

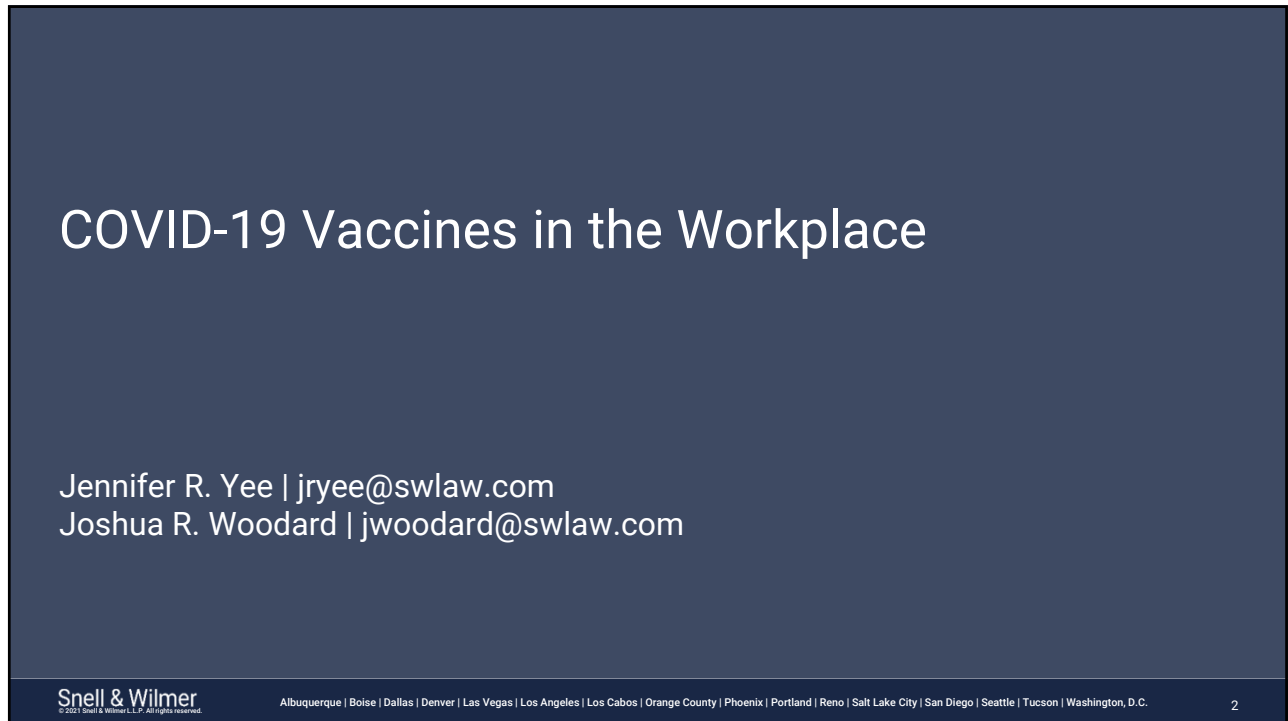
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*Thank you for joining us for the 2021
Employment Law Tool Kit Webinar
Series: Understanding Employment Law
Issues Affecting Today's Workplace*

Session 2: More Issues for All Employers and
State-Specific Updates | November 18, 2021
The webinar will begin shortly.

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COVID-19 Vaccines in the Workplace

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Overview

- COVID-19 Vaccines in the Workplace: What Employers Need to Know
 - What about President Biden’s vaccination mandates?
 - **Large employer (100+ EEs) vaccine and testing mandate (ETS – Emergency Temporary Standard) issued by Fed OSHA November 4 but stayed by federal appeals court on November 12, 2021, until further notice**
 - Can an employer offer a monetary incentive to employees to get the vaccine?
 - Can an employer require their employees receive a vaccine?
 - What are the legally required exceptions?
 - Can I ask an employee for support of their religious or disability-based exception?
 - Examples of reasonable accommodations for employees who can’t/won’t get vaccinated because of a protected reason
 - Confidentiality of employee medical information – which laws apply?

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What About President Biden’s Vaccination Mandate?

Biden’s September 9 announcement for large private employers:

- Occupational Safety and Health Administration (OSHA) developed an emergency temporary rule (ETS) that requires all employers with 100+ employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.
- **OSHA issued the ETS November 4, 2021; it was stayed (suspended) on November 12, 2021, until further notice**
- If upheld, this requirement will impact 80-100 million workers in private sector businesses



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What About President Biden’s Vaccination Mandate? (cont.)

