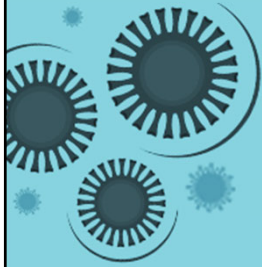


The Latest COVID-19 Guidance for Employers: Vaccine Mandates and Accommodations



Need to Know: COVID-19 Webinar Series



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Our Locations



Long Beach, CA



Portland, OR



Seattle, WA

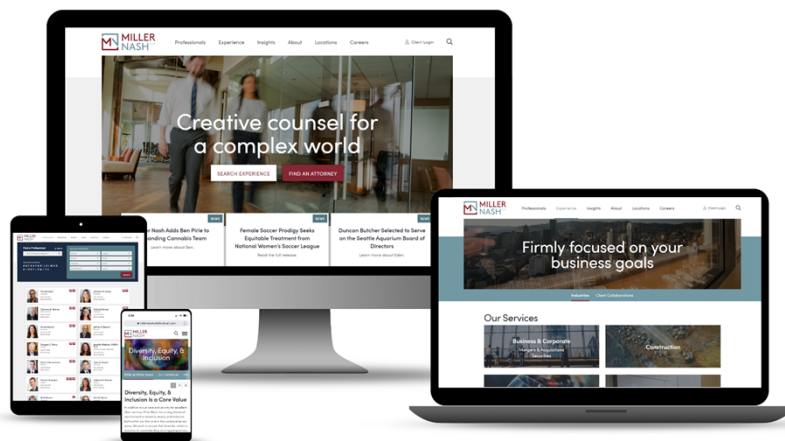


Vancouver, WA



Anchorage, AK

New Website and Resources



Our COVID-19 Resource Center Recent Articles of Interest

- *A Roadmap for the New Normal in the Workplace Under COVID-19* (February 1, 2022)
- *Considerations for Employers Contemplating a Voluntary or Mandatory COVID-19 Vaccine Policy*, (Updated February 1, 2022)
- *Quick-Reference Sheet for Employers – Current COVID-Specific State and Federal Agency Resources* (February 2, 2022)
- *Unionized Private and Public Employers May Have Bargaining Obligations to Meet Before Implementing the ETS and Other Vaccine Mandates*, (December 19, 2021)



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Agenda

- Where We Are Today
- Litigation and Mandate Update
- Disability and Religious Accommodations Update
- Labor Relations Update
- Hot Topics & FAQs: The Pandemic Workplace
- Interactive Q&A



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Webinar Logistics and Q&A

- Zoom's Q&A feature is open, please send in questions
- SHRM and HRCI credits approved
- Complete the short survey to provide bar information for pending CLE credits (WA, OR, CA)



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Introduction: Where We Are Today



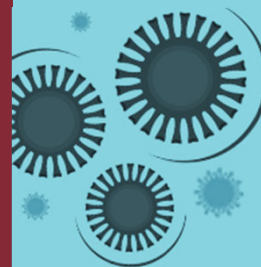
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Primary Obligation: Provide a Safe & Healthy Workplace

- OSHA's General Duty Clause = Employers must take all appropriate precautions to avoid **"known hazards"** to employees.
 - OSHA "Landing Page" Devoted to Coronavirus/COVID-19:
<https://www.osha.gov/coronavirus>
 - In June of 2020, OSHA published **Guidance on Returning to Work**
 - In January of 2021 (with updates in June and August, 2021) OSHA published **"Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace"**

Current State OSH Guidance re. COVID-19

- Washington OSH Resources:
 - Washington's Department of Health has issued guidance in partnership with the Department of Labor and Industries and other state agencies, as well as **specific guidance** about when masks are recommended or required.



Current State OSH Guidance re. COVID-19



- Oregon OSH Resources:
 - Oregon OSHA has adopted a temporary rule addressing **COVID-19 Workplace Risks** which includes specific safety precautions and training requirements.
 - The Oregon Health Authority has also published guidance regarding **vaccine mandate administration, masking and quarantine/isolation**.

Current State OSH Guidance re. COVID-19

- California OSH Resources:
 - California's Department of Public Health (CDPH) has issued general, as well as industry specific guidance about workplace safety in relation to COVID-19.
 - The State also maintains a **COVID-19 public safety measures platform** with current restrictions for certain industries.



Counterbalance: Discrimination and Privacy Protections

- The Americans with Disabilities Act (ADA) and Title VII, and state equivalents, offer assurances of nondiscrimination that employers must comply with and may also require accommodation of various COVID-19 related policies including vaccine mandates and masking, particularly where they conflict with an employee's religious belief or disability.
- In addition, the ADA and state equivalents govern the employer's ability to obtain medical information from employees, and requires special recordkeeping practices as well.

