

COVID-19: Its Impact on Employment Litigation, How Best to Prepare Your Company, and What the Future of Litigation May Hold

November 10, 2021



Littler

Presenters



ALYSSA GONNERMAN

Associate

Littler Mendelson

Kansas City | Missouri

agonnerman@littler.com

816.627.4410



BONNIE BIRDELL

Associate

Littler Mendelson

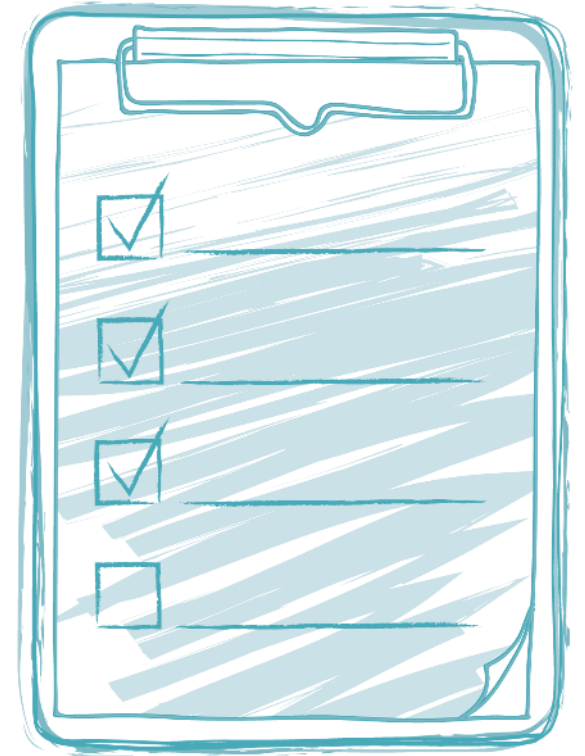
Kansas City | Missouri

bbirdsell@littler.com

816.627.4412

Agenda

- COVID-19 Litigation Stats
 - Littler COVID Tracker
- COVID-19 Litigation Headlines
- Return to Work & Accommodation Guidance
 - EEOC views on mandatory vaccines
- FMLA Litigation Issues
- COVID-19 Wage & Hour Issues: Wandering Workers and Blurring the Line Between Personal & Work Life





**No Rest for the
Weary—COVID
Litigation is a
Real Thing**

Littler COVID-19 L&E Litigation Tracker Report

Highlights:

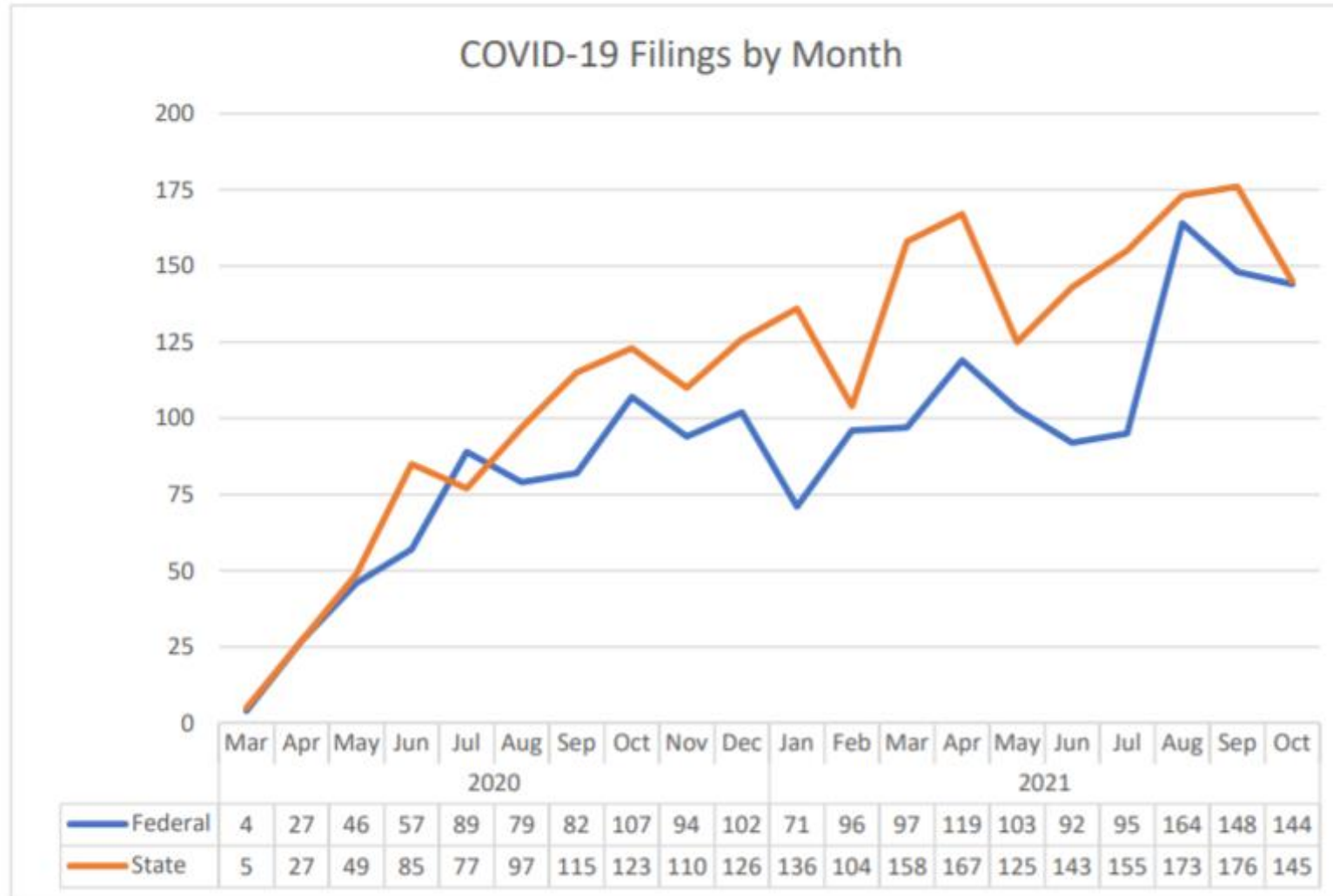
- 4,112 Cases filed since March 12, 2020
 - 1,816 Federal
 - 2,296 State
- 414 are Class Actions