Fed OSHA’s ETS for Large **Private Employers**:

- Emergency Temporary Standard
 - No public comment
 - No formal rule-making
 - Normally takes years
 - OSHA must prove “grave danger”
 - Valid for only 6 months

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What About President Biden’s Vaccination Mandate? (cont.)

Fed OSHA’s ETS for Large **Private Employers**:

- Announced ETS
 - November 4 issued by OSHA
 - November 5 – set to be effective
 - Would expire May 6, 2022
 - Announced Rule Making
 - Comments due by January 4
- ETS Enforcement
 - Fed-OSHA
 - Effective immediately
 - State plan states (20+ states)
 - Includes Arizona, California, Nevada, New Mexico, Oregon, Washington, Utah

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What About President Biden's Vaccination Mandate? *(cont.)*

Fed OSHA's ETS for Large **Private Employers**:

- State plan states that must address ETS
 - 15 days to notify OSHA
 - 30 days to adopt
 - Hold public comment?
 - "At least as effective as"
 - Approval does not always happen

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What About President Biden's Vaccination Mandate? *(cont.)*

Fed OSHA's ETS for Large **Private Employers**:

- U.S. Court of Appeals - Fifth Circuit (New Orleans) decision
 - Saturday, November 6 – ETS suspended
 - Friday, November 12 – ETS suspension continued
 - "Cause to believe there are grave statutory and constitutional issues with the mandate"
 - Multi state politicians and business groups against ETS
 - 30+ lawsuits
 - State statutes
 - Texas, Montana, Tennessee, Florida
 - Preempted by Fed-OSHA

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What About President Biden’s Vaccination Mandate? *(cont.)*

Fed OSHA’s ETS for Large **Private Employers**:

- OSHA’s Response to the Stay:
 - “While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”
- What does OSHA’s Response mean?
 - OSHA’s announcement would lead one to believe that if, following the present litigation, the ETS is found to be valid and enforceable by the Sixth Circuit panel, Federal-OSHA may publish new time deadlines to comply with the ETS provisions.

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What About President Biden’s Vaccination Mandate? *(cont.)*

Fed OSHA’s ETS for Large **Private Employers**:

- 6th Circuit Court of Appeals won the lottery and will hear the consolidated lawsuits challenging the ETS
- Why did this matter?

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What About President Biden’s Vaccination Mandate? (cont.)

Fed OSHA’s ETS for Large Private Employers:

- Application
 - 100 or more employees – nationwide (regardless of vaccination status or where they perform their work)
 - Part-time, seasonal, temporary, remote included
 - Independent contractors do not count
 - Exclusive outside workers included in 100-employee count (even if exempt from vaccine requirement)
 - Exclusive remote workers included in 100-employee count (even if exempt from vaccine requirement)
 - Employees covered by healthcare ETS
 - Determining if employer hits 100 employee threshold is made at any time ETS is in effect – once you hit 100 employees, you are subject to the ETS while it is in effect, even if you later drop below 100 employees

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What About President Biden’s Vaccination Mandate? (cont.)

Fed OSHA’s ETS for Large Private Employers:

- Employer’s two path choices
 1. Mandatory vaccination policy
 - All employees fully vaccinated by January 4
 - New employees, as soon as practicable
 - Exception
 - Medical condition
 - Sincerely held religious belief
 - Exempt employees
 - Wear face covering
 - Weekly COVID-19 testing
 2. Test policy
 - Two choices for employees
 - Fully vaccinated by January 4
 - Provide documentation of vaccination
 - Paper or electronic
 - Submit to weekly testing and masking, if working with employees (e.g., not remote or exclusively outdoors)

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What About President Biden's Vaccination Mandate? (cont.)

Fed OSHA's ETS for Large Private Employers:

- Unvaccinated employees
 - Weekly testing and face covering required
- Testing
 - Viral test, like nucleic acid amplification test (NAAT) or antigen test (NOT antibody test)
 - Antigen tests – only type of diagnostic tests that can be self-administered.
 - To be valid, test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor
 - Cost bore by employee (maybe)
 - Check state statute and other relevant laws (e.g., ADA requires employer to absorb cost of testing for employees who get an exemption for a disability accommodation?)

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What About President Biden's Vaccination Mandate? (cont.)

