

DON'T FORGET THE BASICS WHEN REOPENING YOUR RETAIL BUSINESS: A 5-POINT PLAN

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The COVID-19 coronavirus pandemic that closed hundreds of thousands of business around the country is unprecedented. Fortunately, many retailers were able to maintain a fairly high level of continuity as essential businesses who had to remain open. But even within the essential business community, operating on reduced hours has become common and employees have been affected either by reduced hours or furloughs or layoffs.

Some retailers are not deemed essential and were forced to completely and laid off all their employees. Further, many businesses are seeing employees resign due to medical issues that make it dangerous for them to work. Many of these employees will not want to return to work immediately when they can receive unemployment benefit amounts for four months that far outstrip their wages.

As a result, some retailers are already reporting that they are having trouble finding employees to work open shifts. For this reason, over the next few months as businesses restart, retailers will be in the market for employees but qualified applicants may be scarce. If you ignore the basics just to get warm bodies in the door, you may find yourself dealing with an increase in employment related claims down the line.

This article will address five areas retailers need to monitor to avoid setting themselves up for litigation as they work to return to normalcy: hiring, attendance, wages, performance, and accommodating disabilities.

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1. HIRING

When a store is short, employees and managers are working extra hours to make up for the shortfall. This leads to a tendency to lower the bar for hiring. Depending on the severity of the shortage, the standard can fall between “can they walk and chew gum at the same time?” to “fogs a mirror placed in front of mouth.”

A store manager perceives having an employee who does half a day’s work for a full day’s pays as better than having no help at all. Inevitably, these employees negatively impact the morale of the employees who are fully performing because of the lower standards to which they are held. Nothing encourages employees to seek help from outsiders such as unions and the EEOC than a feeling of being treated unfairly. This unevenness can also create records of what can appear to be discriminatory enforcement of work rules.

Retailers who find themselves in bind for talent need to consider alternatives to hiring less than capable employees. The various options each come with a different cost.

For example, providing additional hours to current employees may raise benefit costs since most retailers have a percentage of their workforce working less than 30 hours per week who are not eligible to participate in various benefits. The question will be whether in a tight labor market the productivity gains offset the costs.

Another option – and the one that seems to be the most common – is to raise the starting hourly wage. As a third option, retailer employers may also look outside of their traditional labor pools and consider hiring minors. While there are many strictures on the employment of minors, opening to that labor pool could increase the quality of candidates available to the employer.

2. ATTENDANCE

Unanticipated absences always have been and always will be a disruptive force. If an employee does call in timely, the manager will spend time seeking to find a replacement for that employee instead of planning for the day. If an employee simply does not appear, then the disruption worsens.

Employers used to combat absences by providing attendance incentives. But the Family and Medical Leave Act (FMLA) ended a lot of those programs because employees whose absences were FMLA-protected became entitled to the bonus even without meeting the attendance goals of the program. Letting employees swap shifts on their own led to employees working overtime. Additionally, the use of "on call" shifts have [come under fire recently](#), making the legal risk in states like [California](#) greater than the potential gain for some employers.

Many employers are battling attendance issues through the use of technology, taking advantage of our increased connectivity. It is far easier to send out one text message or an email to a group of employees than to call them one-by-one. Some employers are even developing apps and other shift swapping tools for employees. The goal is to remove as many obstacles as possible to having an employee present for every slot on every shift.

3. WAGE AND HOUR

A problem with understaffing is that busy stores end up incentivizing managers to engage in practices violating the FLSA. Retailers carefully craft labor hours to allow all the work to be accomplished, assuming the store is filled with productive employees.

Nevertheless, a common refrain we hear in depositions and investigative interviews of store managers is that the amount of labor hours they were provided were never enough. They claim instructions from top management to "do whatever it takes to get the work done" implicitly authorized them to have employees work off the clock or shave the employees' time after it was worked. Some managers have even fessed up to paying employees out of their own pocket to work off the clock rather than allowing the employees to work overtime on the clock.

The most effective method of combating these practices is training and education. Employees must be empowered and encouraged to report this behavior above their managers. Further, managers have to be trained that these practices will result in discharge.

But there is a second question that will be asked by smart plaintiff attorneys trying to paint the picture working

employees off the clock was a corporate wide practice, not an isolated incident: these attorneys will ask for discipline of store managers for using more labor hours than they were allotted. If the company practice is to automatically discipline store managers for minor variations above the labor hour allotment, this creates an appearance that the company's aggressive enforcement regardless of the situation really did put the manager in a Catch-22. Because of this, retailers need to consider under what circumstances store managers are going to be disciplined and/or evaluated on using too many labor hours.

4. PERFORMANCE

A supervisor recently acknowledged that he retained an employee in the face of poor performance because the company was downsizing and if the employee was discharged, she would not be replaced – leaving the manager short-staffed. As a result, the supervisor spent an inordinate amount of time over the next several months closely monitoring that employee because that was the only way to get work from her. The supervisor also spent time handling internal complaints about the employee and doing some of the work the employee should have been. When the employee ultimately resigned, she filed a charge of discrimination alleging her supervisor's careful monitoring of her was "harassment."

In many situations, it is better to have a smaller group of strong employees than a larger pool of underperforming employees. In addition to the tremendous amount of extra work they create, underperforming employees create the same morale issues as newly hired unqualified employees. Good employees become resentful and feel unappreciated because of the uneven workloads and uneven output. Underperforming employees can also create issues with customers, hurting sales and adversely impacting customer loyalty.

Ultimately, when the labor pool broadens, and the manager wants to hold employees to higher standards, the prior treatment can be used as evidence of discrimination. While it is probably impractical to say that there are no sliding scales related to performance, in tight labor markets, letting them slide too far will hurt productivity more than help it.

5. ACCOMMODATING EMPLOYEES

The retail industry is one of the harder environments in which to accommodate employees. There has never been a machine that can bend and twist like the human body. Shelving a product four inches from the ground on a bottom shelf requires a complex set of movements. It is highly uncommon for a retail position to not require a variety of physical attributes.

Thus, there may not be many opportunities inside a store for an employee to perform all the duties of their position if they suffer from a physical restriction. But in tight labor markets, store managers may prefer to keep an employee coming to work for the duties an employee can perform, even if they are not able to perform all the stated essential functions of the position.

The problem with this practice is the precedent it sets. While some judges have concluded that employers should not be penalized for being more generous to employees than the Americans with Disabilities Act (ADA) requires, other cases have used evidence of one employee being allowed to do only certain portions of their job as evidence of what a reasonable accommodation is for that position. Likewise, this practice will set precedent requiring an employer provide any pregnant employee with similar physical restrictions the same accommodation.

The work the employee cannot do falls on co-workers who may not be happy about the extra load of some of the harder duties. Thus, retailers need to focus on being consistent with accommodations in a manner that best allows them to run the business without getting hamstrung with several store employees who cannot do all the work.

CONCLUSION

There will be many difficulties in the road back to normalcy. How a retailer goes about addressing those difficulties goes a long way in whether the problem is only operational or becomes legal as well. Good practices will set employers up for success no matter the market.

Contact the authors [here](#) or [here](#) for more information.