

# Employment Concerns For Financial Cos. During COVID-19

By **Susan Eandi and Paul Evans** (September 11, 2020)

COVID-19 was officially declared a pandemic in the U.S. on March 13. Yet, even now, as we are over six months into the crisis, employers still continue to face challenges when navigating the sometimes daily changes in health and safety orders, updates from federal agencies, court decisions, and the proliferation of lawsuits.

Some of the key decision points for many employers include when to reopen, what should drive that decision, the legal risk of getting it wrong, and how to mitigate that risk. Unlike retailers and restaurants, companies in the financial industry have largely avoided shutting down operations. However, that does not mean they have fully reopened.

Where does the financial industry stand in its reopening? What should financial services companies be concerned about in terms of COVID-19-related guidance and recommendations and legal claims by employees? How can companies mitigate these claims? What are specific COVID-19-related compliance issues unique to investment advisers and broker-dealers?

## **Financial Company Employees Are Still Largely Working From Home**

Currently, many financial firms are not requiring their employees to return to the office. Instead, firms largely have offered employees the opportunity to return to the office on a voluntary basis.

According to news reports, several of the U.S.'s largest financial firms, including some on the Fortune 500 list, have employees returning on a voluntary basis. These news reports note there does appear to be a push at some firms to get traders — and others who cannot fully complete their jobs from home — back to the physical office, but it does not appear the same case is being made for other employees.

Financial news sites have reported many financial firms are following a handful of return-to-office trends. Some firms are allowing somewhere between a small percentage to approximately half of the staff to return voluntarily, often with traders and operations staff heading back first.

Even with employees returning, some firms are keeping office space occupancy to a small percentage to increase chances that employees will be able to follow social distancing guidelines. Some firms have few employees returning now, but strive to have more employees return to the office — or at least to have employees work more hours in the office — at the start of 2021. And at least one financial firm announced it is keeping its offices closed to all staff, including traders, through 2020.

As in other industries, return to work for employees in the financial sector seems to be driven by whether employees can do their job from home. For example, stock and bond traders are used to tracking markets on multiple screens, bankers working on complex deals require interaction with a multitude of investors, and other individuals requiring access to



Susan Eandi



Paul Evans

specific technology or work environments may find it difficult to work from home.

## **Types of Employment Lawsuits Financial Companies Should Keep an Eye On**

While the likelihood of claims was simply an informed prediction several months ago, there has been a proliferation of lawsuits related to employees working from home — or returning to the workplace — in recent weeks. These lawsuits are sometimes triggered by terminations, but also by health and safety concerns, leaves, and wage and hour issues for incumbent employees.

A quick roundup of the types of claims we are seeing are as follows:

### ***Unlawful Termination***

These include cases where employees requested to work from home in light of the pandemic, the request was denied, and employees were ultimately terminated. Typically, there are other facts, including the employee's reporting that the workplace was unsafe and alleged retaliation for the same, or the employee's failure to return to work because of COVID-19 symptoms or diagnosis and subsequent termination.

### ***Conditions of Employment***

Employers are being sued by employees who contend they contracted COVID-19 on the job, or the families of deceased workers who contend their loved ones contracted lethal cases of COVID-19 on the job. These lawsuits center on whether employers adhered to state and federal guidelines for reducing the spread of the virus — including mask use, general lack of personal protective equipment, hygiene measures, etc.

### ***Violation of Leave of Absence Rights***

The majority of these lawsuits have been filed by employees who allege violation of their right to take leave — for example, under the Family and Medical Leave Act, the Families First Coronavirus Response Act or state law — when they are ill from COVID-19 or symptoms of COVID-19, or when they are unable to work or telework because of a need to care for their child whose school is closed or place of child care is unavailable due to COVID-19.

### ***Wage Issues***

Employees have filed lawsuits against employers for improper payment under the Fair Labor Standards Act and state and local law. Issues here often arise when nonexempt employees are not compensated for working overtime to cover for fellow employees out with COVID-19 or who are not returning to work, or once-exempt employees whose FLSA exempt status has been lost as a result of operational changes and who are subsequently not compensated appropriately.

These lawsuits also include claims for violation of state and local reimbursement laws when employees who are required to work from home need specific employer-required equipment to do their jobs, and employers fail to reimburse them appropriately.