Employee Privacy Protections

- General protections around medical information of employees continue to apply, but additional guidance has provided better clarity around some COVID-19-specific issues:
 - The EEOC has offered a helpful Q&A, including when and what kind of COVID-19 testing is allowed, which it has updated frequently during the ongoing pandemic: **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.**
 - It also supplemented prior guidance on pandemic preparedness issues to address COVID-19: **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.**

Mandatory Vaccinations (Federal)



- US Military
- Health Care Workers
- Federal Employees and Contractors **Maybe
- ~~Large Employers~~

Mandatory Vaccinations (Washington)

- In August, Washington's Governor Jay Inslee issued a state vaccine mandate that as of October 18, 2021: applies to those who work for or at:
 - state agencies,
 - health care providers, and
 - educational settings.
- In November, Washington's Governor Inslee amended the state vaccine mandate to allow 24/7 facilities (e.g., corrections, acute care, rehabilitation) to use contractors whose vaccination status has not been verified in certain narrow and limited circumstances.

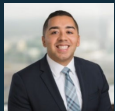
Mandatory Vaccinations (Oregon)

- Likewise, Oregon now has vaccine mandates in effect as of October 18, 2021 for:
 - Executive Branch employees of the state government,
 - health care workers, and
 - teachers, educators, support staff, and volunteers in K-12 schools.
- The Oregon Health Authority also developed specific forms to be used for requesting exemptions, and an FAQ for evaluating requests.

Mandatory Vaccinations (California)

- California has imposed mandatory vaccination for all state and certain private sector employees including:
 - All state workers,
 - Workers in health care and high-risk congregate settings (and boosters),
 - Workers in facilities providing other health care services and their visitors,
 - Workers in adult and senior care facilities,
 - Workers who provide health care in state and local correctional facilities, and
 - School staff at K-12 schools.
- California mandates recognize exemptions for covered workers in certain circumstances.

Litigation and Mandate Update



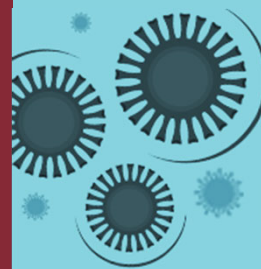
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Litigation Update: OSHA's Emergency Temporary Standard (ETS) Vaccine-or-Test Mandate

- **Background:** In response to President Biden's "Path Out of the Pandemic: COVID-19 Action Plan," OSHA issued the ETS on November 4, 2021. The ETS would have required workers to be vaccinated against COVID-19 or to wear masks and be tested weekly (although employers were not required to pay for the testing) and covered employers to develop and implement either a vaccination policy or a vaccine or test policy, as well as masking and additional safety measures.
- **Current Status:** OSHA has withdrawn the ETS and is moving forward with permanent rulemaking.
- **Upcoming Developments:** OSHA will go through the permanent rulemaking process with notice and comment.
- **Key Takeaway:** Covered employers do not need to comply with ETS at this time. Employers should be mindful of state-specific OSHA regulations.

Litigation Update: Centers for Medicare & Medicaid Services (CMS) Vaccine Mandate

- **Background:** On November 5, 2021, CMS published an interim final rule that establishes requirements regarding COVID-19 vaccine immunization of staff among Medicare- and Medicaid-certified providers and suppliers.
- **Current Status:** The Supreme Court upheld the mandate; the mandate is now in effect in *all* states. This means under the recent CMS guidance, covered facilities not already subject to any of the applicable state mandates be required to ensure that they have developed policies and procedures to implement the vaccine mandate **by January 27, 2022**, and teams be vaccinated (or approved for an exemption) no later than **February 28, 2022**.
- **Upcoming Developments:** Covered providers and suppliers can expect a new influx of exemption requests before the deadline.
- **Key Takeaway:** Covered providers and suppliers should review the EEOC Updated COVID-19 Technical Assistance on requests from employees who seek exceptions to a vaccine requirement and seek legal guidance if they have any questions.

Litigation Update: The Federal Contractor Vaccine Mandate

- **Background:** On September 9, 2021, President Biden announced “Path Out of the Pandemic: COVID-19 Action Plan” and issued Executive Order 14043 requiring vaccination for Federal Employees, among other safety measures against COVID-19.
- **Current Status:** Nationwide injunction in place on January 21, 2022. The U.S. Court of Appeals for the Eighth Circuit has joined three other federal appellate courts (the Fifth, Sixth, and Eleventh Circuits) to consider a challenge to the Federal Contractor vaccine mandate.
- **Upcoming Developments:** Litigation will go forward, including briefing and argument.
- **Key Takeaway:** Covered federal contractors do not need to comply with the rule at this time, BUT employers should be mindful of state-specific OSHA regulations and be on the lookout for any litigation updates.

