

COVID-19 Pandemic New Year: What Employers Should Know

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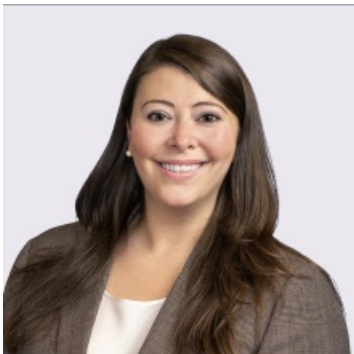
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The country begins the second year of the COVID-19 pandemic with optimism because of three Emergency Use Authorization vaccines and President Joe Biden's direction that all states make all adults eligible for vaccination by May 1, 2021. As more workers return to work in person, there are key considerations for employers in the coming months.

Evolving Legal Landscape

While the Centers for Disease Control and Prevention (CDC) issued guidance and best practices throughout the last year, the decision as to whether to adopt, enforce, or exceed those guidelines was left exclusively to the states. What resulted was a patchwork of laws at the state, county, city, and local health department levels, and confusion as to which rules to follow and when.

The Biden administration has expressed a willingness to take more measures at the federal level and has increased uniformity in terms of approaches for vaccination, isolation and quarantine, and safety measures.

However, uniformity may not translate to a less fluid environment. The CDC, Department of Labor, and new administration continue to issue updates regularly, making it challenging for many employers to keep up.

OSHA Guidance for Employers

Although states are starting to lift or ease restrictions, employers can expect increased enforcement from the Occupational Safety and Health Administration (OSHA). On March 12, 2021, OSHA announced a [National Emphasis Program](#) (NEP) related to COVID-19, targeting "specific high-hazard industries or activities where this hazard is prevalent" and adding a focus on anti-retaliation efforts. The NEP covers certain healthcare industries (*e.g.*, hospitals, home health, and skilled nursing facilities, among many others) and non-healthcare industries that have experienced high rates of COVID-19 infection (*i.e.*, meat and poultry processing) or are public facing (*i.e.*, restaurants, supermarkets, and grocery stores) and critical infrastructure. OSHA also will use calendar year 2020 Form 300A data to identify establishments with elevated rates of illness. With respect to anti-retaliation efforts, OSHA will increase efforts to ensure workers are aware of retaliation protections. (For a more detailed summary of the NEP, see [OSHA Publishes New National Emphasis Program Targeting COVID-19 Enforcement](#).)

OSHA has not issued COVID-19-specific standards to date. In limited circumstances, OSHA has applied existing standards to situations involving COVID-19 (*e.g.*, respiratory protection for healthcare employers). OSHA has otherwise been left to rely on the General Duty Clause in the Occupational Safety and Health Act to hold employers accountable for protecting workers against COVID-19 in the workplace. The General Duty Clause requires employers to provide a safe and healthy workplace that is free from recognized hazards likely to cause death or serious physical harm. OSHA has also issued

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COVID-19 guidance for several industries, as well as [general guidance](#) for all employers. The guidance does not carry the weight of the law, but may be useful to OSHA's enforcement efforts.

Recently, OSHA is under additional pressure following a [report](#) from the Office of the Inspector General (OIG) that criticized the agency for not conducting enough onsite inspections or issuing COVID-19 standards sooner. Prior to the OIG's report, President Biden had directed OSHA to consider whether emergency temporary standards were necessary, and to issue any such standards by March 15, 2021. The emergency temporary standards appear to be delayed, but are anticipated to be issued [imminently](#).

Employers in some states, like [California](#), [Michigan](#), [Oregon](#), and [Virginia](#), are already subject to COVID-19 rules under occupational safety and health state plans. Employers should continue to consult state and local law for safety guidelines in the coming months.

EEOC Guidance for Employers

In March 2020, the U.S. Equal Employment Opportunity Commission (EEOC) published technical assistance for employers entitled [*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*](#). The agency has provided periodic updates, most recently on December 16, 2020.

The technical assistance covers a wide range of topics that will continue to be important for employers in 2021, including:

1. Disability-Related Inquiries and Medical Exams;
2. Confidentiality of Medical Information;
3. Hiring and Onboarding;
4. Reasonable Accommodation;
5. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics;
6. Furloughs and Layoffs;
7. Return to Work;
8. Age;
9. Caregivers/Family Responsibilities;
10. Pregnancy; and
11. Vaccinations.