Month	2019 L&E Filings	2020 L&E Filings	2020 COVID-19 Filings	2020 Percent of COVID-19 Filings	2021 L&E Filings*	2021 COVID-19 Filings	2021 Percent of COVID-19 Filings
Jan.	7,440	7,678	-	-	6,147	207	3.37%
Feb.	6,525	6,717	-	-	6,179	200	3.24%
Mar.	8,235	6,612	9	0.14%	7,132	255	3.58%
Apr.	8,455	5,248	54	1.03%	6,945	286	4.12%
May	9,740	6,201	95	1.53%	6,324	228	3.61%
Jun.	9,269	7,339	142	1.93%	7,889	235	2.98%
Jul.	9,888	7,127	166	2.33%	7,475	250	3.34%
Aug.	8,905	6,736	176	2.61%	7,628	337	4.42%
Sep.	7,605	6,982	197	2.82%	7,417	324	4.37%
Oct.	8,272	7,074	230	3.25%	**	289	
Nov.	7,151	6,715	204	3.04%			
Dec.	7,281	7,044	228	3.24%			
Total	98,766	81,473	1,501	1.84%	63,136	2,611	

* Total filing numbers pulled from Monitor Suite, the numbers may change as cases are added to the database.

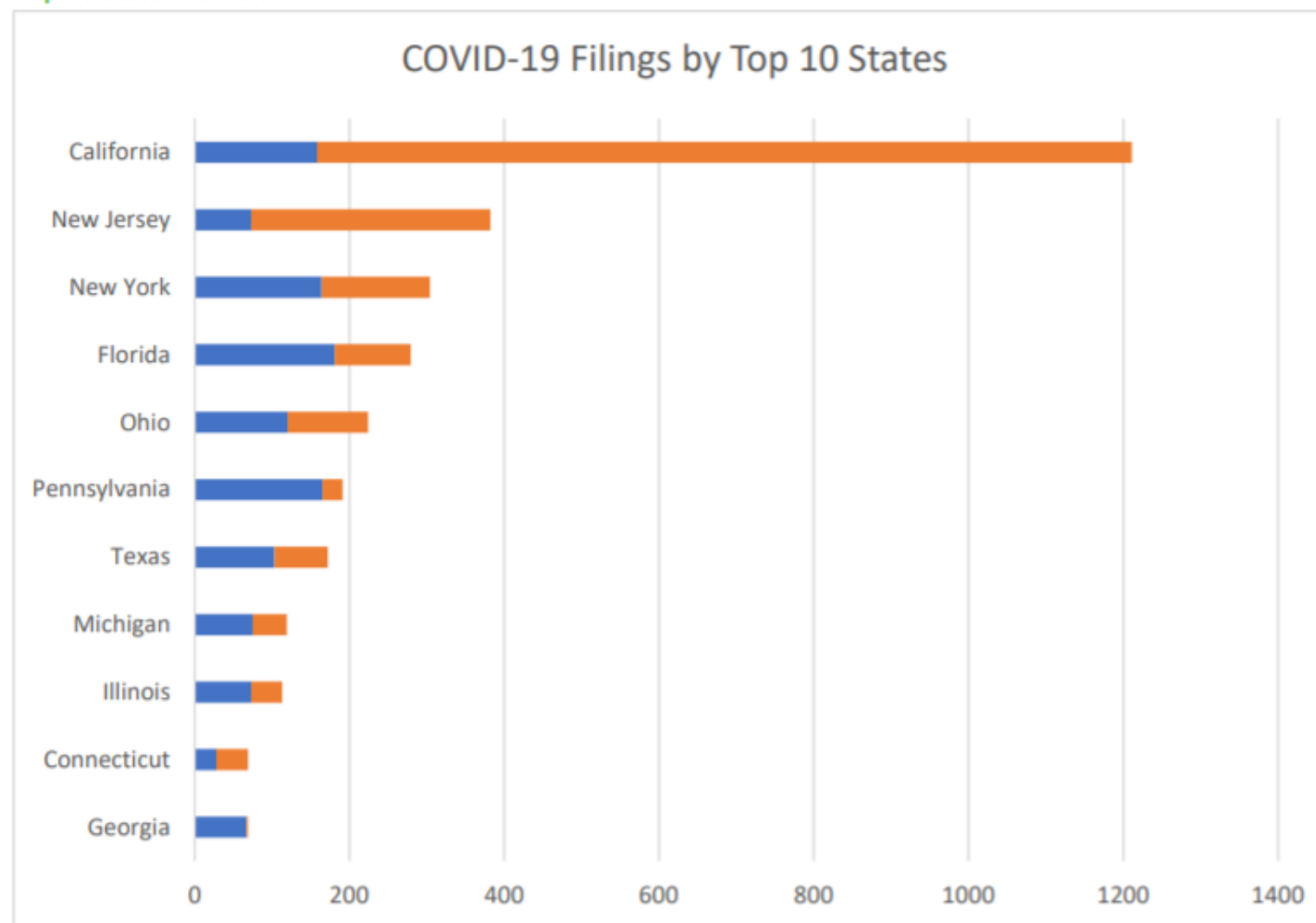
**Totals are incomplete as the month is still in progress.

