

ahead of the curve

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

Employment Litigation Risks in a Post-COVID World



Trevor Brown
brown.trevor@dorsey.com



Marilyn Clark
clark.marilyn@dorsey.com



Melissa Raphan
raphan.melissa@dorsey.com



Jack Sullivan
sullivan.jack@dorsey.com



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Agenda

- **Setting the scene**
 - The workplace: how it looks today and what it may look like tomorrow
 - The Biden Administration's post-COVID priorities
 - Current litigation trends
- **The “big return”**
 - Selecting employees to return
 - Mandatory vaccinations
 - Leave & accommodation issues
 - Safety, OSHA, and workers' compensation
- **The EEOC's litigation outlook**
- **Protecting confidential information in a remote environment**



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When will workers return to the office?

- **Companies that have Transitioned to a *Permanent Remote (or Hybrid) Platform*:**
 - Coinbase
 - Dropbox
 - Facebook
 - Ford Motor Co.
 - Google
 - Microsoft
 - Reddit
 - Salesforce
 - Shopify
 - Siemens
 - Slack
 - Spotify
 - Square
 - Twitter
 - VMWare
 - Zillow
- **Target Announces it is Permanently Moving to a Hybrid Remote-Work Model for 3,500 Employees**

Employee Perspectives

- **Before the pandemic, only 7% of workers in the U.S. had access to a “flexible workplace” benefit, according to a survey by the Pew Research Center.**
 - **Those workers were mostly managers, white-collar professionals, and highly paid.**
- **Today, about 7 in 10 U.S. workers who can do their jobs from home say they are teleworking all or most of the time, according to Pew Research.**

Employee Perspectives



- **Looking ahead, more than half of U.S. employees have expressed wanting to continue working from home even after the Covid-19 crisis subsides, according to Pew Research.**
- **Roughly half of U.S. employees believe their companies will allow them to telecommute at least part-time after the pandemic, according to LinkedIn's Workforce Confidence Index.**
 - **That percentage is even higher in industries such as tech (73%), finance (67%), and media (59%) that see flexible work arrangements as the future.**

The Biden Administration



- **Department of Labor**
 - **Families First Coronavirus Response Act (FFCRA) extension**
 - **Recommend expanding unemployment benefits**
- **Equal Employment Opportunity Commission**
 - **Mandatory vaccinations & accommodations**
- **Occupational Safety and Health Administration**
 - **Focus on protecting workers and workplace safety during COVID-19 pandemic**
 - **Settlement guidance**



The Biden Administration/Current Litigation Trends

- **National Labor Relations Board**
 - **Mandatory Bargaining: vaccinations**
 - **Mail-in ballots for union voting**
- **Proposed Legislation: PRO Act**
- **Current litigation trends**



Returning to the Workplace: Potential Pitfalls

- **Deciding who must return and who may work from home**
 - **CDC guidelines on possible considerations**
- **Potential pitfalls**
 - **Beware the “shecession”**
 - **ADA – remote work as an accommodation**
 - **Provide adequate COVID-19 safeguards for returning employees**
 - **Ex: This month, OSHA cited a tax-preparation business \$136K in penalties (OSHA Inspection Number 1520204)**

Returning to the Workplace: Mandatory Vaccinations

- **Can employers impose vaccine mandates?**
 - **Yes***
 - EEOC published guidance confirms that employers may lawfully require employee vaccinations
 - Medical and religious exemptions
 - Emergency Use Authorization concern
- **Complications of imposing vaccine worth it?**
 - **Potential pitfalls**
 - Whether an accommodation request is reasonable
 - Courts do not always agree with EEOC interpretations
 - Be careful with proof of vaccine requirements
 - **Encouraging vs. requiring vaccination**

Returning to the Workplace: Taking Care with Inquiries Regarding COVID-19 to Mitigate Risk

- **Employers are permitted to ask certain questions of any employee entering the workplace to reduce the risk of workplace exposure to COVID-19**
 - **Diagnosed with COVID-19**
 - **Reason for absence from work**
 - **Symptoms if employee has been out sick**
 - **Where employee has traveled, even if travel is for personal reasons**
- **BUT may NOT ask general questions about whether family members have been diagnosed with or tested for COVID-19**
 - **Prohibited by GINA**
- **May prohibit employees who do not answer from entering the workplace**

Returning to the Workplace: Leave & Accommodation Requests

Expiration of Families First Coronavirus Response Act ("FFCRA")

- **Created two new types of paid-leave benefits**
 - Emergency Paid Sick Leave Act ("EPSLA")
 - Emergency Family and Medical Leave Expansion Act ("EFMLEA")

