



Welcome to the SIG University Webinar Series
**Employer Update – Returning
to the Office After COVID-19**

Doug Desmarais, Esq. | *Smith & Downey*

July 22, 2021





Questions?

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

Reminders

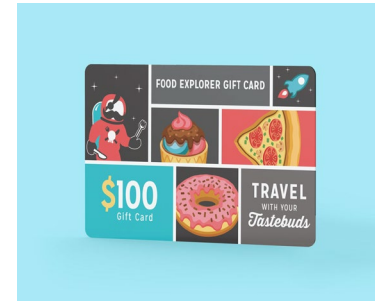
1. Slides and resources will be emailed after the webinar and are available on

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UPCOMING

Holistic Wellbeing: Addressing Health and Financial Wellness

August 19th, 2 PM – 3 PM EST

Data Integrations: APIs and EDIs Explained

August 25th, 12 PM – 1 PM EST

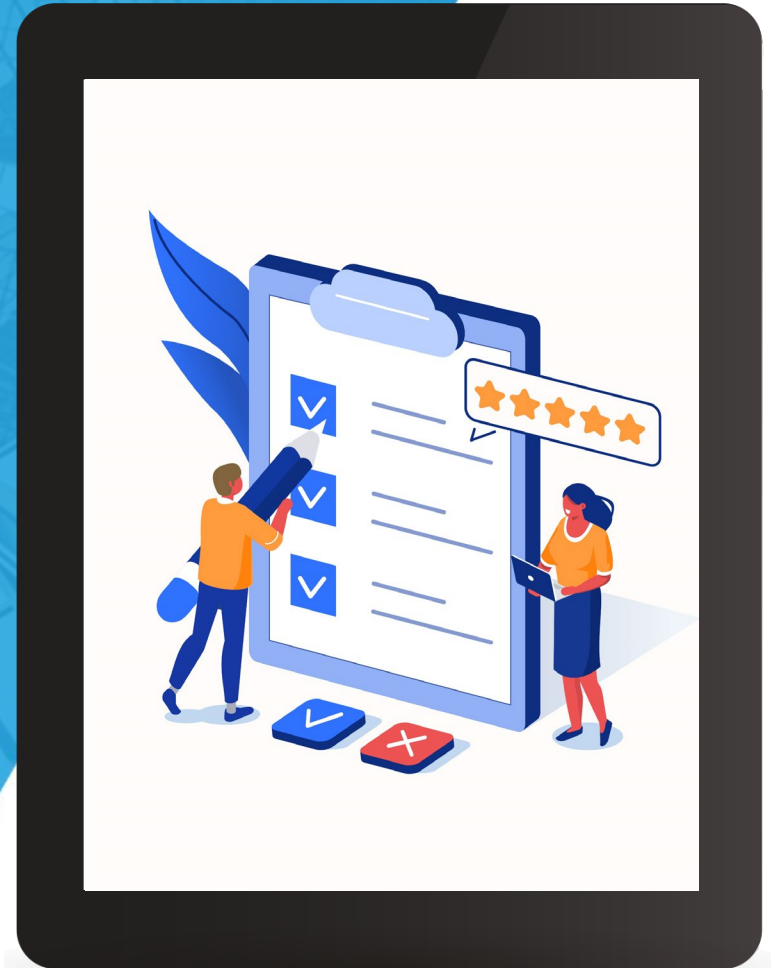


Webinars

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- ▶ Our survey provides companies with comparable benchmarking data for:
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Insight

Legal Alert: Requiring, Incentivizing or Asking About Employees' COVID-19 Vaccine Status

- ▶ As the United States continues to fight against the spread of COVID-19, vaccinations of the most high-risk Americans have begun.
- ▶ Click [Here to Read the Full Legal Alert!](#)



Welcome

Doug Desmarais, Esq., *Smith & Downey*

COVID-19 in 2021

Vaccines, leaves of absence and other key topics

July 22, 2021



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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.

PART I: THE ANNUAL HR PHYSICAL

- Handbook – When was your last “physical”?
 - Handbook Leave of Absence Policies? What was promised?
 - Leave of Absence Practices – Do your organization’s leave practices follow your policies?
 - Inclusion of New Employment Laws - Does your handbook reflect recent updates to the Maryland Healthy Working Families Act; Maryland Fair Employment Practices Act; and reflect the new Maryland minimum wage?

