# THE COVID-19 PANDEMIC: THE TOP EMPLOYMENT LAW LESSONS LEARNED

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# Today's Presenters



Michele Ballard Miller

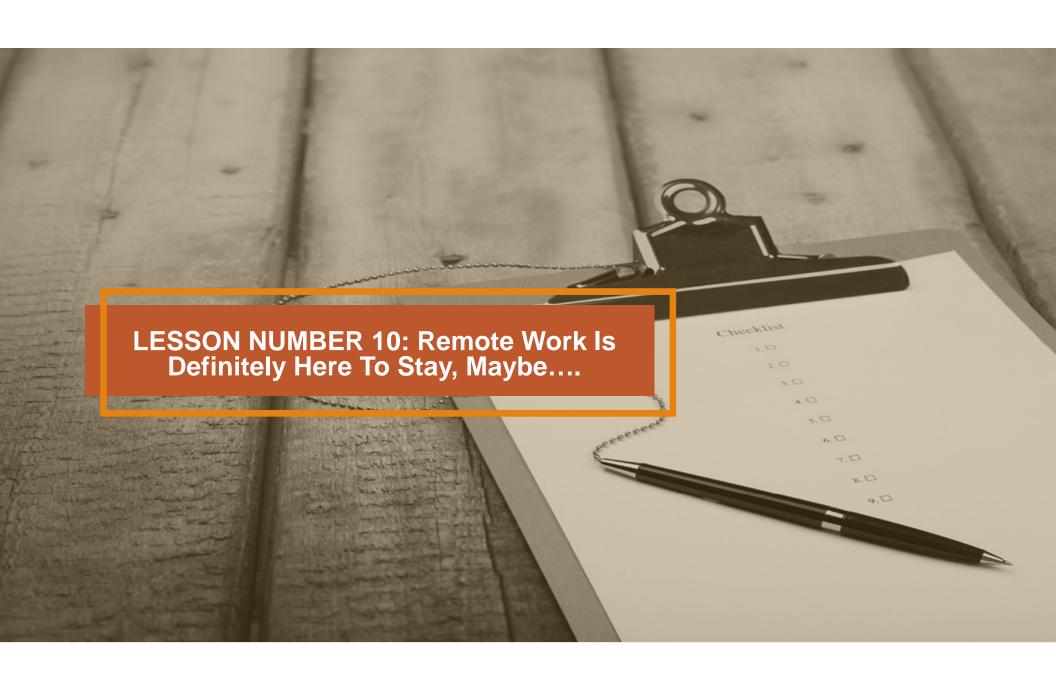


Walter Stella



Elena Hillman





#### Work From Home

- Growing trends show that many companies will continue to allow employees to work from home even after the pandemic
  - Companies like Twitter, Square, Facebook, Shopify, Coinbase, Dropbox, Quora, Reddit, Slack, and Spotify have announced plans to allow some or all of their employees to telework permanently or at least several days a week
  - The SalesForce "Work From Anywhere" Approach
- Many employees may request to continue working from home as reasonable accommodations





#### Remote Work – Pros and Cons

#### PROS:

- Access to Larger Talent Pool
- o Financial and Time Saving Benefits for Both Employers and Employees
  - \$22,000 savings per remote employee for the Company
  - o \$2,000-5,000 savings for remote employees
  - Commuting and parking costs reduced and less time spent commuting
  - o Even if some office space is maintained, less space is needed
- Good for the Environment

#### • CONS:

- o Research shows that Zoom is a poor substitute for face-to-face interactions
  - o Social bonding, managerial oversight, mentorship and support, brainstorming and collaboration can suffer
- Overtime, Meals and Rest Breaks and Compliance with Wage and Hour Laws
- Will Employee Productivity Decline Over Time?



