

2021 Legal Update: COVID-19 Vaccines and What to Expect from a Biden Administration



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GOOD RIDDANCE TO 2020

- Learned a lot of new words
 - Quarantine
 - FFCRA
 - Furlough
 - Weekly supplement
 - Rapid test / PCR test
 - COVID Pandemic Response Plans
 - “Convalescent plasma”
 - COVID-variant
 - #WFH
- What is in store for 2021?
 - Good times?
 - Pro-Employer Administration?
 - End of Virus?
 - Back to the best economy in history?

A meme featuring a close-up of a man with glasses and a deadpan expression, set against a blurred office background. The text is overlaid in large, bold, white letters with black outlines.

HAPPY NEW YEAR !!

**WRONG:
THE HAPPINESS OF THE UPCOMING
YEAR HAS YET TO BE DETERMINED.**

imgflip.com



So What Does 2021 Have in Store for Us?

LET'S PULL BACK THAT CURTAIN TO SEE WHAT IT MEANS

FOR YOUR CLIENTS AND HUMAN RESOURCES

HINT: BUCKLE UP!!

Families First Coronavirus Response Act (FFCRA)

- Hurrah!
- It expired on December 31!!!
- It's gone now, right??

FFCRA is Expired, Now Voluntary

- As we know, the law had a “sunset” provision of Dec. 31, 2020
- Congress did not extend it
- So it is purely **VOLUNTARY** for 2021
- Are you going to provide for it?
- If you do, **you will get tax credits** you got before it expired
- Employees **do not get a new 80 hours of EPSL for 2021**
 - Only get what they did not use in 2020

Electronic Posting of FMLA Policies

- Remote workers may not have access to posters and policies
- DOL Guidance also confirmed that electronic postings of the general FMLA notice will count
- Make it accessible to all employees, on website, especially those working remotely only!



BIDEN WINS 2020 ELECTION



- Historic election
- Country is divided
- I hope the message "A Time to Heal" is true
- What are your thoughts?
- Interesting that he has issued 50 Executive Orders since Jan. 20 – March 8
- Most since last 3 Presidents

What Does the Election Mean for Your Clients and Your Practice?

- President is a Democrat
 - House is Democratic
 - Senate is 50-50
 - Kamala Harris as VP can cast deciding vote
 - **So that is an effective Democratic control of all three branches**
- Means he gets to appoint 3 of 5 members to NLRB
 - He will appoint new heads of EEOC, DOL, OSHA
 - **New DOL Head is former Mayor of Boston, Marty Walsh**
 - **Former head of Boston Building and Trades Council**
 - **Strongly pro-union**
 - **Pledged to reorient DOL toward employees**
 - **Approved as DOL head on March 22, 2021**
 - Senate will vote to confirm and appoint future judges
 - **ALL WE WANT IS A FAIR MINDED JUDGE**

Biden Early Campaign Proposals

- Severely limit “misclassification” of Independent Contractor status
 - Biden quickly overturned the DOL policy passed in December expanding definition of IC’s
 - DOL currently takes the position that mere “reservation” of right to direct work of worker does not prevent IC designation
- **Likely will re-visit the white-collar exemption threshold, which increased to \$35,308, much lower than Obama’s proposed \$47,476.**
- **I would expect to see that current \$35,308 amount raised for being exempt from Overtime**

He Will Support the PRO Act

I want to CREATE a better future at Boeing

I support Boeing's union with my colleagues as part of the Laborers' Union, Engineers, and Technical Employees (LUEATE) in achieving better wages, benefits and working conditions at The Boeing Company.

By submitting this form, I authorize The Society of Professional Engineering Employees in Aerospace (SPEEA), International Federation of Professional and Technical Engineers (IFPTE), Local 2005, to have collective bargaining representation in negotiations with The Boeing Company.

Name: _____ Employee _____

Signature: _____ Title: _____

Date: _____

Home Address: _____

City / State / Zip: _____

Home phone: _____

Work phone: _____

CREATE
Laborers' Union, Engineers, and Technical Employees

SPEEA
OFFICE LOCAL 2005

- Biden campaigned to pass the **PRO Act ("Protect Right to Organize")**
 - Reduce time for union elections (was at about 41 days, now 21-22)
 - Allow Mail in ballots (real risk of fraud)
 - Ban employer "captive" meetings with employees
 - Allow unions who get a majority of employees to sign authorization cards to have full representation rights
 - Would that be an "UNCOERCED MAJORITY?"
 - Impose punitive damages on companies that interfere with elections or retaliate against workers
 - Up to \$50,000 per violation
 - Hold company executives liable for damages too
 - Criminal penalties
 - Bar federal contractors from contracts if they unlawfully oppose unions
 - Weaken **"Right To Work"** laws in 27 states
 - Redefine "employees" to include gig workers like Uber, Lyft

Turner Plumbing Vote Last Year

- May remember we had an active Union organizing attempt a year ago
- Plumbers Union tried to organize Turner Plumbing
- Filed petition on Dec. 26 (day after Christmas)
- Planted a **UNION SALT**
- Took employees out to eat, beer, regular mail outs
 - Promised them \$30 per hour!
- Think they had 20 of 24 employees to sign union cards
- We vigorously campaigned
- **Won Election 22-2 in January 2020**
- Could not do this if PRO Act passed



What Else is in PRO Act?

