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Labor & Employment Law Seminar
2021
Good Morning

FELHABER LARSON

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2021 Labor & Employment Update

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Daniel R. Kelly

Minnesota State Bar Association
Certified ▲ Specialist
Labor and Employment Law

(612) 373-8512
dkelly@felhaber.com

Paul J. Zech

Minnesota State Bar Association
Certified ▲ Specialist
Labor and Employment Law

(612) 373-8436
pzech@felhaber.com

Where Are We Headed?

1. NLRB Update
2. Case Law Update – Labor Law
3. Case Law Update – Employment Law
4. State, Federal, and Local Law Update

NLRB Update

New Composition of the Board

Lauren McFerran (D)
Chairman
Term Expiration – December 16, 2024

Marvin Kaplan (R)
Member
Term Expiration – August 27, 2025

Gwynne Wilcox (D)
Member
Term Expiration – August 28, 2023

David Prouty (D)
Member
Term Expiration – August 2026

John Ring (R)
Member
Term Expiration – December 16, 2022

Jennifer Abruzzo (D)
General Counsel
Term Expiration – July 22, 2025

Abruzzo Announces New Direction for the Board

- In August, GC Abruzzo issued Memo 21-04, which laid out subject matters that NLRB Regions must submit to the Office of the General Counsel for Advice prior to issuing any decision.
- The memo makes clear that she seeks to depart sharply from the priorities outlined by her predecessor, Peter Robb, and specifically targets for review areas where the Trump Board overruled past legal precedent.
- Cases involving the following subject matters must be submitted to Advice:
- **Topics Overturned by the Trump Board:**
  - Employer handbook rules: in particular, the new, more lenient, test for legality of an employer's handbook and policies articulated in *The Boeing Co.*, 365 NLRB No. 154 (2017)
  - Confidentiality provisions: including cases involving the applicability of *Baylor University Medical Center*, 369 NLRB No. 43 (2020), which found that separation agreements that contain confidentiality and non-disparagement clauses, as well as those prohibiting the departing employee from participating in claims brought by any third party against the employer in return for severance monies, lawful

Abruzzo Announces New Direction for the Board

- Protected concerted activity: Including cases involving the applicability of *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), which, according to the GC, "narrowly construed what rises to the level of concerted activity and what constitutes mutual aid or protection within the meaning of Section 8(a)(1)."
- Union access: Including cases involving the applicability of *Tobin Center for the Performing Arts*, 268 NLRB No. 46 (2019) and *UPMC*, 368 NLRB No. 2 (2019), which affirmed employers' rights as property owners to limit access to their premises
- Union dues: Including cases involving the applicability of *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019), which found that an employer may lawfully cease checking off and remitting union dues unilaterally following contract expiration
- Employee status: Including cases involving the applicability of *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which placed emphasis on the significance of entrepreneurial opportunity when determining whether an individual is an independent contractor

Abruzzo Announces New Direction for the Board

- Employer duty to recognize and bargain with a union: Including cases involving the applicability of *MV Transportation*, 368 NLRB No. 66 (2019), wherein the Board adopted the "contract coverage" standard, under which a unilateral action is permitted if it falls within the *compass or scope* of certain contractual language in the CBA

- Also including cases involving applicability of *Pittsburgh Post-Gazette*, 368 NLRB No. 41 (2019), wherein the Board found the employer was not required to pay a 5% increase in annual health insurance premiums following the expiration of CBAs and effectively reversing the Board's decision in *Finley Hospital* 362 NLRB 915 (2015), where the Board held an employer had a statutory duty to maintain the "dynamic status quo" by continuing to grant 3% annual pay increases after the CBA expired (even though the agreement lasted only one year, stated its obligations were for "the duration of the contract," and there was no historical practice of 3% annual pay raises).

Abruzzo Announces New Direction for the Board

Other Areas the GC Wants to Examine:

- Employee status: Including cases involving misclassification of workers as independent contractors and the Act's coverage to individuals with disabilities
- *Weingarten*: Including cases involving *United States Postal Service*, 371 NLRB No. 7 (2021), where the Board refused to find a pre-disciplinary interview right to information and other cases involving the applicability of *Weingarten* principles in non-unionized settings
- Employer duty to recognize and/or bargain: Including cases involving surface bargaining, refusal to furnish information related to a relocation, and cases involving the applicability of *Shaw's Supermarkets*, *Inc.*, 350 NLRB 585 (2007), which permits mid-term withdrawals of recognition where they occur after the third year of a contract of longer duration
- Employees' Section 7 right to strike and/or picket: Including cases involving intermittent strikes and employers' permanent replacement of economic strikers
- Remedies and compliance: Including cases involving make-whole remedies and a discriminatee's obligation to search for interim employment
- Employer interference with employees' Section 7 rights: Including cases involving instances where an employer tells an employee that access to management will be limited if employees opt for union representation and where an employer threatens plant closure

NLRB Update

- For more information on the NLRB, please watch Meggen Lindsay and Tom Trachsel's "Labor Law in 2021" presentation, which is available on demand after today.

Appellate Court Update

Appellate Court Update – Traditional Labor Law

APPELLATE COURT UPDATE

***Cedar Point Nursey v. Hassid*, -- U.S. --, 141 S.Ct. 2063 (2021).**

- In 1975, California enacted a regulation allowing union organizers to meet with agricultural workers at work sites in the hour before and after work and during lunch breaks for as many as 120 days per year.
- Under the regulation, union organizers did not need to obtain the employer's consent before entering their property.
- Fowler Packing Company, a shipper of grapes and citrus, and Cedar Point Nursey, a grower of strawberry plants, challenged the law, arguing that it amounted to a government taking of private property without compensation.

APPELLATE COURT UPDATE

***Cedar Point Nursey v. Hassid*, -- U.S. --, 141 S.Ct. 2063 (2021).**

- The Ninth Circuit ruled that the regulation did not impose a burden so heavy that it amounted to an unconstitutional taking because the right of union organizers to access employer's property was temporary and intermittent.
- The Supreme Court disagreed.
- Chief Justice Roberts, writing for the majority, explained that the Ninth Circuit's position "is unsupportable as a matter of precedent and common sense. There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364."

APPELLATE COURT UPDATE

***Cedar Point Nursey v. Hassid*, -- U.S. --, 141 S.Ct. 2063 (2021).**

- The majority concluded the "access regulation grants labor organizations a right to invade the growers' property" and is, therefore, a "per se" unconstitutional taking.
- In addition, the majority explained that its decision did not invalidate its prior decision in *PruneYard Shopping Center v. Robins*, where the Court held that allowing high school students to gather petitions at a private shopping mall did not amount to a taking of the mall's property.
- Chief Justice Roberts wrote, "[u]nlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."

APPELLATE COURT UPDATE

***RAV Truck & Trailer Repairs Inc., and Concrete Express of NY, LLC, a single employer*, 997 F.3d 314 (D.C. Cir. 2021).**

- RAV Truck and Trailer Repairs, Inc. and Concrete Express of New York, LLC, sought review of a Board decision and order that found they violated the NLRA by discharging one employee, laying off another, and closing RAV Truck because employees engaged in union activity.
- Concrete Express parks its trucks overnight at 3771 Merritt Avenue, and RAV Truck leased a space for its truck repair business at 3773 Merritt Avenue. Though the addresses were different, the companies shared a single open internal space.
- The portion leased by RAV consisted of only 600 square feet of garage space and a single garage door and allegedly lacked featured required by law, like sprinklers, fire alarms, and oil and water separators.

APPELLATE COURT UPDATE

***RAV Truck & Trailer Repairs Inc., and Concrete Express of NY, LLC, a single employer*, 997 F.3d 314 (D.C. Cir. 2021).**

- In May 2018, after learning that employees of Concrete Express were seeking union representation, two RAV Truck mechanics signed union authorization cards and Teamsters Local 456 filed a petition to represent them. The next day, the owner of RAV Truck discharged one of the mechanics. Less than a week later, the owner laid off the other mechanic. The owner closed RAV Truck later that month.
- The Board held the employer violated the Act by discharging one employee, laying off another, and closing the RAV Truck portion of the business.

APPELLATE COURT UPDATE

***RAV Truck & Trailer Repairs Inc., and Concrete Express of NY, LLC, a single employer*, 997 F.3d 314 (D.C. Cir. 2021).**

- The Board found that based on the timing of the business closure and on evidence that RAV Truck was not winding down, the intent was to chill union activity by Concrete Express's employees.
- The Board ordered reinstatement and make-whole remedies for the two mechanics and ordered the restoration of RAV Truck's business operations as they existed on May 14, 2018, the day before the first ULP.

APPELLATE COURT UPDATE

***RAV Truck & Trailer Repairs Inc., and Concrete Express of NY, LLC, a single employer*, 997 F.3d 314 (D.C. Cir. 2021).**

- The court concluded that the Board's unlawful discharge and layoff findings were supported by substantial evidence and enforced those portions of the Board's order.
- The court remanded the case for further consideration regarding whether the closing of RAV Truck was unlawful. The court noted that RAV Truck's location on Merritt Avenue was "a temporary space . . . Neither adequate in size nor properly registered under New York law to accommodate a third-party repair shop." The court also noted the lease for the temporary location ended on May 31, 2018.
- The court stated the record indicated that RAV Truck closed because it could not exist without the leased space, not because of union activities.

APPELLATE COURT UPDATE

***Trinity Services Group v. NLRB*, 998 F.3d 978 (D.C. Cir. 2021)**

- An employee who belonged to United Food and Commercial Workers Local 99, like all members of the union, participated in an unusual paid leave plan.
- In December 2017, the employee's timecard indicated that she had earned 3 days of paid leave under the plan, while the employer's records indicated otherwise.
- Her supervisor made several comments blaming the mix-up on the union, e.g., stating that the union created the problem, that the employee needed to fix it with the union, and that this was the problem with the union.

APPELLATE COURT UPDATE

***Trinity Services Group v. NLRB*, 998 F.3d 978 (D.C. Cir. 2021)**

- The Board panel majority found the comments violated the Act because they "had a reasonable tendency to interfere with" employees' rights under the Act.
- On review, the court disagreed and held that the comments were viewpoints protected by Section 8(c). Under Section 8(c), opinions cannot be used as evidence of an unfair labor practice unless the employer threatens reprisal or force or promises benefits.
- Here, the court found the supervisor's remarks contained no threats or promises.

APPELLATE COURT UPDATE

***NLRB v. NP Palace LLC*, 1 F.4th 12 (D.C. Cir. 2021).**

- In January 2018, the employer's slot-machine technicians voted to organize, and the Board certified a union to represent them. The union asked the employer to produce documents and the employer refused.
- The Board found the employer violated the Act but did not order the employer to furnish all requested information due to confidentiality concerns. In so doing, the Board devised a new standard, stating that: "When a certification-testing employer raises a 'specific confidentiality interest,' the Board will now listen. If the interest is legitimate on its face, the Board will order accommodative bargaining instead of immediate production."
- Applying the new rule, the Board found the employer's confidentiality interest legitimate and ordered it to bargain over the request.

APPELLATE COURT UPDATE

***NLRB v. NP Palace LLC*, 1 F.4th 12 (D.C. Cir. 2021).**

- The union challenged the confidentiality finding. The court found that the Board's remedy was both reasonable and consistent with the Act.
- The court also found that, under the new approach, it was irrelevant that the employer waited until summary judgment to raise confidentiality. Under prior precedent, the Board "may grant the benefits of a change in the law to the very party whose efforts were largely responsible for bringing it about."
- Finally, the court found that it was reasonable for the Board to find the employer's confidentiality claim facially legitimate because the employer articulated a specific confidentiality interest.

APPELLATE COURT UPDATE

***Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021).**

- The union petitioned for review of a Board decision establishing a new test allowing property owners to exclude from their property off-duty contractor employees for labor organizing activity under certain circumstances.
- In the underlying case, musicians were employed by a symphony to perform at a performing arts center in San Antonio, Texas, among other locations. The symphony contracted with the performing arts center pursuant to a "use agreement" that set the terms for performances by the symphony.
- The symphony would also perform in conjunction with a ballet company, which had a separate use agreement with the performing arts center.

APPELLATE COURT UPDATE

***Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021).**

- When the ballet company decided to use pre-recorded music – instead of the symphony – for a number of performances, the symphony musicians represented by the union engaged in handbilling on the performing art center's property during a ballet performance.
- The performing arts center excluded the musicians from its property, and their union filed a ULP charge in response.

APPELLATE COURT UPDATE

***Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021).**

- An ALJ found the performing arts center violated the Act. The Board reversed, overruled its prior standard governing the issue, and announced a new standard, by which:
- "A property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message."

APPELLATE COURT UPDATE

***Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021).**

- Applying this new standard, the Board reversed the ALJ and dismissed the complaint because the musicians did not perform work exclusively at the performing arts center and, in any event, had one or more nontrespassory alternatives to communicate their message.
- On review, the court held that the Board's decision was arbitrary and, therefore, remanded the case back to the Board for further proceedings.

APPELLATE COURT UPDATE

***Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021).**

- Specifically, the court concluded the Board's use of "regularly" and "exclusively" in its new standard was arbitrary because elsewhere in its opinion, the Board used examples to illustrate its meaning (e.g., stocking vending machines at a location once per week) that indicated the musicians *did* work regularly at the performing arts center, even though the Board concluded otherwise.
- The Board also failed to explain how the "exclusivity" requirement connects to the logic of the first step of its analysis (regularity).
- Lastly, the court concluded the second step of the Board's analysis – shifting the burden to the employer to show there were other nontrespassory means available to communicate the employee's message – was arbitrary because the Board failed to apply the burden shift in the very case it used to announce the standard.
- The court thus remanded the case to the Board, giving the Board the option to apply its announced test more faithfully to the instant case or to "develop a new test altogether."

APPELLATE COURT UPDATE

***IBEW Local 43 v. NLRB*, 9 F.4th 63 (2nd Cir. 2021).**

- The court adopted the "contract coverage" test as the governing standard for determining whether a CBA permits an employer's unilateral change to an established policy, but vacated the Board's decision and remanded the case based on its conclusion that the Board erroneously found the employer did not violate the Act when it unilaterally made changes to the employees' workweek.
- The employer, a security system installation company, unilaterally changed its technicians' schedules to a temporary six-day workweek.
- Examining the CBA, the Board found the change was covered by two clauses read in conjunction with each other, one that gave the employer the exclusive right to determine the amount of work in a work week, and a second discussing unlimited overtime.

APPELLATE COURT UPDATE

***IBEW Local 43 v. NLRB*, 9 F.4th 63 (2nd Cir. 2021).**

- Analyzing the Board's opinion in *MV Transportation*, 368 NLRB No. 66 (2019), in which the Board adopted the "contract coverage" standard, the Second Circuit agreed that the contract coverage standard is rational and consistent with the NLRA.
- However, the court concluded the Board erred in interpreting the provisions of the CBA, and therefore erred in its conclusion that the CBA permitted the employer to make unilateral changes to employees' workweeks.
- In the court's view, the hours-of-work provision contained "bargained for restrictions on technicians' hours and work schedules," which limited the employer's ability to act unilaterally. Accordingly, the employer should have bargained with the union prior to implementing the change.

APPELLATE COURT UPDATE

***NLRB v. Nexstar Broadcasting, Inc.*, 4 F.4th 801 (9th Cir. 2021).**

- The employer, post-expiration, began requiring employees to complete annual motor vehicle and driving history background checks, and began posting employee work schedules two weeks in advance, whereas it previously posted schedules four months in advance.
- The Board concluded the employer was not entitled to make post-expiration changes to the terms and conditions of employment under the "contract coverage" standard, and instead adhered to its longstanding rule that after a CBA has expired, unilateral changes by management are permissible during bargaining only it the CBA "contained language explicitly providing that the relevant provision permitting such a change would survive contract expiration."
- The court agreed. Concluding there was no such language in the CBA, the court granted the Board's petition for enforcement.

Appellate Court Update – Employment Law

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- The Eighth Circuit affirmed the district court's grant of summary judgment in favor of Anderson Corporation, holding that a former employee failed to establish essential elements of his claims and highlighting the importance of employers documenting discipline and investigating allegations of misconduct.
- Lissick was employed by Anderson from 2000 to 2018 and was responsible for maintaining and repairing equipment at one of Anderson's manufacturing facilities.

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- For safety reasons, Anderson employees involved in equipment maintenance must follow lock-out, tag-out (LOTO) procedures. The LOTO procedures require a servicing employee to turn off power to and discharge all power sources from equipment prior to performing maintenance. Anderson's Safety Rules and Regulations Enforcement Guidelines recommend termination of an employee following that employee's second LOTO safety protocol violation.
- Lissick violated the LOTO protocol on three occasions, the final violation occurring January 3, 2018. After this third violation, Anderson's HR Department investigated, determined that Lissick had indeed violated the LOTO protocol for a third time, and terminated him on January 11, 2018.

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- Lissick filed suit, and the district court granted summary judgment to Anderson on all of Lissick's claims.
- On appeal, the Eighth Circuit addressed the following claims:
  - Retaliation for reporting violations of laws, regulations, or rules in violation of the Minnesota Whistleblower Act (MWA);
  - Gender discrimination and retaliation for reporting sexual harassment in violation of the Minnesota Human Rights Act (MHRA); and
  - Retaliation for taking leave under the FMLA

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- Lissick's claims were premised on 5 events unrelated to his violation of the LOTO protocol.
- First, on September 6, 2017, Lissick complained to his supervisor that employees were sending inappropriate text messages to one another, including photos of nude women.
- Second, at the same time, Lissick claims that a coworker called him "lipstick" while another coworker called him "love muscle." After investigating Lissick's complaint, HR issued a written disciplinary notice to the employee who called Lissick "lipstick."

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- Third, in April 2017, Lissick requested FMLA leave to care for his father. Lissick was approved to take leave through August 2018, and he utilized his leave intermittently throughout August, September, and October 2017.
- Fourth, Lissick reported two employees to HR on September 13, 2107, after those employees allegedly falsified eye-wash-station inspection reports. HR investigated Lissick's reports and, after finding the reports to be accurate, disciplined those employees.
- Fifth, on October 5, 2017, the employee who was disciplined for calling Lissick "lipstick" inadvertently sent Lissick an email that referred to Lissick as a "lone wolf." Lissick complained about this email and Anderson disciplined that employee a second time.

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- A three-judge panel of the Eighth Circuit addressed each of Lissick's claims.
- The court concluded that Lissick's MWA claim failed because he could not show that Anderson terminated his employment in retaliation for his September 2017 sexual harassment complaint or his September 2017 falsified documentation complaint.
- Lissick argued that causation could be inferred because his termination followed his September 2017 complaints closely in time.
- The court disagreed, noting that although "close temporal proximity between protected activity and termination may occasionally raise an inference of causation, in general, more than a temporal connection is required." Here, the temporal proximity was "too attenuated to create any inference of causation" because Lissick was terminated approximately four months after he made his complaints.

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- Next, the court addressed Lissick's claim of sexual harassment creating a hostile work environment.
- Lissick offered only a few facts to support his hostile work environment claim: employees sent inappropriate texts; one employee referred to him as "lipstick" and then, on a separate occasion, as a "lone wolf;" and a second employee referred to him as "love muscle."
- This, standing alone, did not amount to a work environment that is "objectively offensive in that a reasonable person would find the environment hostile or abusive," despite Lissick's *subjective* belief that it was hostile or abusive.
- In addition, even if these facts were able to meet the "severe-or-pervasive standard," Lissick's claims would fail because Anderson immediately investigated Lissick's complaints and disciplined the employees involved.

APPELLATE COURT UPDATE

***Lissick v. Anderson Corp.*, 996 F.3d 876 (8th Cir. 2021)**

- Finally, the court addressed Lissick's claim that Anderson retaliated against him for taking leave under the FMLA.
- The court concluded that Lissick could not establish the causation element of his *prima facie* claim and, therefore, this allegation failed.
- The court again rejected Lissick's argument that "temporal proximity of the FMLA and the termination are extremely close in time" and therefore causation is established.
- The court reiterated that, while timing alone *may* be used to establish causation, the temporal proximity must be "very close."
- Accordingly, summary judgment on all of Lissick's claims was proper.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- The Eighth Circuit affirmed the district court's grant of summary judgment in favor of the employer, Cooperative Response Center ("CRC"), dismissing Tori Evans's claims that her termination violated the ADA and the FMLA.
- CRC services electric utilities and monitors security and medical alarms throughout the country. CRC hired Evans in 2004. CRC terminated Evans in March 2017 for violating its "no-fault" attendance policy.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- Under CRC's policy, regular attendance is deemed an "essential job function for all CRC employees." Unauthorized and unexcused absences that are not FMLA-eligible generate "points" that progressively lead from verbal warnings up to termination if an employee receives 10 points in a rolling 12-month period.
- In April 2016, Evans was diagnosed with reactive arthritis. Evans's doctor advised CRC that she would need a half-day off once or twice per month to attend medical appointments and a full day off once or twice per month to deal with recurring arthritic flare ups.
- CRC approved Evans for up to two full days and two half-days of intermittent FMLA leave per month, but advised that "absences above and beyond the FMLA approved frequency" would be eligible for points.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- Evans took intermittent FMLA leave over the succeeding months, but there were 11 days she received a point after being denied FMLA leave. These points led to Evans's termination in March 2017 for "excessive absences in violation of the company's attendance, employee conduct, and work rules policies."
- In February 2018, Evans brought suit against CRC, alleging her termination violated her rights under the ADA and the FMLA. The district court granted CRC summary judgment, dismissing all of Evans's claims. Evans then appealed to the Eighth Circuit.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- The Eighth Circuit addressed Evans's ADA claim under the *McDonnell Douglas* burden-shifting framework, which requires a plaintiff to establish a *prima facie* case by demonstrating (1) she was disabled within the meaning of the ADA; (2) that she was qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) a causal connection between an adverse employment action and the disability.
- The court held that Evans could not establish the second element of the *prima facie* case – specifically, Evans was unable to perform the essential functions of her position because she could not come to work on a regular and reliable basis.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- The Eighth Circuit has consistently held that "regular and reliable attendance is a necessary element of most jobs," and "an employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones."
- CRC's attendance policy stated that regular attendance is an "essential function for all CRC employees." In addition, Evans's job description listed tasks, such as answering phones and greeting visitors, that she could perform only when physically present in the office.
- Moreover, Evans's absences placed additional burdens on fellow employees who had to cover for her. CRC was not obligated to reassign existing workers to assist Evans in her essential functions.
- Accordingly, summary judgment was proper to dismiss Evans's ADA claim.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- The court next addressed Evans's FMLA claims. Evans argued CRC interfered with her FMLA leave benefits by assessing unexcused absence points when she was entitled to take FMLA leave (Evans's "Entitlement Claim").
- Evans also alleged that CRC discriminated and retaliated against her for seeking and taking FMLA benefits, for which she was wrongly discharged (Evans's "Discrimination Claim").

