

Workplace of the Future: Innovation and Communication Will Be Crucial for Employers

COVID-19 Return to Work Series: Part 7

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Holland & Knight Alert

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Highlights

- As companies plan their return to the workplace, it is readily acknowledged that to return to some "semblance of previous normality," a COVID-19 vaccine is needed on a global scale. However, employers and their workforces are confronting the future of the workplace now.
- Although some public health and regulatory guidance exists for returning to work, there are also a number of emerging legal, social and cultural issues that will impact the workplace. Key among these are artificial intelligence and other technologies, changes in employer rights and responsibilities, and the need for straightforward two-way communication.
- This is the final installment in a [series of alerts](#) by Holland & Knight's Labor, Employment and Benefits Group focusing on return-to-work issues during the COVID-19 pandemic.

As companies plan their return to the workplace, it is readily acknowledged that to return to some "semblance of previous normality" a COVID-19 vaccine is needed on a global scale.¹ Even with optimistic predictions that a vaccine will be available as early as 2021, employers and their workforces are confronting the future of the workplace now.

Although there is current guidance for returning to work, in terms of public health practices² and regulatory compliance that may establish "community standards" for evaluating an employer's conduct, there also are emerging legal, social and cultural issues that will impact the workplace. The final installment of Holland & Knight's "Return to Work" series addresses key policy and practice issues affecting the workplace and workforce of the future.

Innovation: How Artificial Intelligence and Other Technology Will Shape the Workplace of the Future

The workplace of the future will undoubtedly be a product of focused concerns on health and safety, efficiency and cost-reduction. Advancements in artificial intelligence (AI) and other technology touch on all three and will play a critical role in shaping the workplace of the future – whether employees return fully to the workplace or telework. The COVID-19 crisis has increased employer awareness of and focus on technological tools, and will likely accelerate their development into the workplace. However, the proliferation and evolution of technology in the workplace will inevitably raise compliance and security issues.

Facilitating Remote Work

As employers vacated brick and mortar worksites, they had to continue communicating while teleworking and distancing. It became critical for businesses to be efficient and adaptable to survive. In many instances, companies pivoted to using communication and collaboration technologies such as Zoom, Webex and GoToMeeting, as well as collaboration tools such as Microsoft Teams. With such tools, remote work in some industries has proven an effective and efficient alternative, and is likely here to stay.

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Because of the accelerating effect of COVID-19, communication technologies likely will continue to be created, improved and enhanced.

Hands-Free Voice Control

Products are now readily available to bring hands-free voice control technology into the workplace, and their use can be expected to not only increase productivity but have the side benefit of reducing frequent touch points in accordance with the CDC's COVID-19 recommendations (including phones, keypads and touch screens),³ thereby promoting safety. Other technologies will allow emails to be dictated by the sender and read to the recipient without ever touching a keyboard. Voice control technology will allow users to make calls, schedule appointments, transcribe meetings and enjoy near real-time translation with just a few words. Employers who decline to adopt these tools may be viewed as failing to meet their general duty to provide a safe workplace under the Occupational Safety and Health Act.

AI in Human Resources and Other Functions

While internet-based recruitment tools and virtual interviews are nothing new, AI continues to develop in ways that improve employers' recruiting and onboarding processes. AI products can now help write job descriptions. Others match candidates to jobs, allow candidates to schedule their own interviews, prepare offer letters and aide in the training process. Recruitment software products can even improve fairness and compliance with anti-discrimination laws through controls that remove superfluous or trait-related information that may otherwise consciously or unconsciously influence hiring decisions.

Other AI software can gather data analytics related to employee performance. Notably, the possible existence of algorithmic bias in employee performance metrics remains subject to debate. AI can assist in harnessing discrete information related to scheduling and attendance management (e.g., letting employers know when someone has not been at their computer or work station). Sentiment analysis software can help gauge employee feelings and provide valuable employer feedback. These tools may prove particularly useful with a remote workforce.

COVID-19's workforce disruption has led to HR professionals having their hands full with strategic issues. This state of affairs likely will continue for some time. Tactical issues may be best addressed in a more automated fashion. Online resources and personal chat bots will increasingly cover basic employee questions related to benefits and other human resources issues (for example, questions about health insurance coverage) as well as information technology (IT) inquiries, alerting personnel only if no answer can be found, and provide "learning" on an ongoing basis.

