



ATTORNEYS AT LAW

# COVID-19 Vaccine Rollout and Mandatory Policies





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## FDA Issues EUAs

- **Pfizer**
  - EUA issued on Dec. 11, 2020
  - BLA application expected “in the first half of 2021”
- **Moderna**
  - EUA issued on Dec. 18, 2020
  - BLA application expected “in the first half of 2021”
- **Johnson & Johnson**
  - EUA issued on Feb. 27, 2021
  - CDC and FDA recommend “pause” on April 13, 2021

## Vaccine Rollout





## COVID-19 Vaccine Summary

Summary

Who's Getting Vaccinated

Race/Ethnicity

Distribution

Vaccines Administered

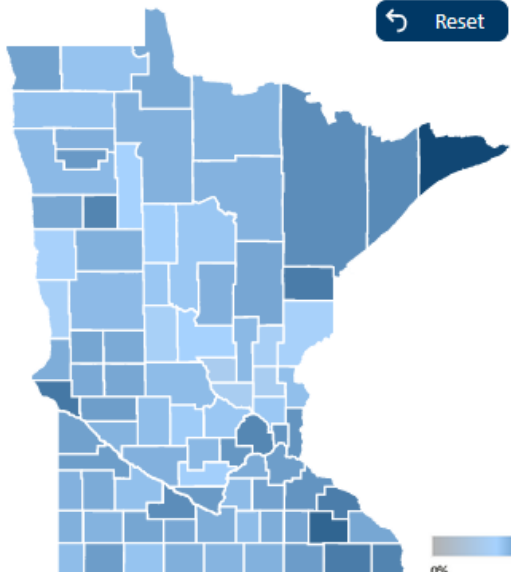
Provider Goals

16+

65+

Total population

Reset



## Statewide Data

Click on a county to narrow results. Data reported as of 4/19/2021.



People with at least one vaccine dose

2,324,241



People with completed vaccine series

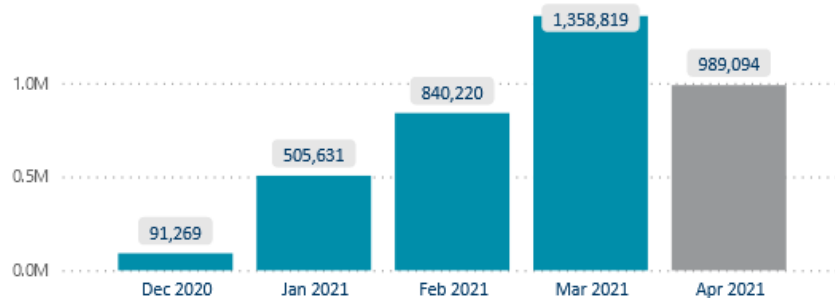
1,648,311

## Vaccine Doses Administered

Monthly

Weekly

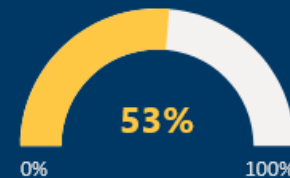
Daily



## Percentage of doses administered by providers

3-day goal:  
90%7-day goal:  
100%

## 16+ with at least one dose





TUESDAY, MARCH 30:  
**Every Minnesotan age 16 years and older  
is eligible to get their shot**

## WINTER

- Health care personnel
- Long term care residents

## FEBRUARY

- Pre-k to 12 grade educators and child care
- People age 65 years and older

## MARCH

- People with specific underlying medical conditions
- Targeted essential workers
- People with rare conditions or disabilities that put them at higher risk

- People 45-64 with one or more underlying medical conditions
- People 16-44 with two or more underlying medical conditions

- Essential frontline workers
- People age 50 and over in multi-generational housing

## NOW

- People age 16 years and over with any underlying medical condition
- Age 50-64 (regardless of health condition)

- General public
- All other essential workers



ROLL UP YOUR SLEEVES, MINNESOTA



## All US adults now eligible for COVID-19 vaccine

Filed Under: [COVID-19](#)

[Stephanie Southery](#) | [News Reporter](#) | [CIDRAP News](#) | [Apr 19, 2021](#)



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During a press briefing today, Andy Slavitt, a senior White House pandemic adviser, expressed optimism about America's prospect of ending the pandemic.

"Things are about to get a whole lot easier," said Slavitt. Today in all 50 states, anyone over the age of 16 is eligible for the COVID-19 vaccine. The nation continues to vaccinate an average of 3 million Americans each day.

"Over 80% of seniors, and 50% of adults in the US had at least one dose," Slavitt said. "Lack of supply, lack of locations, confusing rules are all in the past."

Slavitt said the Biden administration has orchestrated 60,000 free and convenient places to get a shot, and 9 out of 10 Americans live within 5 miles of a vaccination site. And to ensure that momentum continues, Slavitt said the Department of Health and Human Services is getting \$150 million in funds to give to community health providers to get shots into arms.



Governor Tom Wolf / Flickr cc



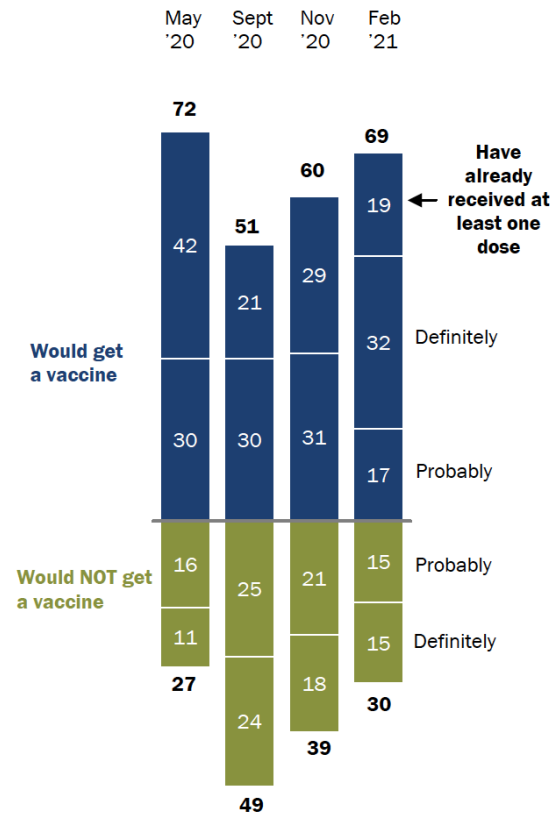
## Vaccine Hesitancy Remains

- February 2021 Pew Research Poll:
  - 69% said they would “definitely” or “probably” get a COVID-19 vaccine.
  - 30% said they would “definitely” or “probably” **not** get the COVID-19 vaccine.



## Half of Americans intend to get a COVID-19 vaccine; 19% already have

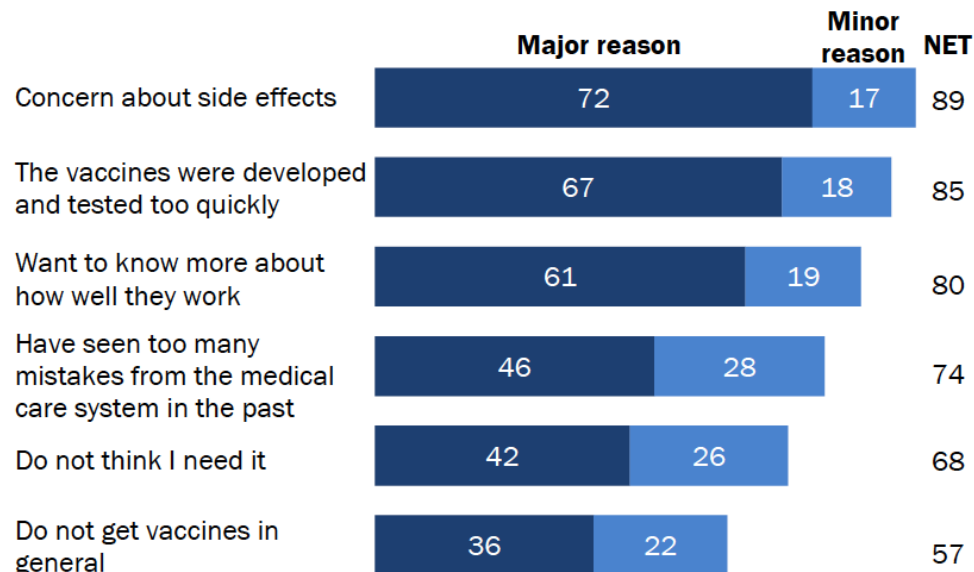
% of U.S. adults who say, thinking about vaccines to prevent COVID-19, they ...





## Those disinclined to be vaccinated cite concerns about side effects, pace of vaccine development and desire for more information as top reasons why

*Among the U.S. adults who say they probably/definitely will NOT get a vaccine to prevent COVID-19, % who say each of the following is a major/minor reason*



Note: Based on those who say they definitely/probably will NOT get a vaccine to prevent COVID-19. Respondents who gave other responses or did not give an answer are not shown.

Source: Survey conducted Feb. 16-21, 2021.

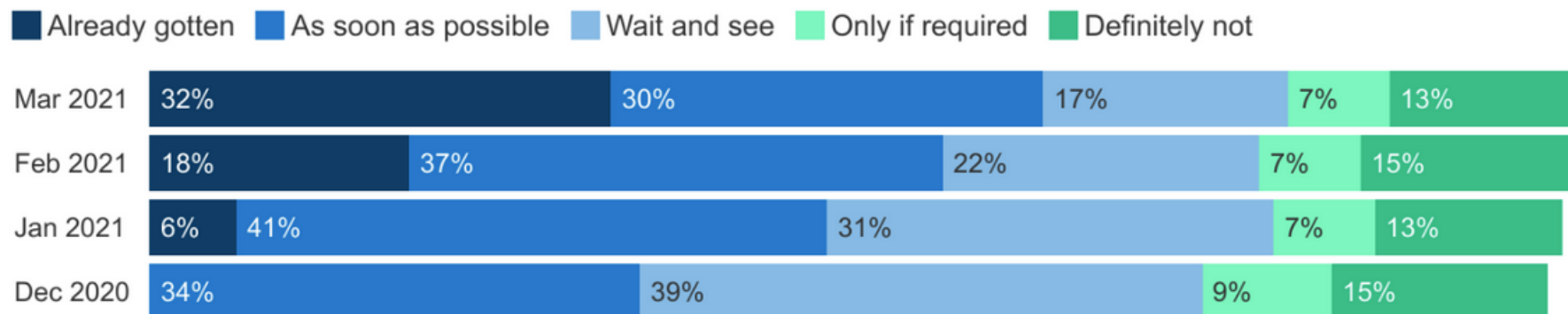
"Growing Share of Americans Say They Plan To Get a COVID-19 Vaccine – or Already Have"

PEW RESEARCH CENTER



## One-Third Report Having Received At Least One COVID-19 Vaccine Dose; Share Wanting To "Wait And See" Continues To Shrink

Have you personally received at least one dose of the COVID-19 vaccine, or not? When an FDA authorized vaccine for COVID-19 is available to you for free, do you think you will...?



