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Returning to Work During the Covid-19 Pandemic: *What Employers Need to Know*

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Unprecedented challenges for businesses

The novel coronavirus, SARS-CoV-2, which causes the disease COVID-19, presents new challenges for everyone, including employers. The difficulty of determining adequate workplace policies is exacerbated by emerging research and conflicted guidance as we learn more about the virus and its attendant risks.

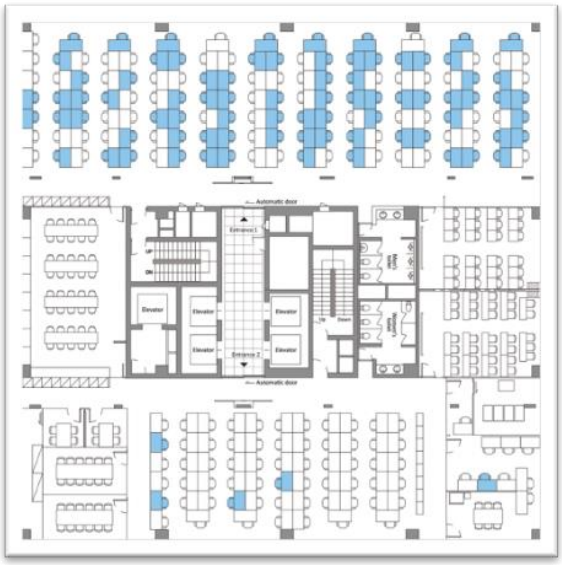
In this article, we discuss pressing issues confronting employers in reopening their businesses.

Case Study: A Single Infected Employee in the Workplace, South Korea (March 2020)

A dramatic illustration of the risks facing employers is seen in the following Case Study of a call center office in South Korea[1]:

According to the study, a single infected employee came to work at a call center in South Korea on the 11th floor of a shared commercial building. That floor had 216 employees. Over the period of a week, 94 of those employees were infected. (See Figure 1: 43.5% of all employees - the blue chairs" - tested positive for the virus. 92 of those 94 people became sick, with only 2 remaining asymptomatic.) The exact number of people infected by respiratory exposure versus fomite transmission (door handles, shared water coolers, elevator buttons, etc.) is unknown. When researchers followed up with affected employees household members, they found that there was a 16.4% secondary attack" rate within employees households.

Figure 1.



This case study is a compelling example of the important and difficult task employers have in assessing risk and devising sufficient employee safety policies in an environment of such uncertainty. While all employers ostensibly want to

[1] https://wwwnc.cdc.gov/eid/article/26/8/20-1274_article. See also, discussion by Erin Bromage, PhD, at https://www.erinbromage.com/post/the-risks-know-them-avoid-them

keep their employees, and their households, safe, employers are also justifiably concerned about how to limit their liability.

COVID-19 & OSHA

Under federal law, employees are entitled to a safe workplace. Specifically, under the Occupational Safety and Health Act (OSHA"), employers must provide to their employees a workplace free of known health and safety hazards. However, due to the COVID-19 pandemic this has become exponentially more challenging. The COVID-19 pandemic has caused numerous businesses across the globe to shut down in order to contain the virus.

Beginning in the middle of March, the great American COVID-19 shutdown has devastated the economy. Businesses are left struggling with whether and when they should fully reopen and return to full capacity and functioning. Further complicating the crisis is the discord among the entities and organizations tasked with providing COVID-19 guidance to America. Every day, conflicting orders, statements and declarations issue from the federal executive branch, state governors, regulatory authorities, and other government entities.

No doubt, the questions with which employers must now wrestle have no precedent in the law. The ramifications of this global crisis extend into every aspect of our public and private lives.

Question 1: When given the risk of COVID-19, can an employee say it is too dangerous to return to work and not face repercussions?

Although the number of confirmed COVID-19 cases has been continuously rising, both federal and state government officials have issued orders lifting previous restriction orders in an attempt to restart the economy and put workers back to work. As top medical experts, including Dr. Fauci of the National Institute of Allergy and Infectious Diseases, have made clear, the danger of SARS-CoV-2 infection is still widespread and uncontained; the virus spreads from asymptomatic carriers.[2]

As such, it is only logical for employers and employees alike to be apprehensive about reopening and returning to business as usual."

What can an employee do if he/she does not believe it is safe to return to work? What are the employer s remedies if an employee refuses to

[2] See https://www.cnn.com/2020/01/31/health/coronavirus-asymptomatic-spread-study/index.html; https://www.businessinsider.com/coronavirus-carriers-transmit-without-symptoms-what-to-know-2020-4; https://www.npr.org/sections/goatsandsoda/2020/04/13/831883560/can-a-coronavirus-patient-who-isnt-showing-symptoms-infect-others.

return to work because he/she deems the workplace unsafe?

