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Navigating the Next Normal

Considerations for Employers as Hybrid/Remote Work Arrangements Become More Permanent

ACC San Diego MCLE

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Agenda

- Maintaining company culture
- Running effective training
- Keeping pace with policy changes
- Testing and vaccination developments
- Restrictive covenant concerns

Maintaining Culture


Intentionality



Maintaining Culture




Core Values



Synchronizing hybrid schedules



Affirmative check-ins




Meeting format; meeting frequencies; “town hall” style sessions




Maintaining Culture




Reemphasize existing resources



Create employee resource groups



Provide resources to combat burnout, isolation, and anxiety



Empower frontline managers to address these issues

Effective Remote Training

Training Considerations for Hybrid/Remote Workforces

Defining the Workplace

Physical; virtual; company apps; other communication channels

Expanding Scope

Covering forms of misconduct unique to hybrid/remote settings

Encouraging Reporting

Keeping channels open; effective notifications; check-ins

Frequency

Recommended intervals; verification; documentation

Defining the Workplace

Physical and virtual workspaces


Conference calls and video meetings

Company apps — Slack, Teams, Drive, Discord, etc.


Other communication channels




Expanding Scope



Address forms of misconduct enabled by remote settings, like cyberbullying



Misconduct grows more difficult to monitor and address—can occur over any remote app or collaboration tool



Remote hurdles can produce perceived slights—making effective communication techniques more important than ever

Reporting


Evaluate existing reporting channels

Give regular reminders and consider new notifications—splash screens, desktop backgrounds, intranet links


Affirmative check-ins




Implementation



Frequency: At least annual



Policy Review: Distribute relevant policies for review after each session



Verification: Obtain signed receipts after each session (e.g., DocuSign)

Remote-Focused Policy Review


Work Schedules



Make availability expectations clear



Consider implementing core hours



Technical measures to enforce remote work schedules


Hourly Employees



Clocking and time entry



Ensuring mandatory breaks



Digitizing and automating missed break forms



Preventing off-the-clock time


Reasonable Accommodations



Changing obligations in remote settings



Removing process barriers



Consider recent EEOC guidance

EEOC Guidance on Reasonable Accommodations

- Telework is not “automatically” a reasonable accommodation
- Employers may invite employees to discuss accommodations needed for future return to in-office work
- Employers need not provide accommodation based on employee's family member's medical condition
- Employers may still:
 - Ask questions to determine whether the condition is a disability
 - Discuss with the employee how the requested accommodation would assist the employee and enable the employee to keep working
 - Explore alternative accommodations that may effectively meet the employee's needs
 - Request medical documentation if needed
- <https://tinyurl.com/nextnormal1>

Determining Work Location

Where do hybrid/remote employees work?

Tax considerations


Wage-and-hour considerations

Local ordinances


COVID-19 Testing & Vaccination




Recent CDC Statements




CDC: “The COVID-19 pandemic has now **shifted to a new phase** [with a] **lower risk of severe disease and death.**”



Testing requirement for persons entering U.S. internationally ended on June 12, 2022




Medical tests—including COVID-19 tests—are only permitted if job-related and consistent with business necessity




CDC's statements likely raise threshold for justifying a COVID-19 test




EEOC Guidance




“Whether pandemic influenza or coronavirus rises to the level of a direct threat depends on the severity of the illness.”



“If the CDC or state or local public health authorities determine that the illness is like seasonal influenza . . . it would not pose a direct threat or justify” testing.



“During a pandemic, employers should rely on the latest CDC and state or local public health assessments.”



“[E]mployers are expected [to] obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments . . . based on this information.”

Direct Threat Analysis

(1) Duration of the risk

(2) Nature and severity of the harm

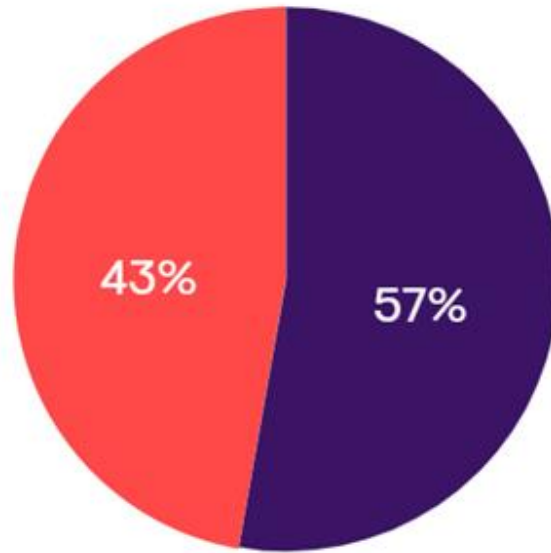
(3) Likelihood that potential harm will occur

(4) Imminence of the potential harm

Vaccine Mandate Litigation

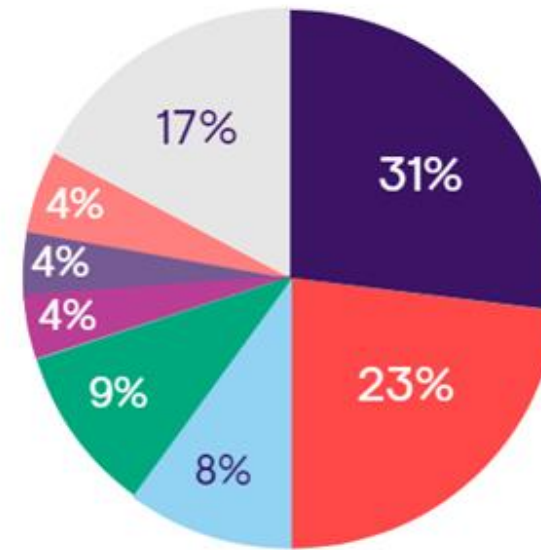
Which Employers are Facing Lawsuits?

