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E-UPDATE

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RECENT DEVELOPMENTS

NLRB Poised to Reverse Course on Work Rules, Joint Employer Status and Mandatory Arbitration Agreements

As we discussed in our August 13, 2021 E-lert, the first official memo issued by General Counsel Jennifer Abruzzo for the National Labor Relations Board set forth a laundry list of issues that she intended to address – many of which impact all employers, whether unionized or not. Many of these issues involve employer-friendly standards that were established in cases decided by the Trump Board. This month, the Biden Board took steps on three of those issues by inviting interested parties to submit briefs regarding the following: (1) the appropriate standard for analyzing facially neutral work rules; (2) independent contractor status; and (3) confidentiality requirements in mandatory arbitration agreements.

Work Rules Standard. The current *Boeing* standard divides facially neutral work rules into three categories: whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. In its invitation for briefs, the Board identified particular questions to be addressed: whether to adhere to the existing standard; whether the Board should modify the standard to better account for employees' economic dependence on their employers and the related potential for work rules to chill their rights to engage in protected concerted activity (PCA) regarding the terms and conditions of employment, as well as the burden of proof and the balancing of employer/employee interests; and whether the Board should continue to hold that certain categories of work rules (e.g. investigative-confidentiality, non-disparagement, prohibition of outside employment) are always lawful. We predict that the now-Democrat majority Board will take this opportunity to return to a more onerous standard that will find attenuated interpretations of reasonable work rules to violate the National Labor Relations Act.

Independent Contractor Status. For decades, the Board had relied on a common-law test to determine whether an individual is an employee, who is subject to the National Labor Relations Act, or an independent contractor, who is not. Under this test, a number of factors are evaluated:

- Extent of control by the employer, with greater control over the manner and means by which the individual does business indicating employee status
- Method of payment, as employers do not typically share the opportunity for profit or loss with independent contractors
- Instrumentalities, tools, and place of work, as those are typically provided by employers to employees but not to independent contractors

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- Supervision, as independent contractors are not generally supervised
- The relationship the parties believed they created
- Engagement in a distinct business/work as part of the employer's regular business/the principal's business, since the more integrated the worker's services are into the employer's business, the more likely the worker is an employee
- Length of employment, with a longer relationship indicating employee status
- Skills required, with specialized skills or training indicating independent contractor status

"An important animating principle" under which the factors are evaluated is "whether the position presents the opportunities and risks inherent in entrepreneurism." In the 2014 case of *FedEx Home Delivery*, however, the Obama Board revamped the independent contractor analysis and severely limited the significance of a worker's entrepreneurial opportunity. The Trump Board, in *SuperShuttle DFW, Inc*., reinstated the prior standard, with its focus on entrepreneurism.

Now, the Board is questioning whether to adhere to the *SuperShuttle* standard, or return to the *FedEx Home Delivery* standard (or some variation thereof). We believe the Board will choose the latter option, which makes it harder to establish independent contractor status and favors a finding of employee status, with the consequent protections of the NLRA.

Confidentiality Clauses in Mandatory Arbitration Agreements. The Trump Board found that the Federal Arbitration Act absolutely protects employers' ability to include confidentiality clauses in mandatory arbitration agreements. The Board now inquires whether the FAA does offer such protection, even where such clauses would interfere with employees' rights to engage in PCA, and, if not, what standard it should apply to determine if such clauses are lawful. The Board also questions whether confidentiality clauses in mandatory arbitration agreements violate employees' rights under the NLRA, including their ability to file Board charges or access Board processes. Again, we predict that the Board will now find the FAA does not protect such clauses, and that such clauses violate employees' rights under the Act – meaning that employers would no longer be able to include confidentiality provisions in mandatory arbitration agreements.

What Are the Parameters for An Employer's Requests for Medical Records Under the ADA?

The Americans with Disabilities Act governs employers' ability to make medical inquiries of employees, including requests for medical records. And where the ADA permits employers to make such inquiries, it also requires employees to comply with those requests, as the U.S. Court of Appeals for the Fourth Circuit recently affirmed in a case that also provided a useful summary of the scope of such inquiries.

