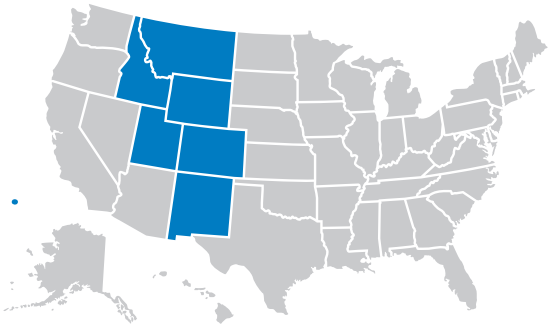
Mountain West
Employment Law Letter

Focusing on Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming

Vol. 2, No. 7 | July 2021



COMMUNICABLE DISEASES

Things to consider before reopening your workplace

CO | ID | MT | NM | UT | WY

by Grace S. Pusavat, Parsons, Behle & Latimer

As governmental regulations surrounding the COVID-19 pandemic begin to loosen, employers with remote operations will have more opportunities to transition people back into the physical workplace. Here are key issues to keep in mind.

No one-size-fits-all solution

To facilitate employees' return to the workplace, you should develop a reopening plan and enact policies to manage numerous considerations, including:

- Fulfilling your business operation targets;
- Complying with ongoing legal and regulatory obligations; and
- Preserving employee satisfaction and the desired company culture.

Because each employer will have different needs based on industry, size, state and local regulations, and unique practical demands, there is no one-size-fits-all standard for reopening.

'The way we were' may no longer work

Before reaching the question of how to transition back to the physical workplace, you should first examine whether a full or partial remote workforce can provide operational efficiencies or cost savings that aren't available in the physical space. If a transition is appropriate, you shouldn't assume it means an immediate return to prepandemic operations.

The COVID-19 outbreak has changed the practices and expectations of both employees and consumers, and your company should account for the shifts as you develop the plan. While your business may be legally permitted to open its doors again on a certain date, it may be smarter to reopen on a later date, at partial capacity, or in stages.

Check out government regulations, guidance

Each state and municipality will have different guidelines for reopening, which the federal agencies and authorities will further inform. The Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) have all issued relevant guidance.

You'll find government guidance on social distancing policies, COVID-19 testing, temperature checks, and symptom assessments. The guidelines may require you to modify workspaces, implement cleaning and disinfecting procedures, and enact policies to guard against safety violations or discrimination.

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Expect more accommodation requests to work remotely

Keep in mind that bare legal compliance may not be the best decision for your business. For example, you should consider employee requests to continue working remotely or provide flexibility on an individualized basis, even if an accommodation isn't legally required.

Under Title I of the Americans with Disabilities Act (ADA), you're required to grant a reasonable accommodation to qualified employees so they can perform the essential job functions if it doesn't cause an undue hardship to the business. A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process. Employees will qualify for reasonable accommodations only if they have a disability under the ADA (i.e., a physical or mental impairment that substantially limits a major life activity).

For employees with disabilities, remote working won't be granted automatically as a reasonable accommodation. Instead, you need to engage in the interactive process with each employee with a disability to find a reasonable accommodation that doesn't cause undue hardship for the business.

EEOC guidance specifies employees without a disability are *not* entitled to an accommodation to work remotely based on concern about virus transmission, including the risk of infecting a family member who is at higher risk of severe illness from COVID-19.

Although not required, you may still benefit by engaging in a dialogue with nonqualified employees requesting remote work to discuss their concerns and possible accommodations. You may discover sound reasons to accommodate an employee on an individual basis (e.g., maintaining workplace satisfaction by letting an employee work remotely who is concerned about an at-risk relative).

Permanent work from home could be reasonable accommodation

by Jeremy Merkelson, Holland & Hart, LLP

Q ***Our employee has filed an Americans with Disabilities Act (ADA) request with her psychiatrist to work from home permanently. Do we have to accommodate her? She already has performance issues, and no one else on her team is a permanent remote employee.***

Not necessarily, but you should engage in the interactive process to determine whether permanent work-from-home status is truly needed under the circumstances. Assuming she is actually disabled because of her psychiatric condition, you'll need to assess whether working from home is a reasonable accommodation or would impose an undue burden on your operations.

The Equal Employment Opportunity Commission (EEOC) has long taken the position that working from home can be a reasonable accommodation under the ADA, but reasonableness depends on the circumstances. If on-site work isn't essential to her position, the telework request may be reasonable. But even if an accommodation is reasonable, it can still be denied if it would amount to an undue hardship for an employer. Courts tend to be less protective of accommodation requests seeking *indefinite* remote work as opposed to remote work on a limited and defined basis.

Ultimately, to deny the request, you would need to show true undue hardship would result from permanent remote work. Making your case may be more difficult after the COVID-19 pandemic if she and similarly situated coworkers have worked effectively from home over the past year.