Fed OSHA's ETS for Large Private Employers:

- Employee benefits
 - 4 hours paid time off to get vaccinated *during work hours* (each primary vaccination dose)
 - No extra paid leave if vaccination dose occurs outside of work hours
 - Cannot force employees to use their existing paid sick or other paid leave
 - "Reasonable" time off (e.g., two sick days per primary dose) to recover from side effects
 - If an employee already has accrued paid sick leave, employer can require employee to use that pre-existing paid sick leave when recovering from side effects (not paid vacation leave that is tracked separately)
 - Cannot force employees to use advance or impose a negative sick leave balance in the future for time off taken for side effects
 - If no existing paid sick leave is available to the employee, additional sick leave needs to be provided (likely needs to be paid, per the conservative approach, but not entirely clear)

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What About President Biden's Vaccination Mandate? *(cont.)*

Fed OSHA's ETS for Large **Private Employers**:

- December 6, 2021**
 - Establish vaccination policy (paragraph (d) of ETS)
 - Mandatory vaccination policy, or
 - Option of offering testing/masking policy for unvaccinated employees (two policy templates on OSHA's website)
 - Determine each employee's vaccination status (paragraph (e) of ETS)
 - Obtain acceptable proof of vaccination (paragraph (e) of ETS)
 - Establish employee vaccination status roster and maintain records (paragraph (e) of ETS)

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What About President Biden's Vaccination Mandate? *(cont.)*

Fed OSHA's ETS for Large **Private Employers**:

- December 6, 2021**
 - Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j) of ETS)
 - Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k) of ETS)
 - Make certain records available, if requested (paragraph (l) of ETS)

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What About President Biden's Vaccination Mandate? (cont.)

Fed OSHA's ETS for Large Private Employers:

- January 4, 2022**
 - Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g) of ETS)
- **How long will the legal challenges take to resolve?**
 - Deadlines suspended for employers pending outcome of legal challenges – no enforcement of ETS deadlines by OSHA in the meantime

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What About President Biden's Vaccination Mandate? (cont.)

Fed OSHA's ETS for Large Private Employers:

- How much time would an employee have to get vaccinated before January 4, 2022**?
 - **For the Moderna vaccine**, the primary vaccination series takes 28 days to complete. Employees receiving the Moderna series therefore must get their first dose **on or before December 7, 2021** and get their second dose 28 days later.
 - **For the Pfizer-BioNTech vaccine**, the primary vaccination series takes 21 days to complete. Employees receiving the Pfizer-BioNTech series therefore must get their first dose **on or before December 14, 2021** and get their second dose 21 days later.
 - **For the Janssen (Johnson & Johnson) vaccine**, the primary vaccination takes 1 day to complete. Employees who receive the Janssen vaccine therefore must get their one Janssen dose **on or before January 4, 2022** to be exempt from the testing requirements of paragraph (g) of the ETS.
- If an employee receives all primary vaccine doses by January 4, 2022, the employee does not have to be tested, even if the employee has not completed the two-week waiting period after the final dose to be "fully vaccinated"

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What About President Biden’s Vaccination Mandate? (cont.)



Biden’s September 9 Executive Order applicable to Federal contractors and subcontractors:

- Covered contractors must require full vaccination in “any workplace locations...in which an individual is working on or in connection with a Federal Government contract or contract-like instrument” except where employee is legally entitled to an accommodation (disability or religious)
- Covered contractors are required to ensure all covered employees are vaccinated for COVID-19 no later than **January 18, 2022 (extended deadline)** (or by the first day of performance on a newly awarded covered contract, newly exercised contract, newly exercised option, or newly extended or renewed contract).
- Covered contractors also must ensure that CDC **masking and physical distancing requirements** for employees and visitors are met at covered workplaces
- Covered contractors must **designate a person to coordinate compliance** with the “Safer Federal Workforce” Guidelines published here: <https://www.saferfederalworkforce.gov/contractors/>

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For Employers Not Subject to a Valid Government Workplace Vaccine Mandate

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Can an Employer Offer a Monetary Incentive to Employees To Get the Vaccine?

- **Yes!**

- Department of Labor (DOL) guidance = vaccine incentive payments do not need to be included in non-exempt employees' regular rate for overtime purposes
- What if an employer or its agent administers the vaccine?
 - Any incentive (both rewards and penalties) must be "not so substantial as to be coercive."
 - Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel "pressured" to disclose protected medical information.
- Incentive limitation does NOT apply if employer offers incentive for employees to voluntarily provide confirmation of COVID-19 vaccination from a third-party provider



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Can an Employer Require Their Employees Receive a Vaccine?

- **YES, subject to certain legally-required exceptions:**

- **ADA** – An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA-qualifying disability that prevents him/her from taking the vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense).
- **Title VII** – If an employee's sincerely held religious belief, practice, or observance prevents him/her from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).



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Can I Ask an Employee for Support of Their Religious or Disability-Based Exception?

- **YES!**

- Examples of types of questions you can ask when evaluating a **religious** accommodation request:
 - Please identify the nature of your religious belief.
 - How long have you held your religious belief?
 - Please identify the specific tenets (i.e., doctrines or canons) of your religious belief that conflict with our vaccine mandate.
 - Please identify the practices, rituals, and/or observances that conflict with our vaccine mandate.
 - Do you have any written literature that explains your religious belief and how it may conflict with our vaccine mandate?
 - If so, will you please share with us?