NOTE: December 2020 survey did not have an option for respondents to indicate they had already been vaccinated. See topline for full question wording.

SOURCE: KFF COVID-19 Vaccine Monitor (March 15-22, 2021)

**KFF COVID-19  
Vaccine Monitor**



# Planning for Employer Vaccination Policies





## Educate and Engage Employees

- Prepare employees for your organization's policies relating to the COVID-19 vaccine.
- Begin a process of educating and engaging employees about the vaccine, its efficacy, and safety.
- CDC has a “toolkit” for employers.



# CDC Resources



Centers for Disease Control and Prevention  
CDC 24/7: Saving Lives, Protecting People™



## COVID-19

ACT NOW!



WEAR A MASK



STAY 6 FEET APART



AVOID CROWDS



Your Health

Vaccines

Cases & Data

Work & School

Healthcare Workers

Health Depts

More

### Vaccines

Key Things to Know



Information for Specific Groups



What to Expect at Your Vaccine Appointment



Benefits of Getting Vaccinated

Different Vaccines



Ensuring the Safety of Vaccines



Ensuring Vaccines Work

How Vaccines Get to You



## Essential Workers COVID-19 Vaccine Toolkit

Information for Employers and Employees

Updated Mar. 1, 2021

[Languages](#)

[Print](#)

CDC will continue to add more materials to this toolkit. Please check back frequently for updates.

### On This Page

[How to Start Promoting Vaccines](#)

[Printable Stickers](#)

[Resources to Communicate with Your Employees](#)

[Social Media](#)

[Flyers & Posters](#)

[How do I get a vaccine web widget](#)



## CDC Resources(cont.)

- CDC's provides:
  - Sample letter to employees.
  - Sample newsletter content.
- “Myths & Facts” regarding COVID-19 vaccine.
- V-Safe Program.



## Vaccine Planning

- Survey your workforce about the vaccine.
- How many are going to voluntarily receive the vaccine?
- How many would like more information regarding the vaccine.
  - Educate, educate, educate.



## Avoid ADA Issues

- Vaccination Status Survey
  - Not a medical inquiry per se, but survey should ensure that the individual does not explain “why” not receiving a vaccine.
  - Warn employees not to provide any medical information.
- Employee’s response may be considered confidential medical information under ADA.



## Vaccine Planning (cont.)

- Send out an FAQ on the COVID-19 vaccine.
  - See “CDC Toolkit”
- Offer training about the vaccine, de-myth the issue.
  - See CDC “Myths and Facts”



## Vaccine Planning (cont.)

- Survey after the training and FAQs to see if you have the figures have changed.
- In our experience:
  - 50-60% before training.
  - 70-80% after training.
- In our experience with other vaccines, over 90% is generally very difficult without mandating.

# Vaccine Policy Considerations

- Mandatory vs. Non-Mandatory
- Scope
- Accommodations
- Pay and Reimbursement
- Labor Unions
- Workers' Comp
- Vaccine Incentives





## Perquisites to a Mandatory Vaccination Policy

- Before enforcing a mandatory vaccination policy, an employer will likely need to await two conditions:
  - ***(1) Full FDA approval/licensure; and***
  - ***(2) Sufficient COVID-19 vaccine available for the employee to receive the vaccine.***



## Legaretta v. New Mexico (2021)

- On Jan. 29, 2021, a government detention center in New Mexico announced that it was implementing a mandatory COVID-19 vaccination policy.
- Cites 21 U.S.C § 360bbb–3 (FD&C Act) regarding “the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product . . . .”



## Legaretta (cont.)

- Plaintiff withdrew TRO motion on March 29.
- Too early to tell whether there is any merit to the employee's claim under the FD&C Act.
- The suit is unique too because it involves a governmental employer and not a private company.
- Not clear whether the “***option to accept or refuse***” would apply to a private employer's vaccination mandate (as opposed to a government employer's mandate).



## Mandatory Policies

- Houston Methodist announced that it would implement a mandatory COVID-19 vaccination policy.
- 83% of 26,000 have received at least one shot.
- Managers and executives were required to be vaccinated by April 15.





## CDC's Vaccine FAQs

### **3 Will use of COVID-19 vaccines be mandated under Emergency Use Authorizations (EUAs)?**

No, the Food and Drug Administration (FDA) does not mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.

### **6 Can I require people to get vaccinated as a condition of work? Can I require proof if someone claims to have been vaccinated?**

Whether an employer may require or mandate COVID-19 vaccination is a matter of state or other applicable law. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof.



## **Mandatory Vaccination Policies**

- Condition enforcement on “availability of the vaccine.”
- Medical Accommodation Process
  - Application (verified by employee)
  - Medical Exemption Form (completed by medical provider)
    - Include GINA safe-harbor



## EEOC Guidance

**K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? (12/16/20)**

The ADA allows an employer to have a [qualification standard](#) that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.



If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies. See also [\*Section J, EEO rights relating to pregnancy\*](#).

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration.

Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, [www.askjan.org](http://www.askjan.org)<sup>cf</sup>. JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm><sup>cf</sup>.



Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in [Question K.7.](#), there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: [www.osha.gov/SLTC/covid-19/](http://www.osha.gov/SLTC/covid-19/).

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).



## CDC Guidance

4

### **Can I require my employees to get the COVID-19 vaccine regardless of their medical conditions or religious beliefs?**

The Equal Employment Opportunity Commission (EEOC) provides guidance on mandatory vaccination against H1N1 influenza. The EEOC guidance may be applicable to COVID-19 vaccination, which became available in December 2020.

For employers covered by the Americans with Disabilities Act (ADA), "...an employee may be entitled to an exemption based on an ADA disability that prevents him from taking the influenza vaccine."

For employers covered under Title VII of the Civil Rights Act of 1964, "once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship."

"Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it."

See question 13 for more information from the EEOC, available at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>



## Mandatory Policies (cont.)

- Religious Accommodation Process
  - Application (verified by employee)
  - Explanation of religious beliefs and how they conflict with receiving the COVID-19 vaccine
  - Ask about other vaccinations



## **EEOC Guidance**

**K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief? (12/16/20)**

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.



## **EEOC Guidance**

**K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)**

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

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U.S.

## Covid-19 Vaccines Draw Warnings From Some Catholic Bishops

Archdiocese of New Orleans called Johnson & Johnson's shot 'morally compromised' because of its connection to embryonic cells



Churchgoers attended Ash Wednesday mass at St. Peter Claver Catholic Church in New Orleans on Feb. 17.

PHOTO: JON CHERRY/GETTY IMAGES



## Mandatory Policies (cont.)

- Scope
  - Consider exemption for permanent telecommuting employees.
- Pay
  - Time is likely compensable (since vaccination is a condition of employment).



## Mandatory Policies (cont.)

- Cost
  - Reimbursement may be required under Minn. Stat. § 181.61.
  - Although not clear that receiving a vaccination is a “medical examination.”



## Mandatory Policies (cont.)

- Labor Unions
  - Mandatory subject of bargaining.
  - If not prohibited by the CBA, employer can implement after providing the union with (1) notice and (2) opportunity to bargain.



## Mandatory Policies (cont.)

- Workers Comp
  - If an employer mandates that its employees receive the COVID-19 vaccine as a condition of continued employment, it is likely to be considered a compensable injury if the employee suffers a severe reaction.
  - See also Minn. Stat. § 176.011, subd. 16.



## WC Statute

§ Subd. 16. **Personal injury.** "Personal injury" means any mental impairment as defined in subdivision 15, paragraph (d), or physical injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of the injury and during the hours of that service.

Where the employer regularly furnished transportation to employees to and from the place of employment, those employees are subject to this chapter while being so transported. Physical stimulus resulting in mental injury and mental stimulus resulting in physical injury shall remain compensable. Mental impairment is not considered a personal injury if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Personal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment. An injury or disease resulting from a vaccine in response to a declaration by the Secretary of the United States Department of Health and Human Services under the Public Health Service Act to address an actual or potential health risk related to the employee's employment is an injury or disease arising out of and in the course of employment.



## OSHA Guidance

### Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

In general, an adverse reaction to the COVID-19 vaccine is recordable if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid).

### If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

If you *require* your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.



## OSHA Guidance

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

No. Although adverse reactions to *recommended* COVID-19 vaccines may be *recordable* under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to *required* vaccines at this time. Therefore, you do not need to record adverse effects from COVID-19 vaccines that you *recommend*, but do not require.

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended" and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment.

Note also that the exercise of this discretion is intended only to provide clarity to the public regarding OSHA's expectations as to the recording of adverse effects during the health emergency; it does not change any of employers' other responsibilities under OSHA's recordkeeping regulations or any of OSHA's interpretations of those regulations.

Finally, note that this answer applies to a variety of scenarios where employers recommend, but do not require vaccines, including where the employer makes the COVID-19 vaccine available to employees at work, where the employer makes arrangements for employees to receive the vaccine at an offsite location (e.g., pharmacy, hospital, local health department, etc.), and where the employer offer the vaccine as part of a voluntary health and wellness program at my workplace. In other words, the method by which employees might receive a recommended vaccine does not matter for the sake of this question.



## CDC FAQs

### **12 What should we tell employees to do if they develop a fever after getting vaccinated?**

Employees who experience a fever after vaccination should, ideally, stay home from work pending further evaluation, including consideration for COVID-19 testing. CDC has released guidance (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/post-vaccine-considerations-healthcare-personnel.html>), which includes suggested approaches to evaluating and managing post-vaccination symptoms, including fever.

### **13 What should I do if people call in sick with side effects?**

In most cases, discomfort after vaccination from fever or pain at the injection site is normal and lasts only a day or 2. You should encourage the employee to stay home and contact their doctor or healthcare provider if:

- The redness or tenderness where they got the shot increases after 24 hours
- Their side effects are worrying them or do not seem to be going away after a few days
- Learn about how to report a problem or bad reaction (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html#Safety>) after getting a COVID-19 vaccine.



# CDC FAQs

## 14 Should we tell employees to report vaccine side effects?

CDC and FDA encourage the public to report possible side effects (called “adverse events”) to the Vaccine Adverse Event Reporting System (<https://vaers.hhs.gov/reportevent.html>). Employers can also encourage employees to enroll in a new smartphone-based tool called “v-safe” (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/vsafe.html>). CDC is implementing v-safe to check in on people’s health after they receive a COVID-19 vaccine. When employees receive a vaccine, they should also receive a v-safe information sheet telling them how to enroll in v-safe. If they enroll, they will receive regular text messages directing them to surveys where they can report any problems or adverse reactions (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html#Safety>) after receiving a COVID-19 vaccine. CDC also provides recommendations (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/allergic-reaction.html>) for people who have had allergic reactions to other vaccines and for those with other types of allergies.



