



# TCHR CHANGING TIDES

Thompson Coburn's  
Annual Labor, Employment and  
Employee Benefits Law Seminar



# Returning to Port –

## How Will the Workplace Rules Change or Return to Pre-Pandemic Rules When the Pandemic Ends

Thompson Coburn's Annual Labor,  
Employment and Employee Benefits Law Seminar

# Agenda



- Introductions and Overview of Potential Changes to the Workplace  
**Stephanie Cohan and Krissa Lubben**
- Analysis of the Requirements Under the ADA and FMLA  
**Stephanie Cohan**
- Recent Changes to Missouri State Leave Law  
**Krissa Lubben**
- Vaccine and Testing Requests and Requirements  
**Krissa Lubben**
- Religious Accommodations for Vaccinations and Masking  
**Stephanie Cohan**
- Other Return to Work Policy Considerations (e.g. remote work and dress)  
**Krissa Lubben**
- Q&A  
**Stephanie Cohan and Krissa Lubben**

# ADA Basics and Return to Office



- The ADA prohibits discrimination because of a disability
  - Applies to employers with 15 or more employees
- Missouri Human Rights Act
  - Applies to employers with 6 or more employees
- Illinois Human Rights Act
  - Applies to employers with 1 or more employees
- Must reasonably accommodate qualified individual
- Requires interactive process
  - Individual assessment
- This has not changed



# Changes with Employees' Return



- Assess policies and procedures in place prior to COVID-19
- Were you more flexible with documentation or appointments during COVID-19?
- Consider whether these processes worked or are working



# ADA and Medical Exams



- The ADA requires that any mandatory medical test of employees be “job-related and consistent with business necessity.”
  - Objective belief that essential job functions will be impaired by a medical condition
  - Direct threat to workplace
- Employers may take screening steps to determine if employees entering the workplace have COVID-19
- It is not in conflict with the ADA to require testing for employees



# Medical Documentation



- Can request documentation when:
  - Employee indicates need for leave or accommodation
  - Observations that an employee is struggling to meet job expectations and there is reason to believe it is due to a medical issue
  - Reason to believe an employee poses a direct threat



# Accommodation Considerations



- Employer must respond when a need arises
- Consider type of accommodation
- Interactive process
  - Do not need to accommodate requested accommodation – not everything is reasonable
  - Will a job change or equipment accommodation help?
  - Leave of absence





# Medical Information Confidentiality



- ADA requires that all medical information about an employee be stored separately from the employee's personnel file
- Limiting access to this confidential information
- Can disclose in limited situations
  - Staffing agency, public health agency



# Considerations for an Employer



- Will the requested accommodation assist the employee?
- Undue hardship
  - Other accommodations?
- Consider job descriptions (is the job remote, hybrid, other requirements?)

# Accommodation Considerations – An ADA Hypothetical



- John is a manager of the Sales Department for National Widget Company
- Since the lockdown two years ago his entire department has been working remotely
- The company is now requiring every employee to come into the office
- John explains that as an asthma sufferer he is very vulnerable to COVID and asks if he can continue to work remotely

# ADA and FMLA Overlap



- ADA leave is a primary option when FMLA leave is exhausted
- Leave from work has always been one form of reasonable accommodation
- EEOC does not support indefinite leave, as each accommodation request requires an individualized assessment

# FMLA Basics



- Applies to employers with 50 employees or more
- Eligible employees:
  - Worked at least 12 months
  - Worked at least 1250 hours during the last 12 months
  - Measure from the date leave begins
  - Actual hours worked



# FMLA Basics (Cont.)



- 12 weeks of unpaid leave
- Can run concurrent to paid leave
- Continues paid health benefits
- Job protection
- What can it be used for?
  - Serious health condition for employee or family members
  - Intermittent or continuous



# Victims Economic Safety and Security Act



- Missouri, Illinois, and other states
- Effective August 28, 2021
- Notice to employees at time of hire
- Applies to Missouri employers with at least 20 employees
- One-week unpaid leave per year if 20-49 employees
- Two weeks unpaid leave per year if more than 50 employees

# Missouri VESSA Basics



- Qualifying Reasons
- Seeking Medical Attention
- Obtaining Services
- Obtaining Counseling
- Safety Planning Participation
- Legal Assistance & Proceedings





# Missouri VESSA Basics (Cont.)



- Can be taken intermittently or on a reduced schedule
- Can require certification
- 48-hour notice
- Together with FMLA cannot exceed 12 weeks in a year



# Missouri VESSA Basics (Cont.)



- No retaliation
- Must make reasonable safety accommodations



# Illinois and Missouri VESSA Comparison



## Missouri

- Applies if 20 Employees
- 1-2 Weeks of Unpaid Leave
- Domestic or Sexual Violence
- Same Qualifying Reasons
- Same Def. of Family Member
- Requires Reasonable Accommodation

## Illinois

- Applies if ONE Employee
- 4-12 Weeks of Unpaid Leave
- Also Includes Gender Violence
- Same Qualifying Reasons
- Same Def. of Family Member
- Requires Reasonable Accommodation

# Other States



- More than 34 states have some type of similar law but vary in content and requirements
  - Terms such as “domestic violence” are defined differently
  - Threshold of # of employees for law to apply vary
  - Who are covered family members differ
  - Some do not have stand-alone acts but require leave to be provided for these reasons in their paid leave statutes
  - Some city or counties have laws where states may not

# VESSA Action Items



- Determine what state laws apply to workforce
- Determine notice and posting obligations
- Review policies or draft policies
- Train supervisors



# VACCINE AND TESTING REQUESTS AND REQUIREMENTS



# Requirements



- On January 26, 2022, OSHA withdrew its vaccination and testing emergency temporary standard issued on Nov. 5, 2021
- Still can require vaccines and/or testing
  - Written vaccine policy?
  - Written testing policy?



