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Phillips**

# American Society of Safety Professionals Rocky Mountain Chapter February Member Meeting

## Employment Law Update for 2021



Presented by:

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- **Colorado Healthy Families and Workplace Act Sick Leave Requirements for 2021**
- **New COVID-19 Rules**
- **Changes under President Biden**
- **Vaccines**

# Colorado Paid Sick Leave Starts January 1, 2021

- Beginning January 1, 2021, the Act requires employers with 16 or more employees to provide paid sick leave to their employees.
- Accrued at one hour of paid sick leave for every 30 hours worked, up to a maximum of 48 hours.
- Beginning January 1, 2022, the Act applies to all employers regardless of size.

# COLORADO PAID SICK LEAVE

An employee:



- Begins accruing paid sick leave when the employee's employment begins;
- May use paid sick leave as it is accrued; and
- May carry forward and use in subsequent calendar years paid sick leave that is not used in the year in which it is accrued.

## COLORADO PAID SICK LEAVE

If an employer already has a more generous PTO, vacation, or sick leave policy (meaning providing at least 48 hours of sick leave), the employer does not need to provide additional leave.

The accrual must be as generous as that required in the Act and be available immediately and for part-time employees.

## COLORADO PAID SICK LEAVE

While the Act refers to paid sick leave as “wages,” it specifically provides that unused paid sick leave need not be paid out at termination.

Any unused paid sick days must be reinstated if the employee is rehired within six months of termination.

The paid sick leave also carries over to any successor employer.

# COLORADO PAID SICK LEAVE

Employees may use accrued paid sick leave to be absent from work for the following purposes:

- The employee has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- The employee needs to care for a family member who has a mental or physical illness, injury, or health condition; needs a medical diagnosis, care, or treatment related to such illness, injury, or condition; or needs to obtain preventive medical care;
- The employee or family member has been the victim of domestic abuse, sexual assault, or harassment and needs to be absent from work for purposes related to such crime; or
- A public official has ordered the closure of the school or place of care of the employee's child or of the employee's place of business due to a public health emergency, necessitating the employee's absence from work.

Employers may require documentation from the employee if they take four or more consecutive paid sick days.

# PUBLIC HEALTH EMERGENCY PAID SICK LEAVE

- In addition to the paid sick leave accrued by an employee, the Act requires an employer to provide its employees an additional amount of paid sick leave during a public health emergency in an amount based on the number of hours the employee works.
- There is no documentation requirement for an employee to take this leave for self-isolation due to a positive diagnosis, seeking medical treatment with respect to a disease, caring for a family member or a child, or inability to work due to pre-existing health conditions.

# PUBLIC HEALTH EMERGENCY PAID SICK LEAVE



- For full-time employees, this amounts to 80 hours of total paid sick leave (an additional 32 hours).
- For employees who regularly work less than 40 hours per week, employers must provide the greater of the number of hours the employee is scheduled to work in a 14-day period or the average time the employee works in a 14-day period.
- Employees must immediately accrue these supplemental hours.

# ANTI-RETALIATION PROVISIONS

The Act prohibits an employer from retaliating against an employee who uses the employee's paid sick leave or otherwise exercises the employee's rights under the Act.

Employees who believe their rights under the Act were violated may file a charge with the Division of Labor, and bring a civil action within two years if they exhaust all administrative remedies.

# RECORD RETENTION REQUIREMENT



## Retain Records

- The new law requires employers to retain records, documenting by employee, the hours worked, paid sick leave accrued, and paid sick leave used.
- This is a critical requirement because you will need to make such records available to the Division of Labor upon request.

# **Current State of Workplace Safety in the Age of COVID-19**

## Trump Administration's Reliance On OSHA's Existing Regulatory Framework to Combat COVID-19

- OSHA declined to issue COVID-19 standards during Trump Administration.
- General Duty Clause applies to COVID-19 related hazards.
  - Employers must ensure their workplaces are “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

# Most Common COVID-19 Citations As Identified By OSHA

- Use of respiratory protection and personal protective equipment (PPE) most commonly-cited standards.
- Many employers are issuing respirators to employees without the required medical evaluation and without establishing and implementing a written respiratory protection program.
- Takeaways:
  - Review OSHA's PPE standards regarding proper use and ensure workers are trained.
  - If you are requiring employees to wear respirators, ensure you have completed medical evaluations and have properly trained your employees.