COVID-19 brought to the forefront concerns about disruption in supply chains and distribution as companies faced shortages and delays in getting the most basic necessities, as well as personal protective equipment (PPE) and disinfecting supplies necessary for essential businesses to continue to operate. Blockchain technology is complex and potentially wide-reaching, but will have application in supply chain monitoring. A blockchain-backed system already is being tested by a major U.S.-based retailer and a well-known business technology provider. According to the World Economic Forum, "COVID-19 makes a compelling case for the wider integration of blockchain."⁴ The learning curve from COVID-19 "can show us how to build transparent, inter-operable and connective [supply] networks." Further development and integration of such algorithm technologies into supply and distribution networks may help lessen the effect of a similar crises in the future by facilitating tighter monitoring over supply and distribution.

Ensuring Safety in the Workplace

Much has been discussed about social distancing and the return to work. From floor stickers to work station partitions, there has been considerable thought given to redesigning the workspace. By the same token, employers have considered phased returns to work and new protocols for alternating use of space, controlling density and other mechanisms to maintain distance.

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Technological innovations and environmental controls and monitoring will play a key role in ensuring the safety of the future worksite. As mentioned in a previous Holland & Knight alert, AI measures and tracking mechanisms have been considered or already reportedly played a significant role in detecting and preventing further spread of the coronavirus: "[D]isinfecting robots, smart helmets, thermal camera-equipped drones and advanced facial recognition are being considered and deployed in the fight against COVID-19."⁵

While a sci-fi "fumigation chamber" likely won't be in the works, the workplace of the future will undoubtedly incorporate innovative technologies to monitor workplace environmental conditions (for example, air flow and quality), indicate workplace (and room) occupancy, and ensure compliance with Occupational Health and Safety Administration (OSHA) standards. Other technologies will help further reduce high frequency touch points, much as automatic doors have done in the past. Heat maps and thermal cameras may play a part, subject to privacy concerns. Lastly, PPE and personal detection devices will continue to evolve, such as the development of 6-foot detection wristbands. Employers may be expected or required to adopt these innovations in order to meet their general duty to provide a safe workplace. Industry-specific OSHA standards may mandate specific and early adoption of one or more of these innovations.

Concerns, Liabilities and Risk Management

Of course, for all the positives, a number of concerns are posed by AI and technological advances. To be sure, some measures will be costly and must be justified by a careful cost-benefit analysis. Employers also run the risk of dehumanizing the work environment by reducing the degree of human contact and interaction.

Additionally, the new technologies raise concerns over employees' rights and potential liability. Statutory protections exist under the Americans with Disabilities Act (ADA) and similar state laws for employee medical testing – including temperature tests and health data, so adequate safeguards to maintain confidentiality and privacy are critical. Greater monitoring of employees raises the specter of privacy concerns as well, as employees have a reasonable expectation of privacy under many state laws, the European Union's General Data Protection Regulation (GDPR) and other sources.

Undoubtedly, with the increased transmission of confidential information from remote locations, employers must also consider cybersecurity. At least one major video conferencing platform has been sued in recent weeks for allegedly allowing unauthorized access to third parties and for sharing information about its users with social media entities. The increased growth of remote and voice control technologies will depend heavily on the level of trust that employers have that their trade secrets and other confidential information will remain protected.

Employer Rights and Responsibilities in the Workplace of the Future

Employee Screening, Testing and Privacy Rights

The U.S. Equal Employment Opportunity Commission (EEOC) issued guidance on May 7, 2020, paving the way for employers to obtain COVID-19-related information from employees. The EEOC stated that "the EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19." Employers should regularly monitor the EEOC's website for updated guidance.

According to the EEOC, first, employers can ask employees and applicants "post offer" if they are experiencing symptoms associated with COVID-19. Second, employers can test employees by taking their temperatures before they enter the workplace or subjecting them to symptom screening. Third, employers can ask employees to undergo COVID-19 testing. The EEOC stated that employers may screen and require testing for COVID-19 because it may present a direct threat to the health of others. The employer must treat this medical information as confidential

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pursuant to EEOC and other applicable federal, state and local regulations.

Employee screening and testing may also implicate employer responsibilities under enacted and introduced consumer privacy laws. For example, pursuant to the California Consumer Privacy Act (CCPA), which went into effect on Jan. 1, 2020, California employers must add CCPA compliance to their COVID-19 protocols. Although employee personal information is excluded from certain parts of the CCPA until Jan. 1, 2021, employees and applicants now have the right to be informed of the categories of personal information collected and the purposes for which it will be used by the business as well as a private right of action. Other states with similar privacy protection legislation enacted or introduced include Nevada, Washington, Florida, Virginia, New Hampshire, Illinois, Nebraska, New Jersey, New York and Vermont.

As a risk management measure, employers who collect COVID-19-related medical information from employees and applicants should consider providing employees with formal notification of the employer's intention to collect the information, and describe the purposes for which it must be retained. Consistent with the CDC's guidance of a two-day to 14-day incubation period for COVID-19, it is recommended that a formal document retention policy be adopted that establishes a minimum period for the retention and destruction of the information.