## **Employment Litigation Mitigation for Financial Companies Planning to Reopen**

Companies reopening right now in regions with low COVID-19 positivity rates — assuming implementation of mandated and recommended precautionary measures — should not face significant legal risk in the form of a challenge to the decision to reopen or for contraction of COVID-19 by employees who come to work. With that said, this analysis changes in areas with higher positivity rates or companies failing to follow mandated and recommended precautionary measures.

Given the potential for a surge in positivity rates — which unfortunately has proven out not only in the U.S., but globally — many companies are being extremely cautious around reopening, because while the cost of defense may be calculable, the reputational risk and potential health implications that may result from an outbreak could be significant.

For financial services companies that are considering reopening, we recommend taking the following steps:

### ***Follow government/agency guidelines.***

Follow state and local reopening requirements and recommendations for businesses and office spaces, as well as the Centers for Disease Control and Prevention's COVID-19 office building recommendations for employers,[1] and the Occupational Safety and Health Administration's return-to-work guidance[2] and COVID-19 FAQ guidance.[3]

Be certain to have a plan in place that complies with these guidelines if an employee in the workplace tests positive for COVID-19. Guidance changes frequently, so be certain to check the CDC, OSHA, and applicable state and local government/agency websites regularly and update your plans as necessary.

### ***Determine whether and how to test/screen.***

Determine how, whether and when you will screen employees before they enter the workplace. Options include COVID-19 diagnostic tests for active virus, temperature scanning and symptom/exposure certification.

### ***Determine how to handle employees who do not want to come to work.***

Certain employees may request to continue working from home because, according to the CDC, they are at increased risk for severe illness from COVID-19. Others may not want to come to work because they have a generalized fear of becoming ill from COVID-19.

Determine how you will handle these employees, and stay on top of U.S. Equal Employment Opportunity Commission guidance[4] regarding high-risk employees who are protected by the Americans with Disabilities Act.

### ***Be prepared for employee leave requests.***

Employees may request leave to care for children whose school or child care is closed or unavailable, to care for others who are sick, or to care for themselves. Determine how to handle these requests and be certain to comply with the Families First Coronavirus Response Act, Family and Medical Leave Act, and state and local law.

***Determine how to handle employees who travel to locations requiring quarantine upon arrival or hot spots requiring their quarantine upon return home.***

This could extend an employee's time out of the office, and raise the question of whether they should be paid during quarantine. Our tracker for U.S. shelter-in-place and reopening orders<sup>[5]</sup> includes links to the relevant quarantine requirements/recommendations for incoming travelers in each state and Washington, D.C.

***Be aware of overtime pay and employees' exempt status.***

If nonexempt employees are working overtime, be certain to pay them accordingly. If you have made changes in duties or pay of exempt employees, be certain the changes do not eliminate their exempt status.

***Importantly, consider employee relations and employee morale.***

There may be employees who are reluctant to return for reasons that have nothing to do with the actual workspace, such as those employees who rely on public transportation, or those whose children will be at home at least part of the week during the school year. Consider being flexible and working with employees individually to make their return to work as painless as possible, being careful not to discriminate — especially against those who are in a protected class under Title VII or applicable state and local law.

For example, many companies are reimbursing employees who wish to take private transportation, such as Uber or Lyft, instead of using public transportation, or allowing employees to continue to work from home part of the week if their children will remain at home.

***OCIE's COVID-19 Risk Alert for Broker-Dealers and Investment Advisers***

Financial company employers should also pay close attention to compliance risks. On Aug. 12, the U.S. Securities and Exchange Commission's Office of Compliance Inspections and Examinations issued an alert on key COVID-19 compliance risks for broker-dealers and investment advisers<sup>[6]</sup> identifying a number of COVID-19-related issues, risks and practices relevant to SEC-registered investment advisers and broker-dealers.

The risk alert addresses regulatory and compliance questions and considerations for firms operating during the pandemic in six categories summarized below, and provides some specific observations regarding firms with employees working from home.

***Protection of Investor Assets***

OCIE encourages firms to focus on the safekeeping of investor assets by updating supervisory and compliance policies to address any delays in processing investor checks and transfer requests sent by mail. OCIE also encourages firms to make any necessary changes to their policies around disbursements to investors, including where investors are taking unusual or unscheduled withdrawals from their accounts, particularly COVID-19-related distributions from their retirement accounts.

