

# Navigating the evolving COVID-19 employment landscape



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With COVID-19 case numbers decreasing, and assuming no additional fatal variants emerge, there is hope that we can finally put the pandemic behind us. However, it's important to keep in mind that litigation and enforcement action against employers remain a real possibility.

## Supreme Court ruling

The Supreme Court's striking of the Biden Administration's policy requiring vaccination or testing for employers of 100 or more was big news for larger companies. However, that ruling doesn't apply to smaller private employers who may be subject to a patchwork of state laws and local regulations.

Under federal law, private company vaccine mandates are allowed, although they are subject to objections based on disability or sincerely held religious beliefs (though most major religions do not oppose vaccines). However, some state laws have more complicated aspects.

## Individual states adopt their own approach

Florida, Montana, and Tennessee prohibit vaccination mandates outright, and there are a handful of other states that have crafted exceptions that may be difficult to interpret. Texas, for instance, permits employees to object to vaccination "for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19."

Arkansas offers weekly testing as an alternative to vaccination. Alabama requires that requests for exemption be interpreted in favor of the employee making the request. North Dakota requires employers with employee vaccination mandates to exempt employees if they provide proof of COVID-19 antibodies from the last six months.

Since these laws have been implemented only recently, there hasn't been an opportunity to see how courts will construe them. That makes things even more challenging for employers.

## Claiming COVID-19 as a disability

The effects of COVID-19 may be considered a disability for employment purposes. The Equal Employment Opportunity Commission has recently issued guidance as to the circumstances under which COVID-19 constitutes a disability for purposes of the Americans with Disabilities Act, which entitles an employee to reasonable accommodation.

The agency made it clear that COVID-19 long haulers whose symptoms substantially limit one or more major life activities (e.g., sleeping, breathing, learning) are to be treated the same as other disabled employees.

## Third-party liability exposure

A recent ruling in California is cause for additional concern. An appellate court has refused to dismiss a wrongful death suit on behalf of a non-employee who allegedly contracted COVID-19 from an employee.

According to the complaint, a group of employees allegedly became infected with COVID-19 in a factory due to a lack of social distancing. One of those employees passed the virus to her (non-employee) spouse. The employee later recovered, but the non-employee spouse died.

The factory owner argued that the case was preempted under the "derivative injury doctrine," which generally prevents lawsuits by third parties for injuries that are "collateral to or derivative of" injuries covered by California's Workers' Compensation Act.

The court rejected that argument, ruling that third parties who suffer injuries "logically and legally independent of any employee's injuries" as a result of a company's negligence have not lost their right to sue.

## Best practices for avoiding liability

In addition to implementing vaccination mandates where permissible, best practices for avoiding liability arising from employee COVID-19 claims include:

- Granting paid time off for employees to get vaccinated.
- Instructing any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive, and all workers with COVID-19 symptoms to stay home from work to prevent or reduce the risk of transmission of the virus that causes COVID-19.
- Implementing physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.
- Providing unvaccinated and otherwise at-risk workers with face coverings or surgical masks unless their work task requires a respirator or other PPE.

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- Educating and training workers on your COVID-19 policies and procedures using accessible formats in clearly understandable language.
- Suggest that unvaccinated customers, visitors, or guests wear face coverings.
- Maintain ventilation systems in accordance with Occupational Health and Safety Administration (OSHA) guidance.
- Perform routine cleaning and disinfection in accordance with OSHA standards.
- Record and report COVID-19 infections and deaths when required. (e.g., a confirmed case of COVID-19), the case is work-related (as defined in OSHA regulations), or the case involves one or more relevant recording criteria (e.g., medical treatment, days away from work).

### Employer communication

OSHA's latest guidance recommends that employers notify workers of their rights to a safe and healthful work environment and implement protections from retaliation.

The agency suggests employers ensure that workers know who to contact with questions or concerns about workplace safety and health. They also need to be aware that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities.

Setting up a hotline or other anonymous outlets for workers to voice concerns about COVID-19-related hazards is recommended. Retaliation can be its own source of employer liability, so employers are well advised to comply with this recommendation.

With the Omicron variant proving less lethal than those that preceded it, the stakes appear to be lowering with respect to COVID-19 employment claims. However, given the prospect of another variant and the persistence of COVID-19, employers are advised to keep COVID-19 safety compliance, and the associated regulations, as a top priority. ■

### STATES PROHIBITING VACCINATION MANDATES OUTRIGHT