Based on the information provided, you should at least engage in the interactive dialogue with her to discuss the request. If she insists on the need for permanent telework, you may have to establish either (1) the job requires in-person performance as an essential job function or (2) accommodating the permanent work-from-home request will cause an undue hardship. When facing a situation like this, we recommend you speak with experienced counsel before making a final determination.

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Be ready to answer employees' questions

Once the reopening plan is developed, share the details with employees, and identify the company's contact persons for follow-up questions.

Be ready to address employee concerns about your health and safety protocols as well as the ramifications if an individual refuses to return to the workplace by the identified date. Much of the hesitation employees may feel in returning to the workplace can be mitigated by clearly articulating the safety procedures you've put in place.

Finally, allow for 'adjustment period'

Finally, you should expect employees to need an adjustment period upon returning to the workplace. Just as the transition to remote work involved rapid changes to their routines, habits, and job duties, the transition back to the workplace will be accompanied by similar changes. Expect employees to have a range of reactions to the return.

While some employees have thrived in a remote environment, relishing the elimination of commute time and performing productively from home, others have found it quite challenging. After spending months avoiding in-person interactions, some workers may feel trepidation at resuming their duties at the office. Acknowledging the challenges and outlining a clear plan for reopening will minimize disruption, increase employee satisfaction, and provide an opportunity to communicate your company values and culture.

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SICK LEAVE

New Mexico requires private employers to provide paid sick leave

CO	ID	MT	**NM**	UT	WY

by Sarah K. Downey, Jackson Loman Stanford Downey & Stevens-Block, P.C.

Effective July 1, 2022, New Mexico joined 15 other states in requiring private employers to provide paid sick leave under its Healthy Workplaces Act (HWA). The Act requires them to provide up to 64 hours of paid sick leave to their employees each year. It broadly defines "employers" as individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized groups of persons employing at least one employee at any time, and they must provide paid sick leave to all employees, including full-time, part-time, seasonal, and temporary employees.

Permitted reasons for paid leave

Employees may use paid sick leave for the following reasons:

- Their mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or preventive medical care;
- Their need to care for a family member relating to the family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or preventive medical care;
- Meetings at their child's school or place of care related to the child's health or disability;
- Absence necessary due to domestic abuse, sexual assault, or stalking suffered by the employee or a family member, provided the leave is for the employee to obtain medical or psychological treatment or other counseling;
- To relocate;
- To prepare for or participate in legal proceedings; or
- To obtain services or assist a family member with any of the activities set forth in the statute.

Broad definition of 'family member'

A "family member" means an employee's spouse or domestic partner or a person related to an employee or an employee's spouse or domestic partner, such as:

- A child;
- A parent;
- A grandparent;
- A grandchild;
- A sibling;
- A spouse or domestic partner of a family member; or
- An individual whose close association with the employee or the employee's spouse or domestic partner is the equivalent of a family relationship.

Accrual and use of paid leave

Employees will accrue one hour of paid sick leave for every 30 hours worked, up to a total of 64 hours a year. They aren't entitled to use more than 64 hours of paid sick leave per calendar year.

An employer can choose how it would like to define a "year" in which paid sick leave must be used, ranging from the calendar year to a fiscal year to a rolling 12-month period. It may choose to frontload its employees with the 64 hours at the beginning of the year.

Paid sick leave hours may carry over, but an employer may still enforce the 64-hour cap per fixed 12-month

period. Employees must take the leave in one-hour increments unless the employer permits them to take it in shorter increments. Employers aren't permitted to require the employee requesting leave to find a coworker to cover for him.

Employee request for leave and required documentation

Employees need only make an oral or written request for paid sick leave to include the expected duration of sick leave being requested. They are required to make a good-faith effort to provide advance notice when need for leave is foreseeable and to take leave in a manner that doesn't unduly disrupt business operations.

Employers may require employees to provide only "reasonable documentation" that sick leave is being used for a qualifying HWA reason if the individual uses at least two consecutive workdays of sick leave. Documentation indicating the amount of earned sick leave is reasonable and necessary could be a note signed by a healthcare professional, a police report, a court-issued document, or a signed statement from a victim services organization, clergy member, attorney, advocate, the employee, a family member of the employee, or other person.

You may not require the documentation to explain the nature of any medical condition or the details of the domestic abuse, sexual assault, or stalking.

Employer obligations

Employers must provide employees with written or electronic notice at the commencement of the following:

- Employee's right to earned sick leave;
- The manner in which sick leave is accrued and calculated;
- Terms of the use of earned sick leave as guaranteed by the Act;
- The fact that retaliation against employees for using the sick leave is prohibited;
- Employee's right to file a complaint with the Labor Relations Division of the New Mexico Department of Workplace Solutions if the employer denies the sick leave request or retaliates against the employee; and
- All means of enforcing violations of the Act.