#### **Employee Concerns**

- Can Employees Insist on Working Remotely?
  - o No, there is no requirement that employers allow remote work.
  - o Remote work as a reasonable accommodation?
    - o Disability that places employee at greater risk from COVID-19
    - Preexisting mental health conditions
    - Religious beliefs or practices
- https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\_ada\_rehabilitaion\_act\_coronavirus.cfm https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment- Information-on-COVID-19-FAQ\_ENG.pdf
- https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\_ENG.pdf
- Fear of contracting COVID-19 is not a "serious health condition." But, a serious health condition may include:
  - A serious illness caused by COVID-19
  - Pre-existing physical conditions exacerbated by Covid-19
  - Anxiety or other legitimate mental health conditions could qualify as a serious health condition





## "Necessary" Business Expenses

- Labor Code Section 2802: requires employers to reimburse their employees for all reasonable and "necessary" expenses incurred in direct consequence of discharging their job duties.
  - Where the expense is necessary, reimbursement "is always required," regardless of whether the employee would have incurred such expenses "absent the job." Herrera v. Zumiez, Inc.,
     \_\_\_ F. 3d \_\_\_\_ (9th Cir. Mar. 19, 2020)
  - o If employees are **required** to work from home, the employer must reimburse the employee for reasonable and necessary home office expenses, which can include cell phone, landline, home internet, personal computer/tablet, video conferring equipment.
  - Reimbursement is not required for an expense that is not reasonable and/or necessary, such as a printer (although this may be required for certain jobs), headphones, faster computer.
  - But, reimbursement may be required for adaptive equipment needed by a disabled employee.

# Is Remote Work "Necessary" if No Continuing Option to Work in the Office?

- Novak v. Boeing Co., 2011 WL 9160940, at \*3 (C.D. Cal. July 20, 2011): Employees offered the option of
  working out of home office did not incur "necessary" expenses related to phone and internet usage as a
  result of working from home, where participation in program was optional, the employer made physical
  workspaces with computers, phones, and other necessary equipment available at its offices, and even
  approved virtual workers to sometimes split time between working from home and working in the office.
- Lawson v. PPG Architectural Finishes, Inc., 2019 WL 3308827, at \*7 (C.D. Cal. June 21, 2019): Court dismissed plaintiff's claim for reimbursement of his home internet where the evidence showed he had been provided with a company-owned mobile hot spot. The court rejected plaintiff's contention that the superior speed and convenience of his home internet plan created an obligation to reimburse under Section 2802.
- Aguilar v. Zep Inc., 2014 WL 4245988, at \*17 (N.D. Cal. Aug. 27, 2014): Cleaning supplies Company who
  expected its employees who worked from home to call customers and place internet sales orders was
  required to reimburse employees for their personal cell phone and internet expenses because they "were
  a foreseeable and clearly anticipated cost of doing business."

## How Much Reimbursement is Required?

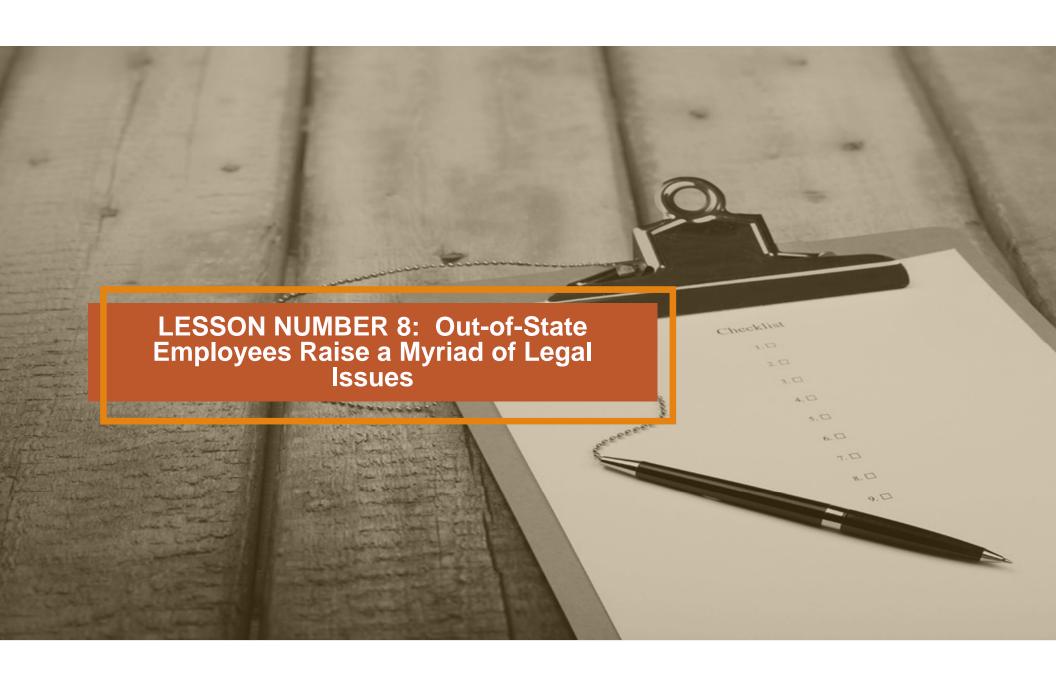
- California courts have held that reimbursement is required for an employee's personal cell phone and voice and data plan when the phone is required for business purposes.
- Cochran v. Schwan's Home Services, Inc., 228 Cal.App.4th 1137 (2014) held that employers must always reimburse employees for "some reasonable percentage" of their cell phone bills if the employer requires them to use their personal cell phones for business purposes.
- Other Expenses? Internet, Heating and Electricity Expenses?
  - O Home office set up?
  - What about an employee's mortgage?