## Mandatory Policies (cont.)

- Incentive Programs
  - Currently, no clear guidance.
  - In April 2021, EEOC's acting legal counsel, stated that the agency expects to update its technical assistance to address these issues.








## Mandatory Policies (cont.)






- Incentive Programs
  - ADA and GINA Wellness Rules
    - “Voluntariness” requirement and proposed *de minimis* standard (“water bottle” rule).
    - Proposed rule withdrawn by Biden administration in Jan. 2021.



## Sample Vaccine Incentives

	\$500 bonus
	\$500 for full-time employees and \$200 for part-time employees
	\$200 bonus
	\$500 bonus
	\$500 bonus

## Sample Vaccine Incentives (cont.)

	For hourly employees, up to <u>four hours</u> of pay — two for each dose of the vaccine. Salaried workers receive flexible hours so they can be vaccinated.
	\$100 bonus
	\$100 bonus
	Offering workers at its corporate headquarters and its corporately-owned restaurants up to <u>four hours</u> of paid time off to get vaccinated.
	For hourly employees, up to <u>four hours</u> of pay. Also offering \$15 reimbursement for Lyft to their vaccination appointments.



## Mandatory Policies (cont.)

- Incentive Programs (cont.)
  - ADA and Title VII Accommodations
    - Alternative means for receiving the incentive for medical contraindications and religious beliefs.
    - But, analogize incentive to FMLA bonus rules.

# Types Vaccine Incentives and Risk

<b>No Risk</b>	Educate and encourage all employees to be vaccinated.
<b>Low Risk</b>	Provide paid time off commensurate with the time it takes to get the vaccine and recover from any adverse effects (2 hours, 4 hours, 8 hours).
<b>Low Risk</b>	Provide low-cost item, such as a water bottle or gift card (likely at a value of \$25 or less) or make employees eligible for a prize drawing.
<b>Medium Risk</b>	Offering a bonus that is tied to the cost associated with receiving the vaccine (time off, child care, travel, etc.).
<b>Higher Risk</b>	Offering a large monetary bonus to those who receive the vaccination. The larger the bonus, the higher the risk.



## Non-Mandatory Vaccination Policies

- Strongly encourage employees to receive the vaccine
- No Accommodation Process Needed
  - See Horvath v. City of Leander, No. 18-51011 (5th Cir. Jan. 9, 2020).
  - Consider having employees complete “declination” form and/or requiring additional steps, such as continuing to mask.



## Non-Mandatory Vaccination Policies

- Pay
  - Time is likely not compensable (since vaccination is not a condition of employment).
  - However, if vaccinated during workday, continuous workday rule would likely apply.



## Non-Mandatory Policies (cont.)

- Cost
  - Reimbursement likely not required.
- Labor Unions
  - Same as Mandatory Policies.



## Non-Mandatory Policies (cont.)

- Workers Comp
  - Unclear, but factors include:
    - (1) Whether the vaccination directly or indirectly benefited the employer;
    - (2) Whether the offering of the vaccine was within the terms, conditions, or customs of the employment;
    - (3) Whether the vaccination event was employer-sponsored;



## Non-Mandatory Policies (cont.)

- Workers Comp
  - Unclear, but factors include: (cont.)
    - (4) Whether the offering of the vaccine was unreasonably reckless or created excessive risk; and,
    - (5) Whether the offering of the vaccine occurred on the premises of the employer.



## **Non-Mandatory Policies (cont.)**

- Incentive Programs
  - Same concerns as Mandatory Policies.



## Non-Mandatory Policies (cont.)

- Customer/Worksite Vaccination
  - Certain jobsites and/or customers require that all individuals performing work at the jobsite receive a COVID-19 vaccine as a condition of being allowed to work on the project.
  - If the employee refuses to be assigned to the customer requiring receipt of the COVID-19 vaccine or refuses to provide documented proof of having received the COVID-19 vaccine, regardless of reason, every effort will be made to look for an alternative position.



## Sample Policies

- Mandatory Covid-19 Immunization Policy
  - Available upon request
- Non-Mandatory Covid-19 Immunization Policy
  - Includes “Customer/Worksite Vaccination”
  - Available upon request



## Post-Vaccination

10

After employees have been vaccinated, can they stop practicing other preventive measures such as social distancing and wearing masks?

No. CDC recommends that people continue to take these and other preventive measures after they are vaccinated. Even if employees have received the COVID-19 vaccine, it will be important for them to continue other preventive measures such as wearing a mask, staying 6 feet away from others, avoiding crowds, washing hands often, and cleaning high-touch surfaces frequently. It takes time for your body to build protection after any vaccination, and the COVID-19 vaccine may not protect you until a week or two after your second shot (dose). Together, getting vaccinated for COVID-19 and following CDC's recommendations for how to protect yourself and others (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>) will offer the best protection from getting and spreading COVID-19.



## Post-Vaccination (cont.)

### II If we vaccinate our employees, can we return to or reopen the workplace?

It is important to conduct a thorough assessment of the workplace to identify potential workplace hazards related to COVID-19. Widespread vaccination of employees can be one consideration for restarting operations and returning to the workplace. Other considerations for returning to the workplace (<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>) include:

1. The necessity for employees to physically return to the workplace and whether telework options can be continued
2. Transmission of SARS CoV-2, the virus that causes COVID-19, in the community (how many infections there are and how fast it's spreading)
3. The ability of employees to practice social distancing and other prevention measures, like wearing masks, when in the workplace
4. Local or state mandates for business closure restrictions



## Post-Vaccination (cont.)



### **If we vaccinate our employees, can we return to or reopen the workplace?**

It is important to conduct a thorough assessment of the workplace to identify potential workplace hazards related to COVID-19. Widespread vaccination of employees can be one consideration for restarting operations and returning to the workplace. Other considerations for returning to the workplace (<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>) include:

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3. The ability of employees to practice social distancing and other prevention measures, like wearing masks, when in the workplace
4. Local or state mandates for business closure restrictions



## Post-Vaccination (cont.)

### **12** What should we tell employees to do if they develop a fever after getting vaccinated?

Employees who experience a fever after vaccination should, ideally, stay home from work pending further evaluation, including consideration for COVID-19 testing. CDC has released guidance (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/post-vaccine-considerations-healthcare-personnel.html>), which includes suggested approaches to evaluating and managing post-vaccination symptoms, including fever.



# Post-Vaccination

## WHAT YOU CAN DO ONCE YOU HAVE BEEN FULLY VACCINATED

### Activity

Visit inside a home or private setting without a mask with other fully vaccinated people of any age	✓
Visit inside a home or private setting without a mask with one household of unvaccinated people who are not at risk for severe illness	✓
Travel domestically without a pre- or post-travel test	✓
Travel domestically without quarantining after travel	✓
Travel internationally without a pre-travel test depending on destination	✓
Travel internationally without quarantining after travel	✓
Visit indoors, without a mask, with people at <a href="#">increased risk for severe illness from COVID-19</a>	✗
Attend medium or large gatherings	✗



# QUESTIONS?

## Thank you.



ATTORNEYS AT LAW

# Legal Update – What's Happened, What's to Come in 2021





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# Where Are We Headed?

1. The FFCRA and Stimulus Updates
2. New Federal Agency Developments
3. State, Federal, and Local Law Update
4. Predicting What's to Come in 2021 and Beyond



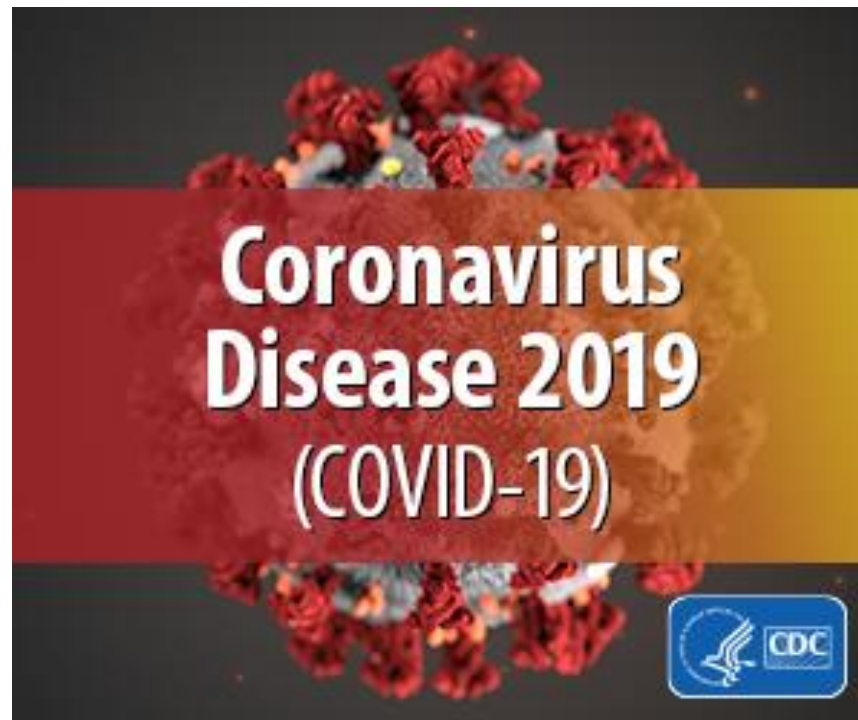
## How It Started . . .



## How it's Going



# FFCRA Update





## FFCRA Basics

- Enacted March 18, 2020
- Effective **April 1, 2020**
- Two New Paid Leave Provisions:
  1. **Public Health Emergency Leave (“E-FMLA”)**
  2. **Emergency Paid Sick Leave (“E-PSL”)**
- Leaves expired on **December 31, 2020**



## FFCRA Basics (cont.)

- Applied to all ***private*** employers with 500 or fewer employees.
- Amount of Leave
  - E-PSL = up to 80 hours
  - E-FMLA = up to 12 weeks (10 paid weeks)
- Costs of providing paid E-FMLA and E-PSL are designed to be offset 100% by payroll tax credits.

E-FMLA =



**E-PSL**

**=**

**SICK  
LEAVE**



## Tax Credits

- Full amount of qualified E-PSL and E-FMLA payments and “qualified health plan expenses.”
- Reimbursement via **IRS Form 941** (Employer’s Quarterly Federal Tax Return).
- IRS also permits an employer to request advance payment by completing **IRS Form 7200**.



## Initial Extension of Tax Credits

- In December 2020, President Trump signed a stimulus bill extending the tax credits for voluntarily-provided E-PSL and E-FMLA.
  - Extended **January 1, 2021 to March 31, 2021.**
- Did **not** increase the caps on E-PSL and E-FMLA (\$5,110 or \$2,000 for E-PSL and \$10,000 for E-FMLA).