You also must display a poster containing the above-mentioned information in a conspicuous and accessible place in each establishment with employees. The poster should be in English, Spanish, and any language that is the first language spoken by at least 10 percent of the employer's workforce.

The New Mexico Department of Workforce Solutions, Labor Relations Division, will provide a poster that must be placed in the workplace. You also must retain records documenting accrued and used paid leave by your employees for the preceding four years.

Violations of the Healthy Workplaces Act

Employees may file a lawsuit against their employers for perceived violations of the HWA within three years from the date the alleged violation occurred. The suits may be based on allegations the employer unlawfully denied sick leave, failed to compensate for the leave, or retaliated against an employee for its lawful use.

Employers also may be penalized for failing to provide notice or comply with the HWA's record-keeping requirements. Penalties range from fines to back pay, lost wages, benefits, and attorneys' fees and costs in a lawsuit.

Takeaways

You must prepare a paid time off (PTO) policy or align the new requirements with your existing policy. Consider consulting with an attorney to confirm your company has taken the right steps to ensure compliance.

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LEGISLATION

State lawmakers push back against mandatory COVID-19 vaccinations in the workplace

CO | ID | MT | NM | UT | WY

by Jeremy Merkelson, Holland & Hart, LLP

Vaccinations are proceeding apace in Colorado and across the United States. But as workplaces get set to resume full in-office operations, there's a movement to limit mandatory vaccination policies and employer consideration of vaccine status. A bill introduced in the Colorado Legislature during the 2021 session, House Bill (HB) 21-1191, failed on an 8-5 party-line vote in a committee hearing. But the Colorado bill and analogous proposals around the nation represent a vocal minority pushing back against mandatory vaccinations in the workplace. How employers handle the concerns is going to be critical in 2021 and beyond.

COVID-19 vaccine discrimination legislation across the country

Subject to religious and disability exceptions under federal antidiscrimination laws, employers may generally

require employees to get vaccinated for COVID-19. Many states, following federal law, provide exceptions only for medical or religious reasons.

A movement is underway, however, in state capitols across the United States to prevent employers from implementing mandatory vaccination policies and protecting current employees and job candidates who refuse to comply. More than 85 such bills have been introduced during 2021 state legislative sessions. At least 19 states have bills currently pending that, if passed, would prohibit employers from requiring the COVID-19 vaccine or taking adverse action against employees who don't get the shots:

- Arkansas passed a bill prohibiting public employers from mandating the vaccine or discriminating against employees who refuse it.
- In Idaho, the governor's recent Executive Order prevents state entities and officials from producing or issuing a COVID-19 vaccine passport or requiring proof of receiving the shots to access state services or facilities.

Legislation is pending in other states more broadly limiting employer mandates for immunizations. Hop aboard. We're taking a ride to the new frontier of workplace vaccination law.

Colorado COVID-19 bill

In Colorado, **HB 21-1191** would have prohibited employers, including licensed healthcare facilities, from taking adverse actions against employees or applicants based on their COVID-19 vaccination status. Under the proposed statute:

- Employees or job applicants could have filed lawsuits against employers for injunctive, affirmative, and equitable relief; and
- The state would have been prohibited from requiring anyone to receive a COVID-19 vaccination or discriminating against individuals based on their vaccine status.

On May 12, 2021, the Colorado bill was defeated on a party-line vote in the health and insurance committee. It's possible the measure could be reintroduced in a future legislative session. For now, however, the state hasn't joined Arkansas and the other states that may impose restrictions above and beyond existing state and federal law protections for religious and disability reasons.

What's to come?

Colorado employees with questions or concerns about employers' well-designed mandatory vaccination policies are unlikely to mount successful legal challenges (provided the policies are operated in compliance with existing federal and state nondiscrimination laws, primarily protecting religious and medical exemptions). Nevertheless, we expect continued friction in the workplace between those who have obtained the vaccine and those who haven't gotten the shots during this reopening era.

Managing the tension isn't going to be as simple as merely complying with the existing nondiscrimination laws. It's likely many of you will have a small cohort of employees who refuse to take the vaccine and either continue working remotely or in the office (if permitted

Determining voluntary termination under ARPA

by Jason R. Mau, Parsons Behle & Latimer

Q ***Under the American Rescue Plan Act (ARPA), if an employee willfully and knowingly disregards company policy, is she not voluntarily terminating her employment? Also, in that same vein, when does misconduct move from violating company policy and arrive at "gross misconduct"?***

A federal COBRA premium assistance program is available under the ARPA to "assistance-eligible individuals" (AEIs) who didn't previously elect the continued healthcare benefit coverage under COBRA. AEIs are generally defined as employees who involuntarily terminated or experienced a reduction in hours between November 1, 2019, and September 30, 2021, and including their covered dependents. Others eligible for the COBRA subsidy are those who elected COBRA continuation coverage but are no longer enrolled because they were unable to continue paying the premium.