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- Evans's Entitlement Claim failed because, on the dates that Evans was assessed unexcused absence points, she failed to provide the required notice to CRC that she wanted to use FMLA to cover those absences.
- For instance, on multiple occasions, Evans failed to call her supervisor or HR to notify them she was seeking FMLA leave. On another day, Evans never mentioned the illness which caused her to be absent was related to her FMLS leave or her reactive arthritis.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- In addition, Evans consistently requested FMLA beyond the days certified by her doctor, but never attempted to increase the amount of intermittent FMLA CRC had approved.
- Evans also argued that CRC inappropriately gave her points when she missed a week of work due to her "knee giving out." The court disagreed, stating that Evans produced no evidence to support her claim that her knee "giving out" was related to her reactive arthritis – the condition for which she was FMLA certified.
- Because CRC did not unlawfully deny Evans FMLA leave for any of the point-bearing absences she challenged, the court affirmed summary judgment dismissing her FMLA Entitlement Claim.

APPELLATE COURT UPDATE

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

- Lastly, the court turned to Evans's FMLA Discrimination Claim. According to Evans, CRC's decision to terminate her was motivated by her exercise of FMLA rights.
- Evans claimed that CRC's assessment of points for absences covered by her FMLA leave was sufficient direct-evidence of discrimination. The court disagreed, stating that "assessing unexcused absence points consistent with CRC's Attendance and FMLA policies is not, without more, sufficient to support a finding that discriminatory animus motivated Evans's termination."
- Under the indirect evidence paradigm, the court held that Evans failed to show a causal connection between her requests for FMLA leave and her termination because too much time (8 months) elapsed between Evans's first FMLA request and her termination.
- Accordingly, Evans's FMLA Discrimination Claim failed as a matter of law.

New EEOC Guidance on LGBTQ+ Discrimination in the Workplace

EEOC Guidance on LGBTQ+ Discrimination

- On the anniversary of the U.S. Supreme Court's landmark decision in *Bostock v. Clayton County*, the EEOC issued a guidance document which aimed to "educate employees, applicants, and employers about the rights of all employees, including lesbian, gay, bisexual, and transgender workers, to be free from sexual orientation and gender identity discrimination in employment."

EEOC Guidance on LGBTQ+ Discrimination

- In *Bostock*, the Supreme Court held that employment discrimination based on sexual orientation or transgender status constitutes discrimination "because of sex" and, therefore, violates Title VII.
- The EEOC Guidance instructs that employers may not deny an employee access to a bathroom, locker room, or shower that corresponds to the employee's gender identity
- The use of pronouns or names that are inconsistent with an individual's gender identity may be unlawful harassment
- Employers cannot require a transgender employee to dress in accordance with the employee's sex assigned at birth
- Employers cannot justify discriminatory behavior based on customer or client preferences

State Law Update

Minnesota Case Law Update

Hall v. City of Plainview,

(Minn. 2021)

- Handbook included two "general contract disclaimers"
  - "The purpose of these policies is to establish a uniform and equitable system of personnel administration for employees of the City of Plainview. They should not be construed as contract terms."
  - "The Personnel Policies and Procedures Manual is not intended to create an express or implied contract of employment between the City of Plainview and an employee."
- PTO plan allowed employees to be paid up to 500 hours if they give sufficient notice of intent to quit.

Hall v. City of Plainview,

(Minn. 2021)

- Court reaffirmed Lee v. Fresenius, which held that held vacation pay is solely a matter of contract between employer and employee and "that section 181.13(a) is a timing statute" that does not create a substantive right to recover vacation pay or other wage payment on termination."
- However, court concluded that the "generalized disclaimers" in the City's Handbook failed to adequate disclaim the creation of a contract under Pine River.
- Thus, case was remanded.

Supreme Court Guidance

Employers can and should include more than boilerplate "no contract" disclaimers in their employee handbooks, both for their own benefit as well as for the benefit of their employees, who will have a clearer understanding of how they may rely on the terms of a handbook provided to them by their employer. A textbook example of such a disclaimer can be found in the City's Handbook: the at-will disclaimer included at the end of the Handbook's introduction. That disclaimer clearly states that the Handbook's employee grievance and termination procedures do not alter the nature of the at-will employment relationship or provide any sort of for-cause termination protection. This level of drafting clarity avoids confusion for employers and employees alike.[FN11]

———

[FN11] Another example is a disclaimer that reserves an employer's right to modify an employee handbook prospectively. We acknowledged an employer's ability to include such language in an employee handbook in Pine River. See 333 N.W.2d at 627 ("Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions."). Such a disclaimer prevents an employee from claiming that the employer is barred from altering the terms of the employee handbook. See, e.g., Roberts, 783 N.W.2d at 229.

2021 Legislature

Reasonable Accommodation

- In McBee, Appellant, v. Team Industries, Inc. (Minn. 2021), Minnesota Supreme Court held that the MHRA (Minn. Stat. § 363A.08, subd. 6(a)) "does ***not*** mandate that employers engage employees in an interactive process to determine whether reasonable accommodations can be made."
- 2021 Minn. Law Ch. 11, Art. 3, Section 13
  - Effective July 1, 2021, the Legislature amended the MHRA to require employers to engage in the interactive process.

Reasonable Accommodations (cont.)

Sec. 13. Minnesota Statutes 2020, section 363A.08, subdivision 6, is amended to read:

Subd. 6. **Reasonable accommodation.** (a) Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer with a number of part-time or full-time employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year equal to or greater than 25 effective July 1, 1992, and equal to or greater than 15 effective July 1, 1994, an employment agency, or a labor organization, not to ~~make~~ provide a reasonable accommodation ~~to the known disability of a qualified disabled person or job applicant~~ for a job applicant or qualified employee with a disability unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization. "Reasonable accommodation" means steps which must be taken to accommodate the known physical or mental limitations of a qualified ~~disabled person~~ individual with a disability. To determine the appropriate reasonable accommodation the employer, agency, or organization shall initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the limitations resulting from the disability and any potential reasonable accommodations that could overcome those limitations. "Reasonable accommodation" may include but is not limited to, nor does it necessarily require: (1) making facilities readily accessible to and usable by ~~disabled persons~~ individuals with disabilities; and (2) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

WESA Pregnancy Accommodations

- Added in 2014 as part of WESA.
- Included as part of the MPLA and required employers to make certain accommodations to pregnant employees without requesting a doctor's note or claiming an undue hardship:
  - (1) more frequent restroom, food, and water breaks;
  - (2) seating; and
  - (3) limits on lifting over 20 pounds.

WESA Pregnancy Accommodations

181.9414 PREGNANCY ACCOMMODATIONS.

§ Subdivision 1. **Accommodation.** An employer must provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests, with the advice of her licensed health care provider or certified doula, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer's business. A pregnant employee shall not be required to obtain the advice of her licensed health care provider or certified doula, nor may an employer claim undue hardship for the following accommodations: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds. The employee and employer shall engage in an interactive process with respect to an employee's request for a reasonable accommodation. "Reasonable accommodation" may include, but is not limited to, temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting. Notwithstanding any other provision of this section, an employer shall not be required to create a new or additional position in order to accommodate an employee pursuant to this section, and shall not be required to discharge any employee, transfer any other employee with greater seniority, or promote any employee.

Subd. 2. **Interaction with other laws.** Nothing in this section shall be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or health conditions related to pregnancy or childbirth under any other provisions of any other law.

Subd. 3. **No employer retribution.** An employer shall not retaliate against an employee for requesting or obtaining accommodation under this section.

Subd. 4. **Employee not required to take leave.** An employer shall not require an employee to take a leave or accept an accommodation.

History: *2014 c 239 art 3 s 4*

Pregnancy Accommodations (cont.)

2021 Minn. Law Ch. 10, Art. 3, Section 4

- Effective January 1, 2022.
- Moves "pregnancy accommodation" language from the MPLA (Minn. Stat. § 181.9414) to a new subdivision under Minnesota's nursing mothers' statute (Minn. Stat. § 181.939).
- Thus, restrictive MPLA definitions of "employee" (working at least 1 year at ½ time) and "employer" (21+ EEs) no longer apply to pregnancy accommodation requests.
- Effectively overturns Hinrichs-Cady v. Hennepin County (Minn. Ct. App. 2020).

Pregnancy Accommodations (cont.)

2021 Minn. Law Ch. 10, Art. 3, Section 3

- Also adds a definition of "employer" to mean any entity "that employs ***15 or more employees*** and includes the state and its political subdivisions."
- Aligns with accommodation requirement in MHRA and ADA.

Nursing Mothers Statute

- Minnesota's nursing mothers statute (Minn. Stat. § 181.939) was first enacted in 1998.
- As originally enacted, the law provided "reasonable unpaid break time" for nursing mothers to "express breast milk for her infant child."
- However, unlike the federal statute, which was passed in 2010 and limited the break times for the first 12 months following birth, the Minnesota statute included no temporal limitation.

Nursing Mothers Expanded, Clarified

2021 Minn. Law Ch. 10, Art. 3, Section 3

- Effective January 1, 2022.
- Makes clear that employers must provide "reasonable break ***times*** [note the plural] each day to express breast milk for her infant child . . . ."
- Removes the provision stating that the breaks may be "***unpaid***" and notes that "***an employer shall not reduce an employee's compensation for time used for the purpose of expressing milk***."
- Expressly limits its application to "***the twelve months following the birth of the child***."

Federal Legislative Update

Build Back Better Act

Labor-Related Provisions

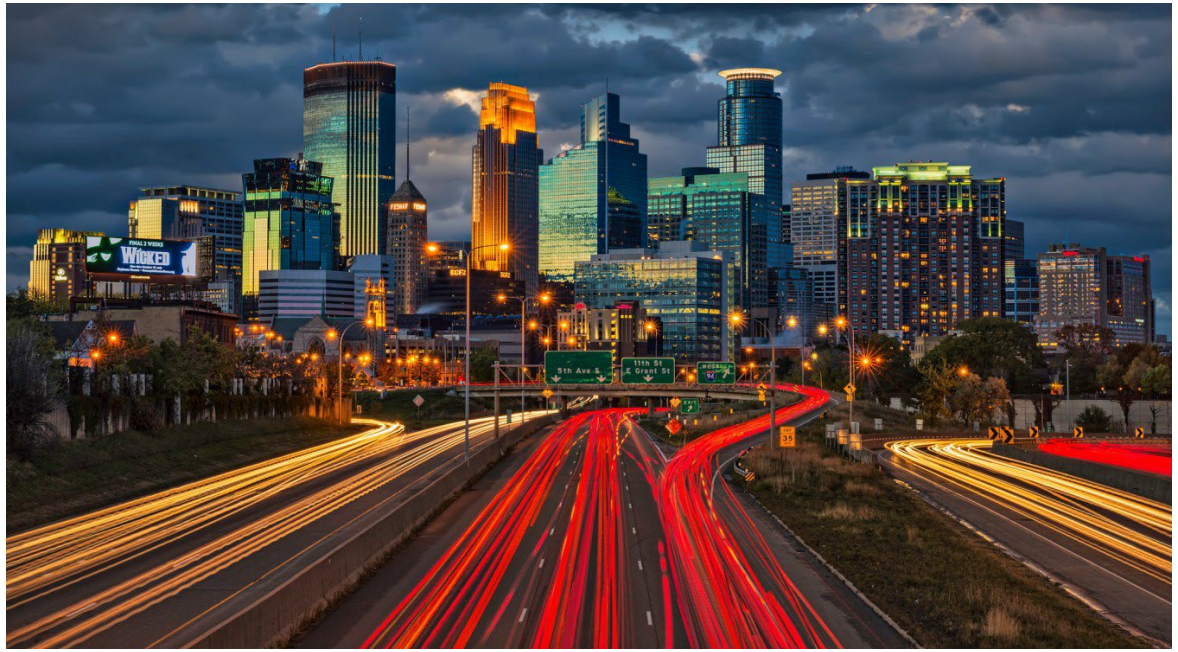
- If passed in its current form, the Act would:
  - Impose civil penalties of up to $50,000 per violation of the NLRA;
  - Double civil penalties up to $100,000 for NLRA violations that resulted in discharge or serious economic harm where the employer committed another similar violation in the past 5 years; and
  - Assess civil penalties against directors and officers where the facts indicate that personal liability is warranted
- These penalties would apply only to ULPs committed by employers, not by unions
- Based on language of current bill, it is unclear whether the penalties would apply only to newly filed charges or pending charges as well

Build Back Better Act

Labor-Related Provisions

- Congressional Democrats have stated they hope to pass the Build Back Better Act by Thanksgiving
- If passed in its current form, the amendments to the NLRA would become effective on **January 1, 2022**

Municipal Update



Minneapolis Freelance Worker Ordinance

- Effective January 1, 2021.
- Requires businesses to enter into written agreements with particular requirements with most “freelance workers.”
- Applies to “commercial hiring parties” and “individual hiring parties.”
- “Freelancer” is defined to 1099 workers and sole proprietors.

Minneapolis Freelance Worker Ordinance

- The written agreement must contain at least the following specified terms:
  - The name and address of the hiring party and the worker;
  - An itemization of all material services to be provided by the worker;
  - The compensation for the services, including the rate or rates and method of compensation; and
  - The date on which the hiring party must pay the agreed-upon compensation or the mechanism by which the date will be determined

Hospitality Worker Right to Recall

- Effective May 1, 2021.
- Requires covered hospitality industry employers to hire qualified employees who were laid off first, unless those employees reject that position or fail to respond.
- Is it preempted by a CBA?

What parts of the hospitality industry are covered?

Under the ordinance, only hotels and event centers located within the City of Minneapolis that are covered if they meet the following criteria:

- Large hotels (offering more than 50 guest rooms)
- Event centers (offering 50,000 rentable square feet or 2,000 seats)

Who is protected under the ordinance?

Any employee who meets all three of the following conditions for the same covered employer is protected:

- Performed work for at least 6 months from March 13th, 2019 to March 13th, 2020 (at least 80 of which were in the city);
- Last day of work was *after* March 13th 2020.; and
- Was separated from empoyment due to a economic, non-discretionary reason.

QUESTIONS?

Thank you.

FELHABER LARSON

ATTORNEYS AT LAW

DUDE, WHERE'S MY WORKFORCE?

TELECOMMUTING, REMOTE WORK, MULTI-STATE EMPLOYMENT ISSUES

NOVEMBER 12, 2020

FELHABER LARSON

ATTORNEYS AT LAW

Sara Gullickson McGrane
(612) 373-8511
smcgrane@felhaber.com

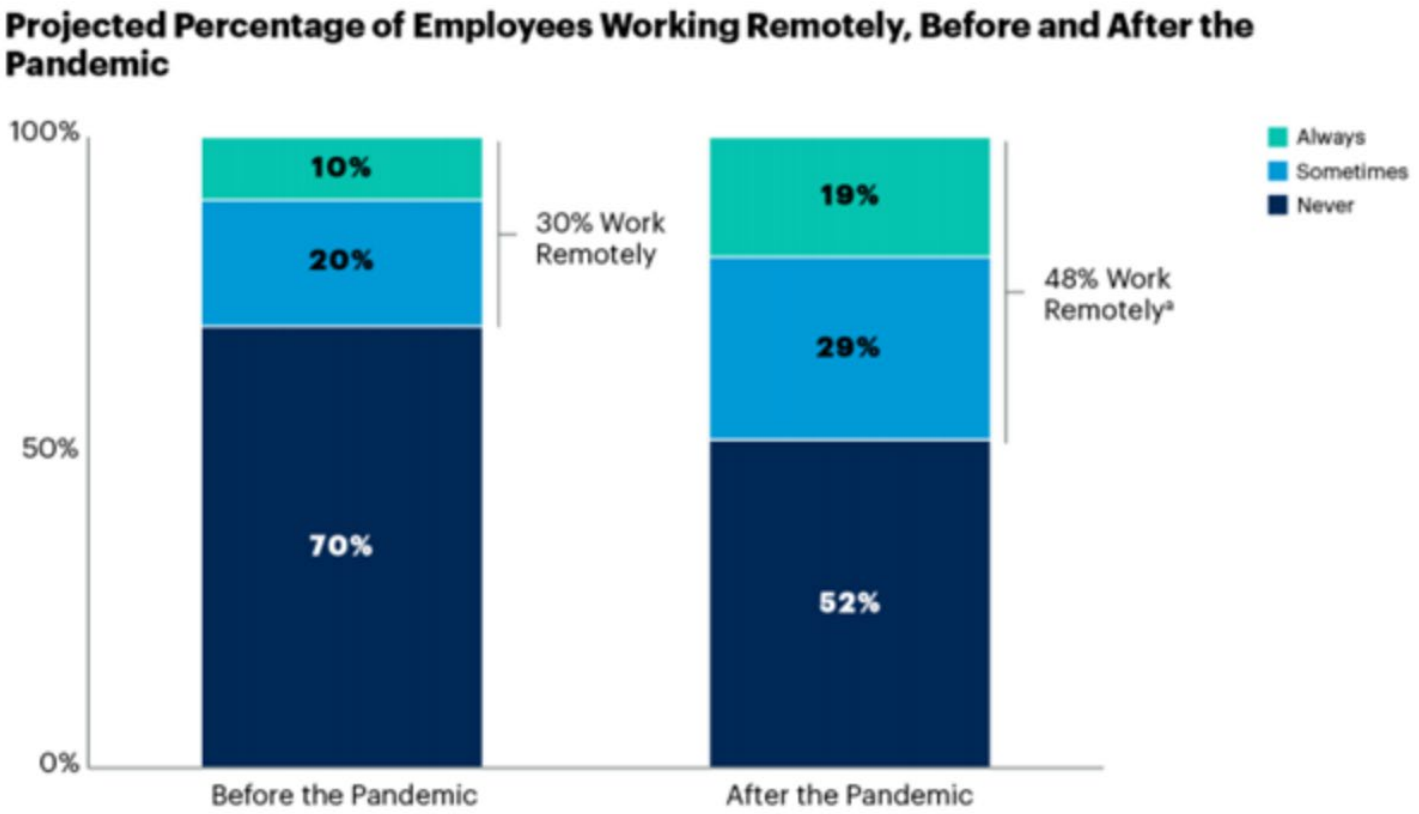
Janell M. Stanton
(612) 373-8542
jstanton@felhaber.com

IN 2021 HYBRID WORKPLACES ARE THE "NEW NORMAL"

After COVID-19, 92% of people surveyed expect to work from home at least 1 day per week and 80% expected to work at least 3 days from home per week.

Source: Owl Labs

In 2021 Hybrid Workplaces are the "New Normal"



Source: Gartner

In 2021 Hybrid Workplaces are the "New Normal"

72%

of employees want to continue working from home at least 2 days a week

74%

Want the option to come into an office

51%

Expect less density and more collaboration space

Source: JLL 2021 Survey

LEGAL IMPLICATIONS OF TELEWORK

FLSA AND TELEWORKING

- Under the Fair Labor Standards Act ("FLSA") covered employees must be paid for all hours they work, even if not specifically requested by their employer.
  - Federal regulations state that "work not requested but suffered or permitted is work time."
  - Further, covered employees are entitled to overtime pay at one and one half times their regular rate of pay for all hours worked in excess of 40 hours in a given work week.
- Time spent for the benefit of the employer and with the employer's knowledge is considered compensable work.

FLSA AND TELEWORKING

- Teleworking does ***not*** impact the employee status under FLSA.
- Teleworking should not affect the salaries of employees who are exempt from the FLSA: these employees must receive their full salary in any week in which they perform any work.
- Teleworking employees who are not exempt from the FLSA generally must be paid at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. If teleworking results in less hours for an employee, the employer only needs to pay for the hours worked.

FLSA AND TELEWORKING

- There are several common FLSA violations to avoid:
  - "Start Early, Stay Late" Violations — Employees required to punch out at the end of their shift (or not allow them to punch in before their shift), but the employer requires them to continue (or start) work.
  - "Booting-Up and Shutting-Down" Violations — Employees are not compensated for time spent for the task of booting their computers at the start of each day and logging out at the end.
  - "Acquiescent Work" Violations — Employees engage in unauthorized (but compensable) work, but an employer's policy does not pay the employee for unapproved hours worked (checking email after hours, making work calls, etc.).

FLSA AND TELEWORKING

- Teleworking is generally considered the same as regular work.
- However, propensity for non-exempt workers to work "off the clock" could create liability for overtime pay. *Auer v. Fla. Neurological Ctr., LLC*, 2018 WL 6532848 (M.D. Fla. 2018).
  - 29 C.F.R. § 785.11 (employees must be compensated for work suffered to be performed).

FLSA AND TELEWORKING

- In order to avoid a potential wage and hour violation under the FLSA, policies should be put in place that require employees to accurately log all hours worked:
- If a non-exempt employee is doing “off the clock” work, for example, checking and responding to emails at night, they must be compensated for that time, and those hours must additionally count towards the employee’s entitlement to overtime.
- A best practice for all employees, especially employees primarily working from home, is one that requires employees to accurately record and submit records of their work hours.

TRAVEL TIME

- Travel to and from work is not compensable. 29 C.F.R. § 785.35.
- Travel during day as part of work is compensable. 29 C.F.R. § 785.38.

TRAVEL TIME

- In an Opinion Letter issued by the Department of Labor on December 31, 2020, the Department stated its position that an employee who chooses to telework for part of the workday and work in the office for the remainder of the same workday does not need to be compensated while traveling between home and the office, even in the middle of the workday, if:
  - The employee is relieved of all duties while traveling; and,
  - The employee has enough free time while traveling to do as they please and potentially perform personal tasks, for example, stopping for lunch or attending a doctor's appointment.

Telecommuting Expenses

- Federal Law
  - No law mandating employers to reimburse employees for business-related expenses.
  - However, non-exempt employees must receive at least federal minimum wage (currently $7.25 per hour).

DOL COVID-19 FAQ#11

Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation.

Employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

TELECOMMUTING EXPENSES (CONT.)

- Minnesota Law
  - No law mandating employers to reimburse employees for business-related expenses.
  - Minn. Stat. § 177.24, subd. 4 prohibits "direct or indirect" deductions that "reduce the wages ***below the minimum wage***," including:
    - "Purchased or rented equipment used in employment, ***except*** tools of a trade, a motor vehicle, or any other equipment which may be used outside the employment"
    - "Consumable supplies required in the course of that employment"
  - Minnesota state-wide minimum wage: $10.08 (large) and $8.21
  - Minneapolis: $14.25 (large) and $12.50 (small)
  - St. Paul: $12.50 (large 101-10,000 employees) and $11.00 (small 6-100 employees)

TELECOMMUTING EXPENSES (CONT.)

State	Expense Reimbursement Requirements
California CA Labor Code § 2802	Employers must reimburse employees for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties
Illinois 820 ILCS 115 § 9.5	Employers must reimburse employees for all "necessary expenditures" required by the duties of the employee's employment that "inure to the primary benefit of the employer." This law was enacted in 2019, and no guidance has been issued regarding whether it applies to expenses used for teleworking also used by the employee in their personal life, for example, home internet service.
Minnesota Minn. Stat. § 177.24	At the time an employee's employment is terminated, employers must reimburse employees for any: • Purchased or rented equipment used in employment, except tools of a trade, a motor vehicle, or any other equipment which may be used outside the employment; and • Consumable supplies required in the course of that employment; When the reimbursement is made, the employer may require the employee to surrender any remaining existing items being reimbursed.

WORKER'S COMPENSATION

- Compensable if injury occurs in "course and scope of employment," even at home.
- Key questions:
  - Was the employee performing a task on the employer's behalf?
  - Did the employer require the employee to perform the task?
  - Did the employer approve the employee's action that caused the injury?