# Employer Support for Vaccinations



- Policy and Procedure for Vaccination
  - Time Paid if during working hours
  - Cannot require use of accrued PTO
- Policy and Procedure for Recovery Time
  - Can require use of PTO/sick leave if available
  - “Reasonable Time” = at least two days



# Medical Accommodations and Exemptions



- Policies
  - Look to update any written policy regarding accommodations and exemptions
- No magic words
  - Document the request!
- Initiate the interactive process
- Documentation of impairment from doctor and how impairment conflicts with vaccine policy
  - Does the employee have a disability?
- Direct threat or undue hardship

# Medical Accommodations – A Hypothetical



- Your company has a mandatory vaccination policy which allows a medical exemption
- In order to obtain such an exemption, employees have to provide a written certification from the employees' health care provider stating that the employee has a medical condition which would put the employee's health at risk if she was vaccinated

# Medical Accommodations – A Hypothetical (Cont.)



- Betsy has not provided a certification and the company will not allow her to go back to work unless she does so or provides proof of vaccination. The state in which Isabel works has a law pending that considered natural acquired immunity to the disease as an acceptable alternative to vaccination

# Vaccine and Testing – A Hypothetical



- Bob works for a company that requires employees to be vaccinated
- Bob has obtained a medical exemption
- The company requires Bob to be tested twice per week and to wear a mask



# Vaccine and Testing – A Hypothetical (Cont.)

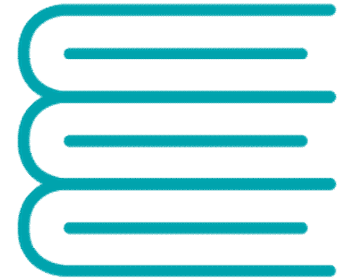


- Nevertheless, a group of co-workers are refusing to work in the vicinity of Bob
- They claim that it is a safety hazard to have Bob work near them
- This is causing a major disruption in operations
- Most of these workers have no pre-existing risk for serious illness if infected by COVID, but one of them has an autoimmune condition which could lead to serious consequences if infected

# Testing



- What happens if an employee tests positive?
  - Notification Requirements
  - Exclusion from Workplace
  - Return to Work
  - Optional:
    - Contract Tracing
    - Exclusion for Exposure
  - Considerations for asymptomatic employees



# Collecting, Maintaining, and Protecting Information



- Vaccination Records
  - Acceptable Proof
  - Restrict Access
  - Is it acceptable to provide to third-party testing services?
- Roster
  - Test Results
  - Restrict Access



# Religious Accommodations



- EEOC Updated Guidance March 2022
- Title VII protects both traditional and nontraditional religious beliefs, practices, or observances
  - May be unfamiliar to employers
- Should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs
  - Can ask to explain the religious nature of their belief and supporting documentation
- Sincerity is typically not in dispute
  - Can ask how religion conflicts with COVID-19 requirements
- If employer grants one religious accommodation, it does not have to grant all



# Religious Accommodations (Cont.)



- Employee requirements
  - Employees are required to tell their employer if they are requesting an exception to a vaccine requirement because of a conflict between that requirement and their sincerely-held religious beliefs, practices or observances
  - Do need to not use “magic words,” such as “accommodation,” but they need to explain the conflict and the religious basis for it
- An employee who fails to cooperate with an employer’s reasonable requests for verification risks losing any subsequent claim that the employer improperly denied an accommodation

# Religious Accommodations – A Hypothetical



- Jane works for a company that has a mandate stating that all employees must be vaccinated unless they have an approved medical or religious exemption
- Jane seeks a religious exemption

# Religious Accommodations – A Hypothetical (Cont.)



- The company knows that Jane has been vaccinated in the past
- Jane claims that she is a new adherent to her religion which forbids vaccination
- Jane submits a statement from a pastor of the Evangelistic Ministries of Anita Fuentes (“EMOAF”) on her behalf, but the statement appears to have been obtained on-line from out of state
- Jane has been very active on social media expressing political views against vaccination



# Other Return to Work Considerations

# Masking



- Updated guidance from March 2022
  - Wear a mask when “a lot” of people are around
  - No federal masking requirements
  - All state and local mandates have expired in St. Louis
    - If outside immediate St. Louis area, check local rules
  - No state mask mandate in Illinois
- Still can require employees to wear a mask
  - Consider accommodation requests

# Other Policy Considerations



- Dress
  - Relaxed policies
  - Consider unnecessary previous policies
- Technology
  - Supporting employees working from home
  - Returning previously loaned equipment
- Maintaining office culture/morale
  - Consider gatherings
  - Social distancing?
  - Other methods to increase and support culture



# Other Policy Considerations



- Hybrid work
  - Draft policies to require employees to come into the office
  - Consider accommodations
    - Do not have grant accommodations even if previously granted
    - Remember the individualized assessment
- Remote work
  - Draft policies to support a remote workforce



# Wage and Hour Policy Considerations



- Wage and hour issues
  - Consider where your employees are located
    - This may have changed if employees are permitted to work remotely or even hybrid
  - Are there state or local laws regard wage and hour issues?
    - Pay frequency
    - Overtime and other classification issues
    - Leaves





# Questions?