

2021 Breakfast Briefing: COVID-19 and Beyond

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Presented by:

Lynn Schonberg

Nick Nykulak

Ross, Brittain & Schonberg

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Introduction

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- 2021 brings with it new emphasis on workplace regulations
 - Department of Labor
 - President Biden has named Boston Mayor Marty Walsh to head the Dept. of Labor
 - Walsh is former leader of Boston's Building and Construction Trades Council
 - Appointment signals employee-friendly labor agenda will be a priority

Introduction

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- Changes at OSHA
 - Trump Administration
 - No emergency workplace rules
 - OSHA issued voluntary guidance
 - Biden Administration
 - Has vowed to issue nationwide worker protection rules
 - Listening sessions being held to solicit input on new mandatory rules

Introduction

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- In 1/21/21 COVID Executive Order:
 - OSHA must determine whether emergency rule needed and if so, new rule by 3/15/21
 - More stringent COVID-19 worker protection
 - New rules expected to
 - Expand OSHA coverage to all workers
 - Create infection prevention rules/training
 - Mandatory PPE
 - Mandatory paid leave policies

Introduction

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- As we head into 2021, there are many other changes that we will discuss:
 - Significant changes in Ohio employment discrimination law
 - Consolidated Appropriations Act of 2021
 - PPP and other relevant provisions
 - COVID Vaccines in the workplace
 - Changes to Independent Contractor rules
 - Non-Compete Agreements

Employment Law

Uniformity Act of 2021

- Effective 4/12/21:
 - 2 year statute of limitations takes effect
 - Was 6 years
 - Must first file charge with OCRC
 - No more personal liability
 - Adopt the federal affirmative defense
 - Publish harassment policy/complaint procedure
 - Employee must comply with policy
 - Employer must investigate and correct offending behavior

Consolidated Appropriations Act of 2021

- \$2.3 Trillion Spending Bill
- Extended CORONA Federal Unemployment Rule
 - Extends to 3/14/21 UC benefits
 - Increases maximum weeks from 39 to 50
 - \$300 additional UC funding from 12/26/20 to 3/14/21
 - Originally was \$600 in additional funding

Consolidated Appropriations Act of 2021

- Voluntary FFCRA Compliance to 3/31/21
 - 80 hours emergency paid sick leave
 - 12 week paid FMLA for child care
 - May continue to obtain payroll tax credits
 - Caution:
 - Those on FFCRA leave on/before 12/31/20 that continue into 2021 must continue to be paid
 - New leaves beginning on or after 1/1/21 no longer need to be paid

Consolidated Appropriations Act of 2021

- Voluntary FFCRA Compliance to 3/31/21
 - Make uniform, consistently applied policy to comply or not to comply
 - If decide to comply, continue to use Assessment Form on our website
 - Same eligibility, etc. rules apply
 - Must continue to document
 - Department of Labor will no longer enforce compliance but IRS will

