



ZOOMcast Episode 6

Liability Considerations of Returning to Work

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McCathern and Ty Sheaks



Ty M. Sheaks

- Formed in 1998, McCathern, PLLC is a law firm headquartered in Dallas with additional offices in Houston, Frisco, and Los Angeles.
- The firm's many practice areas include business & commercial litigation, employment law, personal injury, restaurant & hospitality, construction litigation, insurance litigation, commercial trucking, health care, family law, estate planning, and others.
- McCathern Partner Ty M. Sheaks is based at the firm's Frisco, Texas office and specializes in complex civil and commercial litigation matters and leads the Restaurant & Hospitality section.
- Ty is an IAVM faculty member, serves on the advisory board for the Circle Ten Council of the Boy Scouts of America, is a member of the Claims and Litigation Management Alliance (CLM), Defense Research Institute (DRI), Texas Restaurant Association (TRA), and the Greater Dallas Restaurant Association (GDRA).



And So It Begins...

- COVID-19 related lawsuits will generally be filed by a: (1) consumer; (2) employee; or (3) shareholder.
- Types of COVID-19 related lawsuits generally involve:
 - General Negligence / Premises Liability
 - Class-Actions
 - Contractual
 - Employment law
 - Governmental



Return to Work Considerations

- What is legal obligation to protect anyone who may enter venue?
 - OSHA “general duty” clause (29 U.S.C. 654)
 - (a) employer shall furnish place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees;
 - (b) employee shall comply with occupational safety and health standards under the Act and all rules, regulations, and orders issued under the Act applicable to his/her own actions and conduct
 - Common law “negligence” or “premises liability” standard
 - failing to exercise degree of care expected in order to minimize risk of harm to another; or failure to ensure no unreasonable risk of harm that you knew or should have known about and failed to warn about

Return to Work Considerations

- New written policies and procedures (cleaning, social distancing, PPE, health screening, etc.) and how to convey those to employees and public
- Preparing venue for re-opening (phased for key employees, other staff/vendors, and then public)
- Training
- Enforcement
- Flexibility



Return to Work Resources

- CDC

<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/event-planners-and-attendees-faq.html>

- OSHA Guidance on Preparing Workplaces for COVID-19

<https://www.osha.gov/Publications/OSHA3990.pdf>

<https://www.osha.gov/SLTC/covid-19/>

- DOL/EEOC

<https://www.eeoc.gov/coronavirus>

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- State Governmental Agencies

NGA (<https://www.nga.org/coronavirus/>)

- Whitepapers

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Return to Work FAQs

- Can you require employees to wear PPE at work?
 - Yes, under current guidance may require employees to wear PPE such as masks and gloves as well as observing approved infection control measures like regular hand washing and social distancing protocols
 - Be mindful of specifying which type given ongoing shortages, proper vetting of PPE (i.e. knockoffs), setting expectations on who will provide, what to do if lost/damages on the job, etc.
 - Also don't forget where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), you should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of your business under the ADA or Title VII

Return to Work FAQs

- Can you conduct “medical screening” on employees returning to work and what is extent of that?
 - Yes, under current guidance from CDC, DOL, EEOC. Screening can range from questions regarding currently approved symptoms (fever, chills, cough, shortness of breath, sore throat, new loss of smell/taste, gastrointestinal problems), **measuring body temperature**, to administering COVID-19 testing (but must ensure test is accurate and reliable)
 - **Any medical information obtained from employees must be kept confidential as a medical record and separate from employee’s personnel file**

Return to Work FAQs

- What about the “worried worker” hesitant to return to work and how do you handle?
 - Little more grey, since some basis will be legit and some not. Under current guidance from DOL/EEOC (and check state/local laws as well), if worker hesitant treat it as request for “reasonable accommodation” under ADA and begin “interactive process” to determine whether request will qualify as a “disability”
 - If it is not obvious or already known, employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of the position (that is, the fundamental job duties).
 - ADA only applies to employee’s own health conditions, but FMLA, paid sick leave, Families First Coronavirus Response Act or other state/local law may apply and allow for protected time off

Return to Work FAQs

- Can you require employees to return to work and how do you handle?
 - Under current guidance, you can't force employee to return to work. But make sure offer to return to work is made in writing (multiple formats) and contains details of offer like rate of pay, schedule, duties, etc. If employee refuses to return to work after receiving written offer (again get confirmation of refusal in writing) may result in disqualification from receiving unemployment or other benefits being terminated
- What if employee has been out sick or tested positive for COVID-19?
 - Like refusing to answer medical screening questions, can refuse entry to workplace but make sure you follow CDC and other regulatory guidance on this:

<https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>
 - Can technically require doctor's note under ADA, but be reasonable and make sure no state/local guidance that may be different*

Return to Work FAQs

- What if infection traced to your venue?
 - Tell your story!
 - Were your policies and procedures for returning to work and being open following current health authorities and federal/state/local guidance?
 - CDC FAQ for steps to take if staff member or attendee develops symptoms at an event
 - Follow health authorities and federal/state/local guidance on cleaning and disinfecting protocols to implement
 - Insurance exclusions?

In Conclusion

- Provide a reasonably safe workplace for their workers. Law doesn't require employer to guarantee the safety of their workers, but must take reasonable steps.
- Stay informed of all federal, state, local laws as well as any industry guidance (stay tuned).
- Mitigate risks by creating a plan catered to your business, industry, customers, employees, etc.
- Take reasonable steps now to minimize potential liability in the future. By participating in these industry calls, webinars, and staying abreast of changing dynamics and actions taken by your peers, you are ahead of the game in lessening your liability by acting as the reasonably prudent venue.





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