

From Bricks to Clicks: Navigating the Hidden Dangers of Remote Work



Presented by:

Kirsten Eriksson

Meg Manchester

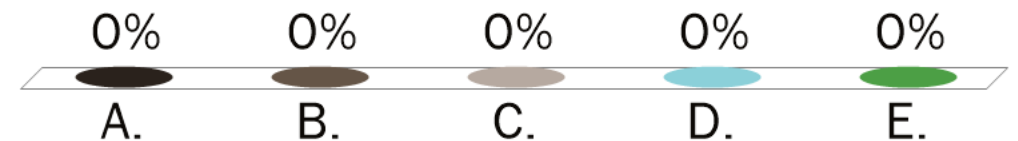
Kathleen Pontone

Sufen Zhang



What describes your current workforce?

- A. 100% office or facility
- B. Hybrid, employee chooses
- C. Hybrid, employer requires employees to come in on certain days
- D. Office...what office?
- E. Different categories of employees have different rules



Surprise, You're a Multistate Employer!



- Employers who had brick and mortar offices with all employees working in one place now may find that they are multi-state employers
- In general, where the employee works determines what law applies – for remote employees, that is their home

Overview

In assessing the tax consequences of remote employees, employers generally need to consider:

- Employee income tax withholding requirements;
- Income (and other) tax nexus; and
- Unemployment tax requirements

If a business has employees abroad, it will also want to consider international tax consequences

Employee Withholding Tax Obligations



- Tax and withholding consequences come into play with respect to employees, not independent contractors
- Employers are responsible for withholding income taxes from employment compensation
- State laws vary in their withholding requirements, and employers must be aware of these differing administrative requirements

Withholding Process Varies by Location



Location dictates withholding requirements

- Withholding from employment taxes is typically based on where employees actually work
- Remote workers generally owe taxes in the state where they work, even if the employer is in another state
- If an employee switches work locations, the employer may be required to process and implement new withholding certificates (i.e., Form W-4)

Movement Across States



- If an employee works in a different state than where they live, withholding rules generally require the employer to withhold in the work state
 - ▶ Exception: reciprocal tax agreements that allow for withholding in the home state
- Employees can take a tax credit for taxes paid to the work state against liability owed to their home state
- Each state generally has a threshold number of work days that will activate a withholding requirement

Entity Level Tax Liability – Nexus



- “Nexus” is a connection with a jurisdiction sufficient enough to subject a business to tax
- P.L. 86-272 preempts states from taxing businesses if their activities are only solicitation of order for sales of tangible property, even if those activities are substantial
- Nexus rules are determined on a state-by-state basis
- Once nexus is established, a business may have an income tax, gross receipts tax, or sales tax obligation in that state (and/or local jurisdictions within the state)

Remote Work Impact on Nexus

- A remote employee can create nexus in a state where a business did not previously have an income tax obligation
- Many states do not have special rules that address how remote work impacts nexus long-term
 - ▶ Some states had temporary COVID relief from nexus for remote workers, but this is not extended to remote work unrelated to COVID
- In the absence of rules specific to remote work, businesses should assume that the states general nexus standards apply

Apportionment of Business Income

<p>What is apportionment?</p>	<p>States have different apportionment methods that businesses must use</p>	<p>If a state apportionment method takes into account payroll, tax liability may arise based on remote employee presence alone</p>
<p>How businesses that operate in more than one state divide their taxable income</p>	<p>Ex. single sales factor; three-factor that takes into account payroll, property, and sales</p>	

Income Tax Sourcing Rules

- Employers should also consider state sourcing rules in determining whether remote employees create taxable nexus
- State sourcing rules may require employers to source sales based on where employee services are performed
 - ▶ Ex. “Cost of performance sourcing” considers where remote workers perform services for customers
- Employers may need to apportion income to a state under the sales factor, depending on these specific sourcing rules

Additional Tax Consequences of Nexus

- Local nexus rules may differ from state thresholds, so employers will want to consider local rules as well
- Employee presence can also trigger gross receipts tax liability
 - ▶ Ex. Virginia BPOL tax, Washington B&O tax



State Unemployment Tax

- Employers will generally be liable for unemployment taxes in the state where a remote employee is located
- The chart lists the steps for determining where unemployment tax should be paid in regard to an employee

Step 1

Primary Jurisdiction

If an employee works primarily in 1 jurisdiction, attribute there. Remote work wages may be reportable to where work is performed.

Step 2

Base of Operations

If there is no primary jurisdiction and the employee performs work at their operations base, attribute to the base's jurisdiction.

Step 3

Directed or Controlled

If there is no base of operations, attribute to the jurisdiction from which the employee's work is directed and controlled.

Step 4

Place of Residence

If no jurisdiction contains a place of direction and control, attribute to the employee's residence if the employee works there.

Step 5

Employer Choice

If no jurisdiction applies under the four steps, jurisdictions typically let employers choose to attribute work to 1 jurisdiction.

International Tax Considerations

- Many countries use concepts analogous to nexus to determine if a business has taxable presence
(Ex. “doing business,” “permanent establishment”)
- Tax treaties can reduce or eliminate tax liability in other countries based on employee presence, but generally apply only to income tax
 - ▶ Some countries have announced temporary relaxed measures on how they view an employee’s presence due to COVID, but this is not extended to remote work unrelated to COVID

Non-Income International Tax Issues

- Types of tax liability can also include payroll withholding, goods and service taxes (GST), value-added taxes (VAT) and national social taxes
- Employers should also be aware of regulatory requirements, such as business registrations and visas



Minimum Wage and Overtime

- Minimum wage laws vary by state
- FLSA requires payment of overtime after 40 hours in a week
- Most states track federal law, but a few are quite different
 - ▶ Overtime: Alaska, California, Colorado, Nevada
- Some states have different exemption tests as well
 - ▶ Salary thresholds for exempt employees may vary – California, New York

Minimum Wage and Overtime (Cont.)

- Timekeeping systems will need to be adjusted almost everywhere
 - ▶ Meal and rest breaks; flex time “pick up the kids” ok?
- Prevent off-the-clock work and include safe harbor language
 - ▶ How are you tracking remote employees’ work?
 - ▶ Is there a way for employees to notify you if their hours are not correct?
 - ▶ Provide a safe harbor compliant procedure for reporting in writing to someone above the supervisory level – preferably an HR role account

Meal and Rest Breaks

- For nonexempt employees, they must be provided compliant meal and rest breaks
- Requirements vary by state, but in some states, employers have affirmative duties to track and ensure compliance
 - ▶ Even if not a requirement = it is defensive requirement
- If self-reporting, there should be some audit



Reimbursement of Business Expenses

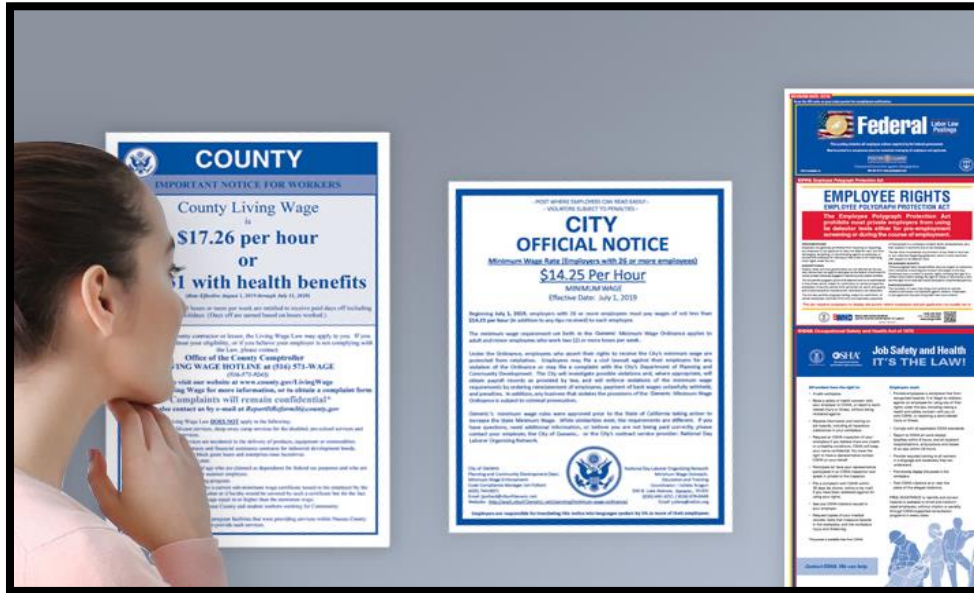
- Several states require employers to pay for necessary business expenses, including computers, internet access and cell phone bills
 - ▶ CA, GA, IL
- Employers generally do not have to pay entire cost, but a reasonable portion
- Consider what items you require employees to use and document in Remote Work Agreement
- This may apply even when employees would have access to the item in office

Other Compensation Issues



- Remote Work Agreements and Special Monitoring Technology Agreements
- Paystubs
 - ▶ Must list certain information on paystubs for some states
 - Payroll companies do not monitor this
- Payroll deduction requirements vary by state
 - ▶ Good practice: have a written authorization for everything

