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2021 Employment Law Update

December 16, 2021

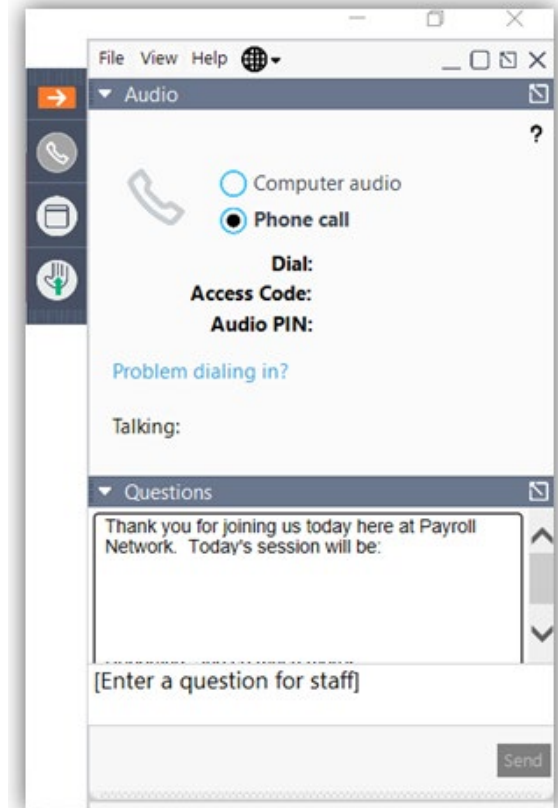


For Today's Session



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- Webinar will be recorded
- All attendees will be placed on mute
- Questions may be input into the Questions Box within GOTOWEBINAR
- Handouts available
- Certified Course



Our Presenters



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The firm offers a full range of legal services, with experience ranging from corporate law, real estate, litigation, estate planning, family law and more.

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POLL

Are you back in the office or remote?

We Made It— MAYBE???



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- Great to be back!
- Rough going, but it was starting to feel like hope was around the corner
- We are not the same
 - Politics in the office
 - Mask and vaccine fights
 - Remote work questions
 - Hiring and retention problems

Overview

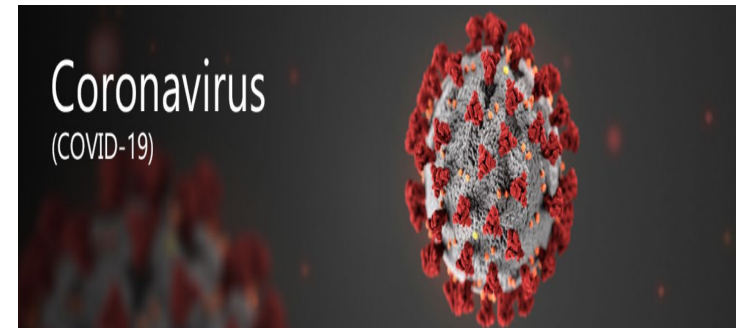


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- COVID:
 - Vaccines
 - Accommodations and forms
 - Return to the office
- Other Employment Law Developments
 - Electronic posting of forms
 - Independent contractors & joint employers
 - Diversity training
 - Executive order on restrictions agreements
- Maryland:
 - Wages, Montgomery County Ban the Box Law
- District of Columbia:
 - Wages, Expanded UPLA and FMLA leave, Sick leave, Restrictions agreements, Voting leave, Rehiring
- Virginia:
 - Wages, New overtime law



- Vaccines
 - Federal government contractor mandate
 - OSHA ETS
- Accommodations
 - Religion
 - Medical/Disability
 - EEOC recommendations
 - Forms
- Return to work
 - Liability
 - Paid leave obligations
 - COVID exposure



EO 14042- Covered Contracts



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- Executive Order 14042- Safer Federal Workforce Task Force **MAYBE???**
- All full time and part time employees, including remote workers
 - Working on a covered contract
 - Including overhead, administration, accounting, HR etc.
 - Working at a covered workplace
 - Even if not doing government contract work

100+ Employees- OSHA ETS



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OSHA Emergency Temporary Standard- **MAYBE???**

- 100+ employees
- Exemptions:
 - 100% remote work
 - Exclusively work outside or where no one else is present
- Must have a policy, including a process for accommodation



OSHA ETS- Paid Leave



- Time off to get the vaccine
 - Up to 4 hours of paid leave to receive each primary vaccine dose
 - Not automatic- ETS predicts
 - Travel time 15 minutes each way
 - Pre-shot wait time minutes per dose
 - Post-shot wait time 20 minutes per dose
 - If it takes longer than 4 hours, can offer unpaid leave but cannot discipline
 - Cannot require the employee use accrued paid leave. If the leave is paid, it's on the employer's dime.
 - During work time- the ETS strongly encourages employers to allow employees to obtain the vaccine during the workday.
 - If the employee chooses to receive the vaccine during non-work hours, not entitled to paid time.