Finally, once a COVID-19 vaccine is available – given the economic devastation, social disruption and personal loss caused by the spread of the virus – employers may require applicants "post offer" and current employees to provide vaccination certification. Whether a reasonable accommodation must be made to an employee who objects to vaccination on religious grounds or because of a disability would need to be assessed on an individualized case-by-case basis.

Continued National Labor Relations Act Protections in Light of New Working Conditions

While shelter-in-place orders remained in effect for a wide swath of the economy, workers continued to work across key economic sectors. Recent headlines describe widespread employee protest actions in key sectors, including hospitals, warehouses, distribution centers, meat processing plants and food delivery enterprises. Such protests spotlight the potential for ongoing job actions, whether they occur in a unionized or non-unionized workforce, as workers return to the workplace on a wider scale. Employers will need to navigate the rules for responding to worker protests in the workplace of the future.

The National Labor Relations Act (Act) protects employees, whether or not they are in a unionized workplace. Under the Act, employees have the federally protected right to engage in "protected concerted activity." Section 7 of the Act spells out these rights: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities ...⁶

Protected concerted activity for mutual aid or protection includes activity with other employees, on the authority of other employees, or to bring attention to a "common cause" relating to the terms and conditions of employment. Protections of the Act are also extended to activities that seek to initiate, induce or prepare for group action, or to bring truly group complaints to the attention of management. Actions by employees to protest the failure to provide adequate PPE, the lack of sufficient time to wash hands or the availability of hand sanitizers, or social distancing violations, fall under these well-established protections. Concerted protected activity also covers grievances over work schedules, such as a failure to implement shorter work days to accommodate changes in commuting or not implementing staggered schedules to promote social distancing, health benefits and testing protocols.

Workers using electronic means to communicate their grievances are just as protected. For example, website articles or blogs, social media posts, emails, text messages, photographs and audio and video recordings of job complaints

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have all been found to be protected concerted activity.

Protests related to COVID-19 and securing healthy and safe workplaces, whether they occur in a picket line in front of the workplace or through electronic media in a variety of formats or platforms, will likely be protected under the Act. Discharging, retaliating or threatening employees who engage in such concerted activities risk unfair labor practice charges being filed with the National Labor Relations Board. Such action would also serve as an organizing tool for non-union workplaces or could solidify a union's support at a time when union support across the private sector has waned.

Communication Is Key to Building Workforce Resilience and Managing Litigation Risk

The powerful impact that COVID-19 has on the emotional well-being and resilience of the current and future workforce cannot be overstated. Whether the workforce teleworks or returns to the workplace, a crucial employer focus will include thoughtful development and transparent implementation of an information communication strategy to inform employees, alleviate stress and build workforce resilience. Due to the long-documented interrelationship between workforce satisfaction and employer litigation risk, facilitating meaningful two-way communication opportunities between employer and employee will not only ease workforce return but will also assist employers in managing related labor and employment litigation risk going forward.

As return to the workplace and continued telework take place, OSHA and the CDC have both recognized the importance of two-way workforce communication to alleviate employee stress, maintain workplace safety and protect employers' business interests in the face of COVID-19. [According to OSHA](#), "[c]lear communication [between employers and employees] promotes confidence in the employer's ability to protect workers and reduces absenteeism," making employees more likely to return to work during a pandemic. Likewise, the [CDC recommends](#) concerted communication efforts as key to a successful return to the workplace while controlling the spread of COVID-19. Employers that fail to take seriously their obligations regarding workplace and workforce health and safety, as well as the communications required to accomplish that goal, may be particularly vulnerable to litigation.

The transparency of information and the ease with which it can be conveyed and accessed are essential to ensure that workers feel understood and supported, and that they know where to obtain answers to the questions most important to them. Transparency includes not only disclosure of new policies and practices, and the reasons for them, but also providing the information in an easily accessible and straightforward manner. Employers may wish to incorporate some or all of the following communication strategies in their return to the workplace practices:

- **Establish a robust internal-facing COVID-19 webpage.** The volume of old and new workplace policies, practices and expectations necessary to address COVID-19 can present daunting challenges for employers. A robust internal COVID-19 webpage can be an excellent employer tool to house and disseminate this information as well as to showcase the employer's dedicated effort to provide these resources to its workforce. The COVID-19 webpage may include: access to and descriptions of new COVID-19 driven policies and practices; reminders to the workforce of the continued application of relevant preexisting workplace policies, including those pertaining to anti-discrimination and retaliation; explanations of the health and safety efforts that have been put in place to protect the workforce, including screening and testing protocols; and a directory of accessible resources for the most up-to-date COVID-19 information, including links to federal, state and local websites.
- **Develop a resource for employees to ask questions and get reliable answers.** It is likely that many workforce members have the same questions and concerns regarding their return to the workplace or continued telework. While some will not hesitate seeking an answer to their concerns, others may be afraid to ask. While the internal COVID-19 website described above may be used as a resource, employers may also wish, depending on available resources, to designate an individual or team responsible for fielding and developing answers to the most common

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employee questions. Making a regularly updated Q&A available to the workforce is likely to alleviate stress on the employees and on the employers' systems, build collegiality among coworkers who recognize that others share their concerns and ensure that the employer is providing uniform responses across the company, regardless of location, to the host of questions that are likely to arise.