# OSHA's Current COVID-19 Recordkeeping Directives

- Employers subject to OSHA recordkeeping requirements must determine whether employees' COVID-19 cases are work-related and, if so, record them on the OSHA 300 log.
- Must record where the case:
  - Is a confirmed case of COVID-19, as defined by the CDC;
  - Is work-related; and
  - Involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.



# “Work-Related” Guidance from OSHA

April 10, 2020 Guidance: only applied to healthcare organizations, emergency response organizations, and correctional institutions.

May 19, 2020 Guidance: all Industries

- 3 Step Process: (1) ask employee about origin; (2) ask employee about work and non-work related activities; and (3) assess workplace of infected employee.



# “Work-Related” Guidance from OSHA (Cont...)

## September 2020 Guidance:

- To be reportable, an in-patient hospitalization due to COVID-19 must occur within 24 hours of an exposure to COVID-19 at work.
- If COVID-19-related fatality occurs within 30 days of exposure at work, must be reported within eight hours of determination that it was work related.

# **Looking Ahead: Workplace Safety Under the Biden Administration**

# OSHA's January 29 COVID-19 Guidance

- OSHA's latest guidance indicates that a COVID-19 prevention program is the most effective way to mitigate the spread of COVID-19 at work.
- This includes requiring that employees who have or likely have COVID-19 isolate until they meet the CDC guidelines for exiting isolation and quarantining employees who have been exposed to COVID-19.
- Also suggests implementing policies on physical distancing and the use of face coverings.

# COVID-19 Prevention Program (contd.)

- Assignment of a workplace coordinator to address COVID-19 issues.
- Identification of where and how workers might be exposed to COVID-19 at work through a hazard assessment.
- Identification of measures that will limit the spread of COVID-19 in the workplace, including engineering hazards, administrative policies and additional personal protective equipment.
- Consideration of protections for workers at higher risk for severe illness through supportive policies and practices.
- Establishment of a system for communicating effectively with workers in a language they understand, including a system for employees to self-report COVID-19 symptoms or exposure.

# COVID-19 Prevention Program (contd.)

- Education and training for workers on COVID-19 policies and procedures.
- Instructing workers who are infected or potentially infected to stay home and isolate or quarantine.
- Minimizing the negative impact of quarantine and isolation on workers through telework and flexible paid leave policies.
- Isolating workers who show symptoms at work.
- Performing enhanced cleaning and disinfection after a suspected or confirmed case of COVID-19.

## COVID-19 Prevention Program (contd.)

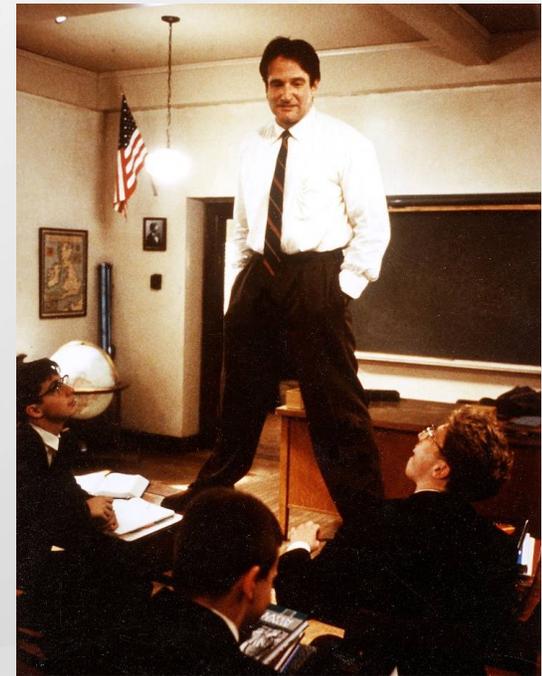
- Providing guidance on screening and testing.
- Recording and reporting COVID-19 infections and deaths.
- Implementing protections from retaliation and setting up an anonymous process for employees to voice concerns about COVID-19 hazards.
- Making a COVID-19 vaccine available at no cost to employees.
- Not relaxing preventative measures for employees who have been vaccinated.

