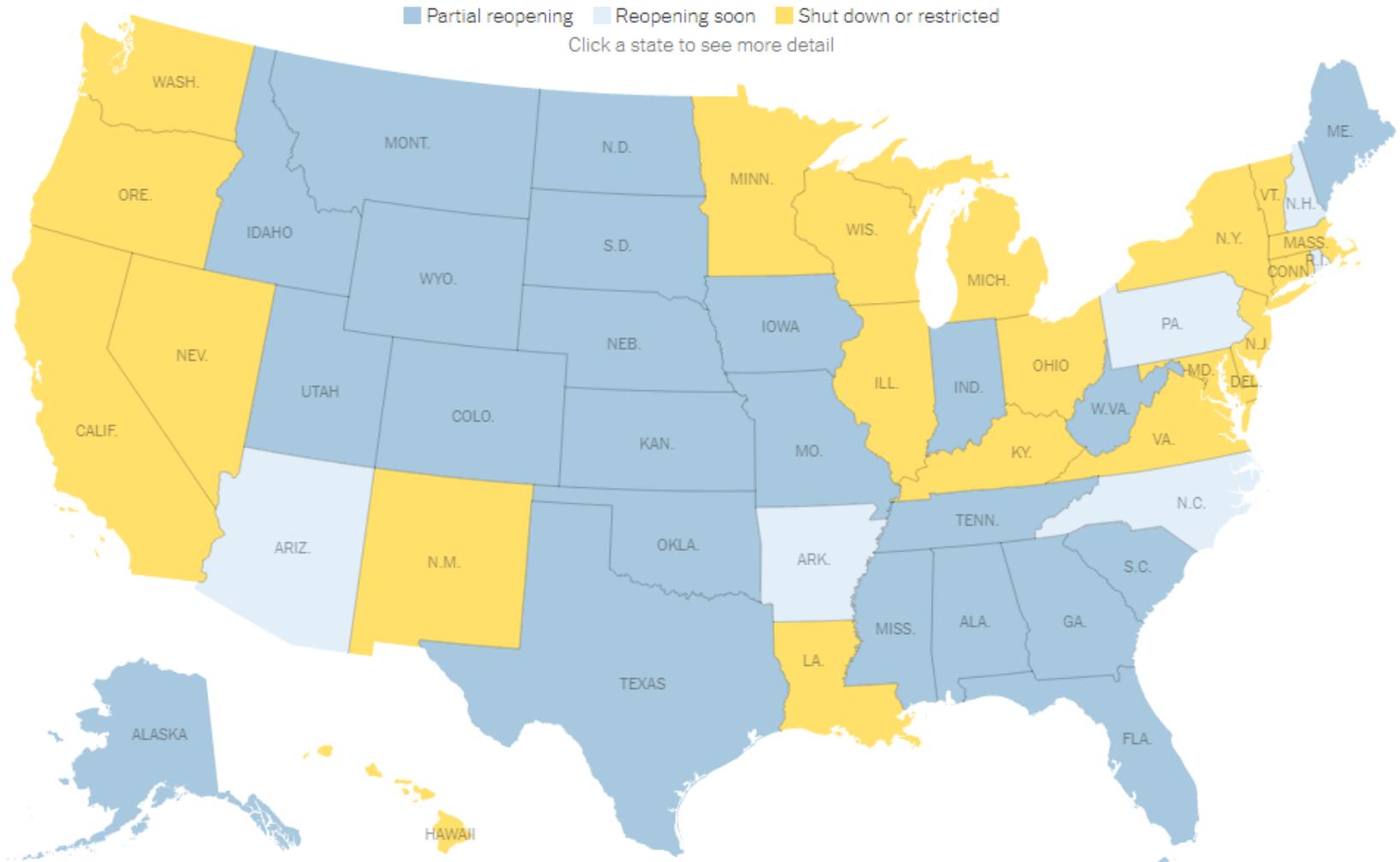
CO-CHAIR
(212) 808-7959
MKONKEL@KELLEYDRYE.COM

MAY 7, 2020



Status of U.S. Stay-At-Home Orders

By Sarah Mervosh, Jasmine C. Lee, Lazaro Gamio and Nadja Popovich Updated May 5, 2020



Some Projected Dates?