According to OCIE, firms may want to consider implementing additional steps to validate the identity of the investor and the authenticity of disbursement instructions, and recommends that each investor, particularly seniors and other vulnerable investors, has a trusted contact person in place.

### ***Supervision of Personnel***

OCIE encourages firms to review and modify supervisory and compliance policies as necessary in response to shifting to firmwide telework, dealing with significant market volatility and related issues, and responding to operational and technical challenges. OCIE advises that firms may wish to modify their practices to address:

- Supervisors not having the same level of oversight and interaction with supervised persons when they are working remotely;
- Supervised persons making securities recommendations in market sectors that have experienced greater volatility or may have heightened risks for fraud;
- The impact of limited on-site due diligence reviews and other resource constraints associated with reviewing of third-party managers, investments and portfolio holding companies;
- Communications or transactions occurring outside of the firms' systems due to personnel working from remote locations and using personal devices;
- Remote oversight of trading, including reviews of affiliated, cross and aberrational trading, particularly in high-volume investments; and
- The inability to perform the same level of diligence during background checks when onboarding personnel — such as obtaining fingerprint information and completing required Form U4 verifications — or to have personnel take requisite examinations.

### ***Fees, Expenses and Financial Transactions***

In the risk alert, OCIE highlights the possibility that the recent market volatility and the resulting impact on investor assets and fees collected by firms may result in increased financial pressures on firms and their personnel to compensate for lost revenue.

Accordingly, OCIE advises that firms may wish to review their fees and expenses policies and consider enhancing their compliance monitoring, particularly by:

- Validating the accuracy of their disclosures, fee and expense calculations, and the investment valuations used;
- Identifying transactions that resulted in high fees and expenses to investors, monitoring for such trends, and evaluating whether these transactions were in the best interest of investors; and
- Evaluating the risks associated with borrowing or taking loans from investors, clients and other parties that create conflicts of interest, as this may impair the impartiality of firms' recommendations. Also, if advisers seek financial assistance, this may result in an obligation to update disclosures on Form ADV Part 2.

## ***Investment Fraud***

In addition, OCIE has observed that times of crisis or uncertainty can create a heightened risk of investment fraud through fraudulent offerings. OCIE recommends that firms stay aware of these risks when conducting due diligence on investments and in determining that the investments are in the best interest of investors. Firms and investors who suspect fraud should contact the SEC and report the potential fraud.

## ***Business Continuity***

OCIE highlights the importance of operating critical business functions during emergency events.

OCIE points to the shift of many firms to predominantly remote operations during the pandemic as requiring firms to reconsider whether supervisory and compliance policies used under normal operating conditions may need to be modified or enhanced to address some of the unique risks and conflicts of interest present in remote operations. This includes risks that may be presented if supervised persons need to take on new or expanded roles in order to maintain business operations, and concerns about security and support for facilities and remote sites.

OCIE encourages firms to review their continuity plans to address these matters, make changes to compliance policies, and provide disclosures to investors as necessary if the firms' operations are materially impacted.

## ***Protection of Sensitive Information***

OCIE underscores firms' obligations to protect investors' personally identifiable information. OCIE has observed that many firms require their personnel to use videoconferencing and other electronic means to communicate while working remotely, which can create vulnerabilities around the potential loss of sensitive information, including personally identifiable information, and additional opportunities for fraudsters to use phishing and other means to improperly access systems and accounts by impersonating firms' personnel, websites and/or investors.

OCIE recommends that firms pay particular attention to the risks regarding access to systems, investor data protection and cybersecurity. The OCIE alert provides more detail as to particular steps that firms may take to address these risks.

Note that the risk alert is not a rule, regulation or statement of the SEC, has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person. However, firms should review the issues and observations contained in the risk alert and consider making appropriate changes to reflect the unique compliance risks presented with operating during the pandemic.

---

*Susan Eandi is a partner, head of the global employment and labor law practice group for North America, and chair of the California labor and employment practice group at Baker McKenzie.*

*Paul Evans is a partner at the firm.*

*Baker McKenzie partners Amy Greer and Jennifer Klass contributed to this article.*

*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.*

[1] <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

[2] <https://www.osha.gov/Publications/OSHA4045.pdf>.

[3] <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>.

[4] <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[5] <https://www.bakermckenzie.com/en/insight/publications/resources/us-shelter-in-place-tracker>.

[6] <https://www.sec.gov/files/Risk%20Alert%20-%20COVID-19%20Compliance.pdf>.