OSHA regulations give employees a limited right to refuse to perform work when:

1. the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and

2. the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger. *See* 29 CFR 1977.12(b)(2).

The United States Supreme Court has held that 29 C.F.R. § 1977.12 permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety.[3] As such, an employee may legally refuse to return to work without facing repercussions if the employee meets all of the following criteria set forth in 29 CFR 1977.12(b)(2). Specifically:

(1) the employee acts in good faith in refusing to perform work due to reasonably recognized dangerous conditions;

(2) the employee s belief was a contributing cause of his/her refusal to work;

(3) the employee s belief is supported by ascertainable, objective evidence; and

(4) the perceived danger posed an immediate danger to employee health or safety.[4]

However, this regulation "does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger."[5] Rather it provides that in such cases the employer may not 'discriminate' against the employees involved, such as discharging them for their refusal to work.[6]

Examples of situations where an employee would likely meet the criteria to legally refuse to work without repercussion are: 1) an active shooter situation at the workplace; 2) a chemical spill or a noxious gas leak at the workplace; 3) discovery of asbestos exposure at the workplace; 4) an explosion at the workplace; and 5) a nuclear meltdown such as what happened at Three-Mile Island.

[3] Whirlpool Corp. v. Marshall, 445 U.S. 1, 10-11, 63 L. Ed. 2d 154, 100 S. Ct. 883 (1980).

[4] See https://www.osha.gov/laws-regs/regulations/standardnumber/1977/1977.12#1977.12(b)(2); https://www.osha.gov/right-to-refuse.html.

[5] Hatzel & Buehler, Inc. v. Orange & Rockland Utilities, Inc., 1992 U.S. Dist. LEXIS 20013, *43 (D. Del Dec. 14, 1992).

[6] Whirlpool Corp., 444 U.S. at 19.

The risks of SARS-CoV-2 infection at the workplace is not easily assessed under the four criteria set out by the Supreme Court. For example, given how little we currently know about the SARS-CoV-2 virus and the COVID-19 disease, how would the third criterion that the employee s refusal be supported by ascertainable, objective evidence" be evaluated by employees, employers and, potentially, courts?

OSHA has provided some guidance to employers, issuing guidelines addressing the occupational risk of exposure to SARS-CoV-2. [7] However, OSHA s guidelines may ultimately provide little in the way of security for employers. OSHA cautions that its guidance is advisory in nature and informational in content, is not a standard or a regulation, and neither creates new legal obligations nor alters existing obligations created by OSHA standards or the Occupational Safety and Health Act (OSH Act).[8]

In order to help employers determine appropriate precautions, OSHA delineates four categories of worker risk of occupational exposure to SARS-CoV-2: very high, high, medium, or lower (caution) risk.[9] (Figure 2.)

Figure 2.

The risk level depends on the pertinent industry; need for contact within 6 feet of those known to be, or suspected of being, infected with SARS-CoV-2; or requirement for repeated or extended contact with those known to be, or suspected of being, infected with SARS-CoV-2. OSHA notes that most American workers will fall in the lower or medium exposure risk levels.

Occupational Risk Pyramid for COVID-19[10]

OSHA has advised that **very high and high risk**" workplaces consist of those in which known or suspected COVID-19 infection is present. These include: hospitals, emergency rooms, and morgues.[11]

[7] See https://www.osha.gov/Publications/OSHA3990.pdf.

[8] Id. at pg. 4.

[9] Id. at pg. 18.

[10] Id.

[11] Id. at pg.9.

Medium-risk workplaces include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients."[12] Examples of medium-risk workplaces are barbershops, schools, factories, meatpacking plants, and restaurants and bars.

Low-risk workplaces consist of those in which there is minimal occupational contact with the public and other coworkers.[13] Examples of low-risk workplaces are law firms, accounting firms, and any workplace with individual and separate offices in it. Notably, OSHA urges employers of low-risk workplaces to follow the guidance for Steps All Employers Can Take to Reduce Workers Risk of Exposure to SARS-CoV-2".[14]

Essentially, OSHA s guidance is that each employer must make its own determination as to what precautions the employer reasonably believes are necessary to prevent and reduce the risk of SARS-CoV-2 spread in the workplace.

As observed in the reported Tyson [15] and Smithfield [16] plant outbreaks, there is a rising tension between employers and employees regarding what precautions and measures are necessary to ensure workplace safety at this time.

