



# Labor & Employment Outlook 2021

 Bloomberg Law



## 2021 Outlook on Labor & Employment

Once bustling public transportation systems - empty. Clogged highways jammed at rush hour almost instantly turned into a quiet, calming oasis. Office chairs unoccupied for months on end. All this amid a renewed focus on issues of representation and workplace inclusion initiatives that define diversity in the workplace.

The modern labor and employment law landscape was thoroughly and completely upended in 2020 by the Covid-19 global pandemic and social unrest that could not have been predicted a year ago.

Start planning your strategy for the year ahead with the **2021 Outlook on Labor & Employment**, including timely news, analysis, and Practical Guidance you can put to work to navigate this unexpected, complex, and quickly shifting landscape.

From legal gray areas that arise with a remote workforce - including questions around overtime, FMLA, vaccine mandates, and more - to useful guidance for bringing workers safely back to the worksite, the outlook provides perspectives you will turn to again and again as labor and employment practitioners like you continue to face the many challenges of the new normal.

Bloomberg Law provides distinct resources to labor and employment professionals, from the In Focus: Coronavirus page featuring chart builders specific to leave, unemployment, safety issues, and more, to federal and state government agency resources and easily searchable, relevant court dockets.

In addition to Practical Guidance documents you can put to immediate use, covering a range of issues from Equal Employment Opportunity (EEO) to Wages, Hours & Leave and more, you will also have access to the latest news from Daily Labor Report® and detailed reviews of key issues from our expert analysts, and a first look at potential changes from the Biden administration that will impact your work. [Request your demo today.](#)

## Table of Contents

Can Your Boss Force Your Vaccination? Employer Mandates Explained .....	1
New DOL Guidance Allows Telemedicine Visits for FMLA Leave .....	2
Amazon's Prime Now Is Sued Over Unpaid Wages, Missed Breaks .....	3
H-1B Employers Foresee Wins, Losses in Biden Approach to Visas .....	4
In-House Attorneys Adapt as Covid Risks Shift.....	6
Will 2020's Changes Last - And Change the Workplace?.....	8
Employment, Checklist - Worksite Reopening During Coronavirus .....	10
Tips for Conducting a Virtual Arbitration Hearing .....	12
Tech's Legal Risks For Employers During Covid-19 .....	14
Covid-19 Vaccines and Workplace Challenges.....	16

# Can Your Boss Force Your Vaccination? Employer Mandates Explained

By Robert LaFolla, Reporter, Bloomberg Law

December 10, 2020

U.S. officials are preparing to distribute the first 40 million doses of Covid-19 vaccines by the end of December, with first priority going to the 21 million health-care workers in hospitals, home health care, and other high-risk settings.

Essential workers in other industries are expected to be next in line, although states have the authority to decide who falls in that category. Industries that have been deemed essential under federal guidelines and state orders include transportation, child care, energy, and critical retail, [according](#) to the National Conference of State Legislatures.

Yet a [Gallup poll](#) published last month shows about four in 10 Americans wouldn't take a vaccine approved by the U.S. Food and Drug Administration, suggesting the availability of shots won't guarantee that workers take them.

## 1. Can employers require workers to get vaccinated for Covid-19?

In general, yes, employers have the authority to mandate vaccination. Most nonunion companies have relatively wide latitude to create such requirements largely because employment relationships are presumed to be "at-will" in nearly every state.

Companies can fire at-will workers for any legal reason, which could include refusal to comply with a vaccine mandate. In addition, employers also have a legal duty to provide a safe and healthy workplace.

## 2. Can workers raise objections to vaccine mandates based on health concerns?

The Americans with Disabilities Act allows workers to request exemptions from vaccine mandates if they have a disability that's covered by the law. Employers must communicate with workers who ask for an exemption to determine whether not taking a shot is a reasonable accommodation for their particular disabilities and job responsibilities—and isn't an undue burden for their employer. Failing to either engage in that interactive process or provide a reasonable accommodation could be grounds for a lawsuit.

Workers with health conditions that compromise their immune systems have a good chance of prevailing on ADA claims if they have doctors' advice saying they should avoid taking a shot. An employer would need to show that allowing a worker to remain unvaccinated would cause an undue burden or pose a direct threat in the workplace, which would be hard if there are alternatives available like working from home or moving to an area segregated from coworkers.

## 3. What about religious objections to vaccines?

Title VII of the 1964 Civil Rights Act prohibits workplace discrimination based on religion, giving workers the right to seek an exception to a vaccination mandate based on their religious beliefs. The Equal Employment Opportunity Commission, which enforces Title VII, defines religion beyond membership in a church or belief in God. Religion for the purposes of federal anti-discrimination law covers strongly and sincerely held moral or ethical beliefs, according to the agency. But employers can deny religious accommodations if they would create an undue burden.

## 4. Does it make sense for employers to require the Covid-19 vaccine?

That depends on the industry and the individual workplace. Many hospitals, for example, call on their workers to get vaccinated for influenza, hepatitis B, and other contagious diseases. The airborne spread of the coronavirus may prompt employers with workers who frequently interact with the public or operate in tight quarters with one another to take a shot.

But given the resistance to getting vaccinated shown in public polling, forcing workers can create practical problems, including the possibility of having to fire valuable and hard to replace workers. Many employers would be better off encouraging and facilitating the use of a Covid-19 vaccine rather than requiring their workers to take it.

# New DOL Guidance Allows Telemedicine Visits for FMLA Leave

By Ben Penn, Reporter, Bloomberg Law

December 29, 2020

The U.S. Labor Department has given employers added flexibility to remain in compliance with wage-and-hour laws during the pandemic-induced disruption to workplace norms, including for telemedicine.

DOL's Wage and Hour Division published a pair of guidance memos Tuesday, one of which said employees' [telemedicine visits](#) are an acceptable means of establishing they're owed time off under the Family and Medical Leave Act. The second outlines conditions under which a business can substitute [electronic notices](#) for hard-copy postings when keeping workers informed of their workplace rights.

The guidance comes more than nine months after much of the workforce began working from home to avoid Covid-19 exposure, and is the agency's latest effort to address legal ambiguities caused by workplace laws that were written without a lengthy pandemic in mind.

The telemedicine-related guidance pertains to situations in which a worker must prove they're suffering from a "serious health condition," or that they need to care for a family member who has such a condition, which prevents them from performing essential work functions. This would qualify the worker for up to 12 weeks of unpaid leave under the FMLA, a federal law DOL enforces.

Department regulations state that an in-person visit to a health-care provider is one method for a worker to prove they have a serious health condition, but the Wage and Hour Division is now offering leniency by accepting telemedicine visits in response to the Covid-19 public health emergency.

To qualify as an in-person visit under FMLA guidelines, the telemedicine visit must satisfy all three of the following conditions: "an examination, evaluation, or treatment by a health care provider; be permitted and accepted by state licensing authorities; and generally, should be performed by video conference," according to the guidance.