Case Background. In *Coffey v. Norfolk Southern Railway Co*., following a work-related accident, a railroad engineer was required to undergo periodic drug testing. At some point, he tested positive for amphetamines and codeine, for which he claimed to have prescriptions. The employer then requested information from the employee's doctor regarding his diagnoses, significant symptoms, medication regimen and compliance with that regimen, medication side effects, awareness of other medications prescribed by other doctors, ability to safely perform essential job functions, and recommended work restrictions or accommodations. Although some records were eventually provided, the employer notified the employee that they were not sufficient. A disciplinary hearing was subsequently held, and the employee provided over 400 pages of medical records – but they still

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did not address fully the employer's requests. He was terminated and, of course, sued his employer. Although he conceded that the employer was entitled to some information, he challenged the scope of the employer's request for medical records and his termination for failing to provide the requested records.

The Fourth Circuit's Opinion. Under the ADA, employers may make medical inquiries where such inquiries are "job related and consistent with business necessity." As the Fourth Circuit noted, that standard is met if the employer reasonably believes that an employee's medical condition impairs their "ability to perform the essential functions of the job" or "the employee poses a direct threat to himself or others." Moreover, the employer must "show that the asserted `business necessity' is vital to the business" and that "the request is no broader or more intrusive than necessary."

In this case, the Fourth Circuit found that the employer's inquiries into the employee's use of amphetamines and codeine were "plainly" job-related and consistent with business necessity. The employer had an "objective basis" to believe the employee's use of these medications could impact his ability to operate a train. The Fourth Circuit stated that each of the employer's inquiries, as listed above, was related to the employee's job, and was "unquestionably consistent" with the necessity of ensuring the safe operation of the trains. The fact that the inquiry required the employee to provide extensive records did not change this conclusion – especially given the public safety aspect of this matter, the employer "was more than justified in requesting enough information to permit an informed decision about whether it was safe for its locomotive engineer to operate a train." And furthermore, the employer was required by federal railroad regulations to obtain that information. Thus, the employee's failure to provide the required information justified his termination.

Of additional interest, the Fourth Circuit rejected the employee's contention that the employer acted unreasonably because it could have spoken directly to the doctor itself, rather than requiring the employee to obtain the information. Although the Fourth Circuit acknowledged this might have been a matter of "common courtesy," the fact that there might have been a better way to get the information did not impact the employer's business necessity defense. As the Fourth Circuit stated, "The employer need not show that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving it."

Lessons for Employers. Although in this case the court found that the employer was entitled to extensive medical records, employers should still be thoughtful about ensuring that they are requesting only as much information as is necessary to establish that the employee has a disability, the extent of their limitations, possible accommodations to enable them to perform the essential functions of their job, and, if applicable, whether they pose a direct threat to the safety of themselves or others. The information requested must be relevant to the job and necessary to the business. And assuming that these conditions are met, the employer can hold the employee accountable for providing the requested information. Moreover, the employer need not contact the doctor directly for the information, although it may choose to do so – with an appropriate written release/authorization from the employee.

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Employers May Request FMLA Recertification If Circumstances Change

A recent case provides a good reminder to employers that they can – and should – request recertification of an employee's need for leave under the Family and Medical Leave Act if an employee's use of such leave suddenly changes.

Recertification Under the FMLA. Under the FMLA, an employer is entitled to request certification from a health care provider of the employee's need for leave. If the indicated minimum duration of FMLA leave (including on an intermittent basis) is longer than 30 days, the employer normally cannot request recertification until that period expires. There are exceptions to this limitation – including where circumstances described in the previous certification have changed. The Department of Labor's regulations implementing FMLA provide specific examples of such changed circumstances:

> For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification… Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences might constitute a significant change in circumstances sufficient for an employer to request a recertification…

Background of the Case. In *Whittington v. Tyson Foods, Inc.*, the employee was approved for intermittent FMLA leave based on his doctor's certification that he would require 4-5 days off once or twice every 1-2 months. The employee used leave in accordance with this certification for about 6 months. He then called out for 16 consecutive workdays, and the employer requested FMLA recertification. The employee failed to provide the requested recertification. After being terminated for failing to return from an unapproved leave and failing to communicate with the employer, he sued for interference with his FMLA rights based on the request for recertification, among other things.

The Court's Decision. The U.S. Court of Appeals for the Eighth Circuit, however, rejected the employee's claim. It found that the 16-day leave was a "significant change in circumstances" that warranted the employer's request for recertification, as supported by the regulatory language quoted above. According to the Eighth Circuit, the request for recertification was reasonable as a matter of law.