## American Rescue Plan Act of 2021

- President Biden's \$1.9 Trillion Stimulus bill was signed into law on March 11, 2021.
  - Extended tax credits for employers who **voluntarily** provide E-PSL and E-FMLA from ***April 1, 2021 to Sept. 30, 2021.***
  - Again, employers are **not** required to continue to provide E-PSL or E-FMLA.
- Some changes to E-PSL, E-FMLA, and the tax credits.



## ARPA – E-PSL Changes

- Effective, April 1, ARPA “resets” the amount of E-PSL available to employees (if provided by employer).
- New Uses (April 1 to Sept. 30)
  - (1) Awaiting the results of a COVID-19 test due to a COVID-19 exposure or because “employer has requested such test or diagnosis.”
  - (2) “The employee is obtaining immunization related to COVID–19.”
  - (3) The employee is “recovering from any injury, disability, illness, or condition related to [a COVID-19] immunization.”



## ARPA – E-FMLA Changes

- Effective, April 1, ARPA “resets” the amount of E-FMLA available to employees (if provided by employer).
- ARPA expands the E-FMLA entitlement to a full 12-weeks of pay by:
  - (1) Increasing the aggregate cap for tax credits from \$10,000 to \$12,000 per employee; and
  - (2) Eliminating the requirement that the first 10 days of E-FMLA is unpaid.
- Appears to expand E-FMLA to cover all of the same qualifying reasons as E-PSL, including the new reasons articulated above (employer-mandating testing, COVID-19 vaccines, and complications related to the vaccine).



## ARPA – Tax Credits

- Remember:
  - **E-PSL**—“Regular rate of pay” capped at \$511 per day and \$5,110 total.
  - **E-FMLA**—2/3 of regular rate capped at \$200 per day and (now) \$12,000 total.
  - Additional tax credits for health insurance costs.
- ARPA adds tax credits for “amounts paid under certain collectively bargained agreements,” including:
  - (1) Pension plan contributions and
  - (2) Apprenticeship fund contributions that are allocable to E-PSL and E-FMLA.



# ARPA – Anti-Retaliation & Discrimination

- Employers are disqualified from receiving FFCRA payroll tax credits if they:
  - (1) Fail to comply with the FFCRA, including its anti-retaliation provisions; or
  - (2) Discriminate in favor of highly compensated employees, full-time employees, or employees on the basis of employment tenure with respect to leave.



## ARPA – COBRA Subsidies

- ARPA provides “Assistance Eligible Individuals” or “AEIs” with a 100% subsidy for COBRA continuation coverage for up to 6 months.
- Subsidy begins on April 1, 2021, and will end on September 30, 2021.
- Qualifying AEIs pay no cost for monthly COBRA premiums if the individual is eligible for COBRA coverage during the subsidy period (i.e., April 1, 2021 to September 30, 2021).



## ARPA – AEIs

- AEIs defined as those who are or become eligible for COBRA as the result of an involuntary termination of employment or reduction in hours:
  - #1—Individuals who were ***previously*** eligible for COBRA continuation coverage, but who did ***not*** elect COBRA and have coverage that would have extended into the subsidy period.
  - Example
    - An individual laid off on September 30, 2020, and would have been eligible for COBRA coverage for up to 18 months, but who did not elect COBRA.



## ARPA – AEIs

- AEIs (cont.)
  - #2—Individuals who were *previously* eligible for COBRA continuation coverage, elected coverage, but later dropped coverage, and that coverage (had it not been dropped) would have extended into the subsidy period
    - Example
      - An individual who was laid off on September 30, 2020, elected COBRA and could have continued COBRA coverage for up to 18 months, but did not pay premiums after January 31, 2021.



## ARPA – AEIs

- AEIs (cont.)
  - #3—Individuals who are or become eligible during the six-month “subsidy period” from April 1, 2021 to September 30, 2021
  - Example
    - An individual involuntarily terminated on March 31, 2021 or an individual involuntarily terminated on or after April 1, 2021, and would be eligible to elect COBRA coverage for up to 18 months.



## ARPA – AEIs

- AEIs does not include individuals who voluntarily terminate their employment.
  - Not eligible for COBRA or COBRA subsidies.
- Subsidies do not extend eligibility for COBRA.
  - The subsidy will end earlier than September 30, 2021 if: (a) the individual loses eligibility for continuation coverage under the normal COBRA rules, such as when the 18-month maximum COBRA period has ended, or (b) becomes covered under any other group health plan (as an employee or otherwise).



## ARPA – New Notices

- The ARPA requires three separate notices to AEIs:
  - (1) Notice of the Availability of Premium Assistance;
  - (2) Notice of Extended Election Period; and
  - (3) Notice of Expiration of Subsidy.
- DOL published guidance and sample notices on April 7, 2021.
  - <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>.



## ARPA – Mechanics of Subsidy

- Under the ARPA, the employer, the plan (in the case of a multi-employer plan), or the insurer (for fully-insured coverage subject to mini-COBRA laws), has an obligation to provide subsidized COBRA coverage and pay or incur the AEI's COBRA premium cost during the "subsidy period" (i.e., April 1, 2021 to September 30, 2021).
- AEIs, in contrast, pay nothing during the subsidy period.



## **DOL FAQs**

### **Q8: How will the premium assistance be provided to me?**

You will not receive a payment of the premium assistance. Instead, Assistance Eligible Individuals do not have to pay any of the COBRA premium for the period of coverage from April 1, 2021 through September 30, 2021. The premium is reimbursed directly to the employer, plan administrator, or insurance company through a COBRA premium assistance credit.

### **Q9: Am I required to pay any administrative fees?**

If you are an Assistance Eligible Individual, you will not need to pay any part of what you would otherwise pay for your COBRA continuation coverage, including any administration fee that would otherwise be charged.



## ARPA – Claiming the Tax Credits

- Most employers sponsoring insured or self-funded group health plans covered by the law will be reimbursed by the federal government for 100% of each eligible individual's COBRA premium (including the administrative fee) for April 2021 through September 2021.
- The subsidy will take the form of a Medicare payroll tax credit, which could result in direct payment to employers whose Medicare tax liability is less than the credit.
- The employer may recover the cost of the coverage plus the 2% administrative fee from the federal government by claiming a credit against its quarterly Medicare payroll tax liability.



## ARPA – Claiming the Tax Credits

- Tax credits are also available for COBRA coverage provided by Taft-Hartley multiemployer plans.
- However, the logistics for claiming the credit will be determined by subsequent regulations issued by the DOL. Specifically, the ARPA directs the DOL to “issue such regulations or other guidance . . . [regarding] the application of [the ARPA] to group health plans that are multiemployer plans . . .



## Regulatory Freeze

- On January 20, 2021, President Biden issued a Memorandum preventing agencies from finalizing any (non-emergency) final rules that had not yet been published.
- Biden appointees are now working on revising and/or reversing many of the regulatory rules released by the Trump administration.

# New EEOC Vaccine Guidance





## EEOC VACCINE GUIDANCE

- On Dec. 16, 2020, the EEOC updated its COVID-19 guidance to address vaccines.
- EEOC makes clear that administration of an approved-vaccine (or requiring that employees be vaccinated) is **not** a “medical exam.”
- This means that employers must stay focused on the need for the vaccine and then ask legitimate questions relating to how getting the vaccine might impact the employee.

# State Law Update



# Minnesota Case Law Update





## Kenneh v. Homeward Bound, Inc.,

(Minn. 2020)

- Plaintiff alleged she was subject to various sexually oriented behaviors, including:
  - Complimenting her haircut and suggesting that he could come to her home and cut her hair;
  - Telling Kenneh, as he stopped to help her with a stuck drawer, that he “likes it pretty all day and all night” and that he liked “beautiful women and beautiful legs.”
  - After suggesting that Kenneh take some cake left over from a party the previous day, he stated “I will eat you—I eat women.”
- District court granted SJ for the employer.



## Kenneh v. Homeward Bound, Inc.,

(Minn. 2020)

- Court retained the “severe and pervasive” standard (from Title VII) for analyzing MHRA claims.
- But, the MN Supreme Court held that conclusions drawn from federal cases over time will **not** necessarily dictate the same results now.
- Instead, facts must be viewed through the lens of modern sensibilities and societal change, with an understanding that what people may have tolerated 30 years ago is no longer acceptable workplace behavior.
- Reversed and remanded for trial.



## 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 adequately 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.

# 2019-2020 Legislature



# Workers' Comp





## FFCRA Leave and Workers' Comp

- Under the Minnesota Workers Comp Act, employers are liable for the injury of an employee “arising out of and in the course of employment.”
- Effective April 8, 2020, certain health care employees who contract COVID-19 are presumed to have an occupational disease covered by the Minnesota workers' compensation law.



## Workers' Comp (cont.)

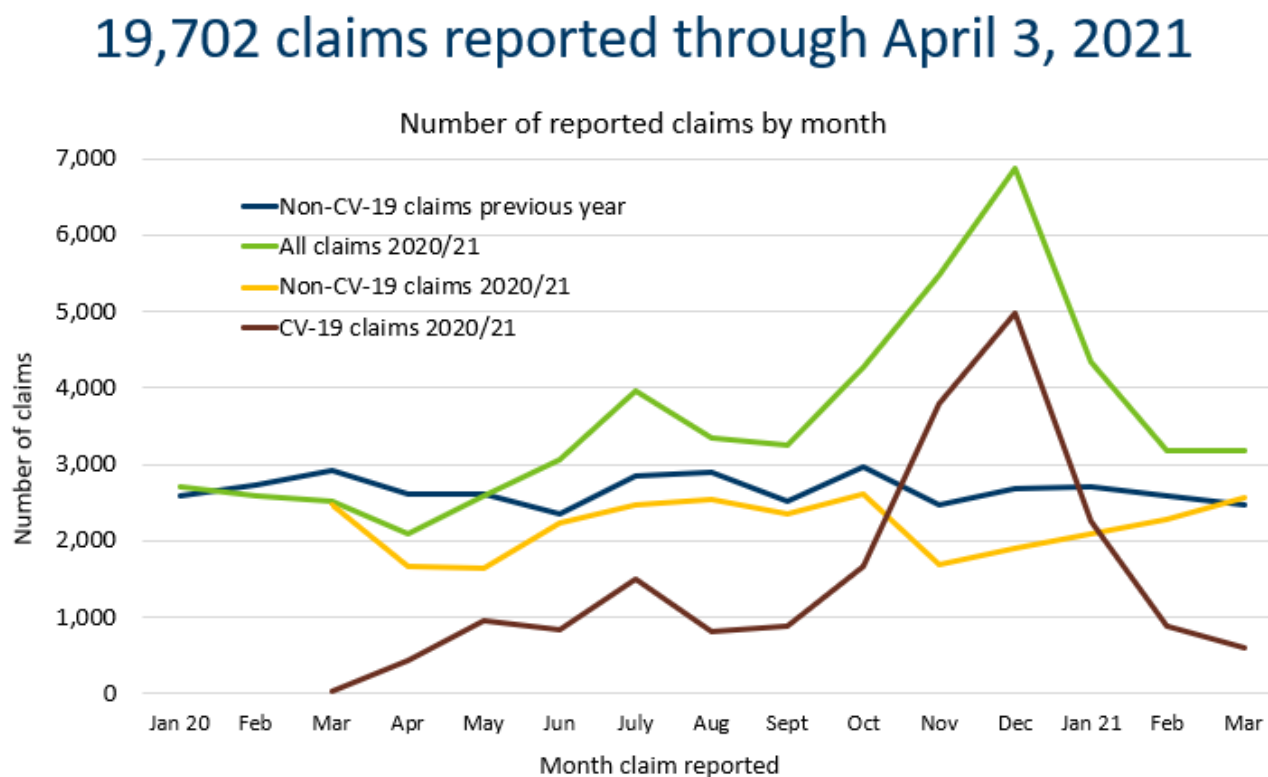
- The law provides that certain types of employees are entitled to the presumption, including:
  - Emergency medical technicians;
  - A health care provider, nurse, or assistive employee employed in a health care, home care, or long-term care setting, with direct COVID-19 patient care or ancillary work in COVID-19 patient units;
  - Workers required to provide child care to first responders and health care workers under EOs 20-02 and 20-19.