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Can I Ask an Employee for Support of Their Religious or Disability-Based Exception? (cont.)

- Do you have any written literature that explains that your religious belief does not conflict with our vaccine mandate?
 - If so, will you please share with us?
- Do you have any statements from religious leader(s) knowledgeable regarding your religious belief, observance, or practice that conflicts with our vaccine mandate?
 - If so, will you please share with us?
- Have you communicated your religious beliefs that may conflict with our vaccine mandate with co-workers?
 - If so, did you communicate in writing (text, email, or otherwise)?
 - Will you please share with us?
- Have you communicated your religious beliefs that may conflict with our vaccine mandate with individuals other than co-workers?
 - If so, who?
 - If so, when?
 - If so, what was said by you?
 - If so, did you communicate in writing (text, email, or otherwise)? Will you share them?



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Can I Ask an Employee for Support of Their Religious or Disability-Based Exception? (cont.)

Examples of questions you can ask when evaluating a **disability** accommodation request:

- Written certification from employee

Part 1 – To Be Completed by the Employee		
<small>[Agencies should modify these fields as needed for purposes of identifying the employee.]</small>		
Employee Name	Date of Request	
Department	Division	
Position	Supervisor	Phone Number
Medical or Disability Exception Request I am requesting a medical exception to the requirement for COVID-19 vaccination or a delay because of a temporary condition or medical circumstance. I declare that the information I have provided is true and correct to the best of my knowledge and ability.		
Employee Signature		
Print Name	Date	

- **Source:** Sample form from the federal government for federal contractors, available here: https://www.saferfederalworkforce.gov/downloads/DISABILITY%20REQUEST%20FORM%20-%2020211004_510pm%20-%20MH508.pdf
- **Part 1 of form:** "I am requesting a medical exception to the requirement for COVID-19 vaccination or a delay because of a temporary condition or medical circumstance. I declare that the information I have provided is true and correct to the best of my knowledge and ability."

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Can I Ask an Employee for Support of Their Religious or Disability-Based Exception? (cont.)

- Examples of questions you can ask when evaluating a **disability** accommodation request:
 - Written certification from employee's medical provider:

Part 2 – To be Completed by the Employee's Medical Provider
Employee Name
Medical Certification for COVID-19 Vaccine Exception Dear Medical Provider: [AGENCY NAME] requires its employees to be fully vaccinated against COVID-19 pursuant to Executive Order of the President of the United States. The individual named above is seeking a medical exception to the requirement for COVID-19 vaccination or a delay because of a temporary condition or medical circumstance. Please complete this form to assist [AGENCY NAME] in its reasonable accommodation process. If you have questions about completing this form, please contact [AGENCY NAME]'s reasonable accommodation coordinator at [EMAIL AND PHONE HERE]. Please provide at least the following information, where applicable: 1. The applicable contraindication or precaution for COVID-19 vaccination, and for each contraindication or precaution, indicate: (a) whether it is recognized by the CDC pursuant to its guidance; and (b) whether it is listed in the package insert or Emergency Use Authorization fact sheet for each of the COVID-19 vaccines authorized or approved for use in the United States; 2. A statement that the individual's condition and medical circumstances relating to the individual are such that COVID-19 vaccination is not considered safe, indicating the specific nature of the medical condition or circumstances that contraindicate immunization with a COVID-19 vaccine or might increase the risk for a serious adverse reaction; and 3. Any other medical condition that would limit the employee from receiving any COVID-19 vaccine. Description of the medical condition for which the employee listed above should be exempted from complying with a COVID-19 vaccination requirement:

The condition described above is:	<input type="checkbox"/> temporary	<input type="checkbox"/> long-term
If this is a temporary condition or medical circumstance, when it is expected to end or expire (allowing for COVID-19 vaccination to begin after the date you provided):		
Medical Provider Name/Title		
Medical Provider Signature	Date	



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Examples of Reasonable Accommodations:

- An unvaccinated employee entering the workplace might be required to:
 - Wear a face mask,
 - Work at a social distance from coworkers or non-employees,
 - Work a modified shift,
 - Get periodic tests for COVID-19,
 - Be given the opportunity to telework,
 - Or accept a reassignment.
- Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees.
- These modifications may be the same as the accommodations made for an employee based on disability or religion.



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Is Information About an Employee's COVID-19 Vaccination Confidential Medical Information?