WORKER'S COMPENSATION

- Reduce liability for worker's compensation claims from remote employees
  - Define work hours to include appropriate breaks
  - Establish home office guidelines to include proper ergonomics and equipment
  - Examine employee's home office setups

ADA Reasonable Accommodations: EEOC Guidance

- "[A]llowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense."
- The ADA does not require that an employer offer telework to all employees
- If an employee requests telework as an accommodation, employers should engage in the interactive process

ADA Reasonable Accommodations: EEOC Guidance

The EEOC has filed suit against a Georgia employer, ISS Facility Services, Inc. The complaint alleges that ISS discriminated against its employee, Ronisha Moncrief, when it denied her reasonable request for an accommodation and terminated her employment. Moncrief, a Health Safety & Environmental Quality Manager ("HSE Manager"), suffered multiple physical ailments including COPD and hypertension. After becoming ill and being diagnosed with Obstructive Lung disease, Moncrief's physician recommended she work from home and take frequent breaks.

Due to the pandemic, ISS's staff, including Moncrief, were working in the facility on a rotational basis, resulting in Moncrief and other employees working from home four days per week. When ISS required all its staff to return to working at the facility five days per week, Moncrief requested an accommodation to continue working from home two days per week.

ADA Reasonable Accommodations: EEOC Guidance

ISS denied Moncrief's request for an accommodation even though other HSE Managers were allowed to work from home. Almost one month after denying Moncrief's requested accommodation, her supervisor contacted HR recommending that Moncrief be removed and replaced due to performance issues. ISS ultimately terminated Moncrief's employment, citing performance issues.

The EEOC argues that Moncrief was a qualified individual with a disability, who could perform all essential functions of her position with an accommodation and that ISS's practices deprived Moncrief of equal employment opportunities due to her disability. The EEOC seeks back pay, compensation for past and future pecuniary and non-pecuniary losses, punitive damages for Moncrief and also seeks a permanent injunction against disability bias.

EEOC v. ISS Facility Services, Inc., No. 1:21-CV-03708 (N.D.G.A. September 7, 2021)

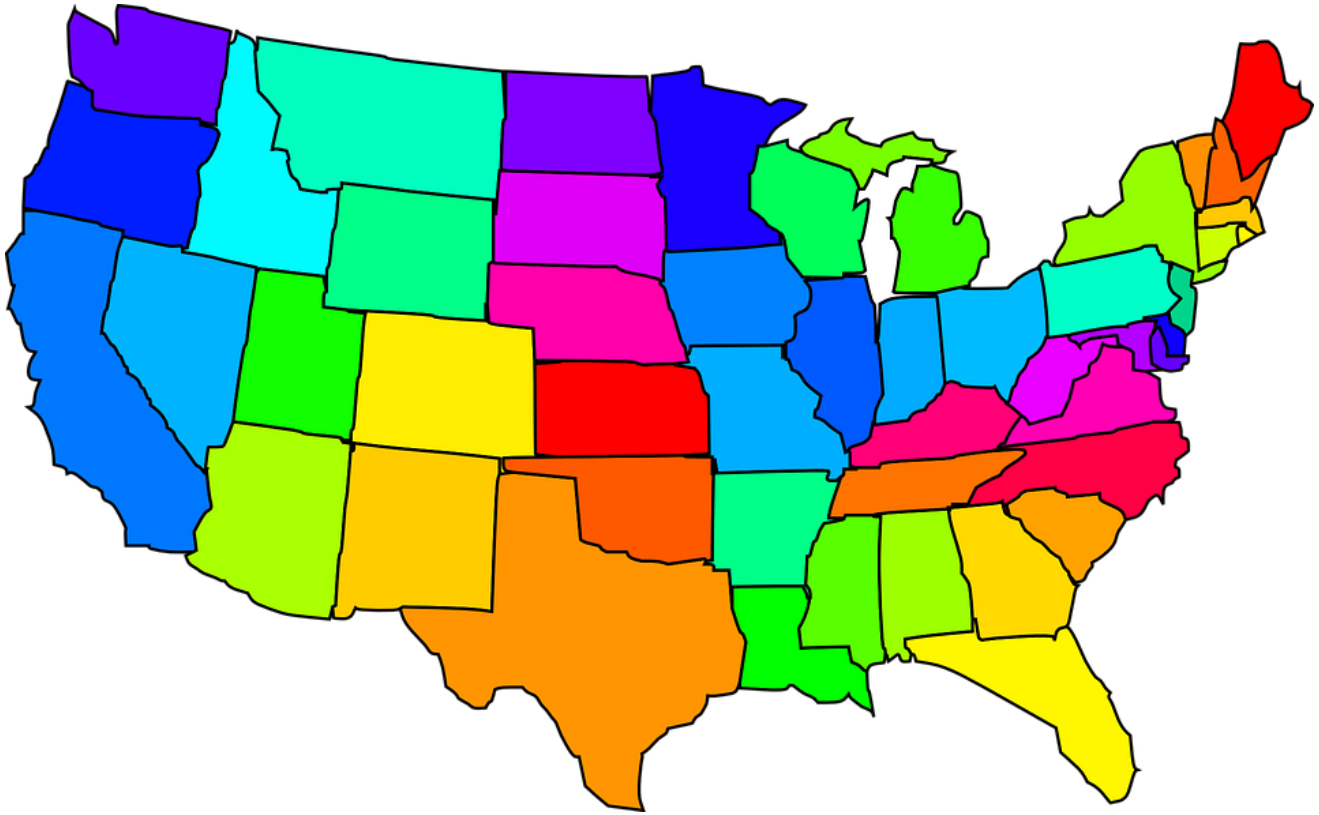
ADA Reasonable Accommodation Limitations

- Courts do recognize that, for some jobs, presence at the workplace is essential to workplace function. *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015); *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995).
- Has this changed after COVID-19?
- In 2021, is the employee's physical presence still an "essential function"?
- If physical presence is an essential function – document legitimate, business-related reasons for the requirement, compare it to other jobs, and include in job description

ADA Reasonable Accommodation Limitations

- What if an employee requests to work remotely in Mexico during the cold, Minnesota winter months?

MULTI-STATE EMPLOYER ISSUES



TAX WITHHOLDING

- Employers must ensure they are withholding taxes in line with local regulations
- Unmanaged remote work can lead to employees failing to disclose their work location – either intentionally or unintentionally
- Remote work can present a tax savings opportunity – especially for employers in NYC, San Francisco, and Seattle

Business Registration

- Companies must ensure compliance with the foreign qualification provisions of state business entity statutes where employees are working
- Review relevant foreign business entity statute and case law to determine whether the activities remote employees perform trigger registration requirements

UNEMPLOYMENT/WORKER'S COMPENSATION

- Key to most unemployment and worker's compensation insurance programs will be where the employee is performing services for the employer.

Local Leave Laws

The Dude, Where's My Money debt collection agency's corporate office is located in Hastings, MN. The agency employs 10 part-time collectors who all work 24 hours per week. In April 2020, at the beginning of the pandemic, the agency sent all the collectors to work from home. Two of the ten collectors lived within the city of Minneapolis.

Chester, one of the Minneapolitan collectors, fell ill with a stomach virus in November of 2020. Chester's manager notified him that the five days of work he missed would be unpaid because part-time employees were ineligible for paid time off. After recovering, Chester was lamenting his five days of missed pay on a Zoom happy hour with his friend, Jesse. Jesse, aware of the Minneapolis paid sick leave law, informed Chester about the law and urged him to ask the agency why he didn't get paid sick leave.

Local Leave Laws

Chester contacts his manager about the Minneapolis paid sick leave law and demands that he be paid for the time he missed with the stomach bug. Chester's manager denies his request for paid leave. After Chester continues to complain about the denial of paid leave, including to other employees, the agency terminates his employment.

Is Chester right? Should he have received paid sick leave even though his employer is based in Hastings and he only works part-time?

LOCAL LEAVE LAWS

71.) Q: When is an employee covered by the Sick and Safe Time Ordinance?

A: Employees who work at least 80 hours in a benefit year within the geographical boundaries of Minneapolis are covered under the Sick and Safe Time Ordinance, regardless of the location of the employer. Employees who only drive through the city are not covered even though this occurs during an employee's work hours. An employee accrues sick and safe time hours only while physically located within Minneapolis and performing work for the employer.

VARYING WAGE AND HOUR LAWS

- State laws differ regarding frequency of wage payment, wage payment on termination, meal and rest breaks, exemption classifications, overtime calculations, and more.

VARYING WAGE AND HOUR LAWS

	California	Illinois	Minnesota
Frequency of Wage Payment	Employers generally must pay all wages on regularly scheduled paydays and at least twice a month. Employers must pay all wages, between the 16th and the 26th, for labor that was performed between the 1st and the 15th. Additionally, employers must pay all wages, between the 1st and the 10th day, of the following month, for labor that was performed between the 16th and the last day.	Employers must pay wages at least twice a month and must be within 13 days after the end of a pay period.	Employers must pay wages—including salary, earnings, and gratuities—at least once every 31 days on a regular payday designated in advance, and all commissions earned must be paid at least once every three months on a regular payday. Wages earned during the first half of the first 31-day period become due on the first regular payday after the first day of work, unless paid earlier.

VARYING WAGE AND HOUR LAWS

	California	Illinois	Minnesota
Payment on Discharge	Employers must pay wages, including all earned commissions, immediately to discharged employees at the place of discharge. The place of final wage payment for discharged employees is the place of termination.	Employers must pay final compensation in full, at the time of separation, to separated employees when possible. However, employers must pay final compensation no later than the next regular payday. Employers must comply with employees' written requests that final compensation be paid by check and mailed to them.	A terminated employee's paycheck must be paid within 24 hours of the employee's demand for wages. If an employee quits, wages are due on the next pay period that is more than five days after quitting. However, wages must be paid within 20 days of separation

VARYING WAGE AND HOUR LAWS

	California	Illinois	Minnesota
Meal Breaks	Employers must provide a meal break of at least 30 minutes to all covered employees scheduled to work more than five hours a day. The first meal break, unless it is waived, must be taken no later than the end of an employee's fifth hour of work. The second meal break must occur no later than the end of the employee's 10th hour of work.	Employers must provide all employees scheduled to work at least 7.5 hours a meal period of at least 20 minutes. Employers must provide the meal period before the fifth hour of continuous work.	Employees working eight hours or more must have sufficient time to eat a meal. Employers are not required to pay the employee during the meal break.

COMPLIANCE IN MULTIPLE JURISDICTIONS

- ✓ **Ensure compliance in all jurisdictions**
  - Stay on top of law changes
  - Develop policies that either:
    - Comply with the most employee-friendly leave law and distribute to all employees; OR
    - Comply with each specific jurisdiction and is distributed only those employees
  - Ensure internal HR and payroll procedures comply with all applicable laws

HYBRID MODELS

HYBRID MODELS

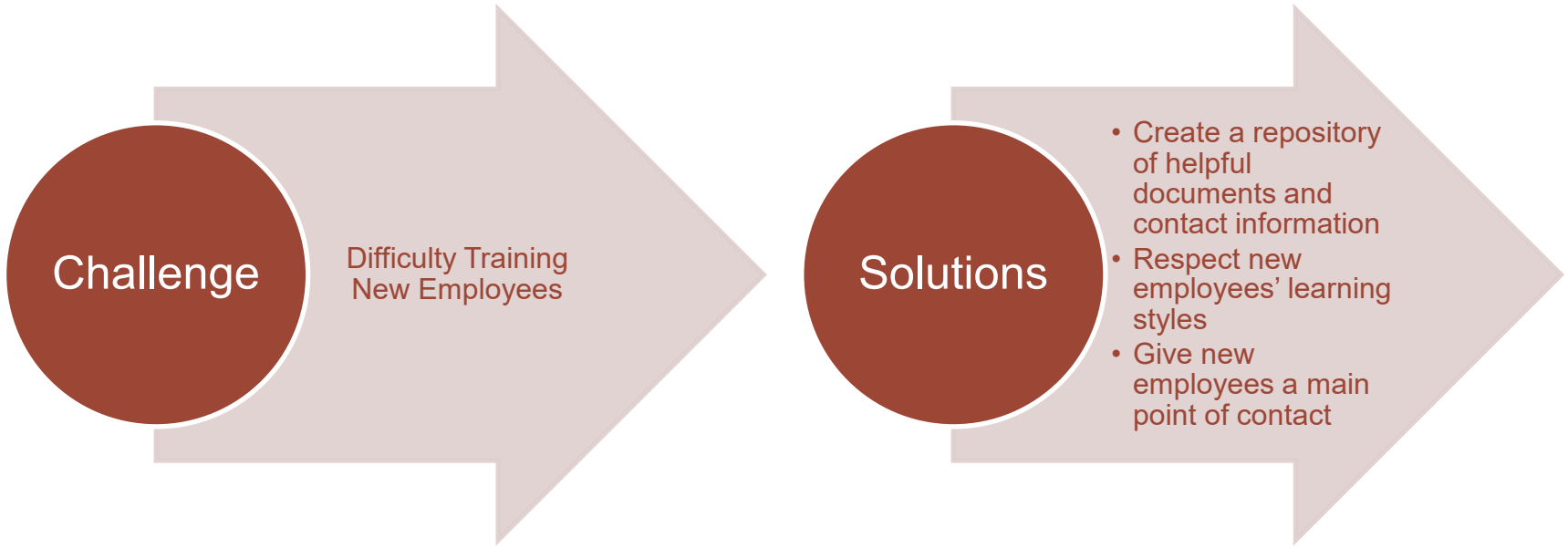
- ✓ Rather than adopting an all-or-nothing approach, some companies are deciding to implement a hybrid approach: allowing employees to work remotely for part of the week and on-site the other.

Pros	Cons
• Less overhead with smaller office spaces • Attract and retain top talent • Safety during the pandemic	• Team building can suffer • Workers can be more prone to burnout • New employees remain an "unknown quantity"

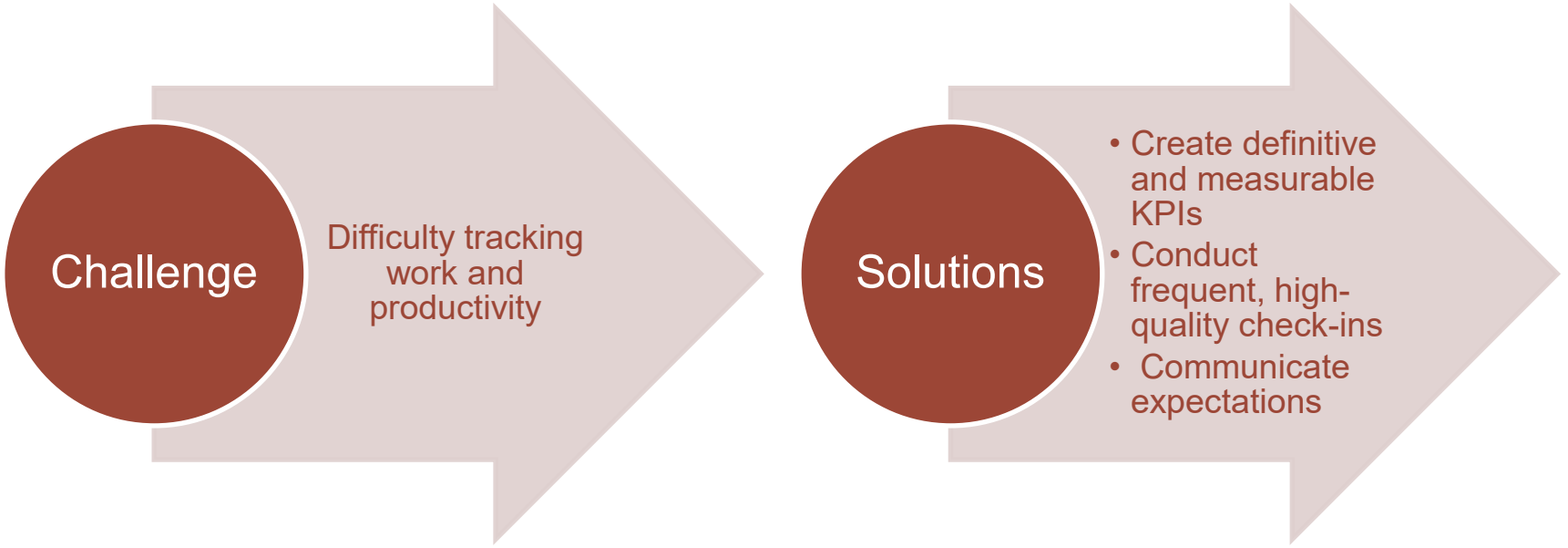
HYBRID MODELS

- ✓ Some companies may adopt a fluid “Work Appropriately” policy, which allows employees to decide where they will work each day according to their need or preference.
- ✓ For other companies, a formal policy establishing specific schedules based on departments, teams of employees or individuals may better align with their company’s goals.

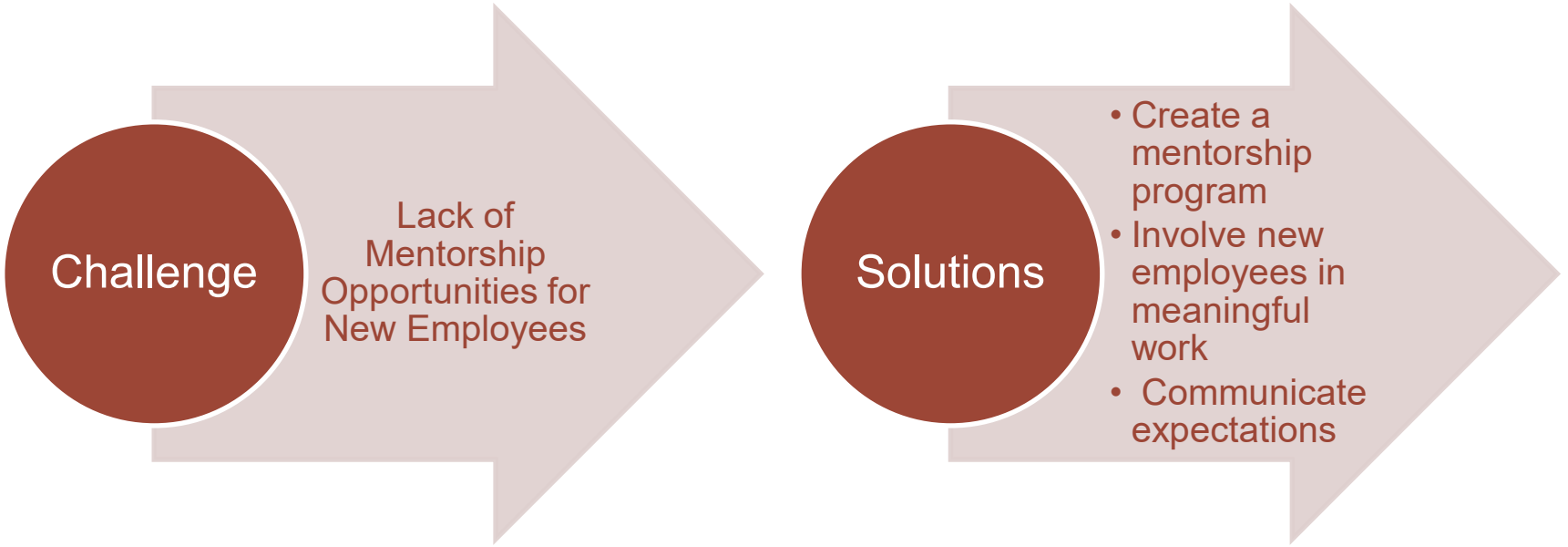
CHALLENGE: DIFFICULTY TRAINING NEW EMPLOYEES



CHALLENGES: EMPLOYER CONCERNS ABOUT SUPERVISION



CHALLENGES: LACK OF MENTORSHIP OPPORTUNITIES FOR NEW EMPLOYEES



PRACTICAL TIPS FOR EMPLOYERS

TELECOMMUTING TIPS

- ✓ **Consider Mandatory and Voluntary Policies**
  - ➢ Route through HR to ensure non-discriminatory application.
  - ➢ Consider temporary policies (part of pandemic response or emergency) and permanent policies.
  - ➢ Require remote workers notify HR prior to changing remote locations
- ✓ **Ensure Cybersecurity and Physical Security**
  - ➢ Mandate use of a VPN
  - ➢ Mandate use of company-provided PCs
  - ➢ Two-factor authentication and

TIPS (CONT.)

- ✓ **Set Hours and Break Expectations for Non-Exempt Employees**
  - ➢ Set work schedule
  - ➢ Include breaks (lunch and rest)
  - ➢ Clearly establish what it means to be “working” and expectation for handling communications “after hours.”

TIPS (CONT.)

- ✓ **Consider Reimbursing Some Expenses**
  - ➢ Consider offering set amounts (rather than full bill).
- ✓ **Define "Work Area"**
  - ➢ Separate room with a desk and door.
  - ➢ Safe space (no fire hazards).
  - ➢ Ensure the employee's residence has an ergonomically-friendly workstation.

TIPS (CONT.)

- ✓ **Train Employees**
  - ➢ Employees need to understand how to be successful while working from home.
- ✓ **Train Managers and Supervisors**
  - ➢ They need to understand how to manage and communicate with a virtual team.
  - ➢ Collaboration and communication are key.

QUESTIONS?

FELHABER LARSON

ATTORNEYS AT LAW

COVID-19 Vaccine Mandates in 2021: What You Need to Know

November 12, 2021

FELHABER LARSON

ATTORNEYS AT LAW

Grant T. Collins
(612) 373-8519
gcollins@felhaber.com

Penelope J. Phillips
(612) 373-8428
pphillips@felhaber.com

Sara Gullickson McGrane
(612) 373-8511
smcgrane@felhaber.com

Sweeping new vaccine mandates for 100 million Americans

By ZEKE MILLER September 9, 2021

President Joe Biden speaks in the State Dining Room at the White House, Thursday, Sept. 9, 2021, in Washington. Biden is announcing sweeping new federal vaccine requirements affecting as many as 100 million Americans in an all-out effort to increase COVID-19 vaccinations and curb the surging delta variant. (AP Photo/Andrew Harnik)

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WASHINGTON (AP) — In his most forceful pandemic actions and words, President Joe Biden on Thursday ordered sweeping new federal vaccine requirements for as many as 100 million Americans — private-sector employees as well as health care workers and federal contractors — in an all-out effort to curb the surging COVID-19 delta variant.

Executive Action

Federal Contractors (and Subcontractors)

SAFER FEDERALWORKFORCE

The **Safer Federal Workforce Task Force** is led by the White House COVID-19 Response Team, the General Services Administration (GSA), and the Office of Personnel Management (OPM). Task Force members include: the Centers for Disease Control and Prevention (CDC), the Department of Veterans Affairs (VA), the Federal Emergency Management Agency (FEMA), the Federal Protective Service (FPS), the Office of Management and Budget (OMB), and the United States Secret Service (USSS).

Task Force Guidance (cont.)

- "Hard" Vaccine Mandate
  - Testing is ***not*** an option.
  - On or before ***December 8, 2021***, employees of federal contractors (and subcontractors) must be either:
    - (a) fully vaccinated for COVID-19 (i.e., two weeks after the final dose) or
    - (b) receive a religious or medical accommodation.
- On November 4, President Biden announced that the deadline would be extended to ***January 4, 2022***.

Legal Challenges

- Several states filed suit in Florida challenging the federal contractor rules (M.D. Fla. 21-cv-2524).
  - Requesting a temporary and permanent injunction.
  - Oral argument scheduled for December 7.

