

Thursday, June 17, 2021

The Post-Pandemic Workplace

Addressing the Lasting Effects of the Pandemic

Agenda

8:30 Welcome and Introduction

8:35 OSHA Update

8:40 Responding to Changes in the Makeup of Your Workforce

9:00 Compliance Issues: I-9

9:20 Evaluating Performance During and After the Pandemic

9:40 Remote Workers in Other Jurisdictions

10:00 Mental Health Issues Arising from Pandemic

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OSHA Update

OSHA's Temporary Emergency Standard

- Has force of law
- Limited to settings providing
 - “Healthcare Services” – direct patient care such as hospitals, long-term care, ambulatory care, home health, hospice, emergency response, transport, autopsies
 - “Healthcare Support Services” – intake, food services, maintenance, housekeeping, medical waste, equipment cleaning/reprocessing
- Exceptions for first aid, retail pharmacy, areas where only vaccinated employees have access, remote support locations, telehealth
- Where applicable, detailed requirements relating to having a plan, face coverings, distancing, barriers, screening, vaccinations, etc.
- See our June 14 Alert

OSHA's Guidance for "At-Risk" Workers

- Guidance, not law, but
 - Duty to accommodate is law
 - Failing to follow Guidance could trigger General Duty Clause violation
- OSHA also issued "Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace"
- Relies heavily on existing CDC guidance for fully vaccinated workers
- Focuses on "at-risk" workers:
 - Can't get vaccinated
 - Can't be fully protected by vaccination
 - Can't wear face coverings
- Protection – same protocols that have been in effect
- Accommodation – protect in same manner as unvaccinated workers

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Responding to Changes in the Makeup of Your Workforce

Causal Factors

- Older workers retiring early;
- Workers (disproportionately women) required to care for child or elderly parent;
- Unemployment kicker creating incentive to not work;
- Increased pressure to diversify workforces.

As the Pandemic Winds Down

- Expect to see a surge of older workers who left the work force returning;
- Care givers whose careers have been disrupted seek to avoid lost ground;
- The unemployment kicker lives on, through September.

Older Workers – Avoiding Claims

- Avoid using terms associated with youthfulness in job descriptions and ads.
 - “Energetic,” “tech savvy,” “fresh minded.”
- Review application materials. Scrub:
 - Requests for graduation years.
 - Inquiries about prior salary.
 - Requests for work history from the beginning of time.

Older Workers – Avoiding Claims (*cont.*)

- Be mindful of interview topics.
 - Interviewees should be asked same topics.
 - Behavioral interviewing ideal.
 - Beware of attempts to connect on a personal level (e.g. “I went to Portland HS too, when did you graduate,” “How old are your kids?”)
- Beware of deeming someone “overqualified.”
- Watch your words, even the way you talk about yourself.
- Same principles apply to performance reviews during employment.

Supporting the Return of Caregivers

- Flexibility and choices.
 - Work from home, part time work, flexible hours that make drop-off / pick-up possible on a consistent basis.
- Constant messaging that it is okay to take paid time off / take advantage of company programs designed to foster health work / life balance.
- Ask people what they need, don't assume.
- Beware of benevolent stereotyping.

Avoiding Sex Discrimination Claims

- Caregivers are disproportionately female (2 out of 3).
- Did that one year break really render the returning female employee less experienced or valuable than her male counterpart?
 - Pay equity
 - Promotional opportunities

Embracing the Unemployment Kicker

- Partial unemployment benefits:
 - Employees who earn less than their weekly benefit amount (e.g. through PT work) may still qualify for unemployment.
 - Employees who qualify for even a very small unemployment benefit will still be eligible to receive the \$300 kicker.
- If understaffed, consider offering part time work on terms that will not jeopardize workers' eligibility for partial UE.

Improving Diversity Without Discriminating

- It is as unlawful to hire an applicant because of their protected characteristic as it is to decline to do so.
- Claims by non-minority candidates are on the rise.
- All hiring managers and leaders must be trained on this concept, lest they create direct evidence of discrimination.
 - “There aren’t enough women in the group. We need to hire a woman, even if she isn’t the most qualified for the role.”