"WHD is proving that maintaining social distance need not distance workers nor employers from their rights, and that expanding flexibilities is key to the workforce's continued recovery and growth as we emerge from this pandemic, and beyond," WHD Administrator Cheryl Stanton said in an accompanying statement.

Stanton's agency has spent much of 2020 focusing on interpreting and enforcing a [virus relief law](#) that provides paid-leave benefits to workers affected by Covid-19.

## Digital Notices

Employers are obligated under several laws and regulations DOL enforces to continuously post notices at worksites, such as on a bulletin board in a break area, that describe entitlements for minimum wage and overtime pay. The new guidance memo said that "in most cases" a business will satisfy this requirement via an electronic notice, such as emails or internet postings, provided the communication meets three conditions for all employees: they must all "exclusively work remotely"; "customarily receive" electronic information from their employer; and have "readily available access" to the e-postings "at all times."

When workers at a company are split between on-site and remote status, the department "would encourage" supplementing electronic notices with a hard-copy posting at the workplace.

Employers also must ensure they've informed workers about how to access the electronic notices, the agency said.

# Amazon's Prime Now Is Sued Over Unpaid Wages, Missed Breaks

By Kathleen Dailey  
Legal Reporter, Bloomberg Law  
December 2, 2020

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 2:20-cv-10912](#)  
(Bloomberg Law Subscription)
- **COMPANY INFO:** [Amazon.com Inc.](#)  
(Bloomberg Law Subscription)

Prime Now, Amazon's same-day delivery service for members, is facing a new lawsuit in a California federal court that alleges it cheated more than 5,000 employees out of overtime wages and required them to work through breaks.

The proposed class and collective action was brought by Amber Pope, who worked for Prime Now LLC in Los Angeles County, on behalf of other nonexempt hourly employees under the Fair Labor Standards Act and California law.

Prime Now unlawfully excluded commissions, bonuses, and premium pay from the employees' regular pay rates for the purposes of calculating overtime, the complaint says. As a result, employees didn't receive these additional wages at the correct overtime rate.

Employees were also regularly forced to work through their meal and rest breaks to keep up with the demands of their jobs, the complaint alleges.

And Prime Now issued wage statements that lacked certain legally required information like employees' gross and net earnings, total hours worked, and applicable hourly pay rates. Employees were therefore unable to easily ascertain their wages, the complaint says.

The complaint was filed Tuesday in the U.S. District Court for the Central District of California. A judge hasn't yet been assigned to the case.

**Causes of Action:** FLSA; California's Labor Code, Business and Professions Code, and Private Attorneys General Act.

**Relief:** Class certification; injunctive relief; actual and liquidated damages; pre and post-judgment interest; civil and statutory penalties; attorneys' fees and costs; and any other and further relief the court deems just and proper.

**Potential Class Size:** The California class includes "well over 5,000 employees." The size of the FLSA collective is unknown.

**Response:** "Amazon has a longstanding practice of not commenting on pending litigation," company spokesperson Leah Seay said Wednesday.

**Attorneys:** Mayall Hurley PC represents Pope and the proposed class and collective.

The case is [Pope v. Prime Now, LLC](#), C.D. Cal., No. 2:20-cv-10912, 12/1/20 .

(Updates story to include company response)

# H-1B Employers Foresee Wins, Losses in Biden Approach to Visas

By Genevieve Douglas

December 1, 2020

- Support for H-1B lottery changes echoes Trump
- More visas could take pressure off wage changes

Employers of H-1B workers with special skills have criticized the Trump administration's changes to the visa program, but they may not see an automatic reversal of those policies under President-elect Joe Biden's administration.

Biden has said he'd work with Congress to first reform temporary visas "to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages."

"High skilled temporary visas should not be used to disincentivize recruiting workers already in the U.S. for in-demand occupations," according to Biden's [immigration platform](#).

That pledge to create a wage-based process for H-1B visas echoes a [proposed rule](#) released by President Donald Trump's administration in October, which would prioritize the selection of H-1B registrations or petitions based on the highest corresponding wage levels, which are typically divided into four tiers representing entry-level to senior job positions. The current lottery system selects petitions for adjudication at random.

"We shouldn't expect a complete 180 from President Trump," said [Roger Tsai](#), an immigration partner for Holland & Hart in Denver. "There are certainly areas where Obama, Trump, and Biden probably align."

Still, the president-elect's immigration policies are likely to diverge sharply from those of his predecessor elsewhere, particularly on the issues of asylum and creating a path to citizenship for otherwise law-abiding people who were brought into the country unlawfully while they were still children.

## More Visas Needed

The focus on wages is likely due to influence from organized labor, "which has a skeptical view of the H-1B program," said [Daniel Griswold](#), a senior research fellow at the Mercatus Center at George Mason University.

"If President Biden wants to take action in the interest of the U.S. economy," there need to be "more visas and less red tape," said Griswold, who is co-director of the center's Program on the American Economy and Globalization.

Biden's immigration platform for temporary foreign workers includes adding more visas to the annual cap, which could alleviate many of the issues in the H-1B program.

"The long-term issue with H-1Bs is we just don't issue enough of them," Griswold said. The program is capped at, effectively, 85,000, and that's been the cap for 30 years, despite the U.S. economy changing and growing, he added. "If we had more visas, the lottery would be a lot less important."

Tsai agreed, noting that the central issue of the H-1B system is that the entire annual supply of visas is exhausted in one day, when the lottery selects from hundreds of thousands of hopeful workers.

Almost three times the number of businesses and groups were seeking the visa than actually received it this year, he said. "It's a drop in the bucket to change how they are selected versus the actual need."

## 'False Dilemma'

Biden's approach is sending signals "all over the place" about H-1B and other temporary visa programs, said [RJ Hauman](#), government relations director at the Federation for American Immigration Reform. Hauman cited the campaign's support for a numerical visa increase, but acknowledgment of visas' potential effect on U.S. workers as an example.

The president-elect's potential support for a wage-based H-1B lottery system is "exactly what the Trump administration has been trying to do at the agency level," Hauman said. "So will Biden check politics at the door and side with American workers in the middle of a crisis or big business? Who knows, but if they do the latter by gutting protections and issuing new regulations that harm American workers, they're opening up a can of worms and I'll leave it at that."

One immigration attorney who represents businesses in the middle of the country said she hopes the Biden administration won't use the wage issue to constrain the program.

"It's a false dilemma," said [Mira Mdivani](#), a business immigration attorney in Overland Park, Kan. "We need to stop the craziness of allocating only so many visas for employers to hire high-tech personnel or doctors. That only results in detriment to our economy and our people."

Allocating H-1B visas based on wages ultimately will undermine smaller companies and companies in the Midwest that can't compete with companies in California or New York, Mdivani said. "It will put the Midwest at a disadvantage compared to the rest of the country, and America at a disadvantage to the rest of the world."

## First 100 Days

Biden's immigration plans during the first 100 days of his presidency largely revolve around reversing Trump's near elimination of the U.S. asylum process.

