

***Returning to the Workplace:*
Navigating Legal and Leadership
Best Practices**

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Housekeeping...

- Please submit questions electronically via chat—we will try to answer some at the end.
- A PDF of presentation will be available.
- Feel free to follow up with any questions at:
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Agenda

- Workforce Models during COVID-19 (and beyond)
 - *What are current best practices in light of COVID-19?*
 - *What are risks and considerations for different workforce models?*
 - *How can you return to in-person work and operate safely?*
- COVID-19 Vaccinations
 - *What do we know about state requirements?*
 - *What do we know about federal requirements?*
 - *What are risks and considerations related to COVID-19 vaccine mandates?*

In-Person Workforces

Deciding to Reopen
Best Practices
Legal Considerations

The Decision to Reopen

- Determine whether any federal, state or local law applies to your business
- Consider whether a collective bargaining agreement applies
- Determine whether reopening is best for your business
 - COVID-19 risk assessment
 - Ability to work remotely
- Communicate with employees
 - Give notice
 - Prepare for reactions and responses

The Decision to Reopen

- Provide training to employees and managers on new policies and/or safety protocols
 - Train managers on implementation of safety procedures
- Request feedback and address concerns
- Train managers on avoiding discrimination and retaliation
 - Consistent enforcement of policies
 - Be mindful of whistleblower protections

In-Person Work: Focus on Safety

- Evaluate options for making your workplace safer
 - Schedule modifications
 - Social distancing
 - Physical barriers
 - Assess risks with common areas
 - Implement cleaning procedures

In-Person Work: Health Screening

- Implement a health screening policy
 - Consider providing on-site Covid-19 viral testing
 - Address confidentiality, wage and hour, and safety issues associated with Covid-19 screening.
 - Consider implementing temperature checks or health screenings.
 - Address confidentiality, wage and hour, and safety issues associated with temperature checks.

In-Person Work: Policies to Consider

- Implement a COVID-19 infection policy
 - Written protocol for suspected or confirmed COVID-19 infections
- What other policies may be implicated by COVID-19 and safety protocols?
 - Travel policies
 - Leave policies
 - Remote work policies
- Consider a vaccine policy
 - Encouragement vs. mandates
 - Prepare to address religious, medical, or other requests for accommodation
 - Maintaining records

Remote/Hybrid Workforces

Best Practices

Legal Considerations

Hybrid Work Arrangements

Remote/Hybrid Work: Considerations & Issues

- Wage and hour concerns
 - All time spent working must be paid, including unauthorized work
 - Managing liability:
 - Ensure compliance with timekeeping policies
 - Have a policy regarding unauthorized work
- Accommodations
 - Employers' duty to accommodate applies to remote work as well as in-person work
 - Telecommuting may itself be a reasonable accommodation

Remote/Hybrid Work: Considerations & Issues

- Safety
 - As with in-person workers, employers should maintain safety protocols related to COVID-19 for remote workers
 - What policies apply to remote workers?
 - Protocols for on-site visits
- Workers' compensation concerns
 - Remote, on-the-job injuries may be compensable
 - Exacerbation of pre-existing conditions
 - Update and train on reporting procedures

Remote/Hybrid Work: Considerations & Issues

- Maintaining confidentiality of company information:
 - Have a written policy regarding confidential information and use of company technology and resources
 - Use secure connections/network
 - Communicate expectation to conduct business in appropriate areas
 - Utilize procedures to manage sensitive documents and non-electronic information
- Privacy concerns for employee monitoring: email, internet, phone
 - Have a clear policy and communicate it to employees

Avoiding Discrimination

- Consider who is eligible for remote work and who is actually participating in remote work
 - Caregiver discrimination laws
- Advancement opportunities
 - Research suggests that remote workers are less likely to earn a promotion than those who work in the office
 - Be mindful and consistent in evaluating performance and offering opportunities to remote and hybrid workers

Remote/Hybrid Work: Crafting a Policy

- Remote work policies should include:
 - Who is eligible (position/responsibilities, tenure)
 - Work hours/accessibility
 - Safeguarding company information
 - Equipment arrangements and conditions
 - Virtual network information
 - Job duties
 - Reminder to comply with other policies
- Keep in mind where work is being performed, as different laws may apply

