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**THE CHANGING LANDSCAPE OF  
CONTRACT WORKERS AND  
JOINT EMPLOYMENT**

# PRESENTERS



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# JOINT EMPLOYERS

- What is the Joint Employment Doctrine?
- Why should we care?





# WHAT IS A JOINT EMPLOYER?



## General Definition:

- Two or more separate entities are jointly considered the “employer” of an employee for liability purposes.

## Examples:

- Parent Corporation – Subsidiary
- Employer – Staffing Agency
- Contractor – Subcontractor
- Employer – HR Outsourcing Company
- Franchisor – Franchisee

# WHY IS IT IMPORTANT?

- Joint Employment can impose obligations or liability under numerous employment statutes:
  - DOL – FLSA – wage and hour issues
  - EEOC – Title VII, ADA, ADEA, etc.
  - NLRB – Labor Management relations
  - OSHA – work place safety regulations



# STANDARDS DIFFERENT BY CIRCUIT

- “Dizzying world of multi-factor tests”
  - Different tests in different Circuit Courts
    - Ninth circuit 4 factor test;
    - Second circuit 10 factor test,
    - Fourth Circuit test focused on relationship between 2 companies.
- Companies operating in multiple jurisdictions face the risk of being subject to joint employer liability in one jurisdiction, but not in another.

# 2020 REGULATION

- April 1, 2019 - DOL announced a revised proposed rule.
- Final Rule became effective March 16, 2020.
- DOL's stated purpose was to provide clarity for businesses.
- Rule focused on actual "control" as the touchstone.
- 4 factor balancing test (used by the 9<sup>th</sup> circuit):
  - Whether the putative joint employer:
    - Hires or fires the employee
    - Supervises and controls the employee's schedule or conditions of employment
    - Determines the employees rate and method of pay
    - Maintains the employees employment records.

# RIGHT TO CONTROL NOT ENOUGH

- The 2020 rule states that reserving the right to control the employee's working conditions would not be enough to show that a business is a joint employer.
- The company must actually exert that control.
- That is a change from many of the current tests that analyze a company's "ability, power, or reserved contractual right" to take action as to a particular worker as relevant to the joint employer analysis.



# ECONOMIC DEPENDENCE NOT A FACTOR

- The 2020 Rule rejects the economic dependence test that looks at whether an employee is economically dependent on a company.
- The revised section states that “economic dependence” on a potential joint employer is irrelevant to deciding if a joint employer relationship exists.

# BUSINESS MODELS DO NOT CREATE JOINT EMPLOYMENT

- The 2020 rule provides that a company's business model does not make joint employer status more or less likely.
- Identifies business practices that do not influence the analysis:
  - Having a franchisor business model
  - Providing a sample employee handbook to a franchisee
  - Allowing an employer to operate a facility on the company's grounds
  - Practicing with an employer in an apprenticeship program
  - Offering an association health or retirement plan to an employer
  - Requiring a business partner to establish minimum wages and policies that address workplace safety, sexual harassment prevention and other issues

# COURT REJECTS THE NEW REGULATION

- **New York v. Scalia (September 2020):**
  - 18 States challenged the DOL's Final Rule in court.
  - District Court held the Final Rule is invalid.
    - Violates the Administrative Procedure Act and conflicts with the FLSA.

# “FINAL RULE”

- Trump Administration January 7, 2021 Independent Contractor Status under the Fair Labor Standards Act
  - Test involved the “focused economic–reality” test
- May 6, 2021 – Biden Administration withdrew the Trump Rule
  - Notably, the Department of Labor (“DOL”) never implemented the Rule

# WHAT IS THE INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT (“FLSA”)?

- Has been and remains the “totality of the circumstances” economic realities test that the DOL traditionally has used.



# UPON WHAT BASIS DID THE BIDEN ADMINISTRATION WITHDRAW THE JANUARY 7 TRUMP RULE:

- Rule was in tension with the FLSA as well as with relevant judicial precedent interpreting the FLSA;
- Rule proposed prioritizing two “core factors” was contrary to balancing approach adopted by courts in implementation; and
- Rule would have narrowed the facts and circumstances comprising the analysis of whether a worker is an employee or independent contractor.

# BIDEN ADMINISTRATION REMARKS

- There were 1,010 comments made to the DOL regarding the Trump Rule and that it listened to those comments.
  - Trump rule never used by any court or the Wage and Hour Division of the DOL;
  - Focus on two “core factors” was too limiting;
  - Concern as to whether a workers’ opportunity for profit or loss should be determinative of employment status;
  - Objection to the “integral” aspect of the work performed for the business.

