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Session 801

EMPLOYERS' PANDEMIC DILEMMA



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EXECUTIVE SUMMARY



Employers' Pandemic Dilemma

MODERATOR:

Chevon Fuller, *Vice President, and Associate General Counsel, Tyson Foods, Inc.*

PANELISTS:

- **Theodora R. Lee**, *Senior Shareholder/Partner, Littler Mendelson, P.C.*
- **Khalilah V. Spencer**, *Inclusion, Equity and Social Responsibility Partner, Honigman LLP*
- **Camille Varlack**, *Partner, Bradford Edwards & Varlack LLP*

OVERVIEW

The Covid-19 pandemic has transformed the modern workplace and brought multiple employment issues to the forefront. As many employees seek to continue working from home, at least some of the time, employers are attempting to develop and implement plans that provide employees the flexibility they seek while still ensuring smooth operations. Transparency and clear standards are critical as companies institute vaccine mandates and address religious and disability exemptions.

A panel of employment law experts discussed the ongoing transformation of the workplace during the pandemic. They shared insights and guidance regarding what employers must think about as they address emerging and nuanced issues such as new work structures, multi-jurisdiction laws, vaccination mandates, and ensuring compliance with federal and state laws.

KEY TAKEAWAYS

Due to the pandemic, the number of people working from home increased substantially. Employers must address how to prepare for the future.

Before the pandemic, approximately 6% of employees worked primarily from home. That number increased to approximately 71% as of December 2020. As a result, employers had to scramble to put a work-from-home structure in place.

BIG IDEAS

- Many employees want to keep working from home; employers must develop plans for a new work structure.
- Federal and state laws may differ regarding vaccination mandates; employers must stay on top of updates from OSHA.
- Many employers are leaning toward soft mandates, where vaccination is required but alternatives exist.
- Ensuring fair treatment when administering mandates is a must for employers to remain compliant with internal and government policies.
- Religious exemption requests will be challenging as employers seek to weed out those who do not sincerely hold their claimed beliefs.

That approach may have sufficed as an interim placeholder, but now employers must develop more comprehensive, longer-term plans and should take advantage of the opportunity instead of assuming a return to the pre-pandemic work environment.

Although some employers may be anxious to get workers back into the office, the combination of the Delta variant, breakthrough infections, and the fact that 82% of employees want to continue working from home in some capacity (only 8% said they would prefer not to work from home at all) means employers are best served by preparing for a potentially permanent workplace transformation.

As employers begin putting “return to work” plans in place, they should think about their industry and speak to their business heads regarding operational and workplace requirements.

