

Practical Solutions to Novel Employment Law Issues

Review five employment law issues that surfaced in 2020, and examples of practical business solutions, drawn from a lively and fruitful discussion at the October 2020 Women, Influence and Power in Law conference.

By Robin Solomon

With 2020 (finally!) over, we're left with a host of novel employment law issues. Many stemmed from the COVID-19 pandemic, but others emerged as a result of the Black Lives Matter protests and the election. As we move forward, we can expect many of these issues to linger for years. Below are five employment law issues that surfaced in 2020, and examples of practical business solutions, drawn from a lively and fruitful discussion at the October 2020 *Women, Influence and Power in Law* conference.

Remote Work

Employees have long clamored for telework arrangements, but many employers weren't ready to take the plunge. In 2020, employers were thrown into the deep end as working remotely became a necessity.

For the salaried workforce, the widespread adoption of videoconferencing eased this transition. Still, employees struggle to balance work with childcare and virtual schooling. At retailer Patagonia, support for working families has always been paramount. When California mandated closure of its offices and on-site childcare center,

the company looked for creative ways to preserve its commitment to working parents, such as experimenting with "no-meeting Fridays," flexible leave policies, and adjustment to individual employees' working hours to accommodate the rigors of at-home schooling. Patagonia has been particularly cognizant of the disproportionate impact of the pandemic on women and aims to counterbalance.

Some employers embraced telework as an opportunity to promote work-life balance. At American Express Global Business Travel (GBT), employees already worked remotely, but in 2020, the company rolled out a "Better Balance" program, offering job-sharing opportunities and modified schedules such as part-time and four-day workweeks, as well as seasonal work and sabbaticals. These flexible programs provided a win-win for GBT by acting as a retention tool while allowing the company to manage its payroll.

JDC, a nonprofit providing global humanitarian aid to Jewish communities, enables employees to adopt part-time and flexible schedules to accommodate family demands. The COVID-19 pandemic



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has emphasized the importance of a close partnership between the legal and human resource departments both to mitigate new and existing legal risk in the rapidly changing employment space, and to support employees. JDC's legal department is grateful to maintain a close partnership and strong working relationship with the human resource department. One challenge of the pandemic has been helping employees set boundaries to support their mental health and disconnect from the virtual office. As a creative solution, JDC's New York office instituted a "give a day, take a day" vacation schedule, wherein employees could take

a vacation day on Friday and be given a vacation day to use the following Monday, encouraging a long weekend without impacting vacation balances.

Assuming the shift to telework represents a permanent change, there are additional employment issues to consider. Will salaries be adjusted downward for employees relocating to less-expensive jurisdictions? Are payroll departments equipped to manage state income tax withholding and business licenses for out-of-state employees?

Screening and Employee Safety

For many hourly workers and essential businesses, remote work is not an option. Janitorial employees, for example, must operate onsite. At Able Services, a multi-state company managing janitorial and building services, the pandemic has increased the demand for cleaning, and unoccupied offices typically need service workers to manage HVAC and plumbing systems.

Screening onsite employees for COVID-19 symptoms has become standard practice to ensure health and safety. These checks can raise privacy concerns and wage/hour issues. If employers record an employees' temperatures—or COVID-19 test results—they create medical records subject to privacy laws. Employers operating in California and subject to the California Consumer Privacy Act may face particular concerns.

Time spent being screened for COVID-19—or waiting to be screened—may be considered paid work, and hourly employees would need to clock in before getting in line, to ensure compensation



Empty office space while officer is working from home to avoid corona virus. Worker follows social distancing and stays at home to prevent COVID-19 or 2019-nCoV infection and reduce pandemic. Credit: KornT/Shutterstock.com

for this extra time. Employers relying on staffing agencies maintain an affirmative obligation to ensure that agencies also follow these rules or employers could potentially face liability for any missteps.

Return to Work

Ensuring worker safety during a pandemic requires more than COVID-19 screening. According to CDC guidelines, employers are expected to require face masks, social distancing, and routine disinfectant of common surfaces.