# WHAT'S ON THE HORIZON?

- Biden Administration had indicated that it does not intend to issue a new independent contractor test under the FLSA.
- President Biden has noted on several occasions his support of the “ABC” test similar to California’s new independent contractor rule in *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018).
- Under ABC all employees are presumed employees instead of contractors and must meet all three of the following criteria to become an independent contractor:
  - Worker is free from control and direction of hiring entity;
  - Worker performs tasks that are outside the usual course of the hiring entity’s business; and
  - Worker is customarily engaged in an independently established trade, occupation, or business.

# QUESTION 1

- **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate.
  - Are they joint employers of the cook?

# ANSWER 1

- YES: Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.



## QUESTION 2

- **Example:** A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions.
- Is the country club a joint employer of the landscaping employees?

## ANSWER 2

- **YES:** Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

# QUESTION 3

- **Example:** Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct.
  - Does A qualify as a joint employer of B's employees?

## ANSWER 3

- **NO:** Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

# QUESTION 4

- **Example:** A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises.
  - Is the retail company a joint employer of the repair company's employees?



## ANSWER 4

- **NO:** Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records

**THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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# COVID IMMUNITY FOR BUSINESS – IS IT REAL?



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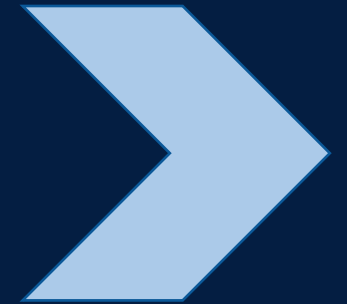
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# COVID IMMUNITY FOR BUSINESSES – IS IT REAL?

- Legal Landscape
  - PREP Act
  - State-specific laws
  - Executive Order Protections
- The Business Reality
- What have you learned?



# LEGAL LANDSCAPE



# THE PREP ACT – THE BASICS

- In March, 2020, HHS published a declaration under the 2005 Public Readiness and Emergency Preparedness Act (“PREP Act”) to provide liability immunity for activities related to medical countermeasures against the COVID-19 pandemic.
- HHS published an advisory opinion on April 14, 2020 regarding the Act’s scope – which can be found here:

<https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-hhs-ogc.pdf>

# OTHER APPLICABLE FEDERAL LEGISLATION?

- CARES Act - new covered countermeasure category for certain respiratory protective devices
- To date – no other legislation has progressed
- Unlikely as more states adopt state-specific legislation and scope/protections vary widely





# STATE IMMUNITY LAWS

- Trend: steadily increasing number of states enacting or considering immunity legislation
- More than 12 state legislatures introduced COVID-19 immunity bill since 2021
- Notable immunity shield laws:
  - AL, GA, IN, IA, LA, MI, MS, MO, MT, NC, OH, OK, SC, SD, TN, UT, WY
- Generally: the laws require that the business be compliant with all relevant guidance for protections to apply.
- Exception: wanton, reckless, willful or intentional misconduct.