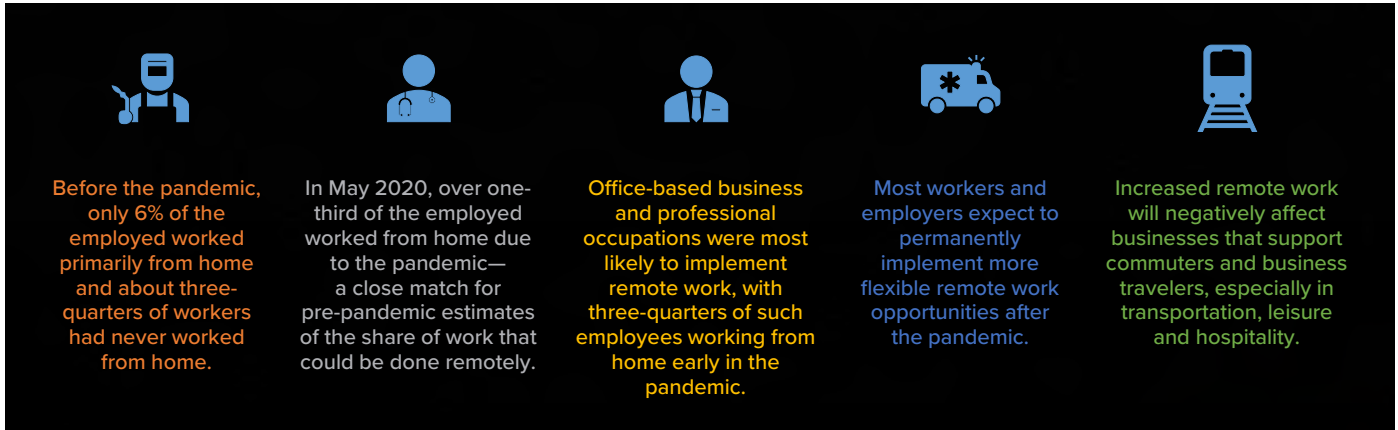


Figure 1: Work from Home - Key Facts

Even where there is an interest in remote work, both employers and employees have concerns about how to navigate this new structure and address issues that are likely to arise. For example, employers may be concerned about how to monitor productivity, ensure cybersecurity, and keep employees engaged, while employees worry about being isolated from colleagues, the lack of face time having a negative impact on their careers, and a decline in the quality of communication.

Employers should consider these matters as they build a customized plan that is workable for their particular business.

“It is important to demonstrate to employees that their concerns were taken into account and the new policies were thoughtfully put together.”

— Camille Varlack, Bradford Edwards & Varlack LLP

Employers should stay on top of OSHA guidelines and set out clear standards regarding who is eligible for remote work and the criteria for the arrangement.

With a rise in jobs where employees can be remote comes concerns related to safety. While OSHA is still working to create guidelines in keeping with the various mandates surrounding the Covid-19 pandemic, its website remains a robust source of updated information that can help employers and counsel stay on top of requirements. This is especially important considering the conflicts between federal and state governments. OSHA is also fielding, tracking, and publishing complaints from workers regarding violations.

Employers must put in place clear policies about who can work from home and address locations eligible for remote work. For example, employees with jobs in the US could conceivably work from Europe, Canada, Mexico, and other foreign regions wreaking havoc on employers that may want the best talent regardless of location but also would like to avoid legal and security complications.

OSHA Resources

- OSHA’s rules and guidance can be accessed at: <https://www.osha.gov/coronavirus>
- Data related to Covid-19 complaints and inspections/violations are tracked and published at <https://www.osha.gov/enforcement/covid-19-data> <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations>



Making sure to comply with Equal Employment Opportunity Commission (EEOC) guidelines and the Fair Labor Standards Act, employers should be transparent and communicate effectively regarding standards and policies for working from home, including reimbursement and overtime. In particular, employees should be aware that, despite not being in the office, all normal work rules, procedures, and comportment still apply in the virtual environment.

“Regardless of opinions regarding mandates, employers and counsel should be concerned about compliance and avoiding public display on the OSHA website as being in violation of safety standards.”

— Khalilah V. Spencer, Honigman LLP

President Biden recently announced a new action plan: Path Out of the Pandemic.

This multi-pronged plan to stem the continuation of the pandemic includes directives for both the private sector and the federal government.

- 1. Emergency temporary standard.** With the hope of slowing the spread of Covid-19 in the workplace, the President has directed OSHA to develop an emergency temporary standard requiring all employers with at least 100 or more employees to ensure that the workplace is fully vaccinated. If it is not, employees must be subjected to weekly Covid-19 testing. Details and timeline on this plan are still forthcoming and will be updated on the OSHA website.
- 2. Executive orders.** President Biden signed two executive orders that mandate vaccinations for all executive branch employees and some federal contractors if they do not meet an exception. The mandate allows for testing as an option if employees refuse to get vaccinated.

Federal mandatory vaccinations and testing are required by Medicare and in most healthcare settings, including hospitals, dialysis centers, ambulatory surgical centers, and home health agencies as a condition of continued federal funding.

Some states are also instituting mandates that apply in other areas such as K-12 schools, both public and private, while other states (such as Texas and Montana) are precluding employers from putting mandates in place.

Implementation and enforcement of mandates are ongoing challenges for employers. Details such as immediate or phased-in deadlines for vaccination, testing frequency, and accommodation for personal, medical, and religious reasons are complicated and a work in progress.

Many employers are leaning toward a “soft mandate” that requires employee vaccinations but allows alternatives such as weekly testing. Yet there are many challenges with soft mandates such as managing the confidentiality of the testing, ensuring employee privacy, and determining who pays for testing and the time to get tested.