OSHA ETS- Paid Leave continued



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- Time off for side effects
 - If the employee has accrued sick leave, the employer can require use of this leave
 - Cannot require use of vacation leave (PTO is ok)
 - Cannot require employee to use “advanced” sick leave
 - If the employee has no accrued sick leave, the employer must provide “reasonable paid time off” to recover

Vaccines– Policy

- Statement of Need
- Statutory Compliance
 - Federal, state and local
- Timeline
- Exceptions
- Consequences



Vaccines- Payroll Network



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- Policy Acknowledgement
- Mass Emails
- Vaccine Document Uploads
- Misc. Tracking Fields
- Reporting



Policy Communication and Acknowledgement



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Employee Messages

COVID-19 Updates

Vaccine Mandate

COVID Policy – in order to keep our employees safe, we have outlined our COVID-19 Vaccine Policy. Please read and acknowledge the details of this safety policy and if any questions reach out to HR@yourcompany.com .

Vaccine Policy/Statement (PDF)

View here 

☐ I acknowledge that I have read and understood this document.

 Sign Acknowledgement

Links

[CDC Resources on Vaccinations](#) 

Tracking Details



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Certification/License

◆ Certification

◆ Effective Date

◆ Expiration Date

+ Add New Edit Delete Refresh Save Cancel

Certification Info

*Certification: Vaccination Status - Negative ▼

Authority:

Effective Date:

MM/DD/YYYY

ID Number:

Total Cost:

Expiration Date:

MM/DD/YYYY

EE Reimbursement Info

Amount:

Approval Date:

MM/DD/YYYY

Reimbursement Date:

MM/DD/YYYY

Comments

A microscopic view of several coronavirus particles, showing their characteristic spherical shape and surface covered in spike proteins. The particles are rendered in a blue, wireframe-like style against a dark blue background with a bokeh effect of out-of-focus light spots.

POLL

Do you have a vaccine policy?

Return to the Office– Accommodations



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- Disability, medical or sincerely held religious belief
 - Government issued forms
 - Do NOT use Task Force religious form
- EEOC Guidance:
 - Employee must request the accommodation
 - Deference– proffered religious objection should generally be accepted at face value
 - Excludes social, political or economic views or personal preferences
- Remote work
- Masking/testing
- Leave
- If request for accommodation is denied– must set a deadline

DOL Guidance on Electronic Posting



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- In Dec. 2020, the Department of Labor issued guidance regarding electronic posting of notices for certain federal statutes
- In order to comply with FLSA and FMLA, which require continuous posting, electronic posting is considered compliant if the following are all satisfied:
 - All employees are exclusively working remotely
 - All employees customarily receive information from employer electronically
 - All employees have readily available access to the electronic posting at all times

DOL Guidance on Electronic Posting



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- In order to comply with the Employee Polygraph Protection Act (EPPA) and the Service Contract Act (SCA), which permit compliance via the delivery of individual notices to employees, employers can email the notice as long as the employee customarily received information from the employer electronically



DOL Guidance on Electronic Posting



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- Existing requirements that employees be able to readily access notice postings continue to apply to electronic notices
- Employers who post using intranet, internet, or shared network drive or file system should consider:
 - Employees must be able to access the electronic posting without having to request specific permission to view a file or access a computer
 - Employers must have a history/custom of posting other notices to employees electronically
 - Notices may not be posted on unknown or little-known electronic locations
 - Employees must be able to easily determine which electronic postings apply to them and their worksite

Withdrawal of 2020 New Independent Contractor and Joint Employer Regulations



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- Independent Contractor Classification Rule
 - In September 2020, the previous administration published new worker classification regulations, which aimed to simplify the employee versus independent contractor analysis for employers.
 - Effective May 6, 2021, the Department of Labor withdrew that regulation
- Joint Employer Rule
 - In 2019, the previous administration published new joint employer regulations which implemented a four-factor balancing test focusing on the degree of control a prospective joint employer exerted over a worker.
 - That rule was partially vacated by a court in late 2020, and the Biden administration proposed rescinding the rule

Revocation of Executive Order on Race & Sex Stereotyping and Training



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- President Biden issued an Executive Order revoking the previous administration's Executive Order on Diversity and Inclusion Training, the implementation of which had been barred by the courts.
- Employers are allowed continue diversity and inclusion trainings as conducted prior to November 2020.