# SAMPLE STATE EXPERIENCE

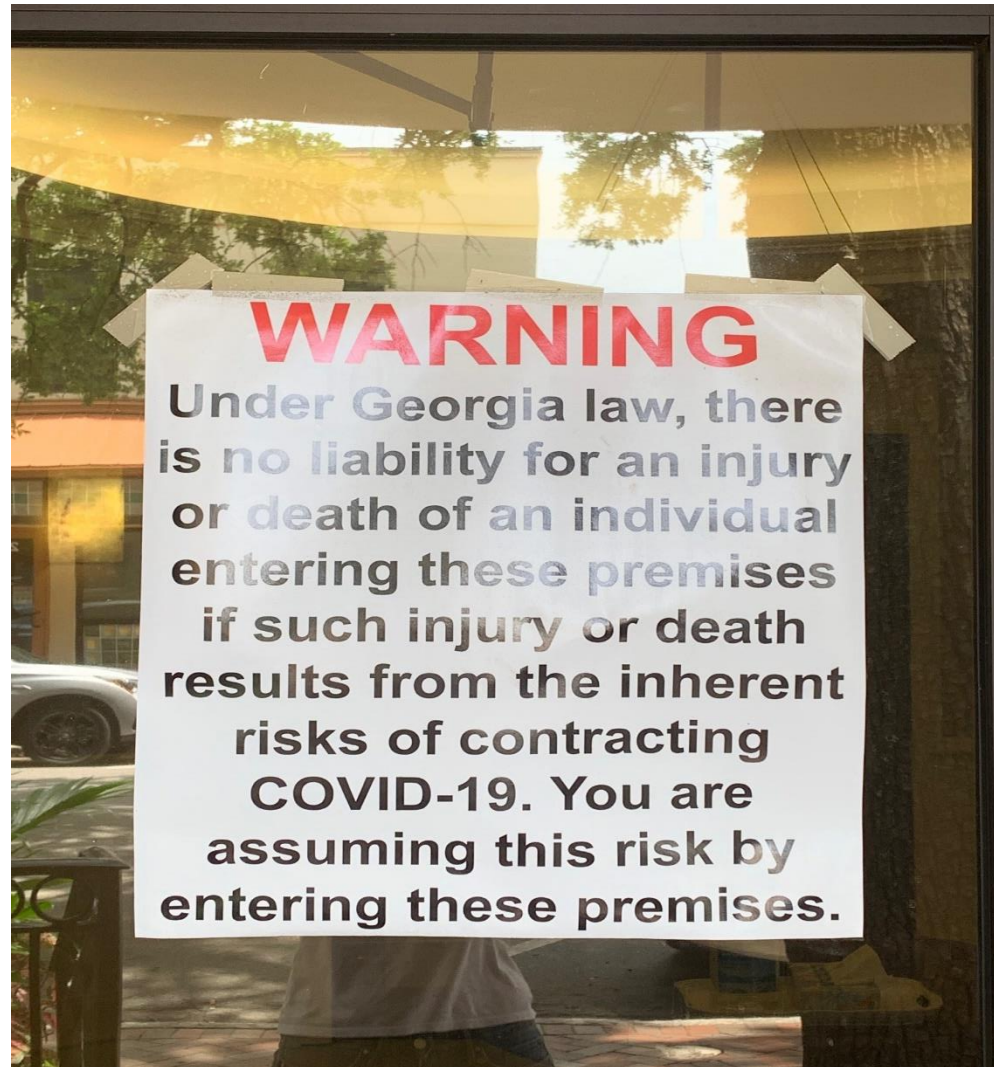
- **Georgia**
  - Must have a warning sign posted at a point of entry informing of the assumption of risk by entering the premises

**WARNING!**

Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.

O.C.G.A. § 51-16-3

# OUR STATES AND EXPERIENCE



# MICHIGAN

- **Michigan**
  - Immunity from tort liability for those acting in compliance with COVID-19-regulations that “had not been denied legal effect at the time of the conduct or risk that allegedly caused harm.”



# UTAH

- Utah
  - Immunity from civil liability if a person is exposed to COVID-19 on a person's premises





# WHAT ARE THE STANDARDS?

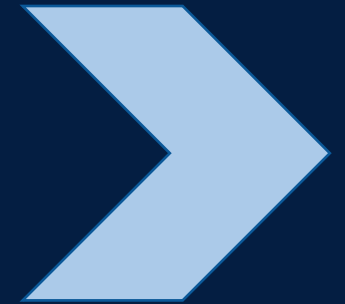
- Many immunity laws require compliance with federal/state/local guidance and rules/regulations
  - These are changing.
  - Different rules for vaccinated and unvaccinated people.

# POP UP QUESTION

- The most common issue in employment litigation related to COVID-19 to date relates to:
  - A. Worker's compensation claims
  - B. Remote Work/Leave Conflicts
  - C. Retaliation
  - D. WARN Act



# THE BUSINESS REALITY





# ACTUAL IMPACT OF IMMUNITY LEGISLATION

- Insignificant impact on day-to-day operations
- What are Clients' concerns about COVID-related liability?
  - Workers Compensation?
  - FFCRA? OSHA? EEOC?
  - What else?

# WHAT ABOUT VACCINES?

- New CDC Guidance for Vaccinated People
  - OSHA has deferred to CDC
  - EEOC

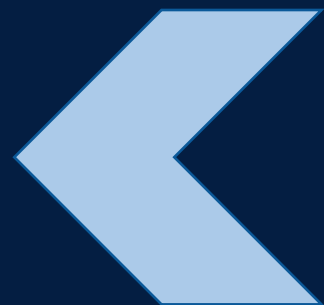


# COMPLYING WITH GUIDANCE – WHAT ABOUT MASKS?



# LAWYERS' PERSPECTIVE

- Most common claims in Georgia
  - FFCRA – should we comply now?
  - Accommodation Claims
- Most common claims in Michigan
  - Retaliation under FFCRA
  - Wrongful discharge in violation of Michigan public policy – source of public policy = Governor's various executive orders



