

**BACK TO BUSINESS:
TOP TEN ISSUES BRINGING THE
WORKFORCE BACK TO WORK FROM
AN EMPLOYMENT LAW PERSPECTIVE**

Presented by:

Craig Annunziata
Regional Managing Partner
Fisher Phillips, LLP

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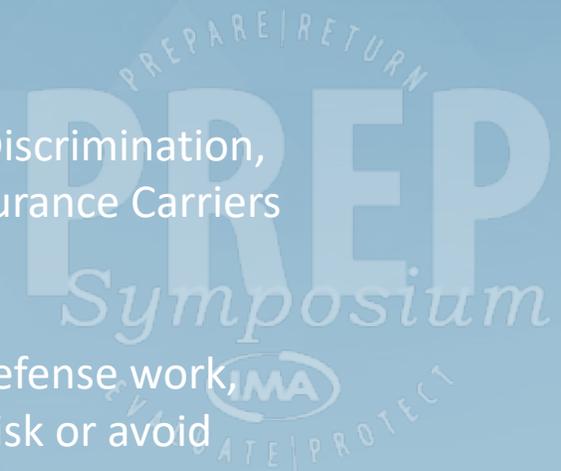
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Craig Annunziata is the Regional Managing Partner of the Chicago office of Fisher Phillips. Craig has practiced employment law for almost 30 years. When Craig is not engaged in one on one consultancy with his clients, he spends his time before state and federal courts and alternative dispute forums throughout the United States.

Craig has extensive experience with Employee Defection & Trade Secrets, Employment Discrimination, Wage & Hour, Class & Collective Actions. Craig and his firm also represent numerous Insurance Carriers as panel counsel for Employment Practices Liability Insurance programs.

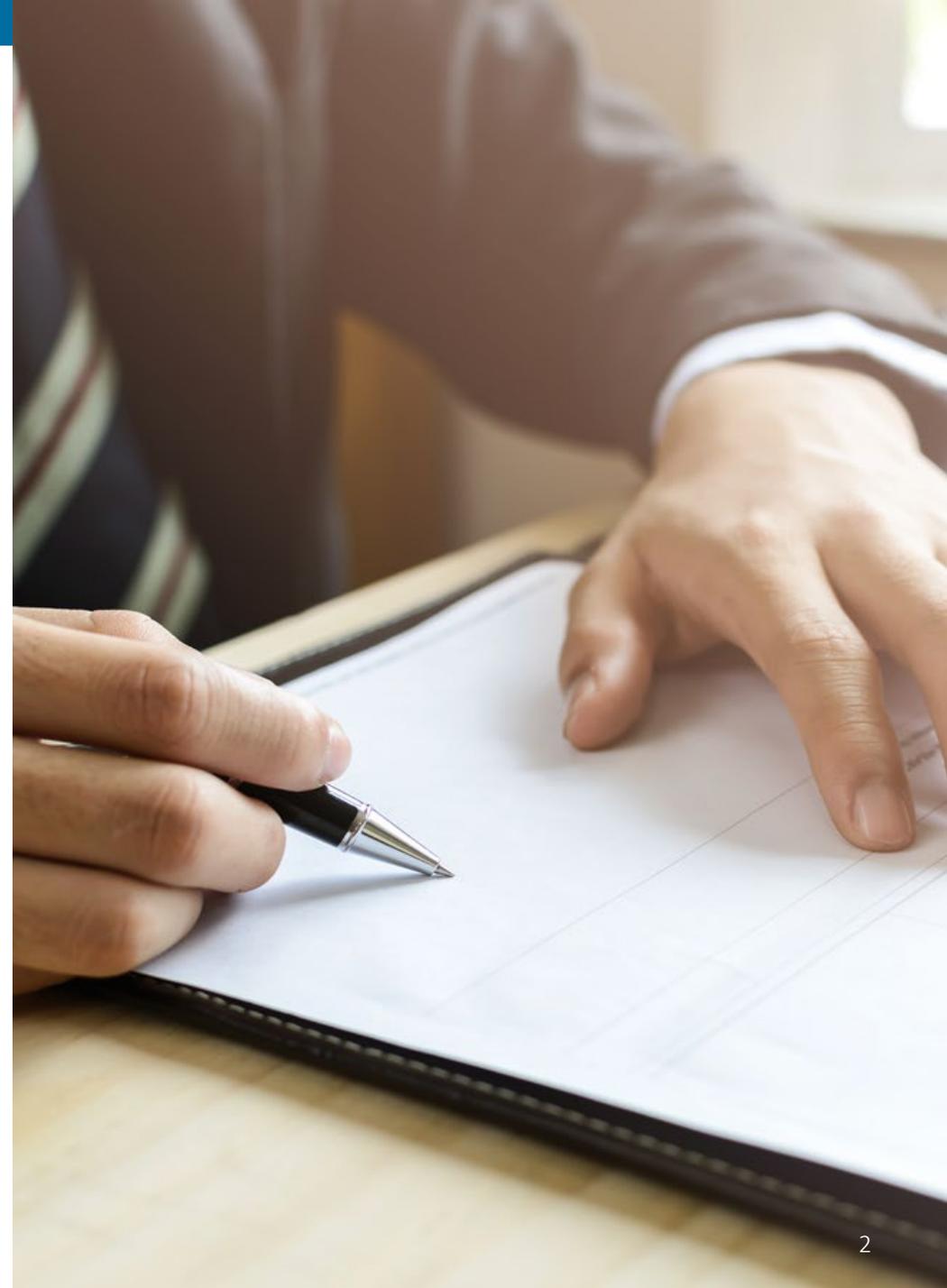
Craig has partnered with Clients and Prospects of IMA for over 20 years. In addition to defense work, Craig and his team provide Alternative Risk Management services to help decrease the risk or avoid employment litigation altogether.