- Prevent Arbitration Agreements in Employment
- Reduce who qualifies as “supervisor”
- Took out two criteria to be a supervisor under Section 2(11) of Act (assignment of work)
- If you lose election, and cannot get a contract in 90 days, it goes to a mediator
- If mediator cannot resolve disputes, goes to a panel of arbitrators to decide the terms of the new contract
- Called “Interest Arbitration”

Amazon Union Election in Bessemer

- About 5,800 warehouse workers at the Amazon facility in Bessemer are voting this month to organize a union
- RWDSU
- Mail in ballots through March 29
- Would be first Amazon warehouse to vote in a union in America
- Could create a seismic shift in union status in Alabama



President Biden Fully Supports the Union Vote

- Posted a video on YouTube in full solidarity with
- union workers
- Shared thousands of times
- Shows he is intent on
- being pro-union for 4 years



'There should be no intimidation, no coercion, no threats, no antiunion propaganda. No supervisor should spread anti-union propaganda.'

— President Biden

Hollywood Celebrities Pushing for Union Vote

TINA FEY, SETH MEYERS



DANNY GLOVER



Bernie Sanders to Visit Today



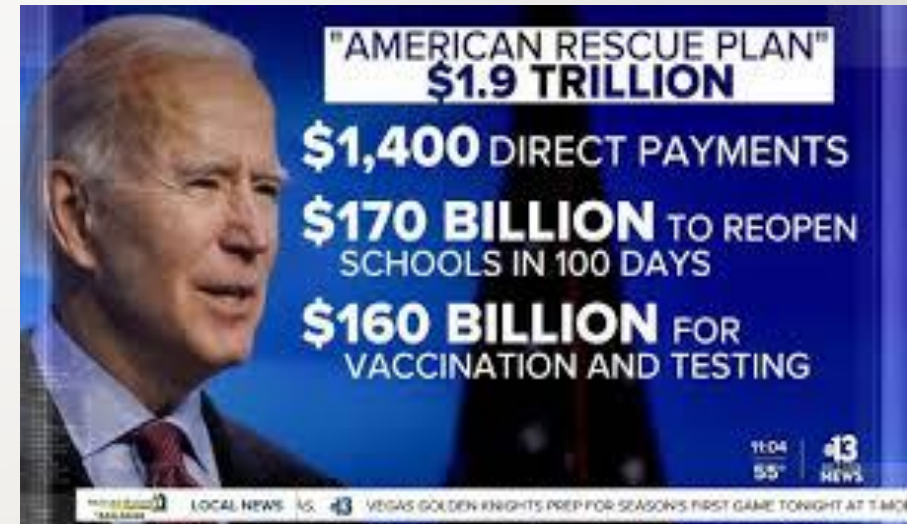
Do Away with No Compete Agreements

- Biden also said he would sign federal legislation that would seriously restrict “no compete” agreements
- Allow such agreements ONLY if they are narrowly limited to a small defined category of trade secrets
- **District of Columbia just passed a similar law on January 11, 2021. Near total ban on no competes, like in California. Financial penalties included.**
- Employers must post notices prohibiting no-competes even if they do not utilize them!
- Does allow policies relating to non-disclosure of trade secrets.
- Law is silent as to solicitations of employees.



“AMERICAN RESCUE PLAN”

- Jan. 14, 2021 Biden unveiled his plan for COVID relief
- Expected to cost \$1.9 Trillion
- Multi-faceted plans



Reinstate and Improve FFCRA

- Expand coverage to all employers
 - Include those with 500 or more employees
- Include “First Responders”
- Increase leave to 14 weeks
- Benefit increased to \$1400 per week
- State and Local Governments will be reimbursed this time
 - But not employers with 500 or more employees



UPDATE: FFCRA Not Included in House Version

- It was pulled last month
- Still purely voluntary through September 2021



What Else Was Hidden in the Plan?

- Increase federal Minimum Wage to **\$15 an hour**
- Eliminate the “Tip Credit” for those in restaurants
 - Now they get a credit for tips, only get paid \$2.13 per hour now since they also receive tips
- **This could be devastating for restaurants**



UPDATE: \$15 Per Hour Measure Pulled!

- Friday Feb. 26, the Senate Parliamentarian indicated Congress cannot put a minimum wage measure in a budget reconciliation bill
- Not part of Biden Incentive Plan!!

Expect Biden's Department of Labor to be Active

- Selected Mayor of Boston Marty Walsh as new Secretary of Labor Jan. 7
- Approved March 22
- **Walsh has pledged to “reorient” the DOL towards workers**
- Former head of the Boston Building and Construction Trades Council
- He and Biden intend to make unions, worker safety and pay, and limiting employer rights a priority of their agenda



What Do We Expect to See??