Safer Federal Task Force Guidance

- "Covered Contract"
  - Incorporates definition from "minimum wage for federal contractor" rule.
  - Contracts covered by the SCA, DBA, concessions contracts not subject to the SCA, and contracts in connection with federal property or land and related to offering services for federal employees, their dependents or the general public.
  - Excludes contracts under $250,000.

Safer Federal Task Force Guidance

- Released on Sept. 24.
- Vaccination Clause is **required** in:
  - New contracts awarded on or after Nov. 15.
  - "Extensions" or "renewals" on existing contracts after Oct. 15.
- Vaccination Clause is **encouraged** (but not required) in:
  - Existing contracts awarded before Nov. 15.
  - Contracts not covered by the EO because it is a "sale of goods" or under the $250,000 threshold.

Sample Clause

(c) *Compliance*. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at https:/www.saferfederalworkforce.gov/contractors/.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

CAAC Letter 2021-03

Safer Federal Task Force Guidance

- How broad is the mandate for federal contractors?
  - Applies to all full- and part-time workers "***working on or in connection with a covered contract or working at a covered contractor workplace***."
  - Guidance makes clear that "covered contractor employee" can include "employees of covered contractors who are not themselves working on or in connection with a covered contract."
  - "Covered contractor workplace" does not include a workers' "residence" (i.e., teleworkers), but vaccine requirement applies to teleworkers if they are a "covered contractor employee" (e.g., HR, legal, etc.).

Task Force Guidance (cont.)

- "Hard Mandate"
  - Testing is not an option.
  - On or before ~~***Dec. 8, 2021***~~ ***(now extended to Jan. 4, 2022)***, employees of federal contractors (and subcontractors) must be either:
    - (a) fully vaccinated for COVID-19 (i.e., two weeks after the final dose) or
    - (b) receive a religious or medical accommodation.
- Accommodation must be "***legally required***."

Task Force COVID-19 Guidelines

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for "medical accommodation" or "medical exceptions" should be treated as requests for a disability accommodation.

Task Force Guidance (cont.)

- Religious and Medical Exemptions
  - Guidance states that vaccination is required "***unless*** the employee is ***legally entitled to an accommodation***."
  - Suggests that a contractor cannot comply with the Task Force's Guidance by liberally granting medical or religious exemptions to requesting employees if the employee is not "legally entitled" to the accommodation.
  - Instead, must follow "interactive process."
- Conflicting state and local laws will be preempted.

Task Force COVID-19 Guidelines

Q19: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in this Guidance?

A: Yes. These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.

Task Force COVID-19 Guidelines

Q20: Can a covered contractor comply with workplace safety requirements from [OSHA], including pursuant to any current or forthcoming [ETS] related to COVID-19, instead of the requirements of this Guidance?

A: No. Covered contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards.

Task Force Guidance (cont.)

- Proof of Vaccination
  - CDC Card, immunization record from provider or state database, or “any other official documentation” verifying “the vaccine name, date(s) of administration, and the name of the [provider or clinic site].”
  - Self certification is ***not*** acceptable
- Contractor must designate “Responsible Party” for compliance.

CMS Standard

CMS Vaccine Mandate

- On November 4, CMS issued an Interim Final Rule with Comment Period ("IFC") requiring all workers in CMS-regulated settings to be ***fully vaccinated*** against COVID-19 by ***January 4, 2022.***
- Implemented in "Phases" and "Phase I" requires first vaccine dose or accommodation request by ***December 6, 2021***.
- The IFC applies to approximately 76,000 providers and covers over 17 million health care workers

No Testing Option

- Unlike the new OSHA ETS, does ***not*** provide weekly COVID-19 testing as an alternative to mandatory vaccination
- The IFC will preempt any inconsistent state or local laws, including laws that ban or limit an employer's authority to require vaccination, masks, or testing

Who is Covered by the IFC?

- The following Medicare- and Medicaid-certified providers and suppliers must ensure that all applicable staff are vaccinated for COVID-19:
  - Ambulatory surgical centers; hospices; psychiatric residential treatment facilities; programs for all-inclusive care for the elderly (PACE); hospitals; long term care facilities and nursing homes; intermediate care facilities for individuals with intellectual disabilities; home health agencies; comprehensive outpatient rehabilitation facilities; critical access hospitals; clinics, rehab agencies, and public health agencies; community mental health centers; home infusion therapy suppliers; rural health clinics/federally qualified health centers; and end-stage renal disease facilities

Who Is Not Covered?

- The IFC applies only to Medicare- and Medicaid-certified facilities. The rule does ***not*** apply to Assisted Living Facilities, Group Homes, or similar settings because CMS does not have regulatory authority over them
- The IFC does ***not*** apply to physician's offices or Medicaid home services because they are not covered by CMS's health and safety regulations

What Workers Are Covered?

- All staff at these CMS-regulated facilities are subject to mandatory vaccination, "***regardless of clinical responsibility or patient contact***," as long as they interact with other staff, patients, residents, or clients
- Individuals who provide services 100% remotely, such as fully remote telehealth or payroll services, are not subject to the mandatory vaccination requirement

Vaccination Timing

- **Phase I** (30 days)
  - By ***December 6, 2021***, covered individuals must have received the ***first dose*** (or only dose, as applicable) of a COVID-19 vaccine ***or*** have ***requested*** a medical or religious exemption.
- **Phase II** (60 Days)
  - By ***January 4, 2022***, covered individuals who have not been granted an exemption must be ***fully vaccinated***.
- An individual is considered "fully vaccinated" two weeks after completion of a primary vaccination series

CMS IFC – Phase 1

"In order to provide protection as soon as possible, we are establishing two implementation phases for this IFC. ***Phase 1***, effective 30 days after publication, includes nearly all provisions of this IFC, including the requirements that ***all staff have received, at a minimum, the first dose of the primary series or a single dose COVID-19 vaccine, or requested and/or been granted a lawful exemption, prior to staff providing any care, treatment, or other services for the facility and/or its patients***. Phase 1 also includes the requirements for facilities to have appropriate policies and procedures developed and implemented, and the requirement that ***all staff must have received a single dose COVID-19 vaccine or the initial dose of a primary series by December 6, 2021***."

CMS IFC – Phase 2

"**Phase 2**, effective 60 days after publication, consists of the requirement that all applicable staff are fully vaccinated for COVID-19, ***except*** for those ***staff who have been granted exemptions from COVID-19 vaccination or those staff for whom COVID-19 vaccination must be temporarily delayed***, as recommended by the CDC, due to clinical precautions and considerations). Although an individual is not considered fully vaccinated until 14 days (2 weeks) after the final dose, ***staff who have received the final dose of a primary vaccination series by the Phase 2 effective date are considered to have met the individual vaccination requirements, even if they have not yet completed the 14-day waiting period***."

Vaccine Exemptions

- Covered individuals must be able to request an exemption from vaccination based on applicable Federal laws, such as the ADA or Title VII
- Facilities must have a process for collecting and evaluating such requests
- Exemption requests should be evaluated in accordance with the facility's established policies and procedures

Vaccine Exemptions

- For individuals requesting a medical exemption, all documentation confirming recognized clinical contraindications, and which supports the individual's request, "must be signed and dated by a licensed practitioner . . . who is acting within their respective scope of practice."
- Such documentation "must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications

CMS IFC – Religious and Medical Exemptions

"Requests for exemptions based on an applicable Federal law ***must be documented and evaluated in accordance with applicable Federal law and each facility's policies and procedures***. As is relevant here, this IFC preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC."

CMS IFC – Exemptions (cont.)

"Under Federal law, including the ADA and Title VII of the Civil Rights Act of 1964 as noted previously, workers who cannot be vaccinated or tested because of an ADA disability, medical condition, or sincerely held religious beliefs, practice, or observance may in some circumstances be granted an exemption from their employer. In granting such exemptions or accommodations, employers must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals, in keeping with their obligation to protect the health and safety of patients. Employers must also follow Federal laws protecting employees from retaliation for requesting an exemption on account of religious belief or disability status. For more information about these situations, employers can consult the [EEOC's] website at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws."

CMS IFC – Medical Exemptions

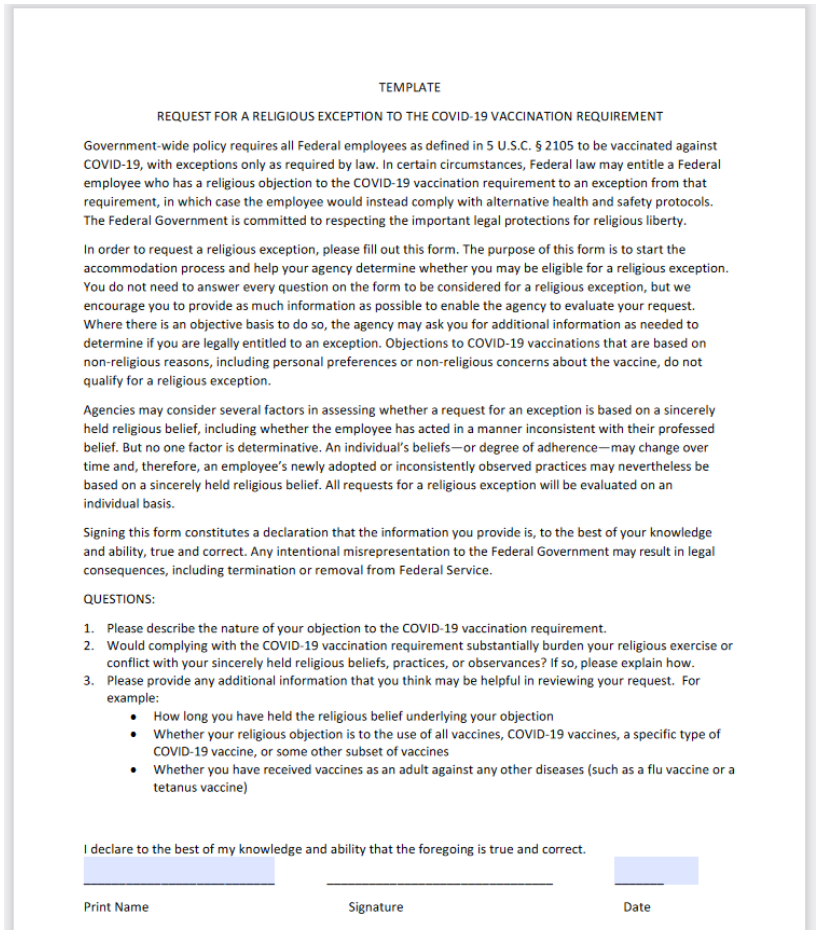
"For staff members who request a medical exemption from vaccination, all documentation confirming recognized clinical contraindications to COVID-19 vaccines, and which supports the staff member's request, must be signed and dated by a ***licensed practitioner***, who is not the individual requesting the exemption, ***and who is acting within their respective scope of practice*** as defined by, and in accordance with, all applicable State and local laws. Such documentation must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications; and a statement by the authenticating practitioner recommending that the staff member be exempted from the facility's COVID-19 vaccination requirements based on the recognized clinical contraindications."

CMS IFC – Religious Exemptions

"We also direct providers and suppliers to the [EEOC] Compliance Manual on Religious Discrimination for information on evaluating and responding to such requests. While ***employers have the flexibility to establish their own processes and procedures, including forms***, we point to The Safer Federal Workforce Task Force's "request for a religious exception to the COVID-19 vaccination requirement" template as an example."

- EEOC Compliance Manual
  - https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination
- Task Force's Accommodation Form
  - https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM%20-%2020211004%20-%20MH508.pdf

Task Force's Religious Accommodation Form



TEMPLATE

REQUEST FOR A RELIGIOUS EXCEPTION TO THE COVID-19 VACCINATION REQUIREMENT

Government-wide policy requires all Federal employees as defined in 5 U.S.C. § 2105 to be vaccinated against COVID-19, with exceptions only as required by law. In certain circumstances, Federal law may entitle a Federal employee who has a religious objection to the COVID-19 vaccination requirement to an exception from that requirement, in which case the employee would instead comply with alternative health and safety protocols. The Federal Government is committed to respecting the important legal protections for religious liberty.

In order to request a religious exception, please fill out this form. The purpose of this form is to start the accommodation process and help your agency determine whether you may be eligible for a religious exception. You do not need to answer every question on the form to be considered for a religious exception, but we encourage you to provide as much information as possible to enable the agency to evaluate your request. Where there is an objective basis to do so, the agency may ask you for additional information as needed to determine if you are legally entitled to an exception. Objections to COVID-19 vaccinations that are based on non-religious reasons, including personal preferences or non-religious concerns about the vaccine, do not qualify for a religious exception.

Agencies may consider several factors in assessing whether a request for an exception is based on a sincerely held religious belief, including whether the employee has acted in a manner inconsistent with their professed belief. But no one factor is determinative. An individual's beliefs—or degree of adherence—may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be based on a sincerely held religious belief. All requests for a religious exception will be evaluated on an individual basis.

Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.

QUESTIONS:

1. Please describe the nature of your objection to the COVID-19 vaccination requirement.
2. Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise or conflict with your sincerely held religious beliefs, practices, or observances? If so, please explain how.
3. Please provide any additional information that you think may be helpful in reviewing your request. For example:
   - How long you have held the religious belief underlying your objection
   - Whether your religious objection is to the use of all vaccines, COVID-19 vaccines, a specific type of COVID-19 vaccine, or some other subset of vaccines
   - Whether you have received vaccines as an adult against any other diseases (such as a flu vaccine or a tetanus vaccine)

I declare to the best of my knowledge and ability that the foregoing is true and correct.

_____ _____ _____

Print Name Signature Date

Form (cont.)

QUESTIONS:

- 1. Please describe the nature of your objection to the COVID-19 vaccination requirement.
- 2. Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise or conflict with your sincerely held religious beliefs, practices, or observances? If so, please explain how.
- (cont.)

Form (cont.)

- 3. Please provide any additional information that you think may be helpful in reviewing your request. For example:
  - How long you have held the religious belief underlying your objection
  - Whether your religious objection is to the use of all vaccines, COVID-19 vaccines, a specific type of COVID-19 vaccine, or some other subset of vaccines
  - Whether you have received vaccines as an adult against any other diseases (such as a flu vaccine or a tetanus vaccine)

GSA Religious Accommodation Form

Seven Questions

- (1) Please describe the nature of your objection to the COVID-19 vaccination requirement.
- (2) Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise? If so, please explain how.
- (3) How long have you held the religious belief underlying your objection?

GSA Form (cont.)

Seven Questions (cont.)

- (4) Please describe whether, as an adult, you have received any vaccines against any other diseases (such as a flu vaccine or a tetanus vaccine) and, if so, what vaccine you most recently received and when, to the best of your recollection.
- (5) If you do not have a religious objection to the use of all vaccines, please explain why your objection is limited to particular vaccines.

GSA Form (cont.)

Seven Questions (cont.)

- (6) If there are any other medicines or products that you do not use because of the religious belief underlying your objection, please identify them.
- (7) Please provide any additional information that you think may be helpful in reviewing your request.

Religious Exemptions

- Three Key Questions
  - (1) Is this belief based on an acceptable "religion"?
  - (2) Is this religious belief sincerely held?
  - (3) Is this sincerely held religious belief, practice, or observance in conflict with the required condition of employment of obtaining the COVID vaccination?
- If the answer to each is "yes," then accommodation should be granted.

What is a "Religious Belief"?

Fallon v. Mercy Catholic Medical Center (3d Cir. 2017)

- **Indicia 1:** *A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters*
  - Religion typically concerns "ultimate ideas" about "life, purpose, and death."
  - Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

What is a "Religious Belief"? (cont.)

- **Indicia 2**: *A religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.*
  - Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."
  - An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it.

What is a "Religious Belief"? (cont.)

- **<u>Indicia 3</u>: A religion often can be recognized by the presence of certain formal and external signs?**
  - Is it analogous to traditional religions?
  - Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation.
  - The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons.

OSHA ETS Standard

June 2021 OSHA ETS Rule

Occupational Safety and Health Administration

CONTACT US FAQ A TO Z INDEX ENGLISH ESPAÑOL

OSHA STANDARDS ENFORCEMENT TOPICS HELP AND RESOURCES SEARCH OSHA

Coronavirus Disease (COVID-19) / COVID-19 Healthcare ETS

EMERGENCY TEMPORARY STANDARD

COVID-19 Healthcare ETS

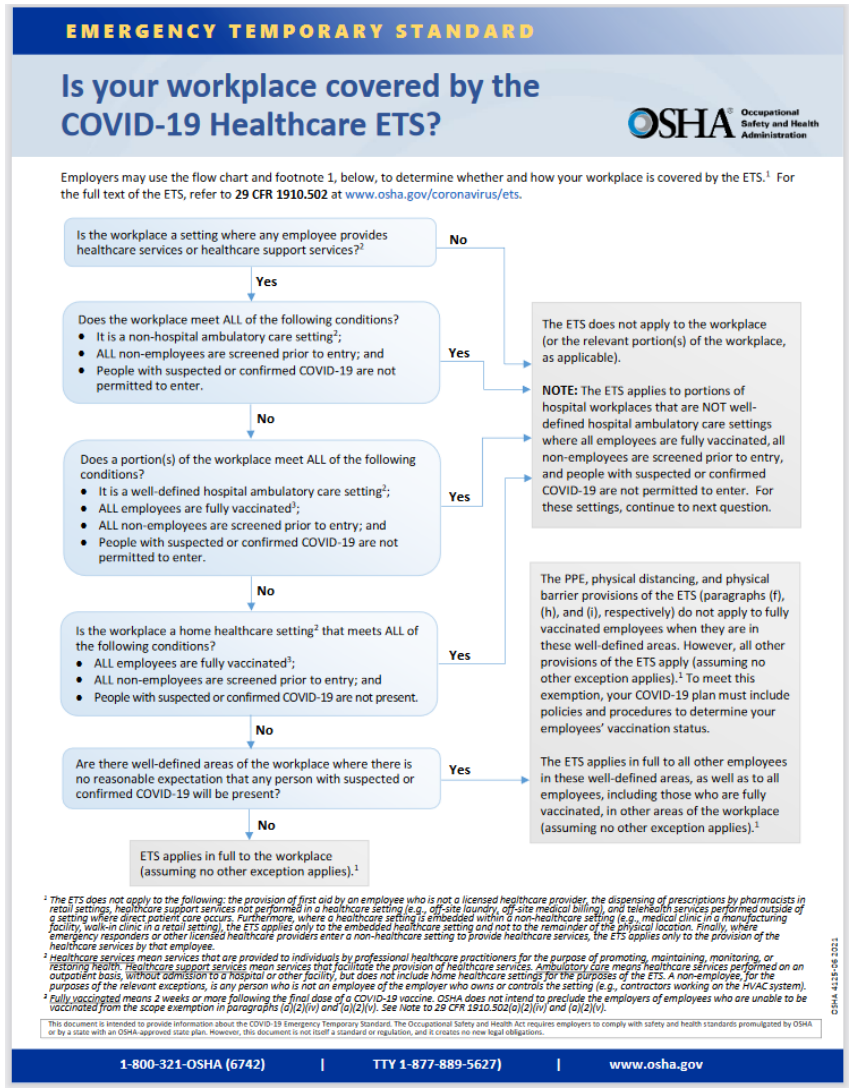
Source: AP Photo/Elaine Thompson

June 2021 OSHA ETS Rule

- OSHA Healthcare ETS rule issued on ***June 21, 2021***.
  - In response to January 2021 Executive Order.
- Applies only to "healthcare worksites."
  - Hospitals
  - Nursing homes/long-term care facilities
  - Healthcare settings embedded in a non-healthcare setting (e.g., employer medical clinics)
  - Autopsy settings.
- Set to ***expire*** after 6 months (Dec. 21, 2021), unless replaced with a permanent standard.

June 2021 OSHA ETS (cont.)

- Does **not** apply to:
  - Provision of first aid by non-licensed provider;
  - Dispensing prescriptions by pharmacists in retail settings;
  - Non-hospital ambulatory care settings ***if*** non-employees are screened;
  - Hospital ambulatory care settings ***if*** well-defined area, all workers fully vaccinated, non-employees screened;
  - Off-site healthcare support services; and
  - Telehealth services outside of direct patient care.



EMERGENCY TEMPORARY STANDARD

Is your workplace covered by the COVID-19 Healthcare ETS?

OSHA Occupational Safety and Health Administration

Employers may use the flow chart and footnote 1, below, to determine whether and how your workplace is covered by the ETS.[1] For the full text of the ETS, refer to **29 CFR 1910.502** at www.osha.gov/coronavirus/ets.

Is the workplace a setting where any employee provides healthcare services or healthcare support services?[2]

- **No** → The ETS does not apply to the workplace (or the relevant portion(s) of the workplace, as applicable).
- **Yes** →

Does the workplace meet ALL of the following conditions?

- It is a non-hospital ambulatory care setting[2];
- ALL non-employees are screened prior to entry; and
- People with suspected or confirmed COVID-19 are not permitted to enter.

- **Yes** → The ETS does not apply to the workplace (or the relevant portion(s) of the workplace, as applicable).

  NOTE: The ETS applies to portions of hospital workplaces that are NOT well-defined hospital ambulatory care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter. For these settings, continue to next question.
- **No** →

Does a portion(s) of the workplace meet ALL of the following conditions?

- It is a well-defined hospital ambulatory care setting[2];
- ALL employees are fully vaccinated[3];
- ALL non-employees are screened prior to entry; and
- People with suspected or confirmed COVID-19 are not permitted to enter.

- **Yes** → The ETS does not apply to the workplace (or the relevant portion(s) of the workplace, as applicable).

  NOTE: The ETS applies to portions of hospital workplaces that are NOT well-defined hospital ambulatory care settings where all employees are fully vaccinated, all non-employees are screened prior to entry, and people with suspected or confirmed COVID-19 are not permitted to enter. For these settings, continue to next question.
- **No** →

Is the workplace a home healthcare setting[2] that meets ALL of the following conditions?

- ALL employees are fully vaccinated[3];
- ALL non-employees are screened prior to entry; and
- People with suspected or confirmed COVID-19 are not present.

- **Yes** → The PPE, physical distancing, and physical barrier provisions of the ETS (paragraphs (f), (h), and (i), respectively) do not apply to fully vaccinated employees when they are in these well-defined areas. However, all other provisions of the ETS apply (assuming no other exception applies).[1] To meet this exemption, your COVID-19 plan must include policies and procedures to determine your employees' vaccination status.

  The ETS applies in full to all other employees in these well-defined areas, as well as to all employees, including those who are fully vaccinated, in other areas of the workplace (assuming no other exception applies).[1]
- **No** →

Are there well-defined areas of the workplace where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present?

- **Yes** → The PPE, physical distancing, and physical barrier provisions of the ETS (paragraphs (f), (h), and (i), respectively) do not apply to fully vaccinated employees when they are in these well-defined areas. However, all other provisions of the ETS apply (assuming no other exception applies).[1] To meet this exemption, your COVID-19 plan must include policies and procedures to determine your employees' vaccination status.

