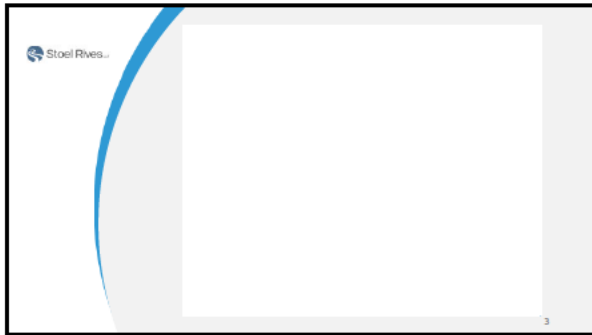


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Topics

- Managing the Remote Workforce
- Mental Health and Wellness
- Regulating Off-Duty Conduct
- Payroll Taxes
- ADA Issues
- Vaccinations
- COVID Litigation

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Challenges to Managing the Remote Workforce

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Remote Work – One Year In

- Getting back to business
- Short- and long-term planning
- Settled into new routines for remote work

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How Do Employers Effectively Manage Performance Remotely?

- Communication, communication, communication!
- Value of "in the moment" feedback
- Recognize:
 - many employees have taken on different roles, often without training
 - employees think differently in stressful situations
 - technology challenges
 - employee engagement challenges

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How Do Employers Effectively Manage Performance Remotely (cont.)?

- May need to temporarily adjust your standards or performance metrics
- But this does not mean you do not continue to:
 - identify key tasks/deliverables
 - identify deadlines
 - hold people accountable

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What Are Your Managers' Beliefs About Remote Work?

- Flexibility also extends to your leaders, who are now leading without being physically present
- How have managers pivoted from face-to-face management to remote management?
 - Do they trust and have confidence in their workforce?
 - Are they making subordinates' lives more stressful?
- Distrust can lead to micromanagement, which could negatively impact employee morale, motivation and, ultimately, productivity

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Is There A Distinction Between Home And Work?

- How do managers maintain boundaries?
- Are there unreasonable expectations as to availability?
- What about those employees juggling work and parenting responsibilities?
- Are employees receiving required rest and meal breaks and appropriately tracking hours worked?

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Tips For More Effective Remote Management

- Employee engagement:
 - Proactively be in touch with your remote workforce
 - Keep the virtual office doors open
 - Treat employees as key stakeholders and recognize contributions
- Ensure employees have the tools and technology to be successful
- Focus more on outcome and less on process
- Reinforce company values and mission statements
- Update telecommuting or remote work policies

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Mental Health and Wellness

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Stoel Rives... **No Matter Who You Are, This Is Stressful**

- Frontline
 - Fear/anxiety of exposure
 - Maintaining physical distance
 - Increased workload
 - Staff shortages due to illness/self-isolation

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Stoel Rives... **No Matter Who You Are, This Is Stressful (cont.)**

- Remote
 - Fear/anxiety of exposure
 - Isolation
 - Changed work environment/patterns
 - Technology issues
 - Home/family situation

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Stoel Rives... **No Matter Who You Are, This Is Stressful (cont.)**

- Furlough
 - Job security
 - Isolation
 - Financial worries
 - Lost sense of purpose

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Supporting Employees

- Stay connected
 - Utilize videoconferences, instant messaging, and phone calls to check in
- Model healthy behaviors
 - Demonstrate that midday breaks are ok
- Be creative
 - If you're struggling with it, odds are your co-workers are too

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Supporting Employees (cont.)

- Offer flexibility and be inclusive
 - Understand that remote environments may create a need for atypical working hours
- Overcommunicate
 - Make sure expectations are clear on the front end
- Know your resources
 - Make sure employees know if EAPs are available and encourage employees to use them

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EEOC Guidance

- Brief history of wellness regulations
 - 2010: ACA permits large incentives to join wellness programs (30% of total cost of premiums; 50% if reduced smoking)
 - 2016: AARP sues the EEOC on the basis that incentives "coerced" employees to reveal protected health information
 - 2019: Court vacates EEOC's rules (left in legal limbo)

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EEOC Guidance (cont.)

