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# It's A Hard Day: Covid-19, FMLA, Wage & Hour Issues

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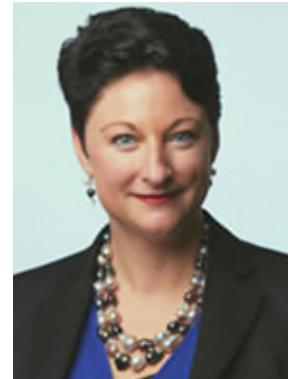


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## Who We Are



Rheanne Falkner  
Senior Counsel



Angela Richie  
Steel Team Lead  
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Connor Cafferty  
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## What We'll Discuss

- Covid 19: Requiring Vaccinations & Vaccination Proof
- FMLA: Extended leave requirements during Pandemic
- Wage & Hour Issues: Time spent screening & testing for Covid-19
- OSHA Question: Drug Testing and Workers Compensation



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# Questions?

Please Submit Anytime Using Chat Feature



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# Covid-19 Concerns: Vaccinations & Proof

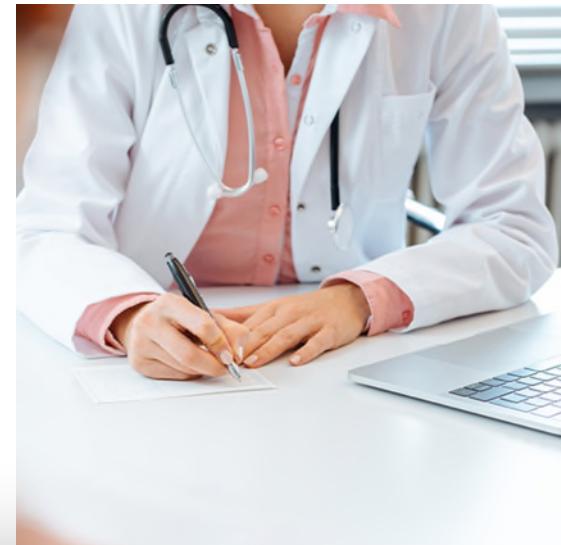
# Covid – 19 Considerations

- Vaccination Requirements:
  - Employers may require employees physically entering the workplace to be vaccinated for COVID-19.
  - Must comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations.
- Disability Concerns
  - No inquiry into conditions regarding Covid-19



# Covid – 19 Considerations

- Proof of Vaccination
  - EEO laws themselves do not prevent employers from requiring confirmation of vaccination
  - Proof of vaccination, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.
  - Employers should refrain from asking follow-up questions about why an employee did not receive a vaccination – this may elicit disability-related information,



# Covid – 19 Considerations

- Social Distancing & Masks
  - Fully vaccinated people no longer need to wear masks or stay 6 feet apart in many indoor and outdoor settings (CDC).
  - Federal, state or local rules may still require such measures.
  - Be mindful of Covid-19 & PPE requirements built into contracts.



# Covid – 19 Considerations

- Social Distancing & Masks
  - OSHA Adopts CDC Recommendations (As Of 7/16/21)
    - » CDC/OSHA says fully vaccinated people can:
      - Resume activities without wearing masks or physically distancing
      - Resume domestic travel and refrain from testing before or after travel and from self-quarantine after travel
      - Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States
      - Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings
      - Refrain from quarantine following a known exposure if asymptomatic
      - Refrain from routine screening testing if feasible



# Covid – 19 Considerations

- Upstream / Downstream Contracts:
  - Can you require vaccination of upstream / downstream parties?
  - Law is not yet clear – But expect it
  - Cases suggesting yes
  - Private Contracts = Anything Not Illegal May be Contracted
    - » Private parties may contract widely
    - » Texas Federal Court Ruling
  - Public Contracts = Different Standard
    - » “Reasonably Calculated to Protect Public Health”
    - » Indiana Federal Court Ruling