First PPP Loan Statistics

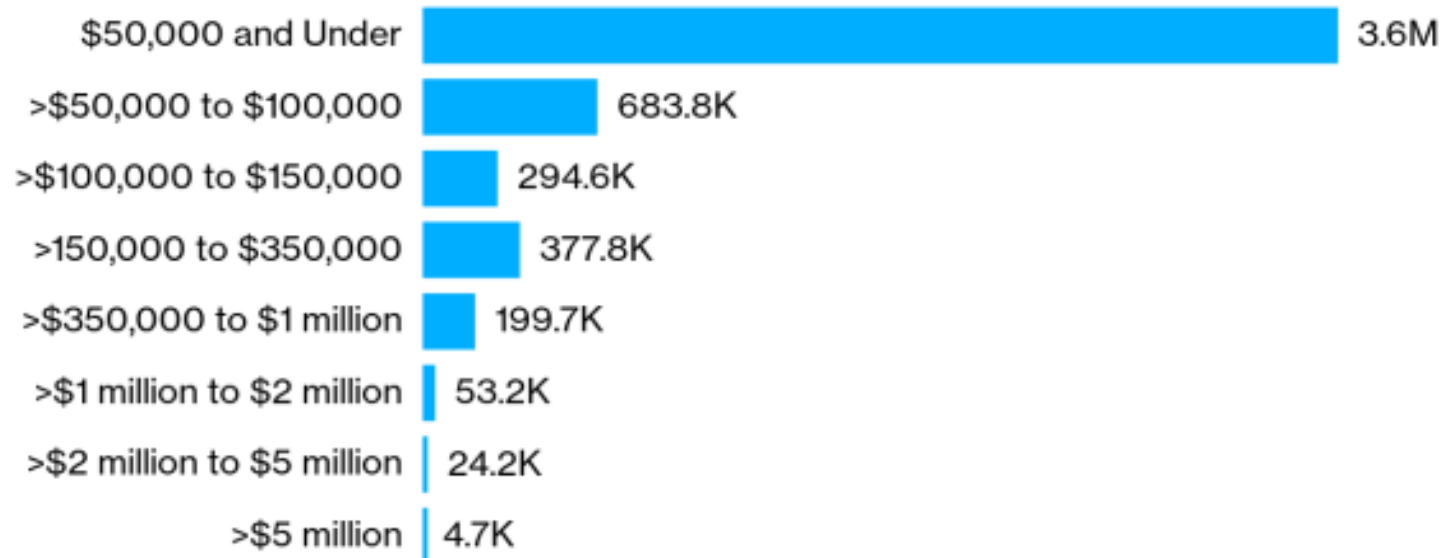
- Original Paycheck Protection Program (PPP) allocated **\$349B** to aid small businesses and retain employees.
- Guaranteed loans ranged from \$1 to \$10M.
- Opened April 3, 2020 was out of money by April 16, 2020.
- On April 24, 2020, under the PPP and Health Care Enactment Act another **\$310B** was allocated to the PPP.
- Overall **\$525B** was loaned through the PPP.
- PPP ended August 8, 2020 and there should be **\$134B** remaining from the second infusion of money into the PPP (total money allocated was **\$659B**).
- Biggest lingering issue was the IRS interpretation that the PPP money spent on wages, fringes or rent would not be deductible- making the loan, if forgiven, essentially taxable.

First PPP Loan Statistics

Paycheck Protection Program Loans by Size

Businesses claimed 5.2 million loans, totaling \$525 billion.

■ Number Distributed



Source: Small Business Administration

Bloomberg Tax

First PPP Loan Statistics

Industry Recipients of PPP Loans, as of 8/8/2020

Industry	Value (\$) of PPP Loans	Percentage of Total Value	Number of PPP Loans	Percentage of Total Number	Average PPP Loan Value (\$)
Health Care and Social Assistance	67,802,899,625	13%	532,775	10%	127,264
Professional, Scientific, and Technical Services	66,806,585,368	13%	681,111	13%	98,085
Construction	65,070,483,743	12%	496,551	10%	131,045
Manufacturing	54,101,623,487	10%	238,494	5%	226,847
Accommodation and Food Services	42,477,369,498	8%	383,561	7%	110,745
Retail Trade	40,576,055,345	8%	472,418	9%	85,890
Other Services (except Public Administration)	31,687,938,997	6%	583,385	11%	54,317
Wholesale Trade	27,650,501,453	5%	174,707	3%	158,268
Administrative and Support and Waste Management and Remediation Services	26,591,901,997	5%	258,907	5%	102,708
Transportation and Warehousing	17,522,942,736	3%	229,565	4%	76,331
Real Estate and Rental and Leasing	15,732,532,646	3%	262,921	5%	59,837
Finance and Insurance	12,202,534,934	2%	181,493	3%	67,234
Educational Services	12,075,274,769	2%	88,022	2%	137,185
Unclassified Establishments	9,652,279,182	2%	219,502	4%	43,974
Information	9,336,848,657	2%	73,824	1%	126,474
Arts, Entertainment, and Recreation	8,223,383,720	2%	130,760	3%	62,889
Agriculture, Forestry, Fishing and Hunting	8,140,628,410	2%	149,535	3%	54,440
Mining	4,542,309,832	1%	22,503	0%	201,854
Public Administration	1,755,782,485	0%	14,291	0%	122,859
Management of Companies and Enterprises	1,561,247,060	0%	9,472	0%	164,828
Utilities	1,501,077,180	0%	8,331	0%	180,180
Total	525,012,201,124	100%	5,212,128	100%	100,729