For retailers, reconfiguration of stores and distribution centers may be needed.

OSHA has issued specific **Guidance on Returning to Work** to assist employers. This guidance explicitly permits the administration of COVID-19 tests and screening, and encourages employers to conduct hazard assessments and establish protocols for identifying and isolating sick employees.

However, states' return-to-work policies and standards vary widely; different jurisdictions apply distinct rules for re-opening offices and retail establishments, creating challenges for multi-state employers. For union workforces, collective bargaining agreements may introduce additional requirements or expectations with respect to worker safety.

Political Engagement

Employees showed increased political engagement and activism in 2020. Protest movements such as Black Lives Matter sparked concern among many employers and led to a re-commitment to Diversity, Equity & Inclusion efforts.

Numerous companies modified their business practices to address racial inequality, and issued public statements in support of the BLM movement; some have made large financial pledges to social justice organizations.

Employees of all political persuasions were nervous about the presidential election, and some employers stepped up to encourage employees to vote, offering paid time off to visit the polls. Patagonia employees were given election day as a paid day off, and also allotted an additional four days of paid leave for employees who wanted to volunteer in the polling locations or as election officials.

When it comes to *employees'* political speech, private employers are usually permitted to set limits on what is appropriate in the workplace. At Delicato Family Wines, the legal department provides training materials to leadership on how to respond to political speech in the workplace, as well as how to manage potentially sensitive conversations. The First Amendment protects freedom of speech, but doesn't bar private employers from setting limits. (Some state laws may protect political speech.) Employers can still take disciplinary action where an employee's political speech is disruptive or alleged to be discriminatory or harassing.

Furloughs

Although workforce reductions were not a new issue in 2020, the extensive use of furloughs was a novel variation. Generally, a furlough refers to a period of employment in which the employee retains benefits (such as medical insurance) but not pay. It's akin to an unpaid leave of absence. Unlike a layoff, a furlough typically does not sever the employment relationship. Furloughs were used widely by employers in 2020 as

a mechanism for reducing near-term payroll costs while retaining employees and preserving their benefits.

Furloughs trigger a number of coordination issues with respect to other employee benefits. When an employee commences short-term or long-term disability during a furlough, how is compensation determined? Does the furlough period count as "service" for pension plans? If so, does this unpaid period also count as zero compensation under a 'final average pay' benefit formula, thus reducing the benefit? Often, the design of the leave or furlough policy may assume a particular treatment of compensation that may not align with the actual plan terms. Even without inconsistency, the payroll codes may need to be updated to appropriately capture or exclude compensation related to the leave period. This can be complicated in the case of LTD income, which may be paid by a third-party outside your payroll system.

There is often ambiguity as to a furloughed employee's status as "active" or "terminated"—or something in between. If the employer treats a furlough as a termination of employment, it can trigger severance benefits, as well as significant consequences for savings and retirement plans. For example, a terminated plan participant would be entitled to take a full distribution from a 401(k) plan account and possibly commence a pension benefit. A termination of employment might also trigger accelerated repayment of a 401(k) plan loan, as well as required minimum distributions to participants over age 72.

For medical benefits, it is critical to coordinate the leave policy with the company's health plan. Although an employer may promise continued medical coverage during a period of extended leave or furlough, this may not necessarily be supported by the underlying plan document or insurance contract. Frequently, these documents condition eligibility on a threshold number of hours worked (or regularly scheduled), and a particular classification status such as "full-time," "regular," or "active." Violating the eligibility terms of an insured plan can result in a denial of medical claims by the carrier; for a self-insured plan, the consequences of violating the eligibility rules could be discovered during a plan audit.

Naturally, novel issues will continue to emerge over time, but hopefully not at the accelerated pace they did in 2020. Adjustments and accommodations made to account for some of these issues may pave the way for the evolution of the workforce. In 2021, we can expect to see changes in corporate culture as businesses adapt to a new environment.

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