BEFORE WE GO

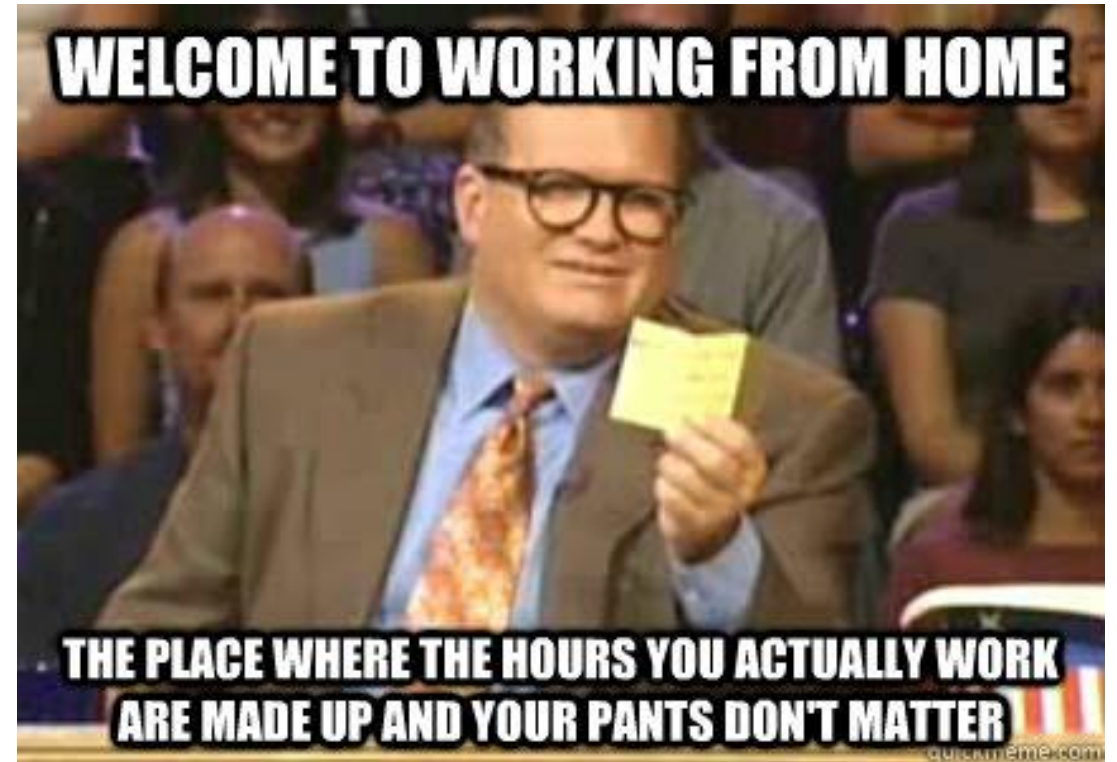


# WHAT HAVE YOU LEARNED FROM THE PANDEMIC?





# WHAT HAVE YOU LEARNED FROM THE PANDEMIC?



THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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**YOUR HOT EMPLOYMENT ISSUES  
BRAINSTORMING STYLE**

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# DISCUSSION FACT PATTERN

# DISCUSSION FACT PATTERN

- JB CURRY is 48 years old and works as a sales associate for SELL A CAR LLC. JB has reported to his sales manager, SUZIE QUE, that he has a respiratory disorder which prevents him from wearing a face-covering.
- He also stated he does not plan to get the vaccine for religious reasons.
- Throughout the last year, SELL A CAR allowed JB to work remotely and conduct sales via ZOOM. However, his sales have plummeted. He needs to come back to work and be on the sales floor.





# DISCUSSION FACT PATTERN



- SELL A CAR has updated its COVID policy to allow employees who have provided proof of full vaccination to not wear a mask.
- Instead, these employees will receive (and are required to wear) a pin that states: “Fully vaccinated!”
- If an employee does not provide proof of full vaccination, s/he must continue to wear a mask.
- Given JB’s health and his religious beliefs, he has agreed to undergo a rapid COVID test every morning prior to work in exchange for being on the sales floor without a face covering.

# DISCUSSION FACT PATTERN

- SELL A CAR is worried about JB's suggested solution, for several reasons.
- One being, ensuring a safe work environment for its employees.
- It is worth noting that the sales manager, who is female, lives with her significant other, another female, who has a severe autoimmune disease.