## Workers' Comp (cont.)

- According to the MN-DOLI, **19,702** COVID-19-related workers' compensation claims have been filed as of April 3, 2021.
- Healthcare and social assistance industries had the most claims: **14,377**.
- RNs and NAs have filed the most claims.

## Workers' Comp (cont.)

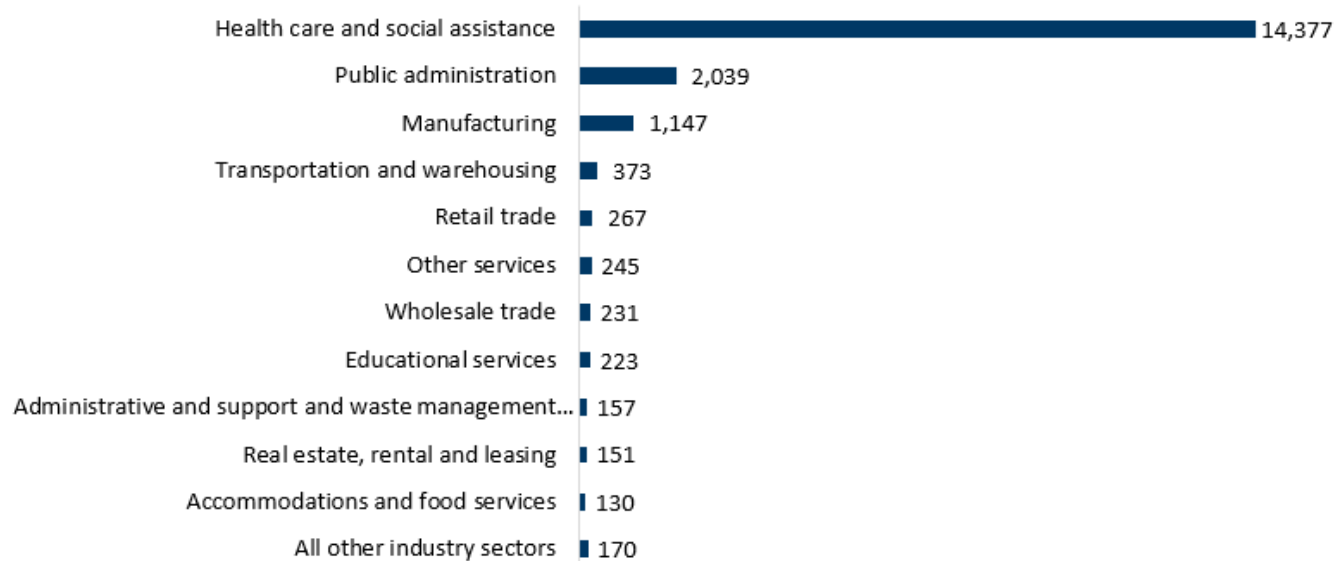




## Workers' Comp (cont.)

### Health care and social assistance has the most COVID-19 claims

Number of CV-19 claims by industry sector\* as of April 3, 2021



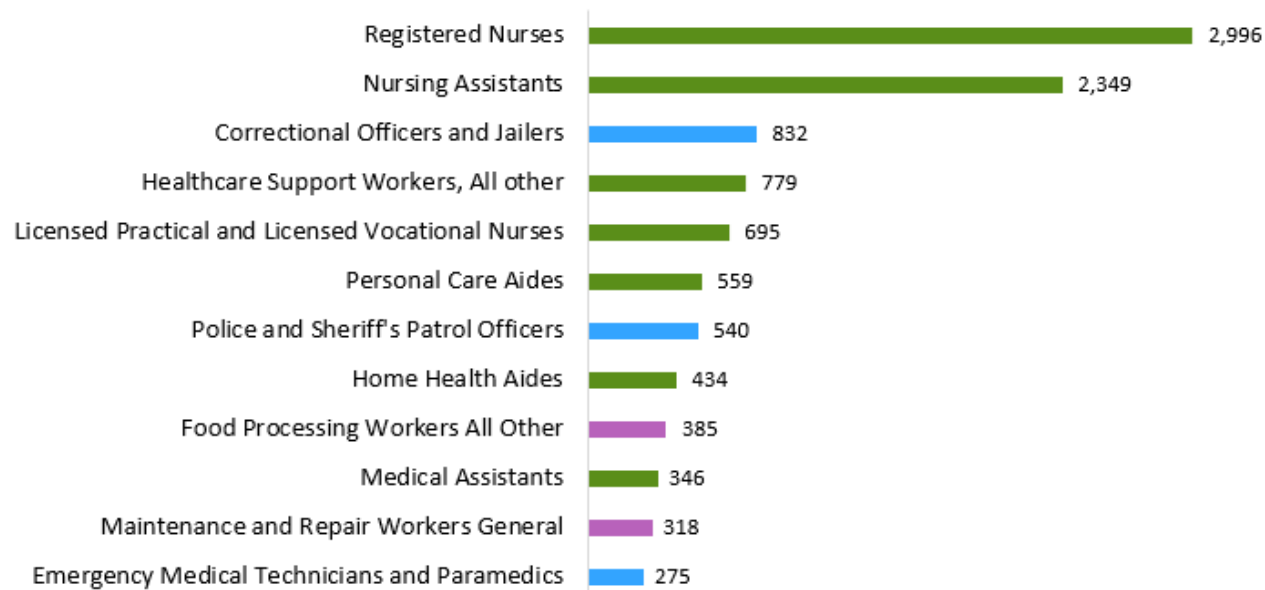
\*North American Industry Classification System



## Workers' Comp (cont.)

### Many types of healthcare workers are filing claims

Specific occupations\* with 250 or more claims as of April 3, 2021



\*Standard Occupation Classification. Occupation data unavailable for 2,957 claims.



## **MN-DOLI FAQ #28**

***Can my employer ask or require me to sign a waiver of liability that prevents me from filing a claim for workers' compensation if I contract COVID-19?***

No, agreements to waive workers' compensation rights are prohibited by Minnesota law. Employees cannot sign away the right to file a workers' compensation claim and an employer may not discriminate against a worker for reporting an injury. The law also prohibits employers from encouraging employees to not report an injury, asking an employee to agree to hold an employer harmless for an injury or relinquishing rights an employee may have to workers' compensation benefits. . . .

# Statute of Limitations





## MN Statute of Limitations

- In April 2020, Legislature passed H.F. No. 4556, which extended “the running of deadlines, . . . including any statute of limitations” during the peacetime emergency declared on March 13, 2020.
- Tolling was set to expire “60 days after the end of the peacetime emergency declaration . . . or February 15, 2021, whichever is earlier.”



## Statute of Limitations (cont.)

- On February 12, 2021, Legislature passed H.F. No. 114, which amended H.F. No. 4556 to extend the tolling through ***April 15, 2021***.
- Deadlines expiring from March 13, 2020 to April 15, 2021 would then expire on **April 16, 2021**.

**CHAPTER 3--H.F.No. 114**

*An act relating to civil actions; suspending the expiring of statutory deadlines imposed upon judicial proceedings during a peacetime emergency; amending Laws 2020, chapter 74, article 1, section 16.*

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Laws 2020, chapter 74, article 1, section 16, is amended to read:

Sec. 16. **DEADLINES GOVERNING PROCEEDINGS IN DISTRICT AND APPELLATE COURTS SUSPENDED DURING PEACETIME EMERGENCY.** ~~(a) The running of~~ Deadlines imposed by statutes governing proceedings in the district and appellate courts, including any statutes of limitations or other time periods prescribed by statute, ~~is suspended during~~ shall not expire from the beginning of the peacetime emergency declared on March 13, 2020, in governor's Executive Order 20-01 ~~and any extensions authorized under Minnesota Statutes, section 12.31, subdivision 2, and for 60 days after the end of the peacetime emergency declaration through April 15, 2021.~~ Nothing in this paragraph prevents a court from holding a hearing, requiring an appearance, or issuing an order during the peacetime emergency if the judge determines that individual circumstances relevant to public safety, personal safety, or other emergency matters require action in a specific case.

~~(b) This section expires 60 days after the end of the peacetime emergency declaration described in paragraph (a) or February 15, 2021, whichever is earlier.~~

**EFFECTIVE DATE.** This section is effective the day following final enactment and applies to all deadlines that had not expired as of March 13, 2020, and that would have expired during the period starting March 13, 2020, and ending April 15, 2021.

Presented to the governor February 12, 2021

Signed by the governor February 12, 2021, 5:28 p.m.

# 2021 Legislature





## Omnibus Jobs Bills

- Dueling bills from the House (HF1342) and Senate (SF1098).
  - Will need a conference committee bill to “iron out” the differences.
- House Bill (HF1342)
  - **Paid Family Leave**—up to 24 weeks of a paid family and medical leave mandate paid for through a new 0.6% payroll tax on every employer to create a broad new state-run insurance program that will collectively cost the Minnesota business community \$2.2 billion over the next three years.



## Omnibus Jobs Bills

- House Bill (cont.)
  - **Paid Sick Leave**—up to 80 hours of a statewide paid sick and safe time mandate that employers must offer fully paid time off in a specific format, for an expanded set of familial persons, for an expanded list of qualifying events. Does not preempt local ordinances.
  - Up to 160 hours of emergency paid sick leave for certain “essential workers” - retroactive to March 13, 2020 and through September 31, 2021.