Among those items he has vowed to address are ending family separation; ending [restrictions](#) put on asylum seekers who travel through Mexico or Guatemala; reversing [policies](#) that limit asylum for victims of gang and domestic violence and LGBTQ individuals; and stopping the practice of "metering" at the border, which limits the number of asylum applications accepted each day.

Those goals also are reflected in Biden's [selection](#) of Alejandro Mayorkas to lead the Department of Homeland Security, an Obama administration alumnus who came to the U.S. from Cuba as a baby.

Mayorkas would be "a sharp contrast to the people the current administration have put in charge," said Mdivani, adding that the Trump administration has directed DHS "to destroy the H-1B program."

Mdivani noted that Mayorkas was head of U.S. Citizenship and Immigration Services when it implemented an optional practical training extension for individuals studying science, technology, engineering, or math, giving participants an extra two years of work authorization, and he also led efforts to expand the Entrepreneurs in Residence initiative.

"Judging by what Alejandro Mayorkas did when he was with USCIS before, I think it will be a positive step because he was known as a builder of legal ways for employers to strengthen the economy," Mdivani said.

Though the Biden administration will likely have major priorities other than the H-1B visa program, "if they understand that part of the economic recovery is making sure employers can hire qualified international personnel, that is an important realization," Mdivani added.

Griswold agreed. "The H-1B program is a huge issue for the Biden administration if it wants to help the U.S. economy get back on track," he said. "It's provided important labor and talent for the U.S. tech industry and that will be very important for recovering from the pandemic."

## ANALYSIS:

# In-House Attorneys Adapt as Covid Risks Shift

By Dori Goldstein, Legal Analyst and Amanda H. Allen, Team Lead-Regulatory & Compliance  
Bloomberg Law

November 16, 2020

*The Bloomberg Law 2021 series previews the themes and topics that our legal analysts will be watching closely in 2021. What does the Future of the Legal Industry look like? Our analysts explore everything from legal technology to legal careers to the business of law to find the answers.*

Open floor plans are more conducive to contagion than productivity, and conversations about whose work is essential have been elevated to cultural discourse. As in-house counsel prepare to flip the calendar to 2021 they are flipping their mindset as well: from emergency response to the longer-term realities of a recession in a pandemic along with a flood of new federal, state, and local requirements to comply with.

Crisis responses to the onset of Covid-19 simultaneously, if not intentionally, sidelined many structural workers-rights safeguards and changed the calculus of corporate risk assessment. Many issues that have material impacts on compliance, budgets, and profit margins have only gotten more complicated. Legal and regulatory compliance issues popping up on the radar may include preparing for a wave of wage and hour lawsuits, understanding public health best practices, and managing corporate policy changes.

## Remote Work

Businesses that are primarily office-based have absorbed and adapted to a sea change in perceptions of remote work; what was once considered a headache for management has become the savior of productivity and businesses continuity. Remote work has been so widely embraced and so successful that some businesses have [decided](#) to make it [permanent](#).

But before companies could settle into their newly dispersed patterns, the abrupt shift to remote work left many businesses vulnerable to wage and hour complaints. Even with the best policies, the realities of life during a pandemic make tracking employees' time difficult. Adjustments to working time to balance [child care responsibilities](#) or manage limited resources within the home aren't generally accompanied by glances at a clock. Employer attempts to offer flexibility can feel like subtle pressure to work more, leading to claims of unpaid wages or overtime. And small changes in employee job duties – even if intended to keep a worker employed – can [throw worker classifications into doubt](#), making workers who were once exempt from overtime pay suddenly considered nonexempt workers.

Telework during state-mandated restrictions on business operations was treated by many employers as an obvious solution; risk would have arisen from requiring employees to show up for work if they were not in positions exempt from emergency orders. But the Covid-19 pandemic could become endemic, and state governments could address ongoing fluctuations in new cases and infection rates by responsively tightening and easing rules. A company switching expectations for its workforce will create new risk for itself.

A future of full-time telework isn't necessarily a risk-free choice, however. The slow creep for many continuously employed and formerly office-based workers from "working from home" to "living at work" has pulled into sharp relief questions about what exactly qualifies as a home office. Kitchen seating and laptop screens don't compare to ergonomic office chairs and dual-monitor setups.

## On-Site Workforce

Employers of on-site workforces face their own legal hurdles, even if in-house counsel have had to become experts at operationalizing a slew of Covid-19-related [state and local](#) training and safety laws that require new policies and procedures.

Some issues are likely to bubble up. Take wage-and-hour: The law [isn't exactly clear](#) on whether employees must be paid for the time spent in Covid screening, for example.

Also, expect a spike in workers' compensation claims due to at-work infections, in part because states are making it easier for infected workers to collect benefits.

But that isn't the whole story, and employer liability doesn't stop with workers' compensation, as many assumed it would. Employers are starting to face [public nuisance](#) claims and suits from infected workers' friends and families. These lawsuits are likely to clash with [state efforts](#) to shield employers from liability.

Safety concerns during the pandemic go beyond infection. Employers have been struggling to fill on-site jobs since the start of the pandemic, leaving many businesses [understaffed and over-worked](#). Especially in industries that produce products categorized as essential, the pressure on workers to produce can be intense, creating a climate that is ripe for safety issues. While the Occupational Health and Safety Administration hasn't engaged in much enforcement activity relating to the pandemic so far, there are signs that a Biden administration will change tacks.

## Lawyering a Company Through a Crisis

Corporate counsel have watched the pandemic and recession dramatically change the businesses they represent and assail the workforces they monitor with multifaceted stressors – indeed, perhaps the biggest challenge facing in-house counsel in 2021 is a stressed, scared, angry, and burned-out workforce. Statistics tell a story of [legal tech-supported efficiency improvements](#) since spring 2019, as well as an [exodus out of the legal profession](#), a combination cementing a goal to do more with fewer person-hours.

Existing laws governing [worker privacy](#) will become more difficult to navigate as states move toward regulation and employers move toward bringing employees back to their worksites. State laws and federal regulations will force businesses to reexamine how they classify independent contractors. New state laws will give [workers](#) rights, while others will [protect businesses](#) from liability. President Trump's executive order will force federal contractors to reexamine their [nondiscrimination and harassment training](#). And, finally, if all goes well in the global health community, businesses will have to spend a good amount of time figuring out if they can or should offer [vaccines](#) to their workforce.

An in-house lawyer may look at any set of specific guidelines – for instance, a state emergency order reinstatement or a comparison of employee training rules in the handful of states where the company operates – but shouldn't fail to consider entirely new solutions for the workplace of the '20s.

Access additional analyses from our Bloomberg Law 2021 series [here](#), including pieces covering trends in Litigation, Transactions & Markets, the Future of the Legal Industry, and ESG.

Bloomberg Law subscribers can find related content in our [Coronavirus Toolkit](#) practical guidance resource.

