

# 'Post'-Pandemic Workplace & Employment Considerations

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## Did we pick our title too soon?

- Delta variant is causing cases to rise nationwide
  - New and potentially worse variants continue to evolve
- 85 million eligible Americans yet to get vaccinated (approx. 25% of U.S. population)
  - Washington Post, Aug. 25, 2021
- ICUs 100% full in Alabama, over 90% in Georgia, Florida, Mississippi, and Texas
  - ABC News, Aug. 19, 2021
- Breakthrough cases
  - 8,000+ hospitalizations or deaths in breakthrough cases, among 166 million vaccinated (CDC)

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## Employment Pressures on Health Employers

- Staffing
  - Staff burnout and friction
  - Managing workplace exposures to COVID-19 & Mandatory vaccinations
- Demand for continued remote-work arrangements
  - Interstate tax and compliance issues
  - Protecting patient and employer privacy
- Flexible scheduling and accommodations
  - Evolving regulatory requirements and state leaves

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## Our Focus:

- Mandating Vaccines
  - Can you, should you, and how??
- Remote Work Arrangements
  - Multi-state complexities and other challenges
- Pandemic-Related Accommodations
  - Employee childcare or vulnerable household members

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## Mandatory Vaccinations

- Increasing number of employers requiring vaccination
- Hospital associations of most New England states endorse vaccine mandates for health care workers:
  - Connecticut Hospital Association – June 24, 2021
  - Massachusetts Hospital Association - July 29, 2021
  - New Hampshire Hospital Association – August 3, 2021
  - Vermont Assoc. of Hospitals and Health Systems – August 5, 2021
- Increasing number of employees *want* employer to require it
  - 60% of Boston area workers across industries (Boston Globe, 6/4/21)
  - Massachusetts Nurses Association – August 19, 2021

## Legal Challenges

- Lawsuits challenging employer vaccine mandates have (so far) failed
  - Houston Methodist Hospital case
    - Dismissed – Employees are appealing
    - Can freely choose to accept or refuse vaccine; if refuse, employee simply needs to work somewhere else
    - Emergency Use Authorization – “option to accept or refuse”
      - DOJ Memo (7/26/21): Confirms EUA status does not prohibit employers and other entities from requiring them – not binding law, but undercuts argument
      - Pfizer vaccine received full approval 8/23/21
    - Right to privacy
    - Forced medical experimentation
  - Indiana University case
    - Denied preliminary injunction – on appeal
    - 14<sup>th</sup> Amendment constitutional rights
    - University policy isn’t forced vaccination—take vaccine, get exemption (religious or medical), take time off, or attend another university
  - Other cases filed, mainly against state agencies, school districts, hospitals, colleges and universities (500+ requiring it)

## How to Mandate Lawfully

- Mandating vaccination of health care workers is lawful if:
  - Job-related, and
  - Reasonable accommodations are offered for disabilities and religious beliefs.
- Beware of state laws
  - Montana has banned requiring vaccines as condition of employment
    - Made vaccination status a protected category under discrimination laws
    - Exemption for nursing homes, long-term care, assisted living facilities that need to comply with federal Medicare/Medicaid/CDC requirements
    - Health care facilities permitted to ask vaccination status and “implement reasonable accommodation measures” based on it
- For unionized workforces – likely a mandatory subject of bargaining
  - Early opposition from organized labor is shifting as public support for vaccine mandates rises

## Employee Privacy and Job-Relatedness

- Mandatory vaccination of employee may be viewed as highly intrusive
- Employer must have a legitimate interest for mandating vaccination
  - Safety of patients/customers
  - Safety of co-workers
  - Safety of employee

## Accepting and Reviewing Accommodation Requests

- Two possible exemptions:
  - Medical/Disability Accommodation Review
    - Combination of Employee Health function, Human Resources, and Infection Control
    - Employee health confidentiality requirements apply
      - Americans with Disabilities Act and perhaps state laws
  - Religious Accommodation Review
    - Combination of Human Resources and Infection Control
    - Proper discretion is appropriate to avoid claims of harassment or retaliation