State Update: Washington

- **Background:** Washington's Governor Inslee has exercised his powers through Executive Order to set vaccine requirements statewide.
- **Current Status:**
 - Proclamation 21-14.3 requires COVID-19 vaccination for state workers, educators, and health care providers, effective November 24, 2021.
 - Proclamation 21-16.1 requires Large Event Organizers to verify vaccination status for certain patrons, effective November 15, 2021.
 - On January 13, 2022, Governor Inslee said that he has no immediate plans to enact new vaccine rules for private companies similar to the ETS, but left the door open.
- **Key Takeaway:** Washington employers should continue to monitor Governor Inslee's Proclamations and Press Releases for updates.

State Update: Oregon

- **Background:** Since May 4, 2021, Oregon OSHA has adopted a Public Health Emergency Rule on COVID-19 (OAR 437-001-0744: Rule Addressing COVID-19 Workplace Risks). That rule has seen several amendments given fluctuating COVID-19 rates in the state.
- **Current Status:** The Oregon OSHA Public Health Emergency Rules remains in effect as is. After the Supreme Court's January 13, 2022, ruling, Oregon OSHA stated that "Oregon OSHA will not move forward with adopting the same or similar standard in Oregon. . . Oregon OSHA maintains a COVID-19 rule that requires employers to implement protections for workers. Those protections include infection control planning, exposure risk assessments, sanitation, and notification. Those measures also require employers to follow the Oregon Health Authority's requirement to use facial coverings indoors."
- **Key Takeaway:** Oregon employers must continue to comply with Oregon OSHA's Public Health Emergency Rules, including masking requirements for indoor spaces.

State Update: California

- **Background:** The California OSHA first adopted its emergency temporary standards on COVID-19 infection prevention (Cal/OSHA ETS), effective November 30, 2020. Since its initial adoption, the Cal/OSHA ETS have been readopted twice and revised.
- **Current Status:** The revised Cal/OSHA ETS is in effect until April 14, 2022.
- **Upcoming Developments:** On December 16, 2021, Governor Newsom issued an Executive Order permitting the revised Cal/OSHA ETS to be extended through the end of 2022. It is possible that the Cal/OSHA Standards Board will rely on this Executive Order and attempt to extend the revised ETS rather than issue a permanent rule.
- **Key Takeaway:** California employers should continue to carefully monitor the California Department of Public Health “guidance” that is adopted into the ETS by function of the prior Governor Newsom’s Executive Order.



Litigation Trends

- Since March 12, 2020, there have been more than 4,880 lawsuits (including 533 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus.
- The top industries targeted by plaintiffs are: health care, retail, manufacturing, government, hospitality, and education.
- At least 2,675 cases involve retaliation claims, more than 1,500 cases involve disability discrimination claims, and more than 1,400 cases involve wrongful discharge claims.

Litigation Trends

- Employers should expect to see different COVID-19 lawsuits being filed and ruled on this year, including challenges to federal and state COVID-19 related mandates.
- So far, we have seen a pattern of individual plaintiff claims:
 - A wrongful death lawsuit against a private employer when the employee contracted COVID-19 at work and her spouse died. (California)
 - A disability discrimination lawsuit against a private employer under the Americans with Disabilities Act (ADA) by an employee who claims she was fired because she tested positive for COVID-19. (Pennsylvania)
 - A disability discrimination lawsuit by the EEOC for alleged harassment suffered by an employee who requested accommodation for her disability and was allegedly terminated for requesting it. (Texas)

Litigation Trends

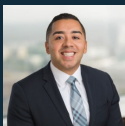
- In the class action space, we have seen a pattern of claims for:
 - Failure to rehire after COVID-19-related layoff or re-hired workers in positions with substantially reduced hours, pay, and no benefits. Workers allege that defendants hired hundred of new employees who were less qualified instead of rehiring plaintiffs. (California)
 - Failure to pay for time spent waiting in line for COVID-19 temperature checks, i.e. off-the-clock time. (California)
 - Failure to reimburse employees working from home for business expenses. (California)
 - Religious freedom, disability discrimination, and due process for state vaccine mandates. (Washington)

Litigation Trends

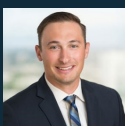
- The states with the most filings are:
 1. California (1,467)
 2. New Jersey (427)
 3. New York (353)
 4. Florida (332)
 5. Ohio (250)
 6. Pennsylvania (230)
 7. Texas (201)
- Oregon and Washington have seen more than 60 cases, 74 and 61 respectively.
- Alaska is near the bottom of the list with less than 5 cases.