First PPP Loan Statistics

Top 15 Lenders, By Value Disbursed, as of 8/8/2020

Rank	Lender Name	Approved Loans	Net Dollars	Average Loan Size	Percentage of Total Authority
1	JPMorgan Chase	280,185	29,352,233,698	\$104,760	4.4%
2	Bank of America	343,626	25,557,615,698	\$74,376	3.9%
3	PNC Bank	73,925	13,003,814,963	\$175,906	2.0%
4	Truist Bank	82,047	12,631,618,727	\$153,956	1.9%
5	Wells Fargo	194,451	10,597,856,807	\$54,501	1.6%
6	TD Bank	85,970	8,557,036,274	\$99,535	1.3%
7	Keybank	43,172	8,211,676,707	\$190,208	1.2%
8	U.S. Bank	108,365	7,608,550,070	\$70,212	1.1%
9	Zions Bank	47,828	7,003,731,087	\$146,436	1.1%
10	M&T Bank	34,651	6,762,506,609	\$195,161	1.0%
11	Huntington Bank	38,486	6,575,686,696	\$170,859	1.0%
12	Cross River Bank	198,738	6,550,306,889	\$32,960	0.9%
13	Fifth Third Bank	40,071	5,422,983,389	\$135,334	0.8%
14	Citizens Bank	50,822	4,853,066,362	\$95,491	0.7%
15	BMO Harris Bank	21,993	4,835,997,160	\$219,888	0.7%
	Total	1,644,330	\$157,524,681,136	\$1,919,584	24%

Second PPP Loans

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- On 12/27/2020 President Trump signed the Economic Aid to Hard-Hit Businesses, Nonprofits and Venues Act (PPP2).
- Allows U.S. Small Business Administration (SBA) to guarantee second draw loans under generally the same terms and conditions of the original Paycheck Protection Program (PPP).
- Allows **first time borrowers** who did not apply for the first PPP loan by August 8, 2020 to do so now (up to 500 employees and loans up to \$10M).
- PPP2 makes modifications to the original PPP for:
 - Loan eligibility
 - Loan forgiveness
 - Taxability

Entities Eligible

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- Also allows certain entities who were not eligible for the first PPP to apply for a first PPP loan, including:
- For profit businesses
- Certain nonprofit organizations
- Housing cooperatives
- Veterans' organizations
- Tribal businesses
- Self-employed individuals
- Sole proprietors
- Independent contractors, and
- Small agricultural cooperatives

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Loan Terms

- **First and Second PPP loans:**
- 100% guaranteed by SBA
- No collateral required
- No personal guarantees
- Interest rate 1%
- Loan period up to 5 years

Not Eligible for PPP

- PPP2 established that certain entities are **NOT** entitled to a first or second loan:
 - Over 500 employees
 - SEC registered company (publically traded company).
 - A business that was not in operation on February 15, 2020.
 - Chinese owned entities at least 20% or has a Chinese Board of Directors Member (China and Hong Kong is the only restricted country).
 - Non profit organizations that receive more than 15% of its revenues from lobbying activities, if lobbying is more than 15% of the organization's activities, or if the organization spent more than \$1M in 2019 for lobbying activities.
 - Any entity that received a grant for shuttered venue operators
 - Any entity owed 20% or more by President, Vice President, Congress or head of an Executive department.

Timeframes

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- Program begins January 11, 2021 for Community Development Financial Institutions.
- On January 13, 2021 Community Financial Institutions can submit first and second PPP loans.
- On January 19, 2021 PPP was open to all large financial banks for PPP loans.
- Program ends when it runs out of money or March 31, 2021.
- \$40B is set aside for businesses with less than 10 employees and up to \$250K loan value in low income areas.

