

What Employers Should Know About Return-To-Work Surveys

By **Jen Rubin** (June 19, 2020, 4:09 PM EDT)

The pandemic triggered an unprecedented flight from the office, which was then followed by an equally extraordinary web of shelter-in-place initiatives. Those initiatives have now morphed into a tangle of rules governing the reopening of most workplaces.

But those return-to-workplace rules do not answer the seemingly simple question of whether employees are ready to return to the workplace.



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What Employers Need to Know to Reopen — But Can't Ask

Current science tells us that COVID-19 poses unique threats to people with certain medical conditions and to those over the age of 65. Most employers are familiar with the sometimes frustrating and often confusing alphabet soup of state and federal laws that regulate the workplace — and it is these very rules that prohibit employers from making the same inquiries the return-to-work rules suggest are conditions to creating a pandemic-safe workplace.

The New York City and Massachusetts reopening rules illustrate this dilemma.

The New York City Commission on Human Rights suggests that if an employer knows that an employee has a medical condition that might place them at higher risk for severe illness if they contract COVID-19, the employer should engage the employee in a "cooperative dialogue about a potential accommodation" even if the employee has not requested that accommodation.

An employee's age is known to human resources professionals at most employers, but few employers would, or should, know of the other COVID-19 markers that might justify an employee's fear of becoming ill or bringing the virus home to at-risk family members.

The rules for reopening Massachusetts businesses also aim to protect populations vulnerable to COVID-19 risks. These employees, Massachusetts employers are told, should be encouraged to remain at home. But the same inherent conflict arises in this context — many employers are unaware of the COVID-19-specific vulnerabilities of their workforce because the law tells them not to ask those questions in the first place.

It appears, then, that government regulators are telling employers to be mindful of returning at-risk

members of their workforce to the office. But at the same time, prepandemic rules ban employers from asking the questions necessary to understand who is, and isn't, at risk.

Employee Surveys to Make the Ask

One way out of this circular puzzle for employers who want to return their workforce to the physical workplace, but who want to provide a safe workplace for those susceptible to COVID-19's worst outcomes, is to survey workers by asking them whether they are ready and willing to return to work. Of course, if an employer goes down this road, it needs to travel carefully.

At the outset, it is important that employers use a balanced survey process. Many employers — especially those with multijurisdictional workplaces — will face unique challenges and disparate rules for reopening their workplaces, and applying those rules and overcoming those challenges will vary depending on the industry sector as well as geography.

Furthermore, in order to drive complete results, inquiries should be elicited from many, if not all, employees in order to yield data that accurately reflects the various worksites and workers who staff them.

Surveys must also carefully balance the collection of informative data without committing unlawful discrimination. Examples of permitted questions might include those phrased in an open-ended manner designed to elicit nothing more than a yes or no response such as "Are you ready to return to the workplace?" without asking for the reason.

Another open-ended question might invite an employee to share whether there are obstacles to the employee's return to the workplace. Or, an employer might ask: "What, if anything, can the company do to make you feel safe?"

Equally important to the survey process — as for any employee process — is ensuring that individuals tasked with conducting the surveys process them appropriately and maintain the highest degree of privacy and data protection. This is particularly critical if employees offer information beyond what the survey elicits, such as demographic and family status information the employer should otherwise avoid affirmatively requesting and collecting.

Responding to the Information Collected

Collecting employee information implicates the question that naturally follows: What will an employer conducting a survey do with the results? At their core, employee surveys invite the type of discussion that might disclose the unique but real fears employees may be experiencing, while at the same time allowing employers the opportunity to address those concerns in a nondiscriminatory manner.

There is risk of course — the employee who is understandably reluctant to share information they believe could impact their job or career might need to decide whether or not to self-identify. The risk exists, when an employer learns information it should not otherwise know, that an employee may perceive a job decision was based on those illegal considerations.

Another risk employee surveys pose is a loss of perceived core employment control the employer gives up by inviting the employee to suggest terms and conditions of employment — an outcome difficult to walk back when normalcy returns to the workplace.

The essence of the employment relationship is the ability of the employer to dictate how an employee does the employee's job. An employee survey implicitly shifts that balance by asking the employee how the employee proposes to get their job done. There is nothing inherently wrong in shifting that balance, provided the employee understands that the employee's survey responses are suggestions — and not commands.

Well-Crafted Surveys Will Impact Safety

A well-crafted survey may also positively impact workplace safety. Many basic issues arising from how employees interact in the workplace and the risks associated with those interactions are unique to the coronavirus pandemic, and in fact may only be known by the individuals actually performing work in their workplaces.

Granular information about even simple challenges (getting a cup of communal coffee, using a break room, storing the lunch the employee brings to work) may elicit critical information about how the employer can proactively respond to those workplace challenges.

No employee should sacrifice a job for safety. And no employer should cede control of its workforce. A balance must exist. But that balance starts with that simple question: What can an employer do to help solve these pandemic-related challenges in the workplace?

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