- **New York** – May 15 beginning of phased reopening
- **California** – Phased reopening “weeks away”
- **Illinois** – Governor hopes to begin reopening by June
- **New Jersey** – Reopening “within weeks”

Issues To Anticipate

- Privacy & safety complaints
- Requests to work from home
- Employee demonstrations
 - Amazon, Whole Foods, Instacart
- A flood of new legal claims
 - Wage & hour claims
 - Claims under new leave laws (e.g., FFCRA)
 - Whistleblower claims (safety complaints)
 - ADA claims (disability discrimination)
 - Other individual discrimination claims after discharge
 - Negligence claims

What We Will Cover

- Creating a reopening plan
- Telework – post-pandemic
- Getting real – real-world situations that *will* happen

THE CRITICAL COMPONENTS OF A REOPENING PLAN



You Need a Written Plan

Have to create an actual written plan:

- Get creative
- Be proactive
- Communicate

Let's be clear: this is not purely for economic gain

- Your workplace will be safer
- Your employees will have less fear
- You will minimize potential disruption

Four Components of RTW Plan:

1. Implement new policies
2. Ensure safety
3. Conduct training (employees and managers)
4. Plan for conflict

Policies – Get It In Writing

#1 Mistake: thinking existing policies are sufficient

- Why? Managers/supervisors will create ad-hoc policies
- These “supervisor created” policies will result in differential treatment
- Stakes are too high to allow varying “policies”

Policies – Get It In Writing

Create or revise:

- Work from home policy
- Screening policies
- Return to work policies for employees who have been exposed to COVID-19
- Social distancing policy
- Workplace contact tracing policy – privacy, please?
- ADA accommodations

Safety – People First

- Who will return and when?
- Phased return (timing and CDC guidance)
- Employee Health Screening
- Elevator protocols – yes, even that!
- Hygiene rules and behaviors

Safety – Who is coming back first?

Think about:

- Who are key staff?
- What jobs cannot be done remotely?
- Who is more “at risk”?
- Are you bringing back based on seniority or other factors?

Be Objective And Document

Safety – Space

Re-design the workplace

- Barriers
- No shared spaces?
- Conference rooms
- Lunchrooms (restrictions? off-limits?)

Safety - Screening/Testing

New EEOC Guidance

- Issued April 23, employers can administer COVID-19 tests to employees before they enter the workplace
 - tests must be “accurate and reliable”
 - ◆ Do you want to require tests?
 - ◆ In what situations?
 - ◆ What are other options?

Testing Considerations

- Confidentiality obligations
- Medical/ regulatory requirements
- What to do with the results?

Other Options

- Pre- screening questionnaire
 - Asking who has symptoms or is COVID positive
 - Temperature screening
 - Requirement of ongoing disclosure

Safety – New Hygiene Policies

Mandates

- Hand washing
- Masks / gloves
- Social distancing
- Disclosure of symptoms

Ongoing monitoring

- How to deal with employees who violate

Training

- Distribute policies **before** employees return to work
- Get an signed acknowledgment
- Distribute pre-screening health questionnaire
- Explain what they will encounter on Day 1

Manager Training

- Train managers remotely
 - Do not play doctor
 - Recognizing requests for accommodations
 - What information must/should be requested and what information is off limits?
 - Respect privacy

THE FUTURE OF TELEWORK: THE “NEW ABNORMAL”?



“Opening Up America Again”

- **Continue to encourage telework, whenever possible and feasible**
- Allow for phased return
- Allow for social distancing
- Consider special accommodations for personnel who are members of a vulnerable population

Who Should Be in the Office?