  The ETS applies in full to all other employees in these well-defined areas, as well as to all employees, including those who are fully vaccinated, in other areas of the workplace (assuming no other exception applies).[1]
- **No** → ETS applies in full to the workplace (assuming no other exception applies).[1]

[1] *The ETS does not apply to the following: the provision of first aid by an employee who is not a licensed healthcare provider, the dispensing of prescriptions by pharmacists in retail settings, healthcare support services not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing), and telehealth services performed outside of a setting where direct patient care occurs. Furthermore, where a healthcare setting is embedded within a non-healthcare setting (e.g., medical clinic in a manufacturing facility, walk-in clinic in a retail setting), the ETS applies only to the embedded healthcare setting and not to the remainder of the physical location. Finally, where emergency responders or other licensed healthcare providers enter a non-healthcare setting to provide healthcare services, the ETS applies only to the provision of the healthcare services by that employee.*

[2] *Healthcare services mean services that are provided to individuals by professional healthcare practitioners for the purpose of promoting, maintaining, monitoring, or restoring health. Healthcare support services mean services that facilitate the provision of healthcare services. Ambulatory care means healthcare services performed on an outpatient basis, without admission to a hospital or other facility, but does not include home healthcare settings for the purposes of the ETS. A non-employee, for the purposes of the relevant exceptions, is any person who is not an employee of the employer who owns or controls the setting (e.g., contractors working on the HVAC system).*

[3] *Fully vaccinated means 2 weeks or more following the final dose of a COVID-19 vaccine. OSHA does not intend to preclude the employers of employees who are unable to be vaccinated from the scope exemption in paragraphs (a)(2)(iv) and (a)(2)(v). See Note to 29 CFR 1910.502(a)(2)(iv) and (a)(2)(v).*

This document is intended to provide information about the COVID-19 Emergency Temporary Standard. The Occupational Safety and Health Act requires employers to comply with safety and health standards promulgated by OSHA or by a state with an OSHA-approved state plan. However, this document is not itself a standard or regulation, and it creates no new legal obligations.

OSHA 4125-08 2021

1-800-321-OSHA (6742) | TTY 1-877-889-5627) | www.osha.gov

Available at: https://www.osha.gov/coronavirus/ets

June 2021 OSHA ETS (cont.)

Requirements

- COVID-19 Plan
  - Must be in writing (if 10+ employees).
- Patient Screening and Management
  - Drafted in accordance with CDC's "*COVID-19 Infection Prevention and Control Recommendations*."
- Standard and Transmission-Based Precautions
  - Developed in accordance with CDC's "*Guidelines for Isolation Precautions*."

June 2021 OSHA ETS (cont.)

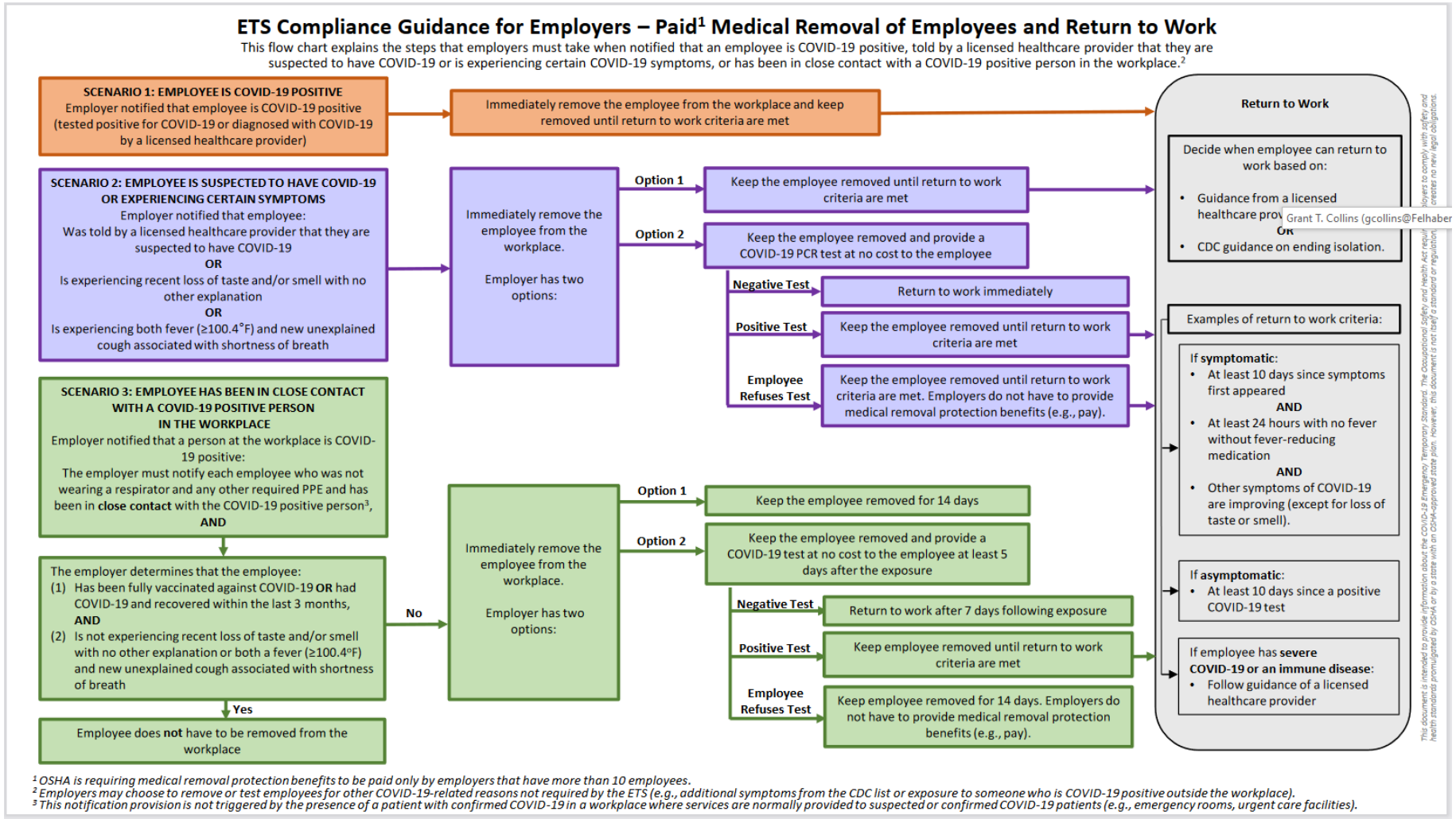
Requirements (cont.)

- PPE
  - Provide facemasks and develop rules for enforcing mask wearing.
  - Provide respirator and protective gear to employees in certain circumstances.
- Rules regarding performance of AGPs.
- Rules regarding physical distancing, physical barriers, cleaning and disinfection, and ventilation.

June 2021 OSHA ETS (cont.)

Requirements (cont.)

- Health screening and medical management
  - Employer must screen each employee before each workday and each shift.
  - If the employer knows an employee is COVID-19-positive, then the employer must immediately remove that employee and keep them removed until they meet the return-to-work criteria.



Available at: https://www.osha.gov/coronavirus/ets

June 2021 OSHA ETS (cont.)

Requirements (cont.)

- Medical Removal Protection Benefits (10+ employees)
  - For employees who are removed (per the ETS rule), the employer is required to provide the employee with "***the same regular pay the employee would have received had the employee not been absent from work, up to $1,400 per week***," until the employee is eligible to return to work as provided for by the ETS rule.
  - "Regular pay" does not include overtime and subject to offset for pay from "other sources."
  - For employers with fewer than 500 employees, it's reduced to 2/3 or $200 per day ($1,000 per week) beginning in the third week.

Medical Removal Benefits

(iii) When an employer ***removes*** an employee in accordance with paragraph (l)(4) of this section [and is ***not*** working remotely or in isolation]:

(A) The employer must continue to ***provide*** the ***benefits*** to which the employee is ***normally entitled*** and must also ***pay*** the employee ***the same regular pay the employee would have received had the employee not been absent from work***, up to ***$1,400 per week***, until the employee meets the return to work criteria specified in paragraph (l)(4)(iii) or (l)(6) of this section.

(B) For employers with ***fewer*** than 500 employees, the employer must pay the employee up to the $1,400 per week cap but, beginning in the third week of an employee's removal, the amount is reduced to only two-thirds of the same regular pay the employee would have received had the employee not been absent from work, up to $200 per day ($1,000 per week in most cases).

(iv) The employer's payment obligation under paragraph (l)(5)(iii) of this section is ***reduced*** by the ***amount of compensation that the employee receives from any other source***, such as a ***publicly or employer-funded compensation program (e.g., paid sick leave, administrative leave)***, for earnings lost during the period of removal or any additional source of income the employee receives that is made possible by virtue of the employee's removal.

OSHA § 1910.502(l)(5)(iii)-(iv)

Medical Removal Benefits

When an employee has been removed from the workplace under paragraph (l)(4) (i.e., and is not working remotely or in isolation), the employer must also continue to pay the employee ***the same regular pay and benefits the employee would have received had the employee not been absent from work, but that regular pay does not include overtime pay even if the employee had regularly worked overtime hours in recent weeks.*** If an employee is removed from work multiple times as required by the ETS, such as because of being exposed at different times at the workplace to people with COVID-19, the employer must pay the employee during removal on each occasion.

86 Fed. Reg. 32376, at 32595 (June 21, 2021)

Medical Removal Benefits

Paragraph (l)(5)(iv) provides that if an employee who has been removed from the workplace and is not working remotely or in isolation receives compensation for lost earnings from ***any other source***, such as ***employer-paid sick leave, administrative leave***, or a ***publicly-funded compensation program***, then the employer may reduce the amount paid to the removed employee by however much the employee receives from the outside source. For example, if a removed employee who is not working remotely or in isolation has accumulated paid sick leave, the employer may require the employee to use that paid sick leave before paying medical removal benefits under this paragraph. If an employee has paid leave available, but the employer is unable to require the employee to use the leave (as may be the case with federal employers) and the employee opts not to use it, then the employer may still reduce the amount paid under this paragraph by the amount of paid leave the employee has available but is opting not to use. Likewise, ***if a removed employee receives, for example, $300 a week from a state or local government benefits program for quarantined or isolated employees, the employer's obligation to pay medical removal benefits to the removed employee would be reduced by $300 per week.***

86 Fed. Reg. 32376, at 32596 (June 21, 2021)

June 2021 OSHA ETS (cont.)

Requirements

- Vaccination
  - Employer must provide reasonable time and paid leave (e.g., paid sick leave, administrative leave) to each employee for vaccination and any side effects experienced following vaccination.
- Training
  - Materials available on OSHA's website.
- Anti-Retaliation
  - Employer must inform employees of anti-retaliation protections.

June 2021 OSHA ETS (cont.)

Requirements

- Implemented at no cost to employees (except self-monitoring)
- Recordkeeping
  - All versions of the COVID-19 plan implemented while the ETS remains in effect.
  - COVID-19 log to record each instance identified by the employer in which an employee is COVID-19-positive (regardless of source of infection).
- Reporting COVID-19 fatalities and hospitalizations
  - Employers must report to OSHA each work-related COVID-19 fatality within 8 hours and each work-related COVID-19 inpatient hospitalization within 24 hours.

November 2021 OSHA ETS Rule

Coronavirus Disease (COVID-19) / COVID-19 Vaccination and Testing ETS

EMERGENCY TEMPORARY STANDARD

COVID-19 Vaccination and Testing ETS

The ETS on Vaccination and Testing was officially filed in the Office of the Federal Register on November 4, 2021, and it became effective when it was published on November 5, 2021. Written comments on any aspect of the ETS must be submitted by December 6, 2021 in Docket number OSHA-2021-0007. Written comments on the information collection determination as described in V.K. of the ETS preamble [2021-23643] must be submitted by January 4, 2022 in Docket number OSHA-2021-0008.

Find information on the COVID-19 Healthcare ETS or on Coronavirus Disease (COVID-19).

OSHA ETS Standard

"Hard" or "Soft" Mandate for Employers with 100+ Employees

- On November 4, OSHA issued a new Emergency Temporary Standard (or "ETS") that requires all employers with ***100+ employees*** to enforce a "soft" mandate
  - Employees required to ***either***: (a) receive the COVID-19 vaccine ***or*** (b) submit to weekly testing.

Legal Challenges to OSHA ETS

- 26 states and employer groups have filed legal challenges to the OSHA ETS Rules.
- On November 7, the Fifth Circuit granted a request for a nationwide ***"stay"*** of enforcement.
  - Briefing completed yesterday.
- Challenges in other appeals courts and courts will look to consolidate those cases on November 16.
- Too soon to tell whether the challenges will be successful, but employers should not count on relief from the courts.

Effective Dates

- The ETS was published in the Federal Register on November 5 and was effective ***immediately***.
- While the ETS is effective immediately, compliance with the ETS is delayed 30 days (i.e., ***December 6, 2021***) and compliance with COVID-19 testing for unvaccinated workers is delayed 60 days (i.e., ***January 4, 2022***).
- ETS rules are designed to be "temporary," so it will only be in effect for 6 months.

Requirement	December 6, 2021	January 4, 2022
Establish policy on vaccination (paragraph (d))	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))	X	
Provide support for employee vaccination (paragraph (f))	X	
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j))	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))	X	
Make certain records available (paragraph (l))	X	
Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g))		X

Counting Employees

- The ETS applies only to employers with 100+ employees – firm or company-wide – at any time the ETS rule is in effect.
  - In determining the number of employees, employers must count all employees company-wide, regardless of work location.
- Employers must ***include:*** part-time, temporary, and seasonal workers.
- Once the ETS applies to you, ***it applies for the entire period the ETS is in effect***.

Counting Employees (cont.)

- Employers can ***exclude***:
  - True “independent contractors” and
  - Employees of other companies (e.g., staffing firms).
- On a “multi-employer” worksite (e.g., construction site), contractors are required to count ***only*** their ***own employees***.

OSHA FAQs

2.A.5. Are independent contractors included in the 100-employee threshold?

No. Independent contractors do not count towards the total number of employees.

2.A.8. How will temporary and seasonal workers be addressed in the employee count?

Temporary and seasonal workers employed directly by the employer (i.e., not obtained from a temporary staffing agency) are counted in determining if the employer meets the 100-employee threshold, provided they are employed at any point while the ETS is in effect. For more information, see FAQ 2.A.7. "How are employees from staffing agencies counted?" and FAQ 2.C. "How do employers determine if they meet the 100-employee threshold for coverage under the standard if they have fluctuating employee numbers?"

OSHA FAQs

2.A.9. How are employees counted at multi-employer worksites?

On a typical multi-employer worksite such as a construction site, *each* company represented – the host employer, the general contractor, and each subcontractor – would only need to count its *own* employees; the host employer and general contractor would not need to count the total number of workers at each site. That said, each employer must count the total number of workers it employs regardless of where they report for work on a particular day. Thus, for example, if a general contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under this ETS even if it does not have 100 or more employees present at any one worksite.

OSHA FAQs

2.A.7. How are employees from staffing agencies counted?

In scenarios in which employees of a staffing agency are placed at a host employer location, only the staffing agency would count these jointly employed workers for purposes of the 100-employee threshold for coverage under this ETS. The host employer, however, would still be covered by this ETS if it has 100 or more employees in addition to the employees of the staffing agency. On the other hand, if a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. A host employer may, however, require the staffing agency to ensure that temporary employees comply with its policy (either be fully vaccinated or tested weekly and wear face coverings).

Counting Employees (cont.)

- In a "franchisor-franchisee relationship," both businesses are separate for counting purposes.
- What about "***related businesses***"?
  - Answer will depend on whether the businesses "*handle safety matters as one company*."
  - If so, they will be considered an "*integrated employer.*"

Counting Employees (cont.)

- In analyzing whether businesses "*handle safety matters as one company,*" courts have applied the following factors:
  - (1) interrelated operations,
  - (2) common management,
  - (3) centralized control of labor relations, and
  - (4) common ownership.
- Solis v. Loretto-Oswego Residential Health Care Facility, 692 F.3d 65 (2d Cir. 2012)

Counting Employees (cont.)

- What about "owners"?
  - OSHA's definition of "employee" is essentially the same as other federal statutes.
  - Courts have held partners are not employees under those statutes.
  - von Kaenel v. Armstrong Teasdale, LLP, 943 F.3d 1139, 1144 (8th Cir. 2019) (held that an equity partner was not an employee under ADEA).
- 29 C.F.R. 1904.31(a) provides that "If your business is organized as a sole proprietorship or partnership, the owner or partners are not considered employees for recordkeeping purposes."

Excluded Workplaces

- The ETS does ***not*** apply to the following workplaces:
  - (1) Workplaces covered by the federal contractor rules; and
  - (2) Workplaces covered by OSHA's Healthcare ETS Rule from June 2021 (i.e., settings where any employee provides healthcare services or healthcare support services)

Excluded Employees

- Certain employees of covered employers are ***not*** subject to the ETS rule, including:
  - (1) Employees who do not report to a workplace where other individuals (such as coworkers or customers) are present;
  - (2) Employees while they are working from home; and
  - (3) Employees who work exclusively outdoors.

OSHA FAQs

2.B. What qualifies as work done exclusively outdoors under the ETS?

In order to qualify as work performed exclusively outdoors, the following criteria must be met:

- The employee must work outdoors on all days (i.e., an employee who works indoors on some days and outdoors on other days would not be exempt from the requirements of this ETS).
- The employee must not routinely occupy vehicles with other employees as part of work duties (i.e., do not drive to worksites together in a company vehicle).
- The employee works outdoors for the duration of every workday except for *de minimis* use of indoor spaces where other individuals may be present – such as a multi-stall bathroom or an administrative office – as long as the time spent indoors is brief, or occurs exclusively in the employee's home (e.g., a lunch break at home).

The employee's work must truly occur "outdoors," which does not include buildings under construction where substantial portions of the structure are in place, such as walls and ceiling elements that would impede the natural flow of fresh air at the worksite.

Mandatory Vaccination Policy (with a Caveat)

- The ETS requires covered employers to develop a mandatory vaccination policy that "***requires each employee to be fully-vaccinated***."
- Recognized exceptions include:
  - (1) Employees with medical contraindications;
  - (2) Employees who have a medical need to delay vaccination; and
  - (3) Employees entitled to a reasonable accommodation for disability or religious reasons.

Vaccination Policy (cont.)

- The ETS includes an exemption to the "hard" mandate if the employer implements a testing regimen requiring unvaccinated workers to be ***tested every 7 days:***
  - "The employer is exempted from the ["hard" vaccine] requirement . . . ***only if*** the employer establishes, implements, and enforces a ***written policy*** allowing any employee not subject to a mandatory vaccination policy to choose ***either*** to be ***fully vaccinated against COVID-19 or provide proof of regular testing . . . and wear a face covering . . .***"

Vaccination Policy (cont.)

- OSHA ETS Rules suggest that regardless of the type of policy ("soft" vs. "hard"), the employer is required to offer exemptions per the rule:
  - (1) Employees with medical contraindications;
  - (2) Employees who have a medical need to delay vaccination; and
  - (3) Employees entitled to a reasonable accommodation for disability or religious reasons
- Why apply exemptions if you have a "soft" mandate?
  - Could be due to "cost of testing."

Vaccination Policy (cont.)

- Requirements for Unvaccinated Workers
  - (1) Must provide their employer with documentation showing a negative COVID-19 test **within the last 7 days** in order to be eligible to work at a covered "workplace," which is any location – fixed or mobile – where the employer's work or operations are performed
  - (2) Must **wear a mask** "when indoors or when occupying a vehicle with another person for work purposes."

OSHA FAQs

6.A. Do unvaccinated employees who work remotely need to submit to weekly COVID-19 testing?

No. The requirements of the standard do not apply to the employees of covered employers who do not report to a workplace where other individuals such as coworkers or customers are present or while working from home. This includes the testing requirements of paragraph (g) of the ETS.

6.C. Can an unvaccinated employee still come to the workplace if they did not obtain a COVID-19 test but wears a face covering and is isolated while on site?

No. If an employee does not provide the result of a COVID-19 test as required by paragraph (g)(1) of the standard, the employer must keep the employee removed from the workplace until the employee provides a test result. In addition to being tested for COVID-19 on a weekly basis, unvaccinated employees must also wear a face covering at the workplace.

Costs of COVID-19 Testing

- The ETS "does ***not*** require the employer to pay for any costs associated with testing." However, "employer payment for testing ***may be required by other laws, regulations, or collective bargaining agreements*** or other collectively negotiated agreements."
- BUT: Check your CBAs and state law.
  - Some states require employers to pay for "medical exams" required by the employer.
  - Is the employer or OSHA requiring the test?

Minn. Stat. § 181.61

181.61 MEDICAL EXAMINATION; RECORDS, COSTS.

It is unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of employment, except certificates of attending physicians in connection with the administration of an employee's pension and disability benefit plan or citizenship papers or birth records.

History: *1951 c 201 s 2; 1Sp2001 c 9 art 15 s 32*

Minn. Stat. § 181.61

- December 2020, MN-DOLI guidance stated that "Section 181.61 "applies to mandatory [COVID-19] testing ***required by the employer*** before employees may return to work. . . ."
- Is the testing pursuant to the OSHA ETS Rule "***required by the employer***"?
  - "**No**" – OSHA is requiring the testing – not the employer.
  - "**Yes**" – the OSHA ETS Rule requires the employer to implement the policy and the testing is required by the employer's policy.

Minn. Stat. § 181.645

181.645 EXPENSES FOR BACKGROUND CHECKS, TESTING, AND ORIENTATION.

Except as provided by section 123B.03 or as otherwise specifically provided by law, an employer, as defined in section 181.931, or a prospective employer may not require an employee or prospective employee to pay for expenses incurred in criminal or background checks, credit checks, or orientation. An employer or prospective employer may not require an employee or prospective employee to pay for the expenses of training or testing that is required by federal or state law or is required by the employer for the employee to maintain the employee's current position, unless the training or testing is required to obtain or maintain a license, registration, or certification for the employee or prospective employee.

History: *2002 c 380 art 3 s 1*

Minn. Stat. § 181.645

- Appears to be directed at “background checks” and written “tests” – not medical testing.
  - Nevertheless, the language is not expressly limited: “testing that is required by federal or state law . . . for the employee to maintain the employee’s current position . . . .”
- Section 181.645 was passed in 2002 as part of an Article titled, “Background Checks.”

What About Costs of Accommodations?

- Is the analysis any different if an employee needs an accommodation under the ADA or Title VII?
  - Typically, employers are required to bear the cost of an accommodation unless it is an "undue hardship."
  - But, is the "exemption" COVID-19 testing or not being subject to vaccination requirement

OSHA FAQs

6.G. Does the ETS require employers to cover the costs associated with COVID-19 testing?

No. The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. OSHA notes that the ETS also does not prohibit the employer from paying for costs associated with testing required by the ETS. Otherwise, the agency leaves the decision regarding who pays for the testing to the employer.

OSHA expects that some workers and/or their representatives will negotiate the terms of payment. OSHA has also considered that some employers may choose to pay for some or all of the costs of testing as an inducement to keep employees in a tight labor market. Other employers may choose to put the full cost of testing on employees in recognition of the employee's decision not to become fully vaccinated. It is also possible that some employers may be required to cover the cost of testing for employees pursuant to other laws or regulations. The subject of payment for the costs associated with testing pursuant to other laws or regulations not associated with the OSH Act is beyond OSHA's authority and jurisdiction.