### Key Takeaways

- Employee Choice May Be a Factor as to What Expenses are "Necessary"
- Certain Types of Expenses May be Necessary, but Others Not
  - Job Specific Inquiry
  - Required Tools and Setting
    - The more requirements employers put into place for minimum home office standards, the more likely the expense will be considered "necessary"
    - o Room with a door to ensure confidentiality
    - Locking filing cabinets
  - o Could the Employee Have Paid Less?
  - More Cost Effective for Employer to Provide Certain Equipment?
- Was the Expense Actually Incurred?
  - Not Relevant in California
  - o Illinois-employers can set reasonable parameters
- Always Provide Option to Employees to Submit Receipts if Stipend/Reimbursement Amount is Too Low





## Remote Work: What Law Applies?

- California Fair Employment and Housing Act (FEHA):
  - FEHA applies to California-based employers regularly employing five or more employees (Note: one or more for harassment claims)
  - o Employees located inside and outside of California are counted in determining whether employers are covered under the Act. (For example, an out-of-state employer with at least five employees total, and at least one California employee, must adhere to FEHA with respect to the one employee
  - O Does FEHA cover California residents working for a non-California employer?
  - O Does FEHA cover employees of a California-based employer working in other states?
  - The 2019 FEHA regulations provide: "Employees located inside and outside California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the ACT if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California."



# Remote Work: What Law Applies?

FEHA laws may apply to out of state workers where there is a sufficient nexus to California

- No Nexus Found:
  - Campbell v. Arco Marine Inc. (1996) 42 Cal.App. 4h 1850 No nexus where a Washington resident claimed FEHA applied simply because the company's headquarters was in California.
  - o *Gonsalves v. Infosys Technologies Ltd. No. C09-04112* (N.D. Cal. May 6, 2010) No nexus where Ohio resident had traveled to California several times during employment and managed clients in California.
- Sufficient Nexus Found:
  - Roger-Vasselin v. Marriott International, No. C04-4027 (N.D. Cal. July 19, 2006)- Sufficient nexus to survive summary judgment where out of state employee's manager was based in California and testified that he had input into the decisions at issue in the case.
  - Sims v. Worldpac Inc., No. C12-05275 (N.D. Cal. Feb. 22, 2013) (unpublished)- Federal court denied motion to dismiss where the decision to terminate was made in California.
- If employment decisions are being made by managers in California, FEHA likely applies.