# How Should Employers Prepare?

- Employers should act now to ensure their safety policies and procedures are compliant with CDC guidance, including these often-misunderstood guidelines:
  - Returning exposed employees to work too early after a negative test;
  - Miscalculating the appropriate quarantine period for those exposed to an infected household member;
  - Not notifying employees of a confirmed COVID-19 case in your workplace; and
  - Incorrectly believing that wearing face coverings trumps the 6-15-48 analysis.

# Oh Captain! My Captain!

- Marty Walsh has been nominated as Secretary of Labor.
- Julie Su nominated as Deputy Secretary of Labor
- Biden nominated Jim Frederick as Deputy Assistant Secretary; Acting Head of OSHA



# Send in the Inspectors!

- Trump Administration cut OSHA inspectors to the lowest level in its 49-year history, approximately 761 inspectors (approximately 1,000 a decade ago).
- Biden promised to build up the number of federal OSHA inspectors.
- It will take roughly 18 months to train new inspectors and begin conducting inspections.
- Employers can expect more OSHA inspectors knocking on their door in the coming months.



# Increase in General Duty Clause Citations

- Under the OSHA and most state OSHA plans, employers must furnish “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”
- OSHA can cite employers for violation of the General Duty Clause if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard.
- The General Duty Clause is used only where there is no OSHA standard that applies to the particular hazard, like the COVID-19 pandemic.

# Expanded OSHA Health & Safety Standards

- Obama administration expanded several OSHA standards:
  - Hazard Communication
  - Walking & Working Surfaces
  - Reduced Silica & Beryllium exposure limits
  - New Electronic Injury and Illness Reporting Requirements
- There are currently 24 pending/proposed standard updates in various stages of OSHA's agenda.
- Given the lack of movement during Trump Administration, expect Biden to attack this agenda and move fast on implementing new (or revising existing) standards.

# Infectious Disease Standard

- During H1N1 pandemic, Obama Administration spent years preparing a permanent infectious disease standard.
- Would have required health facilities and certain other high exposure workplaces to permanently implement infection control programs to protect their workers.
- Look for Biden Administration to resurrect the proposed infectious disease standard and push for its adoption, even if the COVID-19 pandemic ends early in his tenure.

# Greater Oversight of State OSHA Plans

- States and OSHA have not always seen eye to eye
- North Carolina and South Carolina, have refused to adopt federal OSHA's increased maximum penalties, originally adopted under the Obama Administration.
- Other states like Virginia, Michigan, California, and Oregon have adopted their own Emergency Temporary Standard for COVID-19, despite the Trump Administration's refusal to do so.
- Under a Biden Administration, expect federal OSHA to work more closely with the state OSHA plans and seek more aggressive enforcement from their state counterparts.

# OSHA's 2016 Anti-Retaliation Rule

- On May 12, 2016, OSHA published a final rule prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses.
- Rule can apply to action taken under workplace safety incentive programs, injury and accident reporting programs, and post-incident drug testing policies.
- Rule states blanket automatic post-accident drug testing is improper because it has been shown to discourage employees from properly reporting injuries.
- The Trump Administration did not reverse the rule, but it has largely been unenforced.

# OSHA's 2016 Anti-Retaliation Rule (Cont...)

- A Biden Administration likely will begin enforcing the rule beginning in 2021.
- Employers may want to carefully reconsider any post-injury drug testing policies.
- Consider whether the type of incident is one where being under the influence or impaired was reasonably likely to have been a contributing factor (i.e., reasonable-suspicion based test).



# **What Employers Need to Know about a COVID-19 Vaccination Policy**

# Vaccines and the Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are very fact-specific.
- Always take state and local law into account.
- This situation is very fluid and could change rapidly due to a variety of factors.