- Review job functions
 - Can the essential job functions effectively be performed at home?
 - Are there safety concerns? (e.g. a pregnant employee or an elderly worker)
 - Are there performance concerns? (e.g. noticeable deficiencies in work since working from home)

Work From Home Is A Privilege, Not A Right

New Policies and New Training

Work-from-home policies should include:

- Hours of work
- Performance standards and expectation
- Productivity measures
- Monitoring methods – address privacy
- Expectations

The Privilege Can Be Lost If Standards Are Not Met

Other Requirements?

- Equipment and private space
- Childcare while on duty
- Attire for Zoom or live meetings
- Security – documents and equipment
- Cost if there is damage
- Responsibility to return
 - ***Document – writing and signature***

Telework Requests

Key Question – Can employee perform essential job functions?

- However, **ALL** factors should be considered:
 - Is employee pregnant?
 - Is employee elderly?
 - Is employee vulnerable?

THE INEVITABLE CHALLENGES EMPLOYERS WILL FACE



Hypothetical: Cranky Carl

Cranky Carl Wants to Work from Home

Carl is a heavy smoker, has chronic sinusitis, and is overweight.

He claims he is more susceptible to the virus and needs to work from home.

He also claims that his children (15 and 17) are home from school, and there is no one else around to take care of them.

How Should CoronaCom Handle?

It depends!

- Are Carl's ailments "disabilities" that would entitle him to an accommodation?
- Should his request be granted, should he be given a trial period or should it be denied outright?
- How will granting his request affect other employees?

Potential Issues

Reasonable Accommodation under ADA

- Under ADA, reasonable accommodation is only for “qualified individuals” with a disability
- Employer must also consider whether requested accommodation constitutes an “undue hardship” on the company or waives an essential function of the employee’s job duties

Leave under the FFCRA

- Leave for a school closure is only for situations where employee cannot work OR telework
- DOL and IRS guidance prevents abuses (e.g. certification of special circumstances for children over 14)

Employee Lawsuits

A refresher on negligence

- Standard: An employee must prove that it is more likely than not that the employer was the “proximate cause” of injury or illness
 - What did you know?
 - When did you know?
 - What did you do?
 - **AND – that injury is not covered by Workers Comp**
- Establishing that an employee contracted COVID-19 at a specific location will be a difficult burden

Employee Lawsuits: Worker's Comp?

Worker's compensation will generally cover workplace injuries, and may limit liability for exposure to COVID-19, if:

California

- Contracted “in the course of employment” if the employee’s job presented a particular risk of exposure beyond what the public experiences
- Current lobbying for legal presumption that essential employees were infected at work

Employee Lawsuits: Worker's Comp?

Worker's compensation will generally cover workplace injuries, and may cover exposure to COVID-19, if:

New York

- Qualifies as occupational disease or an accident
- Occupational disease: Is a special hazard of that profession and is contracted during course of employment
- "Accident": Occurs when there's a clear connection between the condition and a specific event

Is This Negligence?

- A 15-year employee of a discount retail store is working when the pandemic first hits
- Despite other employees coming to the store with symptoms, store allows them to keep working and doesn't tell other employees
- Employees are allowed to work in close proximity and aren't given masks or gloves
- The employee gets sick and dies from complications related to the virus
- A few days later, another employee from the same store dies from the virus

Result? *Evans v. Walmart*

- Estate of deceased Illinois Walmart worker files a wrongful death suit against Walmart
- Complaint alleges store breached duty of care by failing to:
 - Follow CDC and OSHA guidelines
 - Clean or sterilize
 - Implement social distancing / provide PPE
 - Warn workers that colleagues had symptoms
 - Shut down when employees were symptomatic

See Estate of Wando Evans v. Walmart Inc. et al.

Other Lawsuits?

- Rural Community Workers Alliance and anonymous employee sued Smithfield Foods, Inc. alleging Missouri pork plant was unsafe because company:
 - Provided insufficient PPE
 - Forced workers to work shoulder to shoulder
 - Discouraged workers from taking sick leave
 - Punished workers who covered their mouths when they coughed or sneezed
 - Established bonus payments for workers who came to work while sick

See RCWA et al. v. Smithfield Foods, Inc. et al.

