

2020 Year in Review:

Looking Back and Looking Ahead

Michael C. Schmidt, David L. Barron,
Michele B. Miller, & Jeremy J. Glenn



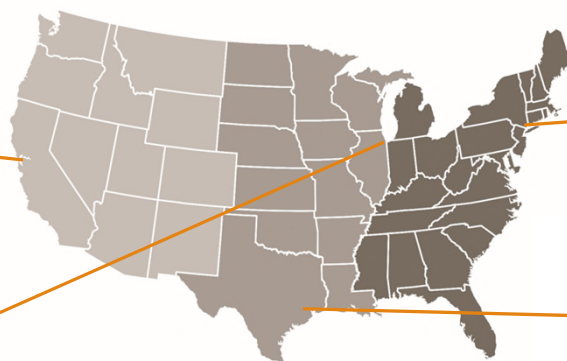
Presenters on Today's Webinar



San Francisco
Michele Ballard Miller



Chicago
Jeremy J. Glenn



New York - Midtown
Michael C. Schmidt



Houston
David L. Barron

Today's Road Map

- Strategies for COVID-19 Vaccine Policy
- Workplace Trends and Issues for 2021
- Strategies for Returning to the Workplace in 2021
- The Latest on FFCRA, Emergency Paid Sick Leave, and Family Leave
- Preview of Biden Administration Priorities



Highlights of New EEOC Vaccine Guidelines

- EEOC issued new guidance on December 16: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K, Vaccinations
- Vaccination is not a “medical examination” under ADA, but employers should be cautious in administering pre-screening questions for vaccination
- Asking an employee to show proof of vaccination is lawful
- Employers may require vaccination subject to disability and religious accommodation (did not address the emergency use authorization question)
- Requiring vaccination does not violate GINA

COVID-19 Vaccine Considerations

- **Can employers require workers to get vaccinated for COVID-19?**
- In general, yes, employers may have authority to mandate vaccination under normal conditions, but there are still important legal concerns surrounding the COVID-19 vaccine:
 - ADA accommodation: Is it job-related and consistent with business necessity?
 - Title VII Religious Belief accommodation: Sincerely held belief and undue hardship
 - Affect on Employee Morale and risk of protected concerted activity in opposition to vaccine policy
 - Legal concerns related to limited Emergency Use Authorization, including public policy exception to employment at will

COVID-19 Vaccine Considerations

- **Can workers refuse a vaccine based on health concerns?**
 - The ADA requires interactive dialogue and reasonable accommodation if the disability is covered
 - Employers must determine whether NOT taking the vaccine is a reasonable accommodation for the disability and the job responsibilities involved — and that such accommodation isn't an undue burden for the employer or a direct threat to others
 - An employer needs to show that the unvaccinated worker would 1) cause an undue burden or 2) pose a direct threat in the workplace. If alternatives are available, like work-from-home, moving to a segregated area, or everyone else is wearing PPE, this might be difficult

COVID-19 Vaccine Considerations

- **What about religious objections to vaccines?**
 - Title VII prohibits workplace discrimination based on religion, giving workers the right to refuse a vaccination mandate based on religious beliefs
 - The EEOC, which enforces Title VII, defines “religion” beyond membership in a church or belief in a God. “Religion,” for the purposes of federal anti-discrimination law, covers strongly and sincerely-held, moral or ethical beliefs. But employers can still deny religious accommodations if they would create an undue burden
- **What about conspiracy theory objections to vaccines?**
 - No - there is no protection for workers who are terminated after refusing a mandatory vaccine based on belief in conspiracy theories. (*e.g.* 5-G trackable microchips, pandemic-for-profit, general anti-vaxx, anti-tech, etc.)

What About Other Policy Issues?

- **The availability of a vaccine also raises other important consideration for employers, short of a mandate**
 - What incentives or benefits will the employer offer to increase the percentage of employees who are vaccinated?
 - Will employees who refuse vaccination be otherwise treated differently in terms of work from home policies or ability to perform certain job duties
 - Will masking and distancing be required for vaccinated employees?

