
Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Next Pandemic-Era Steps For A Safe And Equitable Workplace

By **David Garland and Susan Sholinsky** (March 26, 2021, 5:11 PM EDT)

One year ago this month, the World Health Organization declared the COVID-19 virus a pandemic. After a long and difficult year of unfathomable loss and unprecedented upheaval of lives and livelihoods, the arrival of effective vaccines now offers palpable hope that there is light at the end of the proverbial tunnel, and it's not another train carrying new pandemic woes.

For employers, the big question is what happens now.

Preparing for the Next Normal

Many business leaders and scholars believe that the impact of the pandemic has been so broad and deep that, realistically, there's no going back to the old, prepandemic normal.

Since it is too early to discern an enduring new normal, employers should begin planning for and implementing what has been more aptly termed the "next normal."

As employers consider how to respond to yet another unprecedented challenge, let's remember how, for more than a year now, they have been compelled on an almost daily basis to tackle novel and often profound operational hurdles for which there was no playbook.

Arguably, the employers that most successfully survived 2020 demonstrated unusual flexibility in managing the myriad stresses the pandemic placed on both their operations and the employer-employee relationship, from challenges to traditional notions of work — and even the workplace — to a disrupted, anxious workforce, much of which was burdened with juggling competing family needs.

The transition to the next normal will have its challenges as well — we're already seeing some of them, such as the issues around vaccination — and it will surely require continued flexibility.

It also presents opportunities to create a more agile, committed and productive workforce and a stronger, more compassionate company culture.

The following discussion explores key opportunities for making the move to the next normal a transformative transition and provides guidance on some of the legal and operational considerations implicated in the process.

Facilitating Remote Work Options

While it may not play the essential role it held in 2020, according to a recent report on the future workforce from Upwork Global Inc., remote work will continue through 2021 with more than one in four employees working fully remote. Significantly, most of the 1,000 hiring managers surveyed for this analysis expect to use a hybrid remote work model after COVID-19.



David Garland



Susan Sholinsky

Notably, the Upwork survey also revealed that many employers that had previously opposed remote work were impressed by how well it has worked. To this point, the top three benefits the hiring managers surveyed cited in favor of remote work were (1) increased productivity, (2) greater schedule flexibility, and (3) a reduction in nonessential meetings.

Findings such as these suggest that the adoption of some form of a remote work program will play an increasingly integral role in how companies nationwide and across various sectors manage their operations.

During the pandemic, employers had virtually no choice but to adopt a remote work system. In considering the next normal, employers will have more flexibility in crafting such programs.

Using their pandemic experience as a guide, employers should first determine whether, going forward, remote work — full-time or hybrid — is practical operationally, and whether it is desirable and workable in building and maintaining company culture.

If these questions are answered affirmatively, an employer should then get granular and determine for each specific job whether and to what extent it can be performed successfully off-site, either fully or partially.

Finally, employers may wish to ascertain employee interest in working remotely going forward, to determine what type of arrangement best meets the needs of both the business and its workers.

Once a remote work plan is developed, the employer should train managers and human resources on how to manage full-time or hybrid remote workers during the next normal phase. The plan also should address such other matters as how the company will:

- Conduct employee mentoring and various kinds of training, including anti-harassment;
- Receive and investigate complaints of misconduct involving off-site workers;
- Ensure managers and HR understand and comply with the company's legal obligations to provide eligible employees — including remote workers — reasonable accommodations;
- Protect confidential data and train, or retrain, remote workers on the company's security policies;
- Acclimate new hires into the office culture;
- Redesign the facility to better suit the needs of a hybrid workforce and to ensure a safe and healthy work environment, consistent with current law and guidance;
- Adequately and lawfully address issues such as expense reimbursement, confidentiality, and employee safety and health; and
- Avoid the out-of-sight-out-of-mind syndrome when assessing employee performance.

Relatedly, it should not go unnoticed that the past year has led to a rethinking of the way employee performance is measured.

For example, some employers have begun to focus less on certain productivity metrics and more on the quality of an employee's work.

A move away from primary reliance on productivity also is beneficial in another respect — it minimizes the legal risks, and potential public relations headaches, inherent in various methods used for measuring productivity that may improperly implicate employees' privacy interests, such as tracking keystrokes and online activity.

To this point, a bill currently pending in the New York Legislature would, among other things, prohibit employers from requiring remote employees to install monitoring software on their personal electronic devices and limit monitoring of an employee's website browsing history on an employer-provided electronic device.

In addition, employers are advised that when addressing pay equity in connection with compensation decisions such as pay raises and bonuses, those decisions are nondiscriminatory, both on their face and as applied, and are consistently enforced.

Helping Women to Return to the Office

The numbers don't lie: The pandemic caused an exodus of women from the workforce and it's a business necessity that employers address it. It's also an important opportunity to create smart transformational change in company culture and policies.

