

JacksonLewis

Reimagining the Workplace In the Wake of COVID-19 and the New Administration

March 12, 2021

Tania J. Mistretta, Esq.

Anna Broccolo, Esq.

Jackson Lewis P.C. • New York City

Tania.Mistretta@jacksonlewis.com • (212) 545-4070

Anna.Broccolo@jacksonlewis.com • (212) 545-4039



About Jackson Lewis P.C.



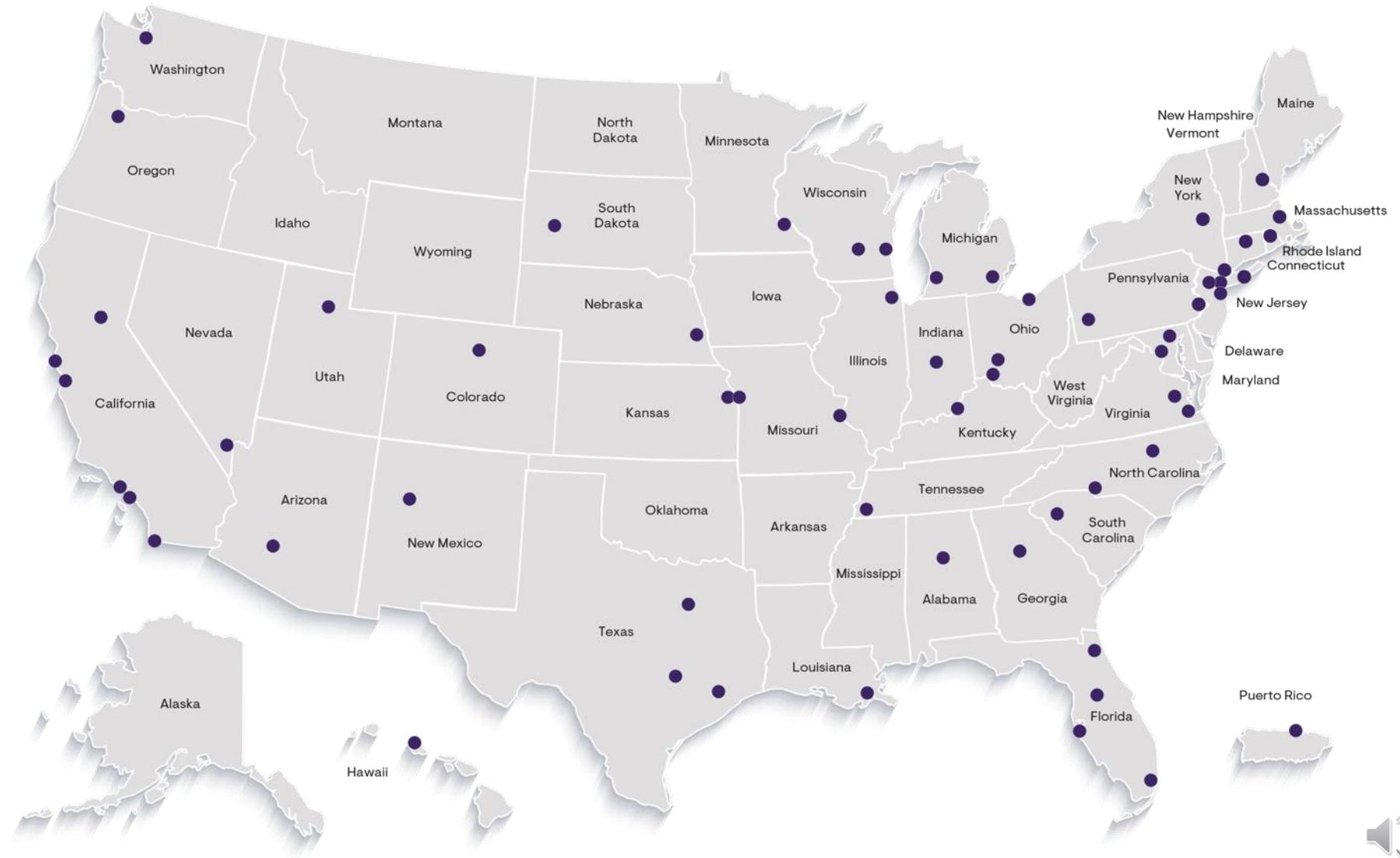
Strategically located to serve employers' needs

