

COVID-Related Employer Obligations

By Dan Eaton



The federal government and many states are ending COVID-19-related emergency declarations issued in the early days of the pandemic in 2020 and extended since. These declarations led to tailored workplace regulations concerning safety and discrimination, supplemental compensation and benefits, and mandates on employee masking, spacing, protected leave, and vaccination.

Some paid leave mandates at the state and federal levels came with corresponding employer tax benefits. For example, the federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted March 27, 2020, gave employers tax credits for keeping employees on the payroll despite COVID-19-related economic hardship. The federal Families First Coronavirus Response Act of 2021

also provided a tax credit to employers with fewer than 500 employees that gave their employees paid leave. Congress also provided subsidies to state unemployment insurance benefits early in the pandemic through the Pandemic Unemployment Assistance (PUA) program.

State legislatures and regulators, in turn, have enacted their own forms of paid leave and workplace tax incentives, as well as special rules related to unemployment and workers' compensation benefits.

We are now entering a fourth year with COVID-19, which soon will no longer be called a pandemic. Things have changed. Because pronouncements from executive agencies, legislatures, and courts are coming so rapidly in the new phase of COVID-19, it is impossible to provide definitive guidance about what employers across jurisdictions must, may,

and may not do. Since its first appearance, the coronavirus has been moving faster than the speed of law. This article identifies the recurring legal issues that employers and the attorneys who advise them have faced as the pandemic has evolved and that they continue to face as the pandemic formally ends. The article concludes with a list of resources available to keep up with COVID-19-related legal mandates and guidelines.

WORKPLACE SAFETY

Every employer has a legal duty to maintain a safe and healthful workplace. That duty stems from federal Occupational Safety and Health Administration laws and regulations or from the laws and regulations of the 21 states plus Puerto Rico that have their own authorized occupational safety and health agency.

As it applies to the latest phase of COVID-19, a non-exhaustive

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checklist applicable to the general workplace may include the employer's duty to:

- Establish and distribute a plan for preventing the spread of COVID-19 in its particular workplace, either separately or as part of the employer's comprehensive injury and illness prevention program.
- Provide masks at no cost to employees upon request.
- Allow employees to wear masks in the workplace, even where masks are not mandated.
- Provide disinfecting supplies such as sanitizing hand cleanser dispensers throughout the workplace.
- Alter office ventilation systems to improve air purification, such as installing high-efficiency particulate air (HEPA) filtration systems/units.
- Involve employees in identifying COVID-19-related workplace hazards and cost-effective ways to mitigate those hazards.
- Educate employees in health and safety policies and practices designed to stop the spread of COVID-19, including through posters and the dissemination of information from government public health and occupational safety agencies.
- If third-party workers, such as employees of vendors, have been in close contact with an employee known to have contracted COVID-19, inform such

workers about their potential exposure to COVID-19 (note, however, the corresponding duty not to reveal the identity of the infected employee).

- In some jurisdictions, encourage employees to get vaccinated and, when showing symptoms, to get tested, even as mandates related to providing

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employees with paid time off for these purposes have expired in many places.

A few caveats: First, some workplaces with especially vulnerable populations, such as health care and senior care facilities, may continue to be subject to stricter rules.

Second, protected employee whistleblowing has been an important spur to agency safety investigations and employee litigation. Investigations and lawsuits may lead to substantial fines, operational disruptions, and other liability. This is yet another reason for employers to enlist their workforces in constructing workplace policies and practices and how to apply them.

Third, in most places, vaccinated and unvaccinated individuals are not subject to different rules as they once were. Most social-distancing mandates also have been dropped.

DISCRIMINATION AND ACCOMMODATION

The U.S. Equal Employment Opportunity Commission (EEOC) and state equal employment opportunity agencies have provided regularly updated guidance about how employers should or must address the special equal opportunity challenges the pandemic has presented to the application of existing rules related to disability and workplace privacy.



Courts also have provided lagging guidance in these areas. Here are a few generally applicable principles that have emerged:

- An employer may ask an employee if he or she is infected with COVID-19 if the employee is exhibiting symptoms of the disease and may exclude an infected employee from the workplace.
- An employer may not ask an employee whether someone in his or her household has been infected with or exposed to COVID-19.
- In many jurisdictions, an employer may require its employees to receive government-approved vaccinations as long as the employer accommodates those with bona fide religious objections and with health conditions that would be aggravated

by vaccinations. In some jurisdictions, vaccine mandates are prohibited.

- An employer may provide positive and negative incentives for its employees voluntarily to get vaccinated by a non-employer health care provider or non-employer agent.
- An employer must keep information about an employee's vaccination status strictly private and maintain it separate from the employee's personnel file.
- Courts and regulators are still working out what constitutes a bona fide religious objection to vaccination, what evidence is sufficient to establish the objection, and how an employer must accommodate a religious objection to a vaccine. The EEOC has posted the form its own employees complete to request a religious accommodation of any kind from the agency (<https://tinyurl.com/2myzbwwj>).
- An employer is not required to choose an employee's preferred accommodation—whether for a disability caused by COVID-19, a religious objection to vaccination, or otherwise—where there is more than one available reasonable accommodation. An employer should carefully consider an employee's preferred accommodation and explain to the employee why the employer opted for an alternative that is less expensive or disruptive.