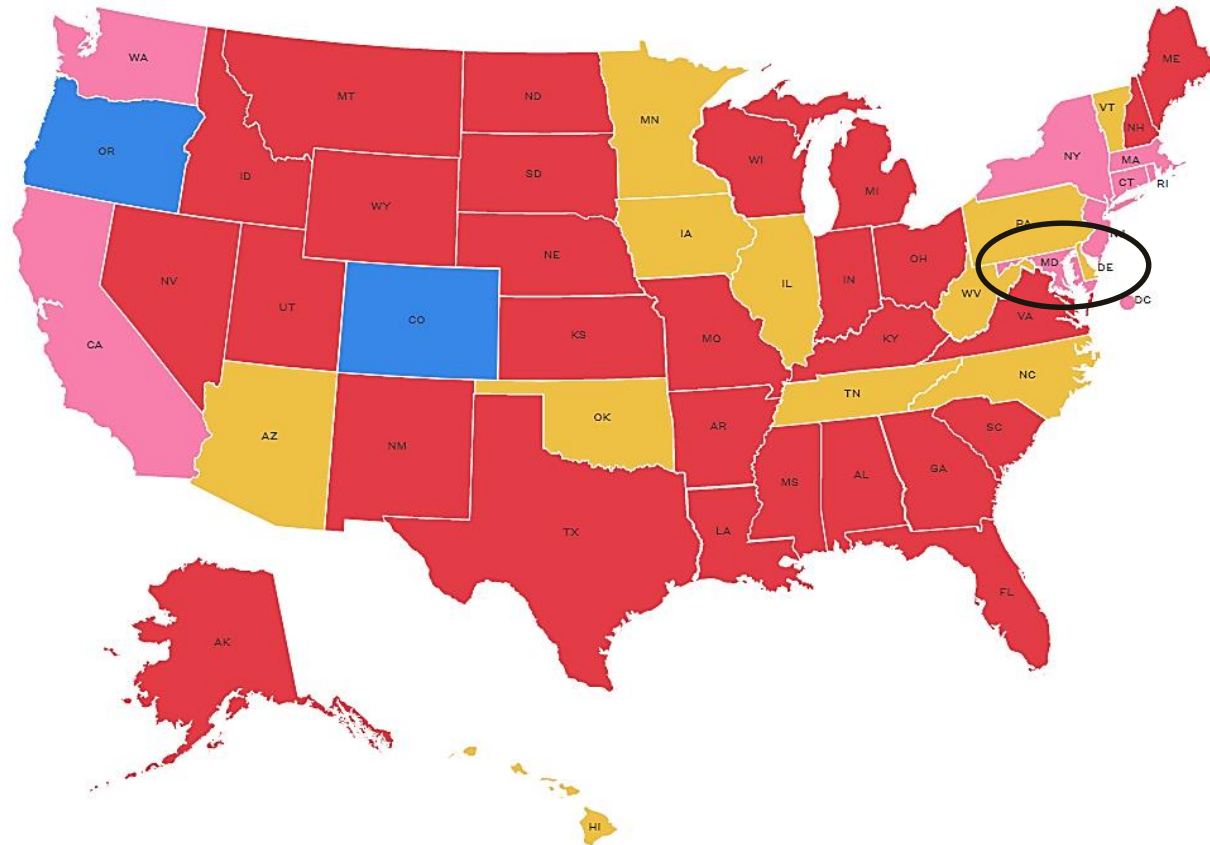
Compliance Issues



- State specific mandatory training
- Notices and job postings
 - ▶ For example, even remote job opportunities available to applicants in CO must include compensation and benefit information

Leave Laws

● States with no PFL legislation introduced ● PFL legislation introduced ● States with PFL laws, but programs are not yet active ● States with active PFL programs



**Growing trend for states
to provide paid family
leave**

Leave Laws {Cont.}

- Most family leave programs are state-sponsored and state-run, akin to unemployment
- Requires registering with the state and paying into state contribution programs
- Coordination with employer-provided benefits

Form **W-4** **Employee's Withholding Certificate** OMB No. 1545-0074

Department of the Treasury Internal Revenue Service

▶ Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay.
▶ Give Form W-4 to your employer.
▶ Your withholding is subject to review by the IRS.

2022

Step 1: Enter Personal Information

(a) First name and middle initial	Last name	(b) Social security number
Address		▶ Does your name match the name on your social security card? If not, to ensure you get credit for your earnings, contact SSA at 800-772-1213 or go to www.ssa.gov .
City or town, state, and ZIP code		
(c) <input type="checkbox"/> Single or Married filing separately <input type="checkbox"/> Married filing jointly or Qualifying widow(er) <input type="checkbox"/> Head of household (Check only if you're unmarried and pay more than half the costs of keeping up a home for yourself and a qualifying individual.)		

Complete Steps 2-4 ONLY if they apply to you; otherwise, skip to Step 5. See page 2 for more information on each step, who can claim exemption from withholding, when to use the estimator at www.irs.gov/W4App, and privacy.

Paid Sick Leave

- Devising a policy to meet requirements of all states can be difficult and overly restrictive
 - ▶ Alternative: state-by-state policies
- Watch out for carry over and accrual requirements that vary by state
- Part-time employees sometimes eligible for leave under state law

Accommodation of Disabilities

- ADA accommodations for remote workers
 - ▶ Employees should request an accommodation the same way that an employee would if they were working in an office
 - ▶ Same procedures for evaluating requests should apply
 - Yes, you may need to ship them a chair
 - ▶ Employers are **not** required to provide an accommodation primarily for personal use
 - Equipment that assists a person in daily activities on and off the job is considered personal items

Other Compliance Issues

- Workers' compensation laws still apply to remote workspaces
- Increasingly difficult to protect confidential data and information
- OSHA requirements – no inspection



Bait and Switch

- Increasing reports that the applicant on the Zoom interview is not the employee that shows up for work!
- Consider ways to verify – screen shots of interviews, internet searches for picture of applicant
 - ▶ Consistency: do not profile
 - ▶ Possible immigration issues with documentation discrimination

Immigration Compliance Issues

- Reporting material changes to U.S. Citizenship and Immigration Services (USCIS) by filing an amended petition
- Materiality varies depending on visa category
 - ▶ Location
 - ▶ Hours: full time vs. part time
 - ▶ Significant changes in job duties

H-1B Compliance Issues



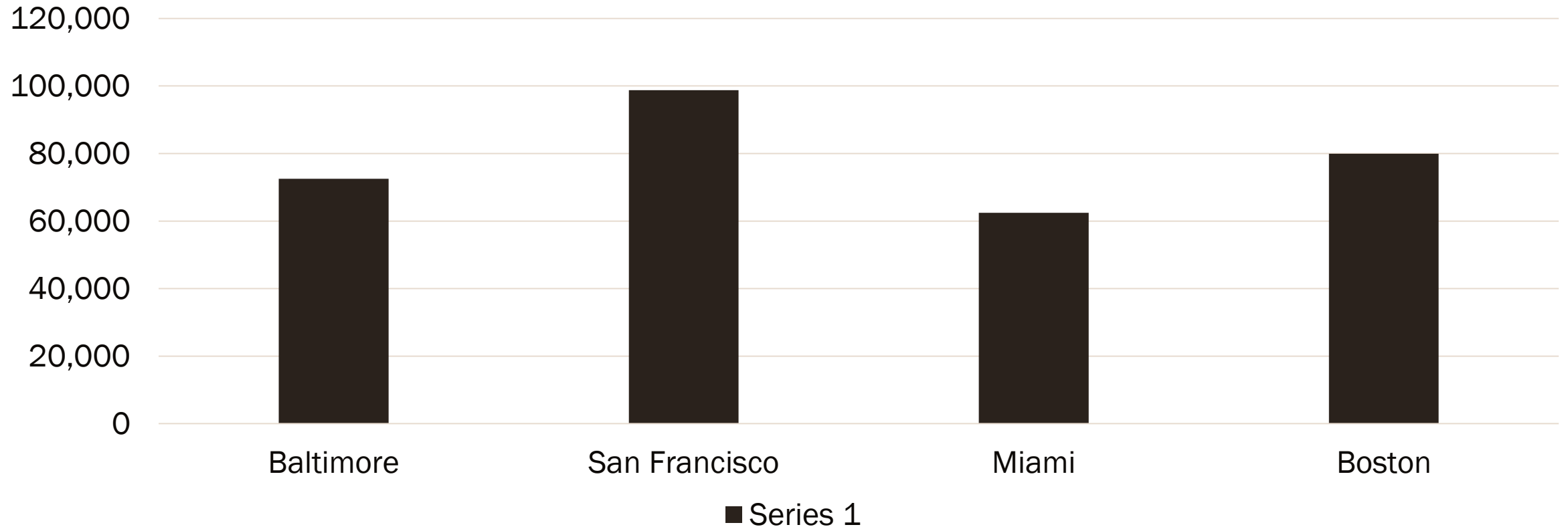
- H-1B is specific to:
 - ▶ Employer
 - ▶ Job
 - ▶ Place of employment:
worksite/physical location where
the employee actually performs
work

H-1B – Prevailing Wage

- Work location dictates the required prevailing wage which is the wage rate set for the occupational classification in the **geographical area of employment**
 - ▶ Area within normal commuting distance of the place (address) of employment, or worksite



H-1B – Prevailing Wage



Remote Work Scenarios

- Within the approved area of employment
- Outside the approved area of employment
 - ▶ Comply with prevailing wage requirements
 - ▶ File a full H-1B amendment petition with the associated filing fees and supporting documentation



- Require employees to obtain advance approval before changing worksite.
 - ▶ Know where your work from home employee is.
- Assess potential immigration related implications.
 - ▶ Confirm prevailing wage rates for new work location.
 - ▶ File an amended petition with USCIS when required.

Next Steps

- Survey your workforce to understand where your employees are and evaluate liability
- Implement policy requiring employees to obtain approval before changing work locations
- Remote work policies and agreements
 - ▶ Productivity and performance
 - ▶ Privacy and security
 - ▶ Safety
 - ▶ Timekeeping, breaks
- Technology Agreements (including expense reimbursement)
- Update job descriptions
- Create training programs



Firm Overview



Miles & Stockbridge is a leading law firm with seven offices in the mid-Atlantic region. Our lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

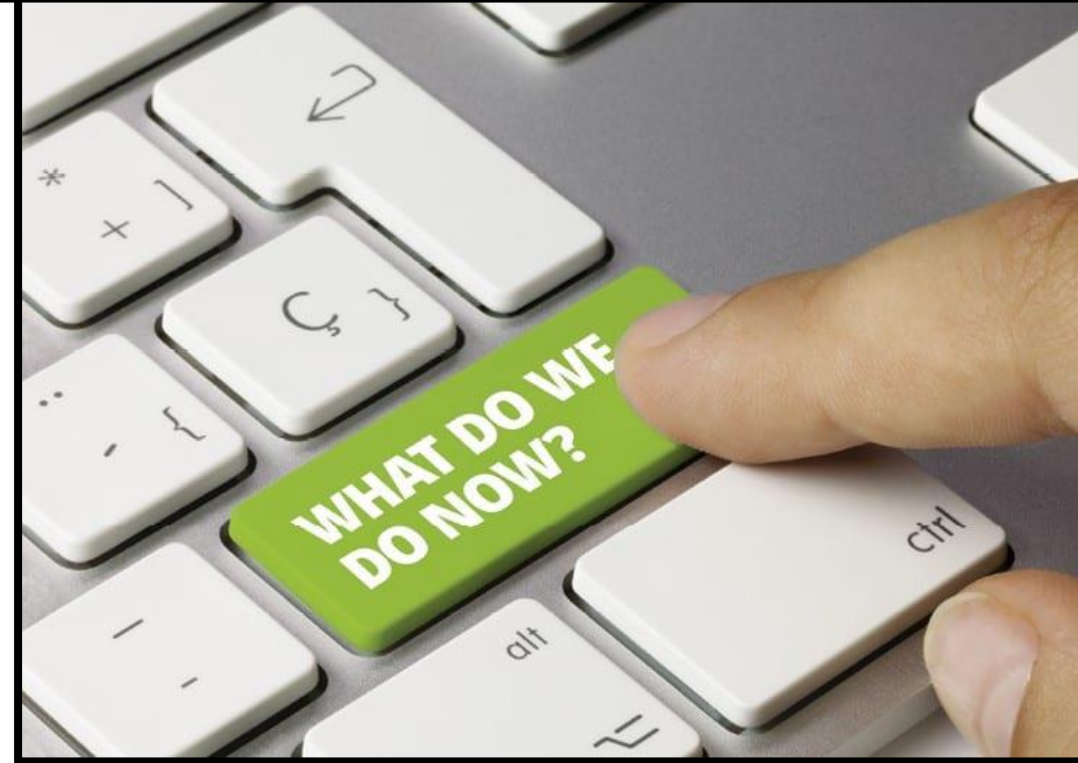
www.mslaw.com

Twitter: [@mstockbridgelaw](https://twitter.com/mstockbridgelaw)



Material contained in the presentation is for general information purposes and is not intended to be and should not be taken as legal advice on any particular matter. Accessing the presentation, or any material included in the presentation, is not intended to and does not create any attorney-client relationship. Because legal advice must vary with individual circumstances, do not act or refrain from acting on the basis of information included in the repository without consulting professional legal counsel. If you communicate with us, whether through email or other means, your communication does not establish an attorney-client relationship.

