

A close-up photograph of a hand placing a wooden block on top of a Jenga tower. The tower is built with several layers of wooden blocks, some of which are slightly offset. The background is a soft, out-of-focus blue and green.

STRATEGIC AND DEFENDABLE TERMINATIONS

NOW YOU'RE JUST
SOMEBODY THAT
I USED TO KNOW



LANE **POWELL**

WELCOME TO THE WEBINAR!

Housekeeping

- We have muted your audio from our end, but we would appreciate it if you would also mute yourself, just in case.
- You will be able to submit questions during the webinar by using the “Q&A” feature located at the bottom of your screen.
- We plan to get through as many submitted questions as possible but if we run out of time look to have your questions answered in a future webinar. Links to the resources mentioned today along with a recording of today’s webinar and PowerPoint slides will be emailed to everyone who registered and made available on our COVID-19 specific webpage next week.

Introductions

MODERATORS



Disa Davis

Parker, Smith & Feek
*Account Executive,
Employee Benefits
Broker*



Marie Gallanar

Parker, Smith & Feek
*VP, Commercial Broker
& Manufacturing Practice
Group Leader*

Upcoming Webinar:

Benefits Annual Compliance Seminar
Thursday, May 28th

Panel of Speakers



Mike Edmonds

Michael is a Vice President, Account Executive, and Management Liability Practice Director in the Commercial Department. He utilizes his nine years of experience with an international insurance carrier to assist in complex management, professional, and privacy liability exposures for a broad array of clients across various industries.



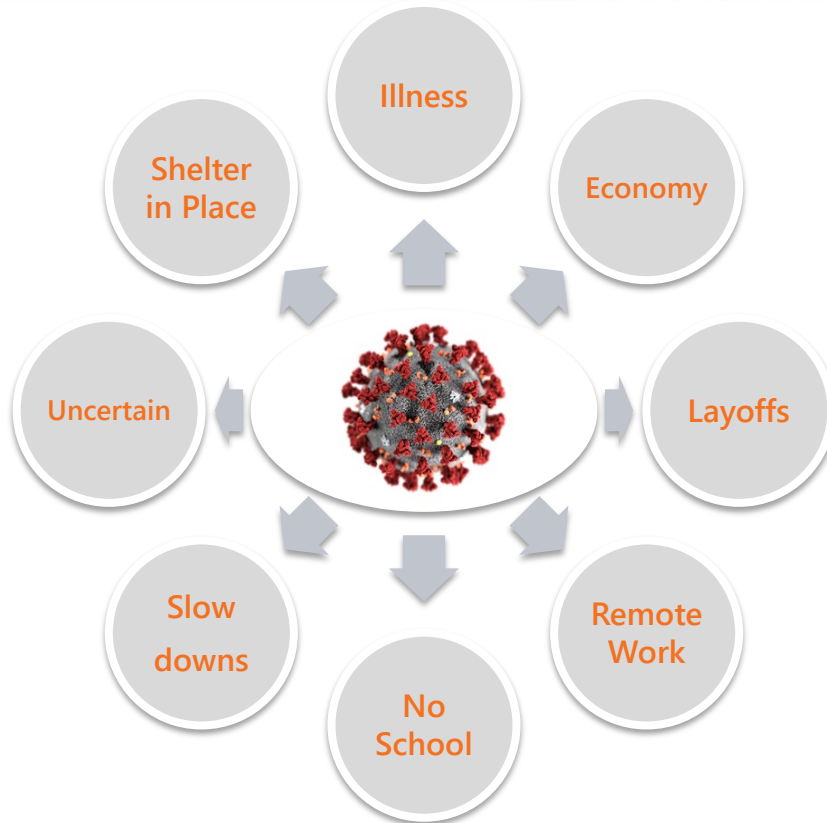
D. Michael Reilly, Lane Powell PC

Small and large employers retain Mike for his strategic advice and decades of experience in employment issues and litigation, business decisions and litigation avoidance. Mike provides advice in claims involving discrimination, retaliation, wrongful discharge, disability accommodation, ERISA and wage hour and wage/hour claims.

Disclaimers

- Information presented is not legal advice.
- This is a very fluid situation, with information changing by the day, hour, minute and every jurisdiction is handling the COVID-19 pandemic differently.
- We have taken the questions you provided during registration and organized them into common themes.

The Effects of COVID-19



How do we encourage employees to return to work?

Returning to work

- **Communicate employee guidelines (or update employee handbook) outlining rules for return:**
 - e.g., self-assess health for COVID-19,
 - adhere to CDC guidelines and employer safety plan.
- **Employer provides Personal Protective Equipment**
 - Masks, sanitizers etc.: Make it available to employees and provide training on the proper way to use the PPE.
- **Provide reasonable accommodations for employees with elevated risk, or who live with someone with elevated risk.**
- **Employee Sign-off: to ensure employee knows expectations**

Can we force employees to return to work? What do we do if they won't come back?

Returning to work

- **If over 500 employees: Coronavirus Response Act factors**
- **Use disability interactive process**
- **Examine roles and risk exposure**
 - Consider job duties versus work from home options
 - Accommodate high risk employees; or those who live with those with high risk
- **Banning employees from returning?-"direct threat"**
- **Testing employees? EEOC OKs with guidelines**

Any strategies or thoughts on encouraging voluntary separations?