- January 7, 2021: EEOC issues proposed rules
- Significantly limits the value of incentives for programs that track health information
- Permits "de minimis" incentives:
 - Water bottle
 - Modest gift card
- Exception for "Group Health Plan Programs"

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Biden Administration Presses Pause

- The EEOC's proposed rules have been withdrawn
- Employers are back in the same position pre-2021 rules – legal limbo
- Many employers are going ahead with incentives for vaccines
- Should be aware of the potential to significantly limit acceptable incentives

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Off-Duty Conduct

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Off-Duty Conduct: General Rule

- An employee's conduct outside of work generally is not the employer's concern
- But there are important exceptions

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Tackling The Issue

- On- or off-duty?
- Are there protections that prevent action by an employer?
- Was the off-duty conduct legal or illegal?
 - Job-related?
 - Harmful to organization?
- What can or should you do?

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What Does "Off-Duty" Mean Now?

- When possible, communicate clear expectations for "work time"
- Company policies apply, even when working from home
- Acceptable use of technology and systems
 - Including no expectation of privacy (including instant messaging and virtual meetings)

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Employee Protections

- NLRA/Section 7
- Retaliation and whistleblower protections
- State off-duty conduct laws
- State privacy rights
- CBAs
- Stored Communications Act / Electronic Communications Privacy Act
- Public employers: constitution

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Possible Exceptions To The General Rule

Illegal conduct <ul style="list-style-type: none">• Driving offenses• Drugs• Violent behavior• Sexual offenses• Theft• Government orders	Legal (but potentially undesirable) conduct <ul style="list-style-type: none">• Alcohol/smoking• Political activities• Embarrassing behavior• Immoral behavior	Conduct that harms an employer's reputation Conduct that exposes employer to liability
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Is The Conduct Legal Or Illegal?

- Illegal conduct is not an unfettered avenue for discipline or discharge
- Disciplining or discharging employees for what they lawfully do off the clock can be a slippery slope

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Does The Conduct Relate To Work?

- Are co-workers involved?
- Is the conduct job-related?
- Does the conduct harm the employer's business reputation (or is it just embarrassing)?

HYPO: Employee is a drug and alcohol counselor who is in recovery herself. You learn that she has been arrested for shoplifting, pled guilty, and received a fine and community service.

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Parting Thoughts

- On- or off-duty?
- Is the conduct protected by law?
- If off-duty, does the conduct affect the workplace?
- Is the company being consistent and fair?

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Payroll Tax Issues

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Stoel Rives... **Topic overview**

- State income tax issues for the remote workplace
- Practical steps for employers withholding state income tax from wages paid to employees performing remote work
- Planning for the future

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Stoel Rives... **What are the issues?**

- If an employer responded to COVID-19 by allowing employees to leave their normal physical work location(s) and perform remote work in a different state, a business may have new tax filing, withholding, and payment obligations in states where the employees performed remote work
- Employers should understand the income tax withholding rules to avoid penalties for failure to file, withhold, and pay state income tax on wages paid to employees working remotely in other states

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Stoel Rives... **COVID-19 did not change the law**

- **Before and after COVID-19:**
 - In general, an employer will need to withhold state income tax in:
 - the state where the employee lives, and/or
 - the state(s) where the employee performs services for the employer
- If an employer withheld state income tax for employees working remotely in other states prior to COVID-19, the employer is likely **already familiar** with the withholding rules

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Stoel Rives... **New developments**

- Some states have taken an aggressive position. See *New Hampshire v. Massachusetts*, No. 220154 (2020) (cert. petition currently pending before SCOTUS)
- Other states responded to COVID-19 by issuing special temporary guidance regarding whether the presence of an employee(s) working remotely in the state due to COVID-19 creates a **nexus for the employer**

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Stoel Rives... **What is nexus?**

- **General rule** Employers must perform withholding for employees in states where the employee's activities create **nexus** for the business, or the business otherwise has nexus.
- **Nexus** = the connection a business has with a state that creates a taxable presence
- Nexus rules are fact-specific and vary by state. The existence of a single employee working remotely in a state may be sufficient to create nexus for state income tax withholding.

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Stoel Rives... **Practical steps**

- What are some **practical steps** an employer can take to avoid penalties for failure to file, withhold, and pay state income tax on wages paid to employees working remotely in other states?