Emerging Federal and State Issues



Presented by:

Kirsten Eriksson

Sasha Hodge-Wren

Rebecca Leaf



Artificial Intelligence

What is AI?



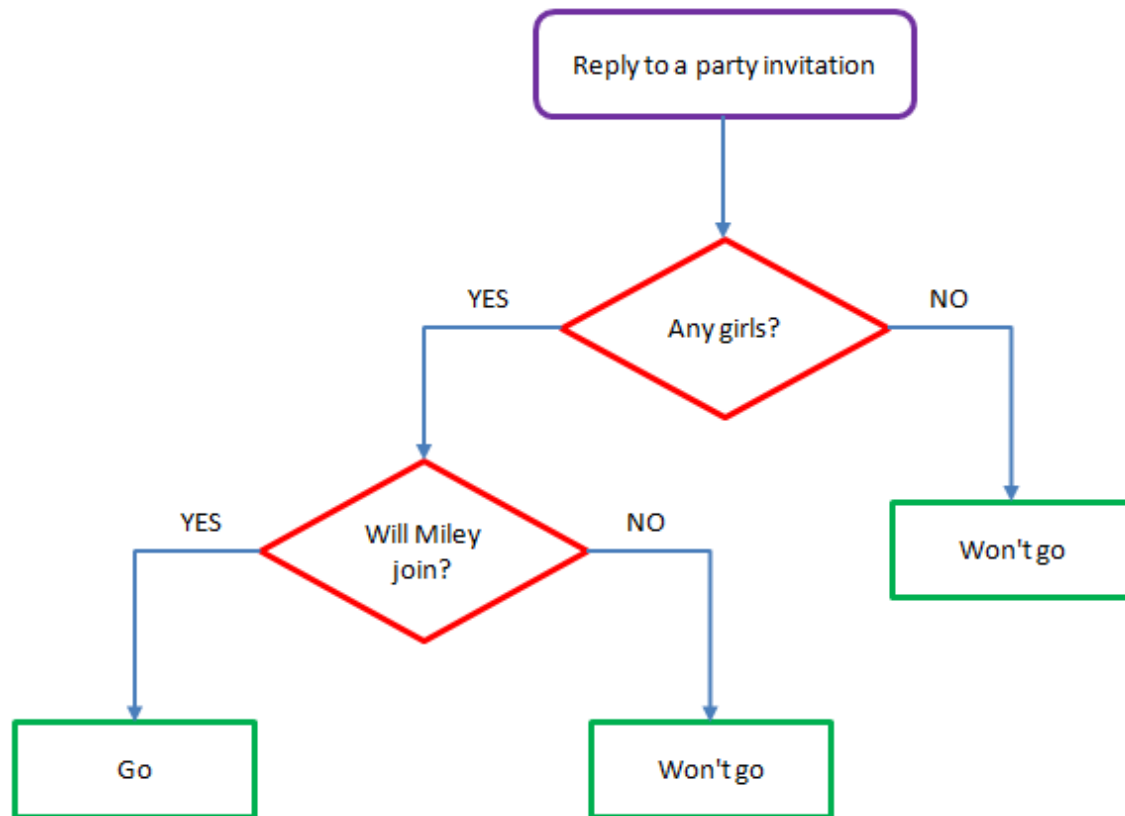
- AI is the use of a computer or program to perform a task that generally required human intelligence or decision making
- Sounds crazy? You use it every day.

Possible Uses for AI in Employment

- Screening of resumes
- Chat bots
- Analyzing video interviews
- Suggest/select candidates to hire
- Track productivity
 - ▶ Monitor characters typed, position of eye movements



Algorithms Aren't Biased, Are They?



- Algorithms may adopt the inherent bias underlying prior employment decisions in the data set
 - ▶ Replicating patterns that reinforce stereotypes or inherent bias

Example — Amazon

- Designed an algorithm to be used in recruitment to identify the attributes of successful candidates
- The algorithm “learned” what a successful candidate looked like by finding patterns in 10 years worth of past hiring data
- Because of historical under-representation of women, the resumes it evaluated were largely from men
- The algorithm demonstrated a consistent bias against women in its selection – penalizing candidates with the word “women’s” on their resume or graduating from all-female colleges
- It favored candidates who described themselves using verbs more commonly found on male resumes, such as “executed” and “captured”

Legislative Response

- **Illinois:** requires companies to notify applicants when A.I. will be used to screen them during video interviews/responses
- **Maryland:** prohibits employers from using facial recognition technology during pre-employment job interviews without the applicant's consent
- **New York City:** prohibits businesses from using artificial intelligence or algorithm-based tools to make hiring decisions about New York City residents without first auditing those tools for biases
- **California:** proposal to make it illegal for businesses and employment agencies to use automated-decision systems to screen out applicants who are considered a protected class
- **EEOC:** Artificial Intelligence and Algorithmic Fairness Initiative

Dangers Under Existing Anti-Discrimination Laws



- Disparate treatment – intentional discrimination
- Disparate impact – facially neutral policy that has a disparate impact on a protected class
- AI can be a “black box” – can the algorithm explain the legitimate business reason to select a candidate?
- Disability discrimination – disqualification of candidates with communications or attention deficits as a result of a physical or mental impairment

Independent Contractors

What is this?



How about this?



One More...



Why Would a Company Use Independent Contractors?

- Control cost
- Control staffing levels
- No overtime or minimum wage
- No employment taxes
- No benefits
- Special equipment savings
- Easier to cut ties when lack of “fit”



Independent Contractor or Employee?



- Employee
- Independent Contractor

- Common Law Test
- IRS 20-Factor Test and 3 Categories of Control
- Economic Realities test
- ABC test
- And more...

How can I tell?

- You control how work is done-
performance management
- Worker works only for you
- Worker performs core business function

- Independent Contractor
- Employee



What are the Risks?

- Unemployment
- Minimum Wage and Overtime
- Payroll Taxes
- Workers Compensation – Premium Fraud
- ERISA – Unpaid Benefits
- Class Actions and Attorneys’ Fees



Pay Equity

Forget **Orange** – Pay Equity is the New **Black**



American Association of University Women members with President John F. Kennedy as he signs the Equal Pay Act into law on June 10, 1963.

- Equal pay laws on the books for years
- New approaches
 - ▶ Prohibition on Salary History
 - ▶ Cannot Prohibit Discussion of Pay
 - ▶ Mandatory Disclosure of Salary Ranges
 - ▶ Mandatory Reporting

Mandatory Disclosure

- Employer must provide pay range if asked – CA, MD
- Employer must provide pay range at some point in the hiring process – CT, NV, RI
- Employer must provide pay range in job postings – CO, NY, WA