Requirements for Second PPP2 Loan

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- Have 300 employees or less (one location);
- Must have used or will use the full amount from the first PPP loan;
- Must demonstrate a 25% decline in “gross receipts” in any quarter of 2020 as compared to the same quarter in 2019.
 - Borrowers not in business the first, second or third quarters of 2019 can compare the 25% decline with the 4th quarter of 2019 with ANY quarter of 2020.
 - If the entity was not in business in 2019, but was in business before February 15, 2020- it can compare the second and third quarters of 2020 with the first quarter of 2020.

Requirements for Second PPP2 Loan

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- Necessity requirement- borrower certifies in good faith the loan is “necessary to the business.” Will not be looked at for loans under \$2M.
- Maximum loan amount for PPP2 is \$2M;
- **“Gross Receipts”:**
 - Does not include First PPP loan.
 - Includes all revenue received or accrued- sales, fees, interest, dividends, rents, royalties, investment income or commissions.
 - Includes all revenue from reimbursable customer costs or reimbursements.
 - Reduced by returns or credits.
 - Excludes net capital gains and sales tax.

Big Tax Changes

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- PPP loan is now entirely tax free.
- Exempts loan forgiveness under the PPP from inclusion in ordinary income.
- Allows a borrower to deduct legitimate business expenses, payroll and fringe benefits paid with PPP monies.

Loan Amounts

- 2.5x the average monthly payroll capped at \$2M.
- **Payroll** includes wages and the cost of fringe benefits.
- Salaries are capped at \$100K per year and the gross amount includes bonuses, tips, commissions and incentive pay.
- NAICS Code 72- Accommodation and Food Services can get **3.5x** the average monthly payroll up to \$2M paid during the 1 year period before the loan was made or calendar year 2019 (whichever is more).
 - Examples include: restaurants, hotels, motels, bed and breakfast Inns, food service contractors, caterers, mobile food services, RV parks and campgrounds, and bars.
- Seasonal Business 2.5x the average monthly payroll costs for the 12 week period that begins February 15, 2019 (or March 1) and ends February 15, 2020.

Simplified Loan Applications

- For loans \$150K or under:
 - Expedited loan application with a 1 page certification.
 - No need to initially submit documentation of 25% decline in gross revenues at the application process.

No need for additional documentation needed for 2nd loan if you use the same bank and 2019 payroll that was already submitted.

Simplified Loan Forgiveness

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- For loans \$150K or under:
 - Forgiveness application for both PPP and PPP2 loans.
 - One page form.
 - No documentary proof needed for forgiveness unless audited.
 - Personal liability for the certification.

PPP Deductible Expenses

- The following are still deducted expenses under PPP and PPP2:
- 100% of the following Payroll costs:
 - Gross wages, health insurance premiums, pension and 401k contributions, and similar benefits.
- Up to 40% of your loan can be used to pay:
 - Mortgage, rent and utility payments
 - Operations expenditures, property damage from public disturbances not covered by insurance,
 - Supplier costs essential to business operations.
 - Worker protection expenditures- PPE gear, upgrading HVAC systems, etc...
 - Software, cloud computing, human resources and accounting needs

Forgiveness Period

- Allows a borrower to elect an 8 week (if PPP loan is prior to June 5, 2020), or a 24 week forgiveness period after origination of the loan.
- 1) Deductions from loan forgiveness can occur if the employer failed to maintain compensation levels of employees at 75% or less during the Covered Period.
- Covered Period is compared to the Reference period of 1/1/2020 through 3/31/2020 to determine whether there was a 25% or more reduction.
- 2) Deductions from loan forgiveness can occur if the employer failed to maintain the same level of FTEs.
 - Reference Period to compare to Covered Period is:
 - Levels from 2/15/2019 to 6/30/2019; or
 - Levels from 1/1/2020 to 2/29/2020; or
 - For Seasonal- either period above or any consecutive 12 week period between 5/1/19 and 9/15/2019