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# FMLA Issues

# FMLA During a Global Pandemic

- Family and Medical Leave Act (FMLA)
  - Eligible employees of covered employers may take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.
  - Twelve weeks in a 12-month period for
    - » Childbirth
    - » Adoption / Foster Care Placement
    - » To care for loved one with serious health condition
    - » Serious health condition rendering employee unable to perform essential functions
    - » Covered active duty military
  - Twenty-Six workweeks in a 12-month period to care for covered service-member with a serious injury or illness

# FMLA During a Global Pandemic

- Families First Coronavirus Response Act – Expanded FMLA
  - Required covered employers provide eligible employees with paid sick and expanded family and medical leave for certain Covid-19 related reasons.
  - Expanded FFCRA/FMLA requirement expired December 31, 2020.
  - Employers who choose to provide such leave through September 30, 2021 may be eligible for employer tax credits.



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# Wage & Hour Issues: Employee Classifications & Work Closures



# Wage & Hour Issues

- Know your business – Know your employees
  - Employee vs. Independent Contractor
  - “Economic Reality Test”
    - » Nature and degree of control over work
    - » Worker’s opportunity for profit/loss
  - Are you calling “Employees” “Independent Contractors” ??
  - Classification Matters to Employer Obligations
    - » FMLA, DOL Class, Benefits, Pay, COBRA, Unemployment Rights, Workers Comp Insurance, etc.

# Wage & Hour Issues

- Know your classifications: Exempt vs. Non-Exempt
  - Exempt = No Overtime Pay
  - Work from home? Key Distinction
- Closure Concerns:
  - Exempt Employees
    - » Must receive their full salary in any week in which they perform any work.
    - » Compensations during closures if performing *any* work.
  - Non-Exempt Employees
    - » Generally only pay for hours worked.
    - » No compensation during closures.
  - Potential for Partial Un-Employment

# Wage & Hour Issues

- Time Spent on Screening Activities
  - May be considered “principal activity” therefore requiring compensation for Non-Exempt Employees.
  - All time between the start and finish of an employee’s workday must be paid unless it falls within one of the exceptions stated in 29 C.F.R. Part 785, such as bona fide meal breaks and off-duty time.
- Required Covid Testing = Required Pay
  - Under the FLSA, an employer is required to pay employees for time spent waiting for and receiving medical attention at their direction.
  - Any required testing for Covid-19 falls within this category



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# Bonus Topic: Drug Testing, OSHA & Workers Comp



# Drug Testing, OSHA & Workers Comp

- On Site Injuries - OSHA
  - Occupational Safety & Health Administration (“OSHA”) requires that employers inform employees about how to report occupational injuries and illnesses.
  - Reporting method required by employers must include:
    - » (1) a “reasonable procedure” for employees to report work-related injuries and illnesses, and
    - » (2) not discriminate or retaliate against employees who report such injuries or illnesses.
  - A procedure is unreasonable if: it deters or discourages a reasonable employee from accurately reporting a workplace injury or illness.
  - Violations = Citations

# Drug Testing, OSHA & Workers Comp

- Drug Testing – OSHA Commentary
  - OSHA Presumption that a reasonable employee might not report a work related injury if policy requires automatic drug testing.
  - OSHA Commentary Reads:
    - » “[a]lthough drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been cause by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting” [1]
- Implication: No automatic drug tests, and only specific types of drug testing are permitted
- Applies EVEN IF state workers compensation laws allow drug testing as an automatic policy upon claim/workplace injury

[1]: 81 FR 29623, Pages 29623-29694

# Drug Testing, OSHA & Workers Comp

- Drug Testing – OSHA Commentary
  - What's the solution?
  - OSHA Commentary Continues:
    - » “To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use” [2]
  - Must test all employees who could have contributed to the incident, rather than just the employees who reported injuries.
- Example Policy Language:
  - The company will require a drug screen and/or alcohol test under this policy any time an on-the-job accident or injury incident occurs but only under circumstances which suggest possible involvement or influence of drugs or alcohol in the accident or injury incident. In the event such testing occurs all employees who could have contributed to such incident will be subject to such testing. As a condition of employment all employees agree and consent to any such test.



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# Conclusion

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