61

Locations Nationwide

950+

Attorneys



COVID-19

Jackson Lewis' Coronavirus Task Force is monitoring the developing situation surrounding COVID-19 in order to provide clients with practical, efficient risk management advice.





Agenda

- Current Guidance for Quarantine
- Best Practices for Handling Employee COVID-19 Vaccination
- Developments on the Horizon for 2021 under the Biden Administration



Disclaimer

The materials contained in this presentation were prepared by the law firm of Jackson Lewis P.C. for the participants' reference in connection with education seminars presented by Jackson Lewis P.C. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.

COVID-19 Laws, Regulations and Guidance **change frequently**, so please consult legal counsel for the most up to date information.



STAY
HOME

Current Quarantine Guidance



What Guidance Should We Follow?

CDC Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

Search COVID-19

COVID-19

ACT NOW!

WEAR A MASK STAY 6 FEET APART AVOID CROWDS

UNITED STATES DEPARTMENT OF LABOR

Occupational Safety and Health Administration

CONTACT US FAQ A TO Z INDEX ENGLISH ESPAÑOL

OSHA STANDARDS TOPICS HELP AND RESOURCES

SEARCH OSHA

U.S. Equal Employment Opportunity Commission

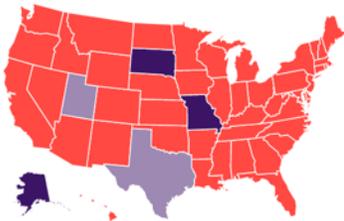
Search terms... Search

JacksonLewis Industries Practices & Services People Offices About Us

COVID-19 Advisor

Business Openings Mass Gathering Limitations PFL / Mini FMLA Predictive Scheduling Unemployment Insurance Paid Sick Leave

Business Openings



Partial Full with Restrictions Full

Click here for more details

Orders, FAQs, et al.

State	Municipality	Link Title	Link
Executive Branch and CDC Guidance		CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again (Appendix F)	
Executive Branch and CDC Guidance		CDC Aircraft Maintenance	
Executive Branch and CDC Guidance		CDC Airline Catering Kitchen Workers	
Executive Branch and CDC Guidance		CDC Airline Customer Service and Gate Agents	
Executive Branch and CDC Guidance		CDC Airport Baggage and Cargo Handlers	
Executive Branch and CDC Guidance		CDC Airport Catering Truck Drivers	
Executive Branch and CDC Guidance		CDC Airport Custodial Staff	
Executive Branch and CDC Guidance		CDC Airport Passenger Assistance Workers	

Translate / Traducir

the ADA, the

Workplace

9 in the

Guidance on This Page For:

- Employers
- Workers
- Essential Services Sector
- Specific Industries

Contracting COVID-19

Use CDC standards. The

alizes, sneezes, or

doors, and can be

rs. Face coverings

ering is

ves in the

D-19 in the

ctions from



CDC Guidance

How Long Must an Employee **WITH COVID-19** Stay Out of the Workplace?

Employee Has COVID-19 With Symptoms

- At least 10 days since symptoms first appeared **and**
 - At least 24 hours with no fever without fever-reducing medication **and**
 - Other symptoms of COVID-19 have improved.
 - No test generally needed to end isolation.
-
- People with severe illness may need to isolate for longer.
 - People with weakened immune system may have to isolate longer and further testing and consultation with experts may be needed.