Lessons for Employers. As employers struggle with managing FMLA leave, particularly in situations where abuse of leave is suspected, they should remember that the regulations do provide some options – like recertification – to ensure that leave is being properly used. And the FMLA will not protect employees who fail to comply with their obligations to provide recertification.

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TAKE NOTE

Update on Enforcement Deadlines for CMS Vaccination Mandate. At this time, the Center for Medicare and Medicaid Services' interim final rule requiring Medicaid and Medicare-certified healthcare providers to mandate vaccination against COVID-19 for all applicable staff (as discussed in our November 8, 2021 E-lert) is now in effect in all states. However, according to CMS, the enforcement deadlines vary, depending on whether a stay previously applied in the state.

There are two compliance deadlines: For Phase 1, staff at all covered health care facilities must have received at least the first dose of a two-dose regimen (Moderna or Pfizer) or the single dose of the Johnson & Johnson/Janssen vaccine. For Phase 2, the staff must have completed the required vaccinations, except for those with legally required medical or religious exemptions, or those for whom vaccination must be delayed for medical reasons as recommended by the CDC.

The following states are subject to a Phase 1 deadline of January 27, 2022 and a Phase 2 deadline of February 28, 2022: CA, CO, CT, DE, DC, FL, HI, IL, ME, MD, MA, MI, MN, NV, NJ, NM, NY, NC, OR, PA, RI, TN, VT, VI, WA and WI.

The following states are subject to a Phase 1 deadline of February 14, 2022 and Phase 2 deadline of March 15, 2022: AL, AK, AZ, AR, GA, ID, IN, IA, KS, KY, LA, MS, MO, MT, NE, NH, ND, OH, OK, SC, SD, UT, WV, and WY.

Texas is subject to a Phase 1 deadline of February 22, 2022, and a Phase 2 deadline of March 21, 2022.

Employer Health Plans Must Cover Costs of At-Home COVID Tests. As of January 15, 2022, employer-sponsored group health plans (as well as insurance companies) are required to fully cover eight over-the-counter at-home tests per covered individual per month, as explained in DOL guidance. These tests must be for personal, and not employment, purposes. If ordered or administered by a health care provider following an individualized clinical assessment, including for those who may need them due to underlying medical conditions, there is no limit on the number of tests, including at-home tests.

There can be no cost-sharing requirements (e.g. deductibles, co-payments, coinsurance, prior authorization or other medical management requirements). The insurer or plan may reimburse sellers directly, or may require employees to submit claims for reimbursement, up to $12 per individual test.

DOL's Annual Penalty Increase. The Department of Labor has announced its annual penalty increases. Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose.

The DOL's announced increases, effective January 15, 2022, include the following:

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $2,074 to $2,203. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of $13,227 per under-18 worker to $14,050, while violations resulting in the child's death will

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increase from a maximum of $60,115 to $63,855, which may be doubled for repeated or willful violations.

- **Occupational Safety and Health Act.** The maximum penalty for posting, other-than-serious, serious, and daily failure-to-abate violations increases from $13,653 to $14,502. The minimum penalty for willful violations increases from $9,753 to $10,360. The maximum penalty for willful and repeat violations increases from $136,532 to $145,027.

- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $178 to $189.

Biden Administration Announces Pro-Union Initiative. On January 21, 2022, the U.S. Secretary of Labor announced the "Good Jobs" initiative, ostensibly intended to improve job quality. The pro-union nature of this initiative, however, is clear from the press release, in which the DOL asserts that it will "create access to good union jobs – free from discrimination and harassment – for all workers and job seekers."

According to the press release, the Good Jobs initiative focuses on empowering working people by:

- Providing workers with easily accessible information about their rights, including the right to bargain collectively and form a union.
- Engaging employer stakeholders as partners to improve job quality and workforce pathways to good jobs.
- Supporting partnerships across federal agencies, and providing technical assistance on grants, contracts and other investments intended to improve job quality.

As a practical matter, however, this is simply another action evidencing the administration's clear pro-union bias. Employers can expect the DOL and NLRB to aggressively pursue union interests in any interactions.

