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The Future of Work Post-COVID-19

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Worldwide, more than 3 million people have died of COVID-19 since the inception of the pandemic, and the virus has infected over 140 million people. As of April 20, 2021, more than 910 million doses of the vaccine had been administered across 156 countries, at a rate of about 16.3 million doses per day.[1] As the vaccine becomes more-widely available, employers have started to transition their employees back to the workplace. In deciding how—and when—to return to the workplace, employers must consider federal guidance, state regulations, and industry-specific guidelines. It is clear that many of the changes brought about by the pandemic, including flexible work schedules and telework, are here to stay.

I. Overview and Sources of Guidance.

To date, there exists no comprehensive federal legislation which imposes mandatory COVID-19 requirements on employers. Rather, employers' duties vary from state to state, and may be informed by non-binding federal guidance, including recommendations from the U.S. Centers for Disease Control and Prevention (CDC) and general occupational standards established by the U.S. Occupational Safety and Health Administration (OSHA).

A. Federal Guidance.

1. CDC Guidance.

The CDC has issued general guidance for employers, as well as industry-specific guidance, about policy, operations, COVID-19 testing, responses to infection, and contact testing.

[1] *See* Bloomberg, *More Than 910 Million Shots Given: Covid-19 Tracker* (updated Apr. 19, 2021), https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/.

On March 8, 2021, the CDC updated its Guidance for Businesses and Employers Responding to Coronavirus Disease 2019, with respect to non-healthcare settings. Among other measures, the updated guidance recommends that businesses develop response plans specific to their workplaces, which identify all areas and job tasks that may result in potential exposure to the virus, and which include control measures to reduce or eliminate such exposures. Among other precautions, the CDC recommends that employers extend telework, and for employees who must report to work in person, that employers implement social distancing, stagger employee work schedules, use physical barriers and personal protective equipment (PPE), limit employees' in-person interactions with the public, implement flexible travel and meeting options, close or limit access to common areas, and prohibit handshaking. The CDC also recommends that employers consider the level of transmission in their communities, whether a large proportion of employees are at an increased risk for severe illness, and sick leave policies.

To prevent and reduce the transmission of COVID-19 among employees, the CDC recommends that employers actively encourage sick employees to stay at home. To that end, employers should implement "flexible, non-punitive paid sick leave and supportive policies and practices." In its recent update, the CDC also encouraged employers to provide in-person or virtual "health checks" before they permit employees to report to work in person. Virtual health checks require employees to self-screen and report the absence of COVID-19 diagnosis for ten days, exposure to someone with the infection for fourteen days, or accompanying symptoms. In-person health checks ensure that workers do not exhibit any COVID-19-related symptoms, including a fever of 100.4 degrees or higher, are not undergoing evaluation for infection, have not been diagnosed with COVID in the last ten days, and have not been in close contact with an infected person during the last fourteen days.

In addition, the updated guidance encouraged employers to consider adding a SARS-CoV-2 testing element to their protocol. The CDC suggested that employers could test all workers before they are permitted to re-enter the workplace, test employees at regular intervals, or target their testing to focus on new workers or those returning from a prolonged absence.

The CDC also clarified that all employees should wear masks, unless the employer requires them to wear respirators or facemasks pursuant to a hazard assessment.

Although the CDC set forth shortened, alternative time periods for quarantine, it recognized that they may be less effective in preventing the transmission of COVID-19. Specifically, the CDC explained that, as determined by local public health authorities, quarantines could end after ten days without testing, provided that daily monitoring occurred, and no symptoms were reported. It also stated that a quarantine could end after seven days when an employee received a negative diagnostic test, and did not exhibit any symptoms.

Nonetheless, the CDC continued to recommend a quarantine period of fourteen days and made clear that under no circumstances, could a quarantine period be discontinued before seven days.

The CDC also provides guidance to employers on how they can improve air quality through their ventilation systems, help employees and visitors stay clean and healthy, perform routing cleaning and disinfection, minimize the risk to employees when planning meetings by using videoconferencing or teleconferencing, or planning meetings in open, well-ventilated spaces, and maintaining a tobacco-free workplace.

2. OSHA Guidance.

The Occupational Safety and Health Act of 1970's General Duty Clause (GDC) requires employers to provide safe workplaces for their employees. Specifically, the GDC states that each employer must "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

OSHA may cite an employer under the GDC when: (1) the employer fails to keep the workplace free of a hazard to which employees were exposed; (2) the hazard was recognized; (3) the hazard caused or was likely to cause serious physical harm or death; and (4) there existed a feasible method to correct the hazard. Because the OSH Act does not incorporate the CDC's COVID-19 guidance, the best way for an employee to correct a work environment which does not comply with the CDC guidelines is though the OSH Act's General Duty Clause.

In the COVID-19 context, OSHA has been widely criticized for its failure to implement a mandatory workplace standard and to enforce the GDC. By May 2020, OSHA received thousands of complaints from employees who feared for their health, but it had not issued a single citation. In fact, under the Trump Administration, the Department of Labor (DOL) responded to employees' complaints about unsafe working conditions by contacting the employers and encouraging them to follow CDC guidance. *See* Nat'l Employment Law Project, *Examining Liability During the COVID-19 Pandemic*, Hearing Before the U.S. Senate, Testimony of Rebecca Dixon, 8 & n.56 (May 12, 2020), *available at* https://www.judiciary.senate.gov/imo/media/doc/Dixon%20Testimony.pdf.