The agency guidance released the first week of April minimally clarified the scope of beneficiaries who qualify as AEIs and, unfortunately, has yet to provide a clear meaning of "involuntary" for terminated workers. Indications are that additional clarifying guidance may be issued by the U.S. Department of Labor (DOL) and the IRS.

The initial agency guidance doesn't shed much light on the meaning of "involuntary" but does confirm, consistent with COBRA provisions, an individual terminated for "gross misconduct" cannot qualify as an AEI. Looking back on previous IRS interpretations of involuntary termination in relation to COBRA suggests termination for cause has been considered involuntary termination. Thus, termination for violation of company policy would likely be interpreted as termination for cause and an involuntary termination under the current provision.

To meet the undefined "gross misconduct" standard for COBRA purposes, the DOL has taken the position it depends on specific facts and circumstances, noting excessive absences or generally poor performance don't meet the standard.

Courts interpreting COBRA gross misconduct determinations (especially the U.S. 9th Circuit Court of Appeals, which reviews federal matters in Idaho and other states) have generally ruled in favor of employees, requiring flagrant and extreme misconduct to meet the standard. Thus, a willful violation of company policy would have to be a substantial deviation from the standards and obligations under your policies to support a gross misconduct determination.

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by company policy). Some steps for managing the friction in this new landscape include:

- Using the opportunity to remind all employees about your company's values, including your open-door and mutual-respect-for-others policies;
- Reinforcing the message your workplace is safe and that you have taken measures to ensure compliance with the latest Centers for Disease Control and Prevention (CDC), Occupational Safety and Health Administration (OSHA), and local guidance for office environments;
- Reminding employees to avoid asking others about their vaccination status or disparaging them for the same;
- Encouraging employees to bring any office safety concerns to a manager or HR for discussion; and
- Empowering people managers and company supervisors to engage in regular dialogue and communication with all employees, regardless of whether they're vaccinated.

Bottom line

While no one-size-fits-all approach will work for all companies, at least thinking about the issues now is recommended. The care and attention you take to ensure all employees are treated with respect and care may be as important as ensuring legal compliance.

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EXECUTIVE ORDERS

Biden raises minimum wage to $15 for certain federal contractors

CO | ID | MT | NM | UT | WY

by Jessica C. Abrahams, Lindsey M. Hogan, Dana B. Pashkoff, and Graciela M. Quintana, Faegre Drinker

President Joe Biden recently signed an Executive Order (EO) requiring certain federal contractors to pay workers on government contracts at least $15 per hour beginning January 30, 2022. Starting in 2023, the minimum wage will be adjusted annually for inflation at a rate set by the secretary of labor. The EO states raising the wage will promote efficiency in federal procurement through (1) enhanced productivity and generation of higher-quality work because of employees' better health, morale, and effort, (2) reduced absenteeism and turnover, and (3) lowered supervisory and training costs.

Which contracts are covered

The new minimum wage requirement applies to new contracts entered into on or after January 30, 2022. It also covers existing contracts if they will be extended or renewed on or after that date.

Agencies are "strongly encouraged," however, to include the higher minimum wage in contracts entered into between the date of the order (April 27, 2021) and January 30, 2022. New contracts also must include a clause requiring contractors and covered subcontractors to flow down the minimum wage requirement into lower-tier subcontracts.

Impact on tipped minimum wage

The EO also phases out the tipped minimum wage for certain federal contractors according to the following schedule:

- Beginning January 30, 2022, federal contractors must pay tipped workers $10.50 per hour.
- Beginning January 1, 2023, they must pay tipped workers 85 percent of the higher minimum wage.
- Beginning January 1, 2024, they must pay them the higher minimum wage.

If a tipped worker's hourly wages and tips don't amount to the higher minimum wage, the federal contractor must increase the hourly wage to make up the difference.

Bearing on previous orders

The EO supersedes President Barack Obama's EO 13658, which was issued in 2014 and required federal contractors to pay federal contract workers $10.10 per hour, indexed to inflation. Under that order, the current minimum wage is $10.95 per hour, and the current tipped minimum wage is $7.65 per hour.

Despite the wage difference, the EOs appear similar in applicability. Both orders apply to contracts for concessions and services covered by the Service Contract Act, and neither order applies to contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act.

The new EO also revokes President Donald Trump's EO 13838, which provided an exemption from the minimum wage for contracts involving recreational services on federal lands. The new minimum wage requirement may therefore apply to outfitters and guides operating on those lands.

Enforcement and forthcoming regulations

The EO is clear the secretary has the sole authority for investigating potential violations related to the required minimum wage increase. In addition, it creates no rights

under the Contract Disputes Act regarding whether a contractor has paid the prescribed wages.

Additionally, the secretary will issue regulations to implement the EO's requirements by November 24, 2021. The regs should include "definitions of relevant terms and, as appropriate, exclusions from the requirements of this order."

