



The Changing Employment Landscape amidst the Covid-19 Pandemic.

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Andrew B. Prescott
Partner, Labor and Employment Group
Nixon Peabody LLP



Kim McCauley
Chief Human Resources Officer
NBIC

Performance concerns during Covid-19



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Performance Feedback in a distance world

Start from the premise the world has changed in so many ways...

- Never has communication been more important
- Address issues sooner rather than later
- The problem may be able to be remedied
- External factors caused by pandemic may be contributing to the problem
 - Early Intervention
 - Patience where it can be exercised
 - Documentation
 - Communication
 - Progressive discipline



Covid-19 and performance improvement plans and termination decisions



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Rethink Standards on Absenteeism

Give employees leeway to follow the rules

Pay attention to patterns of abuse



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Performance Feedback in a distance world

- Keep approach similar to Pre-Pandemic
- Healthy balance of verbal and written feedback
- Verbal discussion: by phone/zoom
- Don't always resort to written documentation because it's easy to create an email
 - Risk of losing DIRECT PERSON TO PERSON contact and building trust



New Regulations and the ABC's of Employment Law



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Families First Coronavirus Response Act (FFCRA)

Pandemic Unemployment Assistance (PUA)



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New Regulations

If you have Covid-19 symptoms, you stay home!

- Looking at employee absenteeism through the same lens as before doesn't really work.
- Rethink our standards regarding absenteeism and giving employees some more leeway, frankly, to follow the rules, because we're all in this together.
- We can't say to employees, “stay home if you have symptoms or don't work if you have symptoms” and then come down on them hard if they do that
- We need to look for patterns of abuse and we need to really think about whether somebody's absenteeism or failure to work is indicative of something other than just trying to comply with the Covid-19 rules.
- It's perfectly appropriate to ask medical questions in this environment. The EEOC has said that those questions are fair game when there's some reason to believe that there's a business necessity to ask them.

Medical discussions with your employees

- Rule of thumb to stay away from any medical discussion that is not job related has changed.
- The Americans with Disabilities Act, establishes various restrictions on employers making what the ADA calls medical inquiries.
- The EEOC specifically has said that during the pandemic, as long as you stay within the confines of the CDC guidance (refer to symptoms), you're not violating the ADA.
 - Need reasonable basis
 - Objective evidence

Manufacturing Environments: When employees can not work from home



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Labor Stabilization in Manufacturing

Plan for increased employee unavailability

- Accept the fact that the production may be diminished,
- May need to evolve into more staggered shifts
- Structure the workforce so that not everybody's in at the same time
- all employers are governed, for example, by the OSHA general duty clause, which mandates generally that all employers provide a safe work environment. And in the middle of a pandemic, permitting or encouraging employees to be at work when they're exhibiting symptoms of Covid-19 doesn't satisfy that obligation.

OSHA
Federally one size fits all

State Law has filled the void to
inspect workplaces



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All employers are governed by the OSHA general duty clause

- Mandates generally that all employers provide a safe work environment.
- And in the middle of a pandemic, permitting or encouraging employees to be at work when they're exhibiting symptoms of Covid-19 doesn't satisfy that obligation.
- Many employers are adopting the state laws despite the fact that the state that they're currently headquartered in don't have the same types of stringent guidelines.

Dealing with employees who knowingly violate Covid-19 guidelines



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Employees report to work with symptoms

Wide range of disciplinary options

- Send a message to the workplace that these protocols are serious and can't be ignored.
- If employee is employed at will, which, most employees in this country are, they can be terminated for violating these protocols.
- A couple of things to keep in mind.
 - Most employers do try to follow.
 - Take into consideration the factors, the circumstances of that situation, how serious were the symptoms?
 - To what extent did the employees present in the workplace expose others to their symptoms?
 - What compelled the employee to come in where they under some particular pressure, did a manager or a supervisor contribute to that, although circumstantial things should be taken into consideration.

It's the employer's right to decide how far to go in terms of discipline in that situation.

Violation of pandemic protocols



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How far should employers go to make sure that employees follow social gathering restrictions?