As employees begin returning to workplaces in greater numbers, employers should consider the EEOC's guidance, especially regarding reasonable accommodations, as they establish their policies and practices and respond to requests for continued remote work and other flexible work arrangements.

The EEOC's latest updates to its technical assistance addresses COVID-19 vaccinations and questions about the applicability of federal equal employment opportunity laws including the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act, Title VII of the Civil Rights Act, and the Pregnancy Discrimination Act. As employers develop policies and employee communications in connection with the vaccines, employers should review section K of the [EEOC's technical assistance](#). That section provides important insights on the EEOC's view on important questions facing employers.

COVID-19 Vaccines and the Workplace

As of this writing, 24.5 percent of the U.S. population have received at least one dose of the vaccine. Employers are faced with how to handle vaccination and the return to work in person, and what role, if any, they should play in encouraging and enabling employees to safely become vaccinated.

In its January 2021 guidance, OSHA encouraged employers to make COVID-19 vaccines available to all eligible employees at no cost and to provide information and training on the benefits and safety of vaccinations.

While many employers are thinking through creative ways to incentivize vaccines, a number of states are considering measures that would prevent employers from mandating vaccinations for return to work or otherwise influence an employer's approach to vaccinations. On the other end of the spectrum, [New York has adopted legislation](#) that requires employers to provide employees with up to four hours of paid time off for each COVID-19 vaccination. Jackson Lewis is tracking pending legislation related to vaccines and the workplace, including more than 100 bills being considered by state legislatures around the country.

In the CDC's [Guidance for Fully Vaccinated People](#), the CDC pointed to evidence suggesting that fully vaccinated individuals are "less likely to have asymptomatic infection and potentially less likely to transmit" the virus to others, but the CDC is continuing to learn more about individuals' abilities to continue the spread of COVID-19 despite being vaccinated. As discussed below, the CDC guidance supports relaxed quarantine requirements for individuals who have been fully vaccinated. Therefore, employers may have a greater interest in vaccination programs, or at least knowing employees' vaccination status. However, the CDC and OSHA recommend vaccinated individuals continue to wear masks, practice physical distancing in public, and take other steps to mitigate the spread of COVID-19.

The CDC has explained that it is still studying the duration of protection provided by the vaccine, and experts are continuing to evaluate at what point the country can achieve herd immunity, or community immunity (when a sufficient portion of the population of an area is immune to a specific disease to make its spread from person to person unlikely). There have been many positive developments and the outlook on the horizon looks promising, but at the moment, many aspects of the work environment are left unchanged. For now, employers should continue to follow state and local orders and guidance and may choose to consider ways in which they can enable employees to become vaccinated and provide information and training for those who are eligible, as consistent with applicable law. Employers who want to educate their workforce about the COVID-19 vaccines can use materials published by the CDC and state agencies.

Latest Guidance on Isolation, Quarantine

The CDC's guidance on recommended isolation and quarantine periods has evolved as both the number of people vaccinated has recently grown, and the number of people in the United States who have recovered from COVID-19 and likely have some protection from the virus has increased.

For individuals who have tested positive for COVID-19 or are symptomatic, the CDC's [Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings](#) sets a

framework for when to discontinue isolation. However, not all states have adopted the CDC's guidelines. Indeed, state and local requirements may not coincide with the CDC's guidance on length of isolation.

With respect to quarantine, on March 12, 2021, the CDC issued revised [guidance](#) stating that individuals who have had COVID-19 within the past three months do *not* need to quarantine if exposed once more to someone positive, as long as they do not develop new symptoms. Similarly, the CDC's [recommendations for fully vaccinated people](#) states that people who have been fully vaccinated do *not* need to quarantine after an exposure, as long as they experience no symptoms. Previously, the CDC limited this exclusion to quarantine only to individuals who had been fully vaccinated within 90 days. Now, the CDC appears to take a broader approach. Some states, including states with occupational safety and health state plans, may have specific rules regarding quarantine that differ from the CDC guidance regardless of vaccination status.

With the increasing number of Americans becoming vaccinated each day, time will tell as to which states will adopt the CDC's recommendations. For now, state and local law must be consulted when evaluating the need and duration of quarantine for employees.

