

2021 HOT TOPICS



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MODERATORS

- Monica Estrada, SHRM-CP
- Adam Boland

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HOT TOPICS

- Re-opening the Workplace
- Harassment and Policy Training
- FLSA/Overtime/Payroll Compliance

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QUESTIONS

- We will address questions presented by the audience?

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Preparing the Workplace for Safe Re-Entry

- State/local law?
- What does CDC recommend?
- What does EEOC allow?

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Texas Executive Order GA-34

- Executive Order GA-34 (*Effective on March 10, 2021*)
- On March 2, 2021, Governor Greg Abbott issued [Executive Order GA-34](#) to provide that, in all counties not in an area with high hospitalizations:
 - there are no COVID-19-related operating limits for any business or other establishment; and
 - individuals are strongly encouraged to wear face coverings over the nose and mouth wherever it is not feasible to maintain six feet of social distancing from another person not in the same household, but no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.

<https://www.dshs.state.tx.us/GA34>

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Texas Executive Order GA-34

- In counties that reside in [Trauma Service Areas \(TSAs\)](#) with high COVID-19 hospitalizations,
- There are no state-imposed COVID-19-related operating limits for any business or other establishment;
- There is no state-imposed requirement to wear a face covering; and
- The county judge may use COVID-19-related mitigation strategies; ***provided, however, that:***
 - business and other establishments may not be required to operate at less than 50 percent of total occupancy, with no operating limits allowed to be imposed for religious services (including those conducted in churches, congregations, and houses of worship), public and private schools and institutions of higher education, and child-care services;
 - no jurisdiction may impose confinement in jail as a penalty for violating any order issued in response to COVID-19; and
 - no jurisdiction may impose a penalty of any kind for failure to wear a face covering or failure to mandate that customers or employees wear face coverings, except that a legally authorized official may act to enforce trespassing laws and remove violators at the request of a business establishment or other property owner.

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Texas Minimum Recommended Health Protocols

Health Protocols for Employees

- Train all employees on cleaning, disinfection, hand hygiene and respiratory etiquette
- Screen all employees before coming into work and refuse to permit employees with listed symptoms from returning to work until cleared.
- Conduct temperature checks on all employees at beginning of their shift
- Social distancing
- Stagger schedules and breaks
- Encourage remote-working and virtual conferences where possible

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Texas Minimum Recommended Health Protocols

Health Protocols for Facilities

- If 6 feet not possible, consider use of dividers and other engineering controls
- Regularly and frequently disinfect regularly touched surfaces, doorknobs, tables, chairs, restrooms
- Disinfect any surface customers contact
- Make hand sanitizers, soap and water, etc. readily available
- Visible signage to remind of hygiene practices
- Encourage contactless payment
- Monitor access to facility, including door opening to limit other from touching door handles
- Limit elevators to 4 at a time with masks
- Disinfect all equipment before and after use
- Provide cleaning products throughout the facility to clean equipment.

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CDC Protocols for Employers (Updated Feb 2021)

- Get [healthcare personnel vaccinated](#) against COVID-19 to ensure the health and safety of essential workforce/protect healthcare capacity.
- Screen patients and visitors for fever, respiratory symptoms, or [other symptoms](#) before entering your healthcare facility.
- Ensure proper use of personal protection equipment (PPE). Healthcare personnel who come in close contact with confirmed or possible patients with COVID-19 [should wear](#) the appropriate [personal protective equipment](#).
- Conduct an inventory of available PPE. Consider conducting an inventory of available PPE supplies. Explore strategies to [optimize PPE supplies](#).
- Encourage sick employees to stay home. Personnel who develop fever, respiratory symptoms, or [other symptoms](#) should be instructed not to report to work. Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
- <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>

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CDC Protocol

- MASKS
 - For now, CDC recommends that people wear masks in public settings, at events and gatherings, and anywhere they will be around other people.
 - Masks are required on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States.
 - <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>

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What does EEOC allow

- EEOC Guidance: <https://www.eeoc.gov/coronavirus>
- COVID-19 Testing – Employer may choose to administer COVID-19 testing to employees before entering the workplace to determine if they have the virus.
 - Tests must be accurate and reliable
- Health Screenings
 - Allowed as long as consistent with CDC and public health authorities
 - Apply to all those entering the workplace.

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Why Does It Matter?

- Since March 2020, there have been 2,314 COVID-related lawsuits filed in the US, including 7 class actions.
- 106 in Texas. Texas is in the Top 6 states for these suits.
 - 40 FMLA/FFCRA
 - 14 Disability
 - 50 Retaliation
 - 31 Workplace safety
- Most common complaints are retaliation, leaves of absence, workplace safety and discrimination.
- Industries that have been sued the most are hospitality, healthcare, manufacturing, retail and public administration.
- EEOC, TWC, OSHA claims.

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Best Practices

- Following the DSHS/CDC/OSHA guidance shows employer took the most prudent and reasonable steps to prevent COVID-19 spread among employees and patients.
- Shows healthcare provider met the standard of care in a potential COVID-19 related lawsuit
- Keeps employees and patients and public as safe as possible
- Defense to negligence claims and violation of regulation claims.