PART II: RETURN TO WORK ISSUES

- FFCRA
- Americans with Disabilities Act
- OSHA – General Duty Clause
- CDC – When Guidance Becomes Law
- Maryland-Specific Workplace Standards

FFCRA in 2021

- Requirements expired on December 31, 2020.
 - Leave was required to be provided if an employee was:
 1. Subject to a quarantine or isolation order;
 2. Advised by a health care provider to self-quarantine;
 3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 4. Caring for an individual who was subject to a quarantine or isolation order, or had been advised by a health care provider to self-quarantine;
 5. Caring for his/her child whose school or place of care was closed due to COVID-19 or the child's care provider was unavailable due to COVID-19; and
 6. Experiencing any other substantially similar condition.
 - Amount and rate of paid leave under Emergency Paid Leave provision:
 - Employees were entitled to 80 hours of leave for reasons 1-6.
 - Employees received full rate for Reasons 1-3, up to \$511/day (\$5,110 in aggregate); and received 2/3rds their rate for Reasons 4-6, up to \$200/day (\$2,000 in aggregate).
 - Expanded FMLA:
 - Required 12 weeks total for Reason #5, the first two weeks of which can be unpaid or taken pursuant to Emergency Paid Leave provision.
 - Capped at \$200/day, or \$10,000 in aggregate.

FFCRA in 2021 (cont.)

- Employers who provided leave under the FFCRA's requirements were entitled to tax credits, matching the paid leave provided, up to the daily and aggregate caps.
 - Can now **voluntarily** provide paid leave and receive tax credit.
 - Tax credits available for paid leave provided through Sept. 30, 2021.
- Employees receive a new “bucket” of leave (but no rollover of previous “bucket”).
 - Same reasons as were required under the FFCRA, plus new reasons provided for:
 1. Obtaining a COVID-19 vaccine;
 2. Recovering from an injury, disability, illness, or condition related to such vaccine; and
 3. Seeking or awaiting the results of a COVID-19 test when the employee has been exposed to COVID-19 or the employer requested the test.
 - The new reasons are subject to the \$511/day (\$5,110 aggregate) caps.
- First two weeks of expanded FMLA (Reason #5) may now be paid, and is now capped at \$12,000 in the aggregate.

The Americans with Disabilities Act ("ADA")

- **Application:** Employers with 15+ employees
- **Requirements:** Employers are required to provide “reasonable accommodations” to employees with qualifying disability
- **Eligibility:** Employees are protected by ADA if they have: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record (or past history) of such impairment; or (3) are regarded by employer as having a disability.

ADA and Sick Leave

- ADA may require employer to provide additional leave even after all available sick leave has been used
- Employer must engage in “interactive dialogue” to determine if there are any reasonable accommodations that would allow employee to perform essential functions of the job without causing undue hardship

Question – Fear of Infection at Work

- **“Anxiety” vs. “anxiety”**

“I don't want to achieve immortality through my work; I want to achieve immortality through not dying. I don't want to live on in the hearts of my countrymen; I want to live on in my apartment.” – Woody Allen

- There are a few limited circumstances where leave to avoid contracting COVID-19 might be covered under FMLA:
 - For example, if an employee has an underlying mental health condition (severe anxiety) which triggers an incapacitating fear of COVID-19, it could be considered a serious health condition as defined by the FMLA. (This would also trigger an ADA interactive dialogue.)
- Anxiety is also a recognized disability under the ADA. Employees with a bona fide diagnosis of such a disability (or an employee who is perceived as having such a disability) may be entitled to protection under the ADA.

Safety Concerns

- **Prior to** reopening, employers should:
 - Consider all local guidance and requirements to ensure compliance;
 - Identify areas at most risk of contamination;
 - Create and communicate a plan that will reduce risk of contamination and promote safety;
 - Encourage feedback from employees on how they would make the workplace safer;
 - Ensure that ventilation systems are fully operational; and
 - Consider employee training on risks of being back in the workplace.

Safety Requirements

- OSHA General Duty Clause – applies to virtually every workplace.
 - Requires employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to...employees.”
 - Also requires employers to comply with all occupational safety and health standards.
 - CDC recommendations should be treated as a requirement under the General Duty Clause.
- OSHA is authorized to sanction employers for COVID-19 outbreaks in workplaces.
 - Taking proper CDC-recommended steps can reduce risk of sanction.
- Reporting obligations:
 - All work-related illnesses must be reported to OSHA.
 - If the illness results in loss of consciousness or one or more days away from work, or days of restricted work, or days of job transfer.
 - Employer must conduct **reasonable determination** whether COVID-19 case is work-related:
 - Does not mean extensive medical inquiry, but reasonable steps (asking the employee how s/he believes COVID-19 was contracted, reviewing work environment, etc.) are required.