Paid Time Off for Vaccination

- Covered employers must provide employees with up to "***4 hours* of paid time**, including travel time, ***at the employee's regular rate of pay***" for each dose of the COVID-19 vaccine.
  - Employers are ***not*** permitted to require employees to use existing PTO, vacation, or sick time balances
- This paid time off requirement is ***not*** retroactive for employees who are already vaccinated.

OSHA FAQs

5.G. Are employers obligated to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination?

No. The ETS requires employers to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay, for the purposes of vaccination. Reasonable time may include, but is not limited to, time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine).

Employers are not, however, obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination. This could include the costs of travel to an off-site vaccination location (e.g., a pharmacy) or travel from an alternate work location (e.g., telework) to the workplace to receive a vaccination dose.

OSHA FAQs

5.C. If an employee gets vaccinated outside of work hours, such as on a Saturday, do I have to still grant them reasonable time for vaccination?

No. If an employee chooses to receive a primary vaccination dose outside of work hours, employers are not required to grant paid time to the employee for the time spent receiving the vaccine during non-work hours. However, even if employees receive a primary vaccination dose outside of work hours, employers must still afford them reasonable time and paid sick leave to recover from side effects that they experience during scheduled work time in accordance with paragraph (f)(2).

Paid Time Off for Vaccination Recovery

- Employers must provide "***reasonable time*** and paid sick leave" to employees recovering from vaccination ***side effects***.
  - Employers ***can*** require employees to use any existing PTO for this time.
- How much time is "reasonable"?
  - OSHA says ***2 days***.
- This paid time off requirement is ***not*** retroactive for employees who are already vaccinated.

OSHA FAQs

5.D. Can employers set a cap on the time that they must provide to employees to recover from side effects?

Yes. Employers are required to provide reasonable time and paid sick leave to employees to recover from side effects experienced following a primary vaccination dose, but the standard does not specify the amount of paid sick leave that the employer is required to provide for that purpose. Employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable. The CDC notes that although some people have no side effects, side effects, if experienced, should go away in a few days. Generally, OSHA presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement. When setting the cap, an employer would not be expected to account for the unlikely possibility of the vaccination resulting in a prolonged illness in the vaccinated employee (e.g., a severe allergic reaction). The reasonable time and paid sick leave that employers are required to provide employees to recover from side effects experienced, is in addition to the reasonable time and four hours of paid time to receive each primary vaccination dose also required by the standard.

No Paid Time for Testing Positive

- Employers must ***immediately remove*** from the workplace an employee who tests positive or receives a COVID-19 diagnosis
- The ETS makes clear that ***employees are <u>not</u> entitled to pay*** if they are removed from the workplace because they are COVID-19-positive
- Employers should be mindful that other paid sick leave laws or CBAs could require that employees be paid for time that is missed as a result of a COVID-19 diagnosis

OSHA FAQs

7.D. Do I have to provide my employee with paid time off if they are removed from the workplace?

No. This ETS does not require employers to provide paid time off to any employee for removal as a result of a positive COVID-19 test or diagnosis of COVID-19; however, paid time off may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. On the other hand, the ETS does not preclude employers from choosing to pay employees for time required for removal under this standard. Additionally, employers should allow their employees to make use of any accrued leave in accordance with the employer's policies and practices on use of leave. This provision, while not placing the burden on the employer to provide paid time off, should not be read as depriving employees of the benefits they are normally entitled to as part of their employment.

OSHA ETS Standard

Returning to Work

- Employees may return to the workplace only if the employee meets one of the following requirements:
  - (1) The employee receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on an antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
  - (2) The employee meets the return-to-work criteria in CDC's "Isolation Guidance"; or
  - (3) The employee receives a recommendation to return to work from a licensed healthcare provider.

OSHA ETS Standard

Recordkeeping

- The ETS includes several recordkeeping requirements, including:
  - Keeping a record of each employee's vaccination status and associated proof of vaccination
  - Storing vaccination records and rosters as they would other medical records and maintaining confidentiality to the extent required by law; and
  - Maintaining records of each COVID-19 test result an employee provides to the employer.

QUESTIONS?

Thank you.

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ADA, FMLA, & Paid Sick Leave
Reviewing Your Paid Leave Policies

Felhaber Larson Annual 2021 Labor & Employment Seminar

November 12, 2021

FELHABER LARSON

ATTORNEYS AT LAW

Penelope J. Phillips

(612) 373-8428

pphillips@felhaber.com

Scott D. Blake

(612) 373-8538

sblake@felhaber.com

WHERE ARE WE HEADED?

1. Unpaid Leave Mandates
2. Paid Leave in Minnesota
3. Updating and Revising Current Policies

Unpaid Leave Mandates

FMLA

- **Purpose:** Provide eligible employees with a federally-protected right to take time off from work.
- **Eligibility:**
  - 50+ employees (75-mile radius)
  - 1,250 hours in preceding 12 months
  - “Serious health condition”
    - Employee
    - Immediate family member

FMLA (cont.)

- **Serious Health Condition:** Any condition that involves:
  - Inpatient care;
  - Continued treatment by provider (3+ days of incapacity and 2+ treatments);
  - Incapacity due to pregnancy or prenatal care;
  - Incapacity because of chronic health condition;
  - Incapacity due to untreatable condition; or
  - Period of absence to receive multiple.

FMLA (cont.)

- **Amount of Leave:** an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period.
- **Insurance Coverage:** Employer must maintain coverage of a group health policy on the same conditions that coverage would have been provided if the employee were not on leave.

FMLA (cont.)

- **Relationship to Paid Leave:** Employee can elect, or the employer can require the substitution of paid leave.
- **Intermittent Leave:** Only if medically necessary and due to a serious health condition.
- **Return to Work:** Same or a substantially similar position with equivalent pay and benefits.

ADA

- **Purpose:** Provide qualified disabled employees with access to work.
- **Eligibility:**
  - 15 or more employees.
  - Available to employees and applicants.
  - Suffer from a “disability.”

ADA (cont.)

- **Disability:**
  - A physical or mental impairment that substantially limits one or more major life activities;
  - A record of such impairment; or
  - Being regarded as having such an impairment.

"Major Life Activity"

- Caring for oneself,
- Performing manual tasks,
- Seeing,
- Hearing,
- Eating,
- Sleeping,
- Walking,
- Standing,
- Lifting,
- Bending,
- Speaking,
- Breathing,
- Learning,
- Reading,
- Concentrating,
- Thinking,
- Communicating,
- Working
- Sitting,
- Reaching,
- Interacting with others, and
- Major bodily functions (immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions).

ADA (cont.)

- **Amount of Leave:**
  - No per se rule (2 months to 17 months)
  - Must be “reasonable” and not impose an “undue hardship.”
  - Employee entitled to “effective” (not preferred) accommodation.

ADA (cont.)

- **EEOC Guidance on "Undue Hardship"**
  - The amount and/or length of leave required, indefinite leave;
  - The frequency of the leave;
  - Flexibility regarding the days on which leave is taken;
  - Whether need for leave is predictable; and
  - The impact on customers and coworkers and on whether specific job duties are being performed in an appropriate and timely manner.

FINITE LEAVE REQUEST CAN BE A REASONABLE ACCOMMODATION

- ***Two and a half weeks***. Caffa-Mobley v. Mattis, 2018 U.S. Dist. LEXIS 30997 (W.D. Ky. Feb. 27, 2018) (fact issue presented on whether employee's request for two and a half weeks of leave plus a month and a half of light duty work was reasonable accommodation).
- ***Two months***. Berk v. Bates Adver. USA, Inc., 1997 WL 749386, at *6 (S.D.N.Y. Dec. 3, 1997) (employer should have granted leave in excess of two months to allow worker to recover from breast cancer surgery).
- ***Four months***. Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998); Rascon v. US W. Commn's, Inc., 143 F.3d 1324, 1334 (10th Cir. 1998); Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 197–01 (S.D.N.Y. 1999).

FINITE REQUESTS (cont.)

- ***Six months***. Miller v. Hersman, 759 F. Supp. 2d 1 (D.D.C. 2011).
- ***Seven months***. Shannon v. City of Phil., 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999) (jury could believe that additional three-month leave after 12-week FMLA leave was required).
- ***One year***. Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1439 (N.D. Cal. 1996), aff'd, 191 F.3d 1043 (9th Cir. 1999); but see Delgado Echevarria v. AstraZeneca Parm. LP, 856 F.3d 119 (1st Cir. 2017) (holding that a request for an additional 12 months of leave was not even a "facially reasonable accommodation").

FINITE REQUESTS (cont.)

- ***More than one year***. White v. Honda of Am. Mfg., Inc., 191 F. Supp. 2d 933, 951 (S.D. Ohio 2002) (jury question whether employer had to provide medical leave in excess of employers 12-month leave policy). But see Melange v. City of Center Line, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012) (suggesting that an employer is not generally required to hold a position open for more than a year).
- ***13 months***. Ralph v. Lucent Techs., 135 F.3d 166, 172 (1st Cir.1998) (four weeks additional leave might be reasonable, despite plaintiff's previous 52 weeks of LWOP).

FINITE REQUESTS (cont.)

- ***14 months***. Khachatourian v. Macy's, Inc., 2017 Cal. App. Unpub. LEXIS 1886 (Cal. Ct. App. Mar. 15, 2017). ("Macy's 14-month medical leave allowance satisfied its reasonable accommodation requirements" because it was 11 months longer than that required under the FMLA and applicable California state law, and six months longer than provided for under Macy's leave policies).
- ***17 months***. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000) (five months beyond employer's one-year job-hold policy).

NOTE

- There is a difference between:
  - (a) Granting the request for leave; and
  - (b) Granting the leave ***and holding the job open***.
- All circuits and even the EEOC agree that an indefinite leave of absence is ***not*** a reasonable accommodation under the ADA.

How Much Leave Is Too Much?

- Under the ADA, there is a split on how much leave is a reasonable accommodation:
  - **EEOC Guidance:** Unpaid leave must be considered as an accommodation (unless undue hardship).
  - **7th Circuit:** Held in *Severson* and *Golden* that a multi-month leave is never a reasonable accommodation.
  - **8th Circuit:** Has not adopted *Severson* or *Golden*.

KEY TO ACCOMMODATION QUESTION

- How long to fill the employee's position?
- Is a ***non-job protected leave*** reasonable accommodation?

ADA (cont.)

- **Insurance Coverage:** Continued coverage during leave is ***not*** required if employer does not provide continuation of benefits to similarly situated, non-disabled employees (e.g., on leave, working part-time, etc.).
- **Relationship to Paid Leave:** Access to accrued paid leave may be a reasonable accommodation. However, employer does not have to grant additional leave.

ADA (cont.)

- **Intermittent Leave:** Intermittent or part-time leave may be a reasonable accommodation.
- **Return to Work:** Reinstatement required unless employer can show that employee is no longer qualified (with or without reasonable accommodation) or it would cause an undue hardship.

State Leaves

MHRA

- **Purpose:** Similar to ADA.
- **Eligibility:**
  - Employers with 1+ employees.
  - However, only those employers with 15 or more part-time or full-time employees are subject to the “reasonable accommodation” requirement.
  - MN employers “shall initiate an informal, interactive process..”

MINNESOTA PARENTAL LEAVE ACT

- **Purpose:** Provide time off for birth or adoption of a child (or prenatal care).
- **Eligibility:**
  - Employers with 21 or more employees at "at least one site."
  - Eligible "employees" must work at least ½ time for 12 consecutive months before the requested leave is to begin.

MPLA (cont.)

- **Reasons for Leave:** (a) in conjunction with birth or adoption of a child or (b) for prenatal care.
- **Amount of Leave:** Amended in 2014 to provide 12 weeks of unpaid leave for birth or adoption of child.
- **Insurance Coverage:** Not required to pay costs, but must continue to make coverage available.

MPLA (cont.)

- **Relationship to Other Leave:**
  - May be reduced by "paid parental, disability, personal, medical, or sick leave, or accrued vacation provided by the employer so that the total leave does not exceed 12 weeks . . ."
  - May be reduced by "leave taken for the same purpose by the employee under [FMLA]."

MPLA (cont.)

- **Intermittent Leave:** Only if employer agrees.
- **Reinstatement:** Employee is entitled to the employee's former position or in a position of comparable duties, number of hours, and pay.

WOMEN'S ECONOMIC SECURITY ACT

- **Purpose:** Passed in 2014, it added "pregnancy accommodations" to the MPLA, including: "temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting."
- **Eligibility:**
  - Depends on whether the accommodation requested is "***leave***" or "***non-leave***" purposes.

WESA (CONT.)

- **Eligibility:**
  - For "leave," must meet definition of "employee" under MPLA (i.e., employed for 12 months at ½ time).
  - For "non-leave," regular definition of "employee" applies.
- See Hinrichs-Cady v. Hennepin County, 943 N.W.2d 417 (Minn. Ct. App. April 20, 2020) rev. granted (June 30, 2020).

WESA (CONT.)

- **Amount of Leave:** Not specified, but makes clear that "makes clear that "an employer shall not be required to create a new or additional position in order to accommodate an employee pursuant to this section, and shall not be required to discharge any employee, transfer any other employee with greater seniority, or promote any employee."

WESA (CONT.)

- **Insurance Coverage:** Not addressed.
- **Return to Work:** Employee is "entitled to return to employment in the employee's former position."

MINNESOTA SICK LEAVE STATUTE

- **Purpose:** Allows employees to use "personal sick leave benefits" for absences due to the illness or injury of the employee's child.
- **Eligibility:**
  - Employers with 21 or more employees ar "at least one site."
  - Eligible "employees" must work at least ½ time for 12 consecutive months before the requested leave is to begin.

SICCLA (cont.)

- Expanded in 2013
  - Permits use to care for (a) adult child, (b) spouse, (c) sibling, (d) parent, (e) grandparent, or (f) step-parent.
- Expanded as part of WESA in 2014
  - Adds “mother-in-law,” “father-in-law,” and “grandchild.”
  - Also includes “safety leave.”

SICCLA (cont.)

- **Amount of Leave:** SICCLA does ***not*** require an employer to provide "personal sick leave benefits."
- **Insurance Coverage:** Not addressed.
- **Return to Work:** Employee is "entitled to return to employment in the employee's former position."

MINNESOTA SCHOOL LEAVE

- **Purpose:** Allows time away to attend school-related activities.
- **Eligibility:**
  - Employers with one or more employees.
  - Eligible "employees" must work at least ½ time (no requirement to work for 12 consecutive months).

SCHOOL LEAVE (cont.)

- **Reasons for Leave:**
  - Attend school conferences or school-related activities related to the employee's child.
  - For daycare, pre-K, or special education, time off may be to observe and monitor the services or program.
  - Must not be possible during non-work hours.

SCHOOL LEAVE (cont.)

- **Amount of Leave:** 16 hours during any 12-month period.
- **Insurance Coverage:** Not addressed.
- **Return to Work:** Employee is "entitled to return to employment in the employee's former position."

"OTHER" UNPAID LEAVE

- **HRO or OFP:** "Reasonable time off" in order to obtain an HRO or OFP.
- **Crime Victim Leave:** Allow victim or witness "reasonable time off" to testify.
- **Jury Duty:** No adverse action based on employee's service on a jury.
- **Civil Air Patrol:** Unpaid time off to serve as member of the Civil Air Patrol.

"OTHER" PAID LEAVE (cont.)

- **Leave to Vote in Elections:** Employee has "right to be absent from work" to vote on the day of the election, "without penalty or deduction from salary or wages because of the absence . . . ."
  - According to SOS, "employees cannot be required to use personal leave or vacation time for the time off necessary to vote."

"OTHER" PAID LEAVE (cont.)

- **Bone Marrow:** Employers with 20+ employees at at least one site are required to provide up to 40 hours of paid leave to an employee donating bone marrow.
- **Organ Donation:** Public employers are required to provide up to 40 hours of paid leave to an employee (who averages 20 hours per week) to donate an organ.

MILITARY LEAVE

- **FMLA—Qualifying Exigency:** Eligible employees may receive up to 12 weeks for a qualifying exigency.
- **FMLA—Military Caregiver:** Eligible employees may take up to a total of 26 weeks of leave in a single 12-month period to care for a covered service member.

MILITARY LEAVE (cont.)

- **USERRA:** requires all employers to provide leaves of absence with the right of reinstatement to employees who need to satisfy their military obligations.

MILITARY LEAVE (cont.)

- **Death of Family Member:** up to 10 working days of unpaid leave for an employee whose "family member" is killed in active service.
- **Attend Military Ceremonies:** up to 1 day each year to attend a "family member's" send-off or homecoming ceremony for the mobilized service member.

MILITARY LEAVE (cont.)

- **Attend Military Events:** up to 2 consecutive days or 6 total days each year to attend departure and return ceremonies, family training and readiness events, and official reintegration programs related to military service of the employee's spouse, parent, or child.

PAID SICK LEAVE

PAID LEAVE ORDINANCES

	Minneapolis	St. Paul	Duluth
Employer Coverage	One to five employees (unpaid); Six or more employees (paid)	One or more employees.	Five or more employees.
Employee Eligibility	All "employees," including "temporary employees and part-time employees, who perform work within the geographic boundaries of the City for at least eighty (80) hours in a year for that employer." Not "independent contractors."	All "employees," including "temporary and part-time employees, who perform work within the geographic boundaries of the city for at least eighty (80) hours in a year for that employer." Not "independent contractors."	"Employee" means "any person employed by an employer who performs work within the geographic boundaries of the city for more than 50 percent of the employee's working time in a 12-month period or is based in the city of Duluth and spends a substantial part of his or her time working in the city and does not spend more than 50 percent of their work-time in a 12-month period in any other particular place." Not "independent contractors."
Accrual	1 hour for every 30 hours worked.	1 hour for every 30 hours worked.	1 hour for every 30 hours worked.
Maximum Annual Accrual	48 hours per year.	48 hours per year.	64 hours per year.
Maximum Carryover/Sick Leave Balance	80 hours.	80 hours.	80 hours/unclear.

PAID LEAVE ORDINANCES (CONT'D)

	Minneapolis	St. Paul	Duluth
Waiting Period	90 days.	90 days.	90 days.
Limits on Usage.	None.	None.	40 hours.
Permissible Uses - Employee	For employee's own illness, injury, health condition, or preventative care.	For employee's own illness, injury, health condition, or preventative care.	For employee's own illness, injury, health condition, or preventative care.
Permissible Uses – for Family Members	To care for a "family member" for the family member's illness, injury, health condition, or preventative care.	To care for a "family member" for the family member's illness, injury, health condition, or preventative care.	To care for a "family member" for the family member's illness, injury, health condition, or preventative care.
Permissible Uses – for "Safe Time"	Leave related to domestic violence or personal safety issues for employee or "family member."	Leave related to domestic violence or personal safety issues for employee or "family member."	Leave related to domestic violence or personal safety issues for employee or "family member."
Minimum Increments	No more than 4 hours.	No more than 4 hours.	No more than 4 hours.
Rate of Pay	"Regular rate of pay," including shift differentials. Does *not* include: tips, commissions, reimbursed expenses, premium payments, bonuses, etc.	"Standard hourly rate, for hourly employees, or an equivalent rate, for salaried employees." No compensation for lost tips or commissions.	"Standard hourly rate, for hourly employees, or an equivalent rate, for salaried employees." No compensation for lost tips or commissions.

SICK AND SAFE TIME (cont.)

- **Exemption for Current Policies?**
  - Yes, but must comply with (1) substantive requirement (e.g., amount of leave) and (2) procedural requirement (i.e., how it's granted).
- **Protections against Discrimination and Retaliation**
  - For using or requesting SST.

UPDATING POLICIES

UPDATING LEAVE POLICIES

- **Concurrent Leaves:** Ensure that all leaves run "concurrently" to the greatest extent possible.
  - Prevents employees from "stacking" leaves.
  - For example, 12 weeks for birth of child would count under ***both*** FMLA and MPLA.

UPDATING LEAVE POLICIES (cont.)

- **Other Leave Policies:** Review policies that provide job-protection beyond statutory requirements.
  - If your medical leave policy provides 1 year of unpaid leave with job protection, it will be hard to claim an undue hardship under ADA.
  - Increase exposure for discrimination claims.

UPDATING LEAVE POLICIES (cont.)

- **"Catch All" Leave Policy:**
  - "*The Company will provide eligible employees with any other leave required by federal, state, and local law. Any leaves will run concurrently to the greatest extent possible.*"

TIME AND ATTENDANCE

- **FMLA:** "Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; ***nor can FMLA leave be counted under no fault attendance policies***."
  - Similar to SST ordinances.
- Employer may, however, develop reasonable call-in procedures.

TIME AND ATTENDANCE (cont.)

- Under FMLA, employers are able to establish reasonable call-in procedures. 29 C.F.R. § 825.302(d).
  - Any discipline or occurrence point is for the failure to follow the procedure – not for sick/safe usage.

TIME AND ATTENDANCE (cont.)

- **DOL Opinion Letter, FMLA2018-1 (Attendance Points)**
  - No-fault attendance policy removes points after 12 months of "active service," which is not defined but did not include FMLA leave.
  - By "freezing" points during FMLA leave, DOL concludes that the employee "neither loses a benefit that accrued prior to taking the leave nor accrues any additional benefit."
  - However, the employer must treat equivalent forms of leave (e.g., non-FMLA leave) similarly.

TIME AND ATTENDANCE (cont.)

- **ADA:** Employer may be required to suspend or modify its attendance policy for a qualified disabled employee, as a reasonable accommodation.
  - May also be required to permit employees to work from home.
- Review and update job descriptions to emphasize regular attendance and on-site attendance, where required for the position.

BONUSES

- **FMLA:** "[I]f a bonus or other payment is based on the ***achievement of a specified goal*** such as hours worked, products sold or ***perfect attendance***, and the employee has not met the goal due to FMLA leave, ***then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave***."
- Example: if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

BONUSES (cont.)

- 1995 FMLA Regulations distinguished between (a) "production" bonuses; and (b) "absence-of-occurrence" bonuses (e.g., safety and perfect attendance bonuses).
- DOL Appendix: "Penalizing an employee for taking FMLA leave under a 'no fault' attendance policy is distinct from disqualifying an employee from a bonus or award for attendance because the former faults an employee for taking leave itself whereas the latter denies a reward for ***achieving the job-related performance goal of perfect attendance***. The Department notes that employers are ***free to prorate such bonuses or awards in a non-discriminatory manner***; nothing in these regulations prohibits employers from doing so."

UNLIMITED VACATION OR "FLEX TIME"

- Netflix
- Grant Thornton
- GrubHub
- LinkedIn
- Virgin Group
- Hubspot

UNLIMITED VACATION (cont.)

- No “accrual” and instead only requires notice and approval by manager.
- Grant Thornton
  - Discovered that utilization went from 17.4 to 19.1 days per year.
  - Tweaked its policy in 2017 to require additional notice in cases of longer leave requests.

UNLIMITED VACATION (cont.)

- Since the time is not "accrued," the employee arguably has no ability to substitute "unlimited vacation" under FMLA.
- Discrimination is the biggest concern.
  - Employee cannot be denied access to "unlimited vacation" simply because they are on FMLA.
  - 3-week honeymoon vs. 3-week surgery.

COMPLYING WITH SST

- Employers with operations in Minneapolis, St. Paul, and Duluth need to comply with SST.
- Applies to all “employees,” including part-time and contract employees (after 90 days).