## Omnibus Jobs Bills

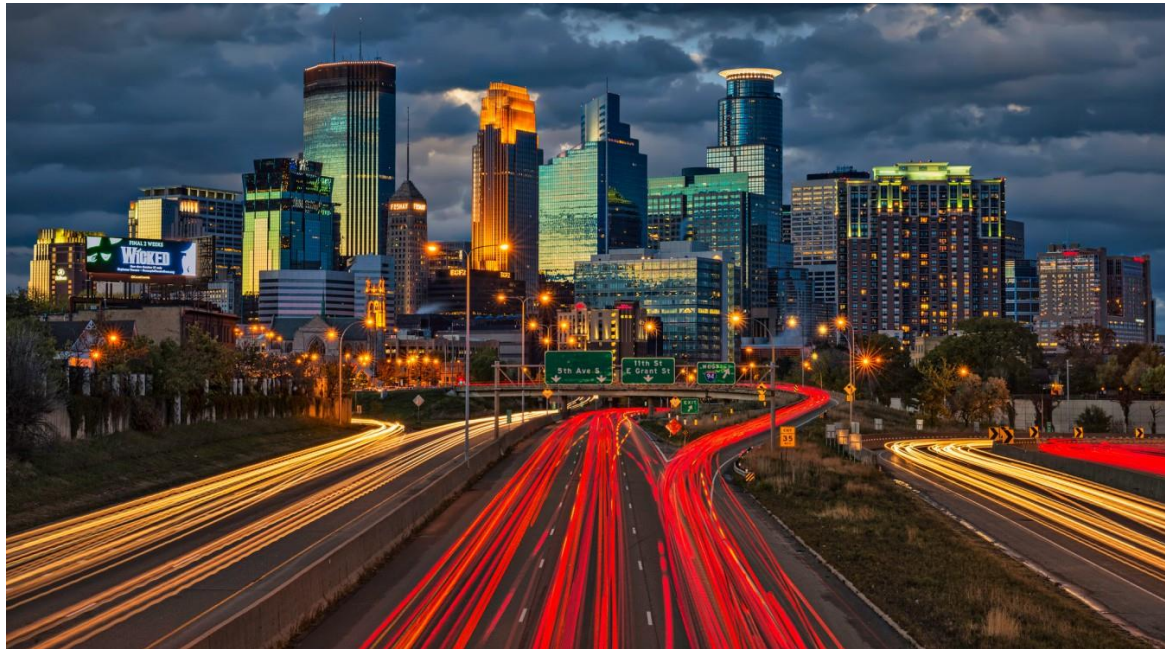
- House Bill (cont.)
  - **Pregnancy Accommodations**—amends state law regarding pregnancy accommodations and employee lactation breaks.
  - **Rehire and Retention**—adds rehire and retention protections on certain employers by requiring them to offer employees who were laid-off due to the pandemic information about available job positions for which they qualify and to rehire from employees based on a preference system of qualifications and seniority.



## Omnibus Jobs Bills

- Senate Bill (SF 1098)
  - **Pregnancy Accommodations**—Allows for reasonable break time to express milk and moves pregnancy accommodation text to new provision (Minn. Stat. 181.939) and avoiding MPLA's definition of "employee" (worked ½ time for at least a year) and "employer" (i.e., 21 or more employees).
  - **Wage Theft**—Makes changes to Section 181.032 to allow for more flexibility and "reinstates" the 15-day cap on penalties under Section 181.101.

# Municipal Update





## \$15 Minimum Wage in the Twin Cities

- Minneapolis passed a \$15 Minimum Wage ordinance on June 30, 2017
- On Nov. 14, 2018, the City of St. Paul passed a new minimum wage ordinance.

**FIGHT FOR \$15**



<b>Date</b>	<b>Large Businesses (100+ workers)</b>	<b>Small Businesses (&lt; 100 workers)</b>
Jan. 1, 2018	\$10	No increase
July 1, 2018	\$11.25	\$10.25
July 1, 2019	\$12.25	\$11
July 1, 2020	\$13.25	\$11.75
July 1, 2021	\$14.25	\$12.50
July 1, 2022	\$15	\$13.50
July 1, 2023	\$15 indexed to inflation	\$14.50
July 1, 2024	\$15 indexed to inflation	\$15



## St. Paul \$15 Minimum Wage (cont.)

- 5 or fewer employees (Micro)
  - July 1, 2020: \$9.25 (then add \$.75 annually)
  - July 1, 2027: \$15
- 6 to 100 employees (Small)
  - July 1, 2020: \$10 (then add \$1 annually)
  - July 1, 2025: \$15
- 101 to 10,000 employees (Large)
  - July 1, 2020: \$11.50 (then add \$1 annually)
  - July 1, 2023: \$15



## Paid Sick Leave

- Minneapolis Ordinance
  - Effective July 1, 2017
- St. Paul Ordinance
  - Effective July 1, 2017 (23+ employees)  
or Jan. 1, 2018 (<23 employees)
- Duluth Ordinance
  - Effective January 1, 2020.



## Preemption Challenges

Graco, Inc. v. City of Minneapolis, (Minn. Jan. 20, 2020)

- Held that minimum wage ordinance was not preempted by Minn. Stat. ch. 177.
- “[T]he statute prohibits employers from paying wages less than the statutory minimum-wage rate; it does not set a cap on the hourly rate that employers can pay.”



## Preemption Challenges

### Minn. Chamber of Commerce v. City of Minneapolis, (June 10, 2020)

- Held state law did not preempt sick leave ordinance.
- As for extraterritoriality, the Court concluded that the SST Ordinance is valid because it applies only to work performed within the city of Minneapolis, something that the City has the authority to regulate.



## 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.
- 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 employment due to a economic, non-discretionary reason.

# Predicting What's to Come in 2021 and Beyond





# Priorities for the Biden-Harris Administration in 2021 and Beyond

- Federal Paid Leave
- Misclassification
- Union Organizing
- OSHA
- Arbitration
- \$15 Minimum Wage





# Paid Family Leave





## The FAMILY Act

- Family and Medical Insurance Leave Act (H.R. 1185; S. 463).
  - Up to 12 weeks of leave paid at 66% of their monthly wages (capped at \$4,000).
  - Used for a new child, a serious health condition of their own or care of a family member, and for a limited set of other situations involving military service members.
- Administered by Social Security Administration.



## The FAMILY Act

- Paid Family Leave in other States
  - New York (2016); Massachusetts (2018); Rhode Island (2013); New Jersey (2008); Connecticut (2019); District of Columbia (2017); Colorado (2020); Washington (2017); Oregon (2019); and California (2002)
  - Typically managed by state unemployment office and not paid directly by employer.
- Similar laws have been proposed in Minnesota in the past few years.

# ABC Test for Employees





# Employee vs. Non-Employee

- Employees
- Non-Employees
  - Independent Contractors—flexible arrangement for both employer and employee.
  - Leased Employees—leased from another company.



## IC Statistics

- In a 2017 report, BLS found **10.6 million** independent contractors (6.9% of workers).
  - The BLS report did **not** include app-based “gig workers.”
  - 79% of independent contractors prefer their work arrangement to traditional jobs.
  - Fewer than 1 in 10 independent contractors would prefer a traditional work arrangement.



## 2020 ADP Report

- From 2010 to 2019, the share of gig workers in companies has increased from 14.2% to 16.4%.
- More than 70% of 1099-MISC gig workers say they are working as independent contractors by their own choice, not because they can't find a "regular" W-2 job.