According to the U.S. Bureau of Labor Statistics, over 2.3 million women dropped out of the labor force between February 2020 and February 2021, resulting in the loss of "a generation of labor force participation gains." Reasons for this exodus include:

- Before the pandemic, women workers dominated many low-paying industries particularly hard hit by the crisis, such as hospitality and retail, and those jobs — millions of them — will be among the last to come back.
- The closure of schools and day care centers compelled many women to leave the workforce to care for their kids.
- Even women who were able to work remotely lacked the support structure they needed to function effectively as both full-time workers and full-time caregivers.

More broadly, U.S. workers — mostly women, but, increasingly, men as well — also are caregivers to other adults, e.g., spouses, parents and other family members.

In truth, the pandemic exacerbated and illuminated an existing problem, namely, the lack of support systems that enable employees, and particularly women, to balance caregiving obligations and work responsibilities.

For example, caregivers tied to a rigid work schedule more frequently come in late, leave early and spend time at work on the phone handling caregiving issues. They are more likely to turn down new projects or promotional opportunities because of time concerns, and are more prone to feel stressed, depressed and isolated from colleagues, which, in turn, often takes a toll on their physical health.

It's no surprise, then, that without sufficient support, some caregiving employees drop out of the workforce altogether, causing employers to bear the expense of hiring and training their replacements. Conversely, effective caregiver policies can increase productivity and employee loyalty, and attract a larger and more diverse applicant pool.

The pandemic made the lack of support for caregivers a problem employers could no longer ignore, as many employers experienced the employee/caregiver crisis up close, especially with the closure of schools and care centers.

Though post-pandemic needs will differ, employers have a tremendous opportunity heading into the next normal to implement or expand caregiver-friendly policies for their employees and, in the process, cultivate or enhance a culture of compassion. Accordingly, they should consider adopting an array of benefits that will make life easier for working caregivers, such as:

- Paid leave that can be used for various caregiving purposes and can be taken incrementally;

- A child care or family care stipend, perhaps in place of another benefit;
- Subsidized backup home care; and
- Flexible work schedules, job-sharing and, yes, remote work arrangements.

An employer also will need to create an effective communications program and train managers on the new benefits — new policies won't make much of a difference if employees aren't aware of them.

Building an Emotionally Healthy Workforce

Going forward, employers will likely be dealing with a significant mental health crisis, as the pandemic has taken a heavy toll on Americans' mental well-being.

Similar to the caregiver issue, the problem existed prepandemic, but the pandemic has substantially exacerbated it. Also like the caregiver matter, this most unfortunate situation presents a meaningful opportunity in the next normal to bring transformational change to the company's culture and make a difference in employees' lives.

The first step in this process is to get a handle on the magnitude of the problem. Consider:

- One in three Americans has lost someone to the virus, The New York Times recently reported.
- Tens of thousands of Americans have lingering illness after contracting COVID-19, and the medical community does not know if or when those suffering from long COVID-19 will recover.
- In an October 2020 Kaiser Family Foundation survey, "more than half of adults in the United States reported that their mental health had been negatively impacted due to worry and stress over the coronavirus." This has led the foundation to conclude that "mental illnesses may soon be the most common pre-existing conditions."
- Researchers have suggested that the pandemic has also aggravated the feeling of burnout among workers, with millennials having the highest levels of burnout, mostly due to feelings of loneliness.

As they develop their plans, employers need to consider novel ways to address the potential impact of the mental health crisis on their companies. Traditional methods of helping employees with mental health issues, such as employee assistance plans, are necessary but likely not a sufficient solution.

Employers may consider adopting policies targeted at easing employee stress and anxiety, such as flexible scheduling, paid mental health days, job-sharing and encouraging employees to use vacation time. Employers can also consider training managers in identifying employees who may need help.

As for employees suffering from loneliness and burnout, a hybrid scenario may be more effective than working fully remote. Employers should ensure that when hybrid workers are onsite, they have ample time to socialize with their colleagues. Employers may also want to consider adopting blackout periods, when workers shut down their computers and work phones at certain times, or days when videoconferences cannot occur.

Finally, employers should understand that they are legally required to treat employee requests for reasonable accommodation of mental illness in the same manner as requests for accommodation of physical disabilities.

Employers need to be aware of their obligations in this regard under state and local laws, as well as federal law, since the former may impose greater accommodation obligations than the latter.

Conclusion

2020 was an awful year, but it also motivated flexible and creative, out-of-the-box solutions to multiple workplace issues.

Employers should maintain this attitude and seize opportunities to implement meaningful changes for both the company and its employees as they steer their way through the largely uncharted waters of the next normal.

David W. Garland and Susan Gross Sholinsky are members at Epstein Becker Green.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2021, Portfolio Media, Inc.