“Reverse” Discrimination Cases

- *EEOC v. Century Shree Corp.* (D. Colo. 2012) – Hampton Inn paid \$85k to settle claim that it unlawfully terminated white employees based on stereotype that they were lazy compared to Hispanic employees
- *Phillips v. Starbucks Corp.* (D. N.J.) (2019, pending) – Former manager claims that after high-profile incident where store in Philadelphia called police on two black customers, Starbucks instituted D&I efforts that led to punishing her and other white employees who were not involved in incident.
- *Kohler v. City of Cincinnati* (S.D. Oh.) (2020, pending) – Police officer filed class action claiming that City’s racial quota hiring practices, stemming from a 1980 consent decree based on past racial discrimination against minority candidates, now result in discrimination against white male candidates.

Diversify the Candidate Pool

- Where are you posting?
- What schools are you recruiting from?
- Who in your organization are you tapping for referrals?
- Who is on the hiring committee?
- Where are you networking?

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Form I-9 Compliance during COVID-19

Immigration Reform and Control Act of 1986

Core requirements are:

- Verification of employment eligibility
- Prohibition against discrimination based upon citizenship or national origin
- Prohibition against retaliation

Who is Covered?

- Verification rules apply at hiring to every employee hired after November 6, 1986
- Every employer is covered, along with certain entities that recruit or refer for fees

Key Definitions

- “Hire” is defined as “the actual commencement of employment of an employee for wages or other remuneration”
- “Employment” defined by reference to a multi-factor control test

Two-Pronged Prohibition

- Prohibition against employing aliens or recruiting or referring them for a fee, knowing that they are unauthorized (unauthorized employment)
- Prohibition against hiring any individuals, or recruiting or referring them for a fee, without following a prescribed system of verification (“paper work” violations)

Basic Verification Process

Step 1: Employee completes Section 1

Step 2: Employee presents documents

Step 3: Employer completes Section 2

Step 4: Employer retains Form I-9

Step 5: ICE may inspect

Form I-9: Employee Attestation

- At the time employment begins (between acceptance of offer and by COB of hire date), every employee must complete and sign Section 1 of Form I-9, and
- Must attest on Form I-9 under penalty of perjury that he or she is a U.S. citizen, lawful permanent resident, or an alien authorized to work, and
- Must acknowledge federal criminal sanctions for false statements or false documents

Form I-9: Employer Attestation

- At the time employment begins, the employer or employer's agent must complete and sign Section II of Form I-9 after examining one document from List A or one document each from List B and List C, and
- Must record the title, issuing authority, number and expiration dates, and
- Must attest on Form I-9 under penalty of perjury that s/he examined the documents, that they appear genuine and to relate to the employee, the date employment began, and that to the best of his/her knowledge the employee is eligible to work

Determining Document Validity

- The standard in reviewing the prospective employee's documents is **reasonableness**
- Employer is not attesting to the legitimacy of the documents (or the person), but only that the employer has reviewed the original document(s) and it reasonably appears to him or her, upon reasonable inspection of its features and the information it contains, to be **genuine** and to **relate to the employee**

Check for Form I-9 Updates

- Must use version in effect at time of hire
- Must use current version for any re-verification
- USCIS has Handbook for Employers (Form M-274)
- The new Form I-9 and Handbook are available online at <http://www.uscis.gov>

When Must Process Be Completed?

- Form I-9 must be completed and document(s) must be presented within three business days of the date of hire
- In very limited circumstances, if the employee is work authorized and lacks a document but has applied for it, presentation of a receipt for the application within three business days gives the employee 90 business days from the date of hire to present the document

COVID “Mutations”

- Temporary virtual I-9 review
- COVID-19 Temporary Policy for List B Identity Documents
- E-Verify Extends Timeframe for Taking Action to Resolve Tentative Nonconfirmations
- Discrimination and identity verification issues

Temporary Virtual Review

- US Department of Homeland Security (DHS) announced on March 20, 2020 a loosening of I-9 requirements for in-person document review during the COVID-19 pandemic in certain circumstances.
- This March 2020 announcement allowed employers “operating remotely” to timely review documents for Section 2 or 3 of Form I-9 virtually without needing to use an employer authorized representative, provided they review the documents in-person at a later date. Employers using this option must keep copies of any document(s) reviewed, annotate the form when section 2 is completed and then again once the physical document inspection takes place, and provide written documentation of their remote onboarding and telework policy for the forms created under this option.

