



## LEGAL UPDATE

Salvatore Puccio, Esq., and Jean Krebs, Esq.

# Avoiding Pandemic Predicaments

Be ready to navigate the changing landscape brought on by COVID-19.



Lee S. Weissman/Northwell Health

**MEETING OF THE MINDS** Keep your staff informed about current policies and set clear expectations about the need to follow them.

What a difference a year can make. Even as vaccines are being administered and lingering restrictions brought on by the pandemic are being lifted, your center must be prepared to face continuing COVID-related legal challenges. The workplace is now different, both in appearance and in the rules that govern it. We have identified three ongoing issues you will likely need to manage in the coming months.

- **Employee leave laws.** In response to the pandemic, several new laws were enacted that afforded your staff with job protection and paid leave benefits. In April 2020, for example, Congress enacted the Families First Coronavirus Response Act, which required certain employers to provide emergency paid sick leave and emergency paid family and medical leave for reasons related to COVID-19. Although that law expired on Dec. 31, 2020, you can receive tax credits until Sept. 30, 2021 for voluntarily providing this leave.

Many states have also passed laws requiring job protected leave and, in some cases, paid leave for employees affected by COVID-19. At least 13 states

and Washington, D.C. have some form of paid sick leave laws, many of which include provisions specific to paid leave for reasons related to COVID-19. While some of these laws are specific to COVID-19, many are general sick leave laws that will withstand the pandemic. In addition, some states — including New York and California — have enacted laws that require you to provide paid leave for employees to obtain COVID-19 vaccines. You should also prepare for new laws and regulations that impose additional requirements on your center to prevent airborne infectious diseases in the workplace. For instance, New York recently passed the HERO Act in an effort to reduce such disease spread. Additionally, OSHA continues to update and enforce respiratory program requirements and COVID-19 workplace illness recording and recordkeeping obligations.

- **Employee discipline.** Many of you have implemented new safety measures designed to prevent the spread of the virus in your facilities. These policies included social distancing protocols, more stringent mask and other PPE mandates, and reporting symptoms and exposures upon arrival at

the workplace. You are likely to encounter a team member who fails to observe these policies and you might want to discipline them for doing so. In most cases, you can discipline your staff members if they fail to conform to your COVID-19 protocols. However, before you do so, make sure you give your staff sufficient notice of these protocols. Your staff should be aware that failure to follow the guidelines could result in discipline and, in certain circumstances, termination of their employment. You can also consider requiring your staff to sign an acknowledgment that they received the new COVID-19 protocols and understand that they can be disciplined for violating them.

Notwithstanding your best efforts to enforce these protocols and protect staff and patients, some staff will claim that they were disciplined for reasons related to COVID-19. Consider the following hypothetical. For several months prior to the pandemic, a team member has consistently been late or absent, causing disruptions to your surgical workflow. They have been disciplined and warned several times that if this behavior continues, they run the risk of being terminated. The employee contracts COVID-19 and, as a result, is absent from work for an extended period of time. Upon returning to work, the employee's poor work efforts continue for reasons unrelated to COVID-19. Ultimately, you decide to fire them. Despite their poor attendance record and past discipline, they allege you discriminated against them because they had COVID-19 and needed to take a leave of absence.

The best way to defend against such a claim is to maintain contemporaneous records of the employee's poor performance, reported incidents and corrective actions taken. You should also document that you have provided your team members any leave required by law or internal policy.

• **Vacation requests.** Summer is approaching, travel restrictions are lifting and your staff are booking their vacations. Now is the time to develop policies to address these requests, while still having adequate and safe coverage at your facility.



**MEETING OF THE MINDS** Contemporaneous documentation of your facility's policies and staff performance provide a strong defense against employee lawsuits.

Continue to monitor the CDC's and your state's travel advisories and quarantine requirements. Though many states are lifting quarantine requirements for domestic travelers, this can often depend on which state your employee travel to. Restrictions remain in place for international travelers. Also, you may want your employees to quarantine or work remotely, if possible, after they have traveled — even where your state does not mandate it — before they return to work. It's important for you to talk to your staff about their travel plans and communicate any remote work or quarantine expectations you've put into place.

As restrictions continue to be lifted, the path to normalcy remains murky. If you are vigilant in tackling these three issues, communicate openly with your staff about workplace expectation and maintain strong documentation, your facility will be well-positioned to tackle the rest of 2021 — or have good outcomes should conflicts arise. **OSM**

*Mr. Puccio ([spuccio@garfunkelwild.com](mailto:spuccio@garfunkelwild.com)) is a partner and Ms. Krebs ([jkrebs@garfunkelwild.com](mailto:jkrebs@garfunkelwild.com)) is an associate at Garfunkel Wild, P.C., which represents healthcare providers across the country.*