

Employment Law in the Time of COVID

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- I. COVID Vaccinations & OSHA Emergency Temporary Standards
- II. Managing Leave and ADA Issues
- III. Significant New Texas Laws
- IV. Wage & Hour Developments

COVID Vaccinations & OSHA Emergency Temporary Standards



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Vaccination Numbers

U.S.

56.7% (187M) fully vaccinated

TX

51.9% (15M) fully vaccinated

Bexar
County

57.74% (1.1M) fully vaccinated

Employers Mandating Vaccines



Deloitte.



Google



On the Horizon...

Mandated vaccination for (many but not all) federal contractors & subs

Mandated vaccines for workers in health care settings receiving Medicaid/Medicare

Employers with 100+ employees to be fully vaccinated or subject to weekly COVID testing

Biggest Unanswered Questions



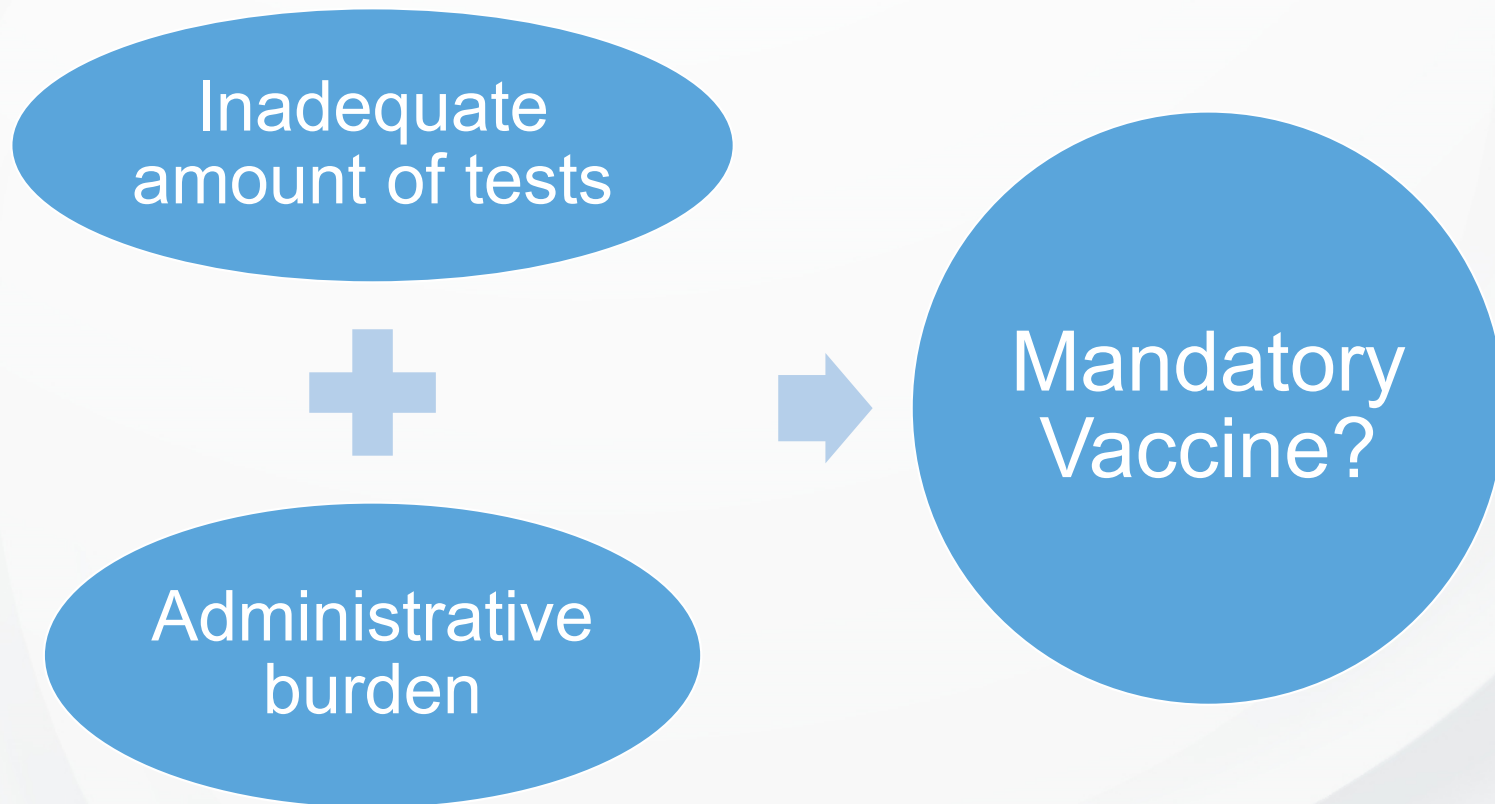
Who pays for vaccine?