Little COVID-19 L&E Litigation Tracker Report



Little COVID-19 L&E Litigation Tracker Report

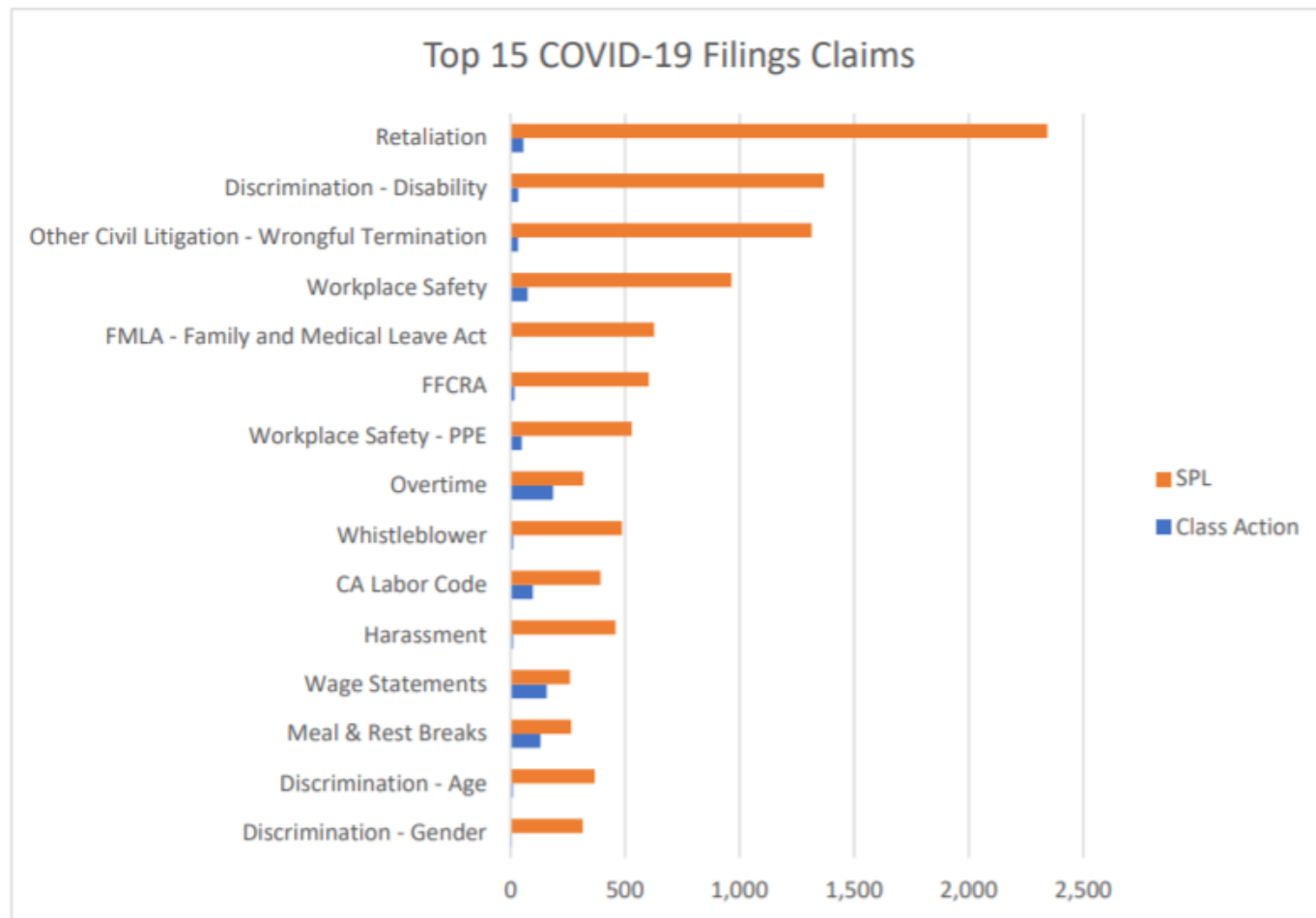
Top 10 State Breakdown



Littler COVID-19 L&E Litigation Tracker Report

Claim Trends

Top 15 COVID-19 Filings Claims



Claims	Class Action	SPL	Grand Total
Retaliation	56	2,343	2,399
Discrimination - Disability	33	1,368	1,401
Other Civil Litigation - Wrongful Termination	32	1,314	1,346
Workplace Safety	74	964	1,038
FMLA - Family and Medical Leave Act	6	627	633
FFCRA	17	603	620
Workplace Safety - PPE	48	529	577
Overtime	185	318	503
Whistleblower	11	486	497
CA Labor Code	97	392	489
Harassment	10	458	468
Wage Statements	157	259	416
Meal & Rest Breaks	130	264	394
Discrimination - Age	9	367	376
Discrimination - Gender	6	315	321

Littler COVID-19 L&E Litigation Tracker Report

Industry Trends

Top 10 Industries Targeted by COVID-19 Filings



Industry	Count
Healthcare	940
Manufacturing	486
Public Administration	428
Retail	370
Hospitality	281
Education	229
Transportation	198
Business Services	190
Construction	186
Finance	150

COVID-19 Litigation in the News

- Vaccine Mandates
 - OSHA's Emergency Temporary Standard
 - *John Does 1-3 et al., Applicants v. Janet T. Mills, Governor of Maine*
 - SCOTUS did not block Maine's vaccine requirement for health care workers
 - *Missouri v. Biden*
 - 10 states filed suit to block the executive order mandating vaccines for federal contractors

COVID-19 Litigation in the News

- The Opposite of Vaccine Mandates
 - Texas Executive Order GA-40
- Whistleblowers
 - *Christopher Neuwirth v. New Jersey*
 - NJ Court recently denied summary judgment on a whistleblower claim against the state alleging the Governor's chief of staff asked for special testing for his family

CLE Check In



Accommodation and FMLA Issues

Return to Work and Accommodation Guidance

- An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?
- What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19?