Chart 2 One in Six Workers in Organizations Is a Gig Worker

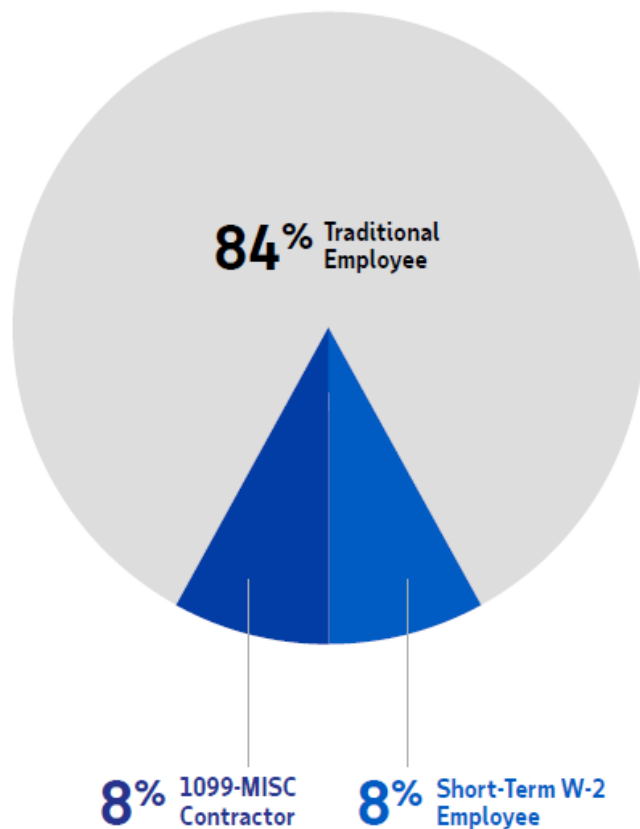


Chart 3 Most Organizations Use Gig Workers

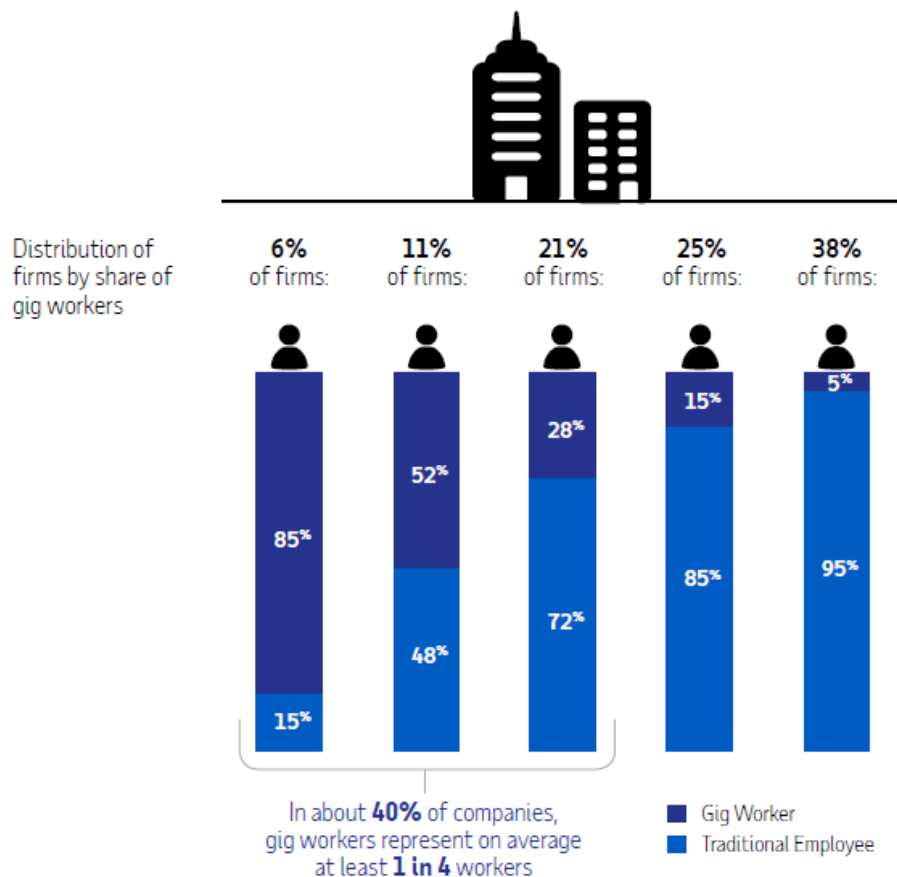
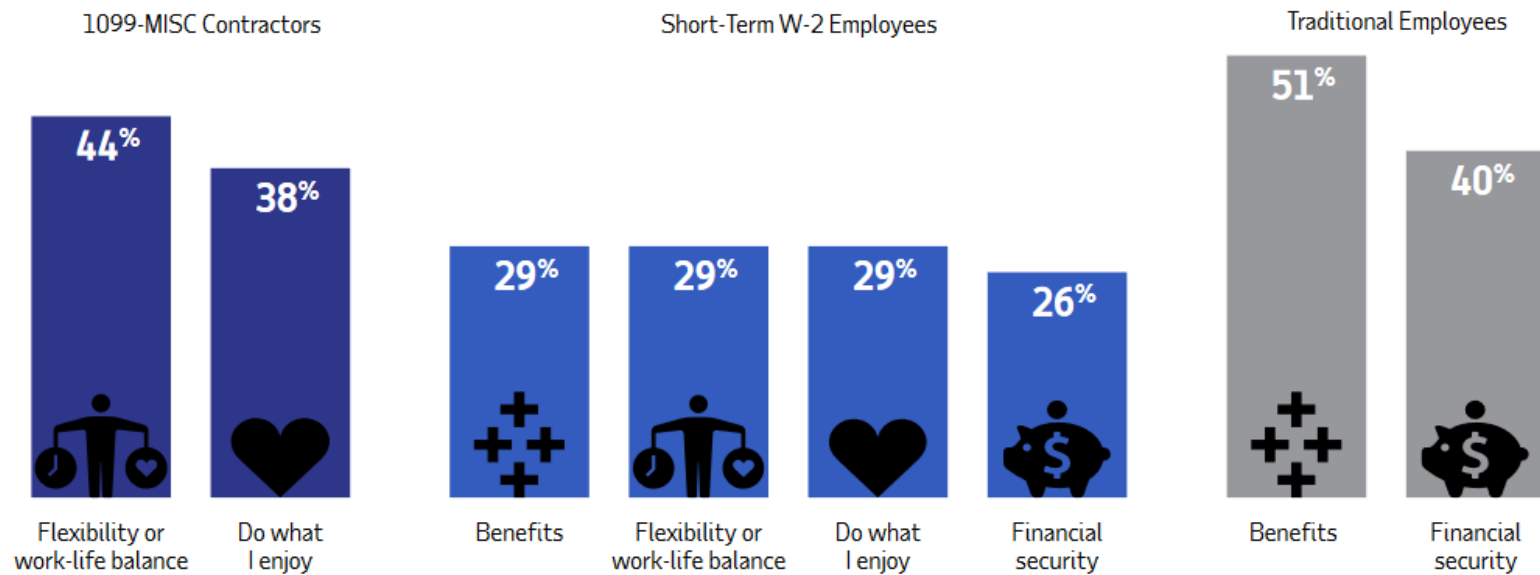


Chart 15 Top Reasons to Work





## Risks of Misclassification

- Wage and Hour Law
  - Overtime / Minimum Wage (FLSA and MFLSA)
  - Liquidated Damages
  - Civil Penalties and Attorneys' Fees
- Discrimination Law
  - Federal Law
  - MHRA



## Risks of Misclassification (cont.)

- Employee Benefits
  - In 2000, Microsoft settled for \$97 million in a lawsuit by “freelancers” alleging that they were entitled to benefits under Microsoft’s 401(k) plan and stock option plan.
- Taxes
  - Employers are required to pay FICA, FUTA, state unemployment tax, and workers’ compensation.



## What Test Applies?

- Common Law Test
- Economic Realities Test
- Hybrid Test
- IRS Test
- ABC Test
- Minnesota State Law Standards
  - DEED, MN-DOLI, etc.



<b>Statute</b>	<b>Test</b>
<b>Federal Taxes</b>	IRS 20-factor test
<b>Minnesota Workers' Compensation Act</b>	DEED Factors (Minn. Admin. R. §§ 5224.0100-.0340)
<b>Title VII, ADEA, ADA</b>	Hybrid Test
<b>MHRA</b>	Hybrid Test
<b>FLSA</b>	Economic Realities Test
<b>FMLA</b>	Economic Realities Test
<b>Minnesota DATWA</b>	Any worker, whether full-time, part-time, temporary or independent contractor is covered.
<b>NLRA</b>	Common Law Test



## “ABC” Test

- Starts with the ***presumption*** that all workers are “employees.”
- Employer must rebut the presumption by proving all three factors:
  - (1) worker is free from the ***control*** and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; **and**



## “ABC” Test (cont.)

- Rebutting presumption (cont.):
  - (2) that the worker performs work that is outside the usual course of the hiring entity's business; **and**
  - (3) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature that involved the work performed.
- Note: all three factors must be met in order to rebut the presumption.



## “ABC Test” under Federal Law

- President-elect Biden has indicated that he would support a federal “ABC” test for employees vs. independent contractors.
  - ***“As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.”***
- Minnesota legislature could enact a similar test under state law.
  - E.g., California’s AB 5 (effective 1/1/20).





## Biden's NLRB

- Will look to “un-reverse” precedent reversed by Trump-led NLRB.
  - *Purple Communications* (email use for union activities)
  - *Specialty Healthcare* (micro-units)
  - *Browning-Ferris* (joint employer)
  - *Banner Health* (confidential investigations)
  - *Lincoln Lutheran* (dues checkoff at expiration)



## PRO Act

- Biden has stated his support for the Protecting the Right to Organize (“PRO”) Act.
  - Proposed amendments to the NLRA.
- House passed PRO Act on February 6, 2020.
- Definitional Changes
  - Narrow the definition of “supervisor.”
  - Broadens definition of “employee.”



## PRO Act (cont.)

- Additional Protections
  - Employers prohibited from permanently replacing striking employees.
  - Removes prohibitions on secondary strikes.
  - Prohibits “right-to-work” laws and captive audience meetings.
  - Mandatory arbitration for first contracts.
  - Ends mandatory arbitration.



## PRO Act (cont.)

- Union Elections
  - Broad remedies for misconduct by employer (including mandatory recognition).
  - Quicker elections
- Unfair Labor Practices
  - Broader remedies (including 2x back pay)
  - Creates a private right of action and ***attorneys' fees*** (after NLRB investigates)

**OSHA<sup>®</sup>**



## OSHA Actions

- In January 2021, Biden issued an executive order ordering OSHA to promulgate an emergency temporary standard applicable to the COVID-19 pandemic.
- Enforcement will likely increase, especially with regard to COVID-19–related complaints.



## E-filing of OSHA Reports

- In January 2019, OSHA issued rules eliminating Obama-era e-filing requirement for Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Injury and Illness Incident Report).
  - Form 301A (Summary of Work-Related Injuries and Illnesses) still needed to be e-filed.
- Biden administration will likely move to re-implement e-filing requirements.



# Mandatory Arbitration Agreements





## Move to Private Arbitration

- Endorsed by Supreme Court in *Epic Systems Corp v. Lewis*.
- Dramatic Increase:
  - In 2017, 56% or 60 million non-union workers were subject to mandatory arbitration.
  - By 2024, it is estimated that 83% or 95 million non-union workers will be subject to mandatory arbitration.
- Source: Center for Popular Democracy



## FAIR Act and Fair Pay EO

- Forced Arbitration Injustice Repeal (“FAIR”) Act
  - Legislation introduced in 2019 that prohibits employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment.
- Reinstate Fair Pay and Safe Workplaces Executive Order
  - Obama-era EO that prohibits predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.

# \$15 Minimum Wage





## \$15 Minimum Wage

- President-elect Biden previously called for a \$15 federal minimum wage.
  - Currently \$7.25.
  - Last increase in 2009.
- Other proposed changes by the President-elect:
  - Elimination of the tip credit.
  - Automatic increases.



# QUESTIONS?

## Thank you.



ATTORNEYS AT LAW

# NLRB Update and What's to Come in 2021

(April 22, 2021)



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# NLRB Update and What's to Come in 2021



## Current Makeup of NLRB

<u>Democratic</u>	<u>Republican</u>
Lauren McFerran, Chair*	John Ring
<b>Open Board Seat</b>	William J. Emmanuel**
	Marvin E. Kaplan

\*President Biden named McFerran as chair on 1/20/21.

\*\*Term expires on August 27, 2021.





# Future Makeup of NLRB

## Timing of Board Nominations

- Biden is expected to soon submit a nominee to the Senate for the currently open Board seat.
- When Emmanuel's term expires in August, the Biden administration will replace him quickly with a Democratic nominee.
- At some point this fall, the Board will have a 3-2 Democratic majority.



## Future Makeup of NLRB

**McFerran Agenda:** At a virtual discussion in February, she indicated an intent to:

- Seek to reverse the decision in *SuperShuttle* 367 NLRB No. 75 (2019), which made it easier for companies to classify workers as independent contractors;
- Favor employees' rights to use company electronic assets for organizing;
- Try to rollback limitations on displays of pro-union paraphernalia at work;
- Push to expand NLRB staffing.



# Turmoil in General Counsel's Office

## ■ General Counsel Ousted

- During campaign, President Biden pledged to be “the strongest labor president you have ever had.”
- Hours after taking office, President Biden fired NLRB General Counsel Peter Robb, who was largely seen as an “aggressively pro-business” general counsel.
- Robb was appointed by former Pres. Trump to a four-year term, which was not supposed to end until November 17, 2021.
- Unions pressured the president to dismiss Robb immediately.
- The position of General Counsel is independent from the NLRB and is responsible for choosing which unfair labor practice charges are prosecuted and for the general supervision of the NLRB's field offices in the processing of cases.