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UNION ORGANIZING

DOL mulls return to Obama-era 'persuader' reporting rule

CO **ID** **MT** **NM** **UT** **WY**

by Daniel Dorson and Matthew A. Fontana, Faegre Drinker

In late April 2021, the U.S. Department of Labor's (DOL) Office of Labor-Management Standards (OLMS) signaled its intent to revisit the "persuader rule," an Obama-era regulation that imposed strict reporting requirements on employers facing union organization. Although the rule hasn't yet been reinstated and will almost certainly face significant opposition, you should be aware of the possible ramifications.

What is the persuader rule?

The persuader rule is a regulation first established by the DOL during the Obama administration. It alters the agency's interpretation of the Labor Management Reporting and Disclosure Act of 1959, which requires employers and their labor consultants to report any activities "undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining."

Since the Act's inception, it has been interpreted as exempting "advice" from the reporting requirements. As long as labor consultants didn't have direct contact with employees, their guidance was considered "advice" and not subject to the reporting requirements.

The persuader rule eliminates the "advice" exception, meaning employers would have to report any assistance rendered by labor consultants, including attorneys, that is "undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining."

The persuader rule faced substantial opposition from national, state, and local business groups culminating in three lawsuits seeking to enjoin its enforcement. In June 2016, the U.S. District Court for the Northern District of Texas issued a temporary injunction blocking the rule from taking effect. The judge found the business groups opposing the rule were likely to succeed on their claims that, among other things, it violated First Amendment rights of free speech and association and the due process clause of the Fifth Amendment because of its vagueness.

Ultimately, in November 2016, the same district court permanently blocked the persuader rule. After Donald Trump was elected president, the federal government didn't pursue an appeal.

Why DOL is revisiting rule

The Biden administration is committed to effectuating a national labor policy that seeks to increase union membership. A major component is the Protecting the Right to Organize (PRO) Act of 2019, which would codify the increased reporting requirements embodied in the persuader rule. Although the PRO Act passed the U.S. House of Representatives in February 2020, it faces an uphill battle in the Senate. In lieu of hoping the Act passes there, the Biden administration can implement certain components via rulemaking.

One example of such rulemaking is by revisiting the persuader rule, which would aid organizing efforts by imposing stricter reporting requirements on employers and labor consultants. In an organizing campaign, the rule would require employers to report all third-party consultants who provide advice about the ongoing organization, including attorneys. In that manner, the rule could:

- Give organizers advanced notice and early insight about employers' efforts and strategies to avoid organization; and
- Present a risk that communications traditionally protected by the attorney-client privilege may be subject to reporting.

What employers should do

Although the OLMS announced it plans to revisit the persuader rule, there's no timeline for implementation. The rule almost certainly will face strong opposition like it did in 2016. In addition to opposition from national, state, and local business organizations, the American Bar Association (ABA) recently criticized the PRO Act's reporting requirements for intruding upon the attorney-client privilege. That's particularly significant because the ABA historically remains neutral in union-management disputes.

Despite the strong opposition to the persuader rule and the PRO Act, you should be aware of and prepared for the potential ramifications of the increased reporting requirements.

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OSHA INSPECTIONS

4 things to consider before demanding warrant from OSHA

CO | ID | MT | NM | UT | WY

by Emily Matta, Foulston Siefkin LLP

Occupational Safety and Health Administration (OSHA) compliance officers typically arrive without advance notice, which is enough to raise alarm bells in the minds of many employers. You might know why they're there. Or you might not have any idea. Whatever the situation, step one should be to ask yourself: Should I demand the inspector come back with a warrant?

I hear you knocking, but you can't come in

That's right! You have a constitutional right under the Fourth Amendment to require OSHA compliance officers to obtain an administrative warrant before entering your premises for an inspection. Of course, you can (and most employers do) consent to an inspection without the need for a warrant. And in many circumstances, consenting to the inspection may be the best approach. So before adopting a film-noir accent and demanding the inspector "come back with a damn warrant," here are four things you should consider.

Demanding warrant only prolongs the inevitable. Demanding a warrant won't prevent OSHA from carrying out its inspection; it temporarily pushes it back. To obtain a warrant, compliance officers need to establish probable cause for the search. Probable cause in this context is a low threshold. After all, the inspectors need to show only that they have a reasonable basis to believe they'll discover a violation in your workplace. The standard is easily met, for example, if (1) you've reported a workplace injury or death, (2) an employee has filed a complaint, or (3) another federal or state agency or has referred OSHA to a possible hazard.

In short, demanding a warrant won't make the compliance officers go away for good. They'll obtain a warrant and be back. And when they do return, warrant in hand, they might look more closely for violations, believing you have something to hide.

Warrant will specify inspection's scope, which could be broader than you had in mind. By demanding a warrant, you lose an opportunity to negotiate with the compliance officer for a limited scope to the inspection. The warrant itself will state how broadly or narrowly the compliance officer may search.