AGENDA

- 1 General Return To Work Principles
- 2 Phased Approach
- 3 TOP TEN Issues In Bringing The Workforce Back To Work from an Employment Law Perspective

PREPARE|RETURN
PREP
Symposium
EVALUATE|PROTECT
IMA



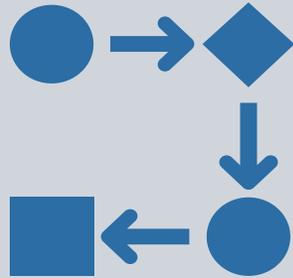
GENERAL RETURN-TO-WORK PRINCIPLES – PHASE ONE

During **Phase One**, employers are recommended to follow five steps:



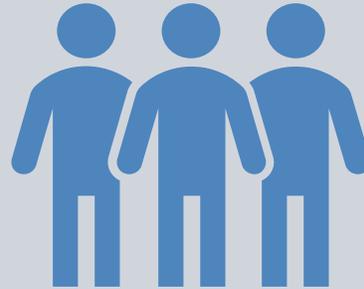
Step 1

Continue to encourage **remote work and telework** whenever possible and feasible with business operations



Step 2

If possible, return to work in **phases**



Step 3

Close **common areas** where personnel are likely to congregates and interact

Enforce **strict** social distancing protocols



Step 4

Minimize **non-essential business travel** and adhere to CDC guidelines regarding isolation following travel

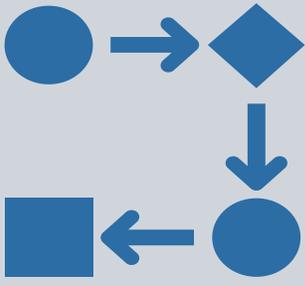


Step 5

Strongly consider **special accommodations** for workers who are members of a **vulnerable population**

GENERAL RETURN-TO-WORK PRINCIPLES – PHASE TWO

During **Phase Two**, employers are recommended to follow four steps:

 <p>Step 1</p>	 <p>Step 2</p>	 <p>Step 3</p>	 <p>Step 4</p>
<p>Continue to encourage remote work and telework whenever possible and feasible with business operations</p>	<p>Continue to close common areas where personnel are likely to congregate and interact</p> <p>Enforce moderate social distancing protocols</p>	<p>Business can resume non-essential business travel</p>	<p>Strongly consider special accommodations for workers who are members of a vulnerable population</p>

GENERAL RETURN-TO-WORK PRINCIPLES – PHASE THREE



States and regions that have no evidence of a rebound of COVID-19 cases, and satisfy the gating criteria a third time, are ready to enter Phase Three.

During this phase, the guidance is simple:

Employers can resume **unrestricted staffing** of worksites.