Forgiveness Period

- **Safe Harbor from Loan Reduction:**

Return all FTE to 2/15/2020 levels by 12/31/20;

or

- Borrower can demonstrate it was unable to operate from 2/15/20 through the Covered Period at the same level of business activity because of compliance requirements or guidance issued between 3/1/2020 and 12/31/2020 by the Secretary of Health, CDC, or OSHA regarding social distancing standards, sanitation and safety reasons.
- State ordered shutdowns and restrictions should also be included and considered.
- **Nothing on forgiveness or comparison period for PPP2**

Forgiveness Period

- In calculating the loan forgiveness amount, a borrower may exclude any reduction in the number of employees if the borrower is able to document in good faith:
 - (1) an inability to rehire individuals who were employees of the borrower on February 15, 2020; and
 - (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020 (Original PPP).
 - Borrowers are required to inform the applicable state unemployment insurance office of any employee's rejected rehire offer within 30 days of the employee's rejection of the offer.
 - The documents that Borrowers should maintain include: 1) the written offer to rehire an individual, 2) a written record of the offer's rejection, and 3) a written record of efforts to hire a similarly qualified individual.

PPP Deductible Expenses

- Unused PPP money can be returned without paying interest.
- PPP loans have an interest rate of 1% and a maturity date of up to 5 years.
- Can apply for forgiveness when the funds are used up.
- No loan payments need to be made so long as forgiveness application is submitted within 10 months of the "Covered Period."
- The "Covered Period" is the end of the 8 week or 24 week period.
- Expenses from outside the 8 or 24 week covered period that are accelerated for payment are not forgivable.
- However, past due expenses for eligible deductions are forgivable if paid during the 8 or 24 week period.

Loan Amount Error

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- When a Borrower receives more than it should have under the 2.5x payroll calculation for the PPP Loan.
- Can be made by the lender or the borrower acting in good faith.
- Borrower will not receive loan forgiveness on the excess amount.
- Borrower is responsible for repaying the unforgiven amount with 1% interest- if interest began accruing.
- Misstatements or fraud on the loan application will be a different result.

EIDL Program (Economic Injury Disaster Loans)

- Targeted EIDL Grants are for business hit hardest by COVID 19.
- Must be located in a low income community and suffered an economic loss greater than 30%.
- Eligible to receive up to \$10,000 - \$1000 per employee as an EIDL Advance.
- **Under Economic Aid Act, does not reduce PPP loan amount or offset against PPP forgiveness**
- **Does not have to be repaid.**

EIDL Program

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- Standard EIDL Loan- 3.75% interest rate- 2.75% for non-profit organizations.
- Term of loan can be up to 30 years.
- Companies that take these loans cannot pay dividends, distributions, or bonuses to employees without SBA approval.
- Loan details are available to the public and the borrower must submit records of how the loan was spent 90 days after the loan is repaid.
- Personal guarantees or collateral required for loans over \$25,000

Employee Retention Credit

Employer paid social security tax credit per employee.

- Under Cares Act- 50% of qualifying wages paid from March through December of 2020
- Reduces federal deposits for withholdings related to payroll
- Take credit on Form 941
- Under CARES ACT- employers picked PPP or Retention Credit

Employee Retention Credit

- **Under CARES Act:**

- All wages paid between **March 13, 2020 and December 31, 2020**
- Eligible employers could take an immediate and refundable credit against the employer portion of their Social Security payroll tax equal to **50%** of qualified wages.

- **Under New Aid Act:**

- Beginning on **January 1, 2021, and through June 30, 2021**
- Eligible employers may now take an immediate and refundable credit against the employer portion of their Social Security payroll tax equal to **70%** of qualified wages.

Employee Retention Credit

■ Under CARES Act:

- Limit on per-employee creditable wages - **\$10,000 for the year.**
- Employers were eligible for the employee retention credit if business operations were either (1) fully or partially suspended by a COVID-19 lockdown order, or (2) for a quarter in 2020, gross receipts were less than **50% of gross receipts** for the same quarter in 2019.

