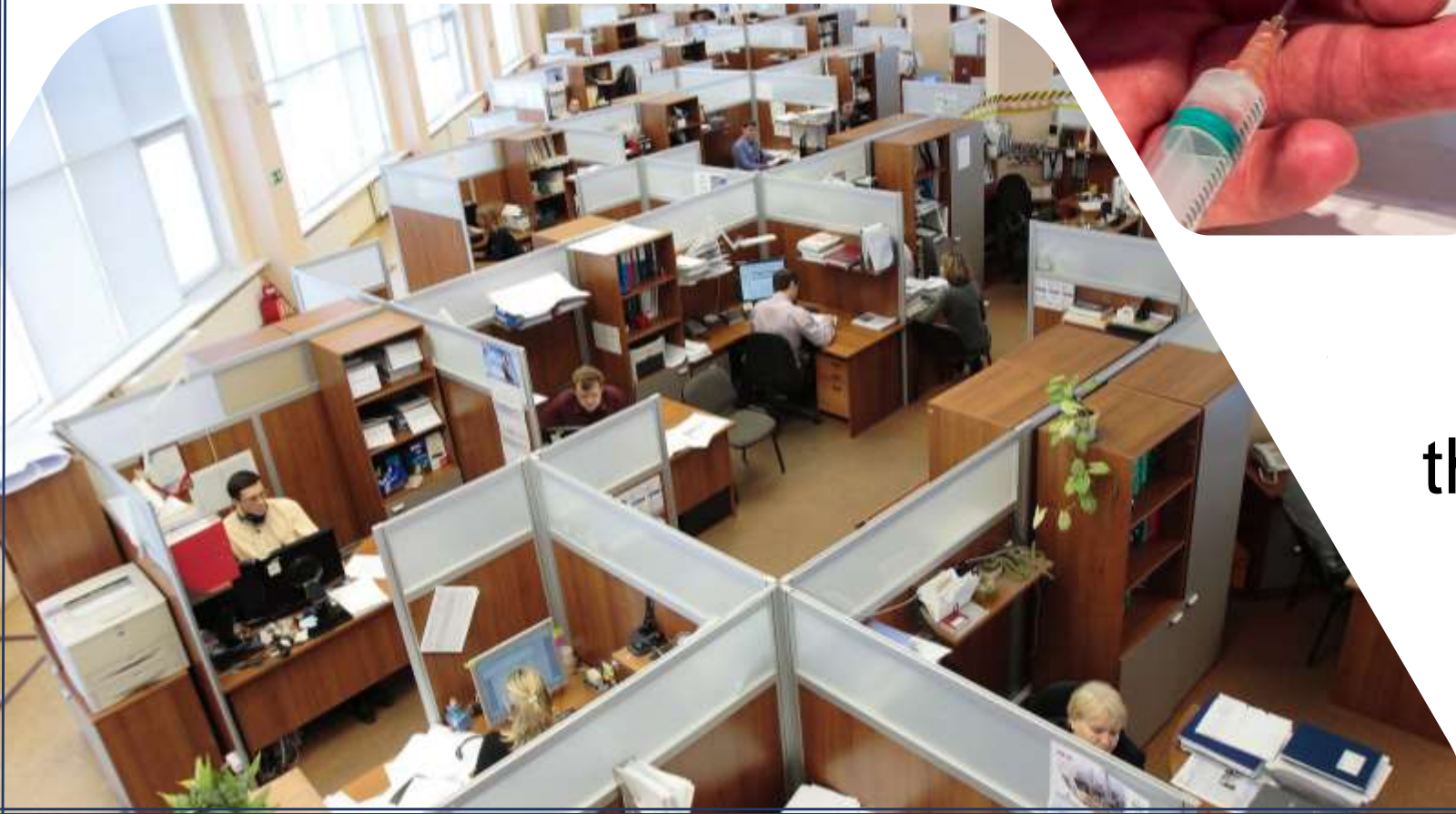
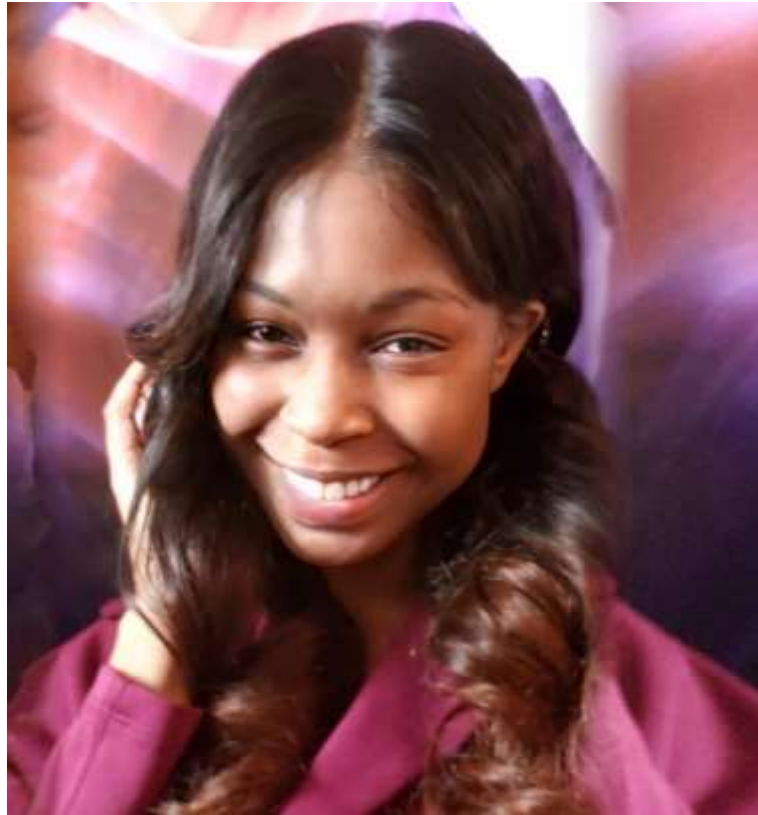