- Isolved has a University that not only allows clients to learn about product features – but there is add-on feature called Learn Pro.
 - 150 Soft Skill classes including Diversity & Ethics, Project Management, and many more Skillsoft classes.
 - Upload you own custom content and courses
 - Load SCORM content
 - Test, Quizzes, and Certificates

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Does your company use Non-Compete Agreements?

Executive Order to Reduce Use of Non-Compete Agreements



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- On July 9, 2021, President Biden issued EO 14036 as part of broad government effort to promote competition within the U.S. economy
- Includes a directive compelling the FTC to seriously restrict, and potentially bar, the use of non-compete agreements
- Many expect FTC to take a more narrow approach, focusing mainly on restricting the use of non-compete agreements for low-wage workers

Montgomery County “Ban the Box” Law



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- Went into effect February 19, 2021
- Goes farther than the statewide Maryland law
- Prohibits an inquiry into a criminal record at any time before a conditional offer to an applicant
 - Previously the law prohibited inquiry before the conclusion of the first interview



Montgomery County “Ban the Box” Law



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- Exemption still in effect for employers that provide programs, services, or direct care to minors or vulnerable adults, or for positions that require a federal government security clearance

Expansion of D.C. Universal Paid Leave Act and D.C. FMLA



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- Effective Oct. 1, 2021, D.C. City Council enacted emergency legislation to expand the benefits available under D.C. UPLA and D.C. FMLA
- Changes to D.C. FMLA
 - Employees are now eligible if they have worked at least 1,000 hours for over a period of 12 consecutive or non-consecutive months in the 7 years preceding the leave
 - Previously the 1,000 hours had to be worked within the 12 months preceding the leave

Expansion of D.C. Universal Paid Leave Act and D.C. FMLA



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- Changes to D.C. UPLA
 - Increased Medical Leave – can now get up to 6 weeks instead of 2 weeks
 - Prenatal Leave – new category of leave; can now get up to 2 weeks of prenatal leave in addition to parental leave
 - *E.g., routine and specialty appointments, ultrasounds, treatment for complications, required bedrest prescribed by healthcare provider, prenatal physical therapy*
 - Retroactive application – benefits apply retroactively if applied for within 30 days of qualifying leave event unless employee unable to apply due to exigent circumstances

Expansion of D.C. Universal Paid Leave Act and D.C. FMLA



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- Maximum amount of UPLA leave an employee may take in a 52-week period, in combination of any of the types of leave below is still **8 weeks**
 - Parental leave – can get up to 8 weeks
 - Family leave (for a family member's serious health condition)– can get up to 6 weeks
 - Medical leave (for employee's own serious health condition) – can get up to 6 weeks
 - Prenatal leave – can get up to 2 weeks

D.C. Accrued Sick and Safe Leave Act Amendment



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- On Nov. 18, 2021, D.C. amended the Accrued Sick and Safe Leave Act (ASSLA) to provide paid time off for COVID-19 vaccinations and recovery, effective immediately
- Employers must provide:
 - Up to 2 hours of paid leave per injection of either the employee or a child under 18 years old who lives with the employee
 - Up to 8 hours of leave for vaccine recovery, during the 24-hour period following the 2-hour vaccination leave period, to recover or care for child recovering from side effects from a COVID-19 vaccine

D.C. Accrued Sick and Safe Leave Act Amendment



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- Employers must be provided up to 48 hours of combined vaccination and recovery leave per year.
- Initial injections, second doses and boosters are all covered by the law
- Eligible employees:
 - employed at least 15 days before the requested leave
 - Spend at least 50% of their time working in D.C.
 - or if the employee does not spend more than 50% of working time in any one state, employee is based in D.C. and spends a substantial part of working time in D.C.