TOP TEN ISSUES BRINGING THE WORKFORCE BACK TO WORK

FROM AN EMPLOYMENT LAW PERSPECTIVE



PREPARE | RETURN | EVALUATE | PROTECT



#1

WORKPLACE SAFETY

Masks and PPE

- Review and follow all local and state guidelines regarding mask wearing and PPE requirements for businesses.
- *Sources: State Executive Orders, Local Health Department requirements, and CDC and OSHA guidance*
- OSHA requires employers to provide, use, and maintain appropriate PPE “wherever it is necessary by reason of” workplace hazards.
- Must train employees regarding use of the PPE (*including donning and doffing*), proper care, maintenance, and useful life of the PPE, and the limitations of the PPE, among other things.
- OSHA requires employers to provide employees with PPE at no cost to employees. 29 C.F.R. § 1910.132(h). Exceptions to this include, non-specialty safety-toe footwear and non-specialty prescription safety eyewear, as well as everyday clothing, “such as long-sleeve shirts, long pants, street shoes, and normal work boots.” 29 C.F.R. § 1910.132(h)(2).

#2

WORKPLACE SAFETY

Employee Screening

- ✓ Can use written questionnaires or verbal interviews
- ✓ Maintain confidentiality of any responses as could be considered a medical record
- ✓ Conduct screening before employee enters facility or comes into contact with other employees
- ✓ Provide appropriate PPE to individual conducting the screening

What can you ask employees about their health?

- ✓ *Do you have a fever, chills, cough, shortness of breath, or a sore throat? Have you recently lost the ability to smell or taste?*
- ✓ *Do you need a reasonable accommodation?*
- ✗ *Do you have an underlying condition that puts you at greater risk of serious complication if you become infected with COVID?*

#3

WORKPLACE SAFETY

Temperature Testing

Under the Americans with Disabilities Act, temperature checks are considered **medical examinations**.

Although the ADA restricts the use of medical examinations, it does allow them if the employer has a reasonable belief that the employee poses a **“direct threat”** to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

The EEOC’s position is that the coronavirus pandemic qualifies as a direct threat.



#4

WORKPLACE SAFETY

Social Distancing



- Maintain signage throughout facility reminding employees about social distancing and maintaining at least 6-foot distance from others
- Consider public areas such as hallways, restrooms, and elevators
- Consider employees waiting in line for pre-work health screenings
- Install physical barriers where applicable, such as plexiglass
- Mark off appropriate distances on floors, tables, and break areas
- Staggering Start/End Times for Shifts
- Employees should not be using community breakrooms, coffee pots

#5 RESPONDING TO A POSITIVE CASE

- Review local public health department guidance regarding any mandatory reporting requirements.
- Interview employee with positive result to determine other employees with whom he/she had close contact in the prior 14 days.
- Notify employees of positive test while maintaining confidentiality of employee who tested positive.
- Notify employees who had direct contact with employee that they have had recent direct contact with employee who tested positive without disclosing the name. Take additional protective measures with such employees, including sending them home for a 14-day period or, in certain critical industries, allowing them to work but requiring additional screening and PPE.
- It is recommended to close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.

#6 REMOTE WORK POLICIES

- Check **state and local mandates**
 - Who, when and how you can return employees back to the workplace
- Consider remote work – just because you can return employees, does not mean you need to
- Working from home (WFH) may be reasonable accommodation under ADA for employees with health conditions negatively impacted by COVID
- Coronavirus WFH policies can be temporary, not necessarily part of handbook

WFH policies must address:

- ✓ who can work from home, expected hours of work (start/end times, breaks, meals), productivity standards
- ✓ technology/logistics, access to work documents/materials, confidentiality, data security
- ✓ should state that WFH policy is based solely on pandemic and subject to modification or termination
- ✓ employee attendance at work is still considered an essential job function

#7

EMPLOYEES WHO REFUSE TO WORK / RETURN TO WORK

OSHA Retaliation Protection: Employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is, “...any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

A generalized fear of COVID-19 generally will likely not meet this standard. However, if there is a recent outbreak in the area/facility, lack of safety measures in place, and/or the person is more susceptible to serious consequences of COVID-19, then there is a chance the refusal is protected.

Caution: avoid being the test case.