“A lot of my clients are actually bringing in testing facilities to the workplace to avoid added expense. How test results are handled and communicated is important. We have to be in compliance with HIPAA.”

— Theodora R. Lee, Littler Mendelson, P.C.

“Fair treatment” is the subject of debate in situations where an employee refuses to get vaccinated.

It is important to ensure that an employee who refuses vaccination be treated fairly. On the other hand, employees who have received vaccinations and want to protect against variances and breakthrough infection also deserve fair treatment and the right to not be exposed to a dangerous environment. Requiring unvaccinated employees to wear masks could have an unintended “scarlet letter” effect that puts them in a position to be treated differently. Instituting mask mandates for all in public and shared areas, regardless of vaccination status, can help alleviate stigma.

Employers must take the time to understand the culture within their workforce and educate employees regarding vaccines to counter the abundance of misinformation. One option is to bring a healthcare professional onsite to answer employee questions. Another is to recruit union leadership and employee resource groups to help employees better understand the magnitude of the problem.

Employers should be careful about offering employees incentives to get vaccinated as it may run counter to state laws in some areas. For some businesses with employees across different states, a 50-state survey is necessary to ensure companies remain in compliance.



In dealing with vaccination requirements, employers must be mindful not to violate disability and religious protection laws.

Religious exemptions are governed by Title VII of the Civil Rights Act of 1964 requiring employers to accommodate sincerely held religious beliefs. The crux of the issue is whether the claim of religious belief is actually “sincerely held.” Throughout the pandemic, requests for religious exemption have abounded. Employers are justified in seeking additional information to determine the sincerity of the belief, and in some cases, may be able to show that by allowing certain religious exemptions, the business would suffer from an undue hardship such as compromised workplace safety or decreased efficiency, or would require other employees to do more than their share of hazardous or burdensome work.

“Internally, you need to make sure you have strong policies and procedures guiding how you go through that analysis and make sure that you’re doing that in every instance.”

— *Camille Varlack, Bradford Edwards & Varlack LLP*

The EEOC laid out four factors that can reasonably create doubt for employers regarding whether an employee’s claimed religious belief is sincerely held:

- The employee has acted in a way that is inconsistent with the claimed belief.
- The employee is seeking a benefit or an exception that is likely to be sought for nonreligious reasons.

- The timing of the request is questionable (for example, because it follows closely on the heels of the same employee’s request for the same benefit for different reasons).
- The employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

Disability is governed by the Americans with Disabilities Act (ADA), which protects qualified individuals from employment discrimination and requires that employers provide reasonable accommodation. This may arise in situations where employees request an exemption from vaccination mandates due to a medical condition or where the possible presence of Covid-19 would be detrimental and affect their ability to perform their work.

“We need to standardize the request for documentation [about accommodations] and make it very clear that managers and supervisors must work with HR and legal counsel in determining whether religious or disability accommodations are made.”

— *Theodora R. Lee, Littler Mendelson, P.C.*

Additional Resources

The panelists advised in-house counsel to start abreast of the constant changes taking place in this area by signing up for updates published by various law firms.



BIOGRAPHIES



MODERATOR

Chevon Fuller

Vice President, and Associate General Counsel, Tyson Foods, Inc.

Chevon Fuller is Vice President and Associate General Counsel for Tyson Foods. As the employment, labor, and sustainability law leader, she supports all domestic and global business segments, manages a team of 65 professionals, and provides legal support for several Board Committees. Prior to joining Tyson Foods, Chevon lived abroad and served as the managing attorney and Corporate Secretary for The Boeing Company's Southeast Asia and Oceanic markets, supervising a team who provided corporate law and commercial advice for 32 APAC entities. Boeing's Executive Council selected Chevon to be imbedded in Ethiopia to handle legal and reputational issues associated with the loss of Ethiopian Airlines Flight 302; one of Boeing's highest priorities. She engaged with a complex mixture of stakeholders, including the victims' family members from 35 countries, embassy officials, customer leadership, regional government leaders, and tribal representatives. Chevon previously served as the New York State Attorney General's Civil Rights Bureau Chief, where she oversaw thousands of investigations statewide, commenced the Attorney General's first public hearing on gender discrimination in the securities industry, and launched the Attorney General's first Disability Rights Project to expand physical accessibility for places of public accommodation. Chevon is a graduate of Cornell Law School.