# Remote Work: What Law Applies?

- Wage and Hour Laws:
- *Sullivan v. Oracle* (2011) 51 Cal.4<sup>th</sup> 1191: Non-California residents working in California for a California-based employer were subject to California daily overtime laws if they performed their in-state work for whole days.
- Ward v. United Airlines (2020) 9 Cal.5<sup>th</sup> 732 and Oman v. Delta Airlines (2020) 9 Cal.5<sup>th</sup> 762: Labor Code sections 226 and 204 applied to pilots and flight attendants who performed most of their work in airspace outside of California's jurisdiction as their "principal place of work" was California. Two-part analysis:
  - o Does the employee work the majority of their time in California? (If yes, then Labor Code 226 and 204 apply)
  - o If not, is the employee "based for work purposes in California?" Does California serve as the physical location where the worker present himself to being work? (Note: the residency or domicile of the employee is **not** a factor).
- No California case has specifically addressed wage and hour application to completely remote employees as a result of the pandemic -- but, based on the above, if an employee does not live or "work" in California, California wage and hour laws may not apply.



### Takeaways...

- Out-of-state employees raise a host of issues beginning with which laws apply
- The impact of employees working from home during the COVID-19 pandemic is going to have different consequences for each employer based on its individual facts, including where its home office(s) are located, where its employees are working, the reason(s) for an employee to be working from home, the rules and guidance in the relevant states, and the employer's other activities conducted in each state.
- It is important to remember that any determination made is likely fluid and subject to change in the future. As government mandates, employer policies and employee requests change throughout the pandemic, the company's state and local tax compliance issues will have to be re-examined.





## COVID-19 Emergency Temporary Standard

- Effective November 30, 2020
- Applies to all employers, employees, and to all places of employment, except for:
  - Workplaces where there is only one employee who does not have contact with other people
  - o Employees who are working from home
  - o Employees who are covered by the Aerosol Transmissible Diseases regulation
- Requires implementation of a written **COVID-19 Prevention Program** or ensure the required elements are included in the employer's existing Injury and Illness Prevention Program (IIPP).
- Cal/OSHA Model Covid-19 Prevention Plan posted on Cal/OSHA website
- Please see FAQs put out by the DIR on the Emergency Temporary Standards: <a href="https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html">https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html</a>



#### Refusal to Perform Unsafe Work

- "[A]s a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of <u>potential</u> <u>unsafe</u> conditions at the workplace." OSHA § 12(b)(1).
- An employee's right to refuse to do a task is protected only if <u>all</u> of the following conditions are met:
  - Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
  - The employee refused to work in "good faith." (employee must genuinely believe that an imminent danger exists); and
  - A reasonable person would agree that there is a real danger of death or serious injury; and
  - There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.





### Best Practices: Safety and Health

- Follow CDC and federal and state OSHA standards, and local orders
- Update Your IIPP to Address COVID-19 and How You Will Train and Communicate with Employees regarding Potential Workplace Hazards as a result of COVID-19
- Do Not Retaliate Against Employees Expressing Safety and Health Concerns!
  - 29 USC 660 (c) of the Occupational Safety and Health Act prohibits employers from retaliating against workers for raising concerns about safety and health in the workplace.
  - In its April 8, 2020 Guidance, OSHA reminded employers of these protections and that employees who believe they have been retaliated against for expressing concerns about safety and health during the COVID-19 pandemic, can file a whistleblower complaint with OSHA.
- Document Employee's Complaint and Employer's Response



# Workplace Safety – Key Takeaways

- The COVID-19 pandemic has turned a spotlight on company safety practices
  - Employees are much more aware
  - Employees are much more willing to raise concerns
  - Heightened employee expectations
- All employers should have an Illness & Injury Prevention Program
  - Requires an assessment of health risks and plan to limit
- Continue to monitor health and safety regulations issued by federal, state and local health an safety agencies





### SB 93: California Right of Recall

- Effective April 16, 2021. Expires December 31, 2024.
- Requires covered employers within five business days of establishing a job position, to offer its laid off employees in writing all job positions that become available for which those laid off employees are qualified.
- Requires covered employers to offer positions to those laid-off employees based on a preference system, based on length of service.
- Employer means a person or entity who owns or operates an "enterprise."
- "Enterprise" means employers who operate hotels, private clubs, event centers, airport hospitality services, or building services to office, retail or other commercial buildings.
- "Laid-off employee" means any employee who was employed by the employer for 6 months or more in the 12 months
  preceding January 1, 2020, and whose most recent separation from active service was due to a reason related to the
  COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in
  force, or other economic, non-disciplinary reason due to the COVID-19 pandemic.
- Laid off employees must be given at least 5 business days to respond to the offer. An employer that declines to recall a laid-off employee on the grounds of lack of qualifications must provide the laid off employee with written notice within 30 days.
- Covered employers have to keep records, including the employee's name, date of hire, and a copy of the notice of layoff for three years.