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Five questions

1. In what state is the employee a resident for tax purposes?
2. What is the withholding law in the state(s) where the employer is based?
3. In what state(s) does the employee perform remote work?
4. Does the employer have nexus with the state(s) where the employee(s) performs remote work?
5. Has the remote work state(s) issued special temporary guidance regarding whether the presence of an employee(s) working remotely in the state due to COVID-19 creates nexus?

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Scenario 1

- Company X is in Portland
- Bill lives in Beaverton and considers Oregon his home. Bill works at Company X's physical office location in downtown Portland. Company X withholds Oregon income tax from the wages it pays to Bill
- In March 2020, Company X directs employees to work remotely due to COVID-19
- In April 2020, Bill emails Company X to say he is temporarily working remotely from his sister's house in South Carolina. He intends to return to his home in Oregon to work remotely in December 2020
- What should Company X do?

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Scenario 1 (cont.)

Company X should ask five questions:

1. In what state is Bill a resident for tax purposes?
2. What is the withholding law in Oregon?
3. In what state is Bill performing remote work?
4. Does Company X have nexus with South Carolina?
5. Has South Carolina issued special temporary guidance regarding whether the presence of employees working remotely in South Carolina due to COVID-19 creates nexus?

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Stoel Rives... Scenario 1 (cont.)

1. In what state is Bill a resident for tax purposes?

- Bill is domiciled in Oregon and maintains his one, true, and permanent home in Oregon. Bill is an **Oregon resident** for tax purposes.
- **Note:** Just because an employee is working from "home" in a state, does not necessarily mean they are "domiciled" in that state for tax purposes – e.g., an out-of-state vacation home.

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Stoel Rives... Scenario 1 (cont.)

2. What is the withholding law in Oregon?

- An Oregon-based employer must withhold income tax from **all wages** paid to Oregon resident employees, including wages earned for services performed **outside** of Oregon
- Bill is an Oregon resident for tax purposes
- Therefore, Company X continues to withhold **Oregon income tax on all wages** paid to Bill for services he performs while working remotely in South Carolina

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Stoel Rives... Scenario 1 (cont.)

3. Where is Bill performing work?

- Bill emailed Company X to say he is **temporarily** working remotely from his sister's house in **South Carolina**. He intends to return to his home in Beaverton to work remotely in December 2020.

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Stoel Rives... Scenario 1 (cont.)

4. Does Company X have nexus with South Carolina because Bill is temporarily working in the state remotely due to COV D-19?

- South Carolina law provides that the state will have **nexus** if employees perform certain employment-related activities in South Carolina
- Bill's remote work in South Carolina may create **nexus** requiring Company X to **withhold South Carolina income tax** from wages paid to Bill during his time working remotely in South Carolina

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Stoel Rives... Scenario 1 (cont.)

5. Has South Carolina issued special temporary guidance regarding whether the presence of employees working remotely in South Carolina due to COV D-19 creates nexus?

- Yes. Effective March 13, 2020 through December 31, 2020, an out-of-state business is not subject to South Carolina's withholding requirement solely due to the shift of employees working on the employer's premises outside of South Carolina to teleworking from South Carolina. S.C. Information Letter #20-11; 20-24

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Stoel Rives... Scenario 1 (cont.)

- South Carolina's special temporary guidance does not require Company X to withhold and pay South Carolina income tax for the period in which Bill performs remote work in South Carolina
- Company X withholds Oregon income tax for all wages during the period Bill works in Oregon because Bill is an Oregon resident for tax purposes

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Temporary means temporary

- **Note** An employer may no longer have protection once state temporary guidance expires
- For example, the Indiana Department of Revenue's website states:
"If the person remains in Indiana after the temporary remote work requirement has ended, nexus may be established for that employer."

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Scenario 2

- Same facts as Scenario 1. In March 2020, Bill tells Company X that he will work remotely from his sister's house in South Carolina. As of March 2021, Bill is still working in South Carolina
- What should Company X do?
 - South Carolina's special temporary guidance expired December 31, 2020
 - Following South Carolina law, Company X withholds South Carolina income tax from wages it pays to Bill for services he performs in South Carolina after December 31, 2020
 - Company X continues to withhold Oregon income tax from all wages paid to Bill for services he performs in South Carolina because Bill is an Oregon resident for tax purposes

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Double taxation?

- "In certain circumstances, you may be able to claim a credit on your Oregon return for income taxes paid to another state. Only take a credit for tax paid to another state if Oregon taxed the income and the other state also had a right to tax the same income."