Temporary Virtual Review (*cont.*)

- The DHS announcement indicated that the opportunity for virtual review is limited only to employers with “remote operations” and is not available where there are employees physically present at a work location. DHS also though noted that it will evaluate quarantine and lockdown situations on a case by case basis.
- DHS indicated initially that this option would available until the period of 60 days from the date of their March 20, 2020 announcement (May 19, 2020), or within 3 business days after the termination of the National Emergency, whichever comes first, and that it would be monitoring the National Emergency and providing additional guidance, including relating to extensions, as necessary.

Temporary Virtual Review (*cont.*)

- USCIS has then since extended this virtual I-9 option continually throughout the remainder of 2020 and into 2021. It has most recently been extended through August 31, 2021. The more recent announcements shift the focus in assessing whether virtual I-9 review is an option to what employees are doing (working onsite or working temporarily remotely as a result of COVID related precautions). This signals that all employees who are back at the worksite after COVID related remote work must have their documents reviewed in person after returning to a company location on “any regular, consistent, or predictable basis”. Employers should plan accordingly.

Agents and Remote Hire

- Written instructions to the agent, including guidance in the proper completion of Section 2 of Form I-9
- Written notice and instructions to employee
- Photocopies
- Prompt secondary review
- Consider virtual HR support
- Protect PII

E-Verify considerations

- E-Verify Extends Timeframe for Taking Action to Resolve Tentative Nonconfirmations
 - E-Verify is extending the timeframe to take action to resolve Social Security Administration (SSA) Tentative Nonconfirmations (TNCs) due to SSA office closures to the public. E-Verify is also extending the timeframe to take action to resolve Department of Homeland Security (DHS) TNCs in limited circumstances when an employee cannot resolve a TNC due to public or private office closures.
- E-Verify Adds 10 Day Timeline for TNC Notice/E-Verify Update
 - USCIS announced in October 2020 that employers that receive a Tentative Nonconfirmation (TNC) on an E-Verify inquiry must either refer the case (because the employee has chosen to contest the TNC) or close the case within ten federal working days after receiving the TNC.

Vaccination Record & I-9 No-match

- Reasonableness standard with regard to name changes
- Handling situations where employee has presented false docs but later obtained status
 - OK from an immigration/I-9 perspective (see guidance in M-274) but does the employer have an honesty policy?
- Constructive knowledge?
 - Likely and should do consistent follow-up with need to term if the employee is undocumented

Prohibition Against Discrimination

- If an individual is authorized to work, it is illegal to discriminate because of national origin or citizenship status
- Employers cannot specify which documents they will accept from an employee
- Employers cannot require more or different documents than the documents specified on Form I-9
- It can be illegal discrimination to refuse hire of an individual because employment authorization is subject to expiration
- USCIS acknowledges that unnecessary verification may violate the anti-discrimination provision

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Evaluating Performance During and After the Pandemic

In some ways, nothing has changed.

Performance management best practices:

- Set clear expectations
 - Identify metrics/standards that will be used to determine success in role
- Commit to regular feedback
 - Regular 1:1 meetings
 - Address any issues that come up promptly
- Do a thorough review at least annually
 - No surprises in annual review
 - Written reviews are important
 - Consider self-evaluation as one component

In other ways, everything has changed!

Pandemic realities:

- Remote work is different
- Some job duties ignored/replaced
- Maybe much less contact between manager and reports, or maybe just different contact
- Many employees have experienced unusual stress
 - Contracted COVID/lingering effects
 - Family members contracted COVID
 - School/day care closures
 - Isolation from older family members
 - Normal coping strategies unavailable (gym, friends, travel)
 - Partner job loss
 - Financial stress

Everything has changed (*cont'd*)

Challenges currently facing employers:

- Significant shift in employee expectations about flexibility
- Very tight job market (i.e., employees have leverage)
 - Need to differentiate your workplace from competitors
- Turnover increasing in many industries
 - New, inexperienced employees replacing seasoned employees

Taking the Pandemic Realities Into Consideration

- Review metrics/standards
 - What is reasonable given the circumstances?
- What was communicated by employer during the pandemic?
 - Individual managers should be expected to adhere to the company's approach
- Were accommodations approved?
 - If so, evaluation should be based on the adjusted role, not the unadjusted role
- Are job descriptions still accurate?