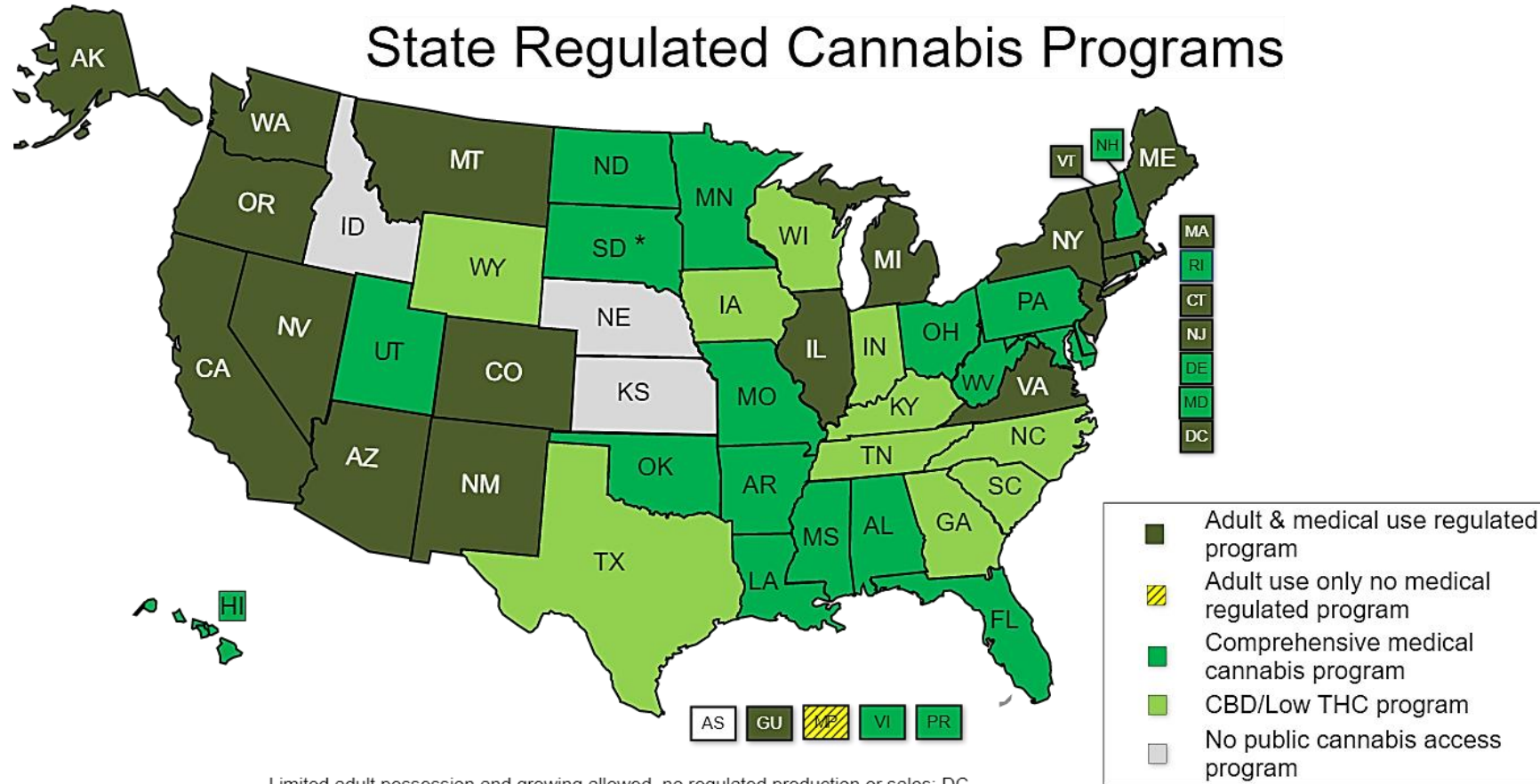


Mandatory Reporting

- **California:** Employees of 100 or more must report pay by establishment, job category, race and ethnicity
- **Illinois:** Employees of 100 or more in the state and any IL business required to file an EEO-1 must apply for an equal pay certificate every 2 years. Submission includes list of employees by gender, race and ethnicity, total wages, and job classification with a certification of non-discrimination

Marijuana

Legalization of Marijuana



February 2022

Legalization of Marijuana

Federal – Democrats have tried

- **BUT STILL ILLEGAL**

State – Decriminalized or Legalized

- 37 states & D.C. –
legalized for medical marijuana;
18 states legalized for recreational
use.



- **Maryland:** Maryland Marijuana Legalization Amendment will be on the ballot in November 2022.
If passed, recreational marijuana for adults over 21, would be legal as of July 1, 2023.
 - ▶ Automatic expungements of past marijuana convictions and anyone found guilty of simple possession (if only charge in case); and allow for resentencing of those convicted of marijuana charges.
- **District of Columbia:** Legalized
- **Virginia:** Legalized

Generally:

- May be exceptions for medical use with proper documentation
- Set policies for operating under the influence
- Check Ban the Box laws in your jurisdiction

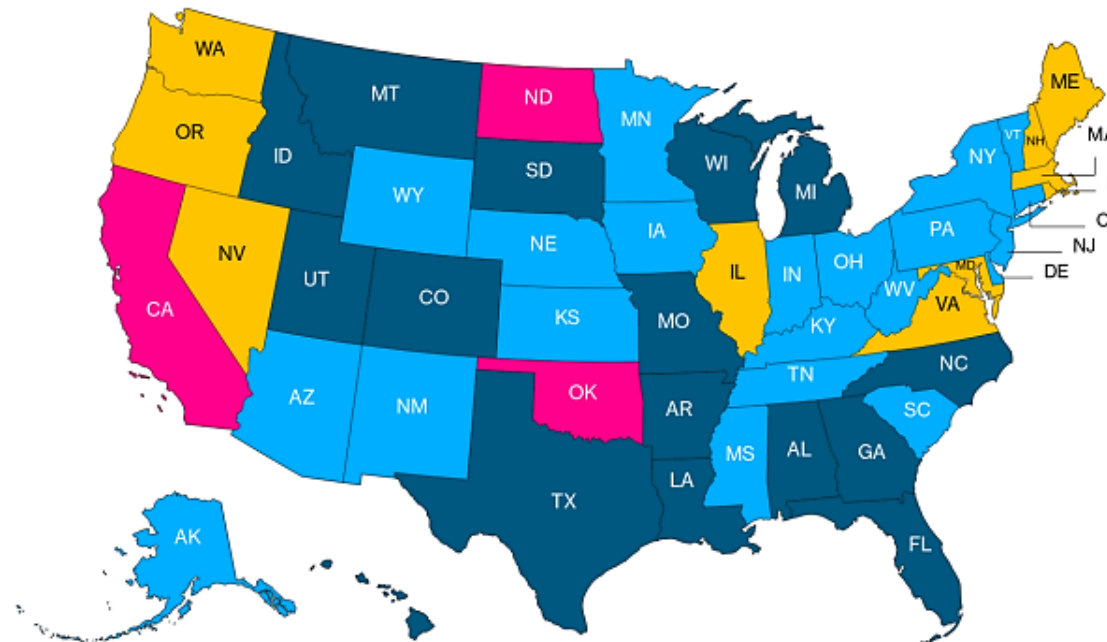
Non-Compete Agreements

Current Legal Framework: State Law on Non-Compete Agreements

Limits on Employee Noncompetes

statutes depicted, not accounting for case law

- allowed if not overly broad
- no statute on noncompetes
- largely banned
- banned for low-wage/hourly workers



Source: Bloomberg Law analysis

Bloomberg Law

Non-Compete



- **Federal** – Biden moves to Restrict non-compete agreements.
- **Currently** – California, ND, Oklahoma – ban non-compete agreements and others prohibit their use with low wage workers.

NEW - Ban on Non-Compete Agreement Act (10/2022)

- Bans non-compete agreements and workplace policies that prohibit employment with other entities both during and after the employee's employment, whether competitive or not
- Maryland Non-Compete and Conflict of Interest Clauses Act (May 2019) - Prohibits non-compete clauses for employees who earn \$15/hour or \$31,200/annually
- Virginia – Prohibits non-compete clauses for employees who earn less than \$52,000/annually

Non-Disparagement/NDAs

BEWARE - States are trending toward prohibiting employers from requiring employees and prospective employees from executing a nondisclosure or confidentiality agreement that would conceal details of a claim of sexual assault



Mandatory Arbitration

Federal Ban on Arbitration of Sexual Harassment Claims



- On March 3, 2022, President Biden signed *The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*.
 - ▶ Employees cannot be forced to arbitrate sexual assault or harassment claims that arise after March 3, 2022.
 - ▶ But note: The law does not bar arbitration of discrimination claims based on sex, nor harassment claims based on other protected classes.

State Bans on Arbitration of Sexual Harassment Claims

States with laws limiting the use of mandatory arbitration provisions of sexual harassment claims:

- | | | |
|-------|-------|-------|
| 1. CA | 3. NJ | 5. VT |
| 2. MD | 4. NY | 6. WA |



Labor Law Update

President Biden and Unions



In my White House, you'll always be welcome. Labor will always be welcome. You know, you've heard me say many times: I intend to be the most pro-union president leading the most pro-union administration in American history.

-President Joseph R. Biden, September 8, 2021

Executive Action Update



- **January 20, 2021 (Inauguration Day):** Biden fires NLRB General Counsel Peter Robb
- **February 4, 2022:** Executive Order on Use of Project Labor Agreements for Federal Construction Projects
- **February 7, 2022:** White House Task Force on Worker Organizing and Empowerment Report
- **March 10, 2022:** U.S. Dept. of Justice and Dept. of Labor sign MOU to strengthen the agencies' relationship concerning efforts to protect workers and ensure labor law compliance

Legislative Update

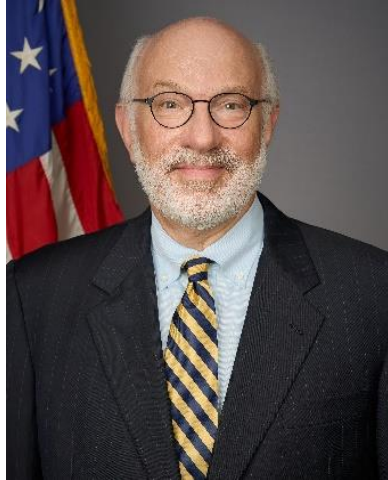


- **March 9, 2021:** PRO Act passed in the House of Representatives
- **November 19, 2021:** Build Back Better Act passes in the House, and incorporates some PRO Act provisions

NLRB Update



Lauren McFerran



David Prouty

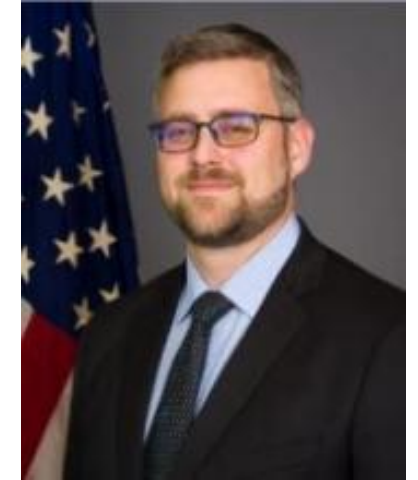


Gwynne Wilcox

Democratic Appointees



John Ring



Marvin Kaplan

Republican Appointees



General Counsel's Agenda:

- Captive audience meetings
- Card check
- Inherently concerted activity
- Remedies under the NLRA

What does this mean for employers?

- More unionization
- More agency charges
- More litigation



Firm Overview



Miles & Stockbridge is a leading law firm with seven offices in the mid-Atlantic region. Our lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

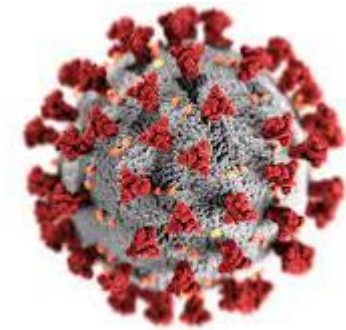
www.mslaw.com

Twitter: [@mstockbridgelaw](https://twitter.com/mstockbridgelaw)



Material contained in the presentation is for general information purposes and is not intended to be and should not be taken as legal advice on any particular matter. Accessing the presentation, or any material included in the presentation, is not intended to and does not create any attorney-client relationship. Because legal advice must vary with individual circumstances, do not act or refrain from acting on the basis of information included in the repository without consulting professional legal counsel. If you communicate with us, whether through email or other means, your communication does not establish an attorney-client relationship.

COVID-19 Update: The Current Landscape and Considerations for Employers



Presented by:
Stephanie Baron
Beth Hall



How Did We Get Here?