■ Under New Aid Act:

Limit on per-employee creditable wages - **\$7,000 for each quarter.**

Employers are now eligible for the employee retention credit in 2021 if business operations are either (1) fully or partially suspended by a COVID-19 lockdown order, or (2) for a quarter in 2021, gross receipts are **less than 80%** of gross receipts for the same quarter in 2019.

Employee Retention Credit

- **Under CARES Act:**

- Ineligible for ERC if you take a Paycheck Protection Program loan

- Wage qualification is based on the average number of employees the business **employed in 2019**

- **Under New Aid Act:**

Employers who receive PPP loans **may still qualify** for the ERC with respect to wages that are not paid for with forgiven PPP proceeds **Retroactive to CARES Act.**

Allows **new employers who were not in existence for all or part of 2019** to be able to claim the credit

COVID Policies in the Workplace

- Do not report to work if
 - You have symptoms, tested positive or been advised by HCP to quarantine
- At work, practice all the following
 - Wear mask
 - Social distance
 - Wash hands and cover coughs/sneezes
 - Avoid sharing objects
 - Clean and disinfect surfaces/objects

COVID Policies in the Workplace

- Return to work considerations
 - Decide whether to follow CDC or ODH
 - Choose one and consistently follow it
 - Assign individual to update on weekly basis
 - Download or print copy of webpage and adjust policy accordingly
 - Obtain if possible HCP recommendation
 - Use COVID Assessment form to document paid leave

COVID Vaccines in the Workplace

- Mandatory vaccine policies are not new
 - Health-care employers require flu shots
 - Based on wide acceptance and studies of flu vaccines
 - Condition of employment
 - Companies that require international travel mandate vaccines recommended by CDC
 - Condition of employment in position that requires oversea travel

COVID Vaccines in the Workplace

- COVID vaccine different due to its rush to market
 - Cleveland Clinic and UH not requiring its health care workers to get vaccinated
 - COVID vaccine so new that many more people, even those who are not anti-vaccine, are hesitant or refuse to be vaccinated

COVID Vaccines in the Workplace

- Employers can require vaccines under Ohio and federal laws
 - If CBA in place, proceed carefully and consider negotiating MOU with union
- Should an employer mandate vaccines?
 - Decision unique to each business
 - Applicable to all or only certain employees?
 - Consider privacy and morale issues
 - Expect loss of 30% of workforce

COVID Vaccines in the Workplace

- EEOC Guidance on Mandated Policies
 - Venue of vaccine location critical
 - Pre-screening questions implicate ADA's rules on medical exam where exam is mandated
 - EEOC recommends use of independent third party, off-site facility to avoid ADA medical exam issues under mandated vaccine policies

COVID Vaccines in the Workplace

- EEOC Guidance on Mandated Policies
 - Reasonable accommodation for disabled
 - Interactive process initiated
 - Work from home, PPE, part-time or modified job, leave of absence, furlough, etc.
 - Determine whether disabled employee poses a direct threat to themselves or others
 - Duration of the risk
 - Nature and severity of the potential harm
 - Likelihood that the potential harm will occur
 - Imminence of the potential harm

COVID Vaccines in the Workplace

- EEOC Guidance on Mandated Policies
 - Reasonable accommodation for sincerely held religious belief
 - Be careful of requesting proof of belief
 - Interactive process initiated
 - Must provide reasonable accommodation for religious belief unless doing so causes an undue hardship
 - More than a de minimus cost or burden on the employer

COVID Vaccines in the Workplace

- EEOC Guidance on Mandated Policies
 - Maintain vaccination records separate from personnel records
 - Terminating Employees
 - Where no reasonable accommodation exists or employee simply refusing to get vaccinated, termination may result
 - EEOC cautions that termination should be last resort
 - Before terminating, contact attorney for guidance

COVID Vaccines in the Workplace

- Who pays for vaccine under Mandatory Vaccine Policies?
 - Insurance may pay
 - EEOC interprets the ADA as requiring employers pay for all mandatory testing or vaccines
 - Must you pay hourly employees for their time in getting vaccinated?
 - Most likely, yes