Welcome Back America!

HR Considerations for
the 2021 US Workplace





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Overview

HR Considerations for the 2021 US Workplace

- Vaccines—Where We Are And Where We Are Going
- Remote Work Considerations
- Wandering Workers: Legal Pitfalls of Remote Work Across State Borders
- Return to Work – General Health and Safety



S P E A K E R

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FRIDAY | **ELDREDGE
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Vaccines – Where We Are and Where We Are Going



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- As of July 1, 47% of the country is fully vaccinated.
- CDC guidance for fully vaccinated individuals:
 - Do not need to wear masks or physically distance
 - Do not need to test following a known exposure, if asymptomatic
 - Do not need to quarantine following a known exposure, if asymptomatic
- Why should employers care about vaccination status?
 - To demonstrate commitment to health and safety measures
 - To limit potential liability
 - To make informed decisions about reopening and implementing safety protocols
 - To determine if workers must quarantine after being exposed to COVID at work
- Permanent FDA approval on the horizon
- Impact of Delta variant?

Mandating COVID-19 Vaccinations



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- Employers may require employees physically entering the workplace to be vaccinated so long as they comply with other workplace laws.
 - ADA accommodation considerations
 - Title VII accommodation considerations
 - Wage and hour considerations
 - Workers comp considerations
- Must also be mindful of disparate impact on protected classes.

Incentivizing COVID-19 Vaccinations



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- Employers may offer incentives to encourage employees to get vaccinated.
- If the vaccine is offered by the employer or its agent, the incentive must not be so substantial in value as to be considered coercive,
- If the vaccine is offered by a third-party, the EEOC limits do not apply but they should still be reasonable.
 - Cash incentives
 - Paid leave
 - Company raffles

Practical Considerations



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- Can ask employees if they are vaccinated
- Can ask employees for proof of vaccination
- Do not ask for details (e.g., why someone was not vaccinated)
- An employee's COVID-19 vaccination information is confidential medical information under the ADA.