You might get lucky with a narrowly drafted warrant limiting the scope of the search to a specific location. But you could just as easily get unlucky. Judges have issued warrants authorizing a "wall-to-wall" inspection of an employer's entire facility, even if the search was triggered by a single employee complaint concerning a specific location. In short, it's a gamble, and demanding a warrant could buy you more trouble than you bargained for.

Demanding warrant does give you time to prepare for inspection. Though demanding a warrant won't prevent the inspection entirely, you'll likely get at least a couple days before the compliance officer returns. If you choose to insist on the warrant, take the opportunity to prepare for the inspection by self-auditing your policies and employee training.

Conduct your own walkthrough and identify potential violations with your designated safety manager and/or safety consultant. If you're especially concerned, consider hiring an attorney and informing them that you've demanded a warrant and would like the attorney to be available for OSHA's inspection.

By negotiating with compliance officer, you might get the best of both worlds. If you're worried demanding a warrant will create more trouble than it's worth, and it often does, you can still give yourself time to prepare and limit your risk of liability by negotiating with the OSHA compliance officer before the inspection.

When the compliance officer comes knocking, politely ask for the reason for the inspection. Is it related to a reported workplace injury or fatality? Is it a random inspection? Is it related to an employee complaint? If so, ask for a copy of the complaint.

Once you know the reason for OSHA's visit, you can propose a reasonable scope for the inspection. Ask the officer to limit the scope to the event triggering the inspection, for example, the subject of an employee complaint, the location of an injury, or the equipment involved in an accident.

You also can ask the officer to wait until your chosen inspection representative and attorney are on-site before the inspection begins. Those individuals can help limit your risk of liability during the inspection, and requesting their presence provides a little extra time to prepare for the event.

Bottom line

When OSHA comes knocking, we generally recommend consenting to an inspection after negotiating its scope and asking for sufficient time for your safety inspection representative and/or attorney to arrive. But if you need additional time to prepare for the visit, consider asking the compliance officer to obtain a warrant, always politely of course.

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IMMIGRATION

COVID-19 benching: H-1Bs can't sit this one out

CO | ID | MT | NM | UT | WY

by Kate N. Dodoo, McAfee & Taft

The ongoing COVID-19 pandemic continues to complicate how employers approach temporary layoffs and furloughs spawned by lost revenues and reduced demands for their services. As if navigating the employment-based immigration laws weren't complicated enough, now employers must balance implementing cost-saving measures with their federal obligations to employer-sponsored migrant workers.

Riding the bench

Let me explain: As a cost-saving measure, a company advises its employees that each employee is required to take a certain number of unpaid hours or days off, every week or every month, through the end of the year. If it employs H-1B workers, this measure potentially runs afoul of the federal laws governing their conditions for employment. In the immigration world, this is referred to as "benching."

The prohibition on benching is hardly a novel concept. The prolonged pandemic, however, brings the anti-benching regulations into focus as employers grapple with cost-saving measures. The Labor Conditions Application (LCA) prescribes the H-1B employee's wages, payment frequency, and employment status and certifies the employer will pay the employee for "nonproductive time." The regulations define "nonproductive time" as time an employee isn't performing work and is in a nonproductive status "due to a decision by the employer."

Examples of "nonproductive status" include lack of assigned work and lack of permit or license. If the employee is in a nonproductive status unrelated to her employment, however (e.g., vacation, family medical leave, or conditions that render her temporarily incapacitated), you aren't obligated to pay her for the nonproductive time if you don't provide the benefit to the other employees.

Enforcement and oversight

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) is tasked with enforcement and oversight of the H-1B program. The WHD ensures H-1B employees are compensated as certified on the LCA and that they are working in the occupations and at the locations specified.

The looming question: Will the WHD attribute temporary layoffs and furloughs due to the pandemic or governmental decrees affecting workflow as a "decision by the employer" or a condition unrelated to employment?

Bottom line

In implementing cost-saving measures, you must be mindful of your federal obligations. A material and substantive change to the H-1B employee's employment conditions may cost you thousands in civil money penalties, back wages, and temporary suspension from the H-1B visa program. You have several options to implement your cost-saving measures legally as it relates to H-1B employees. To fully understand your obligations and ensure your actions conform to the laws, contact your immigration or labor and employment lawyer.

A final note: The H-1B visa is an effective vehicle to recruit talented foreign nationals and, with the employer's assistance, paves the way to permanently retain talented individuals in the United States.

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Making health insurance changes outside of open enrollment

by Sarah K. Downey, Jackson Loman Stanford Downey & Stevens-Block, P.C.