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



“Classic” ADA In a New Light

Obligation to consider accommodations for impairments creating “high risk” of severe symptoms if COVID-19 contracted. Latest CDC:

Cancer

Chronic kidney disease

Chronic liver disease

Chronic lung disease

Dementia or other neurological conditions

Diabetes (type 1 or type 2)

Down syndrome

Heart conditions

HIV infection

Immunocompromised state

Mental health conditions

Overweight and obesity

Pregnancy

Sickle cell disease or thalassemia

Smoking (current or former)

Solid organ or blood stem cell transplant

Stroke or cerebrovascular disease

Substance use disorder

Tuberculosis



EEOC recognizes “Long COVID” Can Be a Disability under the ADA

- On September 9, 2021, EEOC issued a notice that it agreed with Department of Health and Human Services in its guidance titled, “Guidance on the ‘Long COVID’ as a disability under the ADA.”
- Long COVID can be a disability under the ADA if impairment substantially limits one or more major life activities
 - Physical impairment – such as neurological, respiratory, cardiovascular, and circulatory systems
 - Mental impairment – mental or psychological disorder, such as emotional or mental illness
- <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html>

Other COVID-Related Situations That Can Trigger Interactive Dialogue

- “Fear” of COVID – Anxiety and other mental health issues
- Disability-based objections to employer policy requiring wearing of protective gear (cloth masks, gloves, etc.)
 - <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



Accommodation to Avoid Exposing a High-Risk Family Member to COVID

- “Although the ADA prohibits discrimination based on association with an individual with a disability . . . The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.”
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

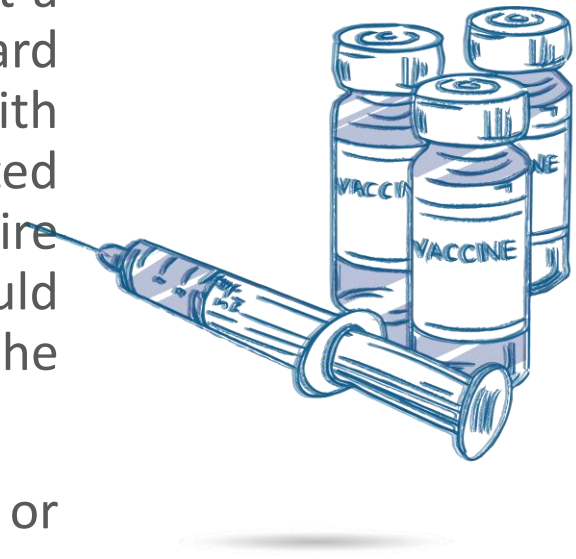


EEOC View on Mandatory Vaccinations and Impact of ADA

Mandatory Vaccinations are generally permissible, but care must be taken based on excluding an employee from the workforce who indicates that he/she cannot receive a COVID-19 vaccination due to a disability or sincerely held religious belief, practice, or observance.

“Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace”

“**Direct threat**” = “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation



EEOC View on Mandatory Vaccinations and Impact of ADA

Step #1: Per the EEOC, this requires an **individualized assessment** whether a direct threat exists:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

Other factors:

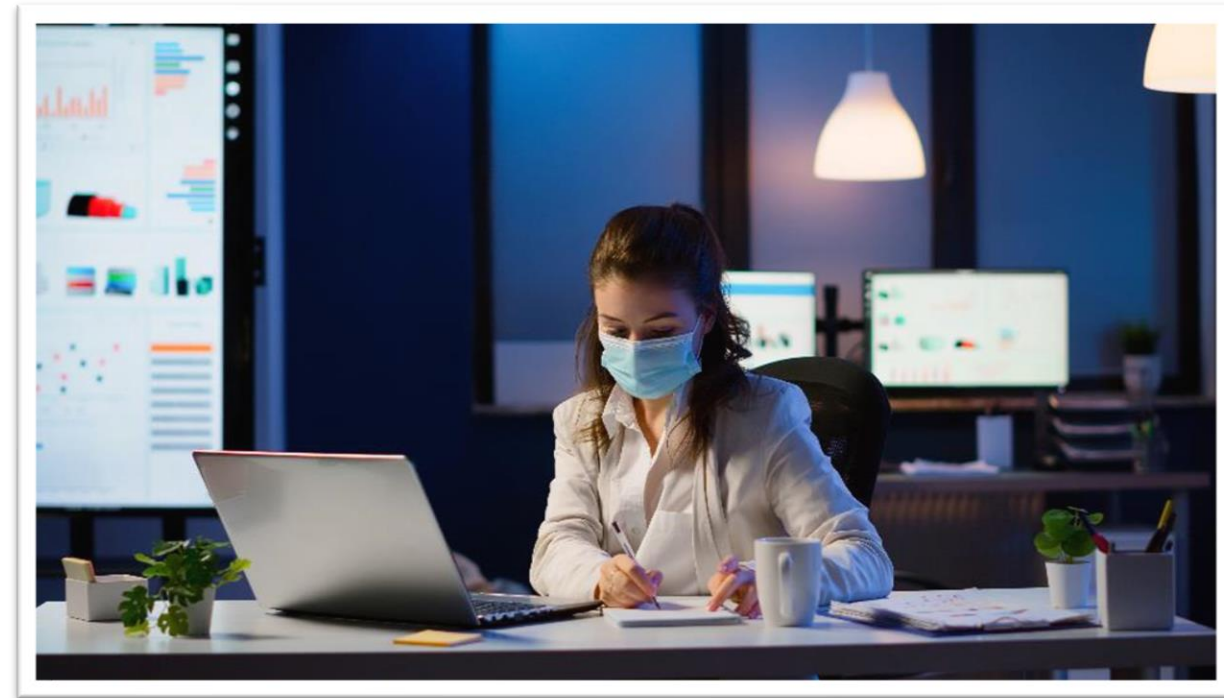
- Type of work environment: solo v. team; inside v. outside
- Available ventilation
- Frequency and duration of direct interaction with other employees and non-employees (e.g. customers, patients, contractors, etc.)
- Number of partially or fully vaccinated individuals already in the workplace
- Whether other employees wear protective gear or undergo routine screening testing
- Ability to social distance

EEOC View on Mandatory Vaccinations and Impact of ADA

Step #2: If conclude a direct threat, assess whether a reasonable accommodation, absent undue hardship, would reduce or eliminate the threat

Potential Reasonable Accommodations:

- Requiring employee to wear a mask
- Work a staggered shift
- Make changes to work environment, such as improving ventilation system or limiting contact with others
- Permit telework, if feasible
- Reassign employee to a vacant position in a different workplace



EEOC Views on Mandatory Vaccinations – Obligation of Reasonable Accommodation and Interactive Process under ADA

Cautionary Notes:

Even if an employer determines that an employee's disability poses a direct threat, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions

If an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

EEOC Views on Mandatory Vaccinations and Religious Accommodations

If an employee indicates that he/she is unable to receive a vaccination because of a sincerely held religious belief, practice, or observance care also must be taken in excluding an employee from the workforce

- EEOC guidance explains that because the definition of religion is broad and protects religious beliefs, practices and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief
- But, if an employer has an objective basis for questioning either the religious nature or sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and requesting additional supporting information
- Practice Pointer: Although there is a lower burden to establish "undue hardship" dealing with religious accommodation, employers should consider the same approach to reasonable accommodation through the interactive process

Would providing the accommodation impose an undue hardship?