- An employer is not required to provide an accommodation that would impose an “undue hardship” on the employer. Courts and regulators have different tests to determine whether the employer has met its burden of showing any accommodation would impose undue hardship. This term the U.S. Supreme Court will consider whether the current test for when a religious accommodation constitutes an undue hardship under federal law is too easy for an employer to meet. (*Groff v. DeJoy*, Docket 22-174.)
- Remote work, or telework, is an accommodation an employer may provide an employee, but it is not a right unless it is the only reasonable accommodation available. Where telework is offered, it must be offered without regard to a person's protected classification, which may include status as a caregiver of a person with a protected classification.
- An employer may not retaliate against someone for taking job-protected leave or for complaining about discrimination based on their disability, religion, or other protected classification, whether related to COVID-19 or not.

COMPENSATION AND BENEFITS

The general rules requiring employers to pay employees timely and provide employees with paid or unpaid leave as required by

applicable federal, state, or local law have had COVID-specific applications. For example:

- An employee has the right to reimbursement for expenses reasonably necessary to work remotely, including the cost of a Zoom or Microsoft Teams account if used for virtual meetings. The employer, however, retains the right to determine what expenses are reasonably necessary for employees to perform their jobs remotely.
- Employee privacy laws and rules in particular jurisdictions may limit an employer's ability to monitor its employees remotely using artificial intelligence.
- In states such as California that prohibit use-it-or-lose-it vacation policies, an employer may not be obligated to pay employees the value of their accrued and unused vacation time until an announced temporary furlough becomes a permanent layoff.
- An employer may be obligated to reimburse employees for employer-imposed COVID-related costs, such as employer mandates to test and, once the free government vaccination program expires in the coming months, to get vaccinated if those costs are not covered by employer-provided insurance.
- In some jurisdictions, an employer must allow its employees to use unused paid time off for their own COVID-19 infection or

to care for an infected loved one.

- Employers generally must inform employees of government benefits that may be available to them if their health or economic well-being is affected by COVID-19. Available benefits may include short- and long-term disability benefits and workers' compensation benefits.

The laws and regulations related to COVID-19 compensation and benefits are minimums. An employer may always provide more generous COVID-19-related compensation and leave benefits than the law requires. Erring on the side of generosity is probably prudent, if it is economically feasible, because definitive answers to questions about the scope of employee rights are likely to come from court rulings issued months, even years, after the issue arises.

RESOURCES

Employers and those who guide them must be alert to shifts in COVID-19-related regulations, legislation, and court rulings. Businesses and those that provide legal counsel to them should regularly consult updates issued by the following sources, most of which have COVID-19-specific pages:

- The U.S. Department of Labor (<https://tinyurl.com/mv529scx>) and state counterparts, including those departments that address workplace benefits, workers' compensation, and unemployment insurance;
- The federal and state

occupational safety and health agencies (<https://tinyurl.com/2p8czzat>), particularly as they concern COVID-19-specific emergency standards and guidance;

- The U.S. Centers for Disease Control and Prevention (<https://tinyurl.com/2x4kxfx9>) and state and local public health agencies where the business operates, as evolving guidance from these agencies may be incorporated into executive or legislative rules by reference;

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- The U.S. Equal Employment Opportunity Commission (<https://tinyurl.com/2p9eudp6>), whose guidance was last updated in July 2022, and state and local equal employment opportunity agencies;
- The Job Accommodation Network, especially its Workplace Accommodation Toolkit (<https://tinyurl.com/5dc727zt>);



Dan Eaton (eaton@scmv.com) is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek, where his practice focuses on defending and advising employers. He writes a biweekly "Law at Work" column for the *San Diego Union-Tribune*. He also is an instructor at the San Diego State University Fowler College of Business, where he teaches classes in business ethics and employment law.

- The U.S. Chamber of Commerce (<https://tinyurl.com/3v8whu5s>) and its state and local affiliates, particularly because these groups usually provide member alerts on significant legislative and regulatory developments and significant court rulings; and
- The Society for Human Resource Management (<https://tinyurl.com/yc34jhsz>) and its state and local affiliates.

CONCLUSION

While we can mark the pre-COVID-19 period, we may never be able to speak of a post-COVID-19 period, any more than we can speak of a post-flu period. The federal legislative and regulatory response to COVID-19 appears to be receding. At the same time, some state legislatures and state and local regulators are constructing a durable legal framework for addressing what many once thought would be a temporary problem. That is happening as courts provide answers on a rolling basis to legal questions presented early in the pandemic and those that are newly emerging.

The charting of what was uncharted legal territory will make the counselor's job of guiding clients through COVID-19 in the coming years—yes, years—both less complicated and more distressing. ■