# Turmoil in General Counsel's Office

- **Legality of General Counsel's ouster is questioned**
  - Robb is the first GC to ever be fired by an incoming president.
  - Legal challenges raised as to whether the president can fire the head of an independent agency.
  - Section 3(d) of the NLRA provides that the General Counsel shall serve "for a term of four years," and permits the President to designate an Acting General Counsel only "[i]n case of vacancy in the office of the General Counsel."
  - Employer-side briefings to the NLRB responding to unfair labor practice charges or complaints routinely now include challenges to the authority of the Acting General Counsel to issue complaints. The Board has so far not taken up the issue.



# Turmoil in General Counsel's Office

## Employers Expected to Challenge Biden's Pick

- Since January 25, Peter Sung Ohr (Regional Director for Region 13 in Chicago) has served as Acting General Counsel.
  - President Biden has nominated Jennifer Abruzzo to be General Counsel.
  - She was the Deputy General Counsel at the NLRB under President Obama and a career NLRB attorney.
  - She had been serving as special counsel for strategic initiatives at the Communications Workers of America.
  - Confirmation sent to U.S. Senate on February 17; No hearing scheduled yet.





## Changes Underway

- The Acting GC immediately rescinded of 10 his predecessor's GC memos and 2 operations memos, which provide guidance for NLRB staff on how to process cases and shape Board policy – including a memo addressing the legality of employee handbook provisions.
- Two memos addressed rights of workers who do not wish to join a union or pay dues, and one urged a stricter standard for assessing the legality of “neutrality” agreements.
- Ohr described the rescinded memos as either no longer necessary, or inconsistent with policies and/or Board law.
- Ohr also directed agency to withdraw complaints attacking union neutrality agreements, which were issued at former GC's direction in an attempt to overturn Board precedent.



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## Rule Making in 2020

•**2/26/20 – Joint Employer Rule:** “a business is a joint employer of another employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment.” To be a joint employer, a business must possess and *exercise* substantial direct and immediate control over one or more essential terms and conditions of employment.

•**7/31/20 – Election Rule:** No longer requires an election to be put on hold if a ULP is filed, reinstates 45-day rule to allow employers or other unions to challenge a union’s status when it has been voluntarily recognized by the employer.



# Potential Changes in 2021

**Secondary Picketing:** In October 2020, the Board sought Briefs on the question of what constitutes unlawful “picketing,” particularly with respect to Scabby the Rat.

- Are giant inflatables the functional equivalent of a picket line?
- Acting GC filed a motion in February with the NLRB to stop processing the case.



**Proposed Election Rule Change:** In July 2020, proposed rulemaking to eliminate requirement that employers provide available personal e-mail addresses and home and personal cell phone numbers of all eligible voters to the Regional Director and union during an election campaign.

- The Board believed this will advance employee privacy interests that current rules do not sufficiently protect.
- Unclear if this remains a priority.



## Potential Changes in 2021

**Employer Uniform Restrictions on Union Insignia:** In February, the Board sought briefs on whether the “special circumstances” test should be modified. Employers currently must identify “special circumstances” that justify prohibiting workers from wearing union insignia.

- Acting GC has filed brief urging NLRB to retain current legal framework.

**Employer Investigations:** In March the Board asked for briefing regarding *Johnnie’s Poultry* safeguards, which apply if an employee is questioned about their own or others’ protected activity. Current safeguards:

- (1) the employer must communicate the purpose of the questioning, assure no reprisal, and obtain the employee’s voluntary participation;
- (2) the questioning must occur in a context free from employer hostility to union organization and must not be coercive; and
- (3) the questions must not exceed the necessities of the legitimate purpose.



## Significant NLRB Cases

### ***General Motors LLC***, 369 NLRB No. 127 (July 21, 2020)

- The Board modified its standard for determining whether an employer may lawfully discipline an employee for abusive or offensive statements and conduct in the context of activity otherwise protected under the Act.
- An employee was suspended the employee for swearing and making racially offensive comments towards management in union-related meetings.
- The administrative law judge found that some of the outbursts were protected and that the GM committed an unfair labor practice for the discipline.
- The Board reversed.



## *General Motors, LLC*

- **Old standard:** An employer violated the NLRA by disciplining or discharging an employee for abusive or offensive workplace conduct in the context of protected activity unless that conduct was so severe that it lost the Act's protection.
- **New standard:** The Board will apply the *Wright Line* framework: to establish that an employer unlawfully disciplined or discharged an employee for protected activity, the Board's general counsel must initially show that the discipline or discharge was motivated by the protected activity. If the GC meets that burden, an employer must prove it would have taken the same action even in the absence of the Section 7 activity.



## ***Motor City Pawn Brokers Inc.***

369 NLRB No. 132 (July 24, 2020)

NLRB considered the legality of multiple work rules:

**Rule 1:** The employer prohibited employees from disclosing “confidential information,” defined as “information about marketing plans, costs, earnings, documents, notes, files, lists and medical files ...”

- **Lawful:** Employees would reasonably understand, from the examples of confidential information, that they were prohibited only from disclosing legitimately confidential and proprietary information, not information related their terms and conditions of employment.

**Rule 2:** Standard of conduct and civility rules, such as no bullying, no inappropriate language and requiring honesty.

- **Lawful:** common-sense rules that require employees to foster "harmonious interactions and relationships" in the workplace and adhere to basic standards of civility.



## *Motor City Pawn Brokers Inc.*

**Rule 3:** Employees were prohibited from disparaging the employer “regardless of whether any such communication is or may be true or founded in facts.”

- **Lawful:** Any potential adverse impact on protected rights was outweighed by the substantial, legitimate justifications that are inherent to such a rule, such as customer loyalty and protecting operations (and it didn’t prohibit employee to employee communications).

**Rules 3/4:** Limiting employee use of e-mail and social media and only allowing computers, etc, to be used for business purposes.

- **Lawful:** The Board currently does not find that employees have a Section 7 right to use an employer's electronic resources for internet and related activity.



## *Motor City Pawn Brokers Inc.*

Unlawful rules included:

- mandatory arbitration agreement that interferes with employees' rights to file charges with, participate in, and access the NLRB and its processes;
- rule prohibiting unauthorized disclosure of the employee handbook; and
- rules in its employee agreement, employee handbook, and updated handbook restricting employees' association with and solicitation of *other employees*.
- Board held that the employees were unlawfully discharged for failing to sign the employment agreement and contract and acknowledgment requiring them to be bound by the employer's work rules, including the unlawful arbitration provision.



## ***Medic Ambulance Service, Inc.***

**370 NLRB No. 65 (January 4, 2021)**

Social Media Policies all found to be lawful because a reasonable employee would not interpret them as prohibiting the exercise of Section 7 rights and any potential adverse impact is outweighed by the justifications.

1. Inappropriate communications, even if made on your own time using your own resources, may be grounds for discipline up to and including immediate termination. We encourage you to use good judgment when communicating via blogs, online chat rooms...
2. Do not disclose confidential or proprietary information regarding the company or your coworkers. Use of copyrighted or trademarked company information, trade secrets, or other sensitive information may subject you to legal action.
3. Do not use company logos, trademarks, or other symbols in social media. You may not use the company name to endorse, promote, denigrate or otherwise comment on any product, opinion, cause or person.



## *Medic Ambulance Service, Inc.*

4. Be respectful of the privacy and dignity of your coworkers. Do not use or post photos of co-workers without their express consent . . . Employees must not post pictures of company owned equipment or other employees on a Web site without obtaining written permission.
5. All telephone calls regarding a current or former employee's position with our company must be forwarded to your supervisor. Only Rudy, Helen or human resources can give out any information on current or former employee compensation.
6. Employees must not use blogs, SNS [(Social Networking Sites)], or personal Web sites to disparage the company, its associates, customers, vendors, business practices, patients, or other employees of the company.

McFerran issued a strong dissent, asserted that all the work policies were unlawful, and called into question how the Board will evaluate the lawfulness of the same policies in the future once the political majority shifts.



## ***Stericycle, 370 NLRB No. 89 (2021)***

**Held:** An employer who adopted and distributed a handbook with a mandatory acknowledgement page to union employees without providing notice or opportunity to bargain did not take unlawful unilateral action.

- The handbook was inconsistent with several provisions in the parties' collective-bargaining agreement, including those involving attendance, overtime, time off, work rules, discipline, grievance procedures, and the employee probationary period.
- It included a disclaimer that "some benefits may not apply to union team members, and in some cases these policies may be impacted by collective bargaining agreements."
- 2-1 majority found that handbook was not unlawful unilateral change because it was not a "material, substantial, and significant" change to employees' terms and conditions of employment.



## *Stericycle*

Majority determined the disclaimer language made clear that the CBA affected the policies in the handbook and that it was not intended to modify, alter or change the existing contract.

(New chairman) McFerran dissented:

- The disclaimer did not communicate to employees with “the clarity or the specificity required by the duty to recognize and bargain with the Union as employees’ exclusive representative.”
- The disclaimer should have asserted that the CBA trumped the handbook.
- The disclaimer also did not encompass terms and conditions of employment in the new handbook that were either not addressed in the CBA or added new elements to those terms and conditions of employment.



## ***Mercy Gilbert Medical Center 370 NLRB No. 67 (Jan. 6. 2021)***

- In July 2018, an Arizona began receiving reports of union activity by employees and commenced a responsive information campaign regarding why it believed unionization was inappropriate.
- The Emergency Department Director and another supervisor approached a health unit clerk at his workstation who had been discovered to be a union organizer and repeatedly asked him about his union involvement. The supervisors denied having asked him questions about his role.
- The union filed a ULP charge and the Board held that the employer violated the Act by giving the *impression* of surveillance and that the questioning was an unlawful interrogation.



## ***Mercy Gilbert Medical Center***

- The Board: “When an employer tells employees that it is aware of their protected activities, but fails to identify the source of this information, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred.”
- The Board also found that the employer’s questioning amounted to unlawful interrogation due to the nature of the repetitive questioning, the insistence that the employee admit his affiliation, and the power imbalance of the parties involved.

# Collective Bargaining Update





## MNA Settlement with Twin Cities Hospitals

- In July 2019, Twin Cities Hospitals and the MNA agreed to wage increases of 3%, 3% and 2.25%.
- Big issues included wages and healthcare costs.
- Biggest non-economic issues included workplace violence.



## Increased Work Stoppages

- Unions are not afraid to request strike authorizations from members.
  - Still required to provide 8(g) notice.
- Unions are using repeated one-day and two-day strikes for leverage.
  - New decision in Walmart Stores, 368 NLRB No. 24 (July 25, 2019) may make it more difficult.
- UAW and GM strike of 48,000 reaches almost 1 month.



# QUESTIONS?

## Thank you.