

# Attorneys Advise Caution on Returning At-Risk Workers

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As the state reopens and government entities continue to roll out recommendations on how to ensure workplace safety, employers are lacking clear guidelines on how to make accommodations for more vulnerable workers who fear exposure to the coronavirus if they return to work.

Not everyone whom the Centers for Disease Control and Prevention says is at higher risk for contracting COVID-19 -- including those over the age of 65 with preexisting conditions -- are entitled to special accommodations by their employers under existing state regulations. But some attorneys are advising employers to make accommodations for all high-risk workers, recommending they follow existing frameworks designed for employees with disabilities.

These precautions, attorneys say, could help employers safeguard against litigation and workers' compensation claims.

The CDC released safety guidelines last week for employers reopening offices -- the latest addition to a growing safety literature for other workplaces by government agencies, including restaurants and construction sites.

Emily Burkhardt Vicente, who represents employers as a partner at Hunton Andrews Kurth LLP, said that besides legal protections Washington Gov. Jay Inslee created in April to accommodate workers at high risk for contracting COVID-19, she isn't aware of any pandemic-specific accommodation guidelines for employers in the nation.

Under Inslee's protections, Washington employers must create alternative work assignments for high-risk employees who do not want to work on-site, and grant them leave if creating an alternative assignment is not possible.

Inslee's protections effectively created a new protected worker class that is entitled to special accommodations: those who are specifically at risk of contracting COVID-19. In California, employers have no obligation to provide special arrangements for workers based on age, but they have long been required to make accommodations for people with disabilities, Burkhardt Vicente said.

Workers in the latter category can cite labor regulations that existed prior to the pandemic when asking for COVID-19 accommodations.

"Under the definition of disability in California it's very broad. Most individuals who have an underlying medical condition are likely to qualify as having a disability," Burkhardt Vicente explained. "Not across the board ... but a lot of them will, and then they would be protected."

Jim McDonald, managing partner of the Irvine office of Fisher & Phillips LLP, said he has been advising employers to make accommodations for all workers at risk of contracting the virus.

"The law hasn't really developed yet to the point of addressing it," McDonald said. "But I think the best approach is to follow the reasonable accommodation process as you would accommodate a disability and do the interactive process."

This process would require an employer and a worker to trade information and negotiate a reasonable accommodation.

McDonald's recommendation applies to workers who have continued to work through the pandemic.

Glenn Rothner, who represents employees as founder of Rothner, Segall & Greenstone, said laid off workers who are also at high risk need to be taken into consideration as well.

For laid-off workers who are called back to work, "If they have a preexisting or current condition that can be accommodated by some paid or unpaid leave, then California and federal law require that kind of accommodation be provided, so long as it's likely that at the end of that leave the employee will be able to perform his or her employment duties," Rothner said.

Rothner, Burkhardt Vicente, McDonald, and Jennifer Kramer, who represents employees at Jennifer Kramer Legal, agreed employers who have set up remote work infrastructure should continue giving workers the option to work from home if they request it.

"I think that the pandemic has shown that there's a lot that can be done remotely," Kramer said.

"Most lawyers anticipate there's going to be litigation down the road," McDonald said. "Any prudent employer would follow as many guidelines as they can."

In the near future, McDonald added, workers could complain to regulatory agencies that they don't feel safe in the workplace. If an employer needs to furlough or lay off more workers, these workers might file whistleblower and retaliation complaints if they previously expressed safety concerns or asked for accommodations.

McDonald also pointed to an executive order issued by California Gov. Gavin Newsom in May, which shifted the burden of proof almost entirely to employers for COVID-19 workers' compensation claims.

"It's important for employers to follow these guidelines," he said of best practices recommended by agencies like the CDC and Cal/OSHA that are not mandatory. "If someone does file an OSHA complaint, you have all your ducks in a row."

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