

Employment Advice to Small Businesses on Re-opening Nashville¹

from Martha Boyd

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Opening Remarks:

- 2 challenges for businesses at this time: (1) keeping employees safe, and (2) reassuring employees that you are doing what is necessary to keep them safe.
- Key to these goals: Create a written “Reopening Protocol” that incorporates CDC, OSHA, and government guidelines and that describes how you are going to operate during the COVID-19 pandemic. The Reopening Protocols should be a roadmap for your business practices going forward: mask requirements, arrangements of furniture in the workplace, break room guidelines, etc. Think about questions such as, will you require employees to remain on premises for meals?
- Train your employees on these protocols and enforce them.

What to Include in your Reopening Protocols for Employee Safety:

- Changes to entrances/exits, cleaning schedules, elevator protocols, etc.
- Engage with managers and other representatives throughout the planning process in order to ensure different perspectives.
- Create a dynamic document → things will change over time, as they already have. Be prepared to update as you see what works or doesn't work for you and your employees.
- Ensure that you save every version as a new version with a date so that you can know when changes to protocols were made.
- You need to demonstrate leadership in following the protocol. If your employees see you walking around with no mask or not taking safety protocols seriously, they will not do so either.
- Screen your employees daily and be sure your protocols list all of the COVID-19 symptoms (and update the list as the CDC changes it).
- Inform your employees that they need to inform their supervisor immediately should they experience any symptoms. They will need to leave work, or not come in if they are at home. They should know that their failure to notify you of their symptoms may result in disciplinary action. Although this may sound harsh, the consequences of their failure to inform you may result in grave consequences for their fellow employees and customers.
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- Have a protocol for what to do when an employee does get sick. Have them call the COVID-19 hotline (615.862.7777) and you should call the Health Department. Keep detailed notes of your processes, phone calls, etc.
- Have a guide for managers to know how long a sick employee needs to wait to come back and how to manage testing or a situation where an employee has symptoms, but is not tested.

Families First Coronavirus Response Act:

¹ Notes from Question and Answer session with Martha Boyd, attorney with Baker Donelson, during the Small Business webinar organized by the Metro government.

This Act was passed by Congress to help get paid leave for employees who are experiencing problems. Employees can receive paid leave if schools, daycare centers, summer camps (i.e., relied-upon childcare) are closed due to COVID-19, for employees who get sick, those who are quarantined, or those who are caring for someone who is quarantined.

Typically, the Department of Labor provides forms for employees to complete when requesting leave. However, under the FFCRA, they have not provided such forms - so you should make your own form and share it with employees when they make a request for leave. Documentation of the need for leave is essential.

Areas of Concern: (1) vulnerable employees, and (2) employees who are afraid to return to work.

- Vulnerable employees include those over 65 and those with underlying medical conditions. You may not be aware that employees fall within a vulnerable category.
 - Well-intentioned employers may decide at first to ban those employees from work, however, this action could subject the employer to a claim of discrimination.
 - Instead, communicate with your employees if you are planning to call them back to work. Ask if any of them need a work accommodation. Then, that accommodation is handled like any other accommodation request under the Americans with Disabilities Act.
- Some employees will be afraid to return to work, regardless of whether they are in a vulnerable category. They may share a home with a vulnerable person. You need to consider what to do about these individuals. They may not be entitled to any specific legally protected leave of absence, but a lot of business owners are trying to accommodate their requests for extended leave or furlough. The compassionate thing, although not legally required, would be to allow the employee to remain out of work until they are comfortable to return.

Questions:

Q. Employees who work on Commission: If some employers have employees who work on commission, and the employees are not certain what the impact will be to their unemployment benefits if they return to work and there are no customers. Advice?

- Commissions count as wages under the unemployment statute, so if you have your commissions reduced and your hours are also reduced, you may qualify for unemployment.
- Tennessee's rule regarding partial unemployment is that you can only get partial unemployment if your hours are reduced, and if you make less than the weekly benefit amount under state law, which is very, very low. Commissioned employees may be in a better position if they are laid off completely rather than retained on the payroll but without the meaningful ability to earn commissions at their earlier levels.