March 6, 2020
18th Annual
Hot Topics Seminar

April 2, 2020
FFCRA
enactment

March 11, 2021
19th Annual Hot Topics
Seminar (Virtual)

November 5, 2021
OSHA publishes COVID-19
Vaccination and Testing ETS

May 13, 2022
20th Annual Hot Topics
Seminar (Welcome back!)

March 11, 2020
WHO declares
COVID-19 a pandemic

December 11, 2020
FDA issues EUA for the
first COVID-19 vaccine
(Pfizer). EUA for Moderna
and J&J follow.

September 24, 2021
Biden issues E.O. 14042,
imposing vaccination
and safety requirements
on federal contractors.

November 29, 2021
CDC recommends
booster shots 6 months
after fully vaccinated

Current Legal Framework: Litigation Tracking

Federal COVID-19-related cases filed

- Pandemic to date - **14,152**
- 2022 to date - **1,522**

Federal COVID-19 employment cases filed

- Pandemic to date - **2,844**
- 2022 to date - **510**



Current Legal Framework: Litigation Tracking (Cont.)

Let's break those 2,844 COVID-19 employment cases down further. . .

Pandemic to Date

- Retaliation (Federal) - 1,930
- State Employment Claim - 1,904
- Discrimination (Federal) - 1,586
- FMLA - 1,032
- ADA - 781
- Accommodation (Federal) - 714
- FLSA - 677
- Harassment (Federal) - 510
- Pro Se - 173
- FLSA Collective Action - 161
- Order re: FLSA Conditional Certification - 4
- EEOC Charging Party - 2



2022 to Date

- State Employment Claim - 375
- Retaliation (Federal) - 350
- Discrimination (Federal) - 347
- Accommodation (Federal) - 189
- FMLA - 178
- ADA - 153
- Harassment (Federal) - 120
- FLSA - 81
- Pro Se - 37
- FLSA Collective Action - 23

COVID-19 Accommodations

Is COVID-19 a disability pursuant to the ADA?

- **It depends.** A person with COVID-19 has an actual disability if the person’s medical condition or set of symptoms is a physical or mental impairment that substantially limits one or more major life activities.
- Per the EEOC, COVID-19 = physiological condition affecting one or more body systems, and is a “physical or mental impairment” under the ADA.

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC (Dec. 14, 2021).

COVID-19 Accommodations (Cont.)

- Note - an **individualized assessment** is necessary to determine whether effects of a person's COVID-19 **substantially limit a major life activity**.
 - ▶ Asymptomatic or mild COVID-19 symptoms? **No disability**.
 - ▶ Severe symptoms? **Maybe**.
- “Long COVID”
- Employers should treat each case as if it may be a disability and engage in the interactive process to determine if there are accommodations that would assist the employee.

In the News: COVID-19 Accommodations Cases



Plaintiff, a philosophy professor at a prominent university, was diagnosed with pulmonary disease and advised “to avoid in-person contact.” She sought a temporary restraining order to compel the University to permit her to continue teaching remotely. As alternative accommodations, the University had previously offered either:

1. That she teach in larger rooms with students wearing N95 or KN95 masks, or
2. That she take leave under the FMLA.

How did the Court rule?

In the News: COVID-19 Accommodations Cases (Cont.)



Case: *Dobbs-Weinstein v. Vanderbilt Univ.*, No. 3:22-CV-00183, 2022 WL 860450, at *1 (M.D. Tenn. Mar. 22, 2022).

HOLDING: In **denying** her motion, the Court found that Plaintiff had not shown that she would suffer irreparable harm without the injunction.

- Plaintiff's largest class enrolled only 11 students.
- Plaintiff's fear of teaching in-person was incongruous with concern that "if she were to take FMLA leave, that she would not be able to use previously approved research grants to attend conferences in Paris and Rome."
- Plaintiff's concern that taking FMLA leave might negatively affect her future salary increases was both speculative and not the kind of harm courts generally find irreparable.

Current Legal Framework: Paid COVID-19 Leave



- FFCRA no longer applies
- Some states and localities have implemented paid COVID-19 leave laws:
 - ▶ California, Colorado (“Public Health Emergency” leave), District of Columbia (for vaccination only), Nevada (for vaccination only), New York, Pennsylvania (Philadelphia and Pittsburgh only), Washington
- Even in states where there is no COVID-19-specific paid leave, be mindful of regular (non-COVID-19-specific) sick leave laws.

The Shot Heard 'Round the World – COVID-19 Vaccination



How is Your Workplace Handling Vaccinations?

- A. We are mandating vaccination
- B. We are encouraging, but not mandating vaccination
- C. We are leaving it up to the employee

Please cast your votes to let us know how you are handling vaccinations!



Status of Various Mandates

- A. **OSHA COVID-19 Vaccination and Testing ETS** –
Stayed by SCOTUS; withdrawn by OSHA
- B. **Federal Contractor Mandate** –
Oral arguments held, decision pending
- C. **Federal Employee Mandate** –
Preliminary injunction overturned
- D. **Centers for Medicare and Medicaid (CMS) Vaccination Rule** –
On January 13, 2022, SCOTUS stayed injunctions, allowing enforcement nationwide

Vaccination Mandate – Can I Implement One?

The EEOC has confirmed that employers **MAY** mandate the vaccine in order for employees to work on site,

BUT:

- **Must make accommodations** for disability/medical and religious exemptions, **AND**
- We recommend **carefully weighing a number of factors** before implementing a mandate.



Considerations for Mandatory Vaccination



- Employees in a state that prohibits a mandate?
- Type of employer subject to **special mandates** (i.e., health care)?
- Process for providing ADA and religious exemption requests?
- Prepared to **terminate** those who refuse but don't have an exception?
- Do you need to **pay** for the **time to get vaccinated?** (probably yes)
- Do you need to **pay** for **expenses associated with vaccination?** (check state law)
- If testing as an alternative to vaccination, **pay** for testing and time testing?
- **Provide leave** for employees to get vaccinated or for symptoms after vaccine?
- What **proof of vaccination** will you require?
- How will you protect the privacy of that information?
- Will mandate **extend to visitors** – clients, vendors, etc.?
- **Unionized workforce?** If so, this is likely a subject of bargaining.

Other Vaccination Issues

- Negligence not to mandate?
 - ▶ Customers/visitors/students/family members
 - ▶ Health and safety standards
- Can I require vaccines for some, but not all employees?
- If you are mandating vaccination - include in job postings



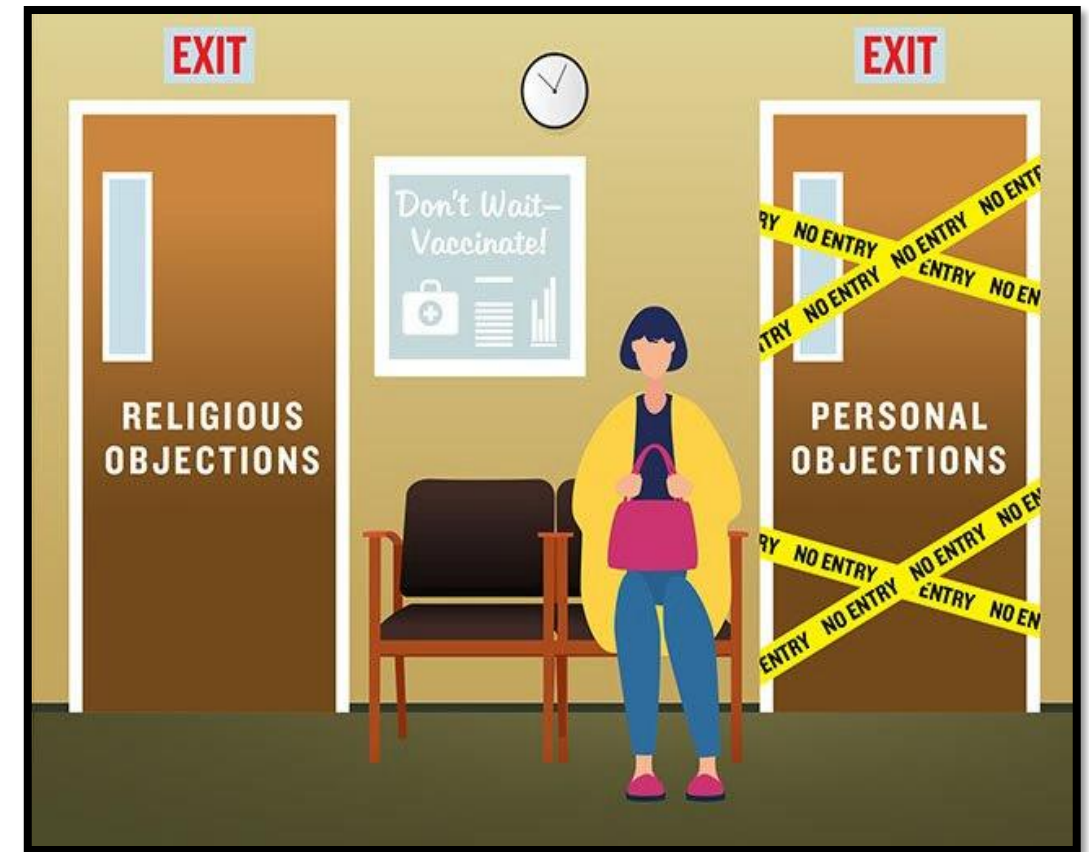
Disability/Medical Accommodations

- ADA Accommodations for those who cannot be vaccinated due to a disability
 - ▶ Do they pose a direct threat?
 - ▶ Is there a reasonable accommodation
 - i.e., working from home
 - ▶ Is it an “undue hardship”
 - significant difficulty or expense – a high bar
- Don’t forget about FMLA
- Consistency is key!

Religious Accommodations

Title VII - religious accommodations for those with a sincerely held religious practice or belief that precludes vaccination

- Very broadly defined
 - ▶ Presence of a deity or deities is not necessary
 - ▶ Can include unique beliefs held by a few or even one individual
- Undue hardship = “more than de minimis” burden or cost to the employer
 - ▶ Lower bar than ADA
- Consistency is key!