CDC Recommendations

- Rearrange workspaces and schedules:
 - Spacing seats further apart and installing shields/other barriers;
 - Posting signs to remind employees to socially distance; and
 - Staggering work schedules to reduce number of employees in office at one time.
- Increase air quality:
 - Increasing frequency of air supply and opening windows;
 - Using fans to redirect airflow and operating exhaust fans in restrooms; and
 - Using ultraviolet germicidal irradiation.
- Promote healthy conduct in the workplace:
 - Consider daily employee screening and/or temperature checks;
 - Require masks for unvaccinated employees who are in common areas, and prohibit handshaking, hugs, etc.; and
 - Remind employees to frequently wash hands.
- Prohibit symptomatic employees from coming to work.

PART III: VACCINATIONS

- Project Warp Speed
- Mandatory?
- ADA Concerns
- Title VII Concerns
- OSHA and Other Concerns
- Employee Wellness Programs

Vaccinations – Project Warp Speed

- Three pharmaceutical companies have received FDA emergency approval for their vaccines.
 - These vaccines are not “fully” approved, but they are now available for US citizens.
 - Vaccines for the general population (those who are at least 12 years old) are now more widely available.
- Health officials have said that it would take 70% to 90% of the population being vaccinated for the threat to be effectively eliminated through herd immunity.
 - Note, “herd immunity” is a moving target, the definition of which is changing rapidly.
 - Currently, approximately 56% of the US population has received at least one shot, with 49% fully vaccinated.
 - Approximately 68% of people 18 and older have received at least one shot, with nearly 60% of these individuals fully vaccinated.

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 now released guidance regarding mandatory COVID-19 vaccinations in light of the vaccine receiving only “emergency use authorization.”
 - In its guidance, the EEOC states that mandatory vaccination policies are permitted, but significant accommodations must be given to employees with legitimate objections to the vaccine.
 - EEOC also suggests that employers encourage vaccines instead of requiring them.

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 allowing the employee to continue working from home, or requiring him/her to wear a mask while in the office.
 - In rare instances, vaccinated individuals have had severe, but non-life-threatening, allergic reactions.
- 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’s latest guidance does not treat vaccinations as an ADA “medical examination.”
 - Workplace medical examinations must be job-related & consistent with a business necessity.
 - However, pre-screening questions may implicate ADA’s disability-related inquiries provision (which is an inquiry likely to elicit information about a disability).
 - Must show that pre-screening question is “job-related and consistent with business necessity.”
 - Requesting proof of receipt of a vaccination is not considered an inquiry, however, asking why the individual did not get vaccinated likely is an inquiry.
- At least until the pandemic subsides, unvaccinated employees could be considered a “direct threat” to the workplace and prohibited from the office.
 - Employers should nonetheless consider a reasonable accommodation and assess the employee on an individualized basis, since the “direct threat” threshold is high.

Vaccinations – Title VII

- Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- The same ADA 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 and requires only that an employer show that the requested accommodation would cause more than a trivial cost to the employer’s operations.
 - But the undue hardship reasoning should still be used with caution.
- An employee may object due to his/her sincerely held religious beliefs.
 - 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 OSHA'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.
 - Current vaccines are not 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 have taken 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.

PART IV: TELECOMMUTING

- Working From Home
 - Safety Issues
 - Confidentiality and FLSA Obligations
- Working From Home From Another State
 - Unemployment Insurance
 - Tax Issues
 - State Registration, Wages & Leave

Work From Home the New Normal?

- COVID-19 resulted in what has been considered the biggest work from home experiment in history.
- What started as temporary is now becoming permanent.
 - Facebook and Twitter switching to work from home model in future.
- Diverse employee group and cost savings:
 - Facebook says its new model will allow it to hire people from around the world.
 - Morgan Stanley sees a work from home future as a way to reduce footprint and costs.
- Global Workplace Analytics:
 - An employer can save ~\$11,000/year for every employee working remotely;
 - An employee can save \$2,500 – \$4,000/year working remotely half of the time.