Q ***If an employee's child joins the military and now has health coverage through the military, is she allowed to drop the child's coverage outside of open enrollment?***

Typically, when an employee makes her health insurance choices during the annual open enrollment period at work, including adding dependents to your plan, they are locked in until the next enrollment period. A dependent's ability to procure his or her own health coverage through a change in employment status or joining the military, however, constitutes a qualifying event, an event during which you can drop coverage for your child.

Be aware, however, that the window to make the change to a job-based health plan is short, usually just 30 days. If you don't act promptly, you may lose the opportunity and need to wait until the next open enrollment period.

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Cutting-Edge HR

Poll finds pandemic shifting desired qualities of job applicants. A new survey from PeopleScout, a recruitment processing outsourcing company, shows that an overwhelming majority of hiring managers say the pandemic has changed what qualities they want to see in potential new hires. The most desired quality named is the ability to work independently. In the survey, 71% of hiring managers said the pandemic has affected the qualities they look for in candidates, with 94% noting "ability to work independently" as an essential quality. Also, 68% of hiring managers said they have trouble finding qualified candidates for open positions. Other desired qualities include ability to handle stress, flexibility, communication, and being self-guided. The survey was conducted between December 19, 2020, and January 2, 2021, and the results were announced April 6.

Survey shows support for hybrid work arrangements. Insurance giant Prudential has released results of a survey showing a large majority of workers who have been working remotely during the pandemic prefer to continue working remotely at least one day a week. The "Pulse of the American Worker Survey: Is This Working? A Year In, Workers Adapting to Tomorrow's Workplace" polled 2,000 adults working full-time a year after many workplaces shut down on-site operations. The survey found that 87% of those workers who worked remotely during the pandemic want at least one remote day a week even after the pandemic. Among all workers, 68% say a hybrid workplace model is ideal. The survey found that 42% of current remote workers said that if their current company does not continue to offer remote work options long term, they will look for a job at a company that does.

Study finds lack of commitment to formal DEI targets. The recent Supply Chain Diversity, Equity, and Inclusion Survey by Gartner, Inc., and the Association for Supply Chain Management found that over half of supply chain organizations want to improve diversity, equity, and inclusion (DEI), but only about a quarter have formal targets. In a survey of 298 supply chain professionals from November through December 2020, 59% of those surveyed reported having some form of objective to improve any dimension of DEI. The survey also noted that 23% of those organizations have formal targets or goals included in management scorecards. Consumer and retail organizations are more likely than other industry sectors to either have a general objective for DEI or formal targets or goals. Company size plays a role when it comes to the dedication of senior leadership to improve DEI. The largest supply chain organizations are far more likely to have DEI objectives than their smaller peers. ■

WORKPLACE ISSUES

COVID took toll on working parents; now it's time to repair damage

CO | ID | MT | NM | UT | WY

There's no denying the misery COVID-19 has inflicted in the workplace. Although many employees quickly and successfully adjusted to remote work, others had a rougher time. With schools and daycares closing or going remote, working parents found themselves not just juggling but also struggling.

Handling work and school and caregiving simultaneously has been too much for many workers, and the effort has been especially difficult for women, who often have borne many of the burdens brought on by the pandemic. But employers can be part of the solution—and they must if they are to avoid losing valuable employees who find themselves too stressed to continue.

Labor force losses

An April survey by staffing firm Robert Half shows that about one in three professionals who were working from home because of the pandemic would look for a new job if required to go back to the office full-time.

Earlier in the pandemic, in November 2020, the National Women's Law Center (NWLC) reported that nearly 2.2 million women had left the labor force since February 2020 just before the brunt of the pandemic struck. The report also noted that 6.5% of women at least 20 years old were unemployed in October 2020. That's an unemployment rate more than twice as high as the prepandemic February 2020 number, when the rate was 3.1%.

The 2020 edition of Women in the Workplace, a report from McKinsey & Company and LeanIn.org, found that almost half of employees reported the pandemic has been a source of consistent stress and the pressure is even worse for working mothers.

The Women in the Workplace report notes that some pandemic challenges are prompting employees, women in particular, to consider downshifting their careers or even leaving the workforce. The report includes a list of factors sparking those thoughts:

- Lack of flexibility at work;
- Feeling like they need to be available to work at all hours;
- Housework and caregiving burdens brought on by COVID-19;
- Discomfort sharing the challenges they are facing with coworkers and management;
- Feeling blindsided by decisions that affect their day-to-day work; and
- Feeling unable to bring their whole self to work.

Steps to ease the strain

So, what should employers do? A number of organizations have made suggestions. The Robert Half research says the professionals it surveyed said employers can support employees being called back to the office by providing:

- Freedom to set preferred office hours;
- A personal, distraction-free workspace;
- Employer-paid commuting costs;
- A relaxed dress code; and
- Employer-provided childcare.

The Women in the Workplace report lists six areas in which companies can focus or expand their efforts to reduce the pressures women are feeling.