- Likely employer + PTO for side effects

Who pays for COVID testing?

- May be able to push cost to employees

Employer's Dilemma



Gov. Abbott Tells President Biden to “Hold my Beer and Watch This...”


- On October 11, 2021, Governor Abbott issued EO GA-40, prohibiting any entity in Texas from requiring any individual, including an employee, to receive a COVID-19 vaccination if that individual objects to the vaccination “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”
- Violation of EO GA-40 can result in a maximum fine of up to \$1,000 per violation.



More Questions Than Answers

- Unclear whether EO prohibits employers from requiring individuals to be vaccinated if those individuals object based on their (1) personal conscience, (2) religious belief, or (3) medical reasons, or whether it prohibits employers from requiring individuals to be vaccinated based on their (1) personal conscience based on a religious belief, or (2) medical reasons.
- No reference to undue hardship or direct threat considerations
- Does not necessarily conflict with forthcoming ETS requiring vaccination or weekly testing
- Seems to conflict with EO mandating vaccines for federal contractors and workers in health care settings

What To Do Now

- 
- Adopt procedure for determining e'ees vaccination status
 - Decide whether to mandate or allow for weekly testing
 - If mandatory, develop accommodation process
 - If voluntary, develop process for tracking testing results
 - Don't forget other safety protocol, which will not be displaced by vaccine ETS

Other Safety Protocol

OK to require employees to disclose vaccination status / provide proof of vaccine

- Can't require proof of vaccine from customers

OK to require all employees to wear masks & adhere to other safety protocol

- Regardless of vaccination status

OK to require vaccination to attend events

Managing Leave & ADA Issues



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Leave Refresher

Tax credits for voluntary FFCRA ended on 9/30/2021

ADA leave: underlying disability or “long COVID”

- No duty to accommodate e’ee family members

FMLA: COVID may be serious medical condition

- May extend to need to care for covered family member

Additional unpaid leave for vaccinated e’ees only?

“Long COVID” as a Disability

CDC: symptoms lasting weeks - months

- fatigue, “brain fog,” heart palpitations, joint or muscle pain, dizziness, and depression or anxiety

HHS/DOJ: long COVID is a physiological condition that affects one or more body systems and can cause physical or mental impairment.

EEOC: agreed long COVID could be a disability; guidance forthcoming

Getting Remote Workers Back to Office

EEOC Guidance

- E'ee request to continue telework does not have to be granted if it requires continuing to excuse the e'ee from performing an essential function.
- BUT, the temporary telework experience could be relevant to considering request to continue telework.

Getting Remote Workers Back to Office

Employee has been working at home



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graph TD; A[Employee has been working at home] --> B[HCP limits accommodation to WAH]; B --> C[Consider following up with HCP to inquire about specific, alternative accommodations];
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HCP limits accommodation to WAH

Consider following up with HCP to inquire about specific, alternative accommodations

First EEOC Lawsuit Regarding Telework

- 9/7/2021: EEOC filed suit against employer who denied employee's request for continued telework after in-person operations resumed
- What would appear to be key fact:
 - other non-disabled, similarly situated employees continued to work from home at the same time employer denied employee's accommodation request
- Takeaways:
 - Be consistent
 - Be prepared to explain differential treatment
 - Ensure job descriptions are up to date

Significant New Texas Laws



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TEXAS REVISED SEXUAL HARASSMENT LAW

- Effective September 1, 2021.
- Reduces Covered “Employer” for the Purpose of Sexual Harassment from 15 Employees to 1 Employee.
- Expands “Employer” to Include “One Acting Directly in the Interest of the Employer in Relation to An Employee” - Individual Liability.
- Impact of New Provisions

TEXAS REVISED SEXUAL HARASSMENT LAW

- “Unlawful Employment Practice” if Sexual Harassment Of an Employee Occurs and the Employer or its Agents or Supervisors:
 - Knew or Should have Known that Conduct Constituting Sexual Harassment was Occurring; and
 - Failed to Take Immediate and Appropriate Corrective Action.

