



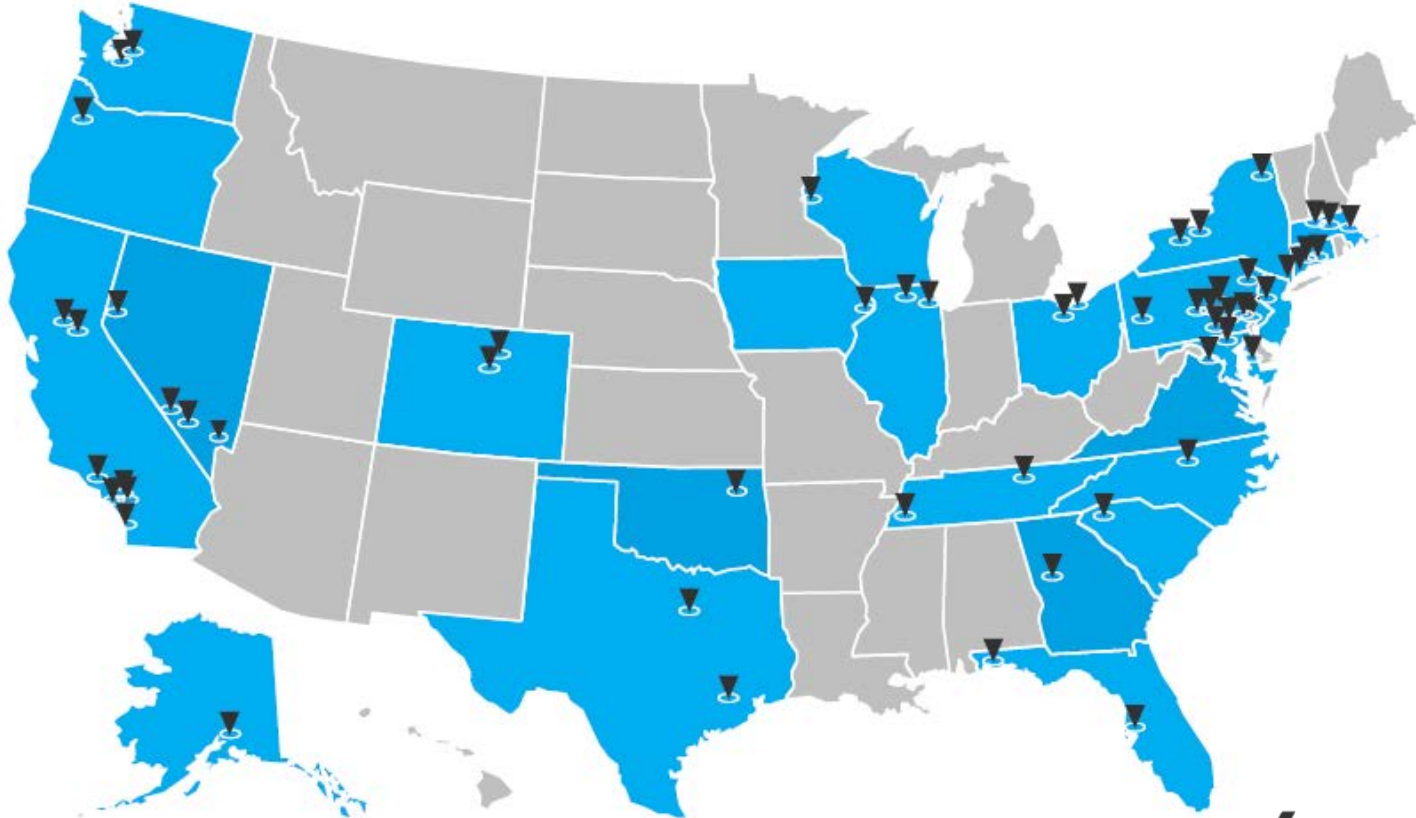
Welcome to the SIG University Webinar Series
**Return to Work Update: Post
Election & Post COVID Spike**

Doug Desmarais, Esq. | *Smith & Downey*

December 3, 2020



Welcome to Our Regional Alera Partner Firms!



Questions?

During the webinar if you have any questions please feel free to...