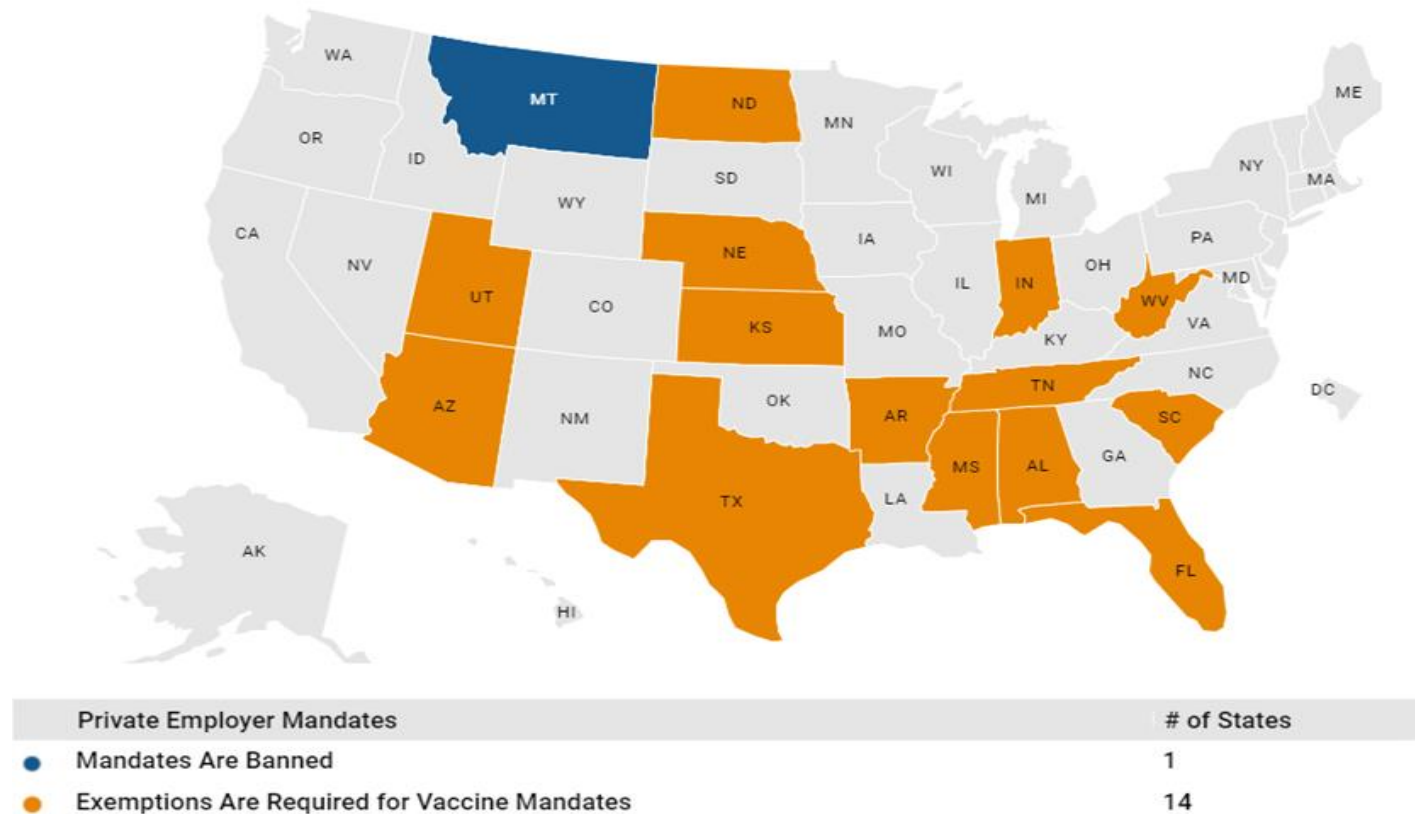
Current Legal Framework: State Law on Mandatory Vaccination



Several states have enacted laws related to COVID-19 vaccine mandates and passports, addressing:

- Banning or enforcing private employer mandated vaccinations
- Mandating vaccines for state employees and health workers
- Implementing vaccine passports/proof of vaccination requirements

Current Legal Framework: State Law on Mandatory Vaccination



Source: National Academy for State Health Policy



- Prudent to implement health and safety rules
 - ▶ Consider public health guidance (CDC, local departments of health, etc.)
 - ▶ Masks for unvaccinated? (even where CDC no longer requires?)
 - ▶ Quarantine/travel restrictions
 - ▶ Must consider state law (e.g., Cal OSHA)
- Importance of updating COVID-19 policies and/or guidance as time passes

- Contact tracing efforts
 - ▶ Make every effort to limit the number of people who know the name of the employee.
- Vaccination status
 - ▶ Keep it confidential!
 - ▶ What about supervisors charged with enforcing health and safety rules?
- Maintaining documents related to vaccination status
 - ▶ Where should this information be stored?

CONFIDENTIAL

Accommodation Hypotheticals - #1



You are the Director of HR for AFC Richmond, a local football team. Keeley, a member of the team's marketing staff, requests exemption from AFC Richmond's mandatory COVID-19 vaccination policy. Her provider cites "pre-diabetes" as Keeley's alleged disability, and indicates that a permanent work from home accommodation would allow Keeley to engage in preventative measures such as exercise. Keeley also submits a lengthy memo voicing her concerns about returning to work, stating that she is more productive at home, AFC Richmond will save money on overhead by allowing Keeley to work from home (citing energy costs equaling \$2.14/sq. ft.), and that she has lost several family members to COVID-19.

What Should You Do with the Accommodation Request?

- A. Grant the request. Per her health care provider, she has a disability.
- B. Deny the request.
- C. Follow-up with specific questions to determine if other accommodations may be available for Keeley, short of a permanent work from home arrangement.
- D. Ask for clarification from Keeley's health care provider.

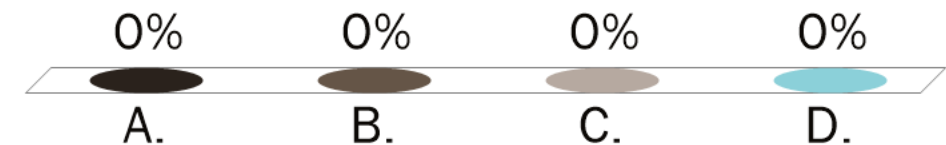


Accommodation Hypotheticals - #2

The star of the football team, Roy, is vehemently opposed to AFC Richmond's new COVID-19 vaccine mandate. He fills out an accommodation request form, stating that his religion sees fetal stem cell use as a sin, and that he considers his body to be “a temple,” and for both of these reasons getting the vaccine would be a violation of his moral convictions.

What Should You Do with the Accommodation Request?

- A. Grant the request. The bar for religious exemptions is low.
- B. Deny the request.
- C. Follow-up with specific questions to determine Roy's request is based on a sincerely held religious belief.
- D. Ask for clarification from a member of the clergy at Roy's church.

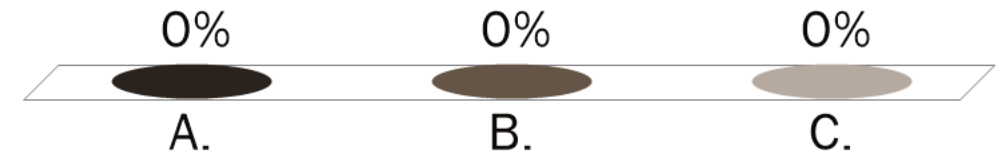


Accommodation Hypotheticals - #3

Dr. Sharon Fieldstone is AFC Richmond's team psychologist. Dr. Fieldstone was out on sick leave last month as a result of her COVID-19 diagnosis. She recently told AFC Richmond's HR Director that since her return to work she has been experiencing intermittent brain fog, fatigue, and headaches. She asks for a remote work accommodation, claiming she can easily do her job from home and meet with athletes via Zoom, like she did during the pandemic.

What Should You Do with the Accommodation Request?

- A. Grant the request, Dr. Fieldstone worked successfully from home for more than a year during the pandemic.
- B. Deny the request, Dr. Fieldstone's services are more effective when performed in person.
- C. Follow-up with specific questions to determine if Dr. Fieldstone's condition constitutes a disability and if other accommodations may be available to assist her



Accommodation Hypotheticals - #4

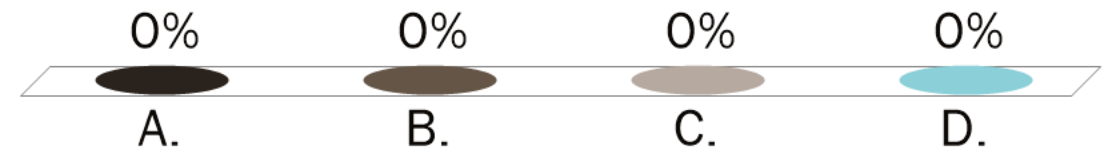


Rupert Mannion, former owner of AFC Richmond, has now pursued a career in the government contracting world. His employer, Fair Federal, hired him to work on a contract with its client, Trinity.

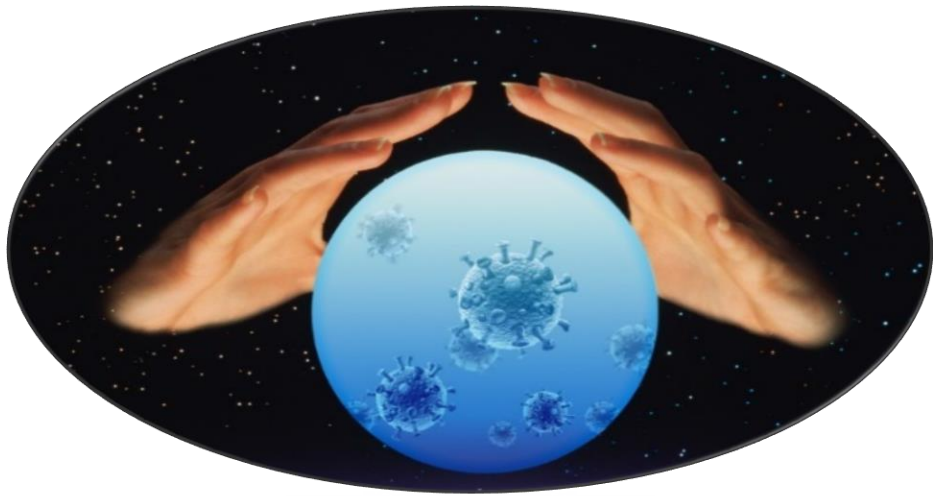
Fair Federal does not have a COVID-19 vaccine mandate, but Trinity insists that all contractors working on its sites be vaccinated. Rupert refuses to get vaccinated and does not have an approved disability or religious accommodation.

As Fair Federal's HR Director, What Do You Do?

