

2021 Brings New Challenges for Employers

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Agenda

- ❖ **Pandemic Challenges Continue**
 - Paid Time Off**
 - Vaccine Policy**
 - Performance Management in a Pandemic**
- ❖ **Social and Political Activism in the Workplace**
- ❖ **The Remote/Hybrid Workplace in 2021**

Pandemic Challenges: FFCRA Paid COVID-19 Leave

- ❑ Mandate expired on 12.31.2020; Tax credit available through 3.31.2021
- ❑ Emergency Paid Sick Leave.
 - 80 hours of pay if quarantining, symptomatic, or COVID+
 - 80 hours, 2/3 pay, if caring for someone who is quarantining, symptomatic, or COVID+
 - 80 hours, 2/3 pay, if caring for a child whose school or place of care is closed due to COVID

Pandemic Challenges: NYS Paid COVID-19 Leave

- ❑ 11-99 Employees – 5 days paid COVID leave; 100+ Employees – 14 days paid COVID leave
- ❑ January 20, 2021 Dept. of Labor Guidance
 - Employees are eligible for paid COVID sick leave up to 3x (one exposure leave, two COVID+ test leaves). *A legal challenge is likely....*
 - An employee who returns to work following a period of mandatory quarantine or isolation ***does not need*** to be tested before returning to work. ***“Please note that an employee is not recommended to be tested to discontinue isolation....”***
 - If employer prohibits employee from returning to workplace due to exposure or potential exposure, employer must pay for time off.

Pandemic Challenges: NYS Paid Sick Leave

- ❑ <5 Employees – 40 hours unpaid sick (& safe) leave; 5-99 Employees – 40 hours paid sick (& safe) leave; 100+ Employees – 56 hours paid sick (& safe) leave.
 - Full-time, part-time, temporary employees and interns eligible.
- ❑ Key Policy Provisions
 - Accrual (1 hour for every 30 hours worked) vs. Grant (annual allotment available on January 1st)
 - Unused sick leave **must be carried over.** Sample Language:

In accordance with the New York State Sick Leave Law effective January 1, 2021, a maximum of five (5) accrued, unused PTO days may be carried over for sick leave purposes only in the new calendar year.

Pandemic Challenges: COVID-19 Vaccine Policy

What will your organization do?

**Mandatory
Vaccination
Policy**

3 E's Vaccine Policy
Educate
Encourage
Enable

**No Workplace
Mention of
Vaccination**

Before Choosing a Vaccination Policy...

- Vaccination is not a “Medical Examination” for purposes of the ADA; therefore, **employers can choose to mandate.**
- Potential Legal Risks Associated with Vaccine Mandate
 - ✓ Adverse reaction – unclear whether covered by Workers Compensation
 - ✓ Consistent Application of Policy
- Practical Ability to Implement Mandate

Pandemic Challenges: Mandatory Vaccine Policy

Recommendation: If mandating vaccine, contract with third party to vaccinate or require proof of vaccination.

Rationale: Screening questions will likely require disclosure of confidential medical information. Employers may ask such questions only if “job-related and consistent with business necessity.”

Remember: Employee Medical Information obtained in the course of a mandatory vaccination program must be kept confidential.

Pandemic Challenges: Mandatory Vaccine Policy

Vaccine mandate must allow for employees who cannot or will not be vaccinated due to a disability or sincerely held religious belief to request a **reasonable accommodation**.

Pandemic Challenges: Mandatory Vaccine Policy Requests for Reasonable Accommodations

- Case-by-Case Assessment. Engage in an Interactive Dialogue.
- Determine whether allowing unvaccinated employee(s) on site will pose a “significant risk of substantial harm to the health or safety of the individual or others.” Factors:
 - ✓ Duration of the risk;
 - ✓ Nature and severity of the potential harm;
 - ✓ Likelihood that the potential harm will occur; or
 - ✓ Imminence of the potential harm.

Pandemic Challenges: Mandatory Vaccine Policy Reasonable Accommodations

Possible Accommodations:

- ✓ Permit unvaccinated employee to work on-site.
- ✓ Require additional PPE/precautions.
- ✓ Require additional COVID-19 Testing
- ✓ Permit remote work arrangement

Conclusion: No Reasonable Accommodation Available

Pandemic Challenges: 3 E's Vaccine Policy

- ❑ **Educate** employees about the COVID-19 vaccine.
 - ✓ Rely on the Centers for Disease Control or New York State Department of Health or similar publications.
- ❑ **Encourage** employees to get vaccinated.
 - ✓ Provide incentives to those who get vaccinated: *e.g.*, water bottles, paid time off, nominal gift cards. Be sure to have an alternative for those with disabilities or sincerely held religious beliefs.
- ❑ **Enable** employees to get vaccinated.
 - ✓ Provide on-site vaccination

Pandemic Challenges: Finally....

- ❑ Proof of Vaccination.
 - ✓ CDC and New York State have eliminated the quarantine requirement for fully vaccinated people following close contact exposure to someone with COVID-19. Employees who have been vaccinated will no longer qualify for COVID Sick Leave based on exposure.
 - ✓ NYS has not yet changed travel quarantine rules.

Pandemic Challenges: Performance Management

- Regular feedback is more important than ever. Remote work makes it easier to avoid confronting performance challenges.
- Review performance appraisal forms. Does your performance evaluation form address pandemic skills, e.g., crisis management, remote work, etc.?
- Use performance review process to reset expectations.
- Pandemic Policies: Remote Work, Video Conferencing, Company Equipment, Dress Codes, Work Hours, etc.

Political Activism in the Workplace: NY Legal Activities Law

- ❑ Employers cannot take adverse employment actions based on:
 - ✓ “Political Activities” (running for public office, campaigning for a candidate, or participating in fund raising for candidate, party or PAC)
 - ✓ “Recreational Activities” (lawful, leisure-time activity)so long as such activity is off-duty and does not create a material conflict of interest.
- ❑ Consistent response is essential. How has the Company handled similar situations in the past.

Social and Racial Activism in the Workplace

- Diversity, Inclusion and Equity Initiatives.
 - ✓ Hiring practices.
 - ✓ Equal pay assessment.
- Sexual Harassment Training.
 - ✓ Mandatory annual training is still required.
 - ✓ Training should address the new ways employees interact/communicate: Zoom, FaceTime, Teams, text messages, etc.

HR Challenges in 2021

- Recruiting Talent Virtually.
- Retaining Talent.
- Performance Management in the Hybrid / Socially Distanced Workplace.
- Employee Morale and Wellness.



Additional Questions

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