📱 Text Richard: (443) 250-8606

💬 Zoom Chat: Enter questions via the “Chat” feature in the Zoom meeting

Reminders

1. Slides and resources will be emailed after the webinar and are available on silbs.com/sig-university
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RECORDINGS

[ACA Supreme Court Case Update: What Happened and What You Should Know!](#)

Presenter: Stacy Barrow, Esq., *Marathas, Barrow, Weatherhead, and Lent, LLP*

[Tackling Mental Well-being: Techniques, Interventions and Meditation for HR Professionals](#)

Presenters: Kerry Graves, *NAMI* and Julie Wald, *Namaste Wellness*

UPCOMING

[End of Year Compliance Roundup](#)

December 9th, 12 PM – 1 PM EST

Presenter: Stacy Barrow, Esq., *Marathas, Barrow, Weatherhead, and Lent, LLP*



Webinars

New Year, Same COVID

December 3, 2020



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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

COVID in December 2020 – Still Deadly

- Maryland is currently reporting a 7.52% positivity rate (which has steadily increased during the past few weeks).
 - Rising at exponential rates in rural counties: 23.39% positivity rate in Somerset County; 16.05% in Allegany County.
- COVID-19 has currently accounted for more than 4,500 Marylander deaths.
 - The United States' total death count is currently at more than 271,000.
 - The World's total death count is currently at more than 1,490,000.
- The approaching flu season brings possibility of a “twindemic” and fear of decreased availability of hospital beds.
 - Flu shots are highly recommended.

Vaccinations – Project Warp Speed

- At least two pharmaceutical companies have submitted their vaccines to the FDA for emergency approval – the first vaccines on the market will not be “fully” approved.
 - The BioNTech and Pfizer vaccine will be available in the UK as early as next week.
 - FDA approval for US citizens could come as early as mid-December.
- The CDC recommends that the first round of vaccines are given to health workers and nursing homes.
 - This high priority population could be effectively vaccinated by April.
 - Vaccines for the general population could come as early as April or May.
- Health officials have said that it would take 75% to 85% of the population being vaccinated for the threat to be effectively eliminated through herd immunity.
 - Only 58% of Americans polled said they would be vaccinated (however, this poll was conducted before results of the vaccines’ effectiveness were released).

Vaccinations –Mandatory?

- Mandatory vaccines are not new in the employment context.
 - Health industry employers have long required employees to be vaccinated against the flu.
- Employers can generally require vaccines, but must be aware of restrictions created by the ADA, Title VII, and the OSH Act.
 - The EEOC has not yet considered mandatory COVID-19 vaccinations, especially in light of the vaccine receiving only “emergency use authorization” instead of being fully approved by the FDA.
 - In guidance provided for flu vaccines the EEOC has held the position that significant accommodations must be given to employees with legitimate objections to the vaccine and suggests that employers should simply encourage vaccines instead of requiring them.
- Employers should also be aware of the limited availability of a COVID-19 vaccine for the general population, which could last until mid-2021.
 - One suggested route is to only encourage vaccines at least until it is widely available and the EEOC has released updated guidance.

Vaccinations – ADA

- The ADA requires that employees receive a reasonable accommodation due to a disability.
 - This requirement extends to mandatory vaccines.
- If the employee has a disability that would prevent him/her from safely receiving the COVID-19 vaccine, a reasonable accommodation might be required.
 - A reasonable accommodation in lieu of being vaccinated could be to allow the employee to continue working from home, or to require the employee to wear a mask while in the office.
- An employer need not provide a reasonable accommodation under the ADA if it would create an undue hardship.
 - “Undue hardship” under the ADA means a significant difficulty or expense in providing the accommodation.

Vaccinations – ADA (cont.)

- The EEOC treats a vaccination as a “medical examination” under the ADA.
 - Medical examinations in the workplace must be job-related and consistent with a business necessity, or it is necessitated by a direct threat.
 - A COVID-19 vaccination would in all likelihood pass this threshold as pandemic-causing viruses are considered “direct threats.”
- At least until the pandemic subsides, unvaccinated employees could themselves be considered a “direct threat” to the workplace and prohibited from the office.
 - Employers should nonetheless consider a reasonable accommodation.

Vaccinations – Title VII

- Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- Like the ADA’s reasonable accommodation requirement, the same reasonable accommodation (work from home or required to wear a mask while in the office) can also be used if the employee has a religious objection to the vaccination.
- However, Title VII’s “undue hardship” definition is any accommodation that would result in more than a de minimis cost to the employer.
 - This is a lower standard than the undue hardship definition under the ADA.
 - But should still be used with caution.
- An employee may object due to his/her sincerely held religious beliefs.
 - But determining what is a true, sincere religious belief is often tricky.
 - Supporting information verifying the employee’s sincere beliefs may be requested.

Vaccinations – OSHA

- OSHA has allowed mandatory vaccinations in the workplace.
- However, employees must be properly informed of the benefits and risks of vaccinations prior to being required to receive one.
 - OSHA has also suggested that any employee refusing a vaccine because he/she reasonably believes that a medical condition creates the risk of a serious illness or death may be protected under the OSH Act’s whistleblower provision.
- The General Duty Clause might apply to workplace vaccinations:
 - Under the Clause, employers are required to furnish to each employee “a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm...”
 - OSHA could sanction an employer under this clause if, for instance, there is a major COVID-19 outbreak at the office, and the employer was not exercising reasonable care in ensuring the workplace was safe from COVID-19
 - Requiring or offering vaccinations could reduce the risk of sanction.