As discussed above, an employee has a right to refuse to do a task assigned by his/her employer, including returning to the workplace, when all of the criteria under OSHA Regulation 1977.12(b)(2) is met. OSHA has advised that an employee s right to refuse to do a task, which would include returning to the workplace, is protected if all of the following conditions are met:

1. The employee must ask the employer to eliminate the danger, and the employer must fail to do so;

2. The employee must refuse to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists;

3. A reasonable person would agree that there is a real danger of death or serious injury; and

4. There isn't enough time, due to the urgency of the hazard, to correct it through regular enforcement channels, such as requesting an OSHA inspection. [17]

[12] Id. at pg. 10.

[13] Id.

[14] Id. at pgs. 7-9.

[15] See https://www.businessinsider.com/tyson-foods-closes-pork-processing-plant-waterloo-iowa-coronavirus-outbreak-2020-4.

[16] See https://www.bbc.com/news/world-us-canada-52311877.

[17] https://www.osha.gov/right-to-refuse.html.

Whether all of the criteria under OSHA Regulation 1977.12(b)(2) are met requires a case-by-case analysis and cannot be decided in a vacuum. But the complexity of the situation goes far beyond this.

It is beyond dispute that employers have a legal duty to keep the workplace reasonably safe from recognized hazards. However, the determination of whether, in a given situation, an employer has failed to keep the workplace reasonably safe and eliminate the danger" will be based substantially on the COVID-19 related guidance, statements, and recent updates issued by federal, state, and local agencies and officials, as well as the medical and scientific community.

In other words, the standard of care" is constantly evolving as we learn more about the virus. This evolving standard of care, in turn, impacts the evaluation of the above criteria, such as, for instance, whether a reasonable person" would agree that a real danger of death or serious injury" exists in the workplace.

One thing is clear. Employers do not have to ensure absolute safety for their employees in their workplaces. They must only adopt reasonable measures to meet the standard of care." On the other hand, as mentioned, the standard of care" in the workplace for keeping employees and customers reasonably safe from the spread of SARS-CoV-2 is not well-defined and constantly evolving.

As such, employers may feel like they are flying blind in a storm. Despite the uncertainty, a good place to start is to follow OSHA s guidance, which includes the suggested implementation of basic infection-prevention measures, development of workplace flexibilities and protections, and the establishment of workplace control.

OSHA s recommended measures include social distancing and not allowing sick workers or those with suspected COVID-19 infection into the workplace. OSHA s guidelines do not go much further with concrete recommendations, and many questions linger as to what precautionary measures are adequate.

Question 2: If a workplace does not require its employees to wear masks, does this unreasonably expose employees and customers alike to a unnecessarily high risk of SARS-CoV-2 infection?

Should the "standard of care" require masks in the workplace?

Although the Center for Disease Control and Prevention (CDC) guidelines do not require masks in the workplace, the CDC recommends masks in

the community setting.[18] Moreover, many medical and scientific experts recommend wearing masks out in public.[19] Many countries in both Asia and Europe now require wearing masks in public, including in the workplace.[20] However, here in the U.S., there is a lack of uniformity on this issue.

States such as Florida, Iowa, Kansas, Montana, Oklahoma neither require nor recommend wearing masks. Other states such as California, Idaho, Missouri, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin merely recommend wearing masks in public.[21] New York, on the other hand, requires any individual who is over age 2 to wear a mask in public, if he/she is able to medically tolerate a face-covering and is unable to maintain social distance.

As such, the question of whether an employee may legally refuse to return to work on the grounds that his employer has not adopted a mandatory-mask policy is a novel one that will have to play out in the courts. Resolution of this issue in the court system will likely be a battle of the medical experts, with employers relying on a lack of OSHA and/or CDC requirements to wear masks in public to reduce the risk of infection.

Realistically, many employees may be reluctant to make such a challenge given the current economic environment and rampant unemployment/under-employment. Additionally, under Tex. Lab. Code Ann. § 207.045(a), an individual is disqualified for benefits if the individual left the individual's last work voluntarily without good cause connected with the individual's work."

As such, if an employee decides not to return to work because of a perceived risk of infection, the employee risks disqualification from both unemployment benefits and other employment-related benefits. The refusal to return to work based on the perceived risk of infection might not qualify as good cause." But again, such a

[18] The CDC in its FAQ section has stated "In light of new data about how COVID-19 spreads, along with evidence of widespread COVID-19 illness in communities across the country, CDC recommends that people wear a cloth face covering to cover their nose and mouth in the community setting." See https://www.cdc.gov/coronavirus/2019-ncov/faq.html.