## ANALYSIS:

# Will 2020's Changes Last – And Change the Workplace?

By Dori Goldstein, Legal Analyst and Amanda H. Allen, Team Lead-Regulatory & Compliance  
Bloomberg Law

November 16, 2020

*The Bloomberg Law 2021 series previews the themes and topics that our legal analysts will be watching closely in 2021. ESG issues have become more visible than ever, and our analysts take a look at how the business world is responding to the pressures in this rapidly evolving area.*

Perhaps the workplace environment of the '20s would have looked a bit different anyway, since calendar digits flipping over to a new decade have a way of inspiring reflection on one's achievements and goals. But a simultaneous pandemic, recession, and widespread reckoning with systemic racism in the U.S. has upended every facet of the working experience, leading employers to give themselves a long, hard look in the mirror. Are they willing to be the organizations that hold themselves accountable to change in a changing society? The ones that talk the talk? Or the ones that opt to opt out of the dialogue altogether?

A repetitive cycle of debate over workplace discrimination, harassment, and safety risks has played out for decades. But recent popular culture shifts, corporate marketing campaigns, news coverage, and changes in legal and regulatory standards have elevated parts of the conversation that have previously been deprioritized or dismissed. For the most part, the American workplace has not been attentive to the various benefits or imperatives that come with a diverse, inclusive, equitable worker experience that encourages employee well-being.

## BLM Forces Change

In 2020, the police killings of George Floyd, Breonna Taylor, Dion Johnson, Tony McDade and too many other Black victims sparked protests against police violence.

In contrast to a long history in the U.S. of corporate reluctance to join potentially divisive social movements, many businesses responded to the demands for change and accountability. They issued [statements](#) in support of the Black Lives Matter movement, [blacked out](#) their social media profiles, and [adjusted policies](#) to allow employees to show support for Black Lives Matter.

Businesses also made substantive changes to address racial disparities: making [diversity pledges](#), forming [taskforces](#), setting [hiring targets](#), ending [customer relationships](#), encouraging [leadership shakeups](#), instituting new [training programs](#), starting [mentorship programs](#), and committing to release [pay data](#).

Businesses have [always known](#) that [Black workers](#) face [discrimination](#) and [harassment](#) at [work](#), yet for many companies, the social media profile edits and the pledges didn't come until this year. Even the most dramatic structural changes to hiring and doing business could fairly be seen as responding to public opinion rather than any moral imperative. But overhauls that start as pandering or peer pressure have the potential to make lasting change in the workplace.

Like the mainstreaming of the #MeToo movement, the public attention to the Black Lives Matter movement created an environment that forced businesses to be accountable to the public – and in the public forum of social media – for their employees' experiences at work. Businesses that [pushed back](#) or stayed silent felt the wrath of an engaged and concerned public. (For what it's worth, many companies gave as good as they got: 2020 is also the year that several companies joined together for an advertising boycott of Facebook and Instagram for providing a platform for "[Racist, discriminatory, and hateful online content](#).")

Black Lives Matter drove change, even as President Trump openly called companies sympathizing with BLM "[weak](#)" and made [policy changes](#) designed to thwart racial justice efforts while government agencies [threatened](#) to investigate businesses' legal diversity initiatives. It was never the responsibility of a people-led movement like Black Lives Matter to solve race discrimination in the workplace, but it gave businesses irrefutable feedback about what could change.

## Worker Safety and Health Lags

What if there isn't government oversight or an organized social movement? More than a century after Upton Sinclair's "The Jungle," modern meatpacking plants have rules, but those rules haven't been enough to protect workers from [injury, infection, and even death during](#) the pandemic. Undeterred by the risks to workers, Trump issued an [executive order](#) designed to [pressure](#) meatpacking plants to stay open. As outbreaks occurred at plant after plant, critics and victims [demanded change](#), but there was [no accountability](#). And there was no hashtag.

For the workers in the U.S. who were able to keep their jobs while logging in from home, reduced exposure to Covid-19 was a major relief. But a sea change in how the home fits into the corporate experience raised other, existential issues, such as companies' regulatory and compliance obligations regarding home-based worker safety.

From the worker point of view, however, the focus is far more diffuse than [reporting requirements](#). Avoiding injury while working remotely is certainly a concern for employees who don't have the benefit of spaces set up and maintained by experts, as is what transformations have to happen in homes to accommodate connectivity, ergonomics, and personal privacy.

Although some companies have provided funds for work-from-home improvements, how many C-suites are considering the long-term impact on their workforces of work taking place in a home environment, especially if such set-ups discourage regular breaks? If a worker's desk is also the kitchen table, what policies keep them from answering emails during dinner? If keylogging and always-on camera technology are demanded by an employer, what parts of a person's life – including parts that implicate protected class characteristics – are visible to management?

## Choosing a Better Workplace

For the workers who leave the house and go to offices, warehouses, and factories, the threats to safety on the job now include microscopic contagion passed along by and among colleagues. In the absence of federal financial support for vulnerable workers or a nationwide rent and mortgage freeze, there are markedly heightened pressures on workers to keep showing up. When a worker experiencing that kind of pressure is also a member of a historically underserved or under-protected community, the impact of corporate policies can be immense.

Public health, economic, social and political forces coalesced in 2020 in a way that brought forth novel perspectives on what the ideal workplace of the future looks like. Whether companies listen to those perspectives – along with emerging data and input from sociology, public health, and other experts – could be a primary factor in corporate success as we head deeper into the decade.

Access additional analyses from our Bloomberg Law 2021 series [here](#), including pieces covering trends in Litigation, Transactions & Markets, the Future of the Legal Industry, and ESG.

Bloomberg Law subscribers can find related content in our [Coronavirus Toolkit](#) practical guidance resource.

## PRACTICAL GUIDANCE:

# Employment, Checklist – Worksite Reopening During Coronavirus

## Decide to Reopen

- Determine if you are permitted to reopen under state and local law. See [National League of Cities and Bloomberg Philanthropies - Covid 19: Local Action Tracker](#).
- Check for state coronavirus-related employment laws that may apply to your business. See the L&E State Developments Tracker – [State L&E Developments](#).
- Determine if reopening is best for your business.
  - Complete a risk assessment to determine if you can reopen safely.
  - Consider any factors that could make it difficult for employees to return to work, such as transportation issues or lack of child care. Note that employees who rely on public transit, carpooling, or other ride sharing may have difficulty traveling to the workplace.
  - Consider the cost and risk of reopening.
  - Assess your business's ability to operate remotely.

## Prepare the Workplace for Reopening

- Designate an employee or taskforce to oversee the reopening process.
- Review federal and state agency guidance for reopening.
  - Centers for Disease Control and Prevention: [Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 \(COVID-19\), May 2020](#)
  - Occupational Health and Safety Administration: [Guidance on Returning to Work](#)
  - Occupational Health and Safety Administration: [Guidance of Preparing Workplaces for Covid-19](#)
  - Equal Employment Opportunity Commission: [Coronavirus and Covid-19](#)
- Assess any structural or design changes that must be made to your workplace.
  - Rearrange employee seating to allow for social/physical distancing protocols.
  - Add partitions or barriers when needed.
  - Designate single-direction hallways whenever possible.
  - Consider elevator safety and design crowd control plans.
  - Assess risks associated with common areas and close areas or remove seating as necessary.
  - Determine if doors, sinks, and toilets can be converted to touchless systems.