### Other Recall Rights and Key Takeaways

- Other Local Recall/Retention Laws: Oakland, Long Beach, Los Angeles, Pasadena, San Diego, San Francisco, Santa Clara
  - Stricter provisions will apply
- Baltimore, New York, Philadelphia
- Prepare Now
  - Hospitality industry and other affected employers in California should prepare for these new obligations by readying forms for recall offer letters and notices of explanation for a decision not to recall, and ensuring that personnel records are updated with all the information required to be maintained for a three-year period.
  - Employers must analyze whether the role of the open job position is essentially the same or substantially the same to the role previously eliminated because of COVID-19.
  - If not, document the differences in the job description which in turn may affect whether the laid off employee is "qualified"



## American Rescue Plan Act of 2021 (ARPA)

- Extends and expands the tax credits for employers who provide paid leave under the Families First Coronavirus Relief Act (FFCRA).
- FFCRA: Requirement to provide paid leave expired December 31, 2020
- Employers with 500 or fewer employees
- Does <u>NOT</u> require paid leave
- Availability of payroll tax credits extended from April 1, 2021 through September 30, 2021
- Again, <u>no</u> requirement to provide paid leave, but tax credits are available for employers who choose to provide paid FFCRA leave



#### FFCRA: Refresher

- Two major provisions:
  - Emergency Expansion of the Family Medical Leave Act ("EFMLA")
  - Private employers with fewer than 500 employees and some public employers had to provide up to 12 weeks of paid family leave for employees unable to work because their child's school was closed or childcare provider was unavailable due to coronavirus
  - Emergency Paid Sick Leave ("EPSL")
  - Private employers with fewer than 500 employees and some public employers had to pay sick leave of up to 80 hours (10 days) to employees who needed to take leave for certain COVID-19 related reasons:
    - Employee was subject to federal, state, or local guarantine order;
    - Employee advised to self-quarantine;
    - Employee experiencing COVID-19 symptoms/seeking diagnosis;
    - Employee caring for individual subject to guarantine;
    - o Employee caring for child who's school or child care provider is unavailable



#### ARPA Provides Additional Reasons For Paid Leave

- Tax credits continue to be available for paid leave for the original FFCRA reasons and additional reasons:
  - Employee is getting a COVID-19 vaccine;
  - Employee is recovering from complications due to receiving the vaccine;
  - Employee is awaiting the results of a COVID-19 test or diagnosis after an exposure or at the employer's request.





#### SB 95: California SPSL

- Effective March 29, 2021, with retroactive application to January 1, 2021
  - o Expires September 30, 2021
- Requires all public and private California employers with more than 25 employees to provide up to 80 hours of supplemental paid sick leave (SPSL) to employees unable to work or telework because the employee:
  - o is subject to a COVID-19 quarantine or isolation period per order or guideline of the California Department of Public Health, the CDC, or a local health officer;
  - o has been advised by a health care provider to self-quarantine due to COVID-19;
  - o is attending COVID-19 vaccine appointment, or cannot work or telework due to vaccine-related symptoms;
  - o is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - o is caring for a family member who is subject to a quarantine isolation order or guideline, as described above, or who has been advised to quarantine by a health care provider due to a COVID-19; or
  - is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19