Make work more sustainable. The report suggests leaders and managers examine the productivity and performance expectations set before COVID-19 hit to see if they're still realistic. Also, they need to address the extra time off COVID made necessary. For example, some employers offer "COVID-19 days" to give parents time to prepare for the new school year.

Reset some norms. Many workers have complained of the "always on" feeling working from home has brought on. Employers can help by establishing set hours for meetings, implementing policies for responding to e-mails outside typical business hours, and improving communication about work hours and availability.

Examine performance reviews. Performance review criteria may need to be adjusted based on what employees can reasonably achieve considering the new challenges they are having to deal with in their personal lives. Making review adjustments can help relieve employee stress and help management refocus on key priorities.

Work against gender bias. The biases women have always faced, such as penalties for mothers who take advantage of flexible work options, may be magnified by the pandemic. So, management needs to make employees aware of gender-based biases. Bias training can help, as well as tracking promotions, raises, and decisions about layoffs and furloughs by gender to make sure women are being treated fairly.

Adjust policies and programs to support employees. Employers should make sure employees are aware of policies and programs made available during the pandemic. For example, many employers have offered more paid time off and resources for homeschooling. Also, many companies offer mental health counseling, but many employees don't know what's available.

Strengthen communication. Employees are going to be more stressed when they are surprised by decisions affecting their work. Employers can help by sharing regular updates. ■

HIRING

Pandemic sparks change in what employers seek in new college grads

CO | ID | MT | NM | UT | WY

As college students head back to campus this fall—or maybe prepare for an online-only semester—they are likely looking ahead to graduation and life after college. Employers also are looking ahead and wondering what these students will bring to the workplace as they launch their careers. Employers have long valued employees who can hit the ground running, but the COVID-19 pandemic has refined many employers' ideas about what they're looking for in new college grads.

Most highly sought qualities

PeopleScout, a recruitment process outsourcing company, released results of a survey in April showing the pandemic has affected what employers look for in job candidates. In fact, 71% of the hiring managers responding to the survey said the pandemic has had an impact.

And what are employers looking for in candidates? The overwhelming majority of the hiring managers responding to the survey (94%) said they want candidates capable of working independently. Also, 68% of the hiring managers said they have a hard time finding qualified candidates.

The survey found that the most important qualities sought, in order of importance, are:

- Ability to work independently;
- Ability to handle stress;
- Flexibility;
- Communication; and
- Ability to be self-guided.

Virtual and internal hiring

The pandemic also has affected the hiring process. When work went virtual during the height of the COVID-19 outbreak, recruiting and hiring did as well. Virtual and automated interviews became the norm, and that trend is likely to continue at least in a limited way postpandemic, according to research from LinkedIn.

A LinkedIn Talent Blog post from October 2020 says 81% of talent professionals agreed virtual recruiting will continue after the pandemic, and 70% said virtual recruiting will become the new standard.

The LinkedIn research also showed a shift toward more internal mobility. Instead of always looking to hire new people, employers are expected to ramp up their internal mobility programs. Companies are expected to catalog employees' current skills and tie internal job opportunities to their learning and development resources.

The research found that one out of two talent professionals expected their recruiting budgets to decrease, but two out of three expected their learning and development budgets to either increase or stay the same.

That change will cause recruiters to prioritize job candidates' potential and transferable skills over their pedigree and technical capacity to do specific work, the LinkedIn post noted.

What employees want

As employers look to what they need from the new college graduates they recruit, they need to consider what those new employees want from their employers. Process management and automation company Nintex in January released its Workplace 2021 Study, which surveyed 1,000 American workers at companies with 501 to 50,000 employees.

The Nintex survey found that 70% of respondents said their experiences working remotely during the pandemic have been better and more productive than they expected, and 51% said their work life would improve with the ability to permanently work remotely.

The study also found that 39% of employees said access to automation software that helps teams automate manual and repetitive tasks would improve their work life.

When asked what would improve their work, generational differences are evident: 55% of Gen Z employees named software to help automate work, 50% of millennials wanted better hardware equipment for a home office, 56% of Gen X employees said more flexible work schedules, and 42% of baby boomers said a pay increase would make their work better.

The survey also found generational differences when employees were asked what would improve their work life: 60% of Gen Z, 63% of Millennials, and 56% of Gen X employees named a work-from-home allowance for faster Wi-Fi and home office equipment. Baby Boomers had a different idea. They said a raise would improve their work life.

The Nintex study also queried employees on why they like to work remotely. Flexibility and freedom were identified as the draws:

- 56% of respondents said they like remote work because it gives them more time to spend with friends and/or family;
- 48% said more time to spend on hobbies;
- 47% appreciated not having to commute;
- 46% liked having no dress code; and
- 31% said they like having more freedom to set their own schedules. ■

MOUNTAIN WEST EMPLOYMENT LAW LETTER (ISSN 2689-7873) is published monthly for $499 per year by **BLR®—Business and Learning Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

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