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To mandate or not to mandate

- Caselaw exists that allows for mandatory vaccinations of employees
- EEOC Guidance for H1N1 vaccinations also allowed for mandatory vaccinations as long as employer allowed reasonable accommodations for disabilities and religious beliefs.
- We recommend to not mandate vaccines, and instead encourage employees to get vaccinated
 - May require proof of vaccine. This is not a disability-related medical inquiry.
 - Incentives – De minimus such as PTO, gift card. What about cash?

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COVID-19 and FMLA

- Is COVID-19 covered under FMLA?
- Not necessarily. It has to meet the definition of a serious health condition - **an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a [health care provider](#).**

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Takeaways/Action Steps

- Review state, local, CDC and OSHA guidance regarding reopening and returning employees back to work
- Assess risk of employees contracting COVID-19 and draft policies and procedures to minimize the risk
 - Health screening
 - Environmental controls (social distancing, rotating schedules rotating weeks for office workers, moving or reconfiguring work stations, hygiene protocols, PPE, travel)
 - Update exposure response plan
 - Prepare communications to employees regarding steps to assure their safety
 - Draft or review accommodation request form and policy
 - Review attendance and call-in procedures
 - Review and revise COVID-19 return to work policy, including any policy regarding vaccinations

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Takeaways/Action Steps

- Review and revise visitor contact protocols
 - Directing visitor traffic through workspace
 - Limiting visitors
 - Zoom meetings
 - Contactless pickup and delivery of supplies
- Create or update telework policies, as necessary
- Revisit EEO policies and retrain managers – including with respect to accommodation, leave, retaliation, etc
- Train appropriate personnel to serve as point of contact for COVID-19 related inquiries, including complaints and be mindful of protected activity in this area
- Ensure you are regularly and consistently up to date on recommendation and guidance, especially from CDC

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Return to Work Procedures

- Phasing in employees returning to work
- Consider a plan for employees in high-risk categories
- Have plan on how to handle employees unable or unwilling to work
- Teleworking
 - Develop plan on teleworking
 - May consider allowing remote work, with some caveats
 - Alternating in-office work days with telework
 - Responding to requests for telework
 - Updating technology to support virtual workers

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Harassment and Policy Training



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Key Points

- Employers should have handbook (Review/Update)
 - Policies change based on size of company
 - Must have an anti-harassment policy/EEO policy
- In anti-harassment policy:
 - Should include numerous avenues to lodge a complaint
 - Prohibit Retaliation
- Investigate each and every complaint
 - Create investigation approach
 - Conduct comprehensive investigation
- Take proportionate and prompt corrective action
 - Equal enforcement of policies paramount

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Key Points

- For all policies, create training plan
 - At hiring, annual or more frequent training
 - Training on primary and new policies
 - Obtain updated acknowledgment on new policies
 - For training, actions speak louder than words
- Structured training schedule/approach is important
- Make sure training is strong for Managers/Supervisors

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- FLSA/Overtime/Payroll Compliance

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Three Types of Classifications

1. Hourly (Non-Exempt) Employees
2. Salaried (Exempt) Employees
3. Independent Contractors (Not Employees)



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Proper Classification is Important

- Misclassification litigation focuses on two issues:
 1. Proper classification of exempt v. non-exempt employees; and
 2. Proper classification of employees v. independent contractors.

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Non-Exempt Employees

- Hourly (Non-Exempt) employees
 - At least \$7.25 per hour (minimum wage)
 - Pay employee minimum wage or more, and then time and a half of their regular rate of pay for all hours worked over 40 in an identified work week (can define work week, 7 day period)



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Non-Exempt Employees

- Trouble Areas:
 - Must record and pay employee for “all hours worked”
 - Be careful of employees working “off the clock”
 - Be careful of technology, mobile devices and teleworking
 - Must pay overtime at time and a half of employee’s regular rate of pay
 - Per Diems – based on identifiable expenses
 - Bonuses – Non-discretionary or Discretionary Bonuses
- Best Practices
 - Have payroll policies in place about not working “off the clock” and reporting all time worked
 - Train managers to address payroll violations
 - Audit classifications

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Exempt Employees

- Exempt employees
 - Must qualify for an identifiable exemption
 - White-Collar exemptions (Administrative, Executive, Professional or Outside Sales)
- To qualify for an exemption, must meet three tests:
 1. Salary Basis Test
 2. Salary Level Test (**\$684/week**)
 3. Duties Test



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The Duties Test

Administrative Exemption: (1) the primary duty must be the performance of office or non-manual work related to the management or general business operations of the employer; and (2) the primary duty includes the exercise of discretion and independent judgment over matters of significance.

Professional Exemption: (1) the primary duty must be the performance of work requiring advanced knowledge, predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Executive Exemption: (1) the primary duty must be managing the enterprise, or managing a customarily recognized department; (2) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (3) the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations must be given particular weight.

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Best Practices

- Understand payroll practices before litigation or a complaint is made.
- Audit job positions for proper classification.
- Audit how starting pay, current pay and merit increases are implemented.
- Understand why disparities in pay exist and how employees are classified.

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Questions



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