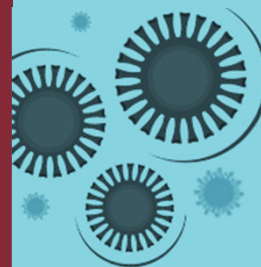
Disability and Religious Accommodations Update



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Common Exemptions

- Two common exemptions from the COVID-19 vaccine and return-to-office mandates are/will be:
 1. a medical reason that rises to the level of a “disability” under federal, state, or local laws; or
 2. a “sincerely held religious belief,” practice, or observance



What Does the ADA Require?

- Employers must provide “reasonable accommodations” to “qualified employees with disabilities” to allow them to perform the “essential functions” of their positions, unless doing so would cause “undue hardship” to the employer.
- Once the employer is aware (or should be aware) that an employee may have a disability that impairs their ability to perform their job, the employer must initiate the dialogue referred to as the “interactive process” to determine whether any reasonable accommodations are available.

What Is a Disability?

- A person can show that they have a disability in one of three ways:
 1. The person has a physical or mental condition that substantially limits one or more major life activities;
 2. The person has a history of a disability; or
 3. The person is subject to an adverse employment action and is believed to have a physical or mental impairment that is not transitory (lasting or expected to last 6 months or less) and minor (even if they do not have such an impairment).

What Does It Mean to Be a “Qualified” Employee Under the ADA?

- An employee must have the “requisite skill, experience, education, and other job-related requirements” of the position and be able to perform the “essential functions” of the position—with or without reasonable accommodations.
- Employees experiencing disabilities are entitled to reasonable accommodations, if needed, to perform their essential job functions.
- If an individual is unable to perform an essential job function—even with a reasonable accommodation—by definition the person is not “qualified” for the position.

What Is the “Essential Function” of a Position?

- An “essential function” is a fundamental job duty of the position, not an employee’s marginal duties.
- An employer may consider a function essential because:
 - it is the reason that the position exists
 - only a limited number of employees can perform that function
 - it is a specialized function and the employee was hired because of their expertise or ability to perform that function
- Essential functions may or may not include those specified in the written job description, or the duties that occupy a majority of the employee’s time.

What Is a Reasonable Accommodation?

- A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables an individual with a disability to perform essential job duties, including eliminating non-essential job duties; physically modifying the way the job is performed; providing aids to assist the employee with the job; altering a schedule; transferring to a light duty position if light duty is offered; or transferring to an open position, along with many other possibilities.
- Reasonable accommodations for workers who can’t get vaccinated may include
 - working remotely;
 - a combination of weekly COVID-19 testing, masking and physical distancing;
 - moving the employee to a private workspace; or
 - transferring the employee to a position that does not require interaction with the public or other employees.
- **REMEMBER:** If the employee’s restrictions prevent the employee from performing the necessary job duties, an unpaid leave of absence may be considered a reasonable accommodation.

What Types of Undue Hardship Considerations May Be Relevant to Determine if a Requested Accommodation Poses Significant Difficulty or Expense During the COVID-19 Pandemic?

- The decision to reject an accommodation request under the ADA based on undue hardship must be based on "an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense"
- Employers should consider the following factors:
 - The nature and cost of the accommodation needed
 - The facility's overall financial resources and number of employees
 - The employer's overall financial resources, size, employee headcount, and type and location of facilities (if the facility that is evaluating the request is part of a larger entity).
 - The employer's type of operations, including the geographic separateness and the administrative or fiscal relationship of the facility involved in making the accommodation
 - The impact of the accommodation on the facility's operations
- If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems

What about Unpaid Leave of Absence?

- The EEOC's ADA guidance states that an unpaid leave is a form of reasonable accommodation an employer should consider.
- While EEOC guidance does not have the force of law, as the federal agency that enforces the ADA, EEOC guidance is often viewed by courts as persuasive.
- How long an employer must allow an employee to be off work is not addressed, and should be on a case-by-case basis using an individualized assessment.
- The EEOC and many federal courts take the position that an indefinite leave of absence with no reasonable estimate of when an employee can return to work is an undue hardship, and therefore not required.
- But what about when an employee's medical provider says an employee may need many weeks, or even months, off work to recover before the employee is released to return to work? Those are difficult and fact-specific questions that depend on the nature of the employer, the employee's job, and how long the employee may need to be off.