- ADA:
 - Requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination.
 - This ADA confidentiality requirement applies regardless of where the employee gets the vaccination.
 - Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.



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Is Information About an Employee’s COVID-19 Vaccination Confidential Medical Information? (cont.)



- Health Insurance Portability and Accountability Act (HIPAA)?
 - Applies to covered entities – e.g., a health care provider, group health plan
 - Applies to business associates – an entity that performs a function or activity on behalf of a covered entity and uses or discloses PHI in connection with those services.
 - **An employer is not necessarily a covered entity or business associate subject to HIPAA.**
 - HIPAA does not prohibit an employer from asking employees directly whether they received a COVID-19 vaccination and obtaining proof from the employee. **This information is not HIPAA PHI.**
 - Nonetheless, still protect confidentiality of the info. and only use it for the purposes of evaluating workplace safety and health issues.
 - Note re group health plans: group health plan is likely a covered entity subject to HIPAA. This means that HIPAA generally prohibits an employer’s group health plan from disclosing which employees received a COVID-19 vaccination to the employer. That information is HIPAA PHI, and an employer’s group health plan must protect that information in accordance with HIPAA’s requirements.

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Is Information About an Employee’s COVID-19 Vaccination Confidential Medical Information? (cont.)



- **OSHA’s position BEFORE the ETS was issued** = Employee vaccination records are “medical records” - must be maintained for length of employment + 30 years.
 - Workaround for the records retention requirement:
 - Look at employee vaccination document (e.g., a vaccination card or doctor’s note),
 - Give it back to the employee (i.e., not keeping or maintaining a copy of it)
 - Make decisions on that basis (e.g., for vaccine incentive payments or allowing physical presence in the workplace).
 - Employers keep a separate document listing the employee’s name and vaccination status
- **OSHA’s position AFTER the ETS was issued** = ETS says employer must maintain a record of each employee’s vaccination status, proof of vaccination, and roster
 - Records and roster are “employee medical records” **HOWEVER** these records and roster are ***not*** subject to the length of employment + 30 years retention requirement, and only must be maintained and preserved while the ETS remains in effect (presumably, 6 months)
 - Consequences for employers – wait and see approach?

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Tax Implications of Remote Workers

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Remote Workers – State and Local Tax Issues

- The Coronavirus Pandemic and stay-at-home orders issued by States in response thereto created a seismic shift in the structure of the workplace
- Employees may be working in a different City, State, or Country from their assigned work location
- As a result, there could be significant state and local tax implications for both Employers and Employees
- From an M&A perspective
 - Diligence whether the Target is in compliance with tax issues (e.g., **payroll taxes**; **State income taxes**) that may exist as a result of a telecommuting work force

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Remote Workers – Payroll Tax (and Employee Income Tax)

- General Rule of Thumb (note all States are different):
 - Employee wages are sourced to the State where the employee **actually performs** the services
 - Employers whose employees telecommute from a different State may now owe payroll withholding to the State where the employee is located (and NOT the historic office location where work used to be performed)
- Exceptions:
 - “Convenience of the Employer” rule or other exceptions sometimes source wages to the location where services are generally/historically performed (e.g., short-term location change to a different State would not require sourcing wages to that State); see NY, CT, DE, PA
 - Reciprocity Agreements (e.g., DC, VA, & MD)

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Remote Workers – Payroll Tax (and Employee Income Tax) (cont.)

- Most States have not issued public guidance
- Presumably, pre-pandemic rules regarding nexus, residency, and withholding continue to apply
- Although some States have indicated that they will not enforce payroll tax laws for remote workers who are temporarily present on account of the pandemic
 - Business friendly/status quo
 - Companies may not have to shift payroll

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Remote Workers – Payroll Tax (and Employee Income Tax) (cont.)

- *New Hampshire (NH) v. Massachusetts (MA)* (U.S. Supreme Court case)
 - Pre-COVID-19
 - Individual NH resident (Employee) commuted to work at employer's MA-based office
 - In general, payroll tax withholding and income tax is sourced to MA (i.e., the location where the services were performed)
 - Early-COVID-19 Pandemic Emergency Measures
 - Pandemic-related telecommuting jeopardized MA tax revenues (i.e., workers stayed in NH and therefore under the general rule of thumb, wages would be sourced to NH)
 - MA temporary rule provided that such wages will continue to be sourced to MA
 - NH argued that the MA rule was unconstitutional (i.e., NH residents should not be subject to tax in MA as they never enter MA and work solely in NH)

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Remote Workers – Payroll Tax (and Employee Income Tax) (cont.)