- Welsh pushed the \$15 an hour statewide in Massachusetts, will do same here
- Raise minimum from \$7.25
- Will push OSHA on workplace safety
- Increase OSHA enforcement, amount of **penalties**
- Raise minimum salary back to \$913 per week (\$47,476 annual)
 - Currently \$684 per week
- Withdraw all opinion letters issued by Trump DOL
- Tackle head on the “misclassification” issue
 - Employee vs. Independent Contractor
 - **Refers to it as “wage theft” by employers**
 - Impose the California “ABC” test which seriously limits who can properly be classified as an IC

What's the Big Deal about Employee or Independent Contractor?

- Laws like worker's comp, unemployment, wage and hour, overtime, and Title VII and Age Discrimination cases all apply to "employees"
- Independent Contractors are NOT covered by these laws
- Exempted from forming a union under NLRA
- Make IC's responsible for own taxes (1099)
- Up to "employers" to prove independent contractor status

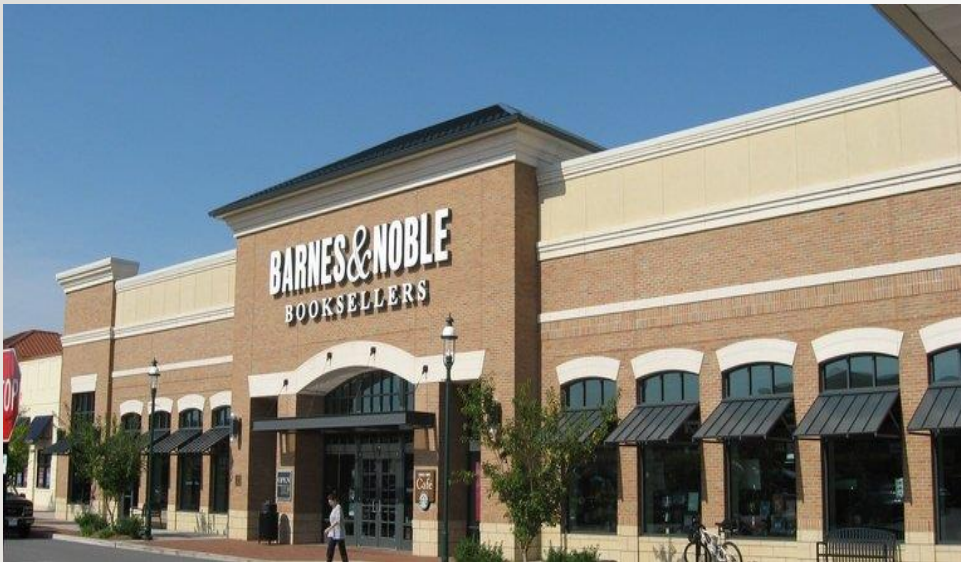
What are the Elements of IC Status?

- Depends on what law you are suing under, and what state you are in
- Most common element is the **lack of control** over day to day duties
- Some use the “**ABC**” test
- To classify someone as an independent contractor, the court said, businesses must show that the worker (a) is free from the control and direction of the employer; (b) **performs work that is outside the hirer's core business**; and (c) customarily engages in "an independently established trade, occupation or business.”
- **Factor B is the killer for IC status**

What Is Another Test for IC Status

- **Some use an easier “economic realities” test:**
- **Generally 11 factors looking at “extent to which the person is dependent on the alleged employer”**
- (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
- (2) the skill required in the particular occupation;
- (3) whether the “employer” or the individual in question furnishes the equipment used and the place of work;
- (4) the length of time during which the individual has worked;
- (5) the method of payment, whether by time or by the job;
- (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation;
- (7) whether annual leave is afforded;
- (8) whether the work is an integral part of the business of the “employer”;
- (9) whether the worker accumulates retirement benefits;
- (10) whether the “employer” pays social security taxes; and
- (11) the intention of the parties.

Examples of “Misclassification” Issue



- Barnes & Noble
- Classified the “café managers” in the Stores as exempt “managers”
- Job titles do not determine if exempt or not
- Found they did not have power to use independent authority to hire or fire, spent most of time doing same duties as non-exempt employees
- Agreed to pay \$910,000 to settle lawsuit (Feb. 26, 2021)

Lyft, Uber Sued in 3 States, Settles in California

- Lyft classified all drivers as IC's
- Sued in California
- Settled case for \$12.25 M
- Uber also facing same lawsuits
 - Settled case in Cal & Mich for \$20 M
 - 13,600 drivers
 - O'Connor v. Uber Technologies (N.D. Cal. March 11, 2019)



Other Examples

- Microsoft misclassified workers and freelancers as IC's
- Worked on site
- Same work teams alongside MS workers
- Same supervisors, same hours
- Only difference, no benefits
- Settled case -- \$96M, \$27 M attorneys fees
- Vizcaino v. Microsoft (9th Cir. 1997)



Domino's Agrees to Settle Case

- 3,000 delivery drivers in North Carolina
- Sued in March 2019
- Collective action
- Paid a per delivery fee or per mile fee
- Neither of those added up to minimum wage
- Failed to reimburse for delivery expenses
- Federal court judge approved a \$3 Million Settlement this month



Does Having a Written Independent Contractor Agreement Help?