Theodora R. Lee

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Theodora R. Lee, a senior shareholder/partner and trial lawyer in the San Francisco, Walnut Creek and Dallas offices of Littler Mendelson, has extensive courtroom experience and defends employers in complex wage and hour class actions, discrimination class action lawsuits and general employment litigation. Ms. Lee specializes in counseling employers on all aspects of employment and labor relations law, including litigation avoidance, reductions in force, COVID-19 in the Workplace and risk management protocols. Ms. Lee's energy and enthusiasm for labor and employment law translates into an intense focus on providing value to clients through innovative and superior quality work with exceptional client service. Ms. Lee regularly appears on TV and Radio, including NPR and PBS, speaking on a wide variety of employment issues and regularly conducts in-house employment law training programs. She has been recognized as one of the Leading Law Firm Rainmakers by the Minority Corporate Counsel Association, named to the Best Lawyers in America®, and identified as a Super Lawyer -Northern California. She is an elected member of the American Board of Trial Advocates (ABOTA). Apart from the practice of law, Ms. Lee is an award-winning vintner, and owner of Theopolis Vineyards. She is a graduate of Spelman College and the University of Texas School Of Law. Prior to entering the practice of law, Ms. Lee worked as a Senate intern in Washington D.C. for Senator Sam Nunn.

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Khalilah V. Spencer serves as Honigman LLP’s Inclusion, Equity and Social Responsibility Partner. As well as serving as an ex-officio member of the firm’s Board of Directors, she chairs the firm’s Diversity and Inclusion Committee, leads the firm’s women and minority community and recruitment outreach activities, and advises on the internal women and minority focused programs. Additionally, Khalilah is responsible for development and implementation of firm’s pro bono and social responsibility programs. In addition to her firm leadership roles, Khalilah continues to practice law as a partner in the firm’s Litigation Department. She has significant and successful first chair experience in several jury trials and arbitrations involving a wide variety of complex commercial, environmental tort and employment matters. She primarily represents public and private companies in various industries including automotive, financial services, telecommunications, and real estate. She also has noteworthy pro bono experience in civil rights advocacy related to public education, criminal justice and voting rights. Active in numerous civic and charitable organizations, Khalilah is an Executive Committee member of both the Michigan NAACP and Detroit Branch NAACP. She is also Secretary of Lakeshore Legal Aid, Vice Board Chair of Michigan Community Resources, and President of Promote the Vote.

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Partner, Bradford Edwards & Varlack LLP

Camille Joseph Varlack is a partner and the chief operating officer of Bradford Edwards & Varlack LLP, where she leads the firm’s business advisory, employment risk and crisis management practices. Ms. Varlack represents large financial institutions and other clients in government investigations, civil litigation, employment disputes, audit defense and provides guidance on many other matters. Ms. Varlack is a former Assistant District Attorney in Kings County. She previously served as Assistant Vice President and Counsel of AXA Equitable Life Insurance Company and as Corporate Secretary of a broker-dealer subsidiary. Ms. Varlack was a principal court attorney to a New York State Supreme Court Justice and served as Special Counsel for Ethics, Risk and Compliance to the Superintendent of the Department of Financial Services. Ms. Varlack served in the New York State Executive Chamber as Deputy Director of State Operations, Chief Risk Officer and Special Counsel. In that capacity, she managed the operations, general policy development and implementation of major policy initiatives for New York State agencies and authorities. Ms. Varlack was in charge of leading teams through statewide crises including natural disasters, storm response, potential terrorist activities and cyber attacks, as well as responding to a multitude of public health crises. As Chief Risk Officer she was helped manage audit, compliance and internal control issues for state agencies and was instrumental in the development and implementation of the first statewide enterprise risk management system.

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