Factors in determining “undue hardship”

- Type of workplace
- Nature of EE’s duties
- Identifiable cost of accommodation in relation to the size and operating costs of the employer
- Number of EEs who will need a particular accommodation

Examples of potential “undue hardship”

- Diminishes efficiency in other jobs
- Infringes on other employees’ job rights or benefits
- Impairs workplace safety
- Causes co-workers to carry the accommodation employee’s share of potentially hazardous or burdensome work

So if Someone Cannot Get Vaccinated, for a Protected Reason, Then What?

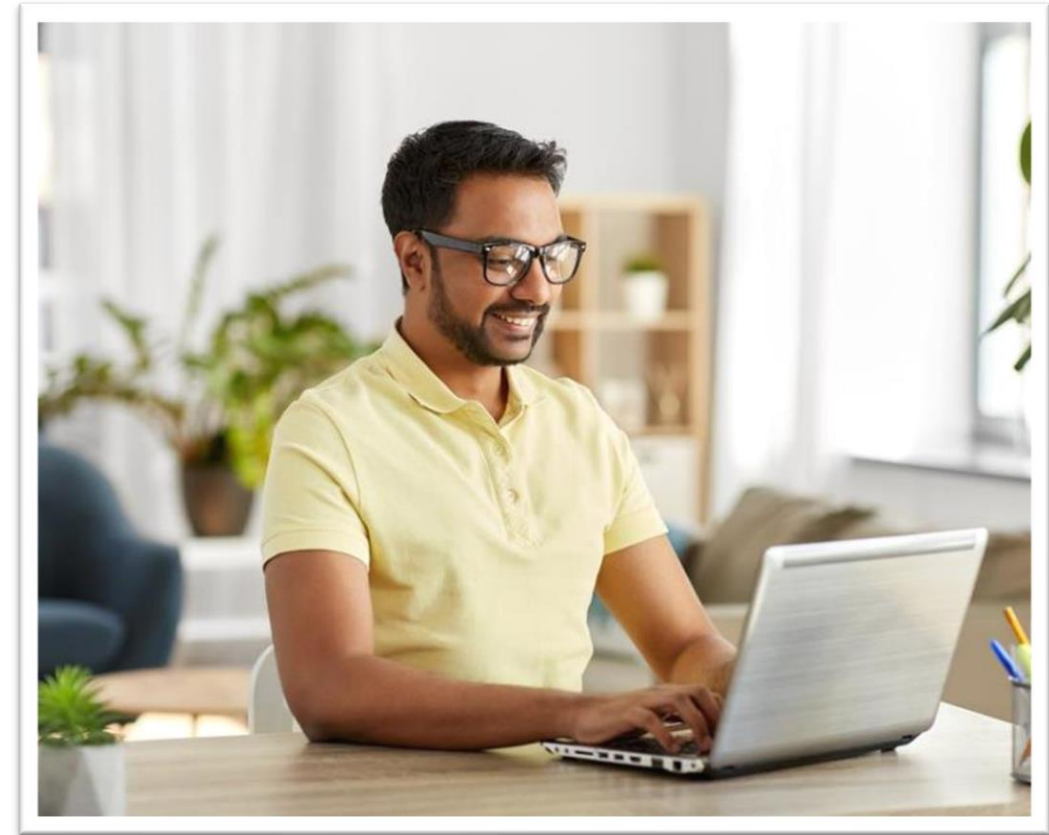
- Employers should consider:
 - Alternative work assignments/locations/workspace/schedules
 - Other protective measures/safety protocols
 - Remote work
 - Leaves of absence (is it FMLA?)
 - Others?
- After exhausting the above options, employers must still conduct an individualized analysis of direct threat prior to removing someone from the workplace for being unvaccinated



Trying to Avoid and Best Defend Against COVID -19 Litigation

- Workplace safety measures like masks, gloves – these are not accommodations
- Interactive process and individualized assessments are critical
- COVID-19 as a trial period?
 - “...telework because of the COVID-19 pandemic could serve as a trial period” to show whether employees could perform all essential functions.
- “Employers should consider any new requests in light of this information.”

EEOC Pandemic Guidance D.16



“Classic” FMLA Litigation Issues

- COVID-19 as “Serious Health Condition”
- Inpatient treatment or connected period of incapacity or subsequent treatment
- Period of incapacity of more than 3 consecutive, full calendar days + subsequent period of incapacity or treatment relating to same condition that **also involves**:
 - Treatment (*in-person*) at least twice within 30 days of first day of incapacity (second treatment excused in extenuating circumstances); or
 - Treatment (*in-person*) at least once which results in a “regimen of continuing treatment.”

FMLA Litigation Issues

**Pregnancy or chronic condition creating “high risk” if COVID contracted –
*Could be “Classic” FMLA***

Don't be Misled by DOL COVID Guidance Q&A:

4. Can an employee stay home under FMLA leave to avoid getting COVID-19?

“No. The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition. ***Leave taken by an employee solely for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.***”

Certain state or local laws may have different requirements, which employers must also consider when determining their obligation to provide leave.

(<https://www.dol.gov/agencies/whd/fmla/pandemic>)

FMLA Litigation Issues

29 CFR § 825.102 – elaborates on definition of “incapacity” for such conditions:

Absences attributable to [pregnancy, prenatal care, or chronic conditions] qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days.

For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

CLE Check In

THE NEXT NORMAL

Working from home is here to stay, even when the economy reopens

PUBLISHED MON, MAY 11 2020-9:00 AM EDT | UPDATED MON, MAY 11 2020-1:01 PM EDT



Ari Levy
@LEVYNEWS

SHARE [f](#) [t](#) [in](#) [✉](#)

Covid-19 could cause permanent shift towards home working

Tech firms will benefit, but some companies could find employees don't want to return to the office

UP FRONT

Telecommuting will likely continue long after the pandemic

Economy | Coronavirus pandemic

As new wave of COVID-19 cases hits, remote work becomes the norm

What for many workers started as a temporary break from the office to stop the spread of the coronavirus has turned into a new way of life.