https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#exclusions



## Other Laws May Require Paid or Unpaid Leave

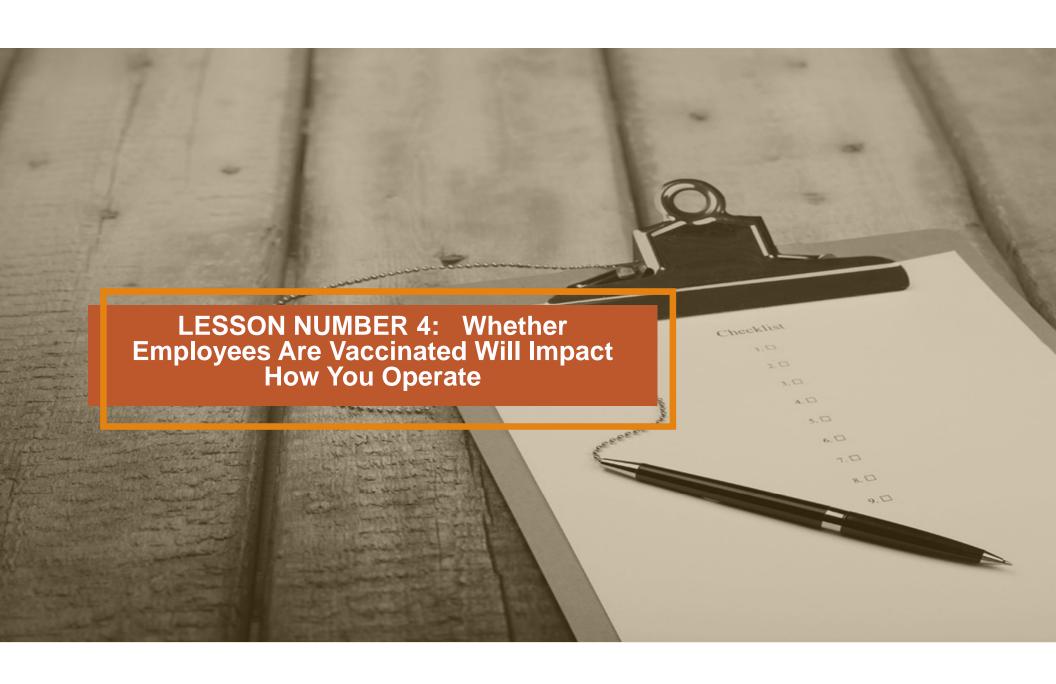
- California Local Ordinances Require Supplemental Paid Sick Leave
- Cal-OSHA Emergency Temporary Standard Exclusion Pay
  - Q: When must an employer exclude employees from work?
  - A: Employers must exclude from work employees who are not fully vaccinated if they (1) are COVID-19 cases, or (2) have had COVID-19 exposure. Applying Executive Order N-84-20 and the new CDPH COVID-19 Public Health Recommendations for Fully Vaccinated Individuals, employers must also exclude fully vaccinated employees if they (1) are COVID-19 cases, or (2) have had a COVID-19 exposure and exhibit COVID-19 symptoms. However, employers do not need to exclude fully vaccinated employees who had a COVID-19 exposure who are asymptomatic.
  - Q. Can an employer require that an employee use 2021 COVID-19 Supplemental Paid Sick Leave when they have excluded an employee for workplace exposure to COVID-19?
  - o A. Yes.
- CFRA/FMLA Leave
- ADA/FEHA Leave



#### Leaves of Absence – Key Takeaways

- Short Term Paid Leave Is Required under SB 95 For COVID-19 Related Reasons
- Longer Unpaid Leaves May be Required under CFRA/FMLA for Serious Health Condition of Employee or Employee's Family Member and/or under the Americans with Disabilities Act and the Fair Employment and Housing Act for Employees
- Is Personal Leave Required or Recommended for Employees Who Refuse Vaccination?
- Indefinite Leaves Not Required, But:
  - o If the employee's health care provider can only provide approximate date of return, projected return date, or range of return dates, the leave is not necessarily indefinite.
  - When employee requests a leave extension, the employer can request information from the employee's health care provider about the need for the additional leave and the likelihood that the employee will be able to return to work if the extension is granted.





# Can employers Legally Mandate Employee Vaccination for COVID-19?

#### Yes, and no....

- The EEOC did not take the position that mandatory vaccination is illegal under federal law, but identified significant exceptions that carry risk.
- Accommodating religious and medical objections are significant legal risks that should not be taken lightly, and disputes could lead to class actions.
- Protected concerted activity in opposition to a vaccine policy could be legally protected.
- Keep in mind potential workers' compensation liability for side effects of vaccination.