Oregon Department of Revenue, Publication OR-17; ORS 316 082

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Stoel Rives... Scenario 3

- Company X is in Portland, Oregon
- Linda works for Company X. Linda lives in **Washington** and considers Washington to be her permanent home
- Company X withholds Oregon income tax from wages paid to Linda for services she performs for Company X at its physical office in Portland
- In March 2020, Company X allows Linda to work remotely from her home in **Washington** due to COVID-19. As of March 2021, Linda is still working remotely from her home in **Washington**
- What should Company X do?

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Stoel Rives... Scenario 3 (cont.)

Five questions:

1. In what state is Linda a resident for tax purposes?
2. What is the withholding law in Oregon?
3. In what state is Linda performing remote work?
4. Does Company X have nexus with Washington?
5. Has Washington issued special temporary guidance regarding whether the presence of employees working remotely in Washington due to COVID-19 creates nexus?

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Stoel Rives... Scenario 3 (cont.)

1. In what state is Linda a resident for tax purposes?
 - Linda is domiciled in Washington and considers Washington her permanent home
 - Therefore, under Oregon law, Linda is likely a Washington resident and an Oregon non-resident
2. What does Oregon law say?
 - An Oregon-based employer must withhold tax from all wages paid to non-resident employees for work performed in Oregon
 - No Oregon withholding is required when a non-resident employee performs work outside of Oregon

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Stoel Rives... Scenario 3 (cont.)

- 3. In what state is Linda performing remote work?
 - Washington
- 4. Does Company X have nexus with Washington?
 - Perhaps. However, Washington does not impose a personal income tax
- 5. Has Washington issued special temporary guidance regarding whether the presence of employees working remotely in Washington due to COVID-19 creates nexus?
 - No

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Stoel Rives... Scenario 3 (cont.)

- Company X takes reasonable steps to ensure that Linda is working remotely from Washington
- Company X confirms that Linda has not worked in the Portland office while she is otherwise working remotely in Washington
- Company X does not withhold Oregon income tax from wages paid to Linda for services she performs while working remotely in Washington

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Stoel Rives... Problem

- **Problem:** What if an employee does not communicate to their employer that they are working remotely in another state?
 - In the event of an audit, the employer will have the burden of proof
 - Employers should ensure that employee tax information is current
 - Document employee roles and locations
 - Many states have issued penalty waivers for late returns due to COVID-19

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Multi-state withholding

- Withholding complexities arise when an employee performs services in a state that is neither:
 - their state of domicile; nor
 - the state where they normally perform services for the employer.
- For example, an employee who lives in Washington but is working remotely in both California and Idaho for an Oregon-based employer due to COVID-19

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Other taxes

- A business should be aware that remote employees working in other states may create additional state tax filing and payment obligations for the business in the state where the employees are working remotely
 - Two examples:
 - Washington B&O tax
 - San Francisco gross receipts tax

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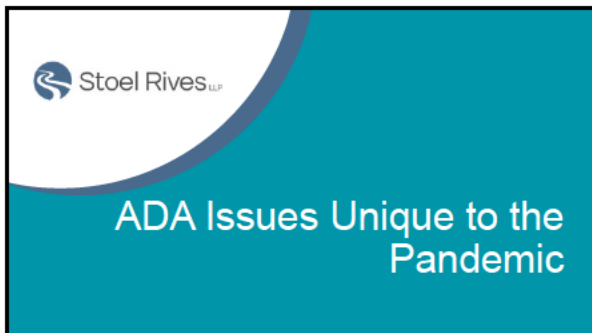
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The future

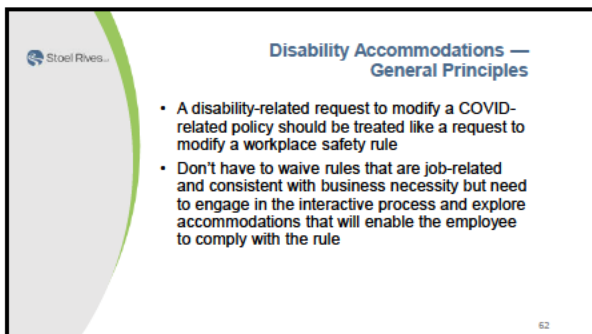
- **Some** form of remote work is likely here to stay
- Watch out for nexus red flags:
 - Multiple employees working remotely in one state
 - Temporary remote work becoming permanent remote work
 - Expiration dates for state temporary guidance
- Develop a remote work plan and/or a return to office plan timeline
- Document relevant communications
- Encourage employee compliance
- Seek tax advice early on