U.S. Workers Discovering Affinity for Remote Work

BY MEGAN BRENAN

Our best estimate is that 25-30% of the workforce will be working-from-home multiple days a week by the end of 2021.

— Kate Lister, *President of Global Workplace Analytics*

Increased demand for work-from-home from employees

The demand for flexibility in where and how people work has been building for decades. Before the crisis, surveys repeatedly showed 80% of employees want to work from home at least some of the time. Over a third would take a pay cut in exchange for the option. While the experience of working at home during the crisis may not have been ideal as whole families sheltered in place, it will give people a taste of what could be. The genie is out of the bottle and it's not likely to go back in.

Increased awareness of cost-saving opportunities in work-from-home

Over the past several years, the primary driver of work-at-home programs has been the attraction and retention of talent, but during the last recession, it was largely about saving money. Organizational leaders, desperate to shed costs, found they could do more with less real estate. Since that time, occupancy studies have shown just how inefficient office space was being used. Employees around the globe are not at their desk 50% to 60% of the time! That's a huge waste of money.

<https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast>

Wage and Hour and WFH

- Telework Policy
 - Non-exempt employees
 - Hours Worked and Timekeeping Policy
 - Specify what constitutes work
 - Defined work schedule
 - Prohibit work outside schedule
 - Accurately report all hours worked
 - Short interruptions = work
 - Cannot aggregate short breaks
 - Meal periods and rest breaks



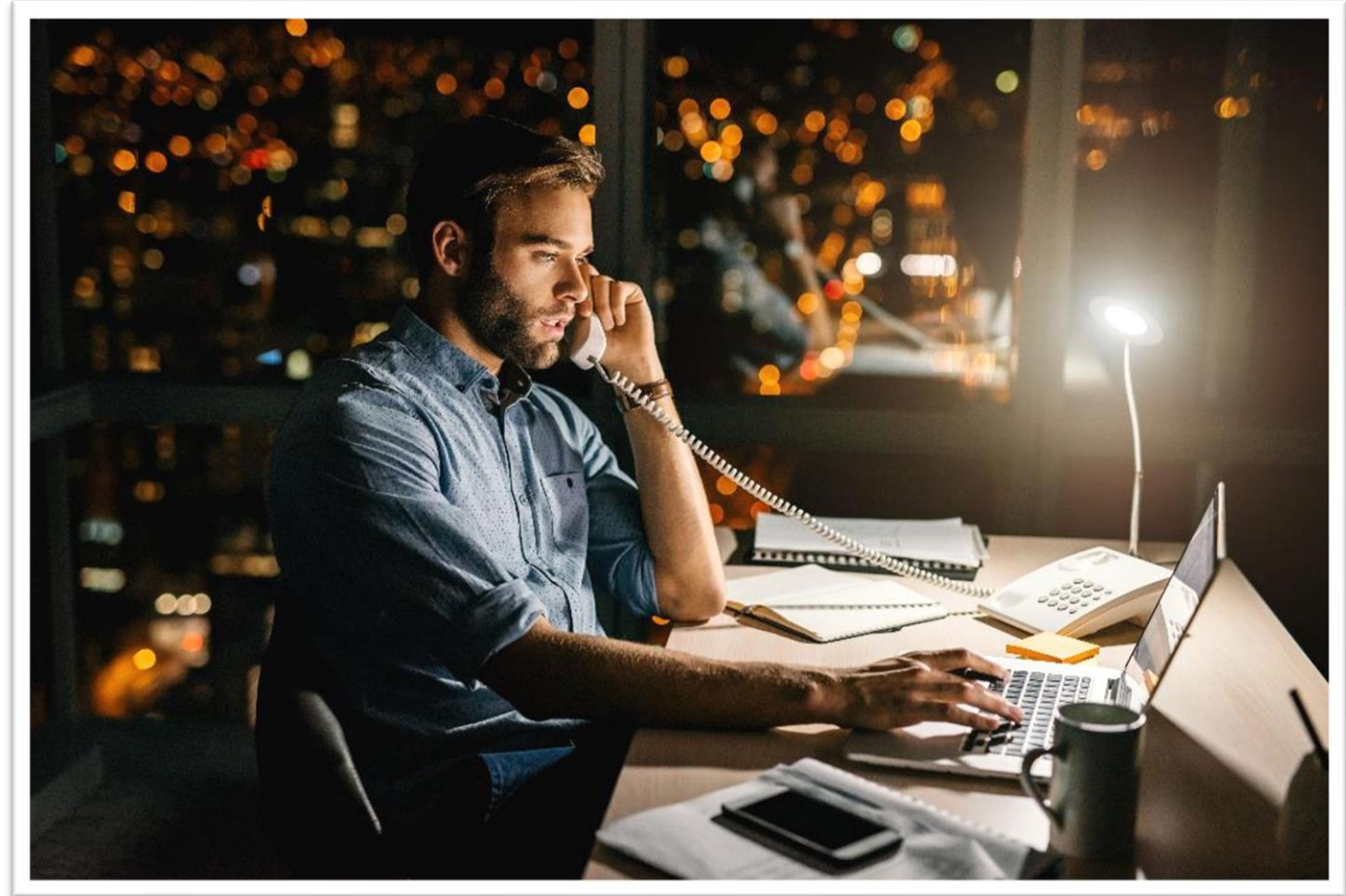
Wage and Hour and WFH

- Telework Policy
 - Non-exempt employees
 - Schedule options
 - Maintain regular schedule (8-12, 1-5)
 - Block schedule (7-8, 9-3, 10-11)
 - Consider “core hours” (i.e., 10-12 and 1-3)
 - Avoid “Continuous Workday”
 - Work blocks greater than 1 hour
 - Blocks greater than 30 minutes apart
 - Split Shift and Spread of Hours