Minn. Chamber of Commerce v. Minneapolis,
(Minn. 2020)

- Supreme Court held the Minneapolis SST ordinance was NOT preempted by state law.
- Also concluded that the ordinance did not have an impermissible extraterritorial effect.
- Now, ***all employers*** (regardless of location) must permit employees to accrue SST if they perform 80+ hours of work in Minneapolis.
- Other cities may follow.

COMPLYING WITH SST (cont.)

- Consider multiple paid leave policies for different classes of employees.
- Full-Time Employees:
  - Unlimited policy for executives?
  - PTO policy for salaried and hourly employees?
- Part-Time Policy:
  - Consider a “bare bones” accrual policy.

COMPLYING WITH SST (cont.)

- Updating Procedure
  - Distinguish between “foreseeable” and “non-foreseeable” leave.
  - Do not require medical documentation before three scheduled absences.
- Updating Minimum Usage
  - Ordinances permit a 4-hour minimum usage requirement.

COMPLYING WITH SST (cont.)

- Medical Documentation
  - Cannot require documentation before 3 consecutive absences.
- Retaliation/Discrimination
  - Include prohibition on retaliation and discrimination.
- Consider a “Local Law Appendix” for multiple jurisdictions

COMPLYING WITH SST (cont.)

- If you use PTO to comply with SST, consider tracking SST within PTO Policy.
  - If you track SST within PTO, then you only need to provide "procedural" protections when employee requests SST-PTO.
- Also, absences may not be protected by SST if the employee has already been provided with 48 (or 80) hours of PTO.

QUESTIONS?

Thank you.

FELHABER LARSON

ATTORNEYS AT LAW

Pay Attention: "Wage Theft" and Increased Federal and State Enforcement

November 12, 2021

Grant T. Collins
(612) 373-8519
gcollins@felhaber.com

Zachary A. Alter
(612) 373-8467
zalter@felhaber.com

Where Are We Headed?

1. MN Wage Theft Statute
2. MPLS Wage Theft Ordinance
3. Federal Wage Enforcement
4. Trends to Watch in 2022

Minnesota Wage Theft Law

- In May 2019, the Wage Theft Law was passed as part of 100+ page omnibus bill during a special session over Memorial Day weekend.
- Main Provisions:
  1) Criminalizes “wage theft.”
  2) Revises recordkeeping requirements.
  3) Creates new “wage notice.”
  4) Adds DOLI and Attorney General enforcement.

"Wage Theft" is a Crime

- Minn. Stat. § 609.52, subd. 2(19) makes "wage theft" a crime punishable by prison.
  - If the value of the wage theft exceeds $35,000, a violator may be sentenced to prison for up to 20 years, receive a fine of up to $100,000, or both.
- Minn. Stat. § 609.52, subd. 1(13) defines "wage theft" which includes any of the following actions by an employer "with intent to defraud:"
  - (1) Failing to pay an employee all wages, salary, gratuities, earnings, or commissions as required by federal, state, or local law;

"Wage Theft" (cont.)

- (3) Directly or indirectly causing an employee to give a receipt for wages for an amount greater than the amount actually paid to the employee for services rendered;
- (4) Directly or indirectly demanding or receiving from any employee any rebate or refund from the wages owed to the employee; or
- (5) Making it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

DOLI FAQs

23. Regarding "intent to defraud" in the criminal wage theft provision: Is there any definition or something similar that explains what this means in a practical or plain-language sense? Are there any examples?

The Department of Labor and Industry is not the enforcement authority for the criminal provisions of the Wage Theft Prevention Act. The criminal wage theft provisions would be investigated by law enforcement agencies with criminal law enforcement authority and prosecuted by city attorneys, county attorneys or the state attorney general's office when requested by a county attorney.

24. Who specifically in the company would be convicted of the felony under this law?

The Department of Labor and Industry is not the enforcement authority for the criminal provisions of the Wage Theft Prevention Act. The criminal wage theft provisions would be investigated by law enforcement agencies with criminal law enforcement authority and prosecuted by city attorneys, county attorneys and the state attorney general's office when requested by a county attorney.

"Wage Notice" Form

- Employers must provide a "Wage Notice" to new employees at the start of their employment.
  - Form must be ***signed*** by the employee.
  - Form must include translation information developed by MN-DOLI.
- Additionally, employer must provide employees with any written changes to the information contained in the wage notice ***before*** the changes become effective.
  - Second notice does ***not*** need to be signed.

New "Wage Notice" Form

DEPARTMENT OF LABOR AND INDUSTRY

Employee notice

1. Employee:	Address:
Phone number:	Email address:
Date employment began:	
2. Legal name of employer:	Main office/principal place of business address:
Phone number:	Email address:
Operating name of employer (if different):	
Mailing address (if different):	
3. Employment status (exempt or non-exempt):	
☐ Employee is exempt from: ☐minimum wage ☐overtime ☐other provisions of Minnesota Statutes 177	
Legal basis for exemption:	
☐ Employee is non-exempt (entitled to overtime, minimum wage, other protections under Minn. Stat. 177)	
4. Rate or rates of pay	
Paid by: Hour ☐ Shift ☐ Day ☐ Week ☐ Salary ☐ Piece ☐ Commission ☐ Other method ☐	
Overtime is owed after: hours	
Allowances claimed:	
$ per meal for meal allowance (max = 60% of one hour of adult minimum wage per meal)	
$ per day for lodging allowance (max = 75% of one hour of adult minimum wage per day) (or fair market value)	
5. Leave benefits available:	
☐Sick leave ☐Paid vacation ☐Other paid time off	
How benefits are accrued: Number of hours ________ or days ________	
per ☐year ☐month ☐per pay period ☐per hours worked	
Terms of use:	
6. Deductions that may be made from employee's pay and amounts:	
7. Number of days in the pay period:	Regularly scheduled payday:
Date employee will receive first payment of wages earned:	
8. Other information relevant to this position:	
I, the employee, have received a copy of this notice: ☐Yes ☐No	
Employer signature Date	Employee signature Date

This document contains important information about your employment. Check the box at left to receive this information in this language.

☐	Spanish/Español	Este documento contiene información importante sobre su empleo. Marque la casilla a la izquierda para recibir esta información en este idioma.
☐	Hmong/Hmoob	Daim ntawv no muaj cov xov tseem ceeb hais txog thaum koj ua hauj lwm. Khij lub npauv ntawm sab laug yog koj xav tau cov xov tseem ceeb no txhais ua lus Hmoob.
☐	Vietnamese/Việt ngữ	Tài liệu này chứa thông tin quan trọng về việc làm của quý vị. Đánh dấu vào ô bên trái để nhận thông tin này bằng Việt ngữ.
☐	Simp. Chinese/简体中文	本文件包含与您的雇用相关的重要信息。勾选左边的方框将接收以这种语言提供的信息。
☐	Russian/русский	Данный документ содержит важную информацию о вашем трудоустройстве. Отметьте галочкой квадрат слева для получения этой информации на данном языке.
☐	Somali/Soomaali	Dukumentigan waxaa ku qoran macluumaad muhiim ah oo ku saabsan shaqadaada. Calaamadi sanduuqan haddii aad rabto inaad macluumaadkan ku hesho luqaddan.
☐	Laotian/ພາສາລາວ	ເອກະສານນີ້ມີຂໍ້ມູນທີ່ສຳຄັນກ່ຽວກັບການຈ້າງງານຂອງທ່ານ. ກາລຸນາໝາຍໃສ່ຫ້ອງທີ່ຢູ່ເບື້ອງຊ້າຍເພື່ອຮັບຂໍ້ມູນນີ້ໃນພາສານີ້.
☐	Korean/한국어	이 문서에는 귀하의 고용 형태에 관련된 중요한 정보가 담겨있습니다. 이 언어로 이 정보를 받기를 원하시면 왼쪽 상자에 체크하여 주세요.
☐	Tagalog/Tagalog	Ang dokumentong ito ay nagtataglay ng mahalagang impormasyon tungkol sa iyong pagtatrabaho. Lagyan ng tsek ang kahon sa kaliwa upang matanggap ang impormasyong ito sa wikang ito.
☐	Oromo/Oromoo	Waraqaan kun waayee hojii keetii odeeffannoo barbaachisoo ta'an qabatee jira. Saaxinnii karaa bitaatti argamu kana irratti mallattoo godhi yoo afaan Kanaan barreeffama argachuu barbaadde.
☐	Amharic/አማርኛ	ይህ ዶኩመንት ስለቅጥርዎ በሚመለከት አስፈላጊ መረጃ የያዘ ነው። ይህንን ዶኩመንት በስተግራ በኩል ባለው ቋንቋ ተተርጉሞ እንዲሰጥዎት ከፈለጉ በዛው በስተግራ በኩል ባለው ሳጥን ውስጥ ምልክት ያድርጉ።
☐	Karen / ကညီကျိာ်	[illegible]
☐	Arabic/ العربية	يحتوي هذا المستند على معلومات مهمة حول عملك. ضع علامة في المربع على اليمين للحصول على هذه المعلومات في هذه اللغة.

Translation providers approved by the Minnesota Department of Administration

Betmar Languages, Inc. 6260 Hwy. 65 N.E. Minneapolis, MN 55432 763-572-9711 best@betmar.com	**The Bridge World Language Center, Inc.** 110 Second Street S., #308 Waite Park, MN 56387 320-259-9239 mini@bridgelanguage.com	**Fox Translation Services** 1152 Mae Street, #122 Hummelstown, PA 17033 866-369-1646 or 407-733-3720 dina@foxfoxcasemanagement.com
Global Translation and Interpreter 913 E. Franklin Ave., #206 Minneapolis, MN 55404 612-722-1244 sandor@globaltranslations.com	**Latin American Translators Network, Inc.** 1720 Peachtree Street N.W., #532 Atlanta, GA 30309 800-943-5286, ext. 8641, translations@latn.com 800-943-5286, ext. 8620, idenis@latn.com	**Latitude Prime, LLC** 80 S. Eighth Street, #900 Minneapolis, MN 55402 888-341-9080, ext. 501 elle@latitude.com
Lingualinx Language Solutions, Inc. 433 River Street, #6001 Troy, NY 12180 518-388-9000 abartlett@lingualinx.com	**Prisma International, Inc.** 1128 Harmon Place, #310 Minneapolis, MN 55403 612-349-3111 jromano@prisma.com	**Swits, LTD** 110 S. Third Street Delavan, WI 53115 262-740-2590 translations@swits.us

Available at https://www.dli.mn.gov/sites/default/files/pdf/employee_notice_form.pdf

"Wage Notice" Form (cont.)

The wage notice form must include **9 elements**:

- (1) the ***rate or rates of pay*** and ***basis thereof***, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method, and the specific application of any additional rates;
- (2) allowances, if any, claimed pursuant to permitted meals and lodging;
- (3) paid vacation, sick time, or other paid time-off accruals and terms of use;
- (4) the employee's employment status and whether the employee is exempt from minimum wage, overtime, and other provisions of chapter 177, and ***on what basis***;

"Wage Notice" Form (cont.)

- (5) a list of deductions that may be made from the employee's pay;
- (6) the number of days in the pay period, the regularly scheduled pay day, and the pay day on which the employee will receive the first payment of wages earned;
- (7) the legal name of the employer and the operating name of the employer if different from the legal name;
- (8) the physical address of the employer's main office or principal place of business, and a mailing address if different; and
- (9) the telephone number of the employer.

DOLI FAQs

3. What does "on what basis" mean in Minn. Stat. 181.032(d)(4)?

"On what basis" means the employer must include in the written notice provided to an employee the legal basis for the exemption from minimum wage, overtime and other provisions of Minn. Stat., Chapter 177.

4. Can an employer meet employee notice obligations by providing or referring to a collective bargaining agreement, handbook or policy?

The initial written notice does not need to be provided by the employer in a specific format or on a specific form. In fact, the reference to and provision of an applicable collective bargaining agreement, policy or handbook may be used to satisfy the information required in the initial employee notice or written change notice if the contract, policy or handbook being provided includes enough specifics for the employee to determine the information required to be in the notice as applied to them. Here are a few examples of this in practice:

DOLI FAQs

11. Should management employees be given the written notice required by the Wage Theft Prevention Act or would they be excluded under the executive/professional /administrative employee designation? Who is covered by these requirements, which types of "employees"?

The Wage Theft Prevention Act requires that employers provide the written notice to all employees.

15. Is emailing the initial written notice to an employee sufficient to meet the signature requirement?

No, the Wage Theft Prevention Act requires the written notice be signed by an employee acknowledging receipt of the written notice.

DOLI FAQs

33. What is the consequence to employers if employees receive changes to the employee written notice after the changes have gone into effect?

This will depend on the facts of the situation and the consequences for employees who were not provided the written notice before the changes went into effect. Employers who violate the employee notice and recordkeeping requirements may be issued a Commissioner Order to Comply that imposes remedies provided for in Minn. Stat. section 177.27 and civil recordkeeping penalties. Employees may also bring a private civil action seeking similar remedies and penalties.

34. The employee notice must include "a list of deductions that may be made from the employee's pay." How comprehensive does this information need to be? Does the exact dollar amount of the deductions need to be listed?

The written notice should identify all of the deductions that may be made by the employer from an employee's pay. The amount of each deduction does not need to be indicated in the written notice. A list of deductions, including the amount of the deduction, is required in the statement of earnings that must be provided to the employee by the employer at the end of each pay period.

Revised Recordkeeping Requirements

- Employers must now keep additional employment records, including:
  - The basis of pay (hourly, salary, piece rate, etc.);
  - Personnel policies provided to the employee (including the date the policies were given to the employee) and a brief description of the policies; and
  - A signed copy of each employee's wage notice form.

Revised Recordkeeping (cont.)

- The law requires that all records be available for inspection and must be kept in a place where employees are working or kept in a manner that allows the employer to comply with a demand for inspection within 72 hours.
- New maximum fine of $5,000 for repeat violations of recordkeeping requirements.
- Prohibition on retaliation:
    - The law provides additional retaliation protections for employees who assert rights under the MFLSA and Minn. Stat. §§ 181.01 to 181.723, or 181.79.

New MN-DOLI Authority

- The law allows the MNDOLI Commissioner to enter an employer's place of business, during working hours, to investigate violations of various Minnesota statutes related to labor standards and wages, employment, child labor, and employment agencies.
- Authority includes the ability to collect evidence of potential violations and interview witnesses.

Revised Earning Statements

- New information required on an employee's earning statement, which must provided to each employee at the end of a pay period:
  - Rate or rates of pay and "***basis thereof***" (hourly, salary, piece rate, etc.);
  - Any allowances for meals or lodging; and
  - The employer's address and phone number.

Hull v. ConvergeOne, Inc.,

2021 WL 5180189 (D. Minn. Nov. 8, 2021)

- Hull, a Utah resident, was hired by CovergeOne as a salesperson.
- Hull was subject to commissions plans in 2017 and 2019.
- Hull alleged that ConvergeOne deliberately underpaid him millions of dollars in commissions.
- Hull sued under Minn. Stat. § 181.032 (earnings statements), § 181.03 (failing to pay commissions), § 181.101 (retaliation).
- ConvergeOne moved to dismiss.

Hull, (cont.)

- Court first denied ConvergeOne's motion on the basis that Hull's employment was not covered by Minnesota law.
- Court noted that Hull alleged that "he attended a four-day mandatory training session in Minnesota, that he receive[d] ongoing guidance, supervision, and direction from his Minnesota supervisors, and that he regularly attend[ed] virtual meetings and conference calls with colleagues in Minnesota."
- Court noted that, like the MHRA, the MPWA "contains no express provision extending its application beyond the borders of the state."
- Citing Wilson v. CFMOTO Powersports, Inc. (D. Minn. 2016), court noted that these contacts could be sufficient.

Hull, (cont.)

- Court denied ConvergeOne's motion to dismiss § 181.032 claim.
- Court rejected ConvergeOne's argument that § 181.032 only requires an employer to provide an earnings statement that indicates the general "***basis***," or foundation, of an employee's pay.
- The Court found that that "basis," as used in § 181.032, is unclear.
  - It could refer only to the general type of payment, i.e., hourly pay, salary, commissions, etc.,
  - It could also refer to the formula used to determine commissions or pay.
- Held that Hull's allegations – that ConvergeOne failed to explain the basis for his commissions – "fall within the scope of the statute."

Timing of Payment and Commissions

- All earnings – including salary and gratuities – must be paid at least every 31 days.
- All earned commissions must be paid at least once every three months.
- New law removes the 15-day maximum penalty for an employer's failure to pay wages upon an employee's demand.
    - Potentially ***unlimited*** penalties after a 10-day notice period, and 1/15 penalty for earned but unpaid commissions after 10-day notice period.

2019 Minn. Law 1st Sp., ch. 7

181.101 WAGES; HOW OFTEN PAID.

(a) Except as provided in paragraph (b), every employer must pay all wages, including salary, earnings, and gratuities earned by an employee at least once every 31 days and all commissions earned by an employee at least once every three months, on a regular payday designated in advance by the employer regardless of whether the employee requests payment at longer intervals. Unless paid earlier, the wages earned during the first half of the first 31-day pay period become due on the first regular payday following the first day of work. If wages or commissions earned are not paid, the commissioner of labor and industry or the commissioner's representative may serve a demand for payment on behalf of an employee. In addition to other remedies under section 177.27, if payment of wages is not made within ten days of service of the demand, the commissioner may charge and collect the wages earned at the employee's rate or rates of pay or at the rate or rates required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater, and a penalty in the amount of the employee's average daily earnings at the same rate ~~agreed upon in the contract of employment, not exceeding 15 days in all,~~ or rates for each day beyond the ten-day limit following the demand. If payment of commissions is not made within ten days of service of the demand, the commissioner may charge and collect the commissions earned and a penalty equal to 1/15 of the commissions earned but unpaid for each day beyond the ten-day limit. Money collected by the commissioner must be paid to the employee concerned. This section does not prevent an employee from prosecuting a claim for wages. This section does not prevent a school district, other public school entity, or other school, as defined under section 120A.22, from paying any wages earned by its employees during a school year on regular paydays in the manner provided by an applicable contract or collective bargaining agreement, or a personnel policy adopted by the governing board. For purposes of this section, "employee" includes a person who performs agricultural labor as defined in section 181.85, subdivision 2. For purposes of this section, wages are earned on the day an employee works. This section provides a substantive right for employees to the payment of wages, including salary, earnings, and gratuities, as well as commissions, in addition to the right to be paid at certain times.

Hull, (cont.)

- Court denied ConvergeOne's motion to dismiss § 181.101 claim.
- Court noted that § 181.101 provides "a ***substantive right*** for employees to the payment of wages, including salary, earnings, and gratuities, as well as commissions, in addition to the right to be paid at certain times."
- ConvergeOne argued that Hull's claim failed because Hull "fail[ed] to allege the DLI made a claim for payment that went unpaid."
- Court rejected he argument, noting that "the statute clearly gives employees a substantive right to bring a private action in response to a wage dispute, regardless of any action or inaction by the DLI."

Hull, (cont.)

- Court noted that enforcing the waiting-time "penalty" may be limited to DLI enforcement:
  - "While ***the ability to enforce a penalty is limited to the DLI***, with any collected funds going to the employee, id., Hull does not allege that he is entitled to collect a penalty."
- Minn. Stat. § 181.171 provides:
  - "A person may bring a civil action seeking redress for violations of sections . . .181.03, . . .***181.032***, . . . ***181.101*** . . . 181.13, 181.14, 181.145 . . . directly to district court. An employer who is found to have violated the above sections is liable to the aggrieved party for the ***civil penalties*** or ***damages*** provided for in the section violated. . . . ."
  - Also liable for "***compensatory damages***" and "***attorneys fees***."

New Attorney General Authority

- Wage Theft Act gave the Attorney General authority to enforce Minn. Stat. ch. 177 and 181 under Minn. Stat. § 8.31.
- Minn. Stat. § 8.31
  - Attorney general has the power to investigate violations of law when it has "a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of this state" referenced in the statute.
  - Able to issue a Civil Investigative Demand (CID) without initiating a lawsuit.

New Attorney General Authority

Wage Theft

The Office of the
Minnesota Attorney General
helping people afford their lives and live with dignity and respect

What Is Wage Theft?

Wage theft occurs any time an employer does not pay an employee everything the employee is owed by law.

Nationally, employees are underpaid by as much as $50 billion dollars each year due to wage theft. No group of workers is immune from wage theft, but low-wage workers are particularly vulnerable. Wage theft can take as much as 10% of a low-wage worker's annual earnings.

Unauthorized Deductions from Paychecks

Sometimes, an employer may deduct wages from an employee's paycheck for lost, damaged, or stolen property or for some other claimed indebtedness. This practice is wage theft unless the worker has authorized, in writing, their employer to make that deduction.

Worker Misclassification

Some employers attempt to avoid legal obligations to workers by classifying them as independent contractors.

Madison Equities v. Office of Attorney General,

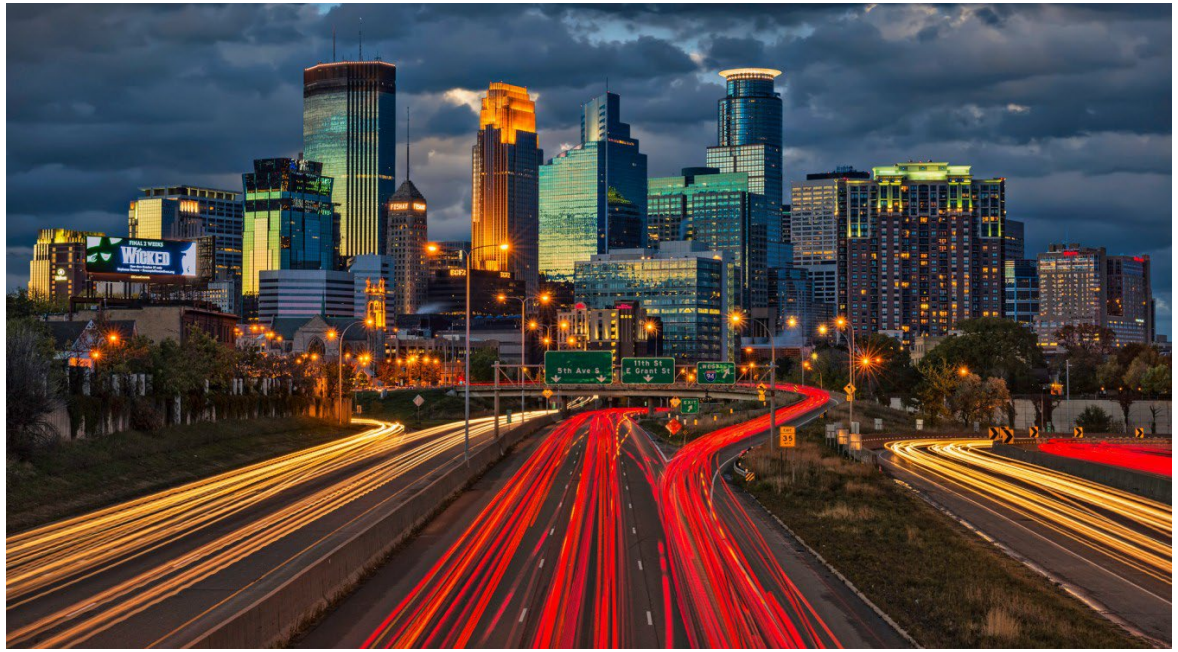
2021 WL 79337 (Minn. Ct. App. Jan. 11, 2021)

- Security Guards alleged that they were instructed to work at different facilities when they approached 40 hours, but were not paid overtime.
- Attorney General commenced an investigation under Minn. Stat. § 8.31 and sought data from Madison Equities.
  - Attorney general has the power to investigate violations of law when it has "a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of this state"
- Madison Equities moved for a protective order.

