

Thursday, June 3, 2021

# The Post-Pandemic Workplace

*What does it look like and how do you get there?*

# Agenda

8:30 Safety Protocols

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8:50 The New Normal: Where Will People Work?

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9:10 Vaccine Inquiries and Mandates

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9:30 Leave

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9:50 Panel Discussion: Re-establishing Organizational Expectations, Culture and Norms

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# Safety Protocols

# What is a “Safe” Post-Pandemic Workplace?

## OSHA

- General Duty Clause
- Infectious Disease Preparedness & Response Plans

## Federal Guidance

- CDC
- EEOC

## State & Local Orders

## Your Specific Workplace

- How agency directives apply to your space(s)
- What your employees are willing to accept

## Where Has OSHA Been?

Trump administration:

- Guidance, not regulation
- Multiple publications for all employers, and for specific industries
- Key element – Employer’s Infectious Disease Preparedness and Response Plan

## Where Has OSHA Been? (cont.)

### Biden Administration:

- March 12, 2021 National Emphasis Program – focus on deaths and multiple hospitalizations from workplace exposure
- Temporary Emergency Standard – President ordered OSHA to issue TEP by March 15; bogged down in review at OMB

Constantly moving target - vaccinations

For now, OSHA says follow CDC Guidance

## The OSHA General Duty Clause

Section 5 of the Occupational Safety and Health Act:

(a) Each employer –

- 1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
- 2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

29 U.S.C. § 654

# What Constitutes a Violation of the General Duty Clause?

Four elements of a General Duty Clause violation:

- An activity or condition that presented a hazard
- The employer or the industry recognized the activity or condition as a hazard
- The hazard was likely to or actually did cause death or serious physical harm
- A feasible means existed to eliminate or materially reduce the hazard



## Relevance of General Duty Clause to COVID-19: *Infectious Disease Preparedness & Response Plan*

- Basis for OSHA citations for COVID as a workplace hazard
- Having and following an Infectious Disease Preparedness & Response Plan that addresses risks of COVID-19 *is* compliance with GD Clause
- Plan elements familiar:

Screening	Isolation/quarantining
Distancing	Remote work
Hygiene	Ventilation
Masking	Barriers
Density	Vaccination
Training/Communication	Enforcement

## Update Your Plan

Include vaccination

- required or voluntary shots
- Required or voluntary reporting of status

Amend plan to differentiate between active pandemic (what we lived through), continuing vigilance on hazard mitigation (where we are now), and eventually baseline infectious disease prevention and control protocols (where we hope to be)

## CDC

- Has no legal authority so credibility of guidance is critical
- Multiple bureaucratic failures during pandemic → damaged credibility
- Early on, failed with development of reliable test
- Recently, jumped around on distancing, masking, schools
- Remains vague about what constitutes herd population
- Still the agency to which other agencies that do have regulatory and enforcement authority (e.g., OSHA, EEOC) turn for science-based pandemic guidance

## CDC Guidance – Update as of May 28

- Fully vaccinated people can:
- Resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance
- Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel
- Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States

## CDC Guidance – Update as of May 28 (cont.)

- Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings
- Refrain from quarantine following a known exposure if asymptomatic
- Refrain from routine screening testing if feasible
- For now, fully vaccinated people should continue to:
- Get tested if experiencing [COVID-19 symptoms](#)
- Follow CDC and health department travel requirements and recommendations

## CDC Guidance - Impact

- Reflects vaccine effectiveness
- Reflects political reality – majority of states ahead of OSHA on dropping masking and other requirements
- Incentivizes employers to maximize percent of vaccinated employees in order to minimize or eliminate workplace protocols

## EEOC

- Jurisdiction is narrow – discriminatory impact of employer responses to public health emergencies
- Anti-discrimination laws do not go away during public health emergency
- Impact on implementation of safety protocols
- Most important position probably recognition of COVID-19 as a “direct threat” under ADA accommodation – impacts duty to accommodate illness, susceptibility, vaccination reluctance
- Also enforcing medical privacy under ADA and GINA