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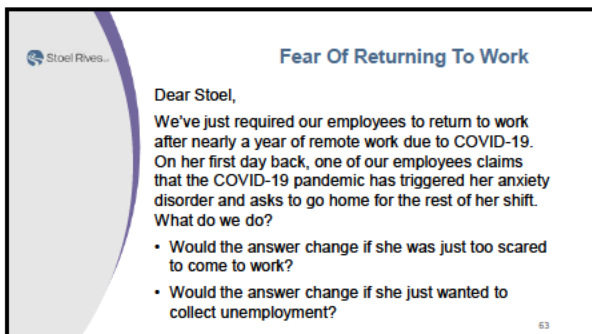
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Vulnerable Employees

Dear Stoel,

We have several employees with underlying health issues who fall in the CDC's "high risk" category. We are concerned about those employees returning to our workplace and would like to offer them the ability to work from home until it is safe for them to return to work. Is that okay?

- Is it okay to offer WFH to them but not anyone else?
- Are we allowed to require that every employee over 60 years old WFH? Encourage it?

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Potential Accommodations

- Remote work?
- Adjustments to working hours?
- Reassignment to a non-public-facing role?
- Restructure of non-essential job duties?
- Continued use of face masks and other PPE?
- Leave as a reasonable accommodation?

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ADA Considerations Amidst COVID

- Be practical and flexible with regards to medical documentation requirements
- Not required to accommodate a direct threat. Direct threat = significant risk of substantial harm to self or others
- Medical documentation, including results of temperature checks and COVID-symptom screenings, must be kept confidential

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ADA Considerations Amidst COVID (cont.)

- Post-COVID 19, will we have to allow employees to telecommute whenever they want? **No.**
- Employers retain authority to determine essential functions, including where work is performed
- Working from home, while necessary for the past several months, is clearly not ideal for every workplace
- What has likely changed is deference employers may receive about the importance of working from a common location
- Helpful link: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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ADA Considerations Amidst COVID (cont.)

- Are we required to make modifications to employees' home workspaces because of their disabilities? **Maybe.**
- The usual rules on reasonable accommodations apply, there is no special "work from home" version
- Potential accommodations
 - Ergonomic chairs and keyboards
 - Adaptive listening or screen-enhancer devices
- Helpful link: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

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COVID-19 Vaccine and the Workplace

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What About Vaccines?

- Absent contrary state law, employers can mandate vaccinations
- December 2020 - EEOC guidance implies that employers can require COVID-19 vaccinations
- Vaccines are not "medical examinations" under the ADA
- But beware of vaccine-related questions
 - Pre-screening questions about the employee's medical history
 - Questions about proof of vaccine receipt
- Union considerations?

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State Statutory Restrictions

Oregon law: Health care employers and first responders

- Covered employers:
 - must provide vaccines to employees if available and medically appropriate
 - must provide vaccines at no cost
 - may not require employee to be immunized as a condition of employment, unless immunization is otherwise required by federal or state law, rule, or regulation
- Health care facility defined to include drug and alcohol treatment facilities
- Be on the lookout for new state legislation

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It's Your Turn

POLL Is your workplace considering mandating the COVID-19 vaccine once it becomes readily available to employees?

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Mandatory Vaccination Policies: Should We Adopt One?

- When will the vaccine be available to our employees?
- How would a mandate be received by employees?
- How would a mandate be received by customers/clients/volunteers? Would mandate extend to them?
- How much time do employees have to get the vaccine once they become eligible?
- Accommodation protocol
- System to track compliance
- What to do with vaccination records, retention requirements

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ADA Accommodations And Vaccines

- Despite the novelty, the same ADA principles apply
 - Engage in the interactive process
 - Determine whether there is a medical condition at issue
 - Determine whether reasonable accommodations exist

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Pregnant Employees

- Oregon's new pregnancy accommodation law
 - Need to make reasonable accommodations for conditions related to pregnancy
 - Can't require leave if employer can make a workplace accommodation instead
- Vaccine trials did not include pregnant women
- What about women trying to get pregnant?

