

2nd Session | *Virtual Community Learning Series*



EMPLOYMENT LAW & WORKERS' COMPENSATION LAW:

“HOW THEY INTERPLAY WITH EACH OTHER IN THE CONTEXT OF RISK”

WITH AN EMPHASIS ON BUSINESS VULNERABILITY AND THE LEGAL, ENVIRONMENTAL AND PHYSICAL “COVID-19 ADHERENCES” WE WILL NOW HAVE TO CONSIDER TO PROTECT OUR BUSINESSES AND MORE IMPORTANTLY OUR EMPLOYEES.



KALA M. SCHMIDT

KSCHMIDT@THEOAKSLAWGROUP.COM | P: 562.606.0102

Is a certified specialist in Workers' Compensation law and the founding attorney of The Oaks Law Group, a Workers' Compensation defense firm committed to success in Risk Management through integrity and dependability. Ms. Schmidt is also formally trained in Advocacy and Problem Solving, Conflict Resolution, and Arbitration Law, having graduated from one of the nation's top 5 Dispute Resolution Institutes. She believes that every participant in the Risk Management industry needs a strong voice and is honored to be that voice for her clients.

1) Due to undue hardships, can COVID-19 itself be a relevant determination in deciding whether a requested accommodation can be denied?

In general, yes, when it comes to the interactive process for temporary work restrictions. For many employers, short-term accommodations may not be feasible in pandemic conditions. Communicating the short-term and emergency nature of policy changes is one way to limit risk, as is ensuring that accommodations are either made or denied uniformly for all similarly situated employees. Furthermore, employers should retain the right to monitor, modify, or withdraw the policy at any time.

If engaging in the interactive process for permanent work restrictions, it is not recommended that COVID-19 be used as a factor in determining whether a requested accommodation may cause undue hardship unless the employer has permanently changed its business model as a result of the pandemic.



2) What should employer's stance be when employee refuses to return to work due to COVID-19?

From a workers' compensation perspective, if a return to work offer is made, and an employee refuses to return to work due to COVID-19, the employer is no longer liable for continuing temporary disability benefits. Likewise, the employer would not be liable for making permanent disability advances if a viable return to work offer is made, assuming it provides the injured worker 85% or more of their pre-injury wages.

Employers can, however, allow their employees to take paid time off but may want to consider following PTO policies to help ensure a sufficient workforce. Additionally, employers may want to offer hesitant employees unpaid leave.

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3) When pre-existing mental illness is exacerbated by COVID-19, what risks do we face as employers?

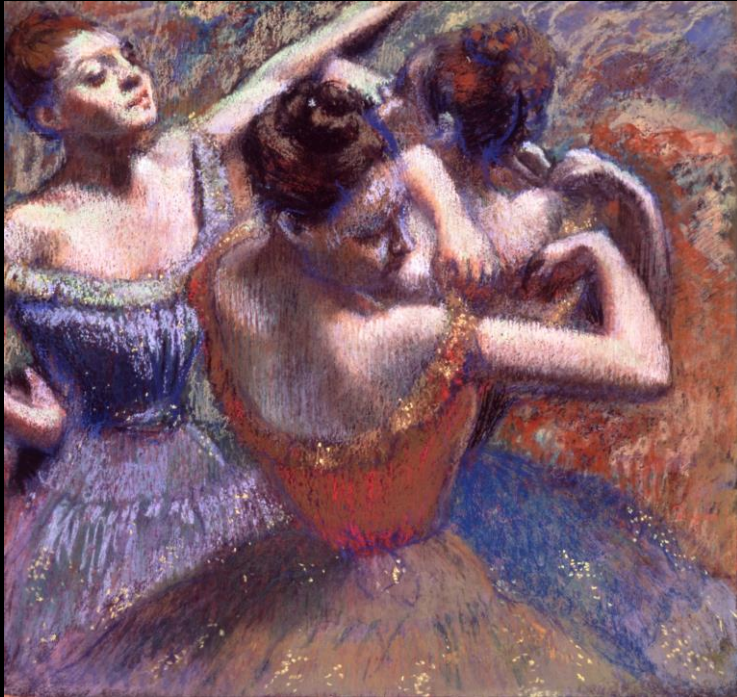
In the realm of workers' compensation, you take your employees as you find them, meaning that an "eggshell" applicant who is more susceptible to psychiatric injury poses a greater risk to their employer. If a fragile employee's pre-existing mental illness is exacerbated by COVID-19, a subsequent event at work such as a stressful interaction with a coworker, customer, vendor, etc., could result in an industrial injury to the psyche assuming the injured worker can establish that the predominant cause of their symptoms resulted from the workplace event.