Example #1

Phil, a manager in the marketing department, used to spend 50% of his time preparing materials for fundraising events. All events were canceled from March 15, 2020 through June 1, 2021. During that period, Phil successfully performed his other job duties. Nancy, Phil's manager, really wishes that Phil had used the time to revamp their old materials and create new materials. Nancy just finished Phil's review for 2020 and gave Phil a "needs improvement" rating. She noted that Phil basically had a part-time job for the past year and should have some wonderful new materials to show for it. She expressed disappointment in his lack of initiative.

Example #2

Lucy is an administrative assistant who supports a 4-person sales team. Lucy has 3 school-age children who had a hybrid model at their local school during the pandemic, and Lucy has been working hard to ensure that they stay on top of their school work and participate fully in all classes on the days they are at home. The team can tell when Lucy's kids are at home because she doesn't respond to their Slack messages and takes MUCH longer to get the normal things done. The VP of Sales said at the beginning of the pandemic that he understands the challenges facing parents with school-age children and that the company would be flexible and reasonable throughout the pandemic in light of these realities. However, Lucy's team wants to point out in her review that although the company has been very understanding during the pandemic, now it's time to resume full focus and engagement. They just want to make sure that she doesn't think this level of productivity will be acceptable going forward.

Example #3

Sarah has been in her role for 2 years. She really likes the part of her job that requires careful attention to creating detailed reports, but does not like the part of her job that requires her to engage with customers. During the pandemic, she appeared to be doing anything but working with customers – that part of her job was always put aside for other projects. Sarah's manager, Ben, mentioned several times over the past 8 months that Sarah really needs to focus on the customer issues. Sarah continues to drag her feet with those assignments. Sarah has two daughters whose day care was closed for a few months during the pandemic, but she pivoted quickly and now has a nanny coming into the house most days. Sarah is occasionally distracted by her children during the workday, but the nanny is usually the one who takes care of the kids.

Moving Forward: Tips for Responding to Current Challenges

- Work with managers to carefully reset expectations
 - Given the tight job market, patience and reasonable expectations are important
- Make decision about how much flexibility the company will permit
- Communicate, communicate, communicate!
- Identify retention strategy
 - Meet with managers to discuss the strategy

Final Thought

Evaluating performance is an important responsibility for all managers – don't put it off until the pandemic is "over"!

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Employees Who Work Remotely in
Other States:
Important Reminders

Working Remotely

- Strong trend in favor of more flexibility in choosing where to work
- Are you ready to consider flexibility on a “permanent” basis, or are you thinking more of a “trial” period?
 - Don’t overcommit!
- State-specific issues

Jurisdiction: Best Practices

- Identify a list of states “approved” for remote work
- Add states to the list after careful consideration of issues (e.g., state employment law, business registration, etc.)
- Recommend basing approval for remote work on specific state at time of approval, and requiring new approval if moving to different state
- Establish a threshold timeframe triggering new review
 - Can employees spend the winter in Utah and the summer on the Cape?

Unemployment Insurance

Localization – Does the employee entirely or primarily work in one state?

No

If Yes – That's the state that has jurisdiction.

Base of Operation – Does the employee perform some service in the state where their base of operations is located?

No

Place of Direction and Control – Does the employee perform work in the state where the work is directed and controlled?

No

Employee Residence – Does the employee perform any service in the state where they live?

Workers' Compensation

- Best practice: all state endorsement
 - Cover all employees regardless of where they are working
 - Notify insurance broker if an employee begins working in a new state (for more than a few weeks)
 - Generally, no additional obligations beyond coverage, but this is state specific
- Jurisdiction for claims generally depends on the degree of contacts in a given state
 - Usually, residence in the state and location of injury in the state will create jurisdiction in that state.
 - Often, but not always, mere residence may be enough for the state to assert jurisdiction.