All employers, even those in states where quarantine may not be required for fully vaccinated employees, should exercise caution in handling communications regarding employees' vaccination status when assessing return to work considerations. According to the EEOC's guidance, asking whether a worker has been vaccinated is not a disability-related inquiry; however, the information may be protected by state or local privacy laws. Employers should be specific about what information should and should not be provided by employees to prevent unsolicited disclosure of medical or genetic information. There are other considerations and best practices for employers when it comes to employees' [vaccination status](#).

On the Horizon in 2021

While the future looks bright, employers can expect to see a lasting impact from COVID-19.

Continued Spotlight on Paid Sick, Family Leave

The pandemic unquestionably shined a light on employer paid leave policies. Pre-pandemic, many states and cities (such as Arizona, California, Nevada, New York, and others) already passed paid sick leave laws. There has been a push at the federal level for employers to provide paid sick leave. The Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020. The FFCRA required employers with fewer than 500 employees to provide paid sick and family leave for certain COVID-19-related reasons. To encourage employers to continue offering paid leave, the Consolidated Appropriations Act of 2021 gave employers who were covered under the FFCRA the option to voluntarily provide "qualified" paid sick leave or paid family leave wages to their employees and continue to receive a [tax credit for such wages](#) until March 31, 2021.

Under the American Rescue Plan Act signed by President Biden on March 11, [the tax credits will again be extended](#), to September 30, 2021. However, Congress made significant changes to the FFCRA and the qualifying reasons for leave. Importantly, employee paid sick leave allotments will reset on April 1, 2021, the reasons for leave have been expanded to address testing and vaccination issues, and the paid family leave can

be used for reasons other than childcare issues. (For more details of how the American Rescue Plan Act modifies the FFCRA, see [The American Rescue Plan Extends FFCRA Tax Credit, But Not the Mandate.](#))

Remember that the FFCRA is voluntary and does not have any impact on employers with more than 500 employees. As a result, ongoing efforts for federal or state and local paid sick and family leave laws are expected. California, for example, has resurrected the [statewide COVID-19 Supplemental Paid Sick Leave](#) that expired at the end of 2020.

Return to Work

For the past year, employers have been encouraged, or required in some cases, to offer remote work to the extent possible. Technology companies have tried to keep up with demand. For example, [according to the BBC](#), the use of Zoom increased 30 fold in April 2020.

Employers eager to return to in-person operations should be prepared for potential resistance from employees who have grown accustomed to working from home, as well as potential accommodation requests related to leave or continued remote work from those who cannot return to work due to medical issues. The EEOC guidance referenced above explains how the pandemic may impact the analysis of whether a requested accommodation poses “significant difficulty” or “significant expense” under the ADA. For example, the EEOC recognizes that the business losses associated with the pandemic are a relevant consideration and that “an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.” On the other hand, the EEOC also warns against excluding certain workers from the workplace involuntarily based on an employee’s higher risk for severe COVID-19 illness. Employers will need to balance the desire to return to “normal” with their obligations under the ADA and other federal and state laws.

Litigation for Years to Come

Jackson Lewis has developed [COVID-19 Employment LitWatch](#) to help employers track litigation trends related to COVID-19. Since the start of the pandemic, over 1,800 complaints have been filed in federal and state courts that allege related labor and employment law violations. More than 55 percent of the complaints allege violations related to disability, leave and accommodation, or discrimination or harassment. California has the most COVID-19 employment lawsuits in the country. (It allows employees to immediately request a right to sue notice from the California Department of Fair Employment and Housing.) Under federal and many state employment discrimination laws, employees often are required to wait months before requesting a right to sue notice. The waiting period frequently creates a delay between a challenged employment action and a lawsuit. Thus, employers may be seeing COVID-19 litigation well into 2022 and beyond.

To reduce the risk of litigation, employers should continue to monitor the ever-changing landscape of federal and state COVID-19 rules and orders. Employers can use Jackson Lewis’ [COVID-19 Advisor](#) to stay up-to-date on COVID-19 issues in all 50 states, including health and safety protocols, paid sick leave guidance, paid family leave and mini-Family and Medical Leave Act guidance, and business opening rules, among many other topics.

Jackson Lewis attorneys are closely monitoring the evolving demands on employers,

including agency guidance, regulations, and best practices and are available to assist employers in preparing policies and procedures related to COVID-19 and other workplace matters.

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