- *NH v. MA (cont'd)*
 - The case went to the Supreme Court (which declined to hear it)
 - MA Department of Revenue then:
 - Withdrew its rule and issued guidance effective September 13, 2021 – Compensation earned by non-resident employees will be sourced based on where they work, regardless of where they worked prior to the COVID-19 pandemic
- Next up: Connecticut (CT) and New Jersey (NJ) arguing that their residents who work remotely (i.e., in CT and NJ) for New York (NY)-based employers should NOT be subject to NY tax.

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Remote Workers – Payroll Tax (and Employee Income Tax) (cont.)

- Proposed Federal Legislation – *Remote and Mobile Worker Relief Act of 2021*, S. 1274
- But will it have retroactive effect?
- Was 2020 an anomaly that will not recur?
- To what extent will telecommuting continue?
- Are employer’s implementing policies about remote working or waiting to see what happens with post-COVID-19 work trends?

Today, multistate businesses face a patchwork of guidance from States, as some extend telework tax relief, while others allow it to expire – meaning that employers and employees need to review each State’s particular guidance

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Remote Workers – Employer’s Corporate Income Tax

- **State Income Tax only if there is nexus** – A company that has “nexus” with a State generally has a tax filing obligation with that State.
- **No nexus if activity is limited to only out-of-state solicitation** – States generally do not subject a business to State income tax if the Business’ **only** activity in the State is the solicitation of sales of tangible personal property located outside the State
 - **Example:** Business has inventory in State A, and Business’ employees (located and working only in State A) call customers in State B to generate sales. Under the general rule, State B will not impose State B income taxes on Business. P.L. 86-272.
- **Telecommuting may create nexus** –
 - Telecommuting employees may create nexus in new States or cause an employer to exceed the protection of P.L. 86-272 (each state has its own rules – some are friendly, some are not)
 - **Example:** Business has employees in State B and is soliciting sales in State B – the combination of which **may now be** sufficient to subject Business to State B income taxes

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Regional Round Up: What's New in Nevada, Arizona, California, Colorado and Utah

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Nevada Round Up: New Developments and What Nevada Businesses Need to Know

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Non-Compete Agreements

- AB 47 modifies the current law, NRS 613.195 and went into effect on October 1, 2021.
- This bill limits the applicability of non-compete agreements.
- Non-compete agreements are now prohibited for hourly employees.
- Employers are now prohibited from restricting former employees from providing service to a former customer or client under certain circumstances.
- Finally, an employee who brings an action challenging an impermissible non-compete agreement is entitled to recover attorney's fees and costs from the employer.

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Asking About Wage History

- Under Senate Bill 293 (also effective October 1, 2021), employers are no longer permitted to seek the wage or salary history of a prospective employee, rely on wage or salary history of an applicant to determine whether to offer employment or to determine the rate of pay for the applicant, and cannot refuse to interview, hire, promote or employ an applicant, or discriminate or retaliate against an applicant, who chooses not to disclose wage or salary history.
- SB 293 also requires employers to provide applicants who have completed an interview the wage or salary range for a position or promotion.
- SB 293 does not prevent an employer from asking a prospective employee about their pay expectations, nor does it prevent an applicant from making a willing disclosure.

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Wages and Labor Commissioner

- The Nevada legislature enacted SB 245, which governs wages and the authority of the labor commissioner. This law went into effect on July 1, 2021.
- SB 245 requires that if an employer fails to pay wages, compensation or salary to an employee upon termination as required, the law authorizes the employee to bring a civil action against the employer for up to two years after the employer's failure.
- SB 245 also revises the definition of "wages" to include amounts owed to a discharged employee or an employee who resigns or quits and whose former employer fails to pay the employee by the statutory deadlines, in addition to the previous requirements of NRS 608.

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Kin Care

- Also, effective October 1, 2021, AB 190 requires employers that provide paid or unpaid sick leave to employees to allow employees to use a portion of that accrued leave to care for an immediate family member with an illness, injury, medical appointment or other authorized medical need ("kin care").
- Nevada employers can limit the amount of sick leave an employee may use for kin care to an amount which is equal to the amount of sick leave that the employee accrues during a six-month period.
- The "Immediate family" is broadly worded to include "child, foster child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent of an employee, or any person for whom the employee is the legal guardian."

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Paid Leave/COVID-19 Vaccination

- Nevada recently passed SB 209, which went into effect on May 29, 2021.
- This law expanded on the recent paid leave for employers of 50 or more employees and now also requires that employers (of 50 or more employees) provide paid leave to receive COVID-19 vaccinations.
 - 2 hours for single-dose vaccination
 - 4 hours for two-dose vaccination
- AB 209 also clarifies that paid leave must be available to employees for “any” use, including treatment of an injury or illness, caregiving or receiving preventative care.