Religious Accommodations



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May Employees Be Exempted from a COVID-19 Vaccination Requirement Because of Their Sincerely Held Religious Beliefs?

- **Yes.** An employee may be entitled to a reasonable accommodation when the vaccination conflicts with their religious beliefs.
- Key Points:
 - It is the employee's burden to request an accommodation for their religious belief, observance, or practice.
 - The employer should assume the request is based on a "sincerely held religious belief," absent an "objective basis" for questioning the sincerity of the belief.
 - If there is an objective basis, the employer may make a limited factual inquiry and request supporting information.
 - The employer may ask the employee how the vaccination requirement conflicts with their religious belief.
 - The employer need not provide an accommodation that creates an undue hardship.

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What Is a Religious Belief?

- A theistic or non-theistic belief system that addresses fundamental questions of existence and morality.
- Personal preferences and political, social, and cultural philosophies do not qualify as religious beliefs.
- A religion need not be traditional, old, logical, or formally organized.
- The individual believer's belief, observance, and practice need not be officially recognized by any particular organized religion.
- Note: An individual believer's belief may differ from their organized religion's position.

When Is a Religious Belief Sincerely Held?

- Sincerity is subjective, so, in most circumstances, an employer should presume the employee's belief is sincerely held.
- Factors that may undermine an employee's credibility include:
 1. actions markedly inconsistent with a professed belief
 2. an attractive accommodation likely sought for secular reasons
 3. suspect timing of the request
 4. other reason to believe the accommodation is not sought for religious reasons

When Must a Religious Belief, Observance, or Practice Be Accommodated?

- A religious accommodation is a modification to the work or the work environment which allows the employee to comply with their religious beliefs.
- Reasonable accommodation should be granted for terms and conditions of employment that conflict with an employee's religious beliefs, observances, or practices unless the accommodation creates an "undue hardship."

When Does an Accommodation Pose an "Undue Hardship"?

- This is a different standard than the ADA's undue hardship standard.
- Under Title VII, an accommodation would pose an undue hardship if it would cause more than *de minimis* cost on the operation of the employer's business or operations.
- The following factors are relevant:
 - the type of workplace
 - the nature of the employee's duties
 - the identifiable cost of the accommodation in relation to the size and operating costs of the employer
 - the number of employees who will in fact need a particular accommodation
 - increased risk of harm to the employee or others
 - increased security risk
 - increased burden on other employees
 - conflict with union seniority rules
- The employer will need to demonstrate how much cost, burden, or disruption a proposed accommodation would involve.

Examples of Requests for Accommodation of a “Religious” Belief or Practice

- A Catholic employee requests a schedule change so they can attend church services on Good Friday.
- A Muslim employee requests an exception to the dress and grooming code allowing her to wear her headscarf.
- An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony.
- An employee who identifies as Christian but is not affiliated with a particular denomination requests accommodation of their religious belief that working on the Sabbath is prohibited.
- An employee claims that some being/entity (e.g., The Creator) who created everyone and everything perfectly and provided people with everything they need to heal and live fully, so altering this system has consequences and can change someone’s soul.
- An employee claims that the Bible teaches them that their body is a temple of God and is a living temple or that it is their duty/obligation to shield their body from foreign substances.

Does an Employer Have to Provide an Accommodation That Would Violate a Seniority System or Collective Bargaining Agreement?

- **No.** A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement.



What if Co-workers Complain about an Employee Being Granted an Accommodation?

- Religious accommodations that infringe on a co-workers' ability to perform their duties, infringe on a co-worker's rights, or subject co-workers to a hostile work environment will generally constitute undue hardship.
- General disgruntlement, resentment, or jealousy of co-workers is not an undue hardship.
- Coworker harassment or retaliation is prohibited.

What Are Common Methods of Religious Accommodation in the Workplace?

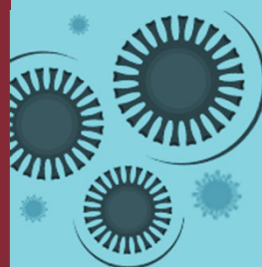
- Scheduling changes, voluntary substitutes, and shift swaps
- Changing an employee's job tasks or providing a lateral transfer
- Making an exception to dress and grooming rules
- Use of the work facility for a religious observance
- Accommodations relating to payment of union dues or agency fees
- Accommodating prayer, proselytizing, and others forms of religious expression
- **REMEMBER: If accommodations are not possible, the employer may consider providing a leave of absence**

Labor Relations Update



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Mandates from State and Local Governments

- Before the ETS was stayed and eventually withdrawn by OSHA, the Office of the National Labor Relations Board (NLRB) General Counsel (GC) issued guidance on employers' bargaining obligations regarding certain aspects of the ETS.
- While OSHA has withdrawn the rule, **state and local governments still have the power to impose vaccine and/or testing mandates.**
- Even though such mandates are not coming from the federal government, the NLRB's guidance on bargaining will likely still apply to mandates from state and local governments.