Q. Full or Part-Time Return to Work?: Should I bring all of my employees back to work for a few hours to get them all a small paycheck or should I bring back a few employees full-time and keep the other employees off work so that they remain eligible for unemployment benefits (while they last)?

Unless an employee makes less than the weekly benefit amount (the maximum benefit amount in Tennessee is \$275), they're not going to qualify for unemployment. And if they don't qualify for unemployment under state law, they're not going to get the additional \$600 provided under the federal CARES Act. So, it may be better for the employee to be laid off altogether, so that they get no wages. Then they are eligible for both the state benefit and the federal benefit, which only lasts until July 31st.

Q. I cannot make my workplace safe for a vulnerable employee. If an employee has a medical condition (i.e. cannot wear a face mask due to that medical condition), and there are no alternative duties available for that employee, what do you recommend?

A reasonable accommodation would be to keep the employee out of work. If you can't come up with any sort of telework or position that the employee could occupy safely, keeping them home as the accommodation is fine. You don't have to pay them if they're home on a leave of absence, but clearly if they have some sort of condition that could be a disability under the ADA, you will need to accommodate that.

Q. Can I be sued if an employee gets sick? If an employee gets Covid-19 once we open up again, can businesses be sued by that employee for medical expenses, etc.?

Businesses can always be sued, but they are generally protected from private suits due to workplace injuries or illnesses by the workers compensation laws. The worst case scenario is that they file for worker's compensation (a state-run program). These lawsuits are unlikely to be successful in most cases because the employee will have to show that he had a greater chance of contracting the disease because of something specific to the business. (Ex: if you work around silica dust and you get some sort of silica disease; that's obviously something that occurred as a result of the course of your employment. If you work in health care with COVID-19 patients and you contract COVID-19, you are likely to prevail.) Even if an employee can show they contracted COVID-19 at work from a sick co-worker, that probably isn't going to qualify the employee for worker's compensation if there's nothing about the place of business that gave the employee a better chance of getting it in the business than other places.

- Work comp is the only remedy for workplace injuries and illnesses, so you're not going to be able to circumvent that process and sue for wrongful injury or death either unless you can show that your employer had the actual intent to harm you, which is a very, very high standard.
- Employers should do their best to keep their employees safe, however. Employers have a general duty under the Occupational Safety and Health Act (OSHA) to keep their workplace safe to avoid known hazards. So, they need to be cognizant that they are obligated to retain a safe workplace and should implement the measures required and recommended by OSHA to lessen the risk of virus transmission in the workplace.

Q. Timing of bringing employees back to work. If all employees were furloughed at the same time, is there any legal requirement that those employees be re-engaged at the same time?

You can bring those employees back in whatever manner so long as that manner is non-discriminatory (not on the basis of race, sex, disability, or any other legally-protected status). I recommend that you talk to your employees and see who is ready to be back to work and who would rather stay at home (particularly if they are drawing unemployment). If you can, base your decision on employee preference and certainly not on any discriminatory factor.

Q. Patient Privacy. Under HIPAA, is an employer allowed to ask about underlying health conditions, etc.?

- Typically an employer would not be a covered entity under HIPAA, and so would not have to consider health information as protected health information.
- That said, employee health information should still be treated as confidential. The Americans with Disabilities Act imposes requirements on employers to keep employee health information in

a file separate from the employee's personnel file - it should only be accessible to individuals such as managers who would need to be aware of it.

Q. Vulnerable Employees. I know that certain of my employees are in vulnerable groups. May I ask/require them to stay at home?

There are a lot of well-meaning employers who have wanted to keep those employees out of work, saying we're not going to ask them to come back. I would suggest that doing that may subject you to a claim of discrimination. Instead, I would say to your employees, "hey we're planning to call you back - if anybody feels like you need an accommodation, you're welcome to let us know." Then, you can handle those just like you would handle any other requests for accommodation under the Americans with Disabilities Act.