Top 4 Top-of-Mind Issues for Employers

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COVID-19 cases are down and vaccinations are up, but 2021's developments continue at a fast and furious pace. With a new administration in place, new legislation taking effect, and the ever-changing considerations of a pandemic-era workplace, employers may find their heads spinning with where to focus and how to build priorities. Below are some of the top areas that are requiring additional thought and focus these days.

1. COVID-19: What's the Latest on Vaccines and Masks?

COVID-19 guidance has proved to be a particularly thorny area for employers. Many employers want to know if they can mandate vaccines if they can create vaccine incentive programs, if they can inquire about vaccine status, and what the CDC's new masking guidelines mean for their workplace. To complicate matters, there is no shortage of misinformation circulating on the internet about vaccines, masks, federal laws such as HIPAA, and what employers can and cannot do.

Here are the basics:

Can employers mandate vaccines?
Yes. Under federal law, employers can mandate that employees receive the vaccine. However, in order to not run afoul of laws such as the Americans with Disabilities Act (ADA) and Title VII, employers must make reasonable accommodations for those employees who refuse a vaccine for medical or religious reasons. Read about more considerations for mandated vaccines here.

**Can employers create vaccine incentive programs?**

Yes. Employers can offer incentives of de minimis value as an incentive for employees to get vaccinated. However, again, employers must be prepared to accommodate employees who refuse a vaccine on certain grounds. After withdrawing its advice on vaccine incentives, the EEOC just confirmed that such incentives are permitted as long as they are not “coercive”. Read more about considerations for a vaccine incentive program here.

**Can employers ask employees about their vaccination status?**

Yes. The EEOC’s current guidance (Section K) is that this is not a medical inquiry, and you can ask applicants or employees without running afoul of the ADA or having to show job-relatedness. If you do ask an employee whether he is fully vaccinated and the employee says no, then you should not ask why — as that would likely be a disability-related inquiry (according to the EEOC).

**What about OSHA guidance regarding recording vaccine reactions?**

Initially, OSHA issued guidance stating that if an employer-mandated vaccines, then the employer was likely responsible for recording any “adverse reactions” an employee had to said vaccine. However, OSHA has since revoked this guidance and, instead, stated that it “does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers’ vaccination efforts.” Thus, OSHA will not enforce these recording requirements. This means that, for employers mandating vaccines, there will be less of an administrative headache to monitor and record any employee adverse reactions.

**Can employers follow the new CDC masking guidelines? And, if so, how can employers determine who is vaccinated?**

First, yes, many employers have opted to follow the most recent CDC guidelines stating that fully vaccinated individuals are not required to wear masks in most indoor settings and in all outdoor settings. But, with this new development comes the tricky business of determining which employees are fully vaccinated. While, again, employers can inquire about vaccination status, there are other options for handling these situations. Read more here about how to determine vaccine status as employers update mask protocols.

### 2. The Changing Minimum Wage Landscape: What Employers Need to Know
In January 2021, 19 states implemented higher minimum wages: Nine of those were automated increases based on cost of living, while 10 of those states — Arkansas, California, Illinois, Maryland, Massachusetts, Missouri, New Jersey, New Mexico, New York, and Vermont — increased the minimum wage through legislation or ballot initiatives. Currently, at least 34 states are contemplating legislation or ballot initiatives to join this growing trend. It is noteworthy, too, that many major corporations are following suit. Amazon, for example, raised its minimum wage to $15 an hour in 2018, and other big-name employers such as Under Armor and Target have done the same.

This movement towards a higher minimum wage is supported by the new Biden administration, which announced in May that it would issue an Executive Order to increase the minimum wage for federal contractors to $15 an hour in 2022.

In recent weeks, there has been much media coverage on the “shortage” of employees to fill open, often low wage, positions. This news has been met with the decision by at least 23 states opting to end federal COVID-19 unemployment benefits in June, months before the program expires in September 2021 (more on that below).

What does this mean for employers? Make sure to stay up to date on not only potential minimum wage hikes in your state, but also monitor industry trends and state unemployment updates.

3. States Opt Out of Unemployment Benefits Early

When the COVID-19 pandemic brought the economy to a screeching halt, Congress passed a stimulus package that included federal unemployment benefits for affected jobless individuals. When the original funding expired, Congress re-upped those benefits at $300 a week starting in December 2020. Now, 24 states are set to opt out of these benefits starting in June, despite the fact that the federal program will be in effect through September 6. Many of the states opting out cite these unemployment benefits as potential causes of the labor shortages that continue to grab headlines across the country.

For employers who are looking to hire as we head into the era of full reopening, this may be welcome news. The following states will be opting out of benefits: Alabama (June 19); Alaska (June 12); Arizona (July 10); Arkansas (June 26); Florida (June 26); Georgia (June 26); Idaho (June 19); Indiana (July 19); Iowa (June 12); Mississippi (June 12); Missouri (June 12); Montana (June 27); Nebraska (June 10); New Hampshire (June 19); North Dakota (June 19); Ohio (June 26); Oklahoma (June 26); South Carolina (June 30); South Dakota (June 26); Tennessee (July 3); Texas (June 26); Utah (June 26); and West Virginia (June 19).

4. Hybrid Workplace? Watch Your Taxes

After the last year of remote work for many employees, reopening workplaces has meant new considerations and new pitfalls. Many employers are considering so-called “hybrid” workplaces, meaning employees can choose to be in-person or remote. While often this means that employees are still living and working wherever
the physical workplace is located, it can also mean that employees are free to travel and/or relocate at will. Some employers report that, during the pandemic’s full-time remote work environment, some employees relocated out of state without notifying the employer. Even though most employers have worked through the technological and logistical requirements for effective remote work, there may be one area they have yet to consider: taxes.

Often, if an employee chooses to relocate to an area or state where the company does not have a physical location, there may be income, sales, and payroll tax implications for the company. This may come as a surprise but is an area that requires extra focus from employers choosing to go the hybrid route. If your workforce now exists over various state lines, chances are that your taxes are going to be increasingly complex. For example, many states have rules that once a company meets a certain threshold of payroll, property, or sales taxes within a state, the company will have a “nexus” in that state for purposes of income or sales tax.

Other complications arise when state tax laws conflict. For example, Arkansas, Connecticut, Delaware, Nebraska, New York, and Pennsylvania all have so-called convenience of employer laws. These laws allow the state to tax out-of-state work for an employee working for an in-state business. So, if an employee working for an Arkansas company were to move to another state that does not have a convenience of employer law, both Arkansas and the new state may assert the “right of first taxation.” There is no quick fix to these complications; many experts say they will simply require litigation, legislation, or both.

In the meantime, employers should create clear guidelines and expectations regarding remote work. This may include enumerating which locations are acceptable for employees looking to relocate; conducting a full inventory of employee locations; and implementing clear protocol for employees contemplating relocation.

**Takeaway**

Employers may feel like they are drinking from the fire hose these days — so much information and not enough time to sift through it all. From COVID-19 protocols to the looming minimum wage hikes to the changing nature of workplaces, employers would do well to pay attention to the details, while not losing sight of the big picture right now.

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