Madison Equities , (cont.)

- Court of appeals affirmed in part and reversed in part:
  - 1) The attorney general may obtain information related to the following entities: Madison Equities, First Bank Building LLC, Alliance Center LLC, and U.S. Bank Center LLC.
  - 2) The attorney general may obtain information related only to those individuals who were or are employed by Madison Equities as security guards.
  - 3) The attorney general may obtain information dating back three years from the filing of the CID.
- Madison Equities petitioned the Minnesota Supreme Court for review, which was granted.

MPLS “Wage Theft” Ordinance

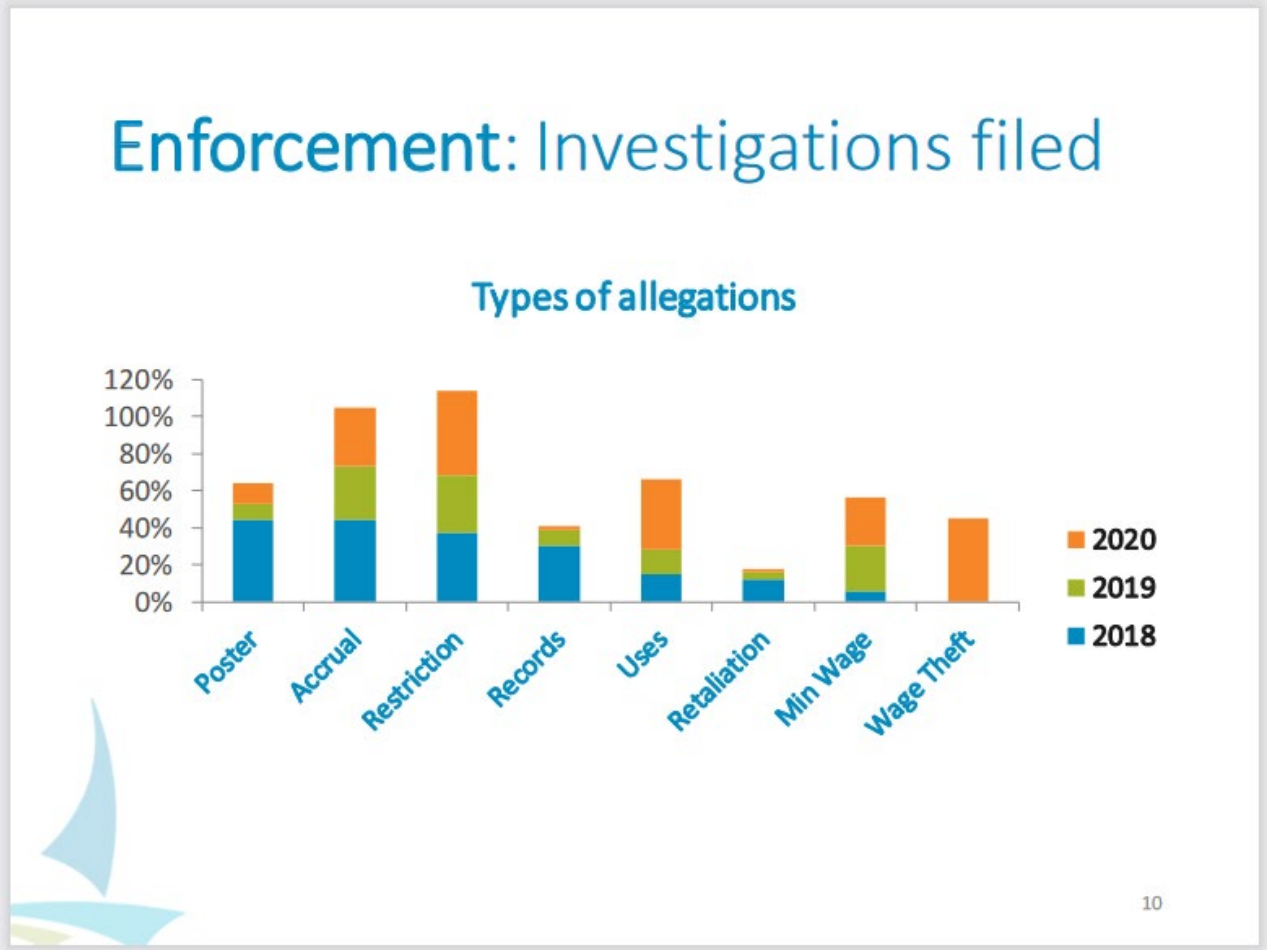


Minneapolis Wage Theft Ordinance

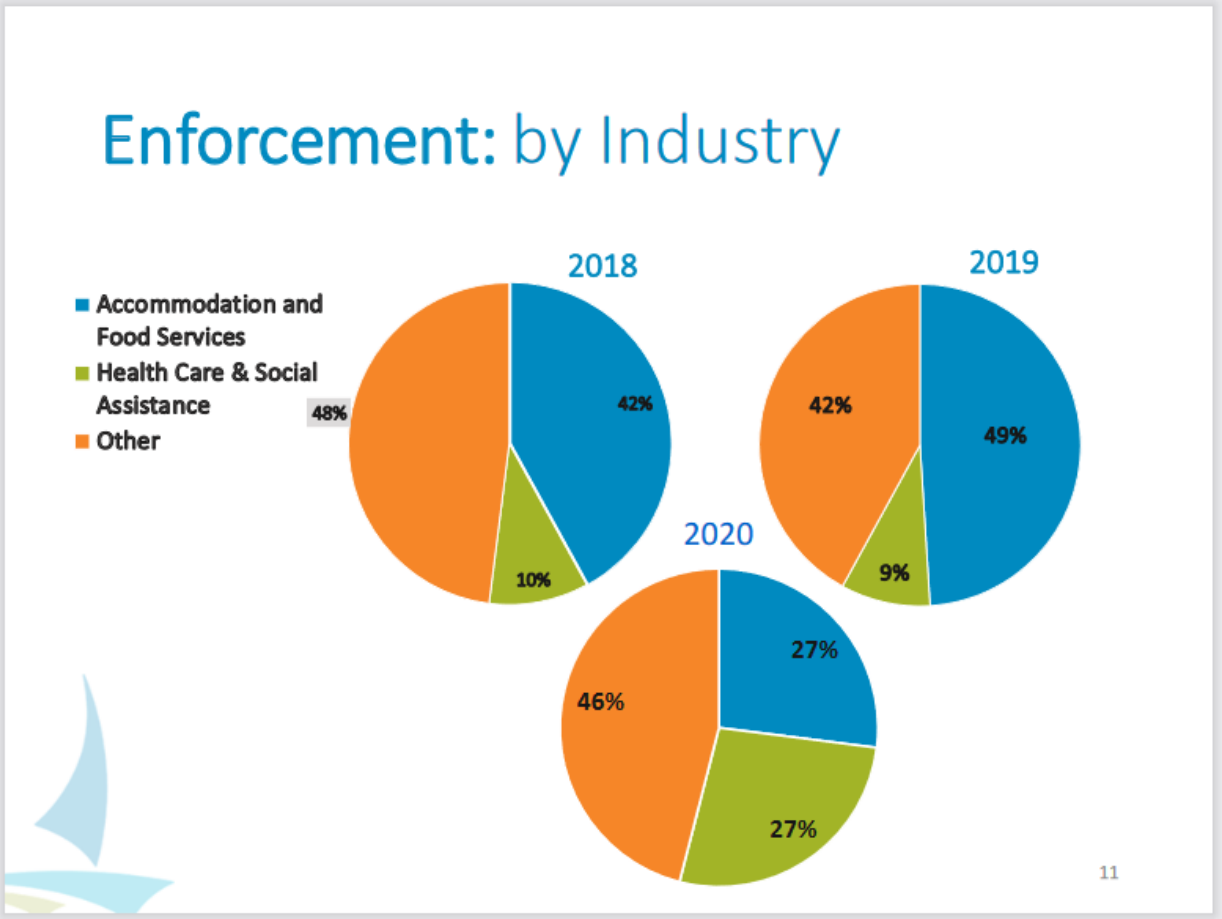
- The City of Minneapolis's wage theft ordinance went into effect on ***January 1, 2020***.
- Applies to any employee who works for an employer for at least 80 hours per year within the geographic boundaries of the City of Minneapolis.
- Enforced by the Minneapolis Civil Rights Department, Labor Standards Division.

MPLS Labor Standards Statistics

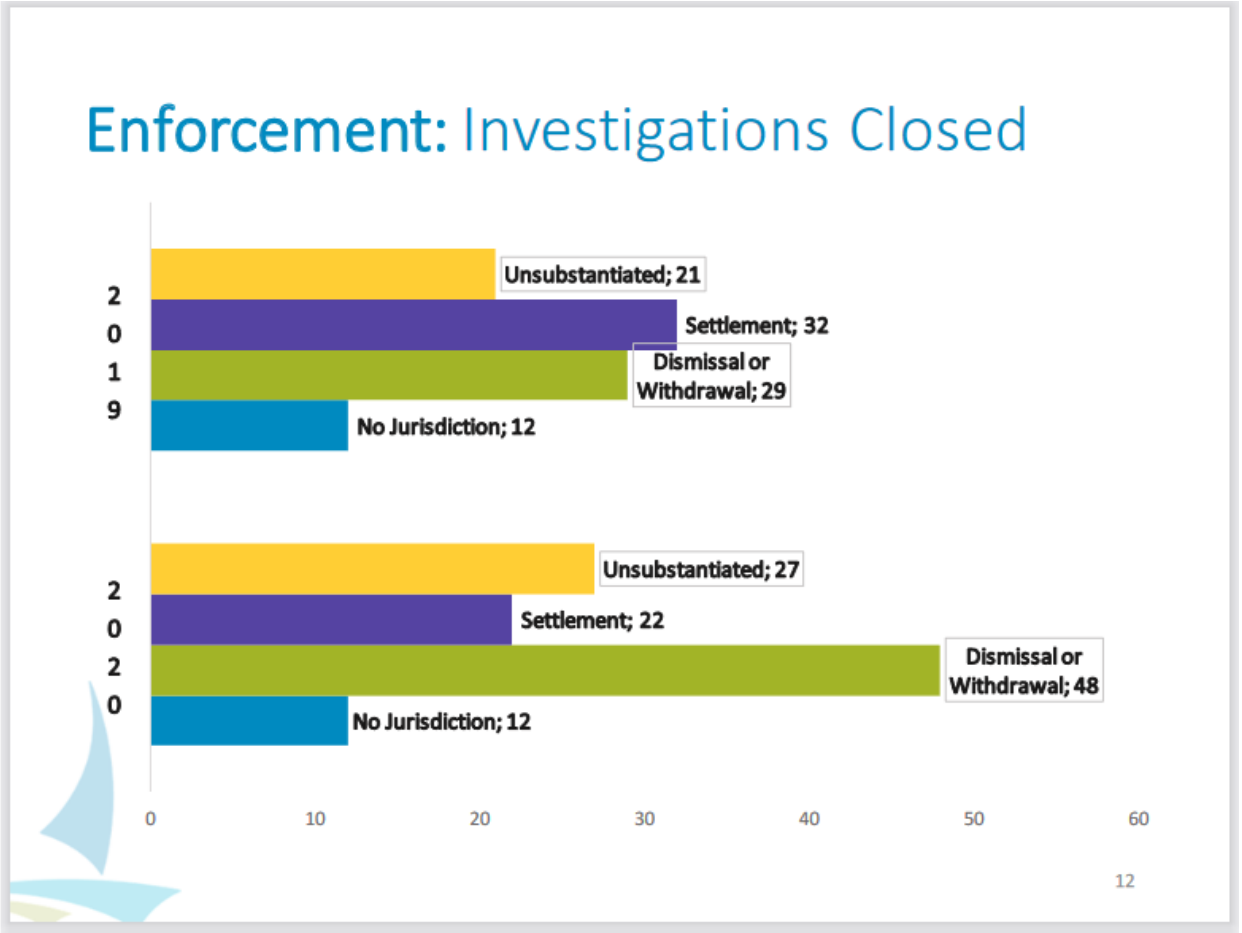
MPLS Stats (cont.)



MPLS Stats (cont.)



MPLS Stats (cont.)



MPLS Stats (cont.)

MPLS Wage Theft Ordinance

- Similar to the Minnesota Wage Theft law:
  - (1) Prohibits “wage theft”;
  - (2) Requires employers to provide “pre-hire” notices and “supplemental” notices; and
  - (3) Requires employers to provide “statement of earnings” at the end of each pay period.

MPLS Wage Theft (cont.)

- MPLS "Pre-Hire" Notices must include:
  - All information required by state law.
  - Date on which employment is to begin (unless cannot be determined ahead of time despite reasonable diligence).
  - For non-exempt employees, number of hours for overtime to apply and applicable rate.
  - Statement that tip sharing is voluntary, per state law.

MPLS Wage Theft (cont.)

- MPLS "Pre-Hire" Notices must include:
  - Rights under Minneapolis SST (or info regarding other sick or PTO policy used to comply with SST), which must include the following elements:
    - (1) the method of accrual;
    - (2) the date of use, and
    - (3) the benefit year.
- Must be ***signed*** (or e-signed) by the employee.

MPLS Wage Theft (cont.)

- Unlike the Minnesota statute, the Minneapolis ordinance requires that employers provide the same notice to ***all current employees on or before the first pay period of 2020***.
- The only exception is if the employer previously provided the employee with "all of the information contained in the prehire notice."

Q: Are employers required to provide current employees with the prehire notice?

A: Yes, current employees are covered by the ordinance as of its effective date of January 1, 2020. Any current employee, as of January 1, 2020, who did not previously receive all the required information (including notice of the employer's sick leave, paid time off, or other time off policy which meets Sick and Safe Time ordinance requirements) ***must be provided with a pre-hire notice no later than during the first full pay period of 2020***. Current employees who were ***already provided with all of the information required by the prehire notice*** (even if it was not all provided in a single notice) do ***not*** need to receive the information a second time.

MPLS Wage Theft (cont.)

- MPLS "Supplemental" Notices
  - Like state law, the Minneapolis ordinance requires an employer to provide notice of "any changes to the information contained" in the original pre-hire notice.
- Unlike state law, supplemental notices must be ***signed*** (can be e-signed) by employee.
  - The only exception is for a wage increase if, in advance of the increase, the employee received notice of the amount and date of the increase.

MPLS Wage Theft (cont.)

- Notice Poster
  - In addition to physically posting the notice, the employer must provide each new employee with a copy of the city's notice poster.
  - FAQs provide that new employees must receive a copy of the notice in "in electronic or printed form . . . no later than the first date on which the employee begins performing work for the employer."

CITY OF MINNEAPOLIS

NOTICE TO EMPLOYEES

Minneapolis Labor and Employment Rights

Minimum Wage Scheduled Increases

	100 or Fewer Employees	More than 100 Employees
	Small Business	Large Business
Jan. 1, 2018	—	$10.00
July 1, 2018	$10.25	$11.25
July 1, 2019	$11.00	$12.25
July 1, 2020	$11.75	$13.25
July 1, 2021	$12.50	$14.25
July 1, 2022	$13.50	$15.00*
July 1, 2023	$14.50	
July 1, 2024	Equal to Large* Business	

*Increases to account for inflation, every subsequent January 1st.

Sick and Safe Time

- Sick and Safe Time is access to time off work for Sick and Safe Time purposes.
- All types of employees, including part-time, qualify.
- One hour accrues for every 30 worked, capped at 48 per year and 80 overall (yearly and overall caps operate simultaneously).
- Employers must compensate for use at employees' base rate, except if they employ fewer than 6 employees.
- Hours begin accruing on 1st day of work and may be used on the 90th day of employment.

Sick Time
- Illness
- Injury
- Medical rest
- Recuperation
- Appointment

Safe Time
Time off for an appointment to address domestic violence or sexual assault

Sick or Safe Time Care of a Family Member

Family Member Place-of-care Closure
Due to inclement weather or unexpected emergency

Working. Thriving. Together.

Help make Minneapolis a healthier, more secure, and more productive community.

Report Violations

Please report information about exploitation of workers in Minneapolis:

Dial 311, file online at minimumwage.minneapolismn.gov or sicktimeinfo.minneapolismn.gov, or visit 350 S. Fifth St. (City Hall) Rm. 239

Retaliation Prohibited

It is unlawful for an employer to restrain, prevent, or deny the exercise of any right protected under the Minneapolis Minimum Wage or Sick and Safe Time Ordinances.

Minneapolis
City of Lakes

THIS POSTER MUST BE DISPLAYED WHERE EMPLOYEES CAN EASILY READ IT
(This poster may be printed on 8 ½" x 11" letter size paper. Download it at minimumwage.minneapolismn.gov or sicktimeinfo.minneapolismn.gov.) More questions? We're here to help: sicktimeinfo@minneapolismn.gov, minimumwage.minneapolismn.gov or call 311.

For reasonable accommodations or alternative formats please contact the Minneapolis Civil Rights Department at 612-673-3012. People who are deaf or hard of hearing can use a relay service to call 311 at 612-673-3000. TTY users can call 612-673-2157 or 612-673-2626. **Para asistencia 612-673-2700, Yog xav tau kev pab, hu 612-673-2800, Hadii aad Caawimaad u baahantahay 612-673-3500.**

MPLS Wage Theft (cont.)

- MPLS Statement of Earnings
  - In addition to the information that is required by state law, the Minneapolis ordinance also requires that employers provide “the number of hours of Sick and Safe Time accrued and used by the employee.”
  - If using PTO, employer should list both the balance and the number of PTO hours used for the year.

MPLS Wage Theft (cont.)

- Employers may provide the pre-hire notices, the supplemental notices, and the earning statements ***electronically***.
- But, employees have the right to request them in writing.

MPLS Wage Theft (cont.)

- Ordinance also incorporates state overtime, meal break, and rest break standards.
- This means that the city may pursue relief for employees on its own instead of turning the case over to state officials.

MPLS Wage Theft (cont.)

- Ordinance provides for the publication of a list of entities with "outstanding wage obligations," including unpaid relief to employees or fines.
- Entities on the list will be barred from entering into contracts or bonds with the city and are risk of losing their city license.

Freelance Worker Ordinance

- Effective January 1, 2021.
- Requires businesses to enter into written agreements with particular requirements with most “freelance workers.”
- Applies to “commercial hiring parties” and “individual hiring parties.”
- “Freelancer” is defined to 1099 workers and sole proprietors.

Hospitality Worker Right to Recall

- Effective May 1, 2021.
  - Expires 1 year after expiration of Gov.'s peacetime emergency and local public health emergency.
- Requires covered hospitality industry employers to hire qualified employees who were laid off first, unless those employees reject that position or fail to respond.
- Is it preempted by a CBA?

What parts of the hospitality industry are covered?

Under the ordinance, only hotels and event centers located within the City of Minneapolis that are covered if they meet the following criteria:

- Large hotels (offering more than 50 guest rooms)
- Event centers (offering 50,000 rentable square feet or 2,000 seats)

Who is protected under the ordinance?

Any employee who meets all three of the following conditions for the same covered employer is protected:

- Performed work for at least 6 months from March 13th, 2019 to March 13th, 2020 (at least 80 of which were in the city);
- Last day of work was *after* March 13th 2020.; and
- Was separated from empoyment due to a economic, non-discretionary reason.

Dept. of Labor

Wage and Hour Division

Secretary of Labor Martin J. Walsh

- Former Mayor of the City of Boston.
- Labor leader, including:
  - president of the Laborers' Union Local 223;
  - Head of the Building and Construction Trades Council.

Adopting PRO-Act and ABC Test

- PRO Act would adopt the ABC Test.
- ABC Test requires employers to prove ***each*** element to be an independent contractor:
  - (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; **AND**
  - (B) the service is performed outside the usual course of the business of the employer; **AND**
  - (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

ABC Test (cont.)

- Protecting the Right to Organize Act of 2021 ("PRO Act")
  - Passed in the House in March 2021.
  - Stalled in the Senate.
- Not included in the latest iteration of the "Build Back Better" Budget Reconciliation Bill
  - Reduced from $3.5 trillion to roughly $2 trillion.
  - Likely could not be included per Senate parliamentarian.

Joint Employer Rule Withdrawn

- On July 29, 2021, the DOL rescinded the Trump-era "joint employer" rule.
  - DOL did not replace the guidance.
  - Instead, courts should revert back to DOL's 1958 guidance, 29 CFR part 791.
- Forthcoming guidance will likely follow Obama-era "joint employer" standard:
  - Browning-Ferris Industries of California, Inc. (2015)
  - 2016 Administrator's Interpretation

Minimum Wage and Salary Threshold

- Biden administration will likely seek increases to the federal minimum wage.
  - Currently $7.25 and has not been raised since 2009.
- Biden administration will likely seek increases to the salary threshold for exempt workers.
  - Currently $35,568 ($107,432 for HCEs)
  - In 2016, Obama administration proposed to increase to $47,476 ($134,004 for HCEs).

Tipped Employees

- DOL issued final rule on October, 29, 2021.
  - Restores the “80/20” rule.
- “80/20 Rule” Categories
  - (1) **Job duties that directly produce tips** (e.g., taking orders, cleaning hotel rooms, etc.)
  - (2) **Job duties that directly support tip-producing work** (e.g., bussing tables, filling salt and pepper, rolling silverware, etc.);
  - (3) **Any other job duties**.

Tipped Employees

- Tip Credit can be applied to:
  - Any time in Category #1
  - Any time in Category #2, provided it "is not performed for a ***substantial amount of time***."
- The DOL defines "substantial amount of time" as:
  - Exceeding 20% of the employee's workweek ***or***
  - Performed for a continuous amount of time exceeding 30 minutes.
- No tip credit for Category #3.

Paid Family Leave

- Initially, the Biden administration supported a program that provides **12 weeks** of paid family and medical leave for all workers.
- "Build Back Better" Budget Reconciliation Bill
  - In early November, the House bill included 4 weeks of paid leave.
  - Sen. Manchin stated he would not budge on his position on the provision, telling reporters, "I just can't do it."

2022 Trends

- MN Legislature (reconvenes on Jan. 31, 2022)
  - Updates to the Wage Theft law?
  - Recreational Marijuana?
  - Ban on non-competes?
  - Ban on salary history?
  - ABC Test?

2022 Trends (cont.)

- Drug Testing
  - In 2018, Maine became first state to protect workers from adverse employment action based on their use of marijuana and marijuana products, provided the use occurs away from the workplace.
  - Other cities have banned pre-employment drug screening for marijuana, including: New York City, Atlanta, New York City and Washington, D.C., and Philadelphia.

2022 Trends (cont.)

- Salary History
  - 21 states and 21 local jurisdictions prohibit requesting an applicant's salary history.
- Sexual Harassment Training
  - Six states – California, Connecticut, Delaware, Illinois, Maine, and New York – and one city – New York City – mandate sexual harassment training for some or all private-sector employees.

QUESTIONS?

Thank you.