## Medical/Disability Accommodations

- Two-Part Review:
  - Is employee legally disabled?
    - Any physical or mental impairment that substantially limits their ability to perform major life activities or bodily functions
      - Ex.: history of anaphylaxis to vaccines or other underlying condition that precludes vaccination
  - Can employee perform essential functions of their role unvaccinated *without posing a direct threat to themselves or others?*
    - Ex.: Are other mitigation efforts short of vaccination acceptable?
      - Frequent testing, social distancing, masking, fully-remote work
      - Modifications of duties, change in role?
      - Must account for evolving nature of virus

## Direct Threat Analysis

- Based on the employee's role, employer should consider:
  - (1) the duration of the risk
  - (2) the nature and severity of the potential harm
  - (3) the likelihood that the potential harm will occur; and
  - (4) the imminence of the potential harm.
  - Relies heavily on infection control expertise
- Unless donning constant heightened PPE, unvaccinated staff members, particularly during period of high community spread, could pose direct threat

## Religious Accommodations

- Two-part inquiry for *private* employers:
  - (i) Does receiving the vaccine conflict with an employee's "sincerely held religious belief, practice, or observance?"
  - (ii) Does the employee remaining unvaccinated pose an "undue hardship" to the employer?

## What beliefs qualify?

- **ANY religious** belief, *if sincerely held*, likely qualifies as an acceptable “religious belief, practice, or observance”
- Employer may inquire whether the belief, practice or observance is sincerely held
  - Ex. Has the employee received prior vaccines? Has the employee asked for similar accommodations in the past or talked about beliefs at work?
- **Not** religious beliefs:
  - Political beliefs
  - Distrust of government
  - Belief that COVID-19 is a hoax
  - Personal preference or convenience

## Undue Hardship

- “More than a minimal cost or burden on the employer”
  - Lower burden than with medical/disability accommodations
- EEOC considerations (May 28, 2021 – pre-Delta Surge):
  - The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19
  - The extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.

## Properly Storing Vaccination Records

- Vaccination records (like medical/disability accommodation requests) are employee health records
  - Not protected by HIPAA, but are protected under the ADA and some state laws
- Must be kept separate from regular personnel files
- When and how can vaccination status be disclosed?
  - May want permission to disclose in the event of workplace exposure
  - *Should managers be told which of their direct reports are unvaccinated?*

## Eliciting Compliance

- Incentives:
  - Gift cards, swag
  - Increased time off
  - Reimbursed expenses
  - Reduced health insurance premiums
  - Vaccine bonuses
    - All must account for those granted exemptions
- Disincentives?
  - Mandated mitigation practices like mask wearing, frequent testing, inability to attend certain in-person events
  - Unpaid suspension
  - Termination

## Remote Work

- The genie is out of the bottle...
  - Employers will have a hard time arguing roles that have been remote since March 2020 can only be done on-site
    - Previous argument that in-person attendance is an essential function of the job may not be persuasive
  - Employees like flexibility of remote work:
    - 63% of U.S. respondents to McKinsey Survey want to work remote at least 3 days a week
    - 30% would seriously consider changing jobs if required to report on-site five days a week
      - <https://www.mckinsey.com/business-functions/organization/our-insights/what-employees-are-saying-about-the-future-of-remote-work>

## Clear Remote Work Policies - Presence

- Anticipated hours/availability expectations while remote
  - Timekeeping guidelines for non-exempt employees
    - All time worked must be paid (including overtime), and all meal breaks taken
- Geographic location matters
  - Laws and taxes of state where work is performed generally prevail
    - Requires appropriate, multi-state payroll infrastructure, workers comp., benefits, etc.
- Expectation for on-site work?
  - If so, how often?
  - Requirement to be on-site within certain amount of time?