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Notice of Services Provided by Department of Employment, Training and Rehabilitation (“DETR”)

- As of October 1, 2021, employers are also required to post a notice of the services provided by the DETR.
- AB 307 instructs DETR to prepare one or more notices regarding the job training and employment services it provides.
- The law also requires each employer in private employment in Nevada to post DETR’s notice(s) concerning its job training services or employment programs.
- Employers are to post notice(s) in a conspicuous location at the workplace. The law took effect on October 1, 2021.

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Discrimination

- Effective June 2, 2021, SB 327 broadened the definition of discrimination on the basis of race.
- The definition now includes traits associated with race, such as hair texture and protective hairstyles.
 - Protective hairstyles include natural hairstyles, afros, bantu knots, curls, braids, locks and twists.
 - Employers may enforce health and safety requirements set forth in federal and state law.
 - Employers may want to review and revise the dress code and grooming policies if they prohibit certain hairstyles.

Right to Return

- Senate Bill 386, the Nevada Hospitality and Travel Workers Right to Return Act (“Right to Return”), gives workers who were laid off after March 12, 2020, for reasons related to the COVID-19 pandemic, an opportunity to return to their job from July 1, 2021, through August 21, 2022.
- Employers in the hospitality, airport, casino, travel and sports stadium industries with more than 30 employees must offer laid-off employees job openings for the same or similar job.
- Employees will have 24 hours to accept the job offer and must be available to return to work within five days.
 - Workers may turn down jobs three times—spaced out by three-week intervals—before they are no longer eligible for the Right to Return protections.
 - Employers that cannot reach an employee are not obligated to offer a job.
 - Employers that do not recall a laid-off employee must provide a written explanation of any decision not to recall employees.

Settlement Agreements (About Sexual Harassment/Discrimination/Criminal Activity/Retaliation)

- The Nevada legislature passed AB 60, which went into effect on May 21, 2021. It voids clauses in contracts and settlement agreements prohibiting a settling party from testifying about alleged sexual harassment, discrimination, criminal activity or retaliation for reporting discrimination.
- This legislation expands upon NRS 10.195, which already voided such restrictions in settlement agreements under more narrow circumstances.

Drug Testing/Marijuana

- Nevada passed protections for marijuana users as to post offer pre-employment drug testing.
- AB 132 amended NRS Chapter 613 to prohibit Nevada employers from failing to or refusing to hire a prospective employee due to the presence of marijuana on a pre-employment (first 30 days of employment) drug screening test.
- The pre-employment discrimination protections do not apply to applicants for positions that, in the determination of the employer, could adversely affect the safety of others.
- The law excludes firefighters, emergency medical technicians and drivers of motor vehicles subject to federal or state screening tests.

Drug Testing/Marijuana (cont.)

- The protections also do not apply to the extent they are inconsistent or conflict with provisions of an employment contract, collective bargaining agreement, or federal law, nor do they apply to positions funded by federal grants.
- This law also does not limit an employer's discipline or termination of an employee who is impaired on the job. Employers may still implement drug-free workplace policies, and employees may face adverse action for violations.
- An employer may also implement other drug testing policies and procedures such as random or reasonable suspicions (but not for marijuana within the first 30 days).

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Minimum Wage

- There have been many changes to the minimum wage over the past few years, including the yearly increase.
- This also effects the daily overtime calculations.
- In 2019, the legislative session passed AJR10 for the first time and AJR10 was passed again this last session; accordingly, given that the bill has had two successive approvals it is now on the ballot for 2022.
- The primary feature of the resolution is doing away with the two-level minimum wage system in the state Constitution to create a single minimum wage, regardless of whether the employer offers health insurance.
- If AJR10 is passed by Nevada voters in 2022, it would go into effect July 1, 2024.

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Arizona Round Up

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California Round Up: New Laws for 2022

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SB 331: Settlement and Non-Disparagement Agreements

- Prohibits confidential settlement agreements in any case alleging harassment, discrimination or retaliation for reporting harassment or discrimination
 - Only applies to the factual information related to the claim filed
 - Does not prevent confidentiality of the amount paid in settlement
 - Applies to agreements entered into on or after January 1, 2022

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SB 331: Settlement and Non-Disparagement Agreements (*cont.*)

- Prohibits non-disparagement agreements that prevent the disclosure of information of unlawful acts in the workplace
- Requires an affirmative disclosure:
 - “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”
- Severance or separation agreements must notify employee that they have the right to consult an attorney and must provide a reasonable period of time, not less than five days, in which to do so
 - Does not apply to settlement agreements

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AB 1033: California Family Rights Act

- Family leave expanded to include care for parents-in-law
- Leave can be taken to care for any of the following:
 - Child (biological, adopted, foster, stepchild, legal ward, child of domestic partner and person to whom employee stands in *loco parentis*)
 - Parent (biological, adoptive, foster, parent-in-law, stepparent, legal guardian, or person who stood in *loco parentis*)
 - Grandparent
 - Grandchild
 - Sibling
 - Spouse
 - Domestic Partner

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SB 657: Electronic Posters

- Any required workplace poster may also be distributed by email
- Does not alter employer's obligation to physically post

REMINDER: Make sure you have all your required posters!

