

COVID Impacts on Your Business: Compensation, Staffing, and Ever- Changing Regulations

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CONGRATULATIONS!!!

You Are Still Standing

What a Ride It's Been!!!

Michael, COVID . . .

**Things Are A LOT Different Now
than they were last year
Right?**

Themes of the Day

Resilience

Flexibility

Resilience

Unpredictable – Won't go as planned

World has Changed, you must change with it

Not Going Back on Some Issues

Bounce Back from Hardships

Be A Weeble!!



***Weebles Wobble
but they don't fall down***

Flexibility

Policies & Principles

**There is a lot you can't control
Worry about what you can**

**Despite Circumstances,
You Do Have a lot of Control & Choice**

Semper Gumby

“Always Flexible”



How Did We Get Here?

COVID-19: Fall 2019

**Wuhan, China....
Then the World**

Government To The Rescue:

PPP Loans

Unemployment Assistance

Eviction Moratorium

Employment Rules (FFCRA / CARES)

Employer Retention Credit (ERC)

Mask and Safety Mandates

Government To The Rescue:

**Vaccine development,
Sighs of Relief
Then . . .Delta**

Where Are We Now?

Better . . . Right?

Back to Normal?

Government To The Rescue:

PPP Loans – EXPIRED May 31st
Unemployment Assistance - EXPIRING
Eviction Moratorium – YES . . . BUT NO
Employment Rules (FFCRA) – EXPIRED (Now Voluntary)
Employer Retention Credit (ERC) – Still Active
Mask and Safety Mandates – OFF, Then ON, then OFF . . .

What Has Worked & What Hasn't:

Effective: Vaccines

Not Effective: Everything Else

What Has Worked & What Hasn't:



What Is Next?

More of the Same

.....at least for planning purposes

COVID Exposed Flaws in our Modern Systems

Workers:

Remain Hard to Find

Supplies:

Hard to Get

Prices:

Going UP

Regulations:

Ever Changing, Confusing



**Remember
Often No “Right” Answers**

Policies & Principles

Worry About What You Can Control

VACCINES

CAN I MAKE MY EMPLOYEES GET A VACCINE?

Short Answer:

Private: Yes

Public: . . . Yes . . . Probably

Better Question:

Should You?

Risks of Mandatory Vaccine

- Worker Availability & Retention
- Bargaining obligations if Unionized;
- ADA, Religious Accommodation obligations
- Disparate impact risk;
- Legal challenges & Costs
- Compliance with state and local requirements
- Confirmation and Medical records / privacy issues;
- Testing . Wage and Hours issues and compliance
- Liability risks associated with requiring a vaccine still in EUA status.

General Advice

Workplace decision.

Alternative - Strongly Encourage, not Mandate.

Vaccine “Passports”

Section 381.00316, Florida Statutes

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Section 381.00316, Florida Statutes

Vaccine “Passports”

“A business entity, as defined in s. 768.38 to include any business operating in this state, may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the business operations in this state.”

Also applies to Governmental Entities

Vaccine “Passports”

Section 381.00316, Florida Statutes

Note: Doesn't apply to Employees.
Nor verbal or non-documentary verification

Vaccine “Passports”

Section 381.00316, Florida Statutes

Federal Court Determined it Was Unconstitutional
on First Amendment Grounds.

Being Appealed.

TIME OFF

Time Off

Not Required to be Paid
Can Get Reimbursed with Tax Credits if Paid (Voluntary FFRCA)

Some Basic Rules:
Non- Discriminatory
Can't be FT Only
or on Basis of Tenure w/ Company

Generally, make it available across the Board if you want Tax Credit.

Time Off

Where Infected?

How Could You Tell?

Really Doesn't Matter. Be Consistent
Can Adopt a Separate Policy to Deal with Excess Leave

HEALTH INSURANCE

Health Insurance

Hard To Change a Benefit Plan

ACA Provisions
Believe It Would Require Legislation

Encourage Vaccination – Incentives better than Penalties.

Health Insurance

. . But Life comes at you fast



**Delta To Impose \$200 Monthly Fine On
Unvaccinated Employees**



Sean Davis
@seanmdav



It puts the needle through the skin or it gets the fee again.