Vaccinations – Other Implications

- State laws – some states require certain employers to mandate vaccinations.
 - However, there are also many states that allow an employee to decline a mandated vaccination for any reason.
- Certain states (e.g., California) require employees to be reimbursed for all necessary expenditures or losses incurred by the employee.
 - Onsite vaccinations should be covered by the employer.
- Unionized employers likely need to negotiate mandatory vaccines with the union.
 - Not required if covered in a CBA's management rights provision.
- Required vaccinations might be unpopular among workers.
 - There is still an anti-vax movement.
 - Early vaccines will not be fully approved – only under an emergency use authorization.
- Employees who are sickened by a vaccine might be covered under workers' comp.

Employee Wellness Programs

- Wellness programs offer employees health-based incentives.
 - Employers often incentivize employees to stop smoking, go through health screenings, etc.
 - Wellness programs are often able to reduce health insurance costs.
 - Incentives can include gifts, monetary awards, etc. that are based on a point system.
- Flu vaccinations are a CDC-recommended addition to an employer's wellness programs.
- Incentivizing (and not requiring) employees to be vaccinated might be more effective.
 - Employers can do this by adding it to their existing wellness program, or by establishing a one-time program offering employees a benefit for getting vaccinated.
 - Could host "vaccination drive" to encourage, and provide an easy way for, employees to be vaccinated (Ford, Target, and Tyson are taking steps to provide vaccinations to employees).

Employee Wellness Programs (cont.)

- Employers must realize privacy concerns (HIPAA), and ERISA and COBRA requirements.
- Wellness programs that include vaccinations will be covered by ERISA.
 - Existing wellness programs are typically already covered by ERISA, unless it is a program that only consists of educational services or only encourages healthy living habits.
- If an existing wellness program is not already covered by ERISA, adding a vaccination benefit to the program will bring it within ERISA's coverage.
 - Obligations include creating an ERISA plan, a summary plan description, filing an annual report, complying with fiduciary duties, establishing a claims and appeals process, etc.
- If adding vaccinations to an existing ERISA-covered plan, obligations include reviewing the plan and summary plan description to determine if amendment is needed.
- COBRA applies to group health plans – wellness programs fall into this category.
 - Employers creating new wellness programs must review and comply with their obligations under COBRA.

New Stimulus Relief? – \$908b proposal

- Recently introduced as a bipartisan bill in the Senate.
- Totals \$908 billion in stimulus (\$348b is “new” money – other funds are leftover from previous stimulus acts).
 - \$300/week in federal unemployment benefits for 18 weeks (retroactive to 12/1 for certain workers).
 - \$288 billion for small business programs, including the PPP and EIDL programs.
 - \$48 billion for airlines and mass transit.
 - Extension of student loan payment deferrals and rent assistance.
- Increases liability protections, and includes a suspension of COVID-19 related suits.
 - Suspension is for both state and federal courts.
 - Intended to give states the time to develop their own protections.
- Any relief bill is likely to undergo significant changes before passage.

New Stimulus Relief? – \$500b proposal

- Sen. Maj. Leader Mitch McConnell has stated that he is likely to propose a separate bill designed for passage as well as President Trump's signature.
 - This suggests that the \$908 billion bipartisan bill will likely not move forward.
 - McConnell also suggested that a new spending bill will be included in the COVID-19 relief bill.
- McConnell's framework entails \$500 billion in relief.
 - \$332.7 billion to small businesses, including the PPP.
 - \$105 billion for schools.
 - \$31 billion for vaccine distribution.
- The Biden Administration is likely to push for another stimulus bill soon after inauguration – McConnell's proposed bill accounts for this.

New Administration

- Major administration goals for employees:
 - Federal minimum wage increase – \$15/hour by 2026 (currently still at \$7.25/hour).
 - More overtime eligibility for employees by limiting overtime exemptions.
 - Strengthening union membership.
 - Stronger worker-safety rules, especially as they relate to infectious diseases.
- Major candidates for Biden's Secretary of Labor pick include:
 - Marty Walsh (Boston Mayor) – supported by major unions.
 - Bernie Sanders – strongly supports unions, but is not supported by many unions.
 - Andy Levin (Rep., Mich.) – supported by unions that previously supported Sanders for president.
- Biden and his Secretary of Labor will likely be limited in their ability to make any significant changes unless both Georgia runoffs result in Democrat victories.

Questions?



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