TEXAS REVISED SEXUAL HARASSMENT LAW

- List of Conduct Constituting Sexual Harassment Tracks Current Law.
- Change in Law From “Prompt” Remedial Action to “Immediate” and Appropriate Corrective Action.
- Burden of Proof?
- Extension of Statute of Limitations for Sexual Harassment from 180 to 300 days.

TEXAS FIREARM CARRY ACT OF 2021

- Effective September 1, 2021.
- Permits Individuals 21 and Older to Possess and Carry a Hand Gun in Public Without an Issued Permit or License.

TEXAS FIREARM CARRY ACT OF 2021

- Business Owners Retain the Right to Prevent Members of the Public from Bringing Firearms Into Their Places of Business.
- Law Provides for New Language to Utilize in Order to Exclude Patrons from Bringing Guns Into Business.
 - “Pursuant to Section 46.03, Penal Code (Places Weapons Prohibited), a person may not carry a firearm or other weapon on this property”

TEXAS FIREARM CARRY ACT OF 2021

- Does Not Amend Texas Labor Code Section 52.062(b) Which Permits Employers to Prohibit an Employee from Possessing a Firearm on Their Premises.
- Also Does Not Effect Employers' Immunity from Civil Liability Against an Occurrence Involving a Firearm and that a Person with Firearm does not By Itself Constitute a Failure by the Employer to Provide a Safe Workplace.

Wage & Hour Developments



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WAGE & HOUR UPDATES

- David Weil Nominated for Wage & Hour Administrator.
 - Nomination Still In Committee.
 - Held Same Position in Obama Administration.
 - Author of Anti-Employer Rules Urging Broad Definition of Joint Employer and Narrow Definition of Independent Contractor.

WAGE & HOUR UPDATES

- Lack of Administrator Likely Limited More Activity to Date. Actions to date include:
 - Actions to Withdraw Trump Era Tip Credit Rules and Impose Obama Era Tip Credit Rules.
 - New Rules on Civil Money Penalties on Tip Issues.

WAGE & HOUR UPDATES

- On May 6, 2021, DOL Rescinded Independent Contractor Rule Focusing on Workers Opportunity to Profit and Lost Due to Individual Initiative and Investment.
- On March 12, 2021, DOL Proposed to Rescind Trump Era Joint Employer Rule.
- Wage & Hour Division Returned to Pursuing Pre-Litigation Liquidated Damages as Part of Settlement.

WAGE & HOUR UPDATES

- Protecting Right to Organize (PRO) Act as Contained in Current Version of Budget Reconciliation Law.
- Increased Fines.

WAGE & HOUR UPDATES

- Aggressive Pronouncements By NLRB General Counsel Likely Signal of Acts by W&H Division Once Leadership in Place.
- Comments Regarding Private School Athletes Being Entitled to Collective Bargaining, Solicitation of Cases and Intention to Prosecute.
- Memo Regarding Seeking Full Compensation in Settlement of Unfair Labor Practices.

WAGE & HOUR UPDATES

- Compensability of Vaccination/Corona Virus Testing Time.
 - Different from Temperature Taking.
 - With Upcoming Government Mandate, Likely Compensable Time.
- Issues with Trending Pay Advance Arrangements.

WAGE & HOUR UPDATES

- Fifth Circuit Opinions of Note.
 - Collective Action Procedure Overhauled – *Swales v. KLLM Transport Services, LLC*.
 - Day Rate Does Not Constitute a Salary for Purpose of White Collar Exemptions – *Huewitt v. Helix Energy Solutions Group*.

WAGE & HOUR UPDATES

- Mandatory Auto Deduct Lunch Periods are Legal Under FLSA – *Dean v. Akal Security, Inc.*

About the Firm

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The firm has more than 900 attorneys located in 53 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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- Provide quality representation with exceptional value



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Thank you!

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