## EEOC Guidance – Update as of May 28

- New section K on Vaccinations added to EEOC COVID-19 guidance
- Guidance will have major impact on employers' choices for vaccination policy
  - Mandatory or voluntary vaccination
  - Mandatory or voluntary reporting of status
  - Use of incentives



## State & Local Rules

- States have primary legal authority over public health
- Some municipal authority exists as well
- Because of emergency powers given to Governors and local city managers, power of enforcement underlies their orders
- Most directly impact employers because of ability to restrict
- Continue to conform Plan to requirements of your state and city
- Modify it as those requirements change and ultimately go away

## Harmonizing Multiple Requirements in Your Plan

- A plan that meets OSHA's template is the minimum standard
- A plan that conforms to CDC and EEOC Guidance minimizes liability risk
- A plan that meets state and local emergency order public health requirements is likely to be more strict, and is legally required
- A plan that incorporates all these elements into your spaces in a way that your employees will accept is the most credible
- As these factors change, amend plan over time to
  - Retain a plan to be activated for an active pandemic (what we lived through)
  - Continue vigilance on hazard mitigation as hazard recedes (where we are now)
  - Learn from this experience and provide for baseline infectious disease prevention and control protocols that are always in effect (where we hope to be)

# Presenter

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# The New Normal: Where Will People Work?

## What will your workplace look like going forward?

Full-time  
telework for  
all employees

Hybrid

Full-time, in-  
office work for  
all employees

## Return to Office - Factors to Consider

- Nature of the work
  - Do you have a business reason to require work in the office?
  - What didn't get done during the pandemic?
  - Do you have significant concerns about productivity across the workforce?
- Workplace culture
- Employee preference
- Workplace safety
  - Office facilities
  - Need to commute (public transportation vs driving)
- Industry practice
  - What are your competitors doing?
- Legal compliance

## Timing Considerations

- Do you need a transition period?
  - Many employers are using this summer to ease people back slowly
- Employer-specific business needs
  - Bring people back ahead of a busy period
- Give plenty of notice!!
- Compliance with state/local orders
  - Industry specific
  - Capacity limits?

## Telework: Best Practices

- Adopt a written policy
- Is telework available for all or only upon approval?
- If approval is necessary, **policy should identify factors considered**
  - Usually job duties, demonstrated success in telework environment
  - Non-discriminatory business factors
  - Does commute matter?
  - Does location of telework matter?
  - Are you leaving it up to the manager?



## Telework: Issues to Address in Policy

### Workspace must be safe and free of hazards

- Workers' comp applies to telework!

### Employee must have reliable internet

- Usually paid by employee, but check state law

### What equipment is employer providing

- Office chair
- Big screen
- Computer/lap top

## Telework: Issues to Address in Policy

### Confidentiality considerations

- No storage of employer information on personal computer or personal cloud storage
- Do not permit family members to use employer-provided equipment

### Geographic limitations

- Recommend approving for specific state
- Require approval prior to move to a new state

## Telework as Reasonable Accommodation

Telework may be reasonable accommodation for:

- Employee with medical or religious reason for not getting vaccine
- Employee with medical reason for heightened concern about exposure to COVID-19 even with vaccination

Conduct fact-specific analysis using regular interactive process

# Telework as Reasonable Accommodation

## EEOC Guidance:

- No *obligation* to accommodate *non-disability* related limitations
- No *obligation* to allow telework for disability related limitations if there is an *alternative* form of reasonable accommodation at the workplace
- Where an employer permitted telework and excused an employee from performing one or more essential functions due to COVID-19, the employer generally has no obligation to permit telework upon reopening if doing so requires continuing to excuse the employee from performing an essential function.
  - Caution: These are fact-specific determinations

## But . . .

- May be challenging to show that telework causes “undue hardship” if essential functions of job were successfully performed remotely for an extended period due to COVID-19
- *Peeples v. Clinical Support Options, Inc.* (Sep. 16, 2020) (precluding employer from discharging employee who claimed inability to work in the office due to a disability and ordering employer to allow employee to telework for at least 60 days)