Public or private employer



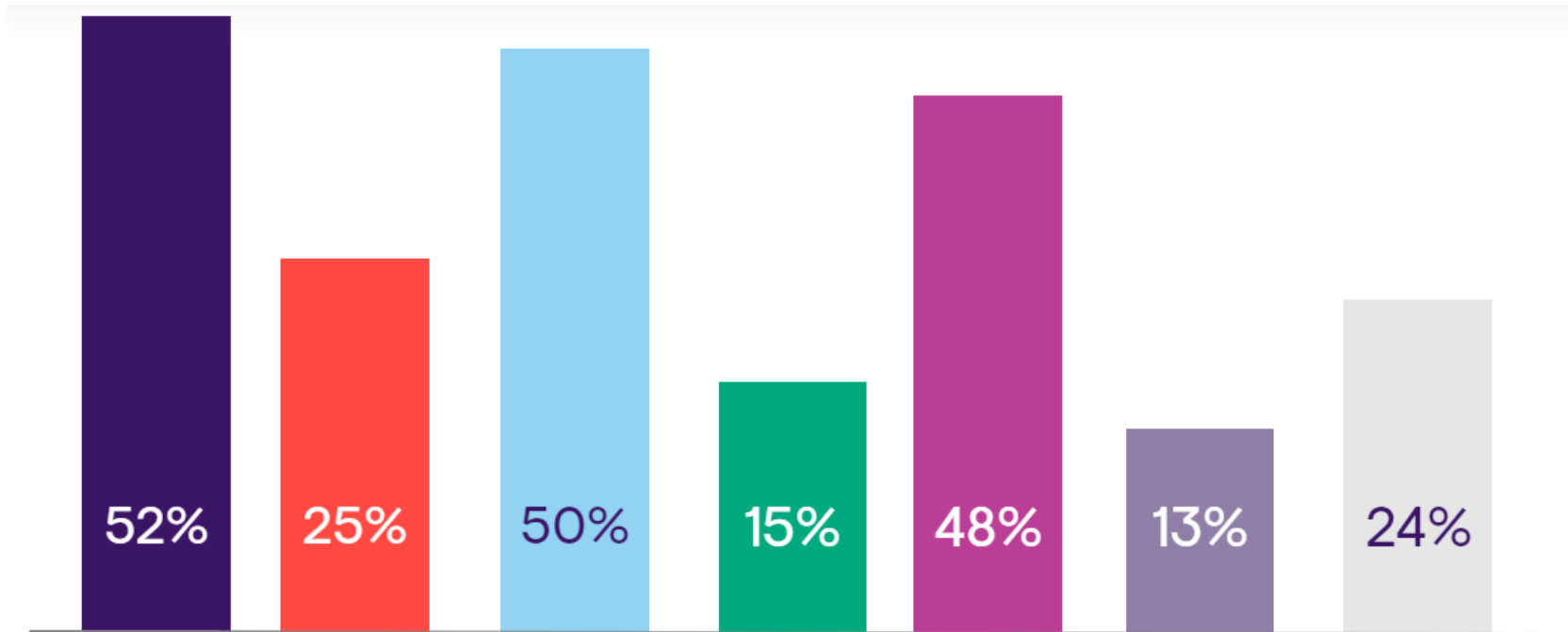
- Private
- Public

Industry



- Healthcare (incl. Assisted Living)
- City/county employer (including police/fire)
- State government employer
- Education (K-12 and higher ed)
- Manufacturing
- Professional services
- Transportation
- Other

What are the Claims?



■ Religious accommodation/discrimination

■ Disability accommodation/discrimination

■ Wrongful discharge/retaliation

■ Privacy violations

■ Constitutional claims (against public and private employers)

■ Labor dispute/CBA breach

■ Common law/contract


Vaccine Mandate Litigation

- In the great majority of recent decisions, applications for preliminary injunctive relief have been denied, with a few exceptions
- Several injunctions have been granted in individual and class cases against the Navy and Air Force's vaccine mandates
- The U.S. District Court for D.C. also preliminarily enjoined a law permitting children to be vaccinated without parental knowledge or consent
- <https://www.jacksonlewis.com/practice/vaccine-mandate-litigation>


Restrictive Covenant Concerns



Employee's Work Location



Determining work location for hybrid/remote employees



Effect on choice-of-law and choice-of-forum clauses



Effect on geographic restrictions

**Remote Work:
Can Employers Track Employees
Productivity?**

Generally

Employers are allowed to track employees' remote hours worked

Most employers track workers activity to promote security and to boost productivity

Examples: (1) Tracking work time on the computer; (2) Logging Keystrokes; (3) Monitoring websites, apps and emails, etc.



Q&A

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Thank you.