State Leave

- When are state laws triggered?
 - One employee v. # of employees working in the particular state
 - Counting employee(s) in the particular state v. all employees across all states where employer operates
- Individual analysis on each leave law

Wage and Hour

Exempt salary
threshold

Overtime

Sundays/holidays
premium pay?

Minimum wage

Meal and rest
breaks

Timing and
frequency of pay,
including final pay

Unused vacation

Wage deductions

And more (e.g.,
days of rest)

Tax Issues: Nexus

- **One** remote employee in a state may be enough to require:
 - Payroll withholding
 - Sales and use tax compliance
 - Corporate income tax compliance
- The compliance burden may be high
 - Multi-jurisdictional complexity
 - Administrative burden
 - Limited safe harbors

Tax Issues: Payroll Withholding

General rule: Employer is required to withhold in each state where an employee performs services for the employer

- Does not matter that employer has no office or physical location in the state
- Multiple state withholding and allocation may be required for an employee who performs services in multiple states.

Safe harbors for nonresidents

- E.g., Maine: 12 days; New York: 14 days; Illinois: 30 days

Tip: Payroll registration may trigger a nexus questionnaire

Tax Issues: Sales Tax Nexus

- Implications of sales tax nexus
 - Register with revenue department;
 - Collect sales tax from customers;
 - Exemption or resale certificate recordkeeping; and
 - Returns.
- Tip: Before hiring a remote employee, consider whether your company already has sales tax nexus in the state due to remote sales, or inventory, office or other in-state physical presence.

Tax Issues: Corporate Income Tax Nexus

- Implications of corporate income tax nexus:
 - Possible state income tax liability on apportioned net income
 - Liability for minimum tax (not protected by P.L. 86-272)
 - File returns (not protected by P.L. 86-272)
- Tip: Before hiring a remote employee, consider P.L. 86-272
 - A federal law that protects a company from a state's income tax if in-state activities are limited to solicitation for orders of tangible personal property, which are approved and fulfilled from outside the state
 - Generally does not protect against minimum tax, gross receipts taxes, or return filing obligation

Foreign Qualification

General rule: companies “doing business” in a state must qualify with the state’s Secretary of State

- State-specific statutes define “doing business.”
- One employee *may not* be enough to require qualification. Look to employee’s in-state activities.

Hypothetical: MA employer – NH employee

Alpha Co, a MA business, has employed Betty, an NH resident, since 2019. Before the pandemic, Betty worked from Alpha's Boston office 3 days a week and worked from her house in Portsmouth 2 days a week. Due to the pandemic, Betty has been working exclusively from home since March 2020. Finding that she likes the flexibility of remote work, Betty has asked to work from NH indefinitely. Alpha has no other connection to NH.

- Should Alpha withhold NH income tax?
- Should Alpha without MA income tax?
- What happened to Alpha's MA payroll withholding obligations now that the MA COVID-19 state of emergency was lifted on June 15, 2021?
- Did Alpha establish corporate income tax (BPT/BET) nexus in NH as a result of Betty working remotely from the state?

Hypothetical: ME employer – MA employee

Same facts as before, except Alpha is a ME company, and Betty is a MA resident who previously worked in both MA and ME and who is now working remotely from her Boston apartment. Under these facts:

- Should Alpha withhold Maine income tax?
- Should Alpha withhold MA income tax?
- What happened to Alpha's MA payroll withholding obligations now that the MA COVID-19 state of emergency was lifted on June 15, 2021?
- Did Alpha establish sales tax nexus in MA as a result of Betty working remotely from the state? What about corporate income tax nexus?

Hypothetical: NY employer – ME employee

Gamma Co, a NY-based business, employs Darrell, a NY resident. In March 2020, Darrell fled NY for his Maine lake house, and decided to relocate to Maine permanently. Darrell continues work for Gamma remotely. Gamma does not have any other connection to Maine. Under these facts:

- Should Gamma have withheld ME income tax during the pandemic? How about now?
- Should Gamma withhold NY income tax during the pandemic? How about now?
- Is Darrell taxed on his income by Maine? By NY?
- Has Gamma established sales tax nexus in Maine as a result of Darrell working remotely from the state? What about corporate income tax nexus?

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