

Five Steps Employers Should Take In the Second Year Of the COVID-19 Pandemic

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For the past year, employers faced unprecedented difficulties as they navigated the twists, turns and ever-present challenges the COVID-19 pandemic dished out. A year later, new challenges face employers. The promise of vaccines, the fear of new variants, and the realization that “normal” will never look quite the same, leave many employers to wonder: “what next?”. As employers prepare to enter the second year of the COVID-19 pandemic, here are five things they should plan to do.

1. Update Workplace Safety Measures

At the onset of the pandemic, employers struggled to understand the safety obligations involved in preventing the spread of COVID in the workplace. As we approach the second year of the pandemic, clearer legal standards and better science exist requiring employers to update the steps they are taking to keep their workplaces safe.

Today, all employers who bring workers into a physical workplace should not only have policies and procedures in place designed to prevent the spread of COVID, they should also regularly update those policies as legal requirements change. Just last month, the Occupational Safety and Health Administration (OSHA) issued detailed recommendations concerning employer’s policies and procedures for preventing the spread of COVID in the workplace including guidance on: isolating and quarantining sick employees; face coverings; improved ventilation; and physical distancing. In addition to OSHA’s new guidance, states and municipalities have issued (and continue to update) directives to employers regarding the prevention of the spread of COVID in the workplace. If employers fail to follow updated OSHA guidelines or state and local legal requirements, they can be exposed to penalties and undermine their defense in lawsuits brought by employees claiming the employer failed to protect them from the spread of the virus.

In addition to rapid changes in legal standards, the scientific understanding of what causes the spread of COVID has also evolved over the past year. As a result, policies and procedures need to be updated. In particular, Centers for Disease Control (CDC) guidance, which many employers reference throughout their written policies, has undergone numerous changes. If an employer’s policy starts with the statement that “we are following all CDC guidelines and recommendations,” then the employer should not only make sure that it knows what current CDC guidelines say, but also that it actually follows current CDC guidelines.

Employers also need to effectively communicate and enforce their safety policies and procedures. Written policies are fruitless if employees don’t know about them, understand them or fail to follow them. Therefore, employers need to effectively distribute written policies to employees and require employees to acknowledge that they received, read and understood those policies. Lastly, employers need to monitor their employees’ actual compliance with safety policies by taking corrective action when those policies are not followed.

2. Plan For Permanent Remote Work

A year into the pandemic, many employers, surprised by the success of remote work initiatives, are considering permitting some or all of their employees to work remotely even after they get the greenlight to go back to the office. Employers who are entertaining making remote work a more permanent way of doing business should take a number of steps.

First, employers should implement strong remote work policies. Remote work policies should: account for the protection of both employer and third-party confidential information; comply with federal, state and local wage and hour requirements for recording their time (including accounting for overtime and time-off); establish guidelines for the safety and setup of the remote workspace; address reimbursement of remote work expenditures; and have some mechanism for oversight and accountability.

Next, employers should update their job descriptions and clearly spell out which positions permit remote work and for which positions attendance at the worksite is a job requirement. The failure to have job descriptions identifying that certain positions require attendance in the workplace could trigger implications under the Americans with Disabilities Act (ADA), make it difficult for employers to deny remote work accommodations to disabled employees, or give fodder to discrimination claims.

Lastly, employers need to know where remote employees are located and follow the state laws in which the employees are working. As remote employees move farther away from the employer's worksite, employers could find themselves obligated to abide by multiple states' tax, workers' compensation and other employment laws. This is because employers are typically required to comply with the laws of the state where their employee performs work (and not just the state of the worksite to which the employee reports),

In particular, state and local tax issues could arise for employers which do not already have a tax presence in the state or locality where their employees are working remotely. Most states take the position that having an employee work in a state is a factor in determining whether there is taxable nexus for sales tax and business income tax purposes. For example a New Jersey employer, which pre-pandemic had all of its employees working in an office in New Jersey and filed New Jersey sales and income tax returns, will need to consider the potential state and local tax exposure that is created if it now has employees working remotely in states outside of New Jersey. The presence of an employee in other states might also require the employer to qualify to do business with the Secretary of State.

Likewise, because remote workers can attain work-related injuries triggering workers' compensations claims, employers have to make sure that their workers' compensation policies both cover their remote workers and comply with the workers' compensation laws of the states in which their employees are located.

Finally, employers will have to make sure they are in compliance with applicable state employment laws including laws pertaining family and medical leave, sick time, minimum wage, overtime and discrimination, harassment and retaliation.

To better control the universe of state laws in play, employers should require employees to: (1) disclose the location from which they will work remotely; (2) work only from that location; and (3) get express permission before working from any other location.