COVID-19 Employee Vaccination Considerations

State Mandates

Federal Mandates

Outstanding Questions

Maine's Healthcare Worker Vaccine Mandate

- Currently limited to healthcare workers at covered facilities
 - Enforcement to begin on October 29, 2021
 - No religious exemption; open question over whether someone with medical exemption can be in the facility
 - On Oct. 13, Judge Levy denied motion for preliminary injunction that sought to preserve religious exemptions
- Vaccination rates are increasing at many facilities, but some facilities are facing resignations and understaffing as a result of the vaccine mandate

Federal Contractor Vaccine Requirement

- Executive Order mandating Covid vaccine for employees of most federal contractors.
- Impacts wide range of companies that do business with the federal government; e.g., information technology, banking, legal services, construction, and manufacturing.
- Covers new and renewed federal contracts on or after October 15, 2021
 - All contract and contract-like instruments entered into with the federal government must include a mandated vaccination clause.
 - Requirements must apply to “all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument.
- NOTE: Remote covered employees are included.

Federal Contractor Vaccine Requirement

- What are federal contractors' obligations?
 - COVID-19 vaccination of all employees (except in limited circumstances where employee obtains an accommodation as a result of a health condition or sincerely held religious belief);
 - Compliance by individuals (including contractor employees and visitors) concerning masking and physical distancing in the workplace;
 - Designation of a person to coordinate COVID-19 workplace safety efforts at covered workplaces; and
 - Employees must be vaccinated by December 8, 2021.
- NOTE: There is no test-out option.

Mandate for Employers with 100+ Employees

- President Biden directive to OSHA to issue an Emergency Temporary Standard for employers with 100+ employees to require:
 - Covid vaccine or weekly testing
 - Paid time off to get vaccine or recover from side effects
- No public comment to be taken
- Rule effective for up to 6 months
- Up to \$14,000 penalty per violation

Mandate for Employers with 100+ Employees

- Outstanding Questions:
 - Who gets counted toward 100 employees?
 - Who will pay for the Covid-19 testing?
 - Will non-exempt employees need to be paid for the time to get tested?
 - How will employers verify workers' vaccination status?

Mandate for Employers with 100+ Employees

- Outstanding Questions:
 - Will employees with natural immunity from prior infection be treated like vaccinated employees?
 - Will boosters be required?
 - What about medical and religious exemptions?
 - Will vaccine mandates convert employer vaccine and incentive/penalties into ERISA plans?

Federal Mandates: Legal Challenges

- Legal challenges to the OSHA rule almost certain
- Authority under OSHA: emergency temporary standards are limited to those new hazards posing a “grave danger” to workers
- Several states allege OSHA rule would be federal overreach:
 - Constitution reserves police power to address public health and safety to the States

Vaccine Mandates: Other Legal Issues

- Labor shortages
 - Workers resigning in light of employer, state and federal mandates
 - Labor unrest and strikes
 - Impact on employer responsibilities to patients, clients, customers
- Ongoing and updated studies regarding COVID-19 and vaccines
 - What are an employer's obligations under legal discrimination standards?
- Workers' compensation concerns
 - File a First Report: benefits may be available to employees for vaccine injuries if vaccines are mandated by employer

Hypothetical #1:

- Facts: Employer requires employees to return to work in the employer's facility. Employer requires all employees receive COVID-19 vaccine. Employee refuses vaccine based on medical condition and requests accommodation to keep working remotely.
- Must the employer allow the employee to continue working remotely?
- Hypothetical 1(a): Employee requests accommodation based on religious reason.

HYPOTHETICAL #2

- Facts: Vaccinated employee objects to working with an unvaccinated co-worker for safety reasons.
- Must the employer accommodate the vaccinated employee's request?

HYPOTHETICAL #3

- Customer/Client refuses to work with your unvaccinated employees.
 - Hypothetical 3(a): your employee cannot receive the vaccine because of a disability
 - Hypothetical 3(b): your employee cannot receive the vaccine because of a sincerely held religious belief

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Questions?

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