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AB 654: COVID-19 Exposure Notifications

REMINDER

- Employers must provide notice to employees of potential COVID-19 exposures
- Employers must provide notice to local health department of COVID-19 outbreaks
 - Notice must now be provided within 48 hours or one business day, whichever is later

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SB 762: Arbitration Fees

- After employee initiates arbitration, arbitration provider must immediately provide to all parties an invoice for any fees and costs required before the arbitration can proceed
 - Absent an express provision in the arbitration agreement stating when arbitration fees must be paid, the arbitration provider must issue invoices as due upon receipt
- Employers must pay the fees or costs required to initiate an arbitration proceeding within 30 days after the due date
- Violations will allow the employee to withdraw the claim from arbitration and proceed to court, where the court can impose sanctions

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Key Employment Law Cases From 2021

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Chamber of Commerce v. Bonta

- Ninth Circuit upheld portions of Labor Code 432.6 which prohibits employers from mandating employees sign an arbitration agreement
- Held that Labor Code 432.6 is *not* preempted by the Federal Arbitration Act (“FAA”)
- But also found that the criminal and civil sanctions for violations of Section 432.6 were preempted to the extent they applied to executed arbitration agreements
- Petition for Rehearing En Banc pending

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Meal and Rest Break Cases

- *Donohue v. AMN Services, LLC*
 - Employers cannot round employees' time records for meal periods
- *Ferra v. Loews Hollywood Hotel, LLC*
 - Meal and rest break premiums must be paid at the regular rate of pay

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Colorado Round Up

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Colorado Update

- Changes to definition of “vacation” pay to encompass all discretionary paid time off
- New regs to parallel Fair Labor Standards Act (“FLSA”) exemption for highly compensated employees
- Continuing compliance challenges under the Healthy Families and Workplaces Act (“HFWA”)
 - Continued applicability of public health emergency leave (“PHE”) under the HFWA
 - Rollover unused PHE
 - Rollover up to 48 hours of safe and sick leave
- Preparing for rollout of the Paid Family and Medical Leave Act
 - Payroll tax begins 1/1/2023
 - Benefits payable beginning 1/1/2024

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Utah Round Up: What’s New

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2021 Utah Legislative Session

- Senate Bill 67 – Workplace Violence Protective Orders

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2021 Utah Legislative Session (*cont.*)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- Senate Bill 46 – Post-Employment Restrictions Amendments

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- Senate Bill 80 – Amendments to Utah Antidiscrimination Act

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- Senate Bill 208 – Employee Medical Protection Act

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- ~~Senate Bill 208 – Employee Medical Protection Act~~
- House Bill 208 – Minimum Wage

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- ~~Senate Bill 208 – Employee Medical Protection Act~~
- ~~House Bill 208 – Minimum Wage~~
- Senate Bill 32 – Employee Status Amendments

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- ~~Senate Bill 208 – Employee Medical Protection Act~~
- ~~House Bill 208 – Minimum Wage~~
- Senate Bill 32 – Employee Status Amendments
- House Bill 120 – Unemployment Insurance Amendments

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- ~~Senate Bill 208 – Employee Medical Protection Act~~
- ~~House Bill 208 – Minimum Wage~~
- Senate Bill 32 – Employee Status Amendments
- House Bill 120 – Unemployment Insurance Amendments
- House Bill 308 – Vaccine Mandate Ban for Public Employers

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2021 Utah Legislative Session (cont.)

- ~~Senate Bill 67 – Workplace Violence Protective Orders~~
- ~~Senate Bill 46 – Post-Employment Restrictions Amendments~~
- ~~Senate Bill 80 – Amendments to Utah Antidiscrimination Act~~
- ~~Senate Bill 208 – Employee Medical Protection Act~~
- ~~House Bill 208 – Minimum Wage~~
- Senate Bill 32 – Employee Status Amendments
- House Bill 120 – Unemployment Insurance Amendments
- House Bill 308 – Vaccine Mandate Ban for Public Employers (moot)

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Case Law

- *Medina v. Jeff Dumas Concrete*: Termination in Violation of Public Policy

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Questions?

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