- It definitely does
- But that alone will not win for you
- Must prove lack of control in court
- Recent case in Federal Court in Birmingham *Nemo v. RR Donnelly*
- He was an IC driver
- But he showed court RRD hired him, assigned him his route, made him use RRD “real time delivery” software, and he used their equipment
- Court found him to be an “employee”
- The IC Agreement said he would receive “no supervision about how to perform your agreed upon delivery services”
- **Evidence was the hub supervisor directed their work in many ways, showing control**
- Paid on same paydays as employees
- *Nemo v. RR Donnelley Logistics Services*, (Feb. 8, 2019)

Fed Ex Drivers found to Be Independent Contractors

- Court of Appeals in DC found Fed Ex drivers in Connecticut not to be employees
- There, Fed Ex able to show the drivers had “entrepreneurial opportunities” for gain or loss
- (1) they could hire other drivers,
- (2) they could sell their routes
- (3) able to operate multiple routes

Fed Ex Home Delivery v. NLRB (2009)



Newspaper Carriers Not IC's in San Diego

- Jury Verdict for \$11 M against San Diego Union-Tribune for misclassifying carriers and bundle haulers as IC, not employees
- **\$6.1 M attorney's fees**
- **Earlier settlement for \$22 M** against Freedom Communications in Orange County Register case
- All very fact specific



What about “Industry Practice?”

- Another recently filed case shows courts may not rely on the **defense of “COMMON INDUSTRY PRACTICE”** to classify as IC’s
- Drivers for 2 companies that operate quarries and sell aggregate products sued saying they did not receive overtime (FLSA)
- Had written IC agreements, but drivers claimed the 2 companies exercised “pervasive control” over their deliveries
- *Bailey v. Vulcan Materials* (filed March 8, 2021)



COVID-19 VACCINATIONS

- We finally have a vaccine
- Can You mandate it?
- Are there exceptions?
- What if someone says NO!
- Who should do it?
- What if your organization has a Union?
- Do we pay them for time to get it?
- What if someone gets sick, or dies?



Can We Mandate Employees Take Vaccine?

- Simply stated, **YES**
- EEOC issued a Guidance on Dec. 16
- Addressed a number of workplace vaccination questions
- EEOC said if **the employee poses a “direct threat” to himself or others by their presence in the workplace without being immunized, and that threat cannot be eliminated by reasonable accommodation,” you can deny the employee access to your facility**
- Explained how the mandatory requirement of a vaccine in the workplace could implicate 4 laws
 - **Title VII** (“religion”)
 - **ADA** (disability, duty to reasonably accommodate)
 - **GINA** (asking about relatives’ tests)
 - **Pregnancy Discrimination** (is this a consideration)
 - Let’s unpack each of those

Do You Really Want to Mandate it?

- Have you thought about how employees will react?
- Where does your facility rank on the hierarchy of “essential” work?
- What will you do if many refuse?
- Would it close down your business if you had a certain number of workers get COVID?
- Will you strategically give it to some departments and not others?
- SHRM poll in December showed 61% of organizations plan to only “encourage” vaccines
- 35% are uncertain which way they will go
- * *SHRM article Jan. 6, 2021*
- A February poll showed **only 6%** will mandate vaccinations

Two Exceptions to Mandating

- In the EEOC's Guidance, they recognized two important exclusions for employers to consider before making it mandatory for certain employees:
 1. **Objections based on Disabilities**
 2. **Objections based on Religion**



Disability Considerations

- The first exception to blanket mandating is an objection based on disability grounds
- ADA covered conditions
- Conditions that make it more likely to aggravate an employee's condition
 - Anxiety, PTSD
 - Allergies to certain vaccines
 - Extremely compromised medical conditions or pre-morbidities
- **Request doctor certification** that it is not advisable for this employee to be required to take the vaccine



Title VII – Religious Objections

- Got to be a “sincerely held religious belief, practice, or custom”
- Hard to define at times
- Does not extend to personal objections
 - Political either
- You may ask for supporting information from employee’s religious leader!
- I use a **Request for Religious Exemption form** for employee to certify
- Glad to send a copy
- Be sensitive here

Is This a “Religion?”

- An employee tells you she is part of the “**PASTA-FARIAN**” RELIGION
- They believe in a Flying Spaghetti Monster as their deity
- They were pirate costumes
- They celebrate two holidays:
 - “**Pastover**” (where large amounts of pasta are consumed) and
 - a more strict **Ramendan** (where only Ramen noodles can be eaten)
- Their heaven includes a beer volcano
- And their Hell is a place having no beer



Tips: How to Handle Asking About “Religion”

- **What Are ‘Religious’ Beliefs and Practices?**

- According to the EEOC, religious practices include the “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”
- **Religion typically concerns “ultimate ideas” about “life, purpose, and death.”**
- The EEOC doesn’t protect beliefs **merely** because they’re strongly held. Whether a practice is religious depends on the employee’s motivation.
- Social, political, or economic philosophies, as well as personal preferences, aren’t protected as religious beliefs under Title VII of the Civil Rights Act of 1964.