Employee Tests Positive but Never Experiences Symptoms

- 10 days have passed since the date of positive test.
- No test generally needed to end isolation.
- People with weakened immune system may have to isolate longer and further testing may be needed.

**** Always check state and local requirements**



CDC Guidance

How Long Must an Employee Who **Has Been Exposed** Stay Out of the Workplace?

- People who have been in close contact should quarantine
 - Close contact = within 6 feet for total of 15 minutes or more (or provided care, physical contact, shared eating utensils, sneezed/coughed on)
 - **State laws can differ on the definition of “close contact” for purposes of contact tracing*
- How long?
 - As long as directed by state/local health authorities.
 - CDC recommends 14 days and identifies 2 shorter options:
 - After day 10 without testing if never any symptoms
 - After day 7 after receiving a negative test result (test must occur on day 5 or later) and never any symptoms
- *“CDC continues to endorse quarantine for 14 days and recognizes that any quarantine shorter than 14 days balances reduced burden against a small possibility of spreading the virus.”*
- ***Under CDC guidance, individuals potentially exposed to persons with COVID-19 should quarantine **longer** than individuals who test positive for COVID-19*



CDC Guidance

Employees Who **Have Had COVID-19** or Are **Vaccinated**

- People who have tested positive for COVID-19 within the **past 3 months** and recovered do not have to quarantine or get tested again as long as they do not develop new symptoms.
- People who have been in close contact with someone who has COVID-19 are not required to quarantine if they have been **fully vaccinated** (2nd shot at least 2 weeks ago) against the disease **within the last 3 months** and show no symptoms.
- **State laws can differ*



Important Resources

[Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings](#)

[Duration of Isolation and Precautions for Adults with COVID-19](#)

[When You Can be Around Others After You Had or Likely Had COVID-19](#)

[When to Quarantine](#)

[Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and Diagnostic Testing](#)

[COVID-19 Critical Infrastructure Sector Response Planning](#)



State Law Quarantine Guidance

- Not all states follow the CDC's guidance
- Many states have issued mandatory and precautionary quarantine orders which carry enforcement obligations and penalties

For example:

- Georgia – <https://dph.georgia.gov/contact>
- New York – <https://forward.ny.gov/>
- Ohio – <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio>
- Tennessee – <https://www.tn.gov/governor/covid-19/economic-recovery.html>
- Texas – <https://www.dshs.state.tx.us/coronavirus/business.aspx>





Return to Work Considerations

- Daily screening protocols
- Safety protocols
- Disinfecting the workplace
- Communicating positive COVID-19 tests to employees
- Mandating vaccines
- Leave management



Absence Management

The 3 Questions

To Determine How Much Time Off You are Required to Provide Remain the Same

Is the employee “entitled” to be absent with job protection?