# What Does the EEOC Have to Say?

**Pandemic Preparedness in the Workplace and the Americans with Disabilities Act** ( Issued in 2009, *updated* in response to the COVID-19 pandemic – March 21, 2020)

Excerpt from response to Question No. 13, regarding whether employers covered by the ADA and Title VII may require flu shots:

“Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **\*As of the date this document is being issued, there is no vaccine available for COVID-19.\***”

# ADA – American with Disabilities Act

- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits employer’s rights to inquire/conduct medical exams
  - Must be job related, consistent with business necessity
  - Significant risk of substantial harm
  - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information
- Similarly, **Title VII** may require accommodation of an employee’s sincerely-held religious beliefs or practices.

# Policy Addressing Vaccine Expectations

- Consider *required* v. *strongly encouraged*
- Any requirement should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.
  - Clearly describe expectations and rationale
  - Explain how to seek an exemption as an accommodation
  - Follow the *individualized* accommodation process diligently
  - Ensure no retaliation (or appearance of retaliation)
  - Safeguard all medical information - separate from general personnel files

# Limitations

- EEOC (Equal Employment Opportunity Commission):
  - An employee may be entitled to an exemption from mandatory flu shots due to an ADA-covered disability or other medical circumstance
  - An employee may be exempted from a flu shot requirement based on sincerely-held religious beliefs, practices, or observances
  - In either case – engage in and document communication with employee to determine whether a reasonable accommodation is needed and feasible
  - The *process* may be as important as the final decision
- Consider potential reasonable accommodations

# Anti-Vaxxers, Other Considerations?

- Some state laws expressly protect employees' rights to engage in legal outside activity, including political activity.
- Other state laws may affect employer's vaccination policies.
  - i.e., Oregon – some vaccines must be *offered*, but generally may not be *required*
- Remain mindful of employees' Section 7 rights to band together regarding terms and conditions



## May Employers require a *COVID-19 Vaccine*?

- *Probably* – subject to the same exceptions as the flu vaccine.
- Policy should explain expectations, rationale, job-relatedness and availability of exemptions as a *reasonable* accommodation.
- Always consider state laws.
- Safeguard employee medical information.



# *Should* an Employer Require Vaccinations?

- Good employee relations are vital for many reasons:
  - Clients, customers and the public notice
  - Critical to maintaining focus, productivity and community relations
  - Consider possible susceptibility to union organizing efforts
- Validate approvals and appropriate delivery of the vaccine.
- Employer pays for mandatory vaccines.
- Evaluate the likely response of your employees.
- Think through logistics (i.e., on-site?)
- Do not underestimate the importance of effective communications.

# Summary

- CDC: Vaccinating now is important, to protect the workplace *and* reduce strain on nation's healthcare system.
- Formalize vaccination policies now.
- Over 80% of employees get flu vaccines when *required* – almost twice the rate as when vaccines are *strongly encouraged*.
- Anticipate issues, questions and level of pushback, if and when COVID-19 vaccine becomes available to your workers.

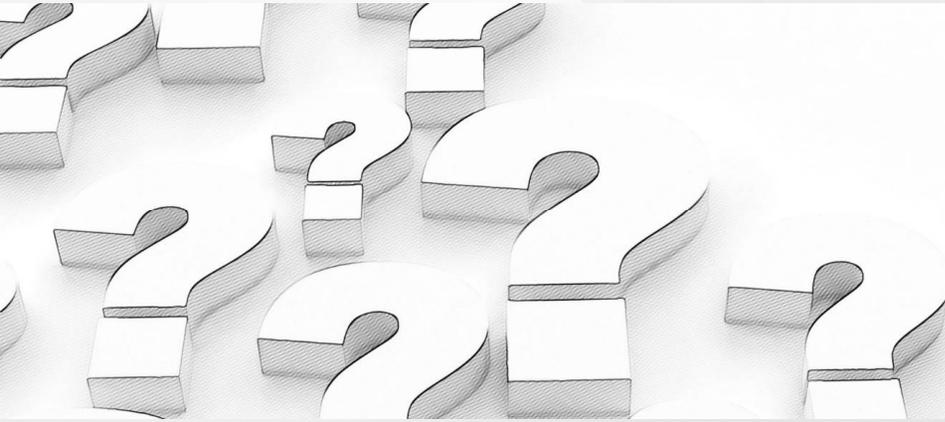
# Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit **[fisherphillips.com](https://fisherphillips.com)** for up-to-date information

# Final Questions?

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