- **Does She Appear to Hold the Beliefs ‘Sincerely’?**

Consider the following factors in deciding whether the religious beliefs are sincerely held, none of which is automatically dispositive of the issue:

- **Whether the employee has behaved in a manner markedly inconsistent with the professed belief;**
- **Whether the requested accommodation is a particularly desirable benefit that’s likely to be sought for secular reasons;**
- **Whether the timing renders the request suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and**
- **Whether you have another reason to believe the accommodation isn’t being sought for religious reasons.**

Duty to Accommodate

- Apply the usual process for accommodating any other disability or request for religious accommodation
- Engage in the “**interactive dialogue**” with employee
- Question if it would be “more than a de minimis cost” to company (Religion)
- ADA standard is much higher (“significant difficulty or expense”)
- Questions to consider:
 - What is the nature of the accommodation sought?
 - How long will it be for
 - Would it compromise employee safety
 - Would it decrease workplace efficiency
 - Would it require co-workers to do more OT, or more than their share of potentially hazardous or burdensome work

Possible Accommodations to Consider

- Continued masking and social distancing
- Remote work
- Isolation to a particular work area
- Modified or staggered work schedule
- Reduced contact with public, other employees
- Transfer to a job with little or no contact with public or others



First Case on Religious Exemption from Vaccine

- Firefighter in Texas refused to take mandatory vaccine for tetanus, diphtheria, and pertussis (TDAP)
- He claimed he was an ordained minister, so exempt from vaccinations for religious reasons
- City offered him a choice of two accommodations:
 - (1) accept a position that did not require him to take a vaccination that offered same pay or benefits, or
 - (2) remain in current position and wear a respirator at all times while on duty
- He declined
- **City terminated him**

COURT: City Satisfied Duty to Offer a Reasonable Accommodation!

- Court noted that **the City's duty was to engage in the interactive process and offer a "reasonable" accommodation**
- **Does not have to be the one the employee prefers!**
- **Just got to be reasonable, and effective!**
- KEY: City promptly reviewed the accommodation request,
 - Identified possible accommodations
 - Presented them to employee
- Employers have recourse when an employee declines possible accommodations!!
- *Horvath v. City of Leander, TX* (5th Cir. Jan. 13, 2020)

Undue Hardship

- Just like in ordinary accommodation cases, you look to see if any proposed accommodation would be an **“undue hardship”** on your operation
- Must make an individualized assessment
- “One size does NOT fit all”
- Considerations
 - If an employee has been working remotely for 7 months, why is it all of sudden a hardship ?
 - That doesn’t seem like the employee would pose a “direct threat” to others

Is “Pregnancy” a Third Basis to Decline Vaccine?

- What if an employee told you she was afraid of the virus impacting her fertility?
- Would that be protected?
- Recent case filed against **Red Hook Tavern** in New York by a female server who was fired 3 days after she expressed concern about how the vaccine might affected her future fertility
- Owner: **“And, now we realize that we need to update our policy so it’s clear how the process works and what we can do to support them.”**
- **CDC – “the actual risks of mRNA vaccines to the pregnant person and her fetus are unknown because these vaccines have not been studied in pregnant women.”**

What if an Employee Says NO!

- You must decide if you want to mandate or encourage it
- Many employers are offering employee incentives for taking it
- Availability of FMLA or other unpaid leave until pandemic declared over
- If they say no, EEOC says you can ban them from the workplace if there is no way to reasonably accommodate them and they pose a “**direct threat**” to selves or others
- Other considerations:
 - Have there been other positives in the facility
 - Rate of vaccinations in community
 - Contact with others outside and risk of employee bringing it inside

POLL: WORKERS WILL DECLINE!!

- Most recent poll
- **40% of U.S. Workers say they will not get the vaccine***
- Even if the Employer requires it
- And if that means losing their job
- 69% concerned about side effects
- 41% say they don't trust the vaccines!
- 60% said they will take it for a \$100 incentive from employer
- **Challenge is for Management to address these concerns**
- Help employees understand WHY they need the vaccine
- *SHRM Feb. 24, 2021