D.C. Accrued Sick and Safe Leave Act Amendment



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- This leave is in addition to the paid leave already provided under ASSLA
- Also must be offered in addition to any other paid leave an employer provides an employee under an existing leave policy
 - unless the existing leave policy exclusively and expressly provides COVID-19 vaccination and recovery leave in at least the same amount
 - Cannot reduce an employee's available paid leave

D.C. Accrued Sick and Safe Leave Act Amendment



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- Employers may require up to 48 hours' notice of need for this leave, except in an emergency an employee can take leave upon reasonable notice
- Employers cannot require employees to search for or identify a replacement employee

D.C. Ban on Non-Compete Agreements Amendment Act of 2020



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- Signed into law on April 2, 2021; goes into effect April 1, 2022
- D.C. law will nearly abolish non-compete restrictions
- Will not impact current enforceable non-compete restrictions, will instead apply only to new restrictions and agreements implemented on April 1, 2022 going forward



D.C. Displaced Workers Right to Reinstatement & Retention Amendment Act



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- Effective April 27, 2021
- Set to expire June 30, 2023
- Provides eligible employees with:
 - Right to reinstatement; and
 - Right to be hired and retained by the new entity if there has been a change in control of the employer's business

D.C. Displaced Workers Right to Reinstatement & Retention Amendment Act



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- Covered employers:
 - Primarily retail, healthcare, security, and hospitality industries, including operators of hotels, restaurants, taverns, brewpubs, nightclubs, event or entertainment establishments or venues, and businesses engaged in the sale of goods to consumers, but not wholesalers
 - At least 50 employees as of Mar. 1, 2020, and for hotels at least 50 employees as of Dec. 1, 2019
 - Also covers contractors that employs at least 25 individuals in food service, janitorial or building maintenance, nonprofessional workers in healthcare settings, or performers of security services, with some exceptions

Virginia Overtime Wage Act (VOWA)



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- Virginia Overtime Wage Act went into effect July 1, 2021
- Differs from and expands upon Fair Labor Standards Act
 - Different standard for regular rate calculations
 - Greater damages
 - Extended statute of limitations for overtime claims

Virginia Overtime Wage Act (VOWA)



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- VOWA regular rate calculation results in larger amounts of overtime owed
 - Hourly workers: regular rate is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any applicable federal exclusions, divided by total number of hours worked that workweek
 - Salaried workers and other workers paid on a regular basis: regular rate is 1/40 of all wages paid for the workweek
- New standard precludes employers from paying nonexempt employees a fixed salary that covers straight-time wages for hours in excess of 40 hours in a workweek, or from using the fluctuating workweek method of calculating overtime that is allowed under the FLSA

Example: employee works 50 hours in a workweek and is paid a salary of \$1,000 a week.

- Under VOWA:
 - \$1,000 divided by 40 hours = \$25/hour regular rate
 - 1.5 times \$25 regular rate = \$37.50 overtime rate
 - 10 overtime hours x \$37.50/hour = \$375 in overtime owed
- Under FLSA, for employees paid salary covering straight time wages for hours over 40 hours in a workweek:
 - \$1,000 divided by 50 hours = \$20/hour regular rate
 - Overtime is calculated using half-time rate of \$10/overtime hour
 - 10 overtime hours x \$10/hour = \$100 in overtime owed

Virginia Overtime Wage Act (VOWA)



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- Increased liquidated damages
 - Employers are strictly liable for double damages
 - Employers may be liable for triple damages if employer had actual knowledge that it failed to pay the overtime wages and acted in deliberate ignorance or reckless disregard as to whether it was paying all overtime wages owed

A microscopic view of several coronavirus particles, showing their characteristic spherical shape and surface covered in spike proteins. The image is rendered in shades of blue and white, with a dark blue background. The particles are scattered across the frame, with one large, detailed particle in the upper right corner and others in the background and foreground.

POLL

Do you have employees in DC or VA?

It's A Lot



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- Crazy times
 - Pandemic
 - Economic roller coaster
 - Change in administration
 - Don't forget Me Too, Black Lives Matter, Anti-Asian Violence etc.
 - Trainings
 - Investigations
- Shulman Rogers has a lot of free resources
 - Alerts
 - Webinars
- Budget Friendly Options
 - Subscription for discounted rates
 - *A la cart* flat fee documents and training



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Q & A

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