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The Hybrid Workforce: Navigating Legal Risks and Opportunities

Presented by Association of Corporate Counsel Northeast

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Overview

**Return to Workplace
Considerations**

**Appropriate Protocols
and Communications**

**Wage and
Hour/Timekeeping**

**The Perspective of the
“Returning”
Workforce**

**OSHA, CDC, and
States’ Guidance**

ADA Considerations



FMLA Applicability



Updating Policies



Wellness Considerations



Choice of Law



Employee Discipline and Confidentiality



The Future of the “Workplace”

Return to Workplace Considerations

The Perspective of the Returning Workforce





Appropriate Protocols and Communications

- Clear communication plans regarding plans to reestablish business processes.
- Employees' social media activity

OSHA General Guidance

- Wearing masks
- Frequent hand washing
- Avoid touching your eyes, nose, or mouth with unwashed hands.
- Good respiratory etiquette, including covering coughs and sneezes or coughing/sneezing into your elbow/upper sleeve.
- Avoiding close contact
- Stay home if sick.
- Recognize personal risk factors.

OSHA General Guidance

- OSHA Guidance

www.osha.gov

- Cal/OSHA Safety Guidance on Coronavirus

www.dir.ca.gov/dosh/

- EEOC Guidance

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

CDC and States' Guidance

- Example of overlap or conflict:
 - CDC's latest recommendation prescribes different isolation and quarantine periods depending on vaccination status (rev. Dec. 27, 2021).
 - <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html>
 - New York state is similar, but includes guidance specific to different age groups, as well as recommendations of no quarantine for anyone who tested positive within the past three months – regardless of vaccination status (rev. March 1, 2022).
 - <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html>

Wage and Hour/Timekeeping

- Remote work and timekeeping considerations
- Employees with in-person essential roles: accommodations made during pandemic to allow them to work from home. Now what?
- Hourly remote/hybrid employees: Meal and other breaks.
- Tracking of and payment for time spent completing health screenings

ADA Considerations

- Eligibility under federal ADA: must have “actual” or “record of” disability *and* some connection between impairment and special need for accommodation. [*Ex.: diabetes, lung disease, weakened immune system, etc.*]
- Employer can verify the existence of the disability and discuss both why an accommodation is needed and the type of accommodation needed.
- Per CDC - Coronavirus alone may not be considered a disability under ADA due to transitory nature. Analysis may be complicated for COVID-19 long-haulers.
- Lifting mask requirements too quickly – potential for disability bias claims from immunocompromised employees?



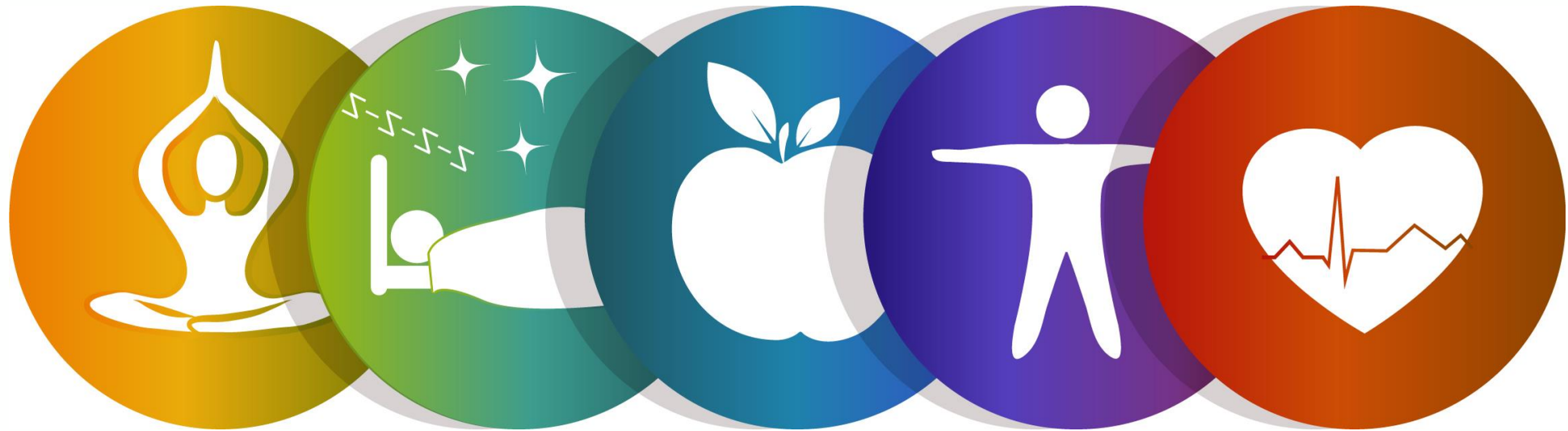
FMLA Considerations

- Subject to any reasonable accommodation requirements imposed by the ADA, employers may terminate employees who fail to **return to work** at the end of an FMLA leave, employees who fail to request an extension, or employees who have exhausted their FMLA leave.

Updating Policies

- Employers will likely need to update or create policies to reflect the new normal:
 - Paid Leave Policies
 - Time off/Sick requests
 - Attendance Policies
 - Flexible Scheduling
 - Meal and Rest Break Policies
 - Travel Policies
 - Technology Policies
 - Telecommuting Policies
 - Choice of Law

Wellness Considerations

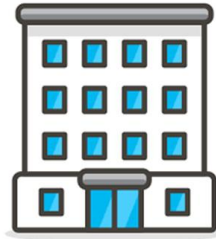


Employee Discipline/ Confidentiality

- Employers are required to keep employee medical information confidential.
- If employee has Covid-19, employers should make every effort to limit the number of people who know the name of the employee.
- Co-workers might be able to figure out who the employee is, but employers still should not confirm the employee's identity.
- Employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information.
- If an employee is on sick leave, the employer can disclose employee is on leave but not the reason.

The “Future” of the Workplace

WHERE ?



HOW ?