[19] See https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449; https://www.livescience.com/coronavirus-can-spread-as-an-aerosol.html; and https://www.starherald.com/news/local_news/health-officials-wear-masks-to-protect-others-from-spread-of-covid-19/article_1a691df0-0672-5e6b-aa20-3874fb589b24.html.

[20] See https://www.washingtonpost.com/world/europe/france-face-masks-coronavirus/2020/05/09/6fbd50fc-8ae6-11ea-80df-d24b35a568ae_story.html; https://www.cnn.com/2020/04/01/asia/coronavirus-mask-messaging-intl-hnk/index.html; https://www.bbc.com/future/article/20200504-coronavirus-what-is-the-best-kind-of-face-mask.

[21] Governor Abbott did issue an Executive Order on April 27, 202 stating that reopening restaurants must follow CDC recommendations, which require face coverings in public.

determination is a novel question and shall be left up to the pertinent state agencies.

On the other hand, the presence of **known** hazards in the workplace changes the equation. Such known hazards" would include the unreasonably high likelihood of contracting COVID-19 due to the business s location, known infections in the workplace, customer composition, workplace logistics, etc. If such known hazards are present, the employer is actually or constructively aware of such hazards, and the employer fails to address these health and safety issues, the employee s decision not to return to the workplace may likely be found justified. Such an employee may then have a viable claim for constructive discharge.

Case Study: Face-Mask Lawsuit in Dallas County

Recently, in Dallas County, an employee of Hillstone Restaurant Group (Hillstone") sued her employer for its policy forbidding its employees from wearing face masks during dinner service.[22]

Doe s petition sought a Temporary Restraining Order (TRO") and Temporary Injunction (TI") to allow her to wear a mask while working. Doe also sought to prevent reprisal from exercising her whistleblowing claim that Hillstone s policy violated 1) County Judge Jenkins s April 23 and May 4, 2020 orders requiring all employees to wear face coverings, and 2) Governor Abbott s April 27, 2020 Executive Order pertaining to restaurants reopening.[23] Doe also claimed that Hillstone s conduct constitutes negligence *per se*, wrongful constructive discharge, and retaliation.[24]

The Court granted Doe s application for the TRO. It found that Doe had a substantial probability of demonstrating that Hillstone violated the law by failing to allow workers to return to work with face coverings, and that Doe had a cause of action sufficient for the purpose of granting a temporary injunction.[25]

More significantly, the Court concluded it was a no brainer" that Hillstone s no-face-mask policy violated the law, given the Dallas County Order and Governor Abbott s Order requiring reopening restaurants to follow the CDC s recommendation to wear masks in public. But critical gray areas"

[22] See Jane Doe v. Hillstone Restaurant Group, Inc., Cause No. DC-20- 06494 (Dallas County 116th Judicial District, May 7, 2020) at https://www.courthousenews.com/wp-content/uploads/2020/05/Covid.AtWork.pdf.

[23] Id. at pg. 8.

[24] Id. at pg. 14.

[25] See Jane Doe v. Hillstone Restaurant Group, Inc., Cause No. DC-20- 06494 (Dallas County 116th Judicial District, May 7, 2020) and https://www.dallasnews.com/news/public-health/2020/05/07/hillstone-restaurant-group-employee-seeks-judges-order-to-be-allowed-to-use-mask/.

remain. For instance, is it sufficient for a mere recommendation" from the CDC to serve as the legal foundation for a governor s executive order?

Another gray area: what if Governor Abbott did not issue such an order? Hillstone could argue that Texas s recommendation to wear face masks preempts Judge Jenkins Order requiring masks in public. If Hillstone was successful in that argument, the matter, as discussed above, then becomes a fact-intensive question of whether the absence of masks creates an unsafe workplace due to the magnitude of risk of SARS-CoV-2 exposure and infection. As such, the matter would be costly to litigate given the need for medical, scientific, and occupational expert testimony.

In sum, unless masks are required under state law[26], whether an employee may legally refuse to return to work for fear of SARS-CoV-2 infection is a question that can only be answered via a case-by-case analysis. Different businesses encounter different levels of risks from coronavirus. This calls for preventative measures tailored to what is reasonable" under the circumstances.

Question 3: Given the COVID-19 pandemic, when can an employer deem an employee's refusal to return to work as a "voluntary quit"?

As Iowa Gov. Kim Reynolds has stated, employees bear substantial risk when determining not to return to work as they might have inadvertently consented to a voluntary quit.[27] Similarly, in Texas, workers may lose their unemployment benefits if they refuse to return to work because of the perceived risk of COVID-19 infection.