If an employee with pre-existing mental illness develops COVID-19 on an industrial basis, and this in fact exacerbates their mental condition, this too may result in exposure for the employer for, at the very least, psychiatric/psychological treatment to bring them back to their mental baseline, and even potentially for disability benefits depending on the severity of that exacerbation.

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4) Can an employee be terminated due to PPE non-compliance or refusal of COVID-19 testing when there is an active workers' compensation claim?

Yes, but it needs to be done according to a written policy that is implemented and carried out objectively and consistently with all employees. An employee with an active workers' compensation claim should not be shielded from actions or consequences that other employees without claims face. That being said, to avoid exposure for a discrimination claim under Labor Code § 132(a), you should have your PPE policy in writing, and that policy should be posted in a conspicuous location(s) throughout the employment site(s). The policy should also be made available to employees in writing, and they should sign an acknowledgement of receipt of said policy. PPE that is required by the employer should be provided to employees, free of charge.

If an employee refuses to wear a mask or use PPE, then the employer should first attempt to explain the requirement to the employee and convince the employee of the need to wear the mask/PPE. If an employee continues to refuse the safety requirement, the employer may be able to suspend the employee or take further action as necessary, unless an employee's disability prevents him or her from wearing a mask, in which case the Americans with Disabilities Act would come into play, and an employment law attorney should be consulted.



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5) If a COVID-19 incident is reported, do we have the duty to inform the general workforce?

There is no legal duty to inform the general workforce of a COVID-19 incident. However, the CDC has advised employers to inform fellow employees of their possible exposure to COVID-19, without disclosing the identity of the person who tested positive. You may also wish to advise customers, vendors, and visitors of their possible exposure.

If an employee tests positive, an employer should do the following:

- o Determine where exactly the employee was physically present at work during the last 14 days and what other employees may have been in overlapping areas;
- o Ask the COVID-19 Positive employee to identify any other employees with whom s/he had contact during the prior 14 days;
- o Alert all employees that are identified that they may have been exposed to a co-worker diagnosed with COVID-19 and direct them to keep an eye out for symptoms. **DO NOT** reveal the identity of the co-worker;
- o Allow any employee who has close contact with someone with COVID-19 to stay home (and work remotely if possible) for 14 days after exposure based on the time it takes to develop illness.

6) What are the legal ramifications on reduction of workforce pay?

In the realm of workers' compensation, be aware that while a reduction in workforce pay is allowable, reducing an employee's temporary disability rate based on a post-injury reduction in pay will likely result in litigation and could expose you to penalties under Labor Code § 5814.

Because Labor Code § LC 4453(c)(4) allows an employee's temporary disability rate to be based on earning capacity instead of actual wages, reducing an employee's temporary disability rate to reflect a reduction in workforce pay is not recommended. The WCAB has been very reluctant to hold that an applicant's post-injury wage decreases adequately reflect his or her earning capacity since the Labor Code does not require disability rates be based on actual earnings.

7) How can we legally secure a firm order when it comes to quarantine and vaccination proceedings especially for the workforce who is anti-vaccine?

Regarding quarantine proceedings, if someone has tested positive for COVID-19 symptoms, follow the steps outlined above though do note that you cannot control where an employee goes and who they come into contact with outside of work.

Assuming a vaccination is developed, employers may wish to encourage employees to be vaccinated. However, if they sponsor vaccinations and/or have the vaccinations administered on-site, the employer may face liability for any adverse reactions and any time off that is required to recover from said reactions.

Are employers required to cover any additional costs that employees incur when working from home?

Yes. Labor Code § 2802 requires employers to reimburse their employees for the reasonable and necessary expenses they incur in direct consequence of discharging their job duties. The purpose of this statute is to prevent employers from passing operating expenses on to their employees. For instance, where it is mandatory for employees to use their personal cell phones for work, generally they must be compensated for a reasonable percentage of their phone plans.

In the context of a workers' compensation claim, having an employee work from home as a temporary accommodation may be a more economic option than paying them temporary disability benefits, even if the employer has to compensate them for additional expenses such as a portion of their cell phone bill, etc.