## Alternatives to Telework

- Additional protective measures or equipment
  - Face masks
  - Air purifiers
  - Plexiglas installations
- Modification of schedule or workspace to reduce exposure
- Reassignment to a lower-exposure position or location

## COVID-19 Related Harassment

- Ensure zero tolerance for “demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or another Asian national origin, including remarks related to the coronavirus or its origins”
  - Take immediate action to address if it occurs!
- Be aware of opposing strongly held beliefs regarding pandemic-related issues and require civility in employee interactions

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# Vaccine Inquires and Mandates

## New EEOC Vaccine Guidance (5/28/2021)

Under federal EEO law, an employer may require all employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodations for the following:

- Disability
- Sincerely held religious belief
- Pregnancy

# Reasonable Accommodations for Unvaccinated Employees

- Obligation to wear face mask
- Social distancing from coworkers and non-employees—move work location
- Work modified shift
- Periodic tests for COVID-19
- Telework
- Reassignment
- Extended leave

## **Most employers can mandate vaccines (with reasonable accommodation). But should they?**

It depends. Factors to Consider:

- Will your top talent quit if you mandate vaccines?
- Will your top talent refuse to come back if you don't?
- Can you implement social distancing, masking and other protocols to keep employees and others safe?
- Are you serving a vulnerable population, such as a nursing home or chemotherapy infusion center?

## **Best Practice: Give Employees Notice Reasonable Accommodation Option**

“As a best practice, an employer introducing a COVID-19 policy and requiring documentation or other confirmation of vaccination should notify all employees that employer will consider requests for reasonable accommodation based on disability [and religious beliefs] on an individualized basis.”

## **Can employers request documentation that an employee obtained the COVID-19 vaccine?**

Yes, unless the employee is working in a state or municipality that has prohibited such inquiry or proof. e.g., Montana and Florida.

Many employers are inquiring about vaccination status for safety and workforce planning purposes.

Some employers are requiring proof of vaccination status and keeping those records confidential.

A relatively small number are mandating employees (not entitled to accommodation) be fully vaccinated as a condition of employment.

## **Can an employer terminate an employee who cannot be vaccinated because of a disability, sincere religious belief or pregnancy?**

An employer may terminate the employee only if it can show that the employee's presence in the workplace would pose a "direct threat" to the health or safety of the employee or others and that threat cannot be eliminated or reduced by reasonable accommodation.

Reasonable accommodations must be made unless the employer can show "undue hardship."

## Undue Hardship

Disability

- Significant difficulty or expense

Religion

- Having more than minimal cost



## **Caution: Newly Enacted State Laws May Limit ER's Choices re Vaccines**

The National Conference of State Legislatures has counted nearly 500 COVID-19 related bills pending across the country.

A majority seek a prohibition on mandatory vaccines and vaccine passports.

Some laws, including one in Montana, prohibit private employers from inquiring about the vaccine status of employees or customers.

## New Hampshire House Bill 220 Medical Freedom in Immunizations

“Every person has the natural, essential, and inherent right to bodily integrity, free from any threat or compulsion **by government** to accept an immunization. Accordingly, no person may be compelled to receive an immunization for COVID-19 in order to secure, receive, or access any **public** facility, any public **benefit**, or any public service from the state of New Hampshire, or any political subdivision thereof, including but not limited to counties, cities, towns, precincts, water districts, school districts, school administrative units, or quasi-public entities.”

Passed by House 4/7/2021

Passed by Senate 5/27/2021

## Montana HB 702

This law recognizes an individual's vaccination status as a protected category.

Prohibits public and private employers from requiring employees to disclose their immunization status and bars employers from requiring employees to receive COVID-19 vaccine.

Exceptions for licensed nursing homes, long-term care facilities and assisted living facilities.

Signed into law by the Governor on May 7, 2021

## Florida Executive Order No. 21-18

Prohibits Florida governmental entities from issuing “vaccine passports” or otherwise publishing or sharing an individual’s COVID-19 vaccination record.

Businesses in Florida prohibited from requiring patrons or customers to provide any documentation of COVID-19 vaccination.

Florida Governor and the cruise ship industry square off. Exemption may be in the offing.