Employers Beware - NLRB and DOL Will Partner on Enforcement. The National Labor Relations Board and Department of Labor have announced an agreement to facilitate information sharing, referrals, joint investigations, and enforcement. The agencies assert that, "The partnership will help ensure that employers pay workers their rightful wages and that workers can take collective action to improve their working conditions without fear of retaliation."

In the past, there has been little cross-agency cooperation. An employer facing enforcement action from one agency was not likely to encounter interest from a separate agency, even if the issue might fall within the jurisdiction of both. This development means that employers could face more aggressive agency activity. And since many wage issues impact more than a single employee, we can expect the NLRB to seize the opportunity to get involved, in keeping with this administration's clearly expressed pro-union agenda.

The agreement identifies a panoply of areas of particular concern to the DOL and NLRB, including: unlawful compensation practices (minimum wage and overtime); retaliation for exercising rights under the NLRA or laws enforced by the DOL's Wage-Hour Division (e.g. Fair Labor Standards Act, Family and Medical Leave Act, Migrant Workers Protection Act); working and living conditions; break times; unilateral changes to terms and conditions of employment; unlawful

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employment practices (e.g. discriminatory failure to hire, retaliatory discipline, threatening immigration or work authorization status); joint employer status; and misclassification of employees as independent contractors. We have already seen both agencies take steps to reverse or limit the previous regulations, guidance, and caselaw on these issues in ways that disfavor employers.

Does the Employer or Employee Own Those Social Media Accounts? This is the question currently being litigated between a bridal designer and her former employer, a bridal gown company, and the case highlights the need for employers to make sure that they address this issue clearly in any employment agreement.

In *JLM Couture, Inc. v. Gutman*, the company and the designer had an employment contract that governed much of their relationship, but not social media accounts. When the relationship ended, the company claimed ownership of the designer's Instagram, TikTok and Pinterest accounts, arguing that she created them in her capacity as an employee. She, on the other hand, argued that she created them in her personal capacity, and she did not cede ownership by agreeing to use the accounts to market the company's products. The federal district court granted an injunction awarding control of the accounts to the Company while the lawsuit was pending. But the U.S. Court of Appeals for the Second Circuit reversed the district court's ruling.

Who will win the argument of ownership has yet to be resolved. But the lesson for employers here is the importance of clarifying who owns a social media account, if an employee is engaged in social media activities for the employer – particularly if there is a mixing of business and personal activity on the account.

Collective Action Waivers in Severance Agreements Are Enforceable. Many employers are interested in having employees sign collective action waivers as part of employment agreements, including severance agreements. Such waivers mean that the employees agree that they will not bring or participate in a lawsuit as part of a group. And the U.S. Court of Appeals for the Second Circuit recently found a waiver of the right to bring a collective action under the Age Discrimination in Employment Act to be enforceable in severance agreements.

In *Estle v. International Business Machines Corp*., the employees signed severance agreements containing collection action waivers under the ADEA. However, they then challenged the validity of the waivers, on the grounds that the employer failed to make certain disclosures that are required for the "knowing and voluntary" waiver of "any right or claim" under the ADEA. The Second Circuit looked to the U.S. Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, in which the Supreme Court held that the ADEA's disclosure requirements applied to "substantive right[s]," like "the statutory right to be free from workplace age discrimination," but not procedural ones, like "the right to seek relief from a court in the first instance." In the present case, the Second Circuit found that collective action waivers address procedural rights, and therefore the ADEA disclosures were not required for their acceptance to be "knowing and voluntary."

This case is good news for employers, as it further supports the ability of employers to obtain collective action waivers in employment agreements.

Arbitration Agreements Only Cover the Signing Parties. And therefore an agreement between an employee and the employer's parent company could not be enforced by the employer, according to the U.S. Court of Appeals for the Ninth Circuit.

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In *Ahlstrom v. DHI Mortgage Company, Ltd., L.P.*, the employee signed an arbitration agreement with his employer's parent company at the time of hire. The agreement specified that an arbitrator would have the authority to resolve any dispute relating the formation, enforceability, applicability, or interpretation of the arbitration agreement. When the employee sued his employer, the employer moved to compel arbitration. The employee objected, arguing that a proper agreement had never been formed. The federal district court determined that the issue of formation, based upon the agreement, should be decided by an arbitrator.