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Employees violate social gathering rules

Normally, this is considered out of work conduct. It's a person's decision to make and it's not the business of the employer

- Covid-19 has changed this perspective
- That private behavior, that off work behavior can have serious impacts for a business and for the other employees, many of whom will be following the rules and making sacrifices not to gather with their families.
- What's fair and how far does an employer go in theory anyway?
 - Again, getting back to employment at will, an employer can terminate or discipline an employee who doesn't follow those guidelines about gathering during the holidays.
 - Should an employer do that? That is a more difficult question that we don't get into as much the law as it is an employee relations decision.

Advice: Have the CEO communicate in the most effective way possible and urge people to follow the guidelines and talk about the consequences if they don't.

Managing changing regulations and conditions



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When is it OK to ask an individual employee questions about their COVID-19 status ?

Steps employers can take

- Designate somebody internally who's accountable for knowing at any point in time what the current requirement is and whether it has shifted.
- Use of a variety of communication tools to mix it up
- Create online training for managers specifically addressing manager responsibilities in regard to Covid-19
 - Identify symptoms
 - Encourage employee to not report to work
 - Reinforce social distancing



Providing fair and equitable accommodations when low performers might try to use the “Corona card?”

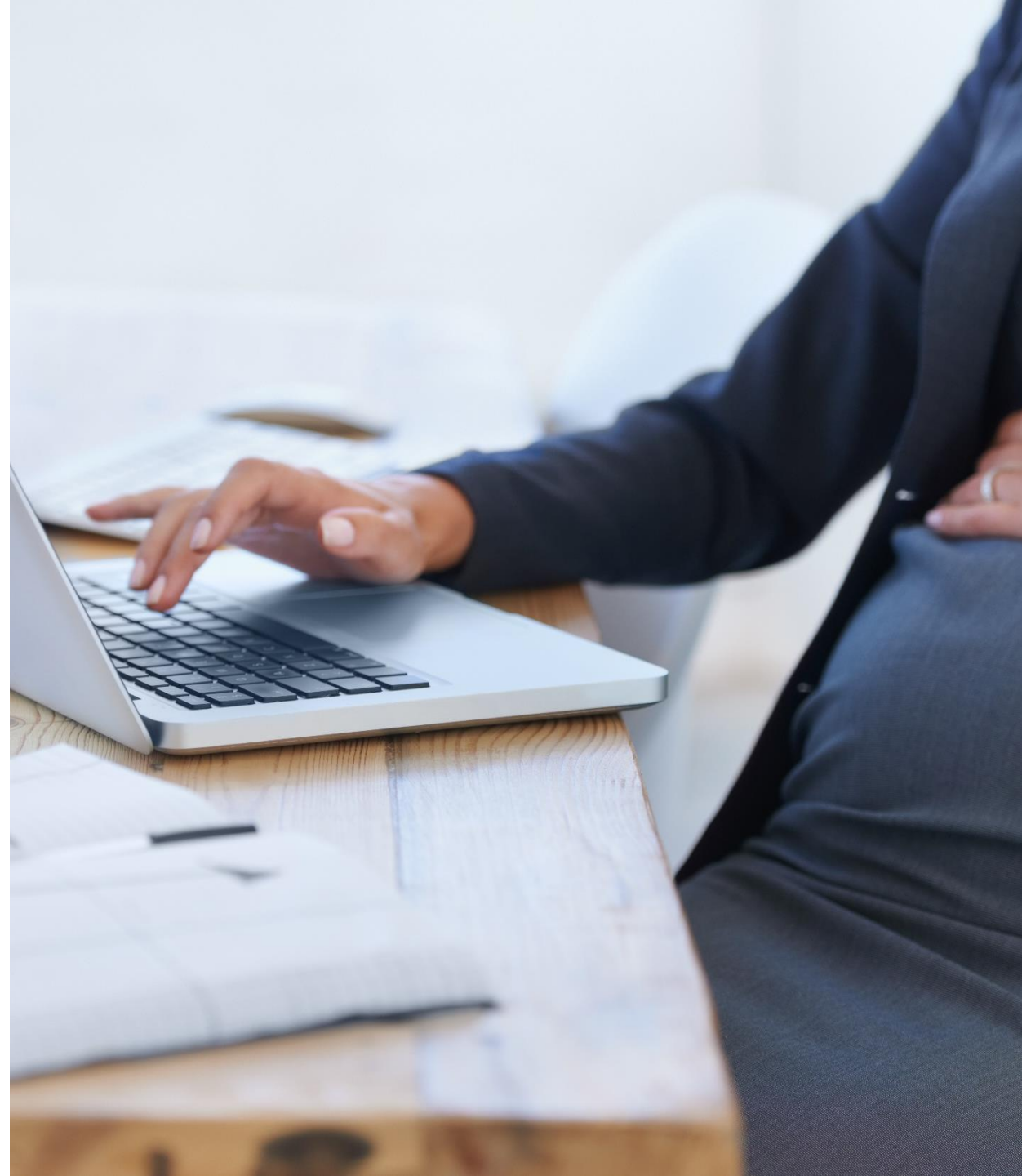
If an employer knows that an employee who is coming to work is pregnant, what should the employer do?



