

Bringing Select Workers Back Carries Litigation Risks: Experts, Business Insurance, ft. Keith Gutstein

Keith Gutstein, Esq., co-managing partner of the Long Island office of Kaufman Dolowich & Voluck, LLP and co-chair of the KD Labor & Employment Law practice group, was quoted in a *Business Insurance* article by Judy Greenwald on May 12, 2020.

Employers that are inviting select employees to return to work after COVID-19 shutdowns must tread carefully to avoid potential discrimination claims, experts say.

Without analysis beforehand, employers could leave themselves open to charges of violation of federal laws including the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964, as well as state and local laws.

There is also the potential for wage and hour litigation, experts say.

They also point out that federal legislation now protects workers who cannot return to work because of child care issues.

Experts warn, too, that given the widespread unemployment created by the pandemic, some litigation may be inevitable, as desperate workers turn to it as a possible income source.

"The potential concern is not having a facially neutral criteria on bringing people back," said Keith Gutstein, co-chair of the labor and employment practice at Kaufman Dolowich Voluck LLP in Woodbury, New York. "You can't just pick your favorites and hope for the best."

Another possible source of claims is the federal Families First Coronavirus Response Act, which took effect April 1 and is set to expire Dec. 31. It requires employers to give employees paid emergency family and medical leave and emergency paid sick leave. The law covers private employers with fewer than 500 employees and certain public employers.

Experts warn an increase in litigation over the return-to-work issue may be inevitable. Currently, there are not many claims, because employees are collecting unemployment benefits that in some cases are more than what they would have made from their regular salary, Mr. Gutstein said.

But that situation may change, when companies start bringing people back and some workers are excluded, "when the unemployment runs out and there's no other income," or when they find their salaries have been cut, he said.