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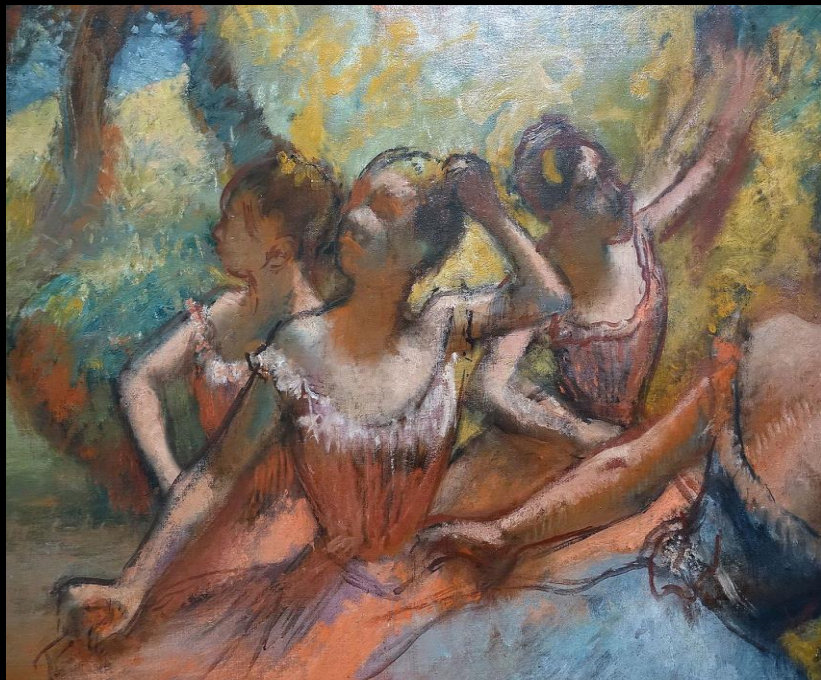
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8) When hiring, can the employer screen applicants for COVID-19?

According to the EEOC, yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This holds true for making a job offer to return to work post-injury. However, if an employee tests positive, the return to work offer cannot be withdrawn. Instead, the employee should be allowed to self-quarantine for at least 14 days, or until symptoms resolve fully and there has been no fever for at least 3 days without the use of fever reducing medication. At that point in time, they should be allowed to resume working according to the terms of the return to work offer.



Employment Law Expert

ERIC DE WAMES

EDEWAMES@SULLIVANATTORNEYS.COM | P: 818.338.4000

Eric is Managing Partner of his firm's employment department and an 18-year trial attorney. He represents businesses in a wide range of employment and labor law matters, including wage-and-hour issues, and cases involving claims of discrimination, harassment, retaliation, wrongful termination and class actions. He is an expert in devising creative and effective strategies for investigating, litigating and negotiating settlements. He counsels business owners, managers and HR professionals on federal and state labor regulations, and is an experienced advocate before the EEOC, DLSE and other governmental agencies. Mr. De Wames has most recently co-authored *Navigating COVID-19: A Legal Guide for California Employers*, available on his firm website.



PLEASE FEEL FREE TO REACH OUT TO ERIC DE WAMES AT EDEWAMES@SULLIVANATTORNEYS.COM IF YOU WOULD LIKE TO SEEK HIS LEGAL COUNSEL ON HOW TO PROACTIVELY DEAL WITH THE ISSUES LISTED BELOW.

- 1) CAN WE IMPLEMENT SPECIFIC POLICIES FOR ELDER EMPLOYEES OR EMPLOYEES WHO HAVE PRE-EXISTING COMORBIDITIES?
- 2) WHAT LOGISTICS SHOULD EMPLOYERS CONSIDER WHEN PREPARING FOR THE PHYSICAL RETURN OF ITS WORKFORCE?
- 3) ARE THERE ANY STEPS EMPLOYERS SHOULD TAKE TO ADDRESS WORKPLACE HARASSMENT RELATED TO COVID-19?
- 4) WHAT LEGAL RESPONSIBILITY DO EMPLOYERS HAVE TO ALLOW FOR PARENTS OR CAREGIVERS "TIME OFF FROM WORK" TO CARE FOR THE SICK OR CHILDREN WHO HAVE BEEN DISMISSED FROM SCHOOL?
- 5) HOW CAN WE LEGALLY SECURE A FIRM ORDER WHEN IT COMES TO QUARANTINE AND VACCINATION PROCEEDING ESPECIALLY THE WORKFORCE WHO IS ANTI-VACCINE?
- 6) ARE EMPLOYERS REQUIRED TO COVER ANY ADDITIONAL COSTS THAT EMPLOYEES INCUR WHEN WORKING FROM HOME?
- 7) WHAT ARE THE LEGAL RAMIFICATIONS ON REDUCTION OF WORKFORCE PAY?
- 8) WHEN HIRING, CAN THE EMPLOYER SCREEN APPLICANTS FOR COVID-19?



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THURSDAY, JULY 16, 2020 | 10:00AM – 11:30AM PST

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