## Policies Cont. – Conduct & Performance

- Conduct policies still apply to remote employees if behavior impacts the organization, co-workers, or patients
- Managing performance remotely requires planning
  - Scheduled check-ins
  - Employee-acknowledged measures of performance
- Teambuilding, morale, and integrating new hires is a challenge
  - Potentially less advantageous for new hires due to difficulty solidifying relationships

## Policies Cont. - Expenses, Injuries, Travel Costs

- Any expense incurred **SOLELY** as a result of working remotely is likely reimbursable
  - Internet, office supplies, office furniture
  - Reimburse directly, or offer work-from-home stipend?
- Injury while remote is still a “workplace injury” for workers compensation purposes
  - Employer has obligation to provide safe workplace
    - Reasonable to require remote workplace inspections
- Remote employee traveling to employer’s site may be reimbursable

## Policies Cont. – Privacy and Confidentiality

- HIPAA requirements still apply
  - Digital PHI:
    - Restrict off-site access
    - Require use of only employer-provided equipment
    - Require storage of data only on employer servers accessed via VPN
  - Physical PHI:
    - Minimize use of paper PHI when possible
    - Locked/secure premises
    - Work performed in private/portioned location
- Controls over other confidential data
  - Ex. Human Resources, Research, Marketing & Financial Material
- Require work in private area

## Remote Work – Additional Considerations

- For out-of-state employees, will need local expertise
  - Legal, Tax, Immigration (I-9 Verifications)
- Written communication of expectations and policies (remote work policy or agreement) is crucial
- For unionized workforces, remote work is likely at least a mandatory subject of impact bargaining

## Pandemic-Related Accommodations

- Pandemic has upended everyone's life to some degree:
  - Deaths
  - Illnesses
  - Delayed non-COVID medical procedures
  - Delayed personal milestones, events, and transactions
  - Household loss of employment/income
  - Loss of care for dependents
    - Childcare/In-person schooling & elder care
- Inevitable that the above circumstances will interfere with employees' ability to work

## How must employers respond?

- Legal duty to accommodate? Probably not
  - Unless the matter concerns an employee's own disability, the employer usually can decide for itself whether it will or will not accommodate
- But must handle requests consistently for all similarly situated employees
- Define the scope and limitations of the accommodation provided
  - If rules or expectations are to be relaxed, identifying who qualifies, for how long, and other conditions is important

## HYPOS

- **HYPO:** Jen, an RN, texts her manager the night before her next shift that her children's daycare has closed due to a positive case of COVID-19. With her wife away for work, she is the only person who can watch her kids until the daycare opens next week, and she won't be into work until then. Her manager is skeptical since Jen previously requested vacation during this same period, which was denied. If the manager previously took Jen's co-worker Bob off the schedule for a week when he unexpectedly had to move his daughter out of her college dorm when the college closed due to the pandemic, how should the manager respond to Jen?

## HYPOS

- **HYPO:** Jackie, an accounts payable administrator, is not looking forward to the October 12 return-to-work date her hospital set for its office employees. She has enjoyed working from home for the last year, has been effective in her role, and at the same time was able to care for her elderly father (who is not vaccinated). Jackie requests to continue working from home because she is concerned that her return to the office, which would require her to take public transportation, could be a risk to her father's health. Is her employer required to allow her to work from home? Should it?

## HYPOS

- **HYPO:** Brad applied for a nursing position and was invited for an interview. When asked at the interview why he was looking for a new job, Brad said that his current employer is requiring vaccination and he won't get it. Your employer is considering requiring that all employees be vaccinated as well, unless they qualify for a medical or religious exemption.
  - Do you tell Brad that he may need to be vaccinated during the interview?
  - Can you decide not to give Brad an offer because he said he "won't get" the vaccine if your employer has yet to set a mandate?
    - What if he had told you he won't get it for medical reasons?

## HYPOS

- **HYPO:** Ryan is a clinical dietitian. He's been seeing all of his patients remotely through telehealth/videoconference for the past 19 months. You recently required that Ryan and employees in similar roles begin seeing patients in-person at least three days per week. Ryan requests to continue remote visits only, as he has been spending more time living at his lake house in Vermont and feels that he can treat his patients just as effectively by video. After you tell him that you're sorry but you can't make an exception for that reason, he submits a doctor's note recommending that he be permitted to work from home full-time as an accommodation for a generalized anxiety disorder. How do you respond?

## Questions & Answers

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## Thank you!

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