



# Returning to In-Person Work

Presented by  
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## Today's Presenters



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## Today's Agenda

- ADA considerations when returning to in-person work
- Vaccinations; how to handle a partially vaccinated workforce; what you can and can't ask employees
- Continued requirements regarding face coverings, social distancing, and symptom screening
- Hybrid work models; what are other companies considering?

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## ADA Considerations

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## ADA Framework

- Must provide reasonable accommodations to qualified individuals with disabilities that will enable them to perform their essential job functions and/or enjoy the benefits and privileges of employment.
- If you are on notice that an employee may need an accommodation, you must engage in the interactive process.

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## ADA Framework

- May be required to eliminate marginal or non-essential job functions as part of the interactive process.
- Employer should take employee's preferred accommodation into consideration but has discretion to decide what accommodation to provide, as long as it is effective.

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## Is In-Person Work Still Essential?

We've been remote since March 2020 and would like employees to return to the office starting this summer. When we return to in-person work, can we claim that being in the office is an "essential job function"?

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## Essential Job Functions

- EEOC: "Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation."
- Job description relevant but not determinative.
- Consider:
  - actual work experience of present or past employees in the job
  - time spent performing a function
  - consequences of not requiring an employee to perform a function
  - terms of a CBA

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## Pregnant Patricia

We are requiring that all employees return to the office in-person starting June 1. Patricia, who is 6 months pregnant and has been diagnosed with gestational diabetes, wants to continue to work from home until after she delivers her baby.

**POLL 1: Do we have to allow Patricia to work from home?**

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## Reasonable Accommodations

- May need to provide accommodations for pregnant employees under state law, even if they don't qualify as "disabled"
- Accommodations could include continued remote work
- Is in-person work an essential job function?
- Are other accommodations available (employer gets to decide what accommodation to ultimately provide)?

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# Vaccinations

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## Legal Framework

- Mandating vaccines in the workplace is permissible (limited exceptions for health care providers under Oregon state law)
- But even if mandated, employer must allow for religious and disability accommodations
- Possible that CBA prevents mandatory vaccination program or requires bargaining
- Also watch out for W&H issues – is time spent getting a mandatory vaccination compensable?

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## Vaccination-Related Inquiries

- EEOC: Okay to ask employees if they have been vaccinated or if they can show proof of vaccination. This is not a “disability-related” inquiry under the ADA.
- EEOC: Subsequent questions, such as asking why an employee isn’t vaccinated, may elicit information about a disability and should be “job related and consistent with business necessity.”
- If an employer retains vaccination records, should be kept confidential. Consider just verifying instead.

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## Vaccination-Related Inquiries on Job Applications

- Okay to ask applicants if they have been vaccinated or if they have a religious or medical exemption
- Potential addition to job applications?
  - Can you provide proof of COVID-19 vaccination or information supporting a medical or religious exemption? Yes/ No

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## Unvaccinated Vicki

We are requiring all employees to get vaccinated before they return to the office. Employees who are unvaccinated are required to work from home. Vicki, who has decided not to get the COVID-19 vaccine because of an unspecified personal belief, has asked to come back to the office because she can't concentrate at home.

**POLL 2: Do we have to allow Vicki to return to the office?**

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## Encouraging but Not Mandating the Vaccine

Legal to require the vaccine but most employers are just encouraging. Alternatives to mandating vaccine:

- Carrot vs. stick
- Limiting office access
- Requiring unvaccinated employees to continue to wear masks
- Awarding bonuses to employees who get vaccinated
- Giving time off for vaccine itself or as a reward
- Raffle
- Hosting an on-site vaccination clinic

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## Legal Considerations for Vaccine Incentives

- Discrimination against those who have received a religious or disability accommodation?
- Bonus for getting the vaccine
  - Taxable income to employee
  - Must be included in regular rate of pay for overtime purposes – earned during workweek that vaccine was obtained?
- Recordkeeping considerations if requiring proof of vaccination
- Oregon Equal Pay Act “fix”

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## Reluctant Ron

We are strongly encouraging, but not requiring, employees to get the COVID-19 vaccine as we start returning to in-person work. Ron, who is fully vaccinated, is refusing to return to work until ALL employees are fully vaccinated. Ron is diabetic and has raised concerns that the vaccines are not 100% effective.

**POLL 3: Can we require Ron to return to work?**

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# Continued Mask Requirements and Other Precautions

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## Do We Still Have to Require Employees to Wear Masks?

We are a small employer and all of our employees have been vaccinated. Do we have to keep requiring our employees to wear masks every time they go to the bathroom or walk down the hall?

**POLL 4: Do employees still have to wear masks?**

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## Continued Mask Requirements

- Continued mask requirements depend on applicable (and evolving) CDC and state guidance
- CDC guidance:  
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>
- Look to local guidance as well:
  - Oregon:  
<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2288k.pdf>
  - Washington:  
<https://www.doh.wa.gov/Emergencies/COVID19/ClothFaceCoveringsandMasks>

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## The New Workplace

- Require or encourage employees to work 50% from the office, 50% from home?
- Social distancing
- Plexiglass
- Open office plans?
- Continued Zoom meetings?
- “Hoteling”

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## We Want to Hear from You!

**POLL 5: Are you considering having employees return to the office full-time, allowing employees to remain fully remote, or some hybrid?**

**What other workplace precautions are you considering?**

**[Please type your answers in the Q&A]**

## Questions



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