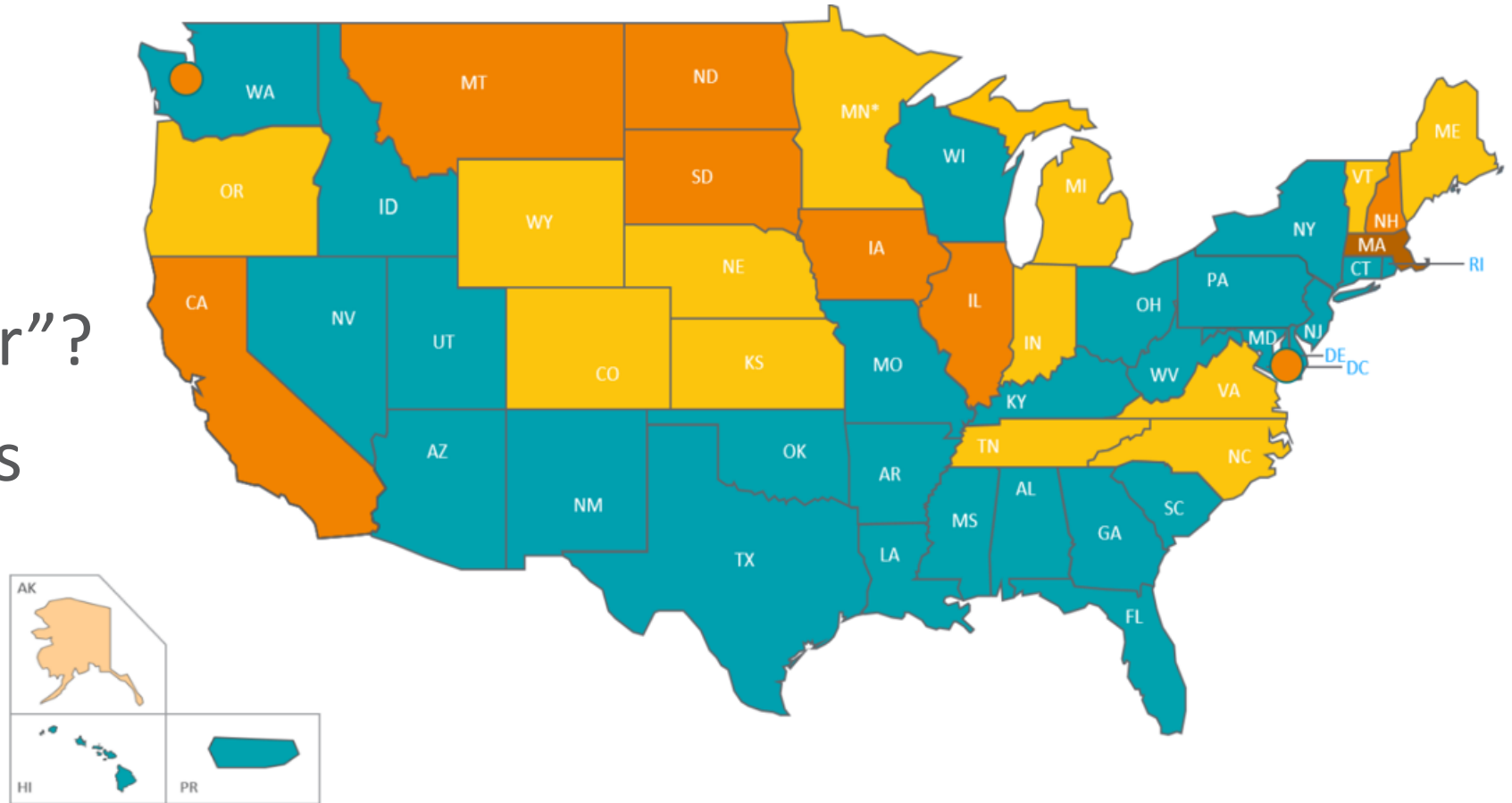
Wage and Hour and WFH

- Non-exempt
 - Access to email
 - Multitasking



Expense Reimbursement

- Is it necessary?
- Is it a “reasonable percentage”?
- Is it “free and clear”?
- Exempt Employees

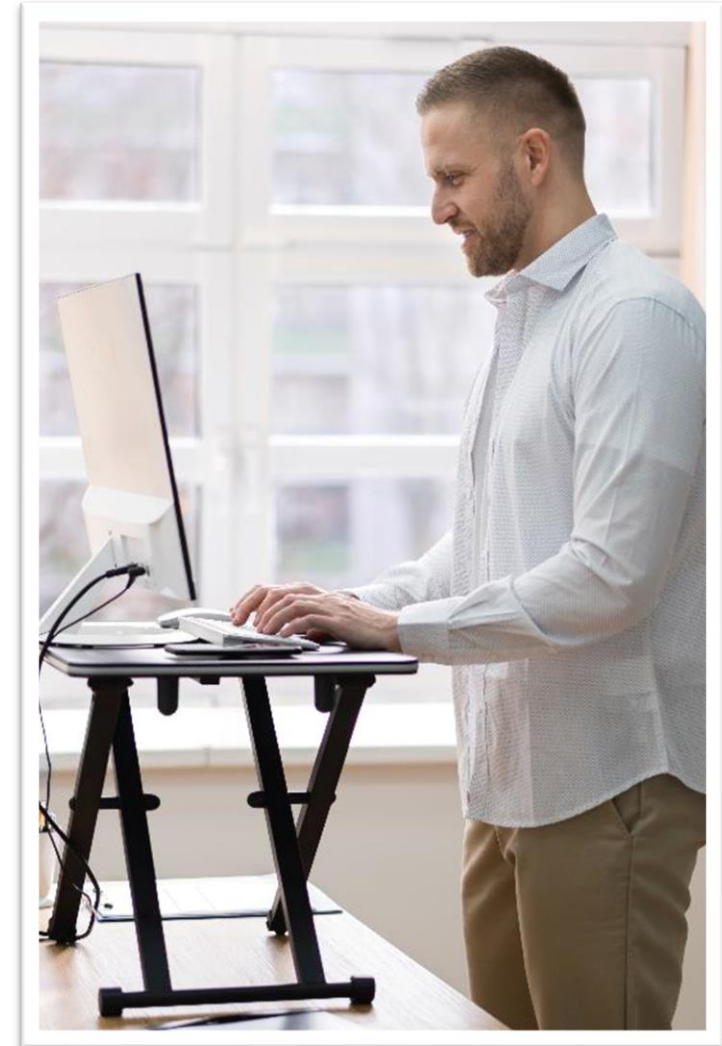


Make it Clear

- Whether purchase is voluntary or involuntary;
- Identify equipment and resources;
- Require prior approval for purchases;
- Replenishing supplies;
- Reasonable cost/percentage;
- Right to appeal.