FMLA, State Paid Sick Leave and Other State Entitlements

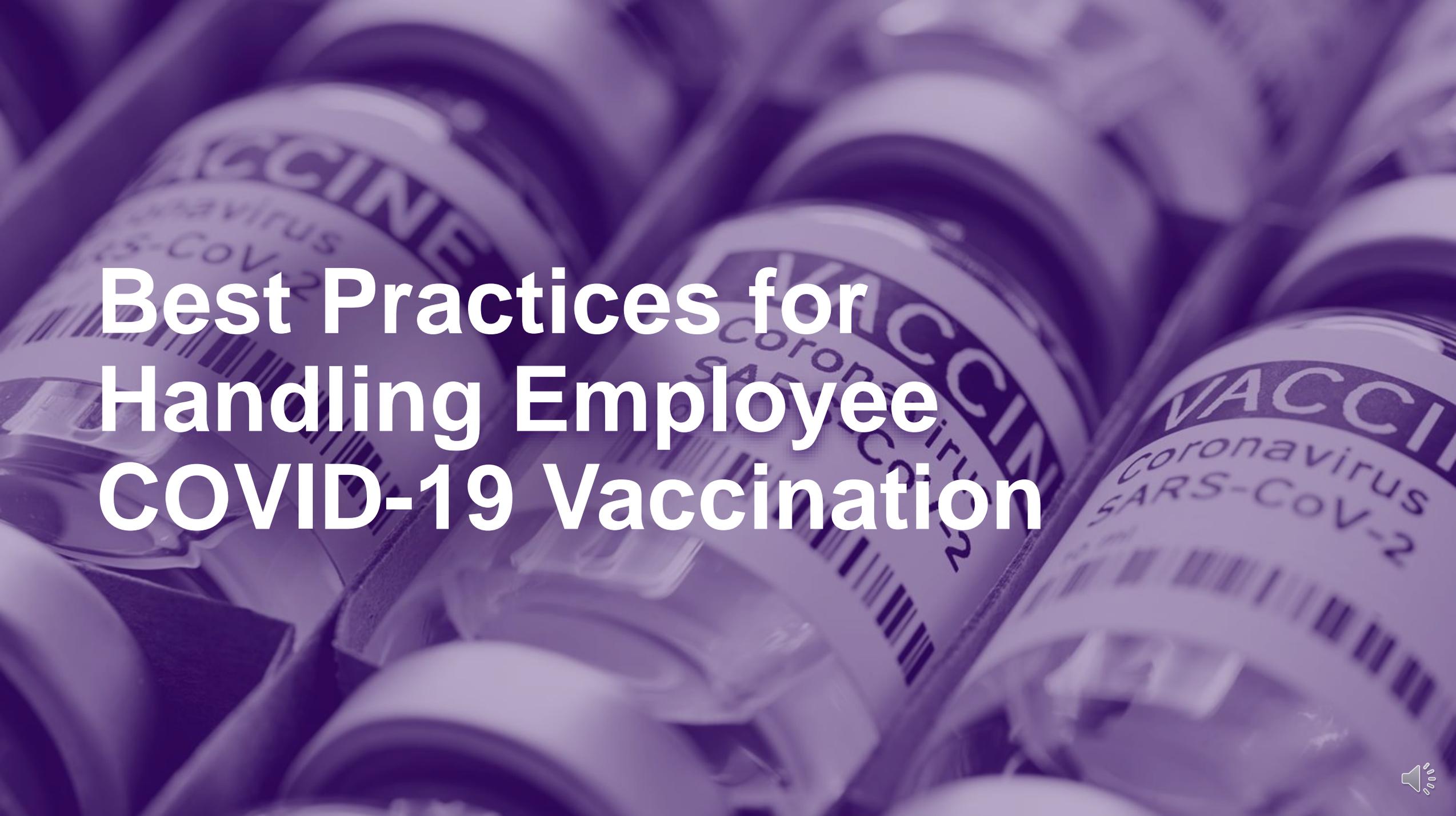
Has employer “committed” to providing additional job-protected leave?

- Collective Bargaining Agreement
- Your policies and past practices

Is additional leave required as a reasonable accommodation for employees with disabilities?

- ADAAA
- PDA
- State pregnancy accommodation laws





Best Practices for Handling Employee COVID-19 Vaccination



Whether or not to Mandate Vaccinations

Many considerations . . . Pros and Cons

- As of now, there is no law that requires employees to get a COVID-19 vaccination.
- Some states are considering laws that would prohibit employers from mandating the vaccine.
- Vaccines are currently **only** approved under EUA.
- The FDA Fact Sheets inform individuals they may accept or reject vaccinations.
- Potential liability issues.
- Employee relations issues and union bargaining issues.
- OSHA requires employers to provide a safe workplace.
- OSHA's guidance: make vaccines available at no cost and provide info and training.