COVID Vaccines in the Workplace

- Liability of Employer under Mandatory Vaccine Policies
 - If employee suffers side effects/harm from vaccine, most likely limited to WC claim
 - But FDA approval should shield employers from claims of negligence

COVID Vaccines in the Workplace

- Alternative to Mandatory Vaccine Policies
 - Consider limiting employees who are mandated to only those at highest risk
 - Promulgate policy *promoting* vaccines
 - Provide incentives or rewards
 - Provide paid time off work to be vaccinated
 - Host vaccination clinic at work
 - Consider mandatory employer-paid *testing*

Independent Contractor New Rules

- Effective 3/8/21 DOL will begin applying the Economic Realities test
 - Is the worker in business for herself or economically dependent on another entity for work?
 - If in business for herself, she's an independent contractor
 - Considered employer-friendly and can be replaced or rejected by new Secretary of DOL

Independent Contractor New Rules

- 2 core factors of economic reality test
 - The nature and degree of worker's control over the work
 - The worker's opportunity for profit or loss based on initiative or investment
- 3 additional factors
 - Amount of skill required
 - Permanency of working relationship
 - Is work part of integrated production unit

Independent Contractor New Rules

- Biden administration has vowed to freeze economic reality test
 - Will be replaced with a more worker-protective interpretation akin to CA law, which requires IC to
 - Be free from control and direction
 - Perform work that is outside of hiring entity's business
 - Be customarily engaged in the same independently established trade or business

Independent Contractor New Rules

- Venue Dictates Rules to be Applied
 - Federal courts in Ohio have applied economic reality test for over 5 years
 - State courts in Ohio apply common law right to control manner or means of work
 - BWC and ODJFS apply 20 point test
 - All rules place at the center of the analysis the right of control

Independent Contractor New Rules

- IRS looks at 11 factors in three areas:
 - Behavioral: right to control what and how worker does job
 - Financial: who controls business aspects
 - Type of Relationship: written contracts, employee-type benefits; continuity of relationship, is work performed a key aspect of the business

Independent Contractor New Rules

- Best practices to adopt
 - Always enter into written agreement
 - IC must have freedom and independence to complete work
 - IC must furnish all or most tools, equipment and material needed
 - IC pays for all business-related expenses
 - IC receives no employment benefits

Independent Contractor New Rules

- Best practices to adopt
 - IC receives a flat fee, where possible
 - Alternatively, IC issues invoices on an agreed upon basis – monthly, etc.
 - Clearly define scope of assignment and duties of each party
 - IC offers services to others
 - IC carries own insurance, WC coverage, etc.

Status on Non-Compete Agreements

- More states are restricting or banning non-compete agreements
 - States having no laws affecting validity
 - OH, AK, AZ, CT, DE, IN, IO, KA, KY, MN, MS, NE, NJ, NM, NY, PA, PR, SC, TN, VT, WV, WY
 - States with complete bans
 - CA, ND and OK and DC just passed new law
 - Remaining states impose restrictions
 - Limit on time and geographic area, level of employee, valuable consideration, etc.

Status on Non-Compete Agreements

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- Is a non-compete right for your Co.?
 - Case-by-case determination
 - May be right for executive level employees
 - Keep in mind court's reluctance to enforce
 - Consider strong non-solicit and non-disclosure agreements instead of non-competes
 - Non-solicit agreements prevent former employee soliciting clients and employees for a certain period of time post-employment

2021 Breakfast Briefing

Thank you for attending

RESOURCES

A copy of the PowerPoint presentation will be available on our website at the bottom of the webinar registration page under Events

- Lynn Schonberg (lynns@rbslaw.com) – 216-643-4505
- Nick Nykulak (nickn@rbslaw.com) – 216-643-4534
- For SHRM Credits – Please contact kbasta@rbslaw.com

Watch for a follow up email with a survey. We appreciate you taking a moment to complete the survey to help us continually improve the experience for all attendees.