Bargaining Obligations for Private Employers

- The GC's memorandum takes the position that:
 - Employers would be obligated to **bargain over the *decision*** of whether to impose a vaccine mandate or the alternative of testing-and-masking
 - An employer is also obligated to **bargain over the *effects*** of any decision to implement policies to comply with the ETS



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Negotiable Effects of Implementing a Mandate

- Examples of effects on mandatory subjects of bargaining may include:
 - Paid time to get vaccinated
 - Employer provided PPE and testing
 - Pay for time to get tested
 - Leave to get vaccinated or to recover from vaccine related side effects
 - Scheduling impacts of testing requirements
 - Discipline for failure to follow policy on vaccines, masks, testing

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Bargaining Obligations for Private Employers

- The GC's memorandum did recognize that an employer would be relieved of its duty to bargain where a specific change in terms and conditions of employment is mandated.
- While the GC's position is not final on this subject, we expect the NLRB to adopt the GC's conclusions in unfair labor practice cases alleging a refusal to bargain over mandatory subjects related to vaccine-or-test mandates from state and local government.

Takeaways for Private Employers with Unions

- The GC's memorandum makes it clear that unionized employers subject to a vaccine mandate:
 - have both decisional and effects bargaining obligations
 - have an obligation to bargain with the union if they have discretion in how to implement a vaccine mandate
 - are required to bargain with the union over the effects of policies implementing a vaccine mandate requirements



Takeaways for Private Employers with Unions

- Employers' dual bargaining obligations mean that they should provide notice to the union of policy changes required to comply with vaccine or testing mandates, and be prepared to bargain over those changes and their effects.
- Private employers subject to OSHA-approved state plans may initiate bargaining now or wait for state standards to be issued.
- Until a standard is issued under the OSHA-approved state plan, it may be difficult to fully understand what subjects can and must be bargained.

Public Employer Bargaining Obligations – Oregon

- In the public sector, there is limited definitive authority addressing bargaining obligations for vaccine mandates.
- In Oregon, the Employment Relations Board (ERB) recently held that the Oregon State Police (OSP) was not obligated to bargain over the decision to mandate vaccines as required by an administrative rule from the Oregon Health Authority (OHA) that applied to police and health care workers.
- The ERB offered no guidance as to effects bargaining, concluding that the union had effectively waived such bargaining before the implementation date for the vaccine mandate.
- See *Oregon St. Police Officers Assn. v. Oregon St. Police*, UP-038-21 (2001).

Public Employer Bargaining Obligations – Washington

- There has been no ruling yet from the Washington Public Employment Relations Commission (PERC) on bargaining over the decision or the effects of vaccine mandates.
- However, in a recent case PERC ruled that an employer’s decision to implement a change required by statute is an illegal, non-mandatory subject of bargaining, even if it involves a mandatory subject.
- See *Kitsap County*, Decision 13306 (PECB, 2021).

Public Employer Bargaining Obligations – California

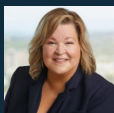
- In a recent case involving the University of California System, the Public Employment Relations Board (PERB) ruled that the state university system was not required to bargain over its decision to mandate COVID-19 vaccines.
- The ruling stated that such mandates were beyond the “scope of representation” as defined by the governing statute.
- PERB was nonetheless clear that there is a duty to bargain over the effects of the decision.
- See *Regents of the University of California* (2021) PERB Decision No. 2783-H.

Taking a “Wait and See” Approach

- In both the private and public sector, the best approach is likely to wait until the a state or local mandate is issued to commence bargaining.
- Until then, the scope of employers’ duty to bargain may be uncertain.



Hot Topics & FAQs The Pandemic Workplace



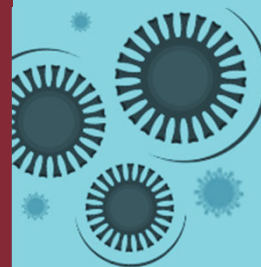
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HOT TOPIC: Employer Vaccine Policies

- Can we still do a vaccine mandate, even if we aren't required to?



