

Employment Law Update-November 2021

With COVID-19 Numbers Down, Vaccinations Up, Employer's Things-To-Do List

By: Malissa Wilson

For 18 months, companies have been consumed with navigating a myriad of operational challenges during this once-in-a-generation pandemic. HR departments have had the daunting task of interpreting in real time the onslaught of executive and state orders, congressional acts, and federal agencies guidelines to implement COVID-19 policies and procedures to address a variety of personnel matters from remote work to vaccination directives.

The time spent on these COVID-19-related matters has, unfortunately, left HR departments little time to step back and assess the new employment landscape created by the pandemic leaving companies potentially exposed to employment-related claims. Performing the following tasks will help companies to develop proactive strategies to address these areas of exposure.

Review medical or religious accommodation procedures.

The Occupational Safety and Health Administration (OSHA) recently announced a new emergency temporary standard requiring employees to choose to either be fully vaccinated or undergo weekly COVID-19 testing and wear a face covering at work if their employer doesn't have in place a mandatory COVID-19 vaccination policy. The rule applies to private-sector companies employing 100 or more employees and comes after many companies have already implemented COVID-19 vaccination policies. For companies implementing a mandatory vaccination policy in response to OSHA's new rule, they should review their procedures for handling requests for medical and religious exemptions to ensure compliance with the legal obligations to employees with genuine religious or medical need for an exemption to avoid legal claims. Companies with COVID-19 mandatory vaccination policies have seen an increase in the number of medical and religious exemption requests. The sheer number of requests over a short period of time before a mandatory vaccination deadline may catch some HR departments off guard and lacking the bandwidth to timely process the requests leading to missteps that could result in violations of [Title VII and the ADA](#). Companies should ensure that their procedures for processing accommodation requests are streamlined by having the internal infrastructure to receive, review and timely manage these requests.

Review all COVID-19-related policies.

Companies should identify any policies and procedures that were implemented in response to the

pandemic, such as leave and remote work policies, and assess whether they need to be amended or removed if they were based on any congressional act or stay-at-home order that has expired or been amended, or if they are no longer needed because the company has resumed in-person operational activities in response to high vaccination numbers and low transmission rates. Many companies are keeping remote work policies with some modifications because, for example, technology upgrades in response to the pandemic have ensured productivity while working remotely. Because remote employees are generally subject to the laws of the state where they are physically located and perform work, it's important that a remote work policy clearly establishes any location parameters to avoid legal issues involving business taxes and workers compensation insurance. Companies should also review their timekeeping policies for compliance with wage and hour laws by accurately capturing and paying for hours worked to prevent remote employees from working unauthorized overtime.

Assess how to evaluate employees during a pandemic.

Conducting meaningful and fair evaluations of an employee's work performance during pre-pandemic times was challenging enough and now, during the pandemic, it's even more challenging. With many employees having worked during the evaluation period either remotely under a company's remote work policy or as a workplace accommodation, and with most markets experiencing periods of slowdown, many companies have elected to suspend evaluations during this period.

For companies who desire to continue evaluating employees, including remote employees, an assessment of the evaluation process may help to identify and prevent certain bias against remote employees, many of whom may be members of a protected class. First, companies should review their assessment criteria because, as currently written, the criteria may not accurately and fairly measure the performance of an employee who has worked or is working remotely. For example, assessing "teamwork skills" may look differently for remote employees who had to rely on video and phone conferences to engage with superiors compared to an in-person colleague whose physical presence in the workplace allowed for spontaneous collaborations with superiors.

Second, once the assessment criteria have been tweaked to consider remote employees, a refresher

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training for managers should be conducted to ensure alignment on how to conduct evaluations with employees who worked remotely or who are working a remote or hybrid schedule during the evaluation period. Companies should avoid evaluation ratings that result in a suspiciously higher number of low performance evaluations of remote employees compared to the performance evaluations of in-person employees and to the performance

evaluations of the same remote employees in pre-pandemic years.

There's no better time than the present to reassess policies and procedures implemented in response to the pandemic. The [Labor and Employment Team](#) at Forman Watkins stands ready to assist companies with making the necessary adjustments to their policies and procedures to reflect the new pandemic "norm."

OSHA'S New COVID-19 Workplace Protection Rule

The [emergency temporary standard \(ETS\)](#) recently issued by OSHA requires employers to implement certain COVID-19 workplace protection policies related to vaccinations, testing and face coverings. Although the ETS is currently being challenged by some companies and states making its future tentative, employers should consider plans to comply with the rule by the December 6th effective date for the face covering requirement and the January 4th effective date for employees to become fully vaccinated or begin weekly COVID-19 testing. The following are a few highlights of the ETS:

- **100 Employees or More Threshold** – The ETS covers employers with 100 or more employees – full and part-time. Independent contractors do not count towards the total number of employees. All employees, whether working remotely or in person, are included in the count. Moreover, a company with multiple offices would need to count employees at all locations and the ETS would apply if the count is 100 or more regardless if there are offices with only one or two employees.
- **Mandatory Vaccination Policy** – There is only one exception to the ETS's mandatory vaccination policy and that is to require employees to wear a face covering in the workplace *and* get tested for COVID-19 weekly. It doesn't matter if the employer also follows the CDC guidelines, they are not a substitute for the ETS requirements.
- **Employee Vaccination** – Employers cannot require employees to use personal time or sick leave to get vaccinated. Employers are required to provide employees reasonable time during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay. Employers may require employees who cannot work because they are experiencing side effects from the vaccine to use their paid sick leave, but employers cannot require employees to accrue negative paid sick leave or borrow against future paid sick leave.
- **COVID-19 Testing** – The ETS does not require employers to cover the costs associated with COVID-19 testing of their employees. (Other laws, regulations, or collective bargaining agreements may require employers to pay for testing.) An over-the-counter COVID-19 test may satisfy the ETS's testing requirement. However, an OTC test cannot be both self-administered *and* self-read *unless* observed by the employer or an authorized telehealth proctor. Employees who are not "fully vaccinated" must be tested. Employees are not considered "fully vaccinated" until two weeks after receiving the final dose of the vaccine. For employees who got the Pfizer or Moderna vaccine, they are not "fully vaccinated" until two weeks after the second dose.
- **Scope of ETS** – OSHA has exempted unvaccinated employees who telework, do not report to a workplace where others are present, or work outdoors from the scope of the ETS.
- **How Long** – According to the OSHA's FAQs: "OSHA anticipates that the ETS will be in effect for six months for the date of publication in the Federal Register (November 5, 2021)." The length of time the ETS will remain in effect will be based on trends in COVID-19 infection and death numbers.



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