WFH Risks

- Suitable seating
- Ergonomic workspaces
- Suitable space
- Identify equipment and resources





UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

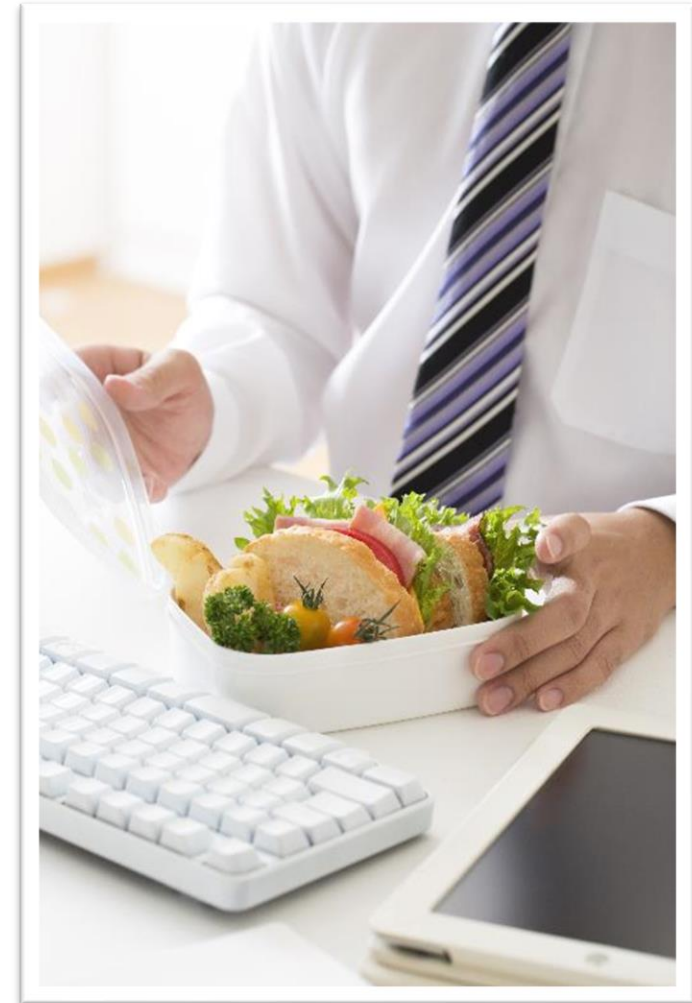


Field Assistance Bulletin 2020-5 (8/24/20)

- Actual or constructive knowledge
- Reasonable diligence
- Reasonable reporting procedure
- Do not prevent or discourage reporting
- Employee reports or other notifications
- Impractical efforts not required

Even more risks!

- Mixing personal and work time
- Travel (time and expense)
- Meal periods
- Recording time



Wandering Workers

- Remote workers who work from a city or state other than their home or office
- Legal requirements vary in different jurisdictions



What Laws Might Apply?

- Applicable legal standards may change based upon the jurisdiction where the employee is working
- Most jurisdictions take an expansive view regarding the applicability of the protections they afford employees under their local laws



Differing Wage and Hour Rules

- Differing reimbursement rules
- Differing available exemptions and exemption standards
- Differing minimum wage rates
- Differing rules on availability of overtime (*e.g.*, daily OT)
- Differing meal and rest break rules
- Differing split shift and reporting time rules



Other Differing Workplace Laws

- Differing EEO protected categories
(*e.g.*, D.C. Code § 2–1402.11 (personal appearance, family responsibilities, political affiliation); Va. Code § 2.2-3900(B)(2) (veteran status))
- Differing workplace protections
(*i.e.*, political activity, private conduct outside the workplace)
- Differing employment tax/withholding issues
- Differing unemployment insurance laws
- Differing workers' compensation laws
- Differing workspace safety standards
- Differing paid and sick leave laws



Solutions!

- Non-exempt employees:
 - Define “work”
 - Set a schedule
 - Include breaks
 - Prohibit work outside schedule
 - Set expectations regarding interruptions
 - Include reasonable reporting procedure



Solutions!

- For all employees:
 - Identify equipment and resources
 - Specify which are employer-provided
 - Clarify expense reimbursement
 - What
 - How much
 - Allow appeals
 - Plan for lost or damages property, and return of equipment upon separation

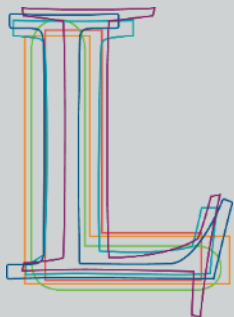
Solutions!

- For all employees:
 - Specify if arrangement is voluntary or involuntary
 - Review and reconsider exemption status
 - Take state law variations into account
- Don't leave this to chance!
 - Document
 - Training
 - Including supervisors

Littler Remote Work Toolkit for Employers

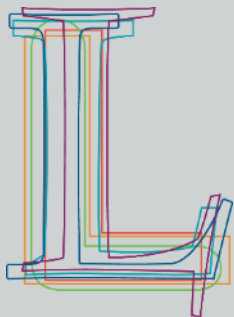
The Remote Work Toolkit for Employers contains a **Guide, Model Policy and Model Agreement** for companies to use when implementing remote work and telework programs in the pandemic and post-pandemic era. The Policy and Agreement are annotated and editable – and can be customized to your needs and circumstances.

To learn more or to purchase the Remote Work Toolkit, visit littler.com or email us at Innovation@Littler.com.



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.