EEOC Vaccination Guidance



- EEOC's December 16, 2020 FAQs did not expressly say employers may mandate the COVID-19 vaccine but that seems implicit in the FAQs, subject to certain accommodations
- Plus, in 2009, EEOC issued pandemic guidance and generally approved mandating the influenza vaccine, subject to certain accommodations



Best Practices for Employers

- Employers who want to encourage or require their employees to get the vaccine should consider several best practices
- Have a written policy:
 - Is the vaccine mandated or encouraged
 - Applicants, all or only some employees
 - Are there phases and timelines for employees
 - While the vaccine is limited, be sure to follow CDC guidance on who should get vaccine and in what order
 - Employees may be eligible to take paid or unpaid time off for absences related to reactions where they feel ill after the vaccination



Best Practices for Employers

- Have a process for handling potential exceptions for any mandatory vaccination requirements; reasonable accommodations for disability, religious beliefs, pregnancy, breastfeeding may be required
 - Train managers/supervisors/HR on how to recognize requests for accommodation and who within the company to direct the request for analysis
 - Interactive process
 - Requirements for supporting documentation
 - Who will manage requests for accommodation
 - While an employer can ask for accommodation requests to be in writing, there is still the obligation to engage in the interactive process if the request is oral



Best Practices for Employers

- Consider how to address other objections:
 - Adverse reaction concerns
 - Personal or philosophical objections
 - Safety concerns
 - Medical information
 - Disability-related inquiries



Important Resources

EEOC's

[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

("WYSK"), Questions K.1 through K.10, added 12/16/2020

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

[COVID-19 Vaccine Communication Toolkit for Essential Workers: Getting Started](#)

[Customizable COVID-19 Vaccine Content for Essential Workers](#)

Jackson Lewis COVID-19 Advisor

<https://www.jacksonlewis.com/covid19-advisor>

State Departments of Health





Developments on the Horizon for 2021 under the Biden Administration



On January 20, 2021
Joe Biden became the 46th
president of the United States

This impacts:

- Health insurance
- Arbitration
- Collective Bargaining
- Unions
- Equal Pay Laws
- Federal Contracts
- Immigration
- Noncompete Agreements
- Paid Leave
- Retirement
- Unemployment Insurance
- Wages



Executive Orders

President Biden has signed **34 new Executive Orders** so far, many of which reverse Trump's executive orders.

Executive Orders

Protecting Worker Health and Safety

- Calls on the Occupational Safety and Health Administration (OSHA) to release clear guidance on COVID-19.
- Increases OSHA enforcement related to COVID-19 violations.

Protecting the Federal Workforce

- Disbands the Interagency Labor Relations Group.
- Restores collective bargaining power and worker protections for federal workers.
- Lays the foundation for a \$15 minimum wage for federal workers.

Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- Prevents workplace discrimination based on sexual orientation or gender identity.
- Specifies that adults should be able to work knowing that they will not be mistreated for how they dress or who they date.



“ Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace ”

Guidance lists 16 elements that effective plan should include



Summary of Protecting Worker Health and Safety

Goal of guidance is to help employers and workers identify risks of being exposed to and/or contracting COVID-19 at work and to help them determine appropriate control measures.

Guidance lists 16 elements that effective plan should include.

The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.



Elements that Effective Plan Should Include

- Assignment of a workplace coordinator
- Identification of where and how workers might be exposed to COVID-19 at work
- Identification of a combination of measure that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls
- Consideration of protections for workers at higher risk for severe illness through supportive policies and practices
- Establishment of a system for communicating effectively with workers and in a language they understand
- Educate and train workers on your COVID-19 policies and procedures using accessible formats and in a language they understand
- Instruct workers who are infected or potentially infected to stay home and isolate or quarantine
- Minimize the negative impact of quarantine and isolation on workers



Elements that Effective Plan Should Include

- Isolating workers who show symptoms at work
- Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility
- Providing guidance on screening and testing
- Recording and reporting COVID-19 infections and deaths
- Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards
- Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees
- Not distinguishing between workers who are vaccinated and those who are not
- Other applicable OSHA standards



Resources for OSHA Guidance

- <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>
- <https://www.osha.gov/coronavirus/safework>
- <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>
- <https://www.osha.gov/coronavirus/standards>



Agency Expansion

- Increased funding for the EEOC, OSHA, OFCCP, and the U.S. Justice Department's civil rights division to increase the number of anti-discrimination investigators, litigators, and enforcement actions.
- Dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate an anti-misclassification effort.
- Direct the DOL to engage in collaborative enforcement partnerships with the NLRB, the EEOC, the IRS, the justice department, and state tax, unemployment insurance, and labor agencies.