- Remove coffeemakers, toasters, microwaves, and other communal food equipment.
  - Provide touchless waste bins or remove lids.
  - Provide for proper personal protective equipment (PPE) disposal.
  - Assess your HVAC system and update it if necessary.
- Arrange for regular cleaning and disinfection of your workplace. Hire additional cleaning staff if necessary.
  - Assess hand sanitizer, soap, and cleaning product needs and availability.
  - Review OSHA [guidelines](#) on PPE, surgical masks, and face coverings and determine what is necessary and available.

## Review Policies and Procedures

- Set a timeline for reopening and communicate it to employees.
- Determine if a collective bargaining agreement applies and if any reopening policies are subject to bargaining.
- Develop a written protocol for suspected or confirmed Covid-19 infections. See [Covid-19 infections in the Workplace](#).
- Consider if Covid-19 viral testing is practical and available (Note: Requiring employees to undergo antibody testing violates the Americans with Disabilities act. See EEO's [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, A.7.](#))
- Update travel policies to eliminate business travel.
- Update leave policies to include any additional leave that employees may be entitled to.
- Update telework policies to clarify eligibility upon return to worksite.
- Review and update visitor policies to limit when guests are allowed on company premises.
- Consider implementing temperature checks or health screenings.
  - Address confidentiality, wage and hour, and safety issues associated with temperature checks. See [Temperature Checks and Health Screening](#).
- Consider adjusting or staggering employee schedules to reduce the number of individuals on site and better allow for social distancing.

- Consider where and when employees will be permitted to eat lunch.
- Consider how to handle employees who are at higher risk for complications from a Covid-19 infection.
- Plan and prepare for disability and religious accommodation requests and political objections.
- Create and implement social distancing, hand washing, cloth face covering, and PPE policies.
- Post signs to remind employees of policies and encourage compliance.

## Prepare Employees to Return to Worksite

- Communicate plans, policies, and timelines to employees.
- Provide training on any new policies and the use of PPE and/or cloth face coverings.
- Provide a method for employees to ask questions and raise concerns.
- Consider employee morale—request feedback and address concerns promptly.
- Notify employees of benefits or resources that are available to them.
- Address misinformation directly.
- Train managers on how to implement and enforce safety procedures.
- Train managers on how to avoid retaliation.

# Tips for Conducting a Virtual Arbitration Hearing

Contributed by Matthew Jacober, Alicia Goedde, and Brooke Wheelwright, Lathrop GPM

In spring 2020, the legal system faced the unprecedented task of operating entirely remotely following the nationwide shutdown caused by the coronavirus pandemic. For months now, in-person court hearings have been suspended, and judges and lawyers, as well as their staff members, have been working from inside their homes versus a courthouse or office building. Still, members of the legal system have done their part to keep the wheels of justice spinning.

This article provides tips for conducting a virtual arbitration hearing, based on the experience of attorneys who litigated a 10-count arbitration demand arising out of a \$2.3 million stock purchase agreement in June 2020. The only live task in this expedited matter, filed in late February with the American Arbitration Association, was the initial interview of potential expert witnesses. The sophisticated financials at issue made expert witnesses necessary on both sides.

The defense team prepared for and conducted the entire hearing without ever meeting with each other, the client, the witnesses, opposing counsel, or the arbitrator in person. Witnesses were prepared remotely. Expert reports were developed via Zoom through screen sharing. Document production, production review, exhibit preparation, and outline drafting were all done without printing a single piece of paper.

The entirety of the preparation process and hearing was conducted from inside each of the team member's respective homes, via Zoom. This seemed impossible a mere six months ago. Indeed, when the realities of the shelter in place orders set in, the initial reaction was to seek an indefinite continuance.

The task of trying this case virtually taught the team many lessons worth sharing. Although the team was prepared for a number of the challenges presented, some of these lessons were learned the hard way. Here are the top takeaways.

## Be Prepared

The logistical challenges of a virtual arbitration require you to be more prepared than you think you need to be. Assemble a team that can work well together and can serve in multiple roles—everyone needs to be prepared to address technology issues, at a minimum. There are multiple challenges that arise simply as a result of attempting to effectively communicate over a computer. The following tips will help you face such challenges:

- Be prepared for your cross examinations to be more challenging. It may take longer to achieve the desired answer from a witness in a virtual form. Be prepared to be flexible.

- Connectivity issues are bound to arise. Copy all exhibits, your outlines, your notes, and other documents to be used during the hearing onto a laptop or portable media device. This will ensure network-connection issues do not cause any delays during the hearing.
- Plan an alternative platform to chat with your team during the hearing. Here, the arbitration was done via Zoom, so the team utilized breakout rooms to talk with the client on breaks, and “passed notes” to team members through Microsoft Teams. This actually proved to be far more effective than the standard passing of notes during an in-person hearing. Note: Ensure all team members are cognizant to not reveal the alternative communication platform to the arbitrator or opposing counsel (such as via a screen-sharing mishap).
- Spend time before the hearing with any vendors, ensuring they have reached the necessary level of technological mastery needed to smoothly do their part in your case. Remember they are there to help you, so make sure they can do so.
- Coordinate alternative forms of communication with the client.

## Be Informed

Proceeding virtually requires you to reach beyond the comfort zone of the courtroom you undoubtedly grew accustomed to throughout your career. Being informed of the capabilities and limitations of the technology involved will go a long way to a smooth virtual arbitration. The following tips are key to creating your new comfort zone:

- Understand the technology forum and do not be afraid of it.
- Educate the client on what to expect, but do not be afraid to admit, “This is new to me, too.”
- Make sure all team members understand how to use the virtual platform. More than one team member should be able to share documents on the screen. Indeed, it's much better to have a lawyer other than the lawyer conducting the questioning move through documents on a screen share. Your team's understanding of the platform and its tools may benefit the proceedings for all parties involved, including the Arbitrator. For instance, an understanding of the use of “break out” rooms can enable seamless “bench conferences” solely with counsel and the Arbitrator as well as facilitating conferences between counsel without the ears of the client or the Arbitrator. At times, the clients were pushed into separate break rooms so the attorneys could conduct such conferences.
- Make sure your client is comfortable with technology. Learn how your client will be connecting, and be prepared to help them through any issues during the hearing.
- Take advantage of training sessions offered by host—it will likely benefit both the lawyer and the client.

- Test video, lighting, and audio in advance of the hearing. This may include using ear phones or calling in via phone.
- Remember the virtual setting is new to all parties. To ensure the new setting has not caused the witnesses (or their counsel) to forget or disregard the rules governing the proceedings, incorporate into the introduction and conclusion of examinations a stipulation from the witness that they were not communicating with anyone electronically during their testimony or using unidentified documents to assist in their testimony.