## Vaccine Incentives New EEOC Guidance

Employers may, under the ADA, offer incentives to employees for voluntarily receiving a vaccine, but if the vaccine is administered by the employer or its agent, the “incentive (which includes both rewards and penalties) may not be so substantial as to be coercive.”

Employers may not, under GINA, offer an employee any incentives in exchange for a family member’s receipt of a vaccination from an employer or agent.

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Leave

## Ongoing Barriers to Return to Work

- Summer camp closures or reduced availability;
- Vaccine / symptoms of vaccine;
- Tension between vaccinated employees and unvaccinated employees, with the former uncomfortable working in person with the latter;
- Unvaccinated employees who are themselves fearful of in person work.



## FFCRA Refresher

- Applies / available to employers with fewer than 500 employees;
- DOL's joint employer / integrated enterprise tests may result in multiple companies' employees being aggregated;
- All employees eligible for paid sick leave;
- Only employees employed for at least 30 days eligible for expanded FMLA;
- Was mandatory through 2020.

## EPSL Refresher

- 2 weeks (up to 80 hours) at **regular rate** (subject to caps) if employee unable to work:
  - Because quarantined pursuant to government order or health care provider directive;
  - Because experiencing symptoms and seeking diagnosis.
- 2 weeks at 2/3 rate if unable to work:
  - Because of need to care for individual subject to quarantine;
  - Because of need to care for a child whose school / place of care is closed or unavailable due to COVID.

## EFMLA Refresher

- An additional 10 weeks of paid leave at 2/3 regular rate if employee is unable to work because child care / school is closed or unavailable due to COVID.
- Note: while the amount of leave available is determined by reference to FMLA, unlike FMLA (which is not available to employees who haven't worked 12 months), EFMLA is available 30 days after hire.

## American Rescue Plan Act (ARPA) of 2021

- Extended tax credits for employers (with under 500 employees) who voluntarily provide FFCRA leave through **September 31, 2021**.
- Added non-discrimination rule – cannot provide leave to some workers and not others.
- Added new qualifying reasons for EPSL **and EFMLA**:
  - Seeking or awaiting results of test;
  - Obtaining vaccine;
  - Recovering from illness / medical condition related to COVID-19 immunization.

## ARPA (cont.)

- Refreshed the 10-day EPSL bank.
- Employee's eligibility for EFMLA determined by reference to FMLA eligibility.
  - Eligibility will depend on the FMLA leave year the employer uses and employee's use of leave during that year.

## FFCRA Common Questions

- Can an employer take tax credits if they offer EPSL, but not EFMLA?
- Can an employer take tax credits if they continue to offer FFCRA leave for some reasons and not others (e.g. for vaccination, but not for quarantine)?
- What documentation do I need in order to take the tax credit?

## Other Leave Entitlements

- **FMLA**: Leave because of employee's serious health condition or to care for certain family members with a serious health condition.
- **ADA**: If an employee is unable to work due to a disability, leave may be a reasonable accommodation.
- In addition to absences directly related to COVID, employees with **mental health conditions** exacerbated by pandemic-related stress / fear may be eligible for leave.

## Other Possible Leave Entitlements

- Maine Earned Paid Leave
- Maine Extreme Public Health Emergency leave
- Massachusetts Earned Sick Time
- Massachusetts Paid Family and Medical Leave law
- Massachusetts Small Necessities
- **New Massachusetts COVID Emergency Paid Leave**



## To Offer FFCRA or Not?

- To what extent does the need remain at your organization?
- Are you looking to incentivize leave (e.g. to ensure sick employees stay home) or discourage (e.g. ensuring employees with alternative child care options use them)?
- Balancing the prospect of “free” paid leave against the burden of administering a leave program and maximizing chance you will receive the tax credit.

# Presenter

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# Panel Discussion

## Moderator

**James Erwin, Pierce Atwood LLP**

*Partner*

## Panelists

**Hope Burnell, Bates College**

*AVP Human Resources and Environmental Health and Safety*

**Jennifer Harnish, Baker Newman Noyes**

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**Carolyn Crosby, Camden National Corporation**

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