NLRA Protected Concerted Activity: Under the NLRA, employees who engage in “protected concerted activity for mutual aid or protection” can’t be fired or disciplined for doing so.

ADA Reasonable Accommodation Requests: Employees who have disabilities or conditions that make the susceptible to serious complications from COVID-19 can request reasonable accommodations before returning to work. RAs can include telework, additional PPE, changes to their work schedule, etc.

#8

FAMILIES FIRST RESPONSE ACT

“FFCRA”

Emergency Paid Sick Leave

Emergency Family And Medical Leave Act

www.fisherphillips.com

COVID-19 Coronavirus Updates, Resources and Guidance

EMERGENCY PAID SICK LEAVE

Covered Employers and Employees

Covered Employers:

Business with 1 to 499 employees

Look to FLSA “Joint Employer” standard to count employees and determine when separate entities are combined

Covered Employees:

Any employee who works for an employer is eligible

No minimum days/hours of employment

Qualifying Reasons

Must provide paid sick time “to the extent the employee is unable to work (or telework) due to a need for leave because:

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. The employee is caring for an **individual** who is subject to an order or self-quarantine as described above
5. The employee is caring for a son or daughter if school or child care is closed/unavailable
6. The employee is experiencing “any other substantially similar condition” specified by HHS (catch all)

Details of Leave

Amount of Leave:

Full-time – 80 hours of paid sick leave

Part-time – Average number of work hours in a two-week period

How much:

For leave related to **Qualifying Reasons 1 – 3**:

Compensated at the higher of the regular rate or the federal / local minimum wage

Capped at \$511 per day and \$5,110 in the aggregate per person

For leave related to **Qualifying Reasons 4 – 6**:

Same rate as above but capped at \$200 per day and \$2,000 in the aggregate

EMERGENCY FAMILY & MEDICAL LEAVE ACT

How does it work?

First 10 days must be unpaid:

An employee may substitute accrued PTO, vacation or sick leave

Eligible employees may take Emergency Paid Sick Leave for the first ten days

After the first 10 days:

Compensated at 2/3 the regular rate

Pay:

Pay is capped at \$200 per day and \$10,000 in the aggregate per employee

Job Restoration / Reinstatement:

If 25 or more employees, employees must be restored to the same or “equivalent” job

If fewer than 25 employees, may not apply

Qualifying Reasons

12 weeks of job protected leave when:

“The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency”

Likely FMLA definition of “son or daughter” will apply

#9

UNEMPLOYMENT COMPENSATION ISSUES

- State law may require you to report re-hired employees who had been laid off or furloughed and have been returned to work or extended an offer to return to work.
- Any employee who refuses to return to work when work is available may no longer be eligible for unemployment benefits.
- When reducing hours or returning hours to employees, may impact their ability to obtain partial unemployment benefits under various state unemployment compensation schemes.

#10

WAGE AND HOUR COMPLIANCE

Bonuses

- If non-discretionary, must be included in calculating the regular rate for overtime purposes
 - > Most bonuses fall within this category
 - > Non-Discretionary = offered as an incentive for an employee to work more efficiently, additional hours, or to remain with the employer

Make Whole Pay

- Non-Exempt Employees – May have to adjust overtime rate during period of time covered by make-up pay
- Exempt Employees – should be classified as a bonus and not make-up pay for salary that was held back

Pay Adjustments/Maintaining Exempt Status

- If you had a prior reduction, you may return/increase non-exempt employee's pay rate at anytime.
- For non-exempt employees, we recommend waiting at least 1 quarter before returning pay and specifying that the reason for change is due to changed financial circumstances. If change is tied to quantity/hours of work, you may lose exempt status

PARTING ADVICE

AVOIDING DISCRIMINATION CLAIMS

With COVID-19's significant impact on the economy and substantial job losses that have occurred and may continue to occur, combined with employees' fear and uncertainty about returning to work, we anticipate a flood of litigation and discrimination claims resulting from how employers respond to this crisis.

Proposed liability shields (employer immunity)

Senator Mitch McConnell has said that any further stimulus bills would be conditioned on narrowly crafted liability protection measures for employers.

Until then, the best course of action is to treat your employees **FAIRLY** and **CONSISTENTLY**

Visit fisherphillips.com for COVID-19 coronavirus latest updates, resources and guidance

cannunziata@fisherphillips.com | 312.346.8061