# DISCUSSION FACT PATTERN



- Sales manager SUZIE QUE is in the process of transitioning from a female to a male and just recently notified management that she identifies as a male.
- SUZIE (now known as SUE . . . . A boy named SUE) stated his intent to use the men's restroom going forward.
- In the conversation with management, SUE mentioned that he was concerned about coworker reaction. SUE has already had someone making fun of him and asking inappropriate questions about the transformation process.
- SUE has disclosed that the transition process is painful and a prescription for medical marijuana has been approved. He intends to fill it ASAP.

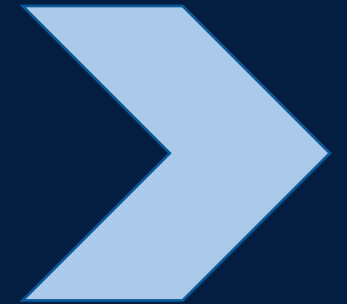
## POP UP QUESTION

- Which federal laws require employers to consider reasonable accommodations?
  - A. ADA
  - B. Title VII
  - C. Wisconsin Cheese Standard Act
  - D. Both the ADA and Title VII



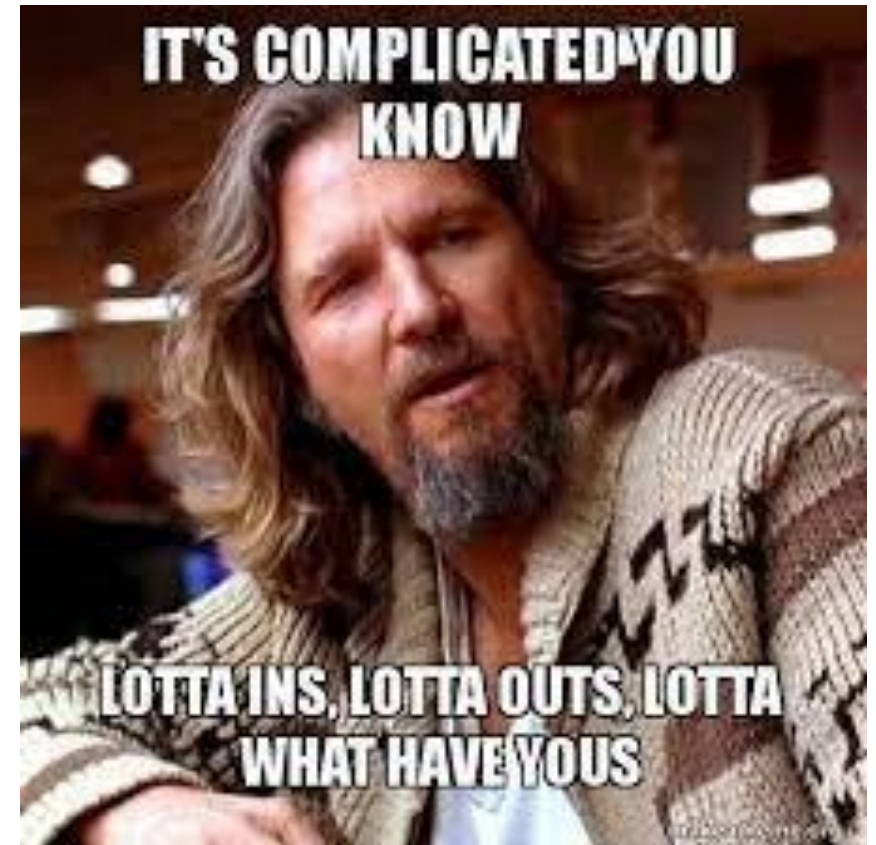


# LESSONS LEARNED



# LESSONS LEARNED

- COVID/Return to work considerations
- Employers can require vaccinations, subject to reasonable accommodation provisions of ADA, Title VII and other EEO considerations
- Employers must engage in the interactive process
- Assessment of whether an undue hardship exists
- For religious accommodation to apply, the employee must hold a sincerely held religious belief
- Gender identity and the use of bathrooms
- Investigation of complaint of comments about transformation of SUE
- Marijuana Usage
- Considerations for “Fully Vaccinated” pin
- Considerations for discipline/termination of JB



THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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**THERE'S NO PLACE LIKE HOME:  
TELEWORK AND COMPENSATION ISSUES DURING AND AFTER THE PANDEMIC**

