

Labor and Employment 2022 Symposium

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Back to Basics 2022, Part 1 – Identifying Your Employment Risks In the Post-Pandemic Workplace

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Materials

PowerPoint Presentation

ahead of the curve



Workplace law trends for today and beyond.
Come up to speed to stay ahead.

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Session Agenda

- **Where We Are: Pandemic**
- **Where We Are: Workforces**
- **What To Do With Your Workforce: Vaccines And Accommodations**
- **Protecting Information When Remote/Hybrid**

Where We Are: Pandemic By The Numbers

- **U.S. is nearing 100 million confirmed cases**
- **US. has exceeded 1 million deaths**
- **78.9 percent of U.S. population: At least one vaccine dose**
- **67.3 percent of U.S. population: Fully vaccinated (initial series)**
- **48.3 percent of fully vaccinated: At least one booster**

Where We Are: Current CDC Guidance

- No more quarantine on exposure
- Instead, if exposed:
 - Day 0: Day of exposure
 - Wear a high-quality mask for 10 days
 - Avoid places where you cannot wear a mask
 - Get tested on day 6
 - If negative: continue precautions through day 10
- If test positive:
 - Isolate immediately

Where We Are: Current CDC Guidance

- If test positive (after exposure or otherwise): Isolate
 - For at least 5 days:
 - Stay home
 - Isolate from others at home
 - Wear mask around others
 - End isolation if:
 - You had no symptoms
 - You are fever free and your symptoms are improving
 - Continue isolation through day 10:
 - Moderate to severe symptoms
 - Still have fever

Where We Are: Workforces

- **Return to offices has been slow**
 - 29 percent of knowledge workers were back to work full-time in 4Q 2021
 - About 35 percent through 1Q and 2Q 2022

Source: Summer 2022 Future Forum Pulse

Where We Are: Workforces

- **Resistance to must-come-back rules**
 - Two-thirds of survey respondents will look to leave if required to come back full-time

Source: People at Work 2022: A Global Workforce View (ADP Research Institute)

What To Do With Your Workforce: Vaccine Requirements

- **Reminder: Most vaccine requirements remain permissible**
- **But, must account for accommodations required under federal and state law (e.g. medical, religious)**

What To Do With Your Workforce: Vaccine Requirements

- **Updated EEOC Guidance to Employers (July 12, 2022):**
 - Some important changes and clarifications:
 - Employers may administer a COVID-19 viral test as a mandatory screening measure
 - But not antibody testing
 - OK to screen applicants (e.g. before in-person interview) for symptoms of COVID-19
 - Under certain conditions, may withdraw job offer if positive test

What To Do With Your Workforce: Vaccine Requirements

- **Updated EEOC Guidance to Employers (July 12, 2022) (continued...):**
 - OK to require vaccination-related documentation
 - But **must** be maintained as confidential medical records under the ADA
 - May share only with employees who need to know to perform their job duties
 - No limit to value of incentive to obtain vaccine from third-party

Remote Work Accommodation Requests in a Post-Pandemic Workplace

- **Pre-pandemic sentiment**
 - Employers need not allow employees with disability to work from home
 - Remote work is the exception, not the norm

Remote Work Accommodation Requests in a Post-Pandemic Workplace (continued...)

- **Post-pandemic sentiment**
 - If in-person is “essential” function, employers need not allow employees with disability to work from home
 - But “temporary telework experience” is relevant in determining whether essential functions can be performed remotely

Conducting Remote Investigations

- **Challenges**
 - Lack of employee awareness of complaint procedures
 - Interruptions and distractions
 - Trouble building witness rapport and assessing credibility
 - Violating employee privacy laws (e.g., ADA, HIPAA, GINA)
 - Disclosing confidential and sensitive company information

Conducting Remote Investigations (continued...)

- **Best Practices**
 - Offer variety of reporting options (e.g., phone, e-mail, text) and make sure these channels are widely known
 - Provide interactive training to all employees
 - Eliminate interruptions and distractions
 - Conduct interviews via videoconference
 - At the start of the interview
 - Confirm witness is in private area without others present
 - Advise that you do not consent to recording of interview
 - If applicable, advise of attorney client privilege
 - Protect private, confidential, and other sensitive information

CLE Code for Attendees

(Tip: The CLE code is different than the event code assigned by states)

Old Risks In The New World: Litigation Risks Of A Hybrid Workforce

- Disability discrimination / failure to accommodate
- Disparate impact
- Wage and hour
- Workers' compensation
- Failure to reimburse business-related expenses
- Confidentiality and information-security claims

Old Risks In The New World: Litigation Risks Of A Hybrid Workforce

- Denial or miscalculation of sick or family leave
 - Whistleblower claims
 - Wrongful death
- Related Issues**
- New risks in venues, and under laws, where your remote workforce resides
 - Pretext Issues
 - Are your employees held to same standard as in-office employees?

Old Risks In The New World: Employee Performance

- How to effectively manage employee-performance issues in a hybrid and remote environment?
- Not just a business risk...

Old Risks In The New World: Employee Performance

- Remote/Hybrid Work Policy
 - Measurable performance expectations
 - Work from home as a right and a privilege
- When are performance issues not actually performance issues?

Old Risks In The New World: Employee Performance

- **Special issues for hourly employees**
 - Clocking in
 - Off-the-clock work
 - Remote monitoring and time-tracking software

Protecting Information When Remote/Hybrid

- **What do you need to protect?**
 - The “usual suspects”
 - Customer lists
 - Business plans
 - Budgets
 - The “new kids”
 - Login credentials (including for cloud-based storage)
 - Employee directories
 - Loaner equipment

Protecting Information When Remote/Hybrid

- **Why do you need to protect it?**
 - Trade Secret Protection
 - “Trade Secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if:
 - (A) the owner thereof has taken *reasonable measures to keep such information secret*; and
 - (B) the information derives independent economic value, actual or potential, *from not being generally known to, and not being readily ascertainable through proper means by, another person* who can obtain economic value from the disclosure or use of the information
 - 18 U.S.C. § 1839(3)
- Consistency
- Other Considerations
 - HIPAA
 - FINRA/SEC
 - Vendor/Customer/Client contracts
 - Competitiveness

Protecting Information When Remote/Hybrid

- **How do you protect it?**
 - Non-Disclosure Agreements
 - Handbooks/Policies
 - Training
 - Information Security Best Practices

- **How do you protect it when employees are remote?**
 - VPN and other Electronic Measures
 - Physical Measures
 - Updated Policies

Protecting Information When Remote/Hybrid

- **The trend of banning NDAs**
 - All forms of workplace discrimination and harassment
 - Wage and hour violations
 - Settlement agreements
- **Nationwide limits?**

Nondisclosure Agreement Laws

- NDA use by private employers limited in these states:

Arizona	New Mexico
California	New York
Hawaii	Oregon
Illinois	Tennessee
Maine *	Vermont
Maryland	Virginia
Nevada	Washington
New Jersey	

- No limits on harassment claim NDAs for private employees in other states.

* Maine's law effective 8/8/22

Source: Bloomberg Law Data

Protecting Information When Remote/Hybrid

- **Have exit procedures**
 - Have an acknowledgement regarding return of property
 - Ask employees where information might be saved (flash drives, desk drawers, Box)
 - Provide pre-paid return shipping
- **Use the opportunity to remind the employee about restrictive covenants**
- **Don't give up!**
 - Send follow-up letters or emails
 - Consider reaching out to the new employer

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