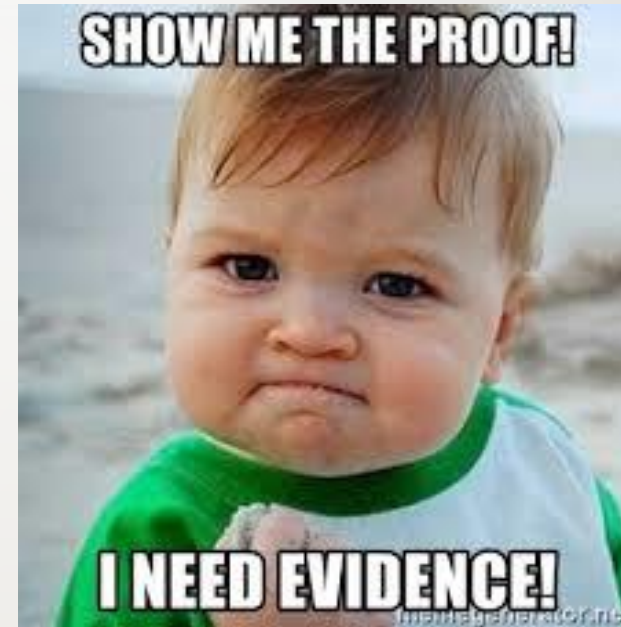
CDC COVID-19 COMMUNICATION TOOLKIT

- On Jan. 29, the CDC posted an on line toolkit for employers of “essential workers”
- To help employers educate employees about vaccines and benefits of vaccinations
- Contains form letters to send out, FAQ's, basic slides to present, Stickers, social media messages, and posters
- Great resource for you to communicate your Organization's position on vaccines



Can We Require Employee Show Us Proof of Vaccine?

- **YES**
- EEOC said simply requesting proof that an employee received vaccine is not likely to elicit information about a disability



Can We Ask an Employee WHY She Did Not Get the Vaccine?

- **NO!!**
- EEOC said subsequent questions about WHY an employee chose not to take a vaccine may elicit disability or medical information and would be subject to the “job-related and consistent with business necessity” standard
- If you are required to ask by a governing agency – like hospitals or state joint commissions – you may be required to ask and record the reason why.



Should My Company Give the Immunizations?

- It depends
- If you have adequate medical space or a clinic, maybe so
- Usually best to contract out with a qualified third party vendor (see next slide)
- Have employees sign a liability waiver



What if You Have a Union?

- If your employees are unionized, does that impact your ability to mandate a vaccine?
- National Labor Relations Board indicates that this will be a **“mandatory subject of bargaining”**
- This would mean you may not be able to implement this plan before you bargain over it with the union!



If the Employee Gets Sick, Are We Liable?

- What if you mandate vaccinations
 - What if an employee complains of being sick, cannot come to work
 - Or she dies from complications?
 - Are you liable?
- A severe allergic reaction to the vaccination is possible but rare, according to the CDC.
 - The CDC reported that 21 cases of anaphylaxis were detected after about 1.9 million initial doses of Pfizer's vaccine were administered
 - About 70 percent of reactions occurred within 15 minutes of receiving the vaccine.
 - The CDC issued guidance for managing anaphylaxis following COVID-19 vaccination.

What Would Alabama Do??

- Alabama law – Likely **YES**.
- **It will probably be covered by Worker's Comp**
- State AG Opinion in 2003.
- Smallpox vaccinations nationwide
- **Attorney General concluded that Alabama Courts would find the side effects from a mandated vaccine to be compensable**
- **May **depend on if mandated or not**, did we give the shot, or was it purely voluntary for the employee**
- **If you contract it out, the Public Readiness and Emergency Preparedness Act (PREP) should provide you immunity from claims of side effects of vaccination**





THE QUESTION OF COMPENSABILITY OF COVID-19 CASES

AN ANALYSIS UNDER
ALABAMA'S WORKERS'
COMPENSATION LAW

By: Stephen D. Palmer, Carr Allison I Birmingham, AL

- There is an excellent article in this Month's Journal of the Alabama Defense Lawyer's Association discussing the Compensability of COVID-19 cases under Alabama Workers' Comp Law

Status of Employer Liability Bill -- **UPDATE**

- State Sen. Arthur Orr (R-Decatur) pre-filed a bill that is intended to provide protection from frivolous lawsuits against businesses and entities for COVID-19
- **Immunity Bill PASSED AND SIGNED Feb. 12, 2021**
- Provides a “safe harbor” for businesses that made reasonable efforts to prevent spread of COVID
- Must be reckless or willful in complying with guidelines in effect at time to be liable
- What steps has your company taken??



Do We Pay the Employee for Time Spent in Line Getting the Vaccine?

- If you mandate it, fairness says YES employers pay for it
- Likely be considered time that benefits the employer
- Compensable
- OSHA says in a 1999 Opinion on Blood Borne Pathogen testing that:
 - *“the employer shall ensure that all medical evaluations and procedures including the hepatitis B vaccine, and vaccination series and post-exposure evaluation and follow up, are (A) made available at no cost to the employee.”*
 - **This would include travel expenses**



CDC RECOMMENDS EMPLOYERS PAY

- New Guidance issued last week
- March 16
- CDC recommends employers pay employees if they go get a vaccine
- Paid time off, transportation

Target is Paying Employees, Plus Transportation



- Announced Feb. 10, 2021 that they will pay up to 4 hours to hourly workers
- 2 hours per dose
- Pay \$15 each way for Lyft rides to and from appointments

New York State Mandates Paid Time to Vaccinate

- March 12, 2021
- Gov. Cuomo signed new law
- Entitles public and private employees to **up to 4 hours of paid leave for each COVID-19 Injection**
- Effective Immediately
- Cannot require employees to use any other kind of paid sick leave



Any State Laws on Mandating Vaccinations?