S P E A K E R

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Wandering Workers: Legal Pitfalls of Remote Work Across State Borders

Workers are Wandering



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- 15.9 million Americans moved during the pandemic, according to the USPS
- Some moves are permanent, some are temporary relocations
- Some employees may have failed to inform their employer of a move
- While the job may be done “from anywhere,” legal ramifications of a teleworker crossing state borders can be significant
- In many instances, the teleworker and employer will be subject to the tax, business, and employment laws of the jurisdiction (state and/or local) where the teleworker is located
 - Every state has its own rules, and each area of the law may be different
 - For some issues, just one teleworker may trigger obligations

Tax Issues



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- State income tax obligations create headaches for employers and employees
 - Individual income tax implications/withholding issues
 - Business income issues
- Employers should be aware of applicable franchise and business taxes and registration requirements, since teleworkers may be deemed to expand their business operations into other states
- Employers may be obligated to pay unemployment insurance tax in the state in which the teleworker is located
- Nine states now have mandatory family and medical leave programs funded by mandatory payroll taxes

Other Legal Issues to Consider



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- Workers compensation coverage
- Wage and hour laws, including expense reimbursement obligations
- Break time and posting laws
- Mandatory sick leave laws
- Payout of accrued leave
- Varying standards for independent contractor classification
- Exposure to claims and litigation in other venues

Practical Issues and Tips



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- Practical pitfalls of long-distance telework
 - Oversight/performance management challenges
 - Inability to require “return to office” if telework doesn’t work
 - Expense of ensuring compliance
- Suggestions:
 - Identify all current telework locations
 - Obtain advice regarding applicable law in all jurisdictions
 - Determine which arrangements to continue
 - Require written telework agreements going forward, including:
 - Stating that agreement pertains only to employee’s current location
 - Requiring notice and permission to change locations



S P E A K E R

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Remote Work – Discrimination Concerns



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- Duty to accommodate under the ADA
 - Same standard, different context
 - Accommodating employees working remotely
 - Remote work as an accommodation
- Other discrimination concerns
 - Application of remote work policies
 - Inequality between remote and in-office workers

Refusals to Work Based on Safety Concerns



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- *Potential* protections for unionized and non-unionized workplaces under the NLRA
 - Section 8(a)(1) of the National Labor Relations Act
 - Section 502 of the Labor Management Relations Act
- *Potential* protections for employees under 29 C.F.R. § 1977.12 of the OSHA
- State law – fire “at will”?
- Considerations beyond the law



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Return to Work – General Health and Safety



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- *Emergency Temporary Standard (ETS) for Healthcare*: Establishes a mandatory workplace safety standard for workers in many healthcare environments.
- *OSHA updated Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*: Establishes voluntary guidance on continued workplace safety measures related to COVID-19.
- CDC Guidance:
 - Interim Public Health Recommendations for Fully Vaccinated People
 - Guidance for Businesses and Employers Responding to Coronavirus Disease 2019
 - Post-vaccination Considerations for Workplaces
 - Updated Healthcare Infection Prevention and Control Recommendations in Response to COVID-19 Vaccination
- State and local health guidance and requirements

Return to Work – OSHA COVID-19 Healthcare ETS



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- Effective June 21, 2021.
- Generally applies to settings where any employee provides healthcare services or healthcare support services, with some fact-specific exceptions (e.g., non-hospital ambulatory care with no COVID-19 exposure risk, retail pharmacy, telehealth, etc.)
- Key requirements of the ETS include (*full requirements at 29 C.F.R. 1910.502*):
 - Implement a COVID-19 workplace safety plan (must be written if 10 or more employees);
 - Conduct patient, employee, and workplace screenings;
 - Implement safety and mitigation policies/strategies, including physical, administrative, and work practice controls;
 - Ensure appropriate personal protective equipment is available, used, and maintained;
 - Provide paid leave for vaccinations and vaccine side effects;
 - Conduct workplace safety training;
 - Implement non-discrimination and anti-retaliation policies concerning COVID-19;
 - Maintain a COVID-19 log of all employee instances of COVID-19 (even if not exposed in the workplace) for employers with 10 or more employees;
 - Report COVID-19 fatalities and hospitalizations, alongside other mandatory notifications; and
 - Implement a mini-respiratory protection program in applicable situations.

Return to Work – Practical Considerations



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- Adopting return-to-work safety protocols for employees who have been working from home
 - Initial return to work safety criteria
 - Continued safety requirements
 - Workplaces with vaccinated/unvaccinated employees
 - Adjust workplace safety requirements (i.e. screening, masks, physical distancing, etc.)
- Timing of the return to work and importance of messaging
- Accommodation for employees with continuing child care needs

Questions?



Thank You!

M O D E R A T O R



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Laura Pasqualone
Partner
Lewis Roca, LLP
Arizona

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