Workplace Trends and Issues in 2021

- **Increase in Remote Work Brings Challenges**

- Support for flexible schedules, more family time, and ability to travel (Accommodation)
- Demand for communication and employee productivity software (Expense Reimbursement)
- Risk of isolation due to lack of training and onboarding

- **Employees are Demanding More of Employers – Stay in Tune**

- Accommodations for family support, health concerns, responsiveness
- Flexible and expanded benefits like PTO, hazard pay, workplace safety, telemedicine
- Increased risk of concerted activity and union organizing efforts surrounding safety and social justice

Workplace Trends and Issues in 2021

- **Additional Issues for Employers to Consider**

- Managing performance remotely, and wage-hour compliance issues:
 - Ensuring no off-the clock work
 - Preserving the white-collar-exemption job duties test
- Decrease in work/life balance due to blurring start and stop of “work day”
- Increased data security issues due to use of at-home tech and personal devices

Strategies for Returning to Work in 2021

- Daily Monitoring of Health
 - Apps and websites for temperature checks, recording events/activities, travel, etc.
- Rotating Employees
 - In terms of available work hours, if production/demand has decreased
- Staggering the “Work Day” Start and End Times
 - Avoid formations of large groups and increase number of entrance/exit points where possible
- Data Security Checks
 - Test and train employees on phishing attacks, review the devices used, and check for cyber-security vulnerabilities

Strategies for Returning to Work in 2021

- OSHA Regulations and Standards
 - Only [“Guidance” has been issued](#) – no national Regulations or Standards, yet
 - OSHA requires “a place of employment...free from recognized hazards...likely to cause death or serious physical harm”
 - State Regulation is on the rise: California, Oregon, Michigan, Nevada, Virginia
- Using Liability Waivers to Protect Employers
 - Waivers signed by employees are likely NOT enforceable under workers’ compensation laws, nor effective against intentional tort claims, third party exposure claims, or avoiding “workplace exposure” claims
 - Broader liability protection hung up in Congress
 - State laws in Michigan, Georgia, Wisconsin, Iowa, Tennessee, Kansas

Strategies for Returning to Work in 2021

- Stay abreast of guidance from CDC, OSHA, the EEOC, and state and local health authority
- Clearly communicate policies to employees
- Include procedures for reporting and a provision forbidding retaliation
- Require acknowledgment of receipt and promise to comply

FFCRA, EPSLA, and EFMLEA

- Families First Coronavirus Response Act
 - The FFCRA (which created the EPSLA and EFMLEA) expires December 31, 2020 – employer tax incentives also end on this date
 - Employees that are partway through their EPSL or EFML – can they continue their leave into 2021?
 - FFCRA will need bi-partisan support to be extended
- Emergency Paid Sick Leave Act
 - Employees who took 80 hours of EPSL while working for a previous employer have exhausted their EPSL one-time entitlement
 - DOL’s regulations provide: “Any person is limited to a total of 80 hours of [EPSL]. An Employee who has taken all such leave and then changes Employers is not entitled to additional Paid Sick Leave from his or her new Employer.”
 - Can Employers ask newer employees whether they have already taken their EPSL with a previous employer?

FFCRA, EPSLA, and EFMLEA

- Emergency Family and Medical Leave Expansion Act
 - EFMLEA requires that certain employers provide up to 10 weeks of paid, and 2 weeks unpaid, EFML to eligible employees if the employee is caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19
 - In its current form, the FFCRA does not require employers to “pay out” any unused EPSL and EFML to employees
 - Any balance of unused EPSL or EFML will expire on January 1, 2021, unless the FFCRA is extended or otherwise amended

Biden Administration Priorities

- OSHA may promulgate COVID-19 Standards & Regulations. Enforcement will likely increase
- Look for movement on mask requirements, vaccines, and school re-openings
- Federal agencies, in general, will likely become more active with more hiring, increased funding, and a renewed sense of authority (DOL, NLRB, EEOC)
- Expected to revoke the Executive Order on Combating Race and Sex Stereotyping (EO 13950) and, instead, *require* federal contractors' diversity and inclusion training and programs

Biden Administration Priorities

- Expect changes to “independent contractor” and “joint employer” definitions that will affect the gig economy
- An FFCRA renewal will require bi-partisan support along with the HEROES Act, and other COVID-19 relief
- Minimum wage might increase to \$15 per hour along with a national paid sick leave act

Questions?

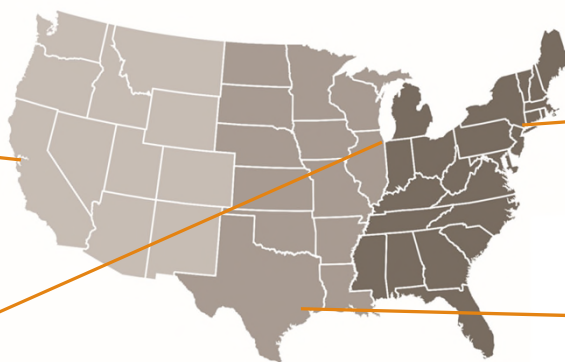
Thank you!



San Francisco
Michele Ballard Miller



Chicago
Jeremy J. Glenn



New York - Midtown
Michael C. Schmidt



Houston
David L. Barron