

As businesses begin planning to reopen, the question that every employer should be asking is not “can we?” but “*should* we?” As businesses face a multitude of judgment calls, this should be the question asked throughout the reopening process. If employers pause and ask “should we?,” they will be able to better navigate the personnel problems that are already surfacing.

Here are some examples of how this approach will help prevent missteps.

The Reluctant Returnee

Most, *but not all*, employees are going to be happy to be able to return to work. You are going to encounter a few reluctant employees. Employees who do not agree that it is safe to reopen. Employees who may have sick or at-risk family members. Or employees who generally worry about how co-workers may impact their health and well-being.

When the reluctant returnee asks if he or she is *required* to return to work, you will be within your rights to say that you can require them to report to work (assuming the shelter-in-place orders have been lifted in your county). But should you?

Think through that question before you make a decision. Ask yourself: Is there really a driving need that you compel this employee to return to work? Or would it be possible to allow that person to continue to work remotely? Could you instead allow them to remain on furlough? If the position *must* be filled, and you have the ability to hire someone else to fill the position, consider whether it will actually be better for you to shore up your employee “bench strength” by bringing on new talent while having additional human resources potentially available in a few weeks or months when (hopefully) there might be greater demand for your products and services. Businesses on the Central Coast have historically competed for talent. Once the shelter-in-place orders are lifted, the competition will likely be even more intense as businesses that have received Payroll Protection Program (“PPP”) loans race the clock to get their payroll numbers up by June 30th. This circumstance might allow you to position yourself to attract new talent, knowing that your reluctant employee is waiting on the sidelines for now and can later be added as business picks up.

Whatever you decide, be sure to go slow and think before you act. And document things carefully because there will be claims arising from how companies handle this first step back. Some will argue they were unfairly *forced* to return to work---that you put profits over safety. So, before compelling your employees to return to work, stop and think “should you?”

The Business as Usual Employer

When the shelter-in-place orders are lifted, businesses will be able to reopen if they follow certain industry specific guidelines. Click here to find the guidelines that apply to your business: <https://covid19.ca.gov/industry-guidance/>

THE QUESTION EVERY EMPLOYER SHOULD BE ASKING

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Many employers will attempt to go back to business as usual, and the guidelines will be implemented to “fit” that business as usual approach. There is no legal reason a business cannot attempt to resume business as usual (assuming the guidelines are indeed followed). But should you?

For example, do you have employees who are working more productively from home? If so, consider extending your temporary remote work agreement. This could allow your employees in the office to have more space and decrease the risk of exposure from others in the office. It could also allow you to be more flexible and be able to adjust more quickly to a retightening of the restrictions should there be an increase in infections as a result of the reopening effort. Of course, some employees who have not worked well remotely may ask to be allowed to continue to work remotely as well, so a well thought out plan will be important to put into place rather than making these decisions on an ad hoc basis.

Another example of how the “Should we?” mindset will help is in deciding how and when to interact with the public. If your business depends on public access and customer interaction, the orders restricting customer interaction will eventually be relaxed. Even though that will mean you can relax your restrictions accordingly, you should still ask whether you should? Relaxing your safety measures because you can will not protect you from the claims that will follow an outbreak that is traced back to your workplace. So you should not be lulled into a false sense of security by the withdrawal of government restrictions, but instead think through how you can maintain maximum protection for your employees and customers. If face-to-face service is not really a necessity, do not revert to face-to-face service just because you can. The public is going to be nervous in the first few weeks, ask whether there is a way you can deliver your products and services to capture that customer population that prefers to still stay home. If that is not viable, think creatively about how you can deliver in-person customer service in a non-conventional way so you can continue maximum safety measures for a while longer.

This article is not intended to dictate to you what decisions will be best for your business, but instead provide a suggested perspective to take that will help you see the shaky ground we are all about to step onto. Asking yourself “should we do this?” will help you sort through the many things you will be told you *can* do and figure out what you actually *should* do in order to avoid future claims.

If you need assistance understanding and applying the guidelines to your business, Kathy Eppright can be reached at kepwright@amblaw.com or (805) 543-4171.