According to the Texas Workforce Commission ("TWC"), to qualify for unemployment benefits in the state, a worker must be willing and able to work all the days and hours required for the type of work you are seeking."[28] As such, there is a fine line between voluntarily withdrawing from a work opportunity and refusing to return to a workplace with recognized hazards.

Tex. Lab. Code Ann. § 207.045(a) states that an individual is disqualified from benefits if they left their last work voluntarily without good cause connected with the work. Further, § 207.045(d) provides that an individual who is available to work may not be disqualified for benefits because the individual left work because of: (1) a medically verified illness of the individual or the individual's

[26] Under the Tenth Amendment of the Constitution, employers can challenge any federal requirement to wear masks in public (assuming the state government does not follow the federal requirement).

[27] See https://thehill.com/homenews/state-watch/495050-states-telling-workers-theyll-lose-unemployment-benefits-if-they-refuse.

[28] Id.

minor child; (2) injury; (3) disability; (4) pregnancy; (5) an involuntary separation…"

Tex. Lab. Code Ann. § 207.046 states an involuntary separation occurs when an employee separates from work for an urgent, compelling, and necessary work-related reason so as to make the separation involuntary. The TWC has deemed that under the statutory framework, a work separation is voluntary if initiated by the employee, and an employee who chooses not to return will become ineligible for benefits.[29]

The TWC has also determined that an employee initiates the work separation if he or she freely initiates a work separation[30] as in a true voluntary work separation, the employee has more control than the employer over the fact and the timing of leaving the work.[31]

Conversely, a work separation is involuntary if initiated by the employer. An employer initiates a work separation by taking some kind of action that makes it clear to the employee that continued employment will not be an option past a certain date.[32] In such a situation, the employer has more control than the employee over the fact and the timing of leaving the work.[33]

Therefore, in the context of COVID-19, the key question is this: is the risk of infection at the workplace of such a magnitude as to make working conditions so intolerable and/or unsafe that a reasonable employee would feel forced to resign, thereby constituting a constructive discharge? As previously stated, this is a fact-intensive inquiry requiring for its resolution medical, scientific, and occupational experts.

In short, according to the TWC, the essential distinction between a voluntary work separation and an involuntary work separation due to COVID-19 depends on who initiates the work separation. A significant part of that analysis turns on whether the employer has met OSHA s requirement to keep the workplace free of recognized hazards.

The employee will claim that the employer s failure to implement reasonable health and safety measures to ensure reasonable protection against SARS-CoV-2 infection is an urgent, compelling, and necessary work-related reason necessitating his/her refusal to return to work. The employer will claim in rebuttal that the risk of SARS-CoV-2 infection in its workplace is low and that it has taken all reasonably necessary measures.

[29] Id.

[30] See https://www.twc.texas.gov/news/efte/types_of_work_separations.html.

[31] Id.

[32] Id.

[33] Id.

In order to bolster the employer s claim, we encourage employers to immediately update their Employee Policies and Handbooks documenting the reasons it believes the risk of infection at its workplace is low and the reasonable precautionary measures it has taken. The attorneys at Nguyen & Chen LLP are readily available to assist in this endeavor.

In sum, whether an employer has taken adequate and reasonable safety measures to prevent SARS-CoV-2 infection depends substantially on the nature of the work done at the workplace, the type of harm the safety measures are intended to address, and the magnitude of the risk. If the employer has taken adequate and reasonable safety measures to prevent SARS-CoV-2 infection, then an employee refusing to return to work due to fear of SARS-CoV-2 infection will be deemed a voluntary quit and thus will not be entitled to unemployment benefits. The employer would not have to worry about a potential chargeback.

STAY TUNED: Part II of this series will discuss the implications of the EEOC's guidance on COVID-19 and how to comply with the Americans with Disabilities Act (ADA), the National Labor Relations Act (NLRA) as it pertains to employees joining together to refuse to work in unsafe conditions, and the Families First Coronavirus Response Act (FFCRA).

Next steps

As your business develops policy and practices required to safely operate in an environment in which COVID-19 is likely to be a risk for the foreseeable future, **the specialists at Nguyen & Chen, LLP, are ready** to deliver practical, timely advice to limit your liability, while helping you protect your business s most valuable resource: your people.

Nguyen & Chen, LLP is a full-service law firm specializing in the areas of complex civil litigation, corporate and commercial transactions, cyber security, immigration, and labor and employment. At Nguyen & Chen, LLP, we strive to consistently deliver seamless, pro-active and interdisciplinary counsel at the highest levels of quality. Our attorneys are skilled, knowledgeable and frequently work across multiple areas of the firm's practice. This superior approach provides our clients with valuable solutions to a myriad of problems and projects, while maintaining continuity of service and building the long-lasting relationships we cherish.

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