Workers' Compensation & OSHA

- Workers' compensation still applies to home offices.
 - Should ensure coverage for home office incidents.
- OSH Act obligations also apply to home offices.
 - Reporting requirements:
 - If an employee suffers a work-related injury or illness at home, must report.
 - Injury/illness is reportable if it results in loss of consciousness, or one or more days away from work, or days of restricted work, or days of job transfer.
 - Employers must conduct a reasonable determination into whether the injury/illness is work-related.
 - Safe-workspace requirements:
 - No requirement to inspect home offices (or ask employees to send pictures of workspace).
 - But should remind employees of safe work practices (taking occasional breaks, decluttering the work space, fire hazards, etc.).
 - And should be proactive with any known dangers, such as employer-supplied equipment.

Confidentiality & FLSA Obligations

- Employees should be frequently reminded of their duty to protect confidentiality and company trade secrets.
 - Employers should also discuss options with IT professionals.
 - Should establish and utilize written policies (must use VPN, may not allow any family members to use work-related device, two-factor authentication, etc.).
- Non-exempt employees are still owed wages for all time worked.
 - Employers should remind employees of their obligation to accurately record their time.
 - Obligation to accurately record time falls onto employer.
 - Time-accounting software can help.
 - Overtime must also be paid.
 - Policies outlining “hours worked” and availability of overtime should be established and used.

Working From Home From Another State

Unemployment Insurance & Workers' Compensation

- State unemployment insurance should be paid to **only one state**.
 - Determination of which state to pay UI requires a 4-part analysis:
 1. Localization of services;
 2. Base of operations;
 3. Place of direction and control; and
 4. State of employee's residence.
- Interstate Reciprocal Coverage Arrangement (all states except Alaska, Kentucky, Mississippi, New Jersey, New York, and Puerto Rico have signed on).
 - Must still seek permission of dominant state.
 - States also have UI reciprocity agreements with neighboring states.
- Workers' Comp. requirements vary state-by-state:
 - Employees may file a claim in the state (1) where they primarily work; (2) where they were injured; or (3) where they live.
 - Generally, must have workers' comp. insurance in the state where employee works.
 - May sometimes achieve through binder amendment on existing policy.

Taxes – Out of State Employees

- Employee tax obligations:
 - Individualized assessment based on employer’s location, employee’s location, time spent working in another state, any possible deductions, and amount earned.
 - Many employees face possibility of filing in two states.
- Employer tax obligations:
 - Whether an employer must withhold/remit an employees’ tax is also state-dependent but technically required for all work performed in the state (even if the employee is a nonresident and only there temporarily).
 - Many states require employer payroll taxes and/or corporate taxes if there are employees remotely working in the state (remote work is often considered a sufficient “nexus” with that state).
 - Some states (e.g., Mississippi & Alabama) have waived employee tax withholding obligations, and others have waived employer taxes (e.g., Maryland & Massachusetts) where the employee is temporarily teleworking due to COVID-19.

State Registration, Wages & Leave

- Registration with a state's department of labor is usually required if an employer must pay unemployment insurance, or if it must withhold/remit and/or pay taxes.
 - Some states (e.g., California) have waived registration requirements if it is triggered by an employee temporarily teleworking due to COVID-19.
 - Continued remote work from another state is likely to trigger the state's registration requirements.
- Must also comply with state and local wage laws.
- Some state paid sick leave obligations will apply to remote workers, too (e.g., if the state requires only that one employee work in the state to be covered by the leave obligations).
 - State leave laws do not generally require separate or new policies, so employers can achieve universal compliance by creating a policy that meets the most restrictive/imposing obligations.

PART V: THE BIDEN ADMINISTRATION

Biden's Goals

- Major administration goals for employees:
 - Federal minimum wage increase – \$15/hour by 2026 (currently still at \$7.25/hour).
 - Has already attempted to push this, but failed.
 - Eliminate the 80/20 rule for tipped employees.
 - Has issued a notice of proposed rulemaking (still in comment phase).
 - More overtime eligibility for employees by limiting overtime exemptions.
 - Strengthening union membership.
 - Stronger worker-safety rules, especially for infectious diseases.
 - Has ordered publication of rules, but none have been published yet.
 - Regulation or prohibition of non-compete laws.

Biden Administration (cont.)

- Employment Agencies:
 - Change in NLRB majority.
 - Currently have 3 Republicans, 1 Democrat and 1 vacancy on the Board.
 - First chance for Democrat majority is likely August 2021, when William Emanuel's term expires.
 - Change in EEOC majority.
 - Currently have Republican majority, which will last until July 2022 – no immediate changes are foreseeable.

Questions?



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