## Be Organized

Organization is critical to any arbitration preparation, but it's even more critical in the virtual setting. Being organized throughout—from the preliminary hearing until the final hearing—will minimize the logistical issues associated with remote exchanges between the parties. The following organizational techniques will be useful:

- Coordinate with opposing counsel for the entry of an agreed to scheduling order providing firm and early due dates (e.g., exhibit exchange, witness lists, and deposition designations). Early deadlines are essential given the logistical difficulties of being presented with a new exhibit or witness virtually. We crafted a scheduling order which included agreements to create a streamlined process for introduction of evidence—this avoided the need to authenticate and introduce exhibits at the hearing unless an exhibit was explicitly objected to in advance—and time limitations for each party to put forth its case in chief.
- Utilize joint stipulations as much as possible—“telling the story” and providing details is more difficult in a virtual forum. The less you have to present, the better.
- Coordinate exhibit numbers and exhibit books with opposing counsel. This is more important in a virtual hearing than when in person. One congruent set of documents for the arbitrator and witnesses will make the entire process smoother and less stressful.
- Ask witnesses and the arbitrator, in advance of the hearing, whether they prefer the exhibits in electronic and paper format. Everyone has a different preference.
- Provide witnesses and the arbitrator the exhibits well in advance of the hearing. Because this task may take coordination with office staff and sending items via mail, it must be done days before the hearing date to allow time for follow-up documents.

## Be Comfortable

Much like your comfort level in a courtroom or before an arbitrator in-person, your comfort level in the virtual setting will most certainly impact the case you present. The more comfortable you are, the cleaner your case will appear. The following are tips helpful in maximizing your comfort level:

- Be open to the idea the virtual form may, in fact, be better in some ways.
- A definite advantage is possible with a virtual examinations—the witnesses can be made full screen and facial cues, while slightly delayed, are more pronounced and easier to read. However, remember your facial expressions are also easily observable by all participants. Remind your client of this, too.
- Use the “hide self view” option on your virtual form—seeing yourself talk is unnatural and can be quite distracting. Similarly, when questioning a witness, it may be helpful to pin the video of the witness so you can focus only on the witness. Advise witnesses of these options as well.
- Do not hesitate to address audio/video issues. This includes asking others to reconnect, if needed.
- Embrace the fact that all it takes to look professional virtually is wear suitable business attire from the waist up, but, if doing so, always remember to turn your video off before standing up.
- Properly equip everyone on your team. As a firm, we allowed everyone to safely return to our offices to take technology home, including docking stations and multiple wide screen monitors thereby replicating our work setups. This allowed all team members to have multiple screens, avoiding having to run separate laptops during the hearing.

# Tech's Legal Risks For Employers During Covid-19

Contributed by Emily Burkhardt Vicente and Lukas Moffett, Hunton Andrews Kurth

Covid-19 presents unprecedented challenges for employers as they try to ensure the safety of employees and customers while still efficiently and productively operating their businesses. Since the pandemic began, a cottage industry has popped up with innovative technology designed to help slow the spread of Covid-19, flatten the curve, and manage compliance with guidance from the Occupational Safety and Health Administration and the Centers for Disease Control.

This technology comes in a variety of forms, each promising to address a specific aspect of the crisis. While many of these technological solutions hold promise and seem poised to help employers manage daily challenges, they also carry legal risks that could outweigh any benefit they profess to provide. In light of this, employers should balance the likelihood of true benefit from these technological solutions against the downside risks before introducing them into the workplace.

## New Tech Solutions

It is often said that necessity is the mother of invention. That has rarely been more true than in recent months. The number of technological solutions available to employers to address the workplace challenges created by Covid-19 has exploded, leaving many employers wondering if they should spend their limited funds to try out these new tools. Temperature scanning devices, social distance monitoring apparatus, wearable devices, and contact and immunity tracing systems are just a few examples in this new arsenal of workplace options.

Employee temperature monitoring has become, and will likely continue to be, a fixture in the workplace, at least for the short term. Innovative companies are capitalizing on this new workplace norm by developing products to streamline the temperature-check process. These new products include paraphernalia, such as rings that track and record the wearer's temperature, kiosks that perform close-range, hands-free temperature scans, and cameras that perform long-range temperature scans.

Technological developments have also appeared to enforce social distancing rules in the workplace. These include surveillance cameras that alert management when employees break social distancing protocol, and wearable devices that flash, vibrate, or emit sounds when an employee comes within a certain proximity of another employee.

Contact and immunity tracing by public health officials also has become widely used to help stem the spread of the virus, and is the catalyst for similar systems to facilitate contact tracing in the workplace. These systems include applications that track locations visited and people contacted by employees, and databases that contain information on employees and others who have contracted and recovered from Covid-19.

These tools and devices can provide employers with streamlined solutions for dealing with the new workplace challenges posed by Covid-19. However, as with any new, untested technology, it is unclear how much benefit they actually provide, and their use presents a number of legal risks that employers should consider. Ultimately, the efficiencies gained through use of this technology may be greatly outweighed by the legal uncertainty they create.

## Employee Privacy Concerns

While emerging technology may streamline processes in the workplace to accommodate safety concerns from Covid-19, many of these new technologies also have raised significant privacy concerns among employee advocates. Some of the products use facial recognition software and location data tracking, and many create and store sensitive information in employee profiles.

For example, thermal cameras, social distancing cameras, and temperature kiosks may include a facial recognition component, linked to an employee profile for data storage and ease of tracking. Contact tracing technology may use employee location data and accumulate broad-based information about an employee's movements, whereabouts, and who they associate with. Temperature checking technology may store information considered confidential medical information under the Americans with Disabilities Act. See [42 U.S.C. § 12112\(d\)](#). All of these functions raise privacy considerations that employers implementing this technology need to grapple with.

Employers should ensure appropriate steps are taken to safeguard the data that is collected and to ensure it is confidentially and securely stored. Significant steps should be considered to prevent the collected information from being compromised. This can create particular challenges for employers that do not regularly collect this type of sensitive data, or that do not already have robust security and information technology controls in place. The cost to protect this type of data, and the risk of not doing so, may far outweigh any efficiencies gained by the technology.

Additionally, employers should be careful to limit who has access to the information that is collected. Strict policies should be put in place to restrict use of the information beyond its intended Covid-19 purposes. Information about who employees have been in contact with can raise concerns around associational discrimination when hiring managers and employment decision-makers are privy to such information.

It is also important to note that federal, state, or local law may require employee consent before collecting, storing, or using certain types of employee data. In some instances, certain information may not be lawful to collect at all, or may require

certain disclosures or advanced written consent. Employers will need to be familiar with these requirements before embarking on the use of technology that collects private data.

## Discrimination and Harassment Claims

In addition to privacy risks, employers should not lose sight of more traditional risk factors associated with the use of new Covid-19 monitoring solutions. This is particularly true with temperature and symptom-checking technology. Given the now-common practice of taking an employee's temperature or inquiring about symptoms, it is easy to forget that taking an employee's temperature is a medical examination under the ADA and subject to a variety of restrictions. See [42 U.S.C. § 12112\(d\)](#) and updated [guidance](#) from the Equal Employment Opportunity Commission.