- A. Require that Rupert get vaccinated.
- B. Try to find Rupert a position on another contract that does not require vaccination.
- C. Tell Trinity that Fair Federal does not have a vaccine requirement and therefore Rupert need not be vaccinated.
- D. Do nothing – this is something Trinity can deal with. Rupert complies with all policies of his employer.



What Does the Future Hold for COVID-19?



- Demands for remote and hybrid work arrangements
- Workforce seeking work/life balance and improved mental health
- Expanded access to paid sick leave/family medical leave
 - ▶ *Note Maryland's newly enacted paid family and medical leave law*
- **COVID-19 is ever-evolving. We are here when you need us!**

Firm Overview



Miles & Stockbridge is a leading law firm with seven offices in the mid-Atlantic region. Our lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

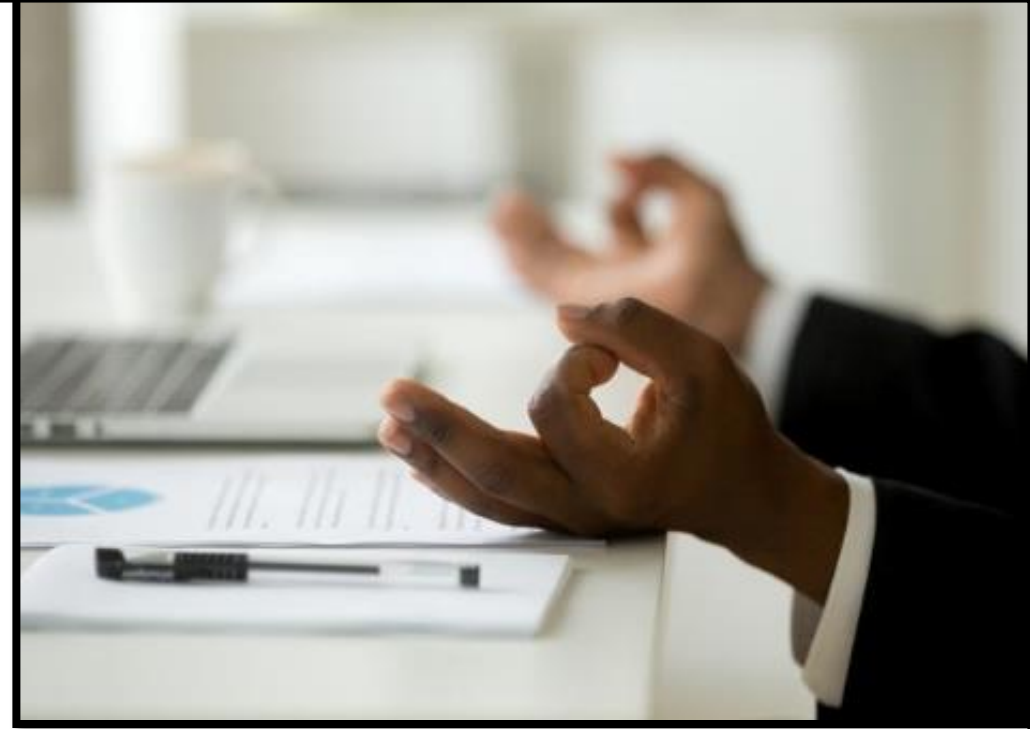
www.mslaw.com

Twitter: [@mstockbridgelaw](https://twitter.com/mstockbridgelaw)



Material contained in the presentation is for general information purposes and is not intended to be and should not be taken as legal advice on any particular matter. Accessing the presentation, or any material included in the presentation, is not intended to and does not create any attorney-client relationship. Because legal advice must vary with individual circumstances, do not act or refrain from acting on the basis of information included in the repository without consulting professional legal counsel. If you communicate with us, whether through email or other means, your communication does not establish an attorney-client relationship.

Mental Health in the Workplace



Presented by:

Suzanne Decker

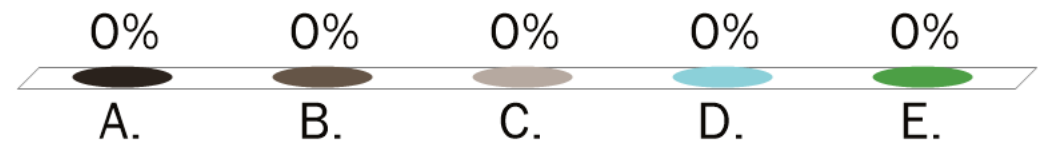
Veronica Jackson

Paolo Pasicolan



Please Make a Selection...

- A. How many of you have had to address employee mental health issues in the prior 12 months?
- B. No issues
- C. Yes, 1-5 employees
- D. Yes, over 5 employees
- E. Yes, over 10 employees



How Much of This is Related to Assertions of Depression or Anxiety?

- A. 25%
- B. 50%
- C. 75%
- D. 100%



According to the Centers for Disease Control and Prevention...



- Mental illnesses are among the most common health conditions in the United States.
- More than 50% of Americans will be diagnosed with a mental illness or disorder at some point in their lifetime.
- 1 in 5 Americans will experience a mental illness in a given year.
- 1 in 25 Americans lives with a serious mental illness, such as schizophrenia, bipolar disorder, or major depression.

▶ *CDC Mental Health Basics*

The Pandemic

- The pandemic has led to a worldwide increase in mental health problems, including widespread depression and anxiety.
- The pandemic has triggered a 25% increase in the prevalence of anxiety and depression worldwide according to the World Health Organization (“WHO”).
- Contributing Factors include:
 - ▶ Unprecedented stress caused by social isolation including constraints on people’s ability to work, seek support from loved ones, and engage in their communities
 - ▶ Loneliness
 - ▶ Fear of infection
 - ▶ Suffering and death for oneself or for loved ones
 - ▶ Grief after bereavement
 - ▶ Financial worries



-World Health Organization

The Economic Cost of Poor Mental Health



An estimated \$1 trillion worth of productivity is lost for the global economy each year due to anxiety and depression.

-World Health Organization

The Americans with Disabilities Act ("ADA")



- The ADA makes it unlawful to discriminate in employment against an individual with a disability.
 - ▶ Under ADA most employers must provide "reasonable accommodations" to employees with disabilities.
 - Adjustments to a work setting that make it possible for employees with disabilities to perform the essential functions of their jobs.
 - ▶ Mental health conditions may require that an employee be provided with a reasonable accommodation.
 - ▶ However, employers are not required to provide an employee with a reasonable accommodation if it would cause "undue hardship" to the employer.
 - Significant difficulty or expense to employer

Federal and State Leave Laws

A. The FMLA entitles eligible employees of most employers to take:

- 12 workweeks of unpaid leave in a 12-month period for:
 - ▶ the birth of a child and to care for the newborn child within 1 year of their birth;
 - ▶ the placement with the employee of a child for adoption or foster care and to care for the newly placed child within 1 year of their placement;
 - ▶ to care for the employee's spouse, child, or parent who has a serious health condition;
 - ▶ **a serious health condition that makes the employee unable to perform the essential functions of their job; or**
 - ▶ any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on covered active duty.

B. State laws

Common Scenarios

- Long-term employee, dependable performer, exhibits unusual behavior
- New hire tells supervisor she suffers from anxiety and depression
- Poor performer raises condition for first time when counseled for performance issues

Challenges Unique to Mental Health Conditions

- Stigma
- Avoidance of treatment/mitigating measures
- Not obvious
- Different people, different experiences
- Treatment





How to Recognize Mental Health Concerns

Mental health issues may present themselves in several ways. For example, you may notice warning signs in your employees such as:

- Difficulty concentrating and making decisions;
- Expressing feelings of irritation, anger, or in denial;
- Expressing feelings of uncertainty, nervousness, or anxiousness;
- Decreased motivation;
- Expressing feelings of tiredness, overwhelm, or burn out;
- Expressing feelings of sadness or depression;
- Loss of interest in activities previously enjoyed, social withdrawal; or
- Restless activity or slowed movements and speech.

– *CDC Mental Health Home: Support for Employees*

Hypothetical

Charlotte has been struggling with PTSD and bi-polar disorder and her doctor placed her on leave. After 2 months of leave, you receive a doctor's note stating that it would be helpful if she could return to the office 3 hours per day.



What does this mean?

- A. She can perform the essential functions for up to 3 hours each day.
- B. As part of her recovery she needs to get used to coming back to work.
- C. Who knows.
- D. She can return full-time but part-time would be nice.



The Interactive Process Continues



1. Being clear about the essential functions
2. Getting clarity on what is the reasonable accommodation being sought
 - ▶ What is the limitation and how does it tie to the job duties
 - ▶ Need for the accommodation
 - ▶ Suggested accommodation

Hypothetical

Marcus, a member of your marketing team, has asked to work remotely 100% because the stress of driving in each day makes him anxious and he would perform his job tasks better without that stress.



How do you respond?

- A. No, driving is not an essential part of his job
- B. Buy Marcus a bus pass
- C. Inquire with the doctor about what this all means.



Unrein v. PHC – Fort Morgan **(10th Cir. 2021)**



- Hospital dietician became legally blind and could no longer drive self to work. She asked for flexible or remote work schedule.
- Tenth Circuit – the essential functions required the employee’s physical presence and a predictable schedule. Her transportation barrier unrelated to “an essential job function or privilege of employment”
- But split in circuits and with EEOC

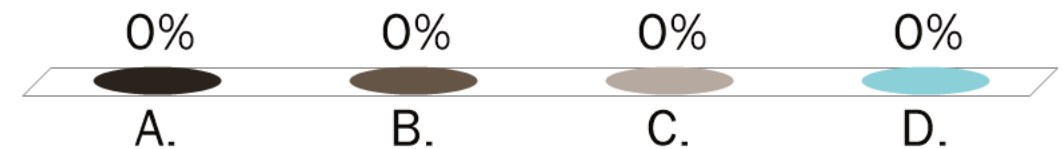
Hypothetical

Reese has begun to have attendance issues and increased irritability with co-workers. Reese's mother-in-law just moved in. At Happy Hour, Reese has a few more drinks than everyone else and seems groggy on morning Zoom calls.



Where to Begin?

- A. Address the attendance and inability to work with others.
- B. Send for fitness for duty.
- C. Ask if they are on medication.
- D. Send for drug and alcohol test.



Disability-Related Inquiries: What **NOT** to Ask.



- ❌ Asking whether they have (or ever had) a disability;
- ❌ Asking how they became disabled;
- ❌ Inquiring about the nature or severity of an employee's disability;
- ❌ Asking an employee's co-worker, family member, doctor, or another person about an employee's disability;
- ❌ Asking about an employee's genetic information;
- ❌ Asking about an employee's prior workers' compensation history;
- ❌ Asking whether they are currently taking any prescription drugs or medications; or
- ❌ Asking a broad question about their impairments that is likely to elicit information about a disability.

-EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA

Disability-Related Inquiries: What You **CAN** Ask.



- ✓ Asking generally about an employee's well being (e.g., How are you?);
- ✓ Asking an employee who looks tired or ill if they are is feeling okay;
- ✓ Asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- ✓ Asking an employee whether they can perform job functions;
- ✓ Asking an employee whether they have been drinking; asking an employee about their current illegal use of drugs; and
- ✓ Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

-EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA

Alcoholism and Drug Addiction

- Drug addiction and alcoholism are considered disabilities under the ADA.
- May take action against an addicted employee if their use of prohibited drugs or alcohol adversely affects job performance or conduct to the extent that the employee is not “qualified.”
- Cannot discipline an alcoholic employee more severely than other employees for the same performance or conduct.
- Drugs and alcohol are also a method of self-medicating other mental health challenges.
 - ▶ Departure from anti-drug policy is not a reasonable accommodation

Current Use of Prohibited Drugs

- The ADA protects:
 - ▶ Employees who are not using illegal drugs and are receiving, or have successfully completed, treatment for drug addiction
 - ▶ Employees who are not using illegal drugs but have a history of drug addiction
- However, an employee who is currently engaging in the illegal use of drugs is not an “individual with a disability” under the ADA.

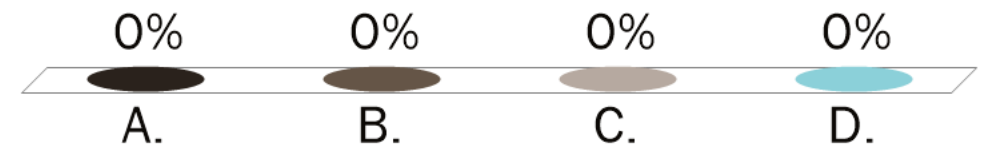
Hypothetical

Skylar is your new office administrator. Although she has only been with your company for a few months, many employees have complained about her behavior, including snapping and screaming at employees; blank stares and intimidating looks, ranting and mumbling to herself; growling at co-workers; and making statements that were perceived as a threat.



What is the Appropriate Response?

- A. Conclude she violates workplace violence policy and proceed with termination.
- B. Put Skylar on administrative leave and submit to a fitness for duty.
- C. Just address as performance issue and discipline her.
- D. Inquire if she is on or needs medication, refer her to counselor.





Fitness for Duty

- Painter v. Illinois Department of Transportation (7th Cir. 2017)
- Examinations must be “job related and consistent with business necessity.”
Specifically, the court noted that:
 - ▶ Ensuring workplace safety = business necessity.
- **Don’t** be afraid to get follow-up examination.
- **Do** remember it may be considered an adverse employment action in other claims (retaliation or discrimination).

ADA Definition of “Qualified”

- Education/experience/skills standards
- Able to perform essential functions
- With or without reasonable “accommodation”



What Are “Essential Functions?”

- Fundamental to the position:
 - ▶ Not marginal
- How about:
 - ▶ Attendance and punctuality?
 - ▶ Ability to work in stressful environment?
 - ▶ Ability to work well with co-workers?
- Essential Functions v. Qualifications
- Job descriptions are helpful evidence so be objective in wording



Examples of Unreasonable Accommodations

- Removal of essential functions
- Reduced expectations or exemption from important employer policies
- Changing supervisor or co-workers. But consider:
 - ▶ Modified or increased training materials/methods
 - ▶ Adjusting supervisory methods
 - ▶ Altering communication methods (email instead of oral instructions)
 - ▶ Increased feedback, guidance, structure
 - ▶ *Temporary* job coaches
- Anything that causes an undue hardship

Best Practices

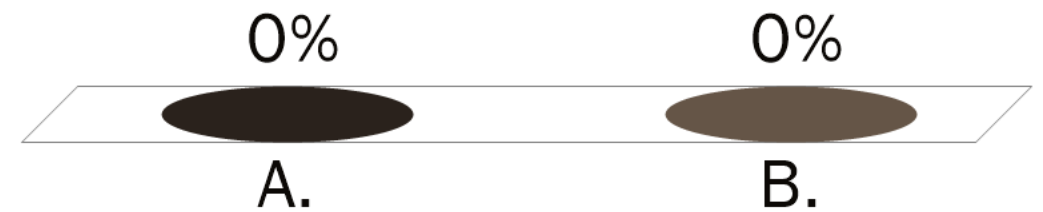
- Don't delay taking appropriate action when you become concerned.
- Don't assume root cause of odd behavior.
- Be consistent.
- Maintain confidentiality and limit people who are privy to issue.
- Document the process and your communications with employees.

Benefits

Have you heard of MHPAEA?

A. Yes

B. No



Why Should I Care?

- DOL audit priority in 2022
- Emerging litigation trend

What is MHPAEA?

- Mental Health Parity and Addiction Equity Act of 2008
- Prohibits health plans from limiting coverage of mental health benefits more stringently than physical health benefits

Applies to

- Financial requirements, e.g., copays and deductibles
- Quantitative treatment limits, e.g., visit limits
- **Nonquantitative treatment limits (NQTLs)**
 - e.g., medical management standards, medical necessity requirements

Enforced by EBSA

- Closed 4,086 investigations in the last 10 years
- Issued 156 inquiry letters in recent audit program

Enforcement Process

- Usually starts with a participant's complaint
- Initial contact is an **information request**

Enforcement Process (Cont.)

- If EBSA finds a violation, the plan has 45 days to correct.
- If plan isn't fixed, participants must be notified within 7 days.
- Violators will be named in a published report.
- Monetary penalties apply.

Audit Priority in 2022

- In December 2020, President Trump signed a COVID stimulus bill amending MHPAEA.
- Required health plans to document comparative analysis of NQTL by June 10, 2021
- Required DOL to report to Congress

DOL's Report to Congress

- EBSA sent 156 audit letters.
- Nobody was compliant.

What's Next?

- Final regulations on NQTLs due in June 2022
- More audits are expected in 2022.

Nobody Was Compliant!?

Plans Were Unprepared.

- Didn't have comparative analysis of NQTLs
- Didn't know who's responsible for the analysis

Comparative Analysis Failed to —

- Identify benefits subject to an NQTL
- Describe how NQTLs apply
- Identify the factors used to design an NQTL
- Detail the stringency of the factors
- Show compliance of NQTLs as written and practiced

N.R. v. Raytheon Company

- Employee's child was diagnosed with autism and prescribed speech therapy
- Claim for benefits was denied because plan excludes “habilitative services”
- Habilitative ≠ rehabilitative

N.R. v. Raytheon Company (Cont.)

- Employee sues, alleging the plan violates MHPAEA.
- Employee alleges that plan covers habilitative services for physical conditions.
- Plan alleges that all habilitative services are excluded.

What Should Employers Do?

- Ask your administrator about the comparative analysis of NQTLs.
- Review your comparative analysis using the DOL's self-compliance tool.
- Ask questions if you're unsure about compliance.
- Make sure your plan document or SPD reflects the terms described in the NQTL.
- Make sure your service agreements cover NQTL analysis.

Firm Overview



Miles & Stockbridge is a leading law firm with seven offices in the mid-Atlantic region. Our lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

www.mslaw.com

Twitter: [@mstockbridgelaw](https://twitter.com/mstockbridgelaw)



Material contained in the presentation is for general information purposes and is not intended to be and should not be taken as legal advice on any particular matter. Accessing the presentation, or any material included in the presentation, is not intended to and does not create any attorney-client relationship. Because legal advice must vary with individual circumstances, do not act or refrain from acting on the basis of information included in the repository without consulting professional legal counsel. If you communicate with us, whether through email or other means, your communication does not establish an attorney-client relationship.

Labor, Employment, Benefits & Immigration



We craft customized solutions that enhance compliance with federal and state laws, minimize disputes with employees, avoid litigation when possible, and maximize strategic advantages should negotiation, dispute resolution or litigation become necessary.

With significant forces radically shaping the modern workplace, **people strategies** are at the core of our clients' success today more than ever. Disruptive technologies, new ways of working, evolving and fragmented regulatory requirements, and economic uncertainties are challenging existing workforce management and talent solutions as HR leaders strive to balance constant tests of risk and regulation.

How We Can Help

- Go-to counsel to meet every employment challenges
- Successful litigators with the big picture in mind
- Seamlessly execute labor, employment, benefits and immigration solutions
- Agile and collaborative legal partnerships
- Actionable insights to keep you ahead of the curve
- Sophisticated approaches to workplace investigations



Labor, Employment, Benefits & Immigration Team



Stephanie Baron
sbaron@milesstockbridge.com
410-385-3463



Suzzanne Decker
sdecker@milesstockbridge.com
410-385-3417



Tyler Duckett
tduckett@milesstockbridge.com
410-385-3767



Kirsten Eriksson
keriksson@milesstockbridge.com
410-385-3583



Steven Frenkil
sfrenkil@milesstockbridge.com
410-385-3758



Brianna Gaddy
bgaddy@milesstockbridge.com
410-385-3526



Tina Goel
tgoel@milesstockbridge.com
410-412-3466



Elisabeth Koloup Hall
ehall@milesstockbridge.com
410-385-3412

Labor, Employment, Benefits & Immigration Team



Zachary Haugen
zhaugen@milesstockbridge.com
410-385-3845



Sasha Hodge-Wren
shodgewren@milesstockbridge.com
202-465-8424



Victoria Hoffberger
vhoffberger@milesstockbridge.com
410-385-3712



Veronica Jackson
vjackson@milesstockbridge.com
410-385-3499



Michelle Johnson
mjohnson@milesstockbridge.com
410-385-3660



Anthony Kraus
akraus@milesstockbridge.com
410-385-3756



Rebecca Leaf
rleaf@milesstockbridge.com
410-385-3485



Meg Manchester
mmanchester@milesstockbridge.com
410-385-3404

Labor, Employment, Benefits & Immigration Team



Paolo Pasicolan
ppasicolan@milesstockbridge.com
410-385-3713



Kathleen Pontone
kpontone@milesstockbridge.com
410-385-3757



Merrell Renaud
mrenaud@milesstockbridge.com
703-610-8641



Marc Sloane
msloane@milesstockbridge.com
410-385-3517



Sufen Zhang
szhang@milesstockbridge.com
410-385-3608