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Religious Accommodations

- Title VII of the Civil Rights Act requires employers to accommodate their employees' "religious beliefs"
- "Religious beliefs" include non-religious beliefs about morality and ethics
- Must be "sincerely held"
 - Does not include mere personal objections to vaccines
 - But benefit of doubt given to employee
- Explore reasonable accommodations

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Accommodation Scenario: Wendy

Dear Stoel,

We operate a retirement community and have decided to mandate the vaccine to protect our residents. Wendy, an Activities Coordinator, is pregnant, and she brought in a note from a Certified Nurse Midwife that states, "Wendy declines to get the COV D-19 vaccine at this time." What do we do?

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Accommodation Scenario: Adrian

Dear Stoel,

We operate a small non-profit and our entire workforce has been remote since March 2020. We want to start bringing employees back to the office once the vaccine is widely available, and we are considering mandating the vaccine because we think it is the right thing to do. One of our employees, Adrian, has stated that his religion prevents him from getting the vaccine and has requested to continue to work from home as an accommodation. What do we do?

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Alternatives To Mandating The Vaccine

- Financial incentives
 - Cash payment, gift card, entry into raffle
 - Paid time off for time spent getting vaccinated
 - Accommodations for employees who are unable to get the vaccine
- Reverse incentives?
 - Continued mask mandate for employees who opt out
- Education and outreach - be a trusted source of information
- Arranging for on-site or off-site vaccination

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It's Your Turn!

POLL Is your workplace considering incentivizing employees to get the COVID-19 vaccine?

What incentives are you considering or have you heard about? (Please provide suggestions in Q&A Function)

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COVID Litigation Trends

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Employment Litigation In 2020

- New employment suits fell off in May
 - Caused by COVID-19 restrictions and economic crisis
- BUT major rebound in November and December
 - 2,282 cases in November
 - 2,202 in December (per Lex Machina)
- November: Most employment cases filed in any month during the past 3 years

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COVID-Related Litigation

- 1,800+ COVID-related cases filed since January 2020
- Most still ongoing
 - Only 4% resolved in state court
 - 25% resolved in federal court
- Of resolved cases:
 - 75% settled
 - 25% dismissed by motion

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States With The Most Cases

- California
- New Jersey
- Florida
- New York
- Ohio

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Stoel Rives... Industries With The Most Cases

- Health care
- Manufacturing
- Public administration
- Retail
- Hospitality

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Stoel Rives... Cases By Geography

- Oregon 18
- Washington 24
- California 426
- Idaho 2
- Utah 2

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Stoel Rives... Types Of Claims

- Retaliation
- Discrimination
- Leave issues
- Workplace safety
- Wage and hour
- Breach of contract
- ERISA and benefits
- Non-compete and trade secrets

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Stoel Rives... **Retaliation**

- For requesting leave to care for children due to school or daycare closures
- For raising COV D-19 precaution concerns
- For requesting accommodations

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Stoel Rives... **Leave**

- Plaintiff, who was an assistant manager, had asthma, asked to continue remote work
- Employer denied request citing need for managers to be on-site
- Plaintiff sued for violations of the ADA and state law, and requested a preliminary injunction to continue working from home and to prevent her employer from terminating her
- Court granted the requested relief

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Stoel Rives... **Litigation Trends**

Wrongful termination

- Fired after testing positive and failing to return to work before mandated quarantine period advised by doctor

Failure to accommodate

- Fired after need to change leave due to knee surgery being rescheduled due to COV D-19
- Fired after eye surgery could not be scheduled due to COVID-19

Differential treatment

- CEO allegedly bullied plaintiff, calling him "chubby," "fat," and "lazy"; during layoffs, plaintiff was the only executive member fired

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Stoel Rives... **Avoiding Litigation**

- Educate and train managers and supervisors
- Train managers to engage with HR for time off and leave requests
- Exercise diligence when handling requests for leave or time off
- Document discussions regarding time-off and leave requests

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Stoel Rives... **Avoiding Litigation (cont.)**

- Meaningfully engage in and document interactive process
- Communicate clear expectations re policies application to remote work
- Document rationale for any adverse employment decision
- Remember WARN
- Be flexible

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Stoel Rives... **Questions?**

				
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