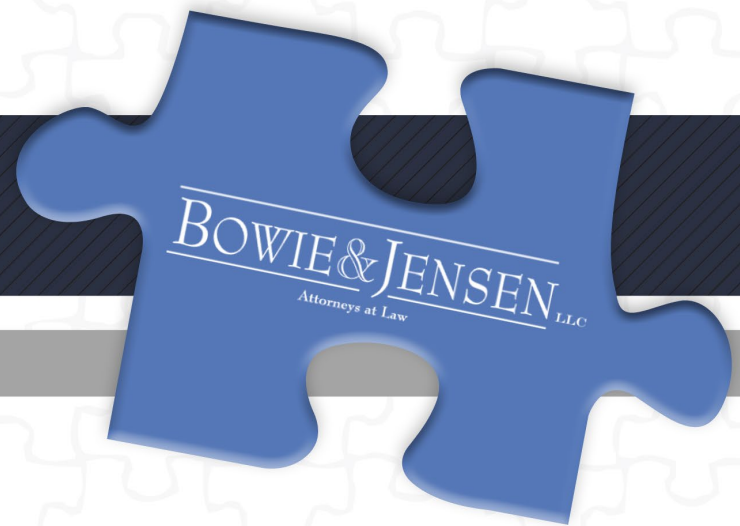


**Legal Issues Related to Reopening Offices
and Return of Employees**
Northeastern Maryland Tech Council

Jeremy T. Garner & J. Nicole Windsor



bowie-jensen.com
windsor@bowiejensen
(410) 583-2400

Water Cooler Topics

1. Executive Orders (state and local)
2. Potential Liability Issues
3. What to do if an employee refuses to return to work?

Executive Orders

Current status of executive orders and what to expect in the coming weeks and months.

Potential Liability Issues

Liability issues to consider when deciding whether to reopen (after orders are lifted).

1. Customers
2. Employees

Helpful Links to Reference Sources

- **EEOC Guidance What You Should Know about COVID19 and the ADA.**
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- **CDC General Business and Frequently Asked Questions.**
<https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>
- **CDC Business and Workplaces page** <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- **Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020** <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Legal Issues Related to Reopening Offices and Return of Employees

Is an employee allowed to refuse to return to work?

Probably not, but there are several steps to determining whether an employee has a legally protected right to refuse to return to work.

Is an employee allowed to refuse to return to work?

Step 1:

Ask the employee the basis for their refusal to return to work.

Is an employee allowed to refuse to return to work?

Step 2:

For employers with less than 500 employees (at any single location), the employer must determine whether the employee is eligible for leave under the Families First Coronavirus Relief Act (“FFCRA”).

1. Paid Sick Leave, or
2. Paid Emergency Family Medical Leave

Is an employee allowed to refuse to return to work?

Step 3:

Determine whether the employee is entitled to a reasonable accommodation under the Americans with Disabilities Act (“ADA”) including unpaid leave.

An employee may be suffering from an underlying medical condition that qualifies as a “disability” under the ADA and may require reduced potential exposure to COVID19. This does not automatically mean that unpaid leave is the required accommodation, but employers must go through the ADA process.

**Is an employee allowed to refuse to
return to work?**

Step 4:

Balance employee OSHA rights in light of what is
Reasonable

Is an employee allowed to refuse to return to work?

An employee generally does not have the right to refuse work merely because of a potentially unsafe condition in the workplace. That said, an employer may not discriminate against an employee who exercises “any right afforded” by the OSH Act.

Is an employee allowed to refuse to return to work?

According to the Occupational Safety and Health Administration (OSHA), this dichotomy means that an employee may only refuse to come to work if **all** of the following criteria are met:

Is an employee allowed to refuse to return to work?

1. Employee asked the employer to eliminate a hazard in the workplace, but the employer has failed or refused to do so;
2. Employee has a “good faith” belief that an imminent danger exists;
3. A “reasonable” person would agree there is a “real danger” of death or serious injury; AND
4. There is no time to get the hazard corrected through appropriate channels (i.e., OSHA inspections, etc.).

Certainly, the “reasonable” element of the test makes this a fact-intensive inquiry. What is “reasonable” in this crazy COVID-19 world?

Is an employee allowed to refuse to return to work?

For employees in low and medium exposure risk categories (as opposed to high risk categories, like healthcare delivery and support, medical transport, and mortuary workers), the following measures will likely be deemed sufficient to require an employee to return (*who is not otherwise entitled to protected leave*):

Is an employee allowed to refuse to return to work?

Train employees about and enforce rules/policies pertaining to **proper workplace sanitation and hygiene** (e.g., wash hands for 20 seconds, use hand sanitizer regularly, etc.);

Is an employee allowed to refuse to return to work?

Provide employees with appropriate PPE (e.g., face coverings, gloves, gowns, respirators, etc.) and train on its proper use, maintenance, and cleaning;

Is an employee allowed to refuse to return to work?

Implement appropriate administrative policies (e.g., temporary shutdown of nonessential activities, staggered shifts, limited customer access, one-way aisles, encouragement of sick workers to stay home, social distancing where feasible, etc.);

Is an employee allowed to refuse to return to work?

Assess and implement appropriate **engineering controls** (e.g., exhaust or ventilation systems, physical barriers or partitions, installation of drive-thru windows for customers, etc.); and

Is an employee allowed to refuse to return to work?

Provide a complaint mechanism and investigate and address workplace hazards, if any.

Is an employee allowed to refuse to return to work?

Employers must demonstrate their good faith efforts to reduce or eliminate COVID-19 hazards in the workplace.

Is an employee allowed to refuse to return to work?

Contemporaneous documentation of these efforts is essential to demonstrate why it is unreasonable for an employee to refuse to return to work.

Is an employee allowed to refuse to return to work?

This list of efforts is ***in addition to*** all other required PPE and safety measures and assessments that must take place in the workplace due to hazards associated with employees' normal job duties.

Is an employee allowed to refuse to return to work?

These slides provide general information to consider when confronted with an employee that refuses to return to work.

Remember, however, that each situation is different and must be reviewed on a case by case basis.