



Navigating the New Normal – Tackling Key Employment Issues During a Pandemic

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What We Will Cover

- Applicable Laws & Administrative Guidance
- Vaccination Policies (where things stand)
- Wage and Hour Considerations
- Remote Work Issues
- Common Questions From Employers
- Protecting Your Business From Liability

Applicable Laws & Administrative Guidance

Laws	Guidance
Americans with Disabilities Act	Equal Employment Opportunity Commission
Family Medical Leave Act	Centers for Disease Control and Prevention
Title VII of the Civil Rights Act of 1964	Occupational Safety and Health Administration
Occupational Safety & Health Act	Department of Labor
Genetic Information Non-Discrimination Act (GINA)	State Health Departments and Related State Agencies

Mandatory Vaccinations

- Have the federal rules on vaccination and testing fallen apart?
 - OSHA withdrew the ETS for large employers (100 + employees)
- But, it is now going through their rule-making process
 - OSHA General Duty Clause – requires all employers to provide a work environment free from recognized hazards

Florida Anti-Vax Mandate

- November 17, 2021
- Employers are prohibited from implementing vaccine mandates – expires June 1, 2023
- \$5 million appropriated to Dept. of Legal Affairs for complaint and investigation activities

Private Employers in Florida

- Regardless of number of employees
- You may impose a vaccine mandate **IF** you offer 5 individual exemptions
 - Medical
 - Religious
 - Immunity from prior infection
 - Periodic testing
 - Use of PPE

Mandatory Vaccination Policies-Revisited

- What if the Governor of your state prohibits vaccine mandates? (Montana, Utah, Texas, Michigan, Tennessee, Georgia, Arkansas, Indiana)
- Conflict with OSHA ETS?
 - Regular testing is still allowed
- Federal contractors

Employee Exemptions From Mandatory Vaccination Policies

- Sincerely held religious belief, practice, or observance
- Disability
- Pregnancy
- Distrust of Vaccine????

Reasonable Accommodations

- What reasonable accommodations are available to exempted employees?
- What if a job can only be performed at the workplace?
- How does an employee request an accommodation?
- What if a **fully vaccinated** employee requests accommodation for an underlying disability due to concern about future infection?

GINA Implications

- Is **Title II of GINA** implicated if an employer:
 - Requires an employee to receive a COVID-19 vaccine administered by the employer or its agent?
 - Requires employees to provide documentation or other confirmation that they received a vaccination

Employee Vaccination Status

- What verification methods are available to employers?
 - Honor system
 - Submission of vaccination cards
 - Special badges or stickers
 - Auditing

Wage-Hour Considerations

- Paid time off for vaccinations
- On-site testing
- State and local paid sick leave laws
- Employee vaccination incentives

Wage & Hour – Remote Work

- Off-the-clock and minimum wage claims
- Must make sure non-exempt employees be paid their promised wage for all hours worked
- Mitigating the risk
 - Training and reinforcement of policies and procedures
 - Auditing of work procedures
 - Terminating system access outside of regular schedules
 - Suspend auto-deduction for meal periods

Remote Work and the ADA

- The ADA requires that employers reasonably accommodate a qualified individual with a disability as long as it does not create an undue hardship
 - A reasonable accommodation is one that allows a person with a disability to perform the essential functions of their job
- Nothing about the pandemic or a request for remote work alters this ADA obligation
- Employers must engage in the interactive process

Remote Work and the ADA

- Is remaining at the worksite an essential function of the job?
 - Have others in the same or similar positions been allowed to work remotely?
 - Has the employee previously shown that they can perform the essential functions of the job while working remotely?
- If on-site is preferred, is there an on-site accommodation available?

Remote Work and Harassment

- Two forms of harassment
 - Quid pro quo – enduring the offensive conduct is a condition of continued employment
 - Hostile work environment – conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive

Remote Work and Harassment

- *Pagan v. Liberty Risk Management, Inc., et al.* - NY – Feb. 19, 2021- employee alleges that owner, among a long list of sexual harassment, refused her requests for remote work during the pandemic so he could be alone with her in the office.
- *Delair v. CSU, San Bernadino et al.* – CA - March 09, 2021 - Employee alleges coworker sent her numerous text messages likening his genitals to his “corona” and inviting her to look.

Remote Work and Harassment

- Three primary issues to look out for with regarding to COVID-19, remote work, and sex harassment:
 - Increased online, social media, and “after hours” sexual harassment
 - Remote work as a withheld benefit
 - Denial of remote work in order to “be alone” in the office with the victim

Common Workplace Questions

Screening Questions about Family

- Can employers ask employees whether they have family members who have COVID-19 or symptoms associated with COVID-19?

Employee “Call-Offs”

- How much information can an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

Sex Discrimination

- If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

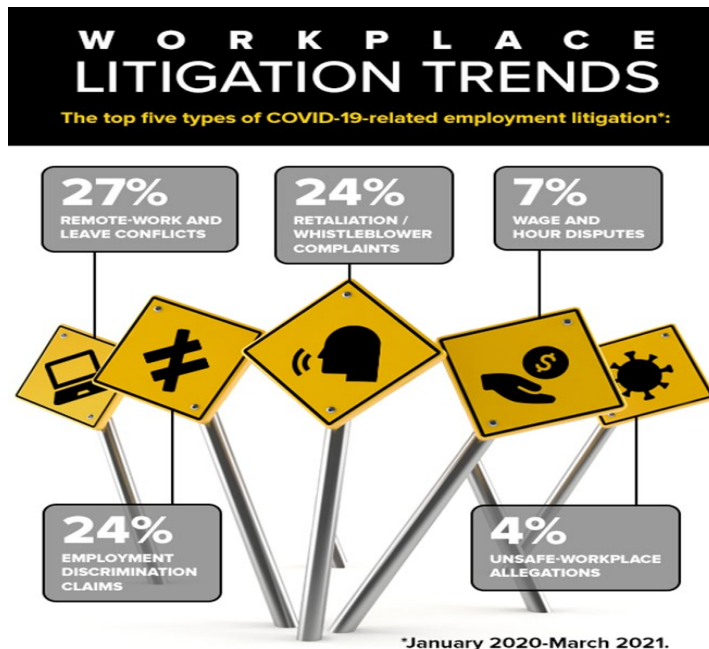
Testing

- Can an employer administer a COVID-19 test when evaluating an employee's initial or continued presence in the workplace?

COVID-19 Related Medical Information

- Can an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?
- Can a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19?
- Are employers required to create a new medical file system solely for COVID-19 related information?

Protecting Your Business Against COVID-19 Lawsuits



*January 2020-March 2021.

Protecting Your Business Against COVID-19 Lawsuits

- State laws that limit COVID-19-related claims do not prevent federal lawsuits.
- Comply with all laws and protocols set by local and federal governments.
- Stay aware of specific laws and regulations pertaining to business operations during COVID-19.

Protecting Your Business Against COVID-19 Lawsuits

- Maintain all documentation of COVID-19 exposure at workplace.
- Post signs listing symptoms of COVID-19 and ask those with symptoms or exposure not to enter.
- Document regular cleaning activities, especially any deep cleaning and sanitizing procedures.
- Promptly notify staff members of any known infections.

Agency Resources

- CDC Guidance for COVID in the Workplace:
<https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>
- CDC Guidance Regarding Vaccinated People:
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>
- EEOC Guidance: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- OSHA Guidance: <https://www.osha.gov/coronavirus/safework>

QUESTIONS?

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