The EEOC permits employers to perform temperature checks on employees during the pandemic. This is because the agency has determined, based on CDC guidance, that individuals with (or who have symptoms of) Covid-19 pose a direct threat to those in the workplace. It is important for employers to monitor this guidance because it could evolve in ways that no longer support temperature screenings in the workplace. As such, employers that require employees to wear temperature-gauging devices, use temperature kiosks, or install thermal cameras to track employee temperatures should be prepared to alter how those items are used when public health officials signal that the pandemic is over—the timing of which may not be clear-cut.

Additionally, employers implementing temperature scanning devices must ensure that proper steps are taken to avoid discriminating against employees in violation of the ADA. See [42 U.S.C. § 12112\(b\)](#). For instance, an employer that expels an employee with a high temperature from the workplace may violate the ADA if the employee's high temperature is due to a long-term health condition that substantially limits one or more of the employee's major life activities.

For this reason, employers should implement procedures that account for the possibility that an employee's high temperature is due to a long-term health condition and not Covid-19. Likewise, employers that perform temperature screenings must take steps to protect the results of those temperature screenings to maintain confidentiality of the information.

If, for example, an employee's temperature reading is visible for other employees to see, or if the employee whose temperature is higher than the employer's protocols permit is walked out of the workplace in front of his co-workers, the employer may be found not to have taken proper protocols to protect medical information under state and federal law. Likewise, an employer who does not protect the identity of employees who test positive for Covid-19 also runs the risk of disability discrimination claims.

The mandatory use of social distancing devices also may present ADA concerns. Social distancing wearables or devices that beep, buzz, flash, or vibrate may exacerbate certain health conditions such as epilepsy or anxiety. Requiring affected employees to wear such devices may run afoul of the ADA if the employer fails to account for these contingencies and make necessary reasonable accommodations where warranted.

Beyond disability discrimination concerns, wearable technology and immunity tracing systems can also present religious harassment and discrimination risks. See [42 U.S.C. § 2000e-2\(a\)](#). For example, an employee may object on religious grounds to wearing a temperature scanning or social distancing device, or submit to a Covid-19 antibody test for purposes of immunity tracing. In such instances, the employer may have an obligation to accommodate those objections, and could run afoul of the law if it discharges, or otherwise punishes or disadvantages the employee for refusing to wear a device or submit to testing, despite religious objections.

Employers, like all of us, are in uncharted territory as companies work to navigate the unprecedented challenges stemming from the global pandemic. Innovations in technology can seem like the golden ticket for struggling businesses looking for ways to more efficiently and safely reopen their workplaces. But the potential legal ramifications of those new technologies are largely yet to be seen and understood. For these reasons, employers should proceed with caution and be thoughtful about weighing the pros and cons of any technological solutions they adopt.

# Covid-19 Vaccines and Workplace Challenges

Contributed by Nathaniel M. Glasser and Jennifer Barna, Epstein Becker Green

As Covid-19 vaccines become widely available, employers will face a critical set of challenges, ranging from whether they can – or will want to – mandate all or some employees get vaccinated, to what liability may attach to mandating vaccination, and even whether the Occupational Safety and Health Administration (OSHA) could require a vaccine program.

While uncommon, mandatory vaccination policies are not new. For example, many health-care employers have implemented mandatory flu vaccination programs to protect staff and patients. The size and scope of the current pandemic, coupled with the desire to swiftly return employees to the physical workplace, however, means that more employers across various industries will likely consider mandating that their employees receive a Covid-19 vaccine once one becomes available.

Employers need to stay ahead of workplace Covid-19 vaccine issues with awareness and planning, so they can adapt their policies to meet the moment. Following are several of the most common questions employers should be prepared to answer in considering Covid-19 vaccination programs.

## **Can (or should) employers require employees to receive the vaccine? If so, how should employers respond to employee objections about vaccination?**

For employers with represented (unionized) workforces, a mandatory vaccination program may constitute a mandatory term and condition of employment, which the employer arguably could not unilaterally impose. Thus, these employers should review their rights under the applicable collective bargaining agreements (CBA) and, if the issue is not addressed, evaluate the breadth of the management rights provision. In any event, employers should consider discussing vaccination now with any unions to reach a written memorandum of understanding (MOU).

Absent an applicable CBA restricting an employer's decision to require a vaccine, employers may unilaterally implement mandatory Covid-19 vaccination programs, provided they accommodate certain employees who raise objections under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act.

Although the Equal Employment Opportunity Commission has not provided specific guidance related to a Covid-19 vaccine, employers can look to existing EEOC [guidance](#): Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (originally drafted in response to H1N1, but updated for the Covid-19 pandemic), which addresses the need for employers to make reasonable accommodations for employees with disabilities or sincerely held religious beliefs.

In that guidance, the EEOC notes that, even in a pandemic, employers cannot institute a blanket vaccination requirement without making exceptions for medical conditions or religious beliefs. Employees may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability or a sincerely held religious belief, practice, or observance. In each case, the employer must analyze whether it can provide a reasonable accommodation.

In the case of Covid-19, a reasonable accommodation could include telework or wearing a face mask or shield and physical distancing, or something else. In *Horvath v. City of Leander*, [946 F.3d 787](#) (5th Cir. Jan. 9, 2020), the U.S. Court of Appeals for the Fifth Circuit held that the two accommodations the defendant city offered to the firefighter plaintiff were reasonable: transfer to a position that did not require vaccination; or wear a respirator and other equipment while on duty, submit to testing for possible disease when warranted, and monitor and record his temperature.

Employers do not need to accommodate an employee's objections to a vaccination where doing so would impose an "undue hardship," which might be hard to show if the employee can telework. But employers with frontline workers—doctors, nurses, first responders, and potentially even retail workers—likely will have an easier time proving that a request not to be vaccinated constitutes an undue hardship. Most of the existing case law on what constitutes an undue hardship comes in the context of patient care for health-care employers, where the risk of infecting vulnerable patients is significant. Courts may be more inclined to rule against mandatory vaccination policies in the office-space context.

Employers also should be aware of potential privacy and morale issues that could arise with a vaccine mandate. According to [studies](#), more than one-third of Americans said they would refuse a Covid-19 vaccine if offered one. These results may be due in part to the anti-vaccination movement, but may also include individuals who typically trust the safety of vaccines but have specific concerns based on their perception of the speed with which the Covid-19 vaccine is being developed. Employers need to be sensitive to such concerns and the problems that could arise if a material portion of their workforce feels unsafe receiving a vaccine shortly after it becomes available.

Relatedly, employers will be required to maintain the privacy of vaccine and accommodation records of their employees. But, some potential solutions for accommodating employees who cannot or do not want to receive the vaccine – such as continued mask wearing, or schedule or seating changes – might inevitably lead employees to guess or assume who received the vaccine and who did not. In turn, those who did receive the vaccine might raise concerns about working in close proximity to employees they presume have not been vaccinated. It will likely make sense for employers to draft

appropriate policies and procedures to avoid such issues, or to address them if they arise.