What Should I Do?

- Look at CDC and OSHA guidance
- Look at state regulatory guidance
 - Document what you do
 - If specific request is made – respond
 - If you cannot grant – explain why

Always Err On The Side Of Safety

Hypotheticals: Cranky Carl

Cranky Carl, an hourly employee, works as a call center representative at CoronaCom, a telephone service company.

CoronaCom has just re-opened for business and it is Carl's first week back.

What Could Possibly Go Wrong?

Hypothetical: Cranky Carl

Cranky Carl Has to Wait in Line

Cranky Carl gets to the office and has to wait 15 minutes to get into the elevator, because of a new policy that limits elevator use to one person at a time.

Once he is in, Cranky Carl has to wait another 20 minutes to get his temperature checked.

Cranky Carl claims he is “on the clock” while waiting for an elevator and temperature check and should therefore be paid for that time.

How Should CoronaCom Handle?

It depends!

- How long was Carl waiting?
- Who made him wait?
- Where is Carl located (law varies by jurisdiction)?
- Highly fact-specific

Potential Issues

FLSA

- Time is only compensable for “principal activities”

State Wage and Hour Laws

- California Supreme Court held post-shift security checks of Apple employees was compensable
- Pennsylvania Supreme Court is currently considering whether time spent waiting for mandatory security screening is compensable

Best Practices

- Analyze all of the facts
- Consider paying employees for time spent waiting in line to get mandatory temperature checks
 - Depends upon specific circumstances
- Think creatively
 - staggered shifts will reduce time spent waiting in line and prevent employees from congregating together

Hypothetical: Cranky Carl

Cranky Carl Decides to Complain

Cranky Carl arrives at the call center, and heads to his cubicle, to find that there is a crack in the plexiglass divider at his station.

Carl, upset by the situation, furiously types the following email and sends it to **all** personnel at CoronaCom.

Re: Workplace Safety

All:

Yesterday I was forced to wait in long lines at the subway, and at the door of my own building! Today, I came in to find a large crack in the plexiglass divider at my workstation. How can CoronaCom expect us to work in unsafe conditions? I question why we are back here so early in the first place! We already know that Jane brought the virus back home, infected her mother, and then she died from it. We all could be next. This is just unacceptable!

Cranky Carl

How Should CoronaCom Handle?

It depends!

- Should Carl be warned, disciplined, terminated?
- What potential issues does CoronaCom face if it takes action against Carl?
- What happens when Jane comes forward to complain that her privacy was violated?

Potential Issues

Whistleblower Claims

- Federal – Ex. OSHA’s “general duty” clause
- State – Ex. NY Labor Law § 740 and § 741

Retaliation Claims

- However, complaints may not be “protected activity” where there is insubordination or are lodged in a disruptive manner.
See Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000)

NLRA Considerations

- Employee engages in “protected concerted activity” when he or she takes action “with or on behalf of other employees” concerning the terms and conditions of their employment.

What To Do With Carl?

Divide Carl's issues into buckets:

- Take safety concerns seriously
 - Remind him of all the safety measures taken
- Communicate that violating employee confidentiality is a violation of company policy
- Decide on disciplinary action
 - Do not discourage appropriate communication with managers

Continue to Stay Informed

- [EEOC Guidance](#)
- [CDC Guidance](#)
- [OSHA – Guidance on Preparing Workplaces for COVID-19](#)
- [OSHA COVID-19 Standards](#)

CONTACTS



BARBARA HOEY
CO-CHAIR
(212) 808-7628
BHOEY@KELLEYDRYE.COM



MARK KONKEL
CO-CHAIR
(212) 808-7959
MKONKEL@KELLEYDRYE.COM

SUBSCRIBE

LaborDaysBlog.com

[Kelley Drye's
COVID-19 Resource
Center](#)