

# CYBER & EMPLOYMENT PRACTICES LIABILITY

There are differing opinions concerning returning to work and reopening the economy during the COVID-19 pandemic, which have resulted in strong opposition and division. As governments and the private sector move forward, data will be key – not only to understand the persistency and resilience of the virus but to also determine who is currently infected, who was exposed, who possesses anti-bodies or potential immunity, and who is more susceptible to the virus as we return to the workplace. This will involve testing, temperature screening, immunity certification, and contact tracing to keep workplaces, employees, customers, and vendors safe.

Determining how this data is collected and used will be central to a consistent and methodical return to work; however, as we have seen in the partisan divide over reopening, we will likely see controversy arise when interpreting existing laws and Fair Information Practice Principals. For example, the California Consumer Privacy Act requires businesses that collect personal data (whether employees or customers) to disclose how the data is used and shared, but other United States regulatory authorities have said they will limit enforcement of privacy legislation. Further, the US Department of Health and Human Services announced that it is waiving the enforcement of certain provisions of HIPAA, and the Office of Civil Rights (OCR) stated that it will not impose penalties for noncompliance with HIPAA in connection with good faith provisions of telehealth services during the pandemic.

Additionally, software developers are creating technology to track and label people according to their virus status. It is likely that the processing of COVID-19 related personal data will not be fully covered by existing privacy notices and policies currently existing in many parts of the world.

How far government in the United States is willing to go remains to be seen, but pressures to reopen and return to work will require businesses to adopt best practices and adjust for ongoing privacy compliance. Moreover, how data for public health is used and what decisions are garnered may be left to interpretation. Will businesses use this data for assessing performance? Will the collection of biometrics be permitted without consent? What limitations of purpose are companies adopting? How will they balance who

returns, who does not, and what is vital versus inessential?

There are insurance implications with each of these decisions and how they are carried out and interpreted. Companies that share information in good faith on request by one government entity may find later that they are subject to regulatory penalties by another government body or subject to private litigation.

Careful legal scrutiny of any situation when healthcare information is being disclosed should be a prerequisite to any action. Insurance coverage that addresses both privacy, discrimination, and the regulatory risk surrounding it is not entirely clear. Covered losses under a cyber insurance policy may be jeopardized if action to disclose personal health information is taken knowingly and in disregard of government regulations. Some policies contain governmental action exclusions that may affect the extent to which cover for regulatory fines and penalties, private litigation, and costs arising from a breach of health information can be provided under a cyber policy. Many policies will not cover what may be deemed as non-breach regulatory action. (These are actions by the employer, not a nefarious hacker.)

The basis of employment decisions, particularly as new work from home environments continue, will also create questions as to whether an employment practices liability policy will fully respond. Discrimination based on race, gender, religion, and sexual orientation are typically covered; however, will data through this crisis reveal other discriminatory aspects? Questions such as who will return, who will not, who is allowed to work from home, who may feel isolated and singled out, and what emotional and mental anguish they may incur will all have to be answered and measured.

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