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## QUESTION 1

- Prior to the coronavirus pandemic, what percentage of employees worked remotely 5 or more days per week?
  - A. 17%
  - B. 12%
  - C. 22%
  - D. 31%



## QUESTION 2

- As of February 2021, what percentage of employees teleworked?
  - A. 55%
  - B. 82%
  - C. 13%
  - D. 23%

## QUESTION 3

- Of the following age groups, which group is the most likely to continue to telework?
  - A. 18-25
  - B. 25-54
  - C. 54-65
  - D. 65 and above

# “BENEFITS” OF TELEWORK

- Reduced overhead/operational costs
- Better work life balance?
- Expanded pool of applicants and more hiring flexibility
- Can lead to increased retention, productivity, satisfaction with work
- Safety during COVID-19 pandemic



<https://www.newgeography.com/content/003082-the-rise-telework-and-what-it-means>

# DRAWBACKS OF TELEWORK

- Wage and hour issues
- Difficulty managing employees
- Consistency with policies and training
- Consistency with accommodation issues
- Workplace health and safety issues
- Less control
- Managing separations is difficult
- Employee equipment returns upon separation



# ALPHABET SOUP

Title VII

OSHA

Fair Labor Standards Act  
"FLSA"

State Laws

COVID-19 – Related  
Laws

# FAIR LABOR STANDARDS ACT

Employers are obligated to compensate all nonexempt employees for all hours employees are “suffered” or “permitted” to work.



- Intermittent hours throughout the day;
- Time checking e-mail and phone;
- Zoom calls;
- Setting up / taking down equipment





# EQUIPMENT CONCERNS



Should the employer provide all, some or no equipment?



Security issues – both cyber and physical



Internet capabilities



Return of equipment upon end of employment

# TRACKING TIME

## FAB 2020-5

- Employer must exercise “reasonable diligence” to ensure employees paid for all time worked.
  - Establish system requiring employees to accurately record and report all time worked.
  - Employers cannot implicitly or overtly discourage or impede accurate reporting.
- No further investigation required.

## FLSA2020-19: December 31, 2020

- Travel Time
- When employee (a) chooses to perform some work before traveling to office or (b) chooses to work at home after leaving office, time is not compensable.

06/03/2021

To whom It May Concern:

**[REDACTED]** under my medical care for the Rheumatologic condition Sjogrens Syndrome. Afflicted patients with Sjogrens Syndrome, even when fully vaccinated for Covid-19, have an increased risk of infection and contracting Covid-19. To date, there is limited medical science data on vaccine protection in people whom are immunocompromised as **[REDACTED]** is. Implementation of precautions to minimize the risk of contracting Covid-19 is recommended. Since she has been working from home since March 2020, the added stress of returning to an office environment in a multi-floor high rise during the pandemic can threaten her immune system which is already immunocompromised by Sjogrens Syndrome.

My recommendation is continued home remote working for **[REDACTED]** during the Covid-19 pandemic. If you have any questions, please feel free to contact my office.

# OSHA/SAFETY/WORKERS' COMPENSATION

- Every employer has a general duty to “furnish to each . . . Employee . . . A place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
  - Applies to home workspaces
- Unless a complaint is received, OSHA will not:
  - Conduct inspections of home offices;
  - Hold employers liable for home offices;
  - Expect employers to conduct inspections of home offices.
- However – maintain employee records for any complaints as well as potential accidents or injuries that occur.
  - OSHA has also issued guidance on a safe return to work:  
<https://www.osha.gov/sites/default/files/publications/OSHA4045.pdf>

# TITLE VII / ACCOMMODATIONS

- Americans with Disabilities Act (ADA)
  - Pre-pandemic: was telework a “reasonable accommodation”?
  - Post-pandemic: is telework *still* a “reasonable accommodation”?
- Religious Accommodations
- Gender Discrimination
- Age Discrimination (ADEA)

# WHAT'S NEXT?

- Return to work
  - Employee wants to go into work
    - Masks?
    - Vaccines?
  - Allowing vs. mandating return to work
  - Creative compensation / incentive bonuses
    - Cash incentives
    - PTO
    - Giftcards
    - Hunting/fishing license...?



# BEST PRACTICES



Obligations under FLSA, Title VII, OSHA and other laws remain intact – stay vigilant of changes in guidance



Review policies dealing with telework



Conduct supervisor and employee training – consistent enforcement is key



Ensure workforce has proper tools/equipment for telework and have a plan to manage it – stay connected with employees to avoid feeling of isolation

THANK YOU! IF YOU HAVE ANY QUESTIONS,  
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