### **If an employer requires employees to receive the Covid-19 vaccine, who should pay for it?**

It appears that employers who want to require their employees to receive the Covid-19 vaccine may not need to wrestle with the issue of who should pay the cost. The Centers for Medicare and Medicaid Services (CMS) [announced](#) a comprehensive plan to ensure that all Americans will have access to the Covid-19 vaccine at no cost when it becomes available. According to the report, CMS released an Interim Final Rule with Comment Period (IFC) establishing that any Covid-19 vaccine that receives Food and Drug Administration authorization will be covered under Medicare as a preventive vaccine at no cost to beneficiaries.

The IFC also implements provisions of the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act that ensure swift coverage of a Covid-19 vaccine by most private health insurance plans without cost sharing from both in- and out-of-network providers during the course of the public health emergency.

### **What is the potential liability if an employer requires the vaccine, and the vaccine later causes health problems?**

It is hard to predict the liability if an employer implements a mandatory vaccination policy, and the vaccine later demonstrates side effects, somehow causes other harm to an employee, or simply proves to be less effective than expected. Employees injured by a Covid-19 vaccine that was mandated by a work policy may attempt to bring lawsuits against employers for, among other things, workers' compensation, negligence, and Occupational Safety and Health Act (the Act) violations, if arguable links can be made between the vaccine injury and the employer's mandatory policy.

On the other hand, a vaccine cannot be distributed without first receiving FDA approval or emergency use authorization. At least as to negligence and claims under the Act, employers will be able to argue that they were simply following the government's safety assurance.

There will be obvious tension between an employer's desire to keep all employees safe at the workplace by mandating vaccination, and potential resultant harm to individual employees due to side effects. Certainly, employers will need to balance the advantages and risks before deciding how to proceed. To reduce risk, employers who are considering a mandate might consider limiting it to high-risk positions, departments, worksites, or locations.

In weighing the risks, employers should note that Pfizer, for instance, has [reported](#) no serious safety concerns with its vaccine. Moderna has [reported](#) that some vaccinated individuals might expect minor, short-lived unpleasant side effects—including fatigue, sore arms, muscle or joint aches, and headache. So, while these side effects may cause

some employees to miss work, they likely will not result in actionable harm. Employers more likely will have to be prepared to schedule around employees who take sick days after receiving the vaccine, and to encourage and remind such employees to get the second dose of the vaccine even if they experience mild symptoms due to the first dose.

### **What position might OSHA take regarding employers and Covid-19 vaccinations?**

OSHA has not promulgated a rule regarding airborne diseases like Covid-19. Given the above-described Title VII and ADA issues, it seems unlikely that OSHA would affirmatively require employers to offer or mandate a Covid-19 vaccine. OSHA, however, potentially could rely on the Act's [general duty clause](#) - which requires employers to furnish "a place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" - to cite an employer that fails to make the vaccine available to its employees.

OSHA has previously taken the [position](#) that employers can require employees to receive the flu vaccine, provided they properly inform employees of the benefits of the vaccinations. Additionally, OSHA has explained that an employee who refuses a flu vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death—such as serious reaction to the vaccine—may be protected under Section [11\(c\)](#) of the Act, which pertains to whistleblower rights. This is yet another consideration for employers considering whether to implement a Covid-19 vaccination mandate.

### **What alternatives do employers have to mandating Covid-19 vaccination?**

Rather than mandating vaccination, employers may consider promoting non-mandatory tools and policies, such as educating and reminding employees about the importance and benefits of vaccination, providing free and convenient access to the vaccine, and giving small incentives or rewards to employees who get the vaccine. Moreover, as rapid Covid-19 tests, which return results in approximately 15 minutes, become more widely available and less expensive, employers initially may wish to rely on mandatory rapid testing rather than vaccination. The EEOC has [expressly approved](#) of the use of mandatory Covid-19 tests in the workplace.

In the context of influenza vaccination, the [CDC](#) recommends that employers encourage vaccination through a variety of means. Employers should consider these suggestions in the context of a Covid-19 vaccine. Employers' efforts to promote vaccination could include providing rewards or incentives to employees to get the vaccine, allowing employees time off of work to be vaccinated, posting and publishing promotional materials about the importance of vaccination, and, potentially, hosting a vaccination clinic at the office.

### When should employers start discussing how to address any eventual Covid-19 vaccine workplace issues?

There is no time like the present. Many of the challenges employers have faced during the pandemic have felt like a fire drill. The Covid-19 pandemic hit the country quickly, and since that time, circumstances and laws have continued to change, sometimes with little or no notice. Employers would be wise to monitor the vaccine-related legal landscape, while developing plans for how they intend to address the vaccine with their workforce.

Even after a Covid-19 vaccine is widely available, there likely will be a period before we know the extent of its effectiveness in widely protecting public health. Therefore, many of the current requirements and best practices that employers have implemented, such as teleworking, mask wearing, and physical distancing, likely will be part of the workplace for some time to come.

Additionally, employers should monitor whether governments mandate a Covid-19 vaccine for any specific group. The [New York State Bar Association](#), for example, [recommended](#) that New York consider mandating a Covid-19 vaccine once a scientific consensus emerges that it is safe, effective, and necessary, but only after conducting a public awareness campaign to encourage voluntary vaccination.

In the meantime, employers considering a mandatory Covid-19 vaccination program should:

- In represented workforces, determine whether such a program is permissible under any governing CBAs, and if the issue is not addressed, consider discussing it now with the union or unions to reach a MOU.
  - If proceeding with such a program, keep vaccination records separate from personnel files, and be prepared to engage in the interactive process and provide reasonable accommodations as appropriate to employees who object to vaccination due to a disability or sincerely held religious belief.
- For those employees who object to vaccination on disability or religious grounds:
    - Ensure that an employee's refusal to be vaccinated originates from a covered disability or sincerely held religious belief, understanding that employers' challenges to claims of sincerely held religious beliefs have been heavily scrutinized by the courts.
    - Consider the nature of the employee's position, as courts are more likely to require an alternative accommodation for employees who do not frequently interact with the public, and accommodations may take the form of telework, wearing of face coverings or face shields, or the transfer to a non-frontline position.
    - Develop policies and practices to help avoid or mitigate, as much as possible, the morale and privacy issues that might be created by having some employees receive accommodations or permission to opt out of the program.
    - Be aware of the possibility that employees who suffer side effects from the vaccination may seek to hold employers liable.

### Conclusion

There are a wide scope of concerns facing employers as they consider Covid-19 vaccination programs, but with proper preparation and in-depth research, employers can move forward into a new era of work with a concrete plan ensuring the maximum level of safety and concern for their workforce.



# Bloomberg Law



To learn more about  
Bloomberg Law, contact  
your representative at  
888.560.2529 or visit  
[pro.bloomberglaw.com](http://pro.bloomberglaw.com)