3. Plan For Vaccines

The rollout of vaccines represents a promise for an ultimate end to the pandemic, but it also brings new challenges for employers. Initially, employers need to determine whether it makes sense to mandate that their employees be vaccinated. Last December, the Equal Employment Opportunity Commission (EEOC) provided guidance establishing that employers *can* mandate that their employees receive a COVID vaccination without running afoul of employment laws as long as they make exceptions for employees with sincerely held religious beliefs and for employees with disabilities. While employers can legally mandate vaccines, whether they should do so is a more difficult question for which there is no one size fits all answer. Employers will have to weigh a number of factors including: the ability of employees to access to the vaccine; the type and size of the business; the administrative costs to monitor and enforce a mandatory vaccination program; whether employees have contact with customers; whether employees can successfully work remotely; and employee morale and receptiveness to the vaccine.

In addition to mandating vaccines, some employers have considered providing incentives to employees who get vaccinated such as free transportation to vaccine appointments, additional time-off, gift cards, stipends or bonuses. While such programs could help to encourage employees to get vaccinated, they are not without potential legal pitfalls and could implicate issues under the ADA or trigger discrimination claims. Given this legal uncertainty, in early February, multiple business groups requested that the EEOC provide guidance on the extent to which employers may provide incentives without running afoul of employment laws. That EEOC guidance is anticipated to be rolled out in the near future. However, until the EEOC issues its guidance, employers should proceed with caution and consult legal counsel before rolling out vaccine incentive programs.

Lastly, all employers will need to plan for having both vaccinated and unvaccinated workers in their workplace. OSHA's recent guidance makes clear that because "there is not evidence that the COVID vaccines prevent the transmission of the virus from person to person," employers have to make sure that vaccinated employees follow the same safety protocols as non-vaccinated employees. This means employers need to adopt policies requiring vaccinated employees to continue to follow the same safety protocols as non-vaccinated employees, monitor compliance and be ready to discipline when vaccinated employees try to shed their masks or fail to follow proper social distancing.

4. Brush Up On Current Time-Off Mandates And Gear Up For New Ones

As we enter the second year of the pandemic, it is inevitable that employees will continue to request time-off because they or their family members are sick or otherwise impacted by COVID. As requests for time-off continue, employers need to understand their current time-off obligations and gear up for possible new mandates.

Current paid leave obligations are in a state of flux. The Families First Coronavirus Response Act (FFCRA), which mandated that employers with less than 500 employees provide emergency paid time sick and family leave, expired at the end of 2020. However, the expiration of FFCRA does not mean an end to paid emergency sick and family leave requirements for employers. Under the stimulus bill passed by Congress at end the of last year, employers can voluntarily continue the paid leave that would have been available under FFCRA through the end of the first quarter of 2021 and get a tax credit for doing so. In addition, even if they don't voluntarily continue FFCRA, multiple state laws require employers to provide emergency paid sick and family leave. Lastly, the Family and Medical Leave Act and applicable state leave laws may obligate employers to provide unpaid time-off to employees who get sick from COVID or are required to care for family members suffering from COVID.

If the current state of leave obligations is not confusing enough, new mandates may be on the way. The stimulus bill proposed by President Biden and currently being considered by Congress calls for reinstating FFCRA's mandatory paid emergency sick and family leave benefits through September 2021. It also expands FFCRA's coverage to employers previously eligible for exemptions including those employers with fewer than 50 or more than 500 employees as well as employers of first responders and healthcare providers. What the final stimulus bill will provide is yet to be determined but in the meantime, employers should decide whether they want to voluntarily extend FFCRA's paid time-off benefits, make certain they are in compliance with the state emergency paid leave requirements, and prepare for a possible return to, and expansion of, mandatory paid time-off benefits.

5. Build Back Employee Morale

As much as the COVID pandemic strained employers, it also devastated many employees who lost loved ones, battled illness, faced economic loss, and juggled school closures. As the COVID pandemic moves into its second year, employers need to take steps to build back employee morale.

While remote and socially distant environments preclude traditional morale building activities like office lunches, holiday parties and after work gatherings, employers can get creative with virtual activities. In addition, employers should use old-fashioned communication to increase morale. To that end, managers should be instructed to regularly communicate with their employees not only to make sure that employees are doing their jobs, but also to check in on employees and make sure they are not feeling isolated from their co-workers. Employers should also regularly distribute information on employee assistance programs and other mental health benefits available to employees. Lastly, employers need to show appreciation for their employees and thank them for their contributions over the last year.

In sum, we do not yet know all the challenges the next year of the COVID pandemic will bring to employers. But, if employers start to implement these recommendations, they will be well on their way to successfully managing their way out of the pandemic.

If you have any questions please contact Laura Corvo (corvol@whiteandwilliams.com; 201.368.7226) or another member of the Labor and Employment Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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