Immigration

- Expand ability of employers to utilize H1-B and similar procedures to bring in workers from outside the U.S.
- Revoke existing Trump Administration executive orders restricting immigration.
- Undo proposed Trump Administration rulemaking.
- Mandatory E-Verify for employers?



Other Equal Pay and Wage Initiatives

Paycheck Fairness Act

Biden states he supports this Act, which provides remedies to workers retaliated against for discussing wages.

Tipped Employee Wages

Under the Raise the Wage Act of 2021, tipped and youth worker minimum wages would reach \$15 in 2027. Biden has expressed support for this type of law.

Domestic Workers' Bill of Rights

Biden plans to establish a general wage and standard board to set fair wage levels and define working conditions for domestic workers.

Minimum Wage

Biden will likely support the new Raise the Wage Act of 2021, which will increase the federal minimum wage to \$15 an hour by 2025.

FAMILY Act

Biden supports passing the Family and Medical Insurance Leave Act, which would provide workers with up to twelve weeks of partial income funded through a payroll tax when they take leave for their own serious health condition, pregnancy, and recovery from childbirth.

Paid Leave

Biden's administration supports increasing paid leave benefits for employees and granting employees seven days of paid sick leave.



Equal Employment Opportunity Commission (EEOC)



- Issues on the table for the EEOC include rulemaking on conciliation, the ability for employers to offer *de minimis* financial incentives to encourage worker participation in employer-sponsored wellness programs, and joint employer issues.
- Biden's administration will consider expanding the EEOC's information collection program to include data on earnings gaps by race and gender
- Biden quickly restructured the EEOC panel.



Discrimination

Tax Incentives

Biden's administration supports tax incentives to employers that comply with the ADA and that hire people with disabilities.

Gender-based pay

Biden's administration supports shifting the burden to employers to prove that any gender-based pay gap exists for job-related reasons and business necessities.

Pregnant Workers Fairness Act

This law would require businesses with at least 15 employees to make reasonable accommodations for workers who are pregnant.

Penalties

The Biden administration supports increased penalties against companies that unlawfully discriminate under applicable federal laws.

BE HEARD Act

Biden supports the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD Act), which will provide grants to employers for preventing and addressing employment discrimination, including harassment.

Equality Act

Biden supports the Equality Act, which protects LGBTQ+ individuals under existing civil rights laws.

Equal Rights Amendment

Biden wants to pass the Equal Rights Amendment, which would end the legal distinctions between men and women in employment and other matters.

Religious Exemptions

Biden supports reversing Trump's religious exemptions to nondiscrimination laws to address discrimination against LGBTQ+ people.

Other Areas of Focus

Non-Compete Agreements

Biden's administration will consider legislation eliminating non-compete clauses except ones that are necessary to protect a narrowly defined category of trade secrets and will ban no-poaching agreements.

Retirement

Biden's tax plan calls for changing the 401(k) plan by ending upfront tax breaks and replacing them with flat-tax credits.

Unemployment Insurance

Biden supports states adopting compensation programs as alternatives to reductions in force. Biden proposes the federal government provide wage differences in the form of unemployment insurance to employees of companies in distress so the company can keep workers employed at reduced hours (e.g., shared work program).

Class Action Lawsuits

The Biden administration supports making it easier for employees to join in class action lawsuits.



JacksonLewis

Thank **you.**

