

infocus | pandemic response | BY MARK GORDON | MANAGING EDITOR

# Businesses face heightened lawsuit risk

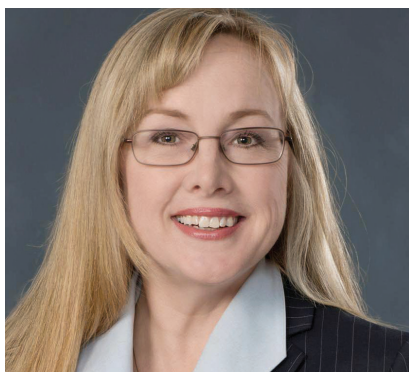
Reopening offices and workspaces, two legal experts say, isn't a simple process. One key: Have, and stick to, a well-designed plan.

**E**mployment attorneys are getting COVID-19 whiplash, spinning around to stay on top of federal, state and local regulations regarding come-back-to-work procedures.

Not only are there myriad regulations, but also, Sarasota labor and employment lawyer Jennifer Fowler-Hermes says, the green light to return to a workplace is flipping around office norms. Take something as simple as lunch. Workplace kitchens and snack rooms are anathema to clean work environment in the age of the coronavirus. So offices will need to adjust. "One of the things employers are doing now," she says, "is 'I know we always tell you, don't eat at your desk. Well, eat at your desk.'"

Fowler-Hermes is with Sarasota-based Williams Parker. She and Jan Pietruszka, a partner with Shumaker, Loop & Kendrick, have written and co-written a series of blog posts on key issues employers are bound to face as businesses and workplaces reopen. "The majority of my calls right now are, 'How do I bring people back?' 'How do I keep people safe?'" says Pietruszka, a partner and co-administrator of the labor and employment practice at Shumaker, which has offices in Tampa and Sarasota. "And what are my liabilities?"

In separate interviews, the attorneys addressed what business owners and executives need to look out for in reopening a workplace.



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**As a business community, we have to work together to make sure these businesses survive and that there's jobs for employees to come back to. That's the focus of most of my clients."**

Jennifer Fowler-Hermes | Williams Parker

“”

**When times are hard, and there's high unemployment and a lack of jobs, people who lost a job don't have any other remedy. They have unemployment, and they have a lawsuit."**

Jan Pietruszka | Shumaker, Loop & Kendrick

*What are some pitfalls employers should be aware of when reopening?*

**Fowler-Hermes:** If an employer doesn't have a plan in place, and they just call people back, that's where they are going to have issues. There's already litigation there. The best way to prevent that is to have a plan. The CDC and [Occupational Safety and Health Administration] guidelines give a basic road map that if someone presents this, this is what you should do. If you have a plan in place that you are following, you will be in a better position to defend what you are doing.

**Pietruszka:** Some people were in such a rush to reopen that they didn't think about issues they could have planned for in advance. We need to rethink how we do everything: How do we still keep people 6 feet apart? How do we handle office flow? How do we use the restrooms? How do we use meeting rooms?

We have employers now that

have reopened and have an exposure or a positive case, and they don't have a plan. As we reopen, these things will happen. A lot of employers were dealing with this on an ad-hoc basis when we were all scrambling six weeks ago, but now they should have a plan.

*Why is having a plan key to reopening an office or workplace?*

**Fowler-Hermes:** In the next year or so, there's going to be a wave of litigation against employers. That's one reason why employers need a plan. They need to document their well-thought-out decisions. Employers need to understand that the plaintiff's bar is already advertising. Those lawsuits are already being filed. **Pietruszka:** There were a lot of layoffs. I expect claims of discrimination in how people were selected to be terminated or laid off. The [Worker Adjustment and Retraining Notification Act] may have required advance notice prior



to layoffs, and I think some employers may not have appreciated that requirement or attempted to comply but didn't strictly comply.

*What are some risks, outside of litigation, employers face in opening back up?*

**Pietruszka:** Employee objections. We are seeing employees push back against returning. Part of that may be the unemployment that's available, where we have employees making more on unemployment than they do for some employers. How will employers get them to come back to the office?

*Are businesses required to do additional cleaning if an employee, once back at work, tests positive for the coronavirus?*

**Pietruszka:** Gov. Ron DeSantis' May 4 executive order on reopening doesn't have anything on cleaning but says employers that open should follow CDC and OSHA guid-

ance. The CDC has general guidance about cleaning high-traffic areas and which cleaners are effective. But I haven't seen any specific guidance that says you have to hire XYZ company.

But OSHA has a general duty clause where employers have a general duty to protect workers from known risks or hazards in the workplace and one of those known risks right now is COVID-19. I imagine if an employer is doing nothing to clean common or high-traffic areas, there is a potential claim or risk there.

*Is there an advantage to bringing employees back in stages?*

**Fowler-Hermes:** There is, but that doesn't mean every workplace can do it. For one, there might not be enough work to bring everyone back at once — then it could be overkill. Also, a lot of these decisions will be based on whether the business has a PPP loan. Because if it does, you will want those employees to be back at work. You don't want to pay them to sit at home doing nothing.

All of your civil rights statutes, they all still apply. You can't make decisions based on race, gender, age, discrimination — unless of course someone has COVID-19. If they do, you are not going to make them come back to work right away. You will let them get better.

*Can employers do temperature checks and require COVID-19 tests?*

**Fowler-Hermes:** Generally, these types of things aren't allowed. However, the EEOC has come up with new guidance, and that guidance provides, for at least while the pandemic continues, that employers can do both: They can test employees for COVID-19, and they can require them to be tested, and they can do temperature checks. But they have to do so in a way that is well thought out. They have to be approved tests. Employers also need to understand that so, 'we tested everyone Tuesday,' (and no one had COVID-19), but that doesn't mean someone didn't go out to the grocery store Tuesday night and catch COVID-19.

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