#### Disability and Religious Accommodations

#### Can workers refuse a vaccine based on health concerns?

- The ADA requires interactive dialogue and possible reasonable accommodation
- To refuse accommodation, an employer needs to show that the unvaccinated worker would: 1) cause an undue burden or 2) pose a direct threat in the workplace.

#### • Can workers refuse a vaccine based on religious beliefs?

 An employer must provide reasonable accommodation for an employee's sincerely held religious belief, practice, or observance, unless it would impose an undue hardship on the employer.



# Are Inquiries About Vaccination Unlawful?

# K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? (12/16/20)

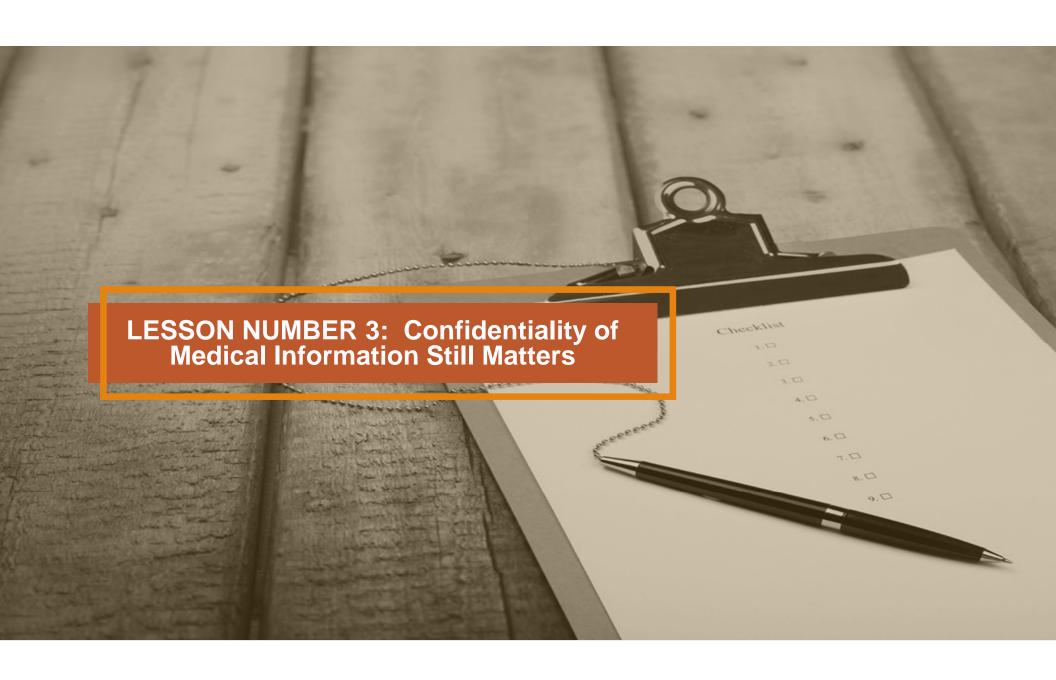
No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "jobrelated and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.



### No Accommodation Possible EEOC Guidance

- K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)
- If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.





## Medical Inquiries

- Can:
  - Ask if exhibiting COVID-19 Symptoms
  - Ask why employee is absent from work
  - Require employees to wear personal protective equipment
  - Measure body temperature
    - DFEH for limited purpose of evaluating risk of exposure of COVID-19 only
  - Request a doctor's note certifying fitness for duty
    - EEOC Guidance yes



### Medical Inquiries

#### Cannot:

- Disclose any personal health information of employee
- o Communicate about the health of one employee to other employees
- o Identify specific employee who tests positive
- Inquire about family medical history (GINA)