Extended Consolidated Appropriations Act of 2021

- **Extended payroll tax credits for employers voluntarily providing FFCRA-like leave**

American Rescue Plan of 2021

- **Resets FFCRA**
 - Previously unexhausted 10-day/80-hour limit for paid sick leave entitlement
 - 3 additional qualifying reasons
- **EFML Changes**
 - Full 12 week pay; total cap increase
 - Additional qualifying reasons
- **Nondiscrimination provisions**
- **Extends tax credits**

Returning to the Workplace: Safety, OSHA, and Workers' Compensation

- **Increasing safety concerns**
 - **Changing federal/state regulations**
 - **Ex: Virus shield laws among states**
 - **Is COVID-19 illness covered?**
 - **It depends**
 - **Are harmful vaccine side effects covered?**
 - **It depends**
 - **Payroll withholding**
 - **Whistleblower concerns**
 - **Changes to working conditions and locations may affect workers' compensation**

Returning to the Workplace: Takeaways

Keep up with federal law and agency guidelines

- Understand obligations related to wage and hour, vaccination, and other areas
 - Expect OSHA rule on protecting workers from COVID-19

Keep up with state and local laws

Court watch

- Expect a high volume of employment litigation arising from conduct related to COVID-19 and vaccinations

General tips

- Curb the “shecession”
 - Seriously consider flexibility requests
 - Post work schedules in advance to allow time to secure childcare
- Take steps to avoid litigation
 - Set clear expectations for employees who are teleworking
 - Document performance issues
 - Carefully consider accommodation requests
- Wage and Hour rules
- Other

EEOC Charge Statistics

	2017	2018	2019	2020
Total Charges	84,524	76,418	72,675	67,448
Race	33.9%	32.2%	33.0%	32.7%
Sex	30.4%	32.3%	32.4%	31.7%
Age	21.8%	22.1%	21.4%	21.0%
Disability	31.9%	32.2%	33.4%	36.1%
Retaliation	48.8%	51.6%	53.8%	55.8%

EEOC Litigation Statistics

	2017	2018	2019	2020
Total Suits	201	217	157	97
Title VII	53.2%	51.2%	55.4%	60.8%
ADEA	6.0%	4.6%	4.5%	7.2%
ADA	37.8%	38.7%	35.0%	33.0%
Subpoenas	8.5%	8.3%	8.3%	4.1%

Protecting Confidential Information in a Remote Environment

- **The “old” tests will be slow to catch up with “new” remote work norms**
- **How should you protect it?**
 - Update work-from-home policies (for the pandemic and beyond!)
 - Involve the right personnel (IT, HR, Legal, Operations)
 - Training as employees return

The Takeaway



When it comes to litigation risks in a post-COVID world...

...be vigilant and look for variations on familiar themes.



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Case Reference List



- *Labarbera vs. NYU Winthrop Hospital*, 2021 U.S. Dist. LEXIS 48988 (E.D.N.Y. March 16, 2021)(mandatory vaccination)
- *Legaretta vs. Macias*, 2021 U.S. Dist. LEXIS 44474 (D. NM. March 4, 2021) (Covid-19 vaccination)
- *Sanchez vs. Treesmiths*, 2021 U.S. Dist. LEXIS 38327 (U.S.D.C. M.D. PA, March 1, 2021)(FFCRA)
- *Payne vs. Woods Services*, 2021 U.S. Dist. LEXIS 28198 (E.D. PA., February 16, 2021)(FFCRA)
- *Jean vs. Palm Beach Endocrine & Diabetes Specialists, P.A.*, 2021 U.S. Dist. 50298 (M.D. FL. March 16, 2021) (FFCRA)



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Case Reference List

- *Beltran vs. 2 Deer Park Drive Operations, LLC*, 2021 U.S. Dist. 37291 (D.N.J. February 28, 2021) (FFCRA)
- *Hesketh v. Total Renal Care Inc.*, NO. C20-1733JLR, 2021 U.S. Dist. LEXIS 70518 (W.D. Wash. Apr. 12, 2021) (breach-of-contract)
- *Kristina Eisenacher v. Vitas Hospice Services, LLC*, No. 20-cv-04948-RS, 2021 BL 123297 (N.D. Cal. Apr. 2, 2021) (OSHA and retaliation)
- *Warner v. United Nat. Foods, Inc.*, No. 1:20-cv-1758, 2021 U.S. Dist. LEXIS 6191 (M.D. Penn. Jan. 13, 2021) (wrongful termination)



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Thank you!



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