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Voluntary Employer Vaccine Policies

- **Yes!**
 - Keep in mind employers' obligation to explore (even if you ultimately cannot provide) accommodations, which is typically in the form of medical and religious exemption requests.
 - Can be global, limited to certain jobs or work groups, including only for those who work on-site and/or with clients/customers/owners that require vaccine.



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FAQ: COVID-19 Discrimination Protections

- Is COVID-19 a disability that I have to accommodate?
- Am I discriminating if I terminate someone who had COVID-19 (for non-work reasons) and is not able to work?



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COVID-19 Protections via ADA

MAYBE!

- The ADA's three-part definition of disability applies to COVID-19 in the same way it applies to any other medical condition. A person can be an individual with a "disability" for purposes of the ADA in one of three ways:
 1. "Actual" Disability;
 2. "Record of" a Disability; or
 3. "Regarded as" an Individual with a Disability

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COVID-19 as Actual Disability

- Will depend on individualized facts, and whether the employee is **substantially limited in a major life activity**.
- Examples:
 - **YES:** An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to the virus.
 - **NO:** An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects.

“Record of” or “Regarded as” Protections

- Again, whether an employee's personal COVID-19 illness will be considered to be a “record” of a disability will depend upon their individual circumstances. Likely, when it manifests as a flu without complications or long haul symptomology, it won't be.
- But even if not, employers need to avoid “regarding” the employee as disabled. EEOC examples:
 - An employer fires an employee because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months.
 - An employer fires employee for having COVID-19, and the COVID-19, although lasting or expected to last less than six months, caused non-minor symptoms.

COVID-19 Protections via ADA

Even if an employee's COVID-19 illness, or ongoing long haul symptoms, would potentially trigger ADA protections, that doesn't mean that an employer has automatically violated the ADA by taking an adverse action.

For example:

- If the employee is not/no longer qualified for the job; or
- The employer can show the employee posed a "direct threat."
- If there is a legitimate nondiscriminatory reason for the action.

A note of caution from the EEOC:

"Of course, an employer risks violating the ADA if it relies on myths, fears, or stereotypes about a condition to disallow the employee's return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others."

FAQ: Screening

- **What about screening?**
- **Do we still have to do that?**
- **Any tips on best practices?**



Screening and Tracing

YES! Screening not only important but required.

- Make sure that employees know not to come to work if sick.
- Have clear procedures for isolating/excluding potentially ill employees and connecting to local resources for testing/medical care.
- Create/maintain a form/list of questions to use to identify work-related exposure and discern potential notification obligations.
- Designate a qualified representative responsible for oversight of COVID-19 preparedness policy/protocols.

HOT TOPIC: Mask Confusion



- **Mask confusion – what is happening?**
- **Do we have to require them? What kind?**
- **An employee is telling me they won't wear a mask, do I have to make them? Do I have to accommodate?**

OSHA's Position on Masks

- OSHA's guidance is consistent with the Centers for Disease Control and Prevention (CDC), which **recommends** that even fully vaccinated people wear masks in public indoor settings **in areas of substantial or high transmission** and notes that fully vaccinated people may appropriately choose to wear a mask in public indoor settings regardless of level of transmission, particularly for people who are at-risk or have someone in their household who is at-risk or not fully vaccinated.

State Mask Rules as of Today

- **Alaska:** DHSS “strongly encourages the wearing of masks in public,” but the state has not required it.
 - Anchorage, Alaska's largest city, lifted a municipal indoor mask mandate Dec. 8; a similar order remains in place in Juneau, the state capital.



State Mask Rules as of Today

- **California:** Masks are required in indoor public settings for all individuals age 2 and over, regardless of vaccination status.
 - The universal mandate, instituted in mid-December, replaced a prior order covering only unvaccinated people and will be in place until at Feb. 15.
 - Masking is also required for all people in schools, health care and long-term care facilities, correctional facilities, homeless and emergency shelters, and on public transit.
 - Los Angeles County requires face-covering at large outdoor events.

State Mask Rules as of Today

- **Oregon:** Oregonians age 5 and over have been required since mid-August to mask up in most indoor public spaces.
 - An expanded mask order covering crowded outdoor settings was lifted Nov. 23 as the state reported steadily declining COVID-19 cases and hospitalizations.
- **Washington:** Masking is required in most indoor public settings and at outdoor events attended by more than 500 people, regardless of vaccination status.
 - The order applies to people age 5 and over in indoor public spaces, with narrow exceptions for certain situations where people are working indoors alone or in areas not generally accessible to the public.

FAQ: Quarantine and Isolation

- What are the current rules and/or guidance on quarantine/isolation?