- Many states are considering legislation
- Many only apply to public employers
- **NY has proposed one to ban, and one to mandate**
- Minnesota law – felony for any business owner to mandate vaccine not otherwise required by federal or state law (10 years)
- Oregon – prohibits mandating unless required by federal or state law
- TN – considering a law to stop allowing parents to not immunize children during a pandemic

California Agrees, Employers Can Mandate Vaccine

- March 4, 2021
- California Dept. of Fair Employment and Housing (DFEH) updated its COVID-19 guidance
- **Employers can mandate**
- Employees can object on disability or religious bases
- Employers must “reasonably accommodate” requests, unless it would pose an undue hardship on operation
- **Not okay for employee to say they do not “trust the vaccine is safe.”**
- Can ask for proof of vaccinations



Alabama Bill to Prohibit Mandatory Vaccines

- Jan. 28, 2021
- Rep. Brown presented bill
- “This bill would prohibit an employer from taking adverse action against an employee or prospective employee based on the employee’s immunization status.”
- Moving through legislature
- Expected to pass??
- Expect many other states to adopt similar law

Has OSHA Implemented a Standard on COVID Testing?

- To date, OSHA has declined to do so
- In November, Biden urged OSHA to release and enforce an Emergency Temporary Standard to give employers and front line workers specific, enforceable guidance on what to do to stop the spread of COVID
- Now they operate from the **“General Duty clause” requiring all employers** to provide a safe workplace
- Biden OSHA emergency standard would require businesses to develop and create a detailed **workplace safety plan.**
- So, OSHA (presently) is not a bar to mandated vaccinations

OSHA UPDATE!!!

- Friday Jan. 29, 2021
- OSHA Issued Worker Safety Guidance for Coronavirus Protection Programs
- Guidance, not law
- Strongly suggests that employers implement a Coronavirus Protection/Prevention Program
- Elements:
 - Conduct a hazard assessment
 - Identify control measures to limit spread
 - Adopt policies and procedures for paid leave
 - NEW: says employers should provide free face coverings and masks
 - Discuss problems an employee may have wearing masks

EMERGENCY TEMPORARY STANDARD

- OSHA is coming out with a temporary COVID standard
- **By March 15!**
- It will be comprehensive
- The Guidance from January is a precursor to what you will need to be doing



UPDATE: OSHA PROPOSED COVID RULE STALLED

- It has been drafted, OSHA claims
- Fine tuning rules
- Should be next two weeks
- Will be clear rules on infection prevention requirements for all employers
- Strict prohibitions of airborne spread of virus
- **Yes, there WILL be one**
- And it will be onerous
- Areas to cover
 - **Proper Respiratory protection**
 - **Physical distancing**
 - **Implement COVID infection prevention programs**
 - **Treat CDC Guidance as a requirement**
 - **Unions pushing to guarantee pay and benefits for workers who miss time at jobs because of exposures**
 - **No retaliation for reporting**

OSHA ISSUES NATIONAL EMPHASIS PROGRAM (NEP)

- On March 12, 2021 OSHA Issued its NEP
- Targets specific high-hazard industries and worksites where danger of contracting COVID-19 is prevalent
- Will have UNPROGRAMMED INSPECTIONS
- Will begin MARCH 26, 2021
- Better get them ready
- Targeted industries:
 - Doctor's and Dentist's offices
 - Hospitals, Home Health Care
 - Nursing Homes
 - Meat and Poultry Processing
 - Grocery Stores
 - Department Stores
 - Restaurants

What About the Fear of COVID??

- What if an employee tells you she is afraid to come to work because of COVID?
- Executive Order from Biden
- **Instructed US Dept. of Labor to issue instructions to state unemployment agencies that will allow individuals to claim Unemployment benefits even if they quit their jobs because they feel unsafe working during the Pandemic**
- No details given about what constitutes a “valid fear” or if any underlying condition is required
- *“...The President is asking the Department of Labor to consider clarifying that workers have a federally guaranteed right to refuse employment that will jeopardize their health, and if they do so, they will still qualify for unemployment insurance.”*