On appeal, however, the Ninth Circuit first found that while issues of validity and arbitrability can be delegated to an arbitrator, the question of formation cannot. Referring to Supreme Court precedent and joining the Fifth and Tenth Circuits, the Ninth Circuit stated that "a court should order arbitration only if it is convinced an agreement has been formed."

The Ninth Circuit then turned to whether an agreement to arbitrate had, in fact, been formed here, and found that it had not. The agreement was clearly between the employee and the employer's parent company, with no mention of the employer. Although the employer argued that, as a subsidiary, it was encompassed in the agreement, the Ninth Circuit disagreed. Rather, "Courts adhere to the fundamental principle that corporations, including parent companies and their subsidiaries, are treated as distinct entities." Thus, because the employer was not named in the agreement and did not sign the agreement, there was no agreement between the employer and the employee.

This case reminds companies that are part of a parent-subsidiary relationship that it is critically important to make sure the right entities are named in any agreement – including arbitration agreements – with an employee.

Requests for Accommodations Must Be Sufficiently Specific and Supported. According to the U.S. Court of Appeals for the Sixth Circuit, a request that is lacking in sufficient specificity will not be considered a request for accommodation under the Americans with Disabilities Act.

In *Stover v. Amazon.com, LLC*, soon after hire, the employee stated he had a "chronic illness" and required additional break time. The employer gave him ADA accommodations forms to complete, but he did not do so. Several months later, he stated he had a gastrointestinal illness that required "more breaks" and a "readily accessible" bathroom. In response to a request for clarification, he explained that he needed a reduced work schedule and to use the restroom whenever he had an episode. However, he failed to provide any supporting medical documentation in response to the employer's request. After he was terminated for unrelated misconduct, he sued the employer, alleging a failure to accommodate, among other things.

The Sixth Circuit, however, found that his requests for more breaks and a readily accessible bathroom were so lacking in specificity that they were tantamount to a failure to request accommodation at all. According to the Sixth Circuit, "An employee, after all, must 'reasonably inform' an employer about the nature of the requested accommodation, thereby putting the employer on notice of whether and what type of accommodation might be appropriate." Moreover, his failure to provide any supporting medical documentation doomed his accommodation claims.

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For employers, this case provides a good guide for the appropriate way to handle possible accommodations requests. Even if the request is not clear, the wise employer will direct the employee to follow the accommodations process and seek clarification from the employee and their doctor. And if the employee fails to respond appropriately to the process, the employer need not provide any accommodation.

NEWS AND EVENTS

New Partner – We are delighted to announce that Chad M. Horton has been made a Partner at our Firm. Chad represents both unionized and union-free employers in a full range of labor and employee relations matters. Before joining us, Chad served as a Field Attorney with the National Labor Relations Board. He is a magna cum laude graduate of Ithaca College and Tulane University Law School.

Publication – We are pleased to announce the publication of the 2022 edition of the Maryland Human Resources Manual, which we author and update annually on behalf of the American Chamber of Commerce Resources and the Maryland Chamber of Commerce. This comprehensive human resources manual explains, in plain English, the duties of the employer during the entire employment process – everything from pre-hire through post-termination. It also contains hundreds of forms and policies. Purchase of this manual includes one year of online publication access that allows you to search for answers electronically.

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q4 2021. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the eleventh consecutive quarter and twelfth time overall that Fiona has received this honor.

Media – Parker E. Thoeni was quoted in a January 7, 2022 Law360 article, " 'You Can't Kill Patients': Justices Open To CMS Vaccine Rule." (Subscription required for access). Parker offered insight into the Supreme Court's hearing on whether to stay the CMS rule requiring vaccination for employees of Medicare- and Medicaid-certified healthcare providers.

Podcast – Fiona W. Ong was a guest speaker for the Employment Law Alliance's podcast series, Employment Matters Episode 345: US Supreme Court "Stays" OSHA ETS. The podcast can be accessed on the ELA website or on your favorite podcast streaming service.

Media – Fiona W. Ong was quoted in a January 21, 2022 article by Dawn Kawamoto, "How Bereavement Leave Is Evolving at Work," on Builtin.com, an online community for startups and tech companies.

TOP TIP: Employers, Don't Ignore COVID Just Because the Vax-or-Test ETS Is Gone

Although the Occupational Safety and Health Administration's attempt to issue a general workplace COVID standard was unsuccessful, employers should not assume that they are off the hook with regard to COVID preventative measures, as one company recently learned.