FAQ: Quarantine and Isolation

- **CDC Guidance: What To Do After Exposure?**
 - Isolate from other people *for at least* 5 days after contact with a person who has COVID-19, and for 10 days after, watch for fever, cough, shortness or breath, or other COVID-19 symptoms.
 - If symptoms develop, get tested immediately and isolate until results received.
 - If NO symptoms develop, then testing at least 5 days *after* exposure.
 - If a positive test, isolate for at least 5 days from the date of the positive test (if no symptoms) OR 5 days from the date that symptoms began (if symptoms).

FAQ: Quarantine and Isolation

CDC Guidance: Can Anyone Skip Quarantine? Yes!

- If they are up-to-date on COVID-19 vaccines
- If they had confirmed COVID-19 within the last 90 days (+ test)



But...

- They must still wear a well-fitting mask around others for 10 days from the date of exposure and get tested at least 5 days after exposure
- If positive test, then isolate

FAQ: Quarantine and Isolation

• State-Specific Guidelines?

- Oregon, Washington, and Alaska's guidance is consistent with the CDC guidelines, though Washington recommends quarantining for 10-14 days where possible
- Washington and Alaska also have specific guidance for those in the commercial seafood industry



FAQ: Quarantine and Isolation

- **What about California?**

- California takes the CDC guidance and then adds its own flavor with respect to boosters.
- It is also stricter on isolation (without 2nd test) for confirmed/presumed positive– must stay home for full 10 days, or until symptoms gone, whichever is longer.
- For exposure to non-vaccinated/un-boosted but eligible required quarantine for 5 days, then:
 - If negative test and no symptoms, can end quarantine, but
 - If no test or symptoms need to quarantine full 10 days/end of symptoms.

FAQ: Quarantine and Isolation

- **What about California?**

- Rules for exposure different for (a) vaccinated and boosted and (b) those not vaccinated or those who are eligible but not boosted:
- For category (a) post-exposure, no quarantine required just test on day 5 and continue to mask. If test positive – follow isolation rules. If symptoms, remain in quarantine.
- For category (b) post-exposure quarantine required for 5 days, then:
 - If negative test and no symptoms, can end quarantine, but
 - If no test or symptoms need to quarantine full 10 days/end of symptoms.

FAQ: Employee Leave and Absence

Real Life Scenario:

**Ned Ryerson calls in sick.
Is he entitled to pay and/or
job protection?**



Employee Leave/Absence Protections

- **Sick Time/PTO** – *protected and paid
 - Will be governed by ER policy
 - However, ER policy/practice in WA/OR/CA policies subject to minimum state/local requirements that require it to be available for:
 1. Employee's own illness (including time waiting for testing/quarantine or isolation)
 2. Care for an employee's ill family member
 3. Closure of employee's child's school or place of care due to COVID-19.
- **FMLA (OFLA in Oregon)** – *protected only, paid if sick time/PTO used concurrently
 - Will only apply if employee is ill or caring for family member who is ill, if illness rises to level of "serious health condition"

Employee Leave/Absence Protections

- **(WA ONLY) PFML** – *paid and protected only for large employers (over 50 employees)
 - Probably not applicable, similar to FMLA, unless illness qualifies as “serious health condition” of employee or their family member requiring care
- **ADA** – *protected only, paid if sick time/PTO used concurrently
 - If illness/symptomology trigger disability protections then leave needs to be evaluated a reasonable accommodation even if employee has exhausted (or is in eligible for) other leaves

Employee Leave/Absence Protections

- **CA ETS Requires Pay and Benefits if Excluded from Workplace Due to Exposure *CALIFORNIA ONLY**
 - Applies where workplace exposure only, does not apply to employees who are unable to work for another reason (i.e. caring for a family member)
 - Employers can discount Company sick leave/PTO, disability and workers’ comp payments from exclusion pay
 - Time for testing and quarantine – generally 5-10 days but could be longer depending on circumstances
 - Exceptions: employees who work at home, completely alone, at a location that the employer does not control

FAQ: Visitors and Guests

- Are we allowed to ask visitors/guests about vaccinated status?
- Are we required to allow exceptions?



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Visitors and Guests

- **Yes!**
 - Consider whether this is a requirement you want to have for your customers
 - Be consistent with the message you are sending your employees
 - Consider how you want to collect this information and how you want to store it (if at all)
 - Consider your obligations to your employees regarding workplace violence protections

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Questions?



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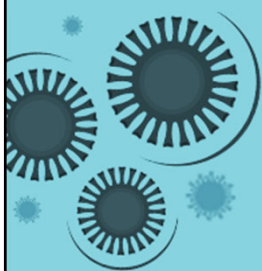
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Thank You!

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