#### • Must:

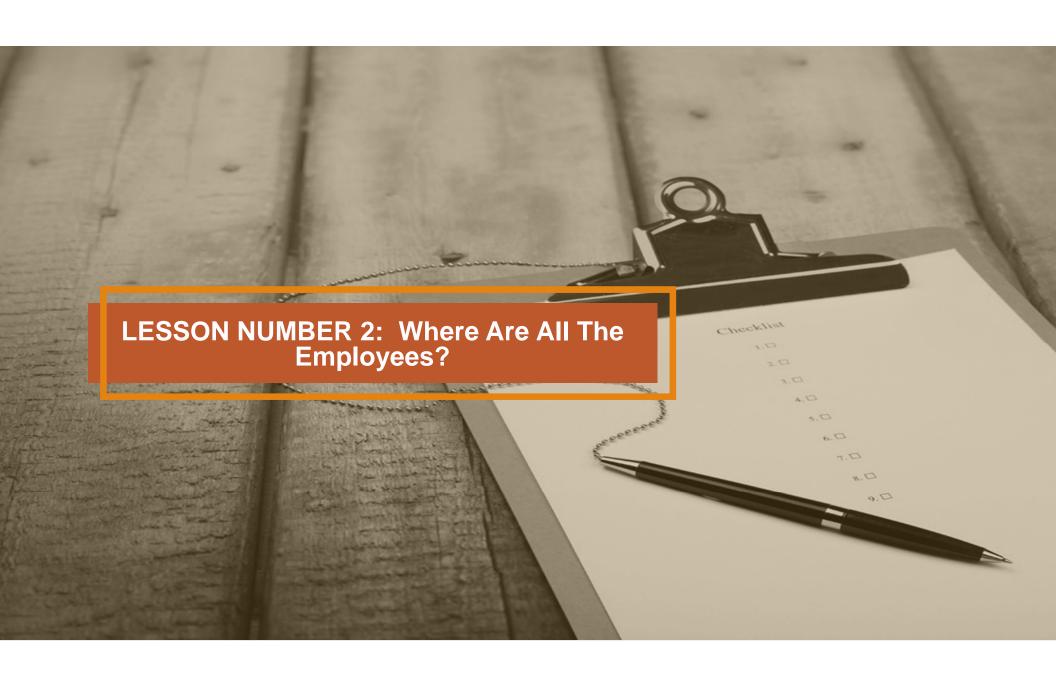
Maintain confidentiality of all information relating to employee's illness/symptoms



# Medical Information & Inquiries – Key Takeaways

- The 'Direct Threat' posed by the pandemic has opened the door to medical inquiries not otherwise permitted
- Even during the pandemic, limits exist:
  - Medical confidentiality must be maintained to the extent possible
  - Must maintain anonymity whenever possible
  - Records must be confidentially maintained
- Company policies/practices must be aligned with a post-pandemic era
- Train (Retrain) managers about limits and obligations
- Will we see a rise in disability hostile work environment claims?





## **Labor Shortages**

- A shortage of qualified job candidates predated the pandemic
  - "Skilled Labor" is a segment of the workforce that has specialized know-how, training, and experience to carry out more complex physical, or mental tasks than routine job functions. It is generally characterized by higher education, greater expertise, gained attained training and experience, and higher wages.
  - Multiple reasons: Retirement of boomers, low birthrates, lack of access to training, etc.
- The pandemic has exacerbated the shortage
  - o Impact is uneven: some industries, such as hospitality, hit harder than others.
  - Possible reasons:
    - Fear of getting sick
    - Childcare or other family needs
    - Lack of interest in returning to work due to government benefits



## **Labor Shortages**

- Beware of creative responses:
  - Pay increases, hiring bonuses, employee referral incentives and other options
    - olssues: Impact on pay equity, possible disparate treatment
  - Ocontinued/selective remote work
    - o Issues: possible disparate treatment, taxes, licenses
  - Change in hiring standards
    - Issues: impact on workplace on lowering or modifying background checks and other screenings





### The New Normal

- Looking forward in 2021:
  - Leaves in all shapes and sizes will continue to challenge employers
  - Vaccine Policies will continue to evolve as guidance is issued
  - Greater activism regarding the minimum wage
  - Family Responsibility Discrimination
  - Black Lives Matter and #MeToo will remain important to company compliance and culture
  - Uptick in claims alleging AAPR discrimination and harassment
  - Increased union activity, including organizing that targets non-traditional employers in non-traditional ways



# Questions?

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Thank You

