

Can I please go to work yet?

by RJ Zayed, Marcus A. Mollison, Kirk Schuler, and Ryan E. Mick

Working from home. When it started back in March, it was a novel experience. Dry cleaning bills went to zero, we could reallocate commuting time to catching up on Netflix, and we knew we'd be home for family dinner.

Fast-forward to November. The novelty has worn off. Putting on clothes that require dry cleaning is a rare treat. The Netflix queue is long exhausted. And while family meals are indeed important, having breakfast, lunch, and dinner with the whole family every day for eight months might qualify as too much of a good thing.

So can you go back to the office yet? And can you bring back to the office your employees who have been working from home? In Minnesota, the short answer is likely "no", but both questions require a fact-specific analysis. For a longer answer, read on.

Current restrictions:

Current Minnesota law requires that "Any worker who can work from home must do so." See Minnesota Emergency Executive Order 20-74, June 5, 2020, paragraph 7(a), as affirmed by Minnesota Emergency Executive Order 20-96, November 10, 2020, paragraph 1 (collectively, the "Order"). The Order's requirement applies to employees in any industry, regardless of whether the state has designated that industry as "critical." (For context: critical industries include healthcare and public health, food and agriculture, energy, transportation, critical manufacturing, and financial services, among others.)

Regarding the requirement, "Any worker who can work from home must do so," Minnesota has not defined the word "can" or set forth any written guidance on how to interpret the word "can." Rather, in the state's view, if a worker is able to perform his/her job functions at all, even less productively than usual, then the employee "can" work from home and therefore must do so.

The following facts have proven relevant to state authorities: (1) whether an employee has a broadband internet connection at home (lack of broadband could support a finding that the employee cannot work from home); (2) whether data security is particularly

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important for the person's job (so, a person who has to have Social Security Numbers up on their screen arguably cannot work at home); and (3) whether an employee has been working at home since the state first issued work-from-home orders in March. Regarding that last item: if an employee has been working at home since March, the state concludes the person "can" work from home, and therefore is skeptical of any effort to return to work now.

In contrast, the following facts are not relevant to the state's determination of whether an employer has violated the Order: (1) whether employees have a strong preference for returning to work; (2) whether executive leadership thinks the Order is warranted; and (3) whether the employer can keep employees socially distanced once they're in the workplace. (COVID safety in the workplace becomes relevant only if an employee cannot perform job functions from home and therefore may return to the office.)

Stiff penalties for non-compliance:

The Order sets out stiff penalties for non-compliance. An individual who willfully violates the Order is guilty of a misdemeanor and faces a fine of up to \$1,000 and jail time of up to 90 days. See Order 20-96, paragraph 8. The penalties are even more strict for the leaders of a business: "Any business owner, manager, or supervisor who requires or encourages any of their employees, contractors, vendors, volunteers, or interns to violate this Executive Order" is guilty of a gross misdemeanor and faces a fine of up to \$3,000 and jail time of up to 1 year. *Id.* The Minnesota Attorney General, city attorneys, and county attorneys may seek civil relief, including injunctions of actual or threatened violations of the Order, costs of investigation, and penalties of "up to \$25,000 per occurrence." *Id.* Governor Walz's November 10 Executive Order added the ability to recoup the costs of investigations to the existing powers provided under previous orders.

Real risk of enforcement:

The practical risk of enforcement is real. Employees and their significant others have been contacting the State of Minnesota to note perceived violations of the applicable Executive Orders, often out of concern that an employer's actions may be exposing them to COVID-19. Specifically, Minnesotans have been lodging complaints with the state's "Work From Home Violation Helpline" and the Dept. of Labor & Industry (which includes Minnesota OSHA), among other entities. The state—via the entity that received the complaint in the first place or via the Minnesota Bureau of Criminal Apprehension—then inquires with the employer and demands an accounting for why employees are back in the office.

Looking to the future:

We are in uncharted waters, but it doesn't appear that Minnesota authorities will relax restrictions any time soon. The legal basis for the work-from-home requirement is Minnesota Gov. Tim Walz's underlying declaration of a state of emergency. Gov. Walz has been renewing that declaration of state of emergency every month. Despite pressure from Minnesota Senate Republicans to cease renewing the state of emergency, all indications are that Gov. Walz will continue to renew it until COVID stops spreading on its own (an unlikely scenario) or because the health care system develops and deploys a

vaccine (more likely).

The Walz Administration has said that it will modify the work-from-home and related COVID restrictions based upon various public-health indicators in Minnesota, primarily the following:

- (1) the percentage of COVID-19 tests that come back positive;
- (2) daily new cases per 100,000 residents;
- (3) weekly COVID-19 tests per 10,000 residents;
- (4) weekly new hospital admissions per 100,000 residents; and
- (5) percentage of cases contracted due to community spread as opposed to a known source of exposure.

Unfortunately, as of November 11, almost every one of those indicators is pointed in the wrong direction, as you can see at the Minnesota Department of Health [dashboard available at this link](#). Therefore, all evidence suggests that the state government will be maintaining the current restrictions for the foreseeable future. The state has not specified what changes in those indicators would correspond to additional or fewer restrictions on office work.

What should I do?

To manage risk of non-compliance with the Order, you should take four steps:

- (1) Ensure that no one at your company is requiring or encouraging any worker to work in the office if that worker could perform his/her job functions remotely.
- (2) Ensure that workers who can perform their job functions remotely are doing so.
- (3) If you have any employees present in any facility for any reason, ensure your business has developed and implemented a COVID-19 Preparedness Plan, as required by Minnesota law for employers in both critical and non-critical industries.
- (4) If you receive an inquiry from any enforcement authority, consult counsel before responding.

Dorsey & Whitney attorneys have been guiding companies through the full range of COVID-19-related regulations since the pandemic began—including addressing inquiries from authorities and drafting Preparedness Plans—and stand ready to assist you.