Voluntary Terminations

- **Severance Packages generally not legally required**
 - Check handbook, employment agreements, ERISA plan, CBA
 - Reduces exposure to wrongful discharge lawsuits
- **Messaging a reduction-in-force/layoff:**
 - “We are in harrowing times; this is NOT a reflection on your work.”
 - Done the right way it can enhance work environment
- **Retaining Key Employees—communication/retention bonus?**
- **Reduction in force (RIF) questionnaire**
 - Underwriters will scrutinize the process in place

What are some special considerations for terminating union employees?

Organized Labor Groups

- **Bumping rights**
 - Allows an employee to displace another employee due to layoff or other employment action.
 - Consider seniority
- **Refer to collective bargaining agreement**
 - The agreement may provide a grievance procedure allowing appeals. Arbitrator's decision is final.
 - Separate guidelines for general layoffs vs. individual terminations.

How to manage protected classes or those who claim discrimination?

Protected Classes

- **Review Reilly's CHECKLIST to evaluate risk of this termination**
- **Before termination decision on layoffs:**
 - Business Justification Memo
- **Before performance/misconduct terminations:**
 - Documentation
- **Discrimination/retaliation complaints launched at termination**
 - Let the employee know the allegation is taken seriously;
 - Launch investigation;
 - Report (generally) outcome of investigation

What types of terminations typically drive the most lawsuits?

Greatest Risk of Retaliation

- **Undocumented, surprise or public terminations**
 - Make sure your documentation is in order
 - Treat employee with respect
- **Long term employees**
 - Honest, periodic performance reviews are key:
 - Helps defense in retaliation, failure to accommodate and discrimination claims
 - Prior to termination (performance), coaching/additional training

What is the best setting to perform a termination?

Where, When and How

- **Communication method**

- Prefer in person, with witness (same gender as employee)
 - In this environment, virtual meeting or phone might be required
 - Avoid termination while on leave

- **Severance agreement checklist**

- Separation date, accrued vacation, reimbursement of business expenses, confidentiality, return of company property, etc.

- **What to say?**

- The “Upcoming decision” script (in Reilly’s written materials)
- “Resignation in lieu of termination” script
- Termination with severance

How can we deal with a vocal employee in the termination meeting?

Employee disputes during termination

- **Dealing with a defensive employee**
 - Allow them to vent; listen, respectfully, and maintain your position but show empathy
- **Employee threatens to sue, or go to EEOC**
 - Don't argue or try to dissuade them from contacting EEOC or attorney
 - Investigate complaints

What if it escalates?

- **Employee becomes hostile:**
- Document responses
- Offer EAP information
- Consider calling additional security; consider violence in workplace consultation.
- Review Employment Practices Liability policies for endorsement of workplace violence expenses.

Could my Workers' Comp Immunity be
compromised by a COVID-19 claim?

Potential Lawsuit

An employer is very unlikely to be sued (successfully) by an employee contracting COVID-19 allegedly at work because:

- Washington's worker compensation act generally provides immunity to employers for worker injuries.
- Washington would require an employee to prove the employer "willfully disregarded" the risk to the employee. Courts will require proof of "deliberate intent".
- Courts have rejected asbestos/cancer workers compensation claims because the employee has to prove "cognizable injury" while employed.
- Employer should have a return to work safety plan.

Bonus Question:

How do you think COVID-19 will affect the workplace in the long-run?

Final Thoughts...

- Remember you're not alone - every business is asking the same questions with same concerns.
- Understand your risk.
- Stay abreast of changes and adjust accordingly.
- Use your advisors as a resource.

Resources

- Washington “Safe Start” Plan: <https://coronavirus.wa.gov/what-you-need-know/safe-start>
- CDC: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- CDC Guidelines for Disinfection: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
- WHO: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- Employment Security Department (ESD) COVID-19 Newsroom: <https://esd.wa.gov/newsroom/covid-19>
- WA State OIC: <https://www.insurance.wa.gov/coronavirus>
- WA Coronavirus Site: <https://www.coronavirus.wa.gov>
- OSHA: <https://www.osha.gov/SLTC/covid-19/standards.html>
- FFCRA Leave Graphic: <https://equinoxbusinesslaw.com/blog/how-to-implement-the-families-first-coronavirus-response-act/>

Resources Continued

- Unoccupied Building Safety: <https://www.psfinc.com/articles/preparation-for-unoccupied-buildings/>
- Washington Labor & Industries: <https://lni.wa.gov/agency/outreach/novel-coronavirus-outbreak-covid-19-resources>
- Alaska: <https://covid19.alaska.gov/>
- Oregon: <https://osha.oregon.gov/Pages/re/covid-19.aspx>

Have More Questions?

Mike Edmonds

Account Executive, VP - PS&F

moedmonds@psfinc.com

Mike Reilly

Attorney, Shareholder - Lane Powell

reillym@lanepowell.com

Disa Davis

Account Executive - PS&F

drdavis@psfinc.com

Marie Gallanar

Account Executive, VP – PS&F

mcgallanar@psfinc.com

***Or Contact Your Specific
Account Team at
PS&F and/or Lane Powell**

Thank you!



PARKER | SMITH | FEEK

www.psfinc.com