Disclose.tv @disclosetv

JUST IN - Delta Air Lines will impose a \$200 monthly fee on unvaccinated employees starting Nov. 1 (CNBC)

9:34 AM · Aug 25, 2021



Employer Retention Credit (ERC)

Employer Retention Credit (ERC)

- Provides refundable payroll tax credits who keep workers on job
- Extended to Dec 31, 2021 by American Rescue Plan Act
- Up to a \$7K per person, per quarter for 2021
- Must have either (i) Shutdown; (ii) > 20% gross receipts, or (iii) be a recovery startup or severely distressed business

What about third parties?

- Local government
- Customers and clients
- Vendors and suppliers

Local Government

- SB 2006 – effective July 1, 2021
 - Includes many revisions relating to public health emergencies
 - Vaccine passport prohibition (discussed by Rob)
 - However, also gives governor authority to trump all local emergency orders relating to Covid-19 that “restrict rights and liberties”
 - Which he did in EO 21-101 – wiped out all pre-existing local orders. Declared that they were not narrowly tailored.

Local Government

- EO 21-102
 - Suspended all current local Covid-19 “restrictions and mandates” on individuals and businesses
 - Bars local government from enacting any emergency orders or ordinances imposing “restrictions or mandates” upon businesses or individuals due to Covid-19 emergency
 - i.e.: no vaccine mandate, mask mandate, social distancing mandate, curfew, forced closures, etc. EXCEPT by governor

Local Government

- Hotly debated and contested
 - Examples:
 - Miami-Dade County:
 - Requiring masks at indoor county facilities
 - Orange County:
 - Nonunion county employees must get vaccinated
 - Negotiated for similar requirement for union employees

Customers and Clients

- Premises liability
- Negligence
- Intentional torts

- It happens! Even if they aren't going to prevail, it can be costly.

“To be stricken with disease through another’s negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another’s negligence.”

Billo v. Allegheny Steel Co. (Pa. 1937) 195 A. 110.

Customers and Clients

- Problems:
 - Duty
 - *Estate of Madden v. Sw. Airlines, Co.*, 1:21-CV-00672-SAG, 2021 WL 2580119, at *1 (D. Md. June 23, 2021).
 - Causation
 - Public policy – how far could this be extended?

Customers and Clients

- SB 72 – Enacted new statute: 768.38
- Places limitations on civil liability against person(s), business entities, educational institutions, governmental entities, or religious institutions arising from or related to COVID-19.
- The term includes any such claim for damages, injury, or death.

Customers and Clients

- New statute requires:
 - Heightened pleading standard
 - Affidavit from doctor connecting Covid-19 injury or death to defendant's acts or omissions
 - Court must consider whether defendant made "good faith" effort to comply with government-issued health standards or guidance
 - If more than one, only need to comply with one
 - If complied in good faith, immune from civil liability

Customers and Clients

- If no good faith compliance, still protected unless acted with gross negligence by clear and convincing evidence
- Statute of limitations: 1 year

Protection for Health Care Providers

- Section 768.381
 - Claims relating to the diagnosis, treatment and transmission for Covid-19
 - Must prove gross negligence or intentional misconduct by greater weight of the evidence
 - Affirmative defenses include “substantial compliance” with government-issues health standards or evidence that compliance not possible due to mitigating circumstances
 - Statute of Limitations: 1 year

Vendors and suppliers

- Contractual relationships
 - More power to negotiate and limit liability and exposure
- Options:
 - Release or limitations of liability
 - Indemnification clauses
 - Force majeure clauses
 - Damages caps

Vendors and Suppliers

- Doctrines of impossibility of performance and frustration of performance have not been successful
 - Financial difficulty or economic hardship, even if caused by an unforeseen event like COVID-19, will not excuse contract performance under impossibility or frustration theories. *See, e.g., Lantino v. Clay LLC*, No. 1:18-cv-12247 (S.D.N.Y. May 8, 2020).

Vendors and Suppliers

- Tips:
 - Negotiate business-specific protections
 - Make sure contract clauses are broad but also specific enough to be enforceable
 - If you are on the other side of a force majeure clause, limitation of liability, or damages cap, ask for a notice provision before those clauses can be invoked

What about insurance?

- Commercial General Liability
 - If they didn't have pandemic or illness exclusion, they most likely do now
 - Often titled "Communicable Disease Exclusion"
- Understand:
 - Duty to Defend
 - Duty to Indemnify

Liability Insurance

- Tips:
 - Report claims in a timely manner
 - Read your policy carefully
 - Negotiate with your insurance carrier for your specific needs
 - Keep records of safety compliance for at least 5 years
 - Breach of contract: 5 years
 - Torts: 4 years
 - New Florida statute: 1 year for Covid-19 related claims

Questions?

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