- **Create a safe avenue for employees to report concerns.** As employee confidentiality concerns rise along with employer's continued obligations to comply with applicable disability, discrimination, and wage and hour laws, employers may wish to provide avenues for employees to anonymously or confidentially share their concerns. This may include establishing an internal or third-party hotline for employees to report perceived or actual health and safety violations, management or coworker misconduct, wage and hour concerns, and any other complaints arising in the workplace or through telework. The hotline not only would provide employees with the assurance that they are being heard but also would allow the employer to keep its finger on the pulse of the workforce, thus enabling meaningful policy adjustments and communications to occur.
- **Host regular web-based trainings and opportunities to engage in workplace socializing to maintain a strong corporate culture.** The enormity of workplace change and the need to communicate it, together with striving to maintain the social fabric and corporate culture that employers and employees have invested in, will undoubtedly be challenging in the face of continued social distancing and telework. Developing webinar training programs on policies and practices, with opportunities to ask questions and receive answers, is essential. Also important will be the need for employers to develop new ways to "gather" employees together to allow them to share their experiences. Employers may wish to provide live or recorded formal trainings on policies and practices as well as to provide the time and space for peer groups to join together for less formal socializing opportunities.

As the workforce and employers cope with the stresses of returning to work amid the COVID-19 pandemic, employers must look to the future of the workplace. This look ahead requires employers to show empathy and underscore their commitment to providing safe workplaces by providing easy access to the information tools necessary to keep their employees informed.

About This Series

States are easing or phasing out their stay-at-home orders. Nonessential businesses will begin to reopen and their employees will return to work. Many essential businesses that have continued to operate likely will see an increase in the number of employees returning to the workplace. But concerns about transmission of COVID-19 remain. Many states have or can be expected to impose significant obligations on employers to ensure that their workplaces remain safe and that the risk of COVID-19 transmission is minimized. This laudable objective presents many challenges to all employers.

As shelter-in-place orders are being lifted and employers are permitted to reopen their workspaces, they will need to do so with caution while wading through a patchwork of local, state and federal requirements and understanding what guidance or recommendations are mandatory.

To assist companies in their efforts, Holland & Knight has created a series of alerts focused on return-to-work issues. In addition, as state and local governments continue to issue new orders for May, Holland & Knight provides [updated summaries of state and local orders](#) to help companies keep track of regulations and requirements that are essential to all businesses.

Previous alerts in our COVID-19 Return to Work Series can be viewed below.

- [Part 1: Considerations and Practicalities for Returning Employees to Work During a Pandemic](#)
- [Part 2: Maintaining a Safe Workplace: Screening Employees as They Return to Work During a Pandemic](#)

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- **Part 3:** [New Employer Obligations in the Age of COVID-19: Safety Policies, PPE and Deep Cleaning](#)
- **Part 4:** [Dealing with COVID-19 in the Workplace](#)
- **Part 5:** [A Dedicated Pandemic Response Team Can Identify and Implement Policies Needed for a Safe Return](#)
- **Part 6:** [New Challenges for Employers, But Old Accommodation, Anti-Discrimination, Wage Laws Still Apply](#)

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Notes

¹ "A strategic approach to COVID-19 vaccine R&D," Lawrence Corey, John R. Mascola, Anthony S. Fauci, Francis S. Collins, Corey, et al., *Science* 10.1126/science.abc5312, May 11, 2020.

² See ["Workplaces During the COVID-19 Pandemic"](#) and ["CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again,"](#) Centers for Disease Control and Prevention (CDC).

³ See ["Guidance for Cleaning and Disinfecting,"](#) CDC.

⁴ See ["Why COVID-19 makes a compelling case for the wider integration of blockchain,"](#) World Economic Forum, May 8, 2020.

⁵ See Holland & Knight's previous alert, ["Navigating Artificial Intelligence and Consumer Protection Laws in Wake of the COVID-19 Pandemic,"](#) April 16, 2020, referencing the BBC's March 3, 2020, article, ["Coronavirus: China's tech fights back."](#)

⁶ 29 U.S.C. §157 (1935).

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the author of this alert for timely advice.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.



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