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Pregnancy Discrimination Act of 1978 (“PDA”)

The PDA prohibits discrimination on the basis of pregnancy, childbirth and related medical conditions in any area of employment, including benefits.



RI Pregnancy Accommodation Law

It is an unfair employment practice to:

- Fail to accommodate an employee's pregnancy
- Forms of required accommodation include leaves of absence for birth or to recover, providing light duty, temporary transfer to less strenuous or hazardous positions, adjusting hours of work, and providing private (non-bathroom) space for expressing breast milk
- Undue hardship defense to failure to accommodate claim
 - Factors include expense of accommodation, overall resources of employer, and operational impacts
 - Burden on employer to provide undue hardship

Americans with Disabilities Act ("ADA")

The ADA protects “qualified individuals with a disability.”

- The ADA prohibits employment discrimination based upon a mental or physical disability against an employee or job applicant with respect to positions for which the individual is qualified.
- The ADA requires “reasonable accommodations” in hiring process and during employment; certain limitations on obligation



Title VII of the Civil Rights Act of 1964 (“Title VII”)

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. It covers recruiting, hiring, compensation, termination, job assignment, training and all other terms and conditions of employment.

What about employees who have childcare responsibilities and school or child care closures prevent them from coming to work?



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Inability to work due to child care closures

- First, we need to comply with FAFSA
- The employee may be eligible for paid time off or Emergency Family and Medical Leave Act leave because of the unavailability of child care
- Employers have to ascertain how far to go in being flexible and allowing people the time off they need or the teleworking opportunity. And at the end of the day, make the best decision for both the employee and the organization.
- These go to sort of the fundamentals of their lives, their kids, their families, their health, and so doing the right thing goes along way with employee retention and morale.



Protecting employee health privacy while contact tracing at work



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Protecting employee privacy

- Communicate with sufficient information to the other employees without individually identifying a Covid positive employee.
- “Someone on the 14th floor has tested positive for Covid “
- A lot of employers are not covered entities when it comes to HIPPA. So HIPPA and other health care laws may not apply.



Mandatory vaccines



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Mandatory vaccine

- Naturally, employers are beginning to ask the question: **“Can we require employees to be vaccinated against COVID-19?”**



Mandatory vaccine

- Naturally, employers are beginning to ask the question: “**Can we require employees to be vaccinated against COVID-19?**”
- Mandatory vaccinations in the workplace are particularly prevalent among healthcare providers, but what about other industries and what about the balance an employer needs to consider in mandating vaccinations as an employment condition and also respecting employees personal and religious choices?



Mandatory vaccine considerations

- The EEOC has said that an employer cannot impose a “no exception” mandatory vaccine requirement.
- The Title Seven Protection Against Religious Discrimination may require that an employer accommodate an employee who was refusing to be vaccinated on religious grounds.
- Americans with Disabilities Act may require accommodation of an employee who's refusing to be vaccinated because the vaccination may cause them harm in light of a pre-existing disability
- National Labor Relations Act, which protects employees who are engaged in concerted, protected activity may protect a group of employees who were joining together in resistance to a mandatory vaccination policy.
- Workers compensation laws at the state level and the possibility that adverse reaction to vaccines may trigger an employee's right to compensation under those statutory schemes



Thank you



Kim McCauley

NBIC

Kim.mccauley@nbic.com



Andrew B. Prescott

Nixon Peabody LLP

aprescott@nixonpeabody.com

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