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The U.S. Department of Labor recently issued a press release to announce its citation of an auto-parts supplier for failing to protect its workers against COVID-19 in the workplace. This press release effectively warns other employers to comply with CDC and OSHA workplace guidance on COVID-19 prevention and remediation. Although there is no current COVID-specific standard, OSHA is making good on its commitment to use existing standards, including the General Duty clause, which requires employers to provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm."

The employer at issue was found to have violated the General Duty clause by failing to protect its workers against COVID-19. Specifically, at the beginning of the pandemic, in March 2020, the employer had issued a corporate-wide social distancing policy, and in May 2020, had trained employees on return-to-work precautions that included mask-wearing and social distancing. However, in a COVID surge over a year later, in August 2021, 88 employees fell ill with COVID, with one ultimately dying.

In its citation, OSHA asserted that the employer failed to enforce its own COVID-prevention policy regarding mask-wearing. More specifically, it found that, "Employees worked and congregated in close proximity without face coverings or without wearing face coverings over nose and mouth, as recommended by the Centers for Disease Control and Prevention (CDC), leading to exposures among unvaccinated employees." (Emphasis added). The employer further "failed to take immediate and effective steps to identify, inform, and remove all potentially exposed employees."

Instructive for other employers, OSHA provided "feasible and acceptable means of abatement" as follows (emphasis added):

- Periodically review the COVID-19 disease rates in the community and conduct a hazard assessment to identify employee practices and workplace behaviors that could increase risks for COVID-19 transmission, and update control measure or implement new ones as needed.
- Re-evaluate existing COVID-19 company procedures and retrain workforce as necessary when updates (e.g. due to COVID-19 variants) are necessary or when deficiencies in the program are noticed.
- Implement contact tracing to ensure that employees who have worked near someone who tested positive for COVID-19, and/or develop symptoms of COVID-19 are informed of their potential exposure to the virus, encouraged to quarantine, and excluded from the facility until they meet the conditions to return to work per the CDC guidelines.
- Screen employee(s) for COVID-19 symptoms and potential COVID-19 exposure. Employees who appear to have symptoms upon arrival at work or who become sick during the day must immediately be separated from other employees, customers, and visitors; sent home; and encouraged to seek medical attention. Have a procedure in place for the safe isolation of employees who become sick while at work as they may need to be transported home or to a healthcare provider. Utilize, develop, and implement flexible sick leave and supportive policies and practices.
- Follow and implement guidelines from the CDC, other federal agencies (e.g., Department of Homeland Security (DHS) Cybersecurity and Infrastructure Security (CISC)), and State and

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Municipal public health recommendations for exposed employees (close contacts) to quarantine, telework if possible, and self-monitor for symptoms.

- Enforce physical distancing measures to ensure that everyone (especially asymptomatic positive employees) in the workplace maintains at least six feet of distance. Install transparent, impermeable barriers at locations where physical distancing is not possible. Provide and require workers to wear face coverings or surgical masks, as appropriate, unless their work task requires a respirator or other PPE.
- Facilitate employees getting vaccinated by granting paid time off for employees to get vaccinated and recover from any side effects. Vaccination is the key element in a multi-layered approach to protect workers. Vaccines authorized by the U.S. Food and Drug Administration are highly effective at protecting vaccinated people against asymptomatic and severe COVID-19 illness and death.

Although we are all weary of the pandemic, employers should not relax their preventative measures and should be prepared to adjust them to changing circumstances. And the "means of abatement" suggested by OSHA certainly provides employers with an overview of the measures that OSHA thinks should be in place.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- OSHA Withdraws Vax-or-Test ETS, Plans to Issue Permanent Healthcare Standard by Fiona W. Ong, January 25, 2022
- The DOL (Finally!) Provides Guidance on the Compensability of COVID Testing/Vaccination Time! by Fiona W. Ong, January 21, 2022
- Pay Equity – What's Good for the Gander Is Good for the Goose? by Elizabeth Torphy-Donzella, January 20, 2022
- Supreme Court Stays Vax-or-Test ETS, But Allows CMS Vaccine Mandate – What Employers Need to Know by Fiona W. Ong, January 13, 2022
- What the CDC's Updated Isolation/Quarantine Guidance Means for Employers by Fiona W. Ong, January 6, 2022

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