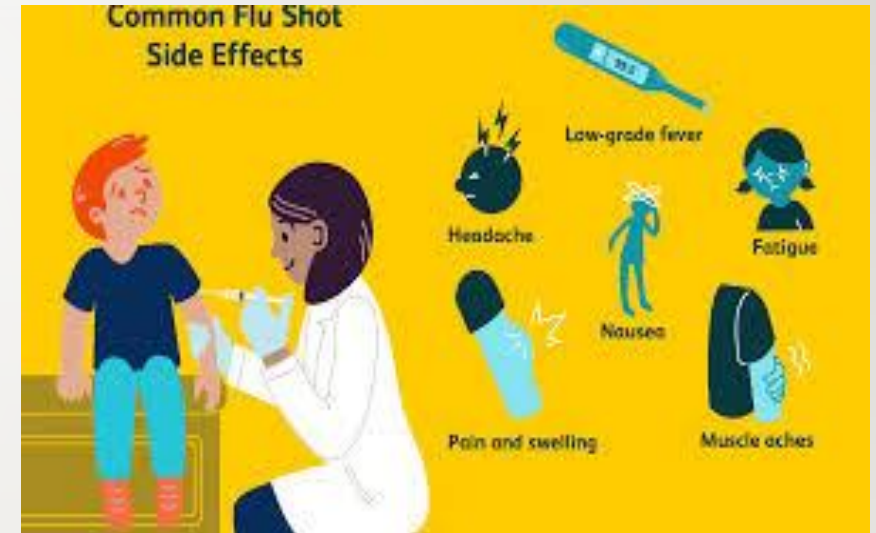
Can We Offer Incentives to Take Vaccine?

- Seems like a good idea
- EEOC said in a proposed rule on Jan. 7 that “high value incentives” would violate the ADA or GINA by coercing employees to participate in wellness programs, or taking medical exams, or collecting their medical information
- EEOC said gifts of minimal (“de minimis”) value, like water bottles or gift cards of modest value were OK
- **Biden – froze all pending federal agency regulations on Jan. 20, so we do not know now**



FLASH: What About Incentives for Day After Vaccine??

- We have all heard that many people have experienced flu like symptoms within 24 hours after receiving the second immunization
- 30% of companies surveyed indicate they will offer extra PTO for employees who voluntarily take the COVID vaccine
- **Think about scheduling vaccines on Fridays!!**



JUST RELEASED

- Does an employee who has been vaccinated (both shots) have to quarantine if they are exposed to COVID-19 positive person?
- **According to CDC on Feb. 10, NO**
- Still must mask and socially distance
- But if received both vaccines and it has been 14 days, they say NO
- But, only good for 30 days post vaccine



WAIT – NEW UPDATE ON “FULLY VACCINATED” PERSONS

- **Monday March 8, 2020**
- CDC Updates (again) ability of “Fully Vaccinated” people to mask or social distance
- Fully vaccinated means had **both** shots, **14 days expired**
- Or the one Johnson & Johnson shot
- **According to data compiled by the CDC as of March 24, 2021, 14% of the U.S. population is now fully vaccinated, and 25.7% have received at least one dose.**
-
- So, CDC says, if INDOORS you can:
- **Not wear a mask, not social distance if all in room with you are also fully vaccinated**
 - (so you can hug grand mom if both fully vaccinated)
- Same if some in room are not fully vaccinated, but are from same household, not at severe risk
- **KEY: No need to test or quarantine if exposed and you are asymptomatic**

CDC Guidelines for Reopening Schools

- This came out Friday afternoon Feb. 12
- Gives good ideas about reopening work
- 5 key COVID mitigation strategies:
 - Universal and correct wearing of masks
 - Physical distancing
 - Washing hands
 - Cleaning facilities and improving ventilation; and
 - Contact tracing, isolation and quarantine
- Noticeably absent was any requirement to mandate vaccinations for teachers
- *"Based on the data available, in-person learning in schools has not been associated with substantial community transmission."*

Alabama Medical Marijuana Bill

- Another bill we are following
- Had voted it down in 2019
- Gov. Ivey told legislature give her a bill and she would sign it in 2020
- Formed the Medical Cannabis Commission to come up with plan
- Had a bill ready to go last year
- But the **session closed due to Pandemic**



Same Bill Introduced Again This Year

- **Passed the State Senate on Wednesday Feb. 24**
- Creates a Medical Cannabis Commission
 - Oversee regulations, licensing for marijuana cultivators and processors and dispensaries
 - From “seed to sale”
 - Would cover 16 qualifying medical conditions
 - **Added Sickle Cell Anemia to list on last day**
 - An “approved” doctor must issue prescription
 - Does give employers many rights to regulate it
 - Can test employees
 - Can terminate if impaired at work



If Law Passes, then

- So what changes if this law is passed
- Must **modify your Drug Testing Policy**
- Most just prohibit “illegal drugs”
- If marijuana becomes “legal” got to change it, list marijuana specifically
- Remember, even if “legal,” an employee cannot come to work impaired
- Will be tested

Other Changes to Employee Handbooks

- Remote Work Policy
- Leave policy (paid leave?)
- Add **Sexual Orientation, Gender Identity, Trans-sexual status** as protected groups
- Add **Pregnancy** Status too
- Add Accommodations for Pregnancy and Disability
- Add Emergency Closing Policy
- Add vaping to your smoking policy
- Add Opiate look alike substances (Kratom and Tianna Red) as illegal
- Add Safety Policy (see what OSHA says on March 15, or so)
- OSHA looking at WORKPLACE EMERGENCY policy
 - Active Shooter training???
- **Update your CALL IN Procedure** for any absence, especially FMLA (call in to two places—YES)



Any Questions????



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