The DOL's lack of action prompted an investigation by the DOL's Office of Inspector General (OIG). The OIG found that OSHA received thirty percent more complaints for the period of February 1, 2020 through May 31, 2020, than for the same period in 2019. It also found that OSHA failed to investigate the 1,618 COVID-19 whistleblower complaints it received during that period in a timely manner. *See generally* Report to OSHA, *COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic,* Report No. 19-20-

010-10-105 (Aug. 14, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/2020/19-20-010-10-105.pdf.

It was not until July 2020, after the OIG initiated its investigation, that OSHA issued its first citation. Indeed, by the end of August 2020, OSHA had issued only *five* citations.[2] By comparison, WorkSafeBC, a statutory agency in British Columbia which enforces workplace health and safety requirements, conducted 12,646 worksite inspections and issued 334 orders for health and safety violations as of July 2020.[3] To put the numbers in perspective, British Columbia has a population of about five million people while the USA population is about 330 million.[4]

In September 2020, OSHA issued a handful of citations to meatpacking plants, nursing homes, and healthcare providers. For example, OSHA cited Smithfield Packaged Meats Corporation for failing to protect its employees from exposure to COVID-19. Specifically, Smithfield employed 3,700 workers, 1,294 of whom contracted coronavirus, and four of whom died. OSHA faulted Smithfield for failing to implement proactive measures to protect its workers from exposure, such as social-distancing requirements, physical barriers, face shields, and face coverings. In response, OSHA proposed the maximum penalty of $13,494.

In addition to requiring that employers furnish safe working environments to their employees, the OSH Act also prohibits employers from:

> discharg[ing] or in any manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

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[2] *See* OSHA, *Inspections with COVID-Related Citations*, https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations.

[3] *See* WorkSafeBC Has Found Over 300 Violations of COVID-19 Safety Plans, CBC News (July 21, 2020), https://www.cbc.ca/news/canada/british-columbia/worksafebc-health-safety-compliance-numbers-worksites-1.5658235

[4] *Months Late, Federal OSHA Finally Gets Moving on COVID-19 Citations*, Laborers' Health & Safety Fund of N. Am. (Nov. 2020), https://www.lhsfna.org/index.cfm/lifelines/november-2020/months-late-federal-osha-finally-gets-moving-on-covid-19-citations/.

29 U.S.C. § 660(c)(1). To engage in protected activity under the OSH Act, an employee must file a complaint "under or related to" the OSH Act, such as a request for inspection. 29 C.F.R. § 1977.9(a) (explaining that "[t]he range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power"). The OSH Act also covers any good-faith complaints made by employees about "occupational safety and health matters." 29 C.F.R. § 1977.9(c). Further, to succeed on a retaliation claim under the OSH Act, an employee need only show that her protected activity was a substantial reason for the adverse action, not the "sole consideration" for it. *Id.* § 1977.6(b). However, an employee's only remedy is through the administrative process; the employee has no private cause of action.

Aside from OSHA's non-binding COVID-19 guidance and the General Duty Clause's requirements, OSHA's Personal Protective Equipment standards may provide enhanced protection for employees in certain industries. *See* 29 CFR § 1910.132. In addition, where applicable, OSHA's Bloodborne Pathogens standards may require employers to take steps to prevent occupational exposures to COVID-19. *See* 29 CFR § 1910.1030. OSHA also promulgated various industry-specific standards that continue to apply during the pandemic.

On January 29, 2021, OSHA released advisory guidance entitled, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," which *recommended* that employers implement prevention programs to help limit the spread of the virus.

To date, OSHA has not yet proposed a mandatory COVID-19 standard for the workplace. However, a temporary emergency standard likely is coming soon. On January 21, 2021, President Biden issued an Executive Order, Protecting Worker Health and Safety, directing the Secretary of Labor to consider the necessity of any emergency temporary standards (ETS) on COVID-19. The Executive Order directed DOL to issue any necessary ETS by March 15, 2021. Although the DOL has not yet issued a standard, DOL officials confirmed that the agency intends to do so.

B. State Regulations.

In the absence of comprehensive federal legislation, many states have taken it upon themselves to enact mandatory COVID-19 standards for the workplace. Currently, twenty-two states operate OSHA-approved workplace safety and health programs. Pursuant to their statutory authority, state programs may create temporary standards that incorporate, or go beyond, CDC guidance. Governors also may use executive orders to require that public health recommendations be enforced.

For example, the Virginia Occupational Safety and Health (VOSH) Program implemented mandatory COVID-19 regulations, entitled, "Permanent Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19," which went into effect on January 27, 2021, and codify CDC guidance. *See* 16 Va. Code § 25-220.

With respect to returning to work, VOSH set forth standards about:

- The conditions under which employees known or suspected to be infected with COVID-19 may to return to work;
- The conditions under which asymptomatic employees known to be infected may return to work;
- The mandatory policies and procedures employers must implement to ensure employees observe physical distancing while on the job and during paid breaks on the employer's property, including by decreasing work density;
- Limiting and controlling access to common areas;
- The enforcement of occupancy limits;
- Cleaning and disinfecting common areas at regular intervals throughout the day and between shifts; and
- The establishment of handwashing facilities.

The regulations set forth requirements for workplaces, depending on whether job tasks are classified as "very high," "high," "medium," or "lower" exposure risks.

Significantly, under 16 Va. Code § 25-220-90(C), an employer may not retaliate against an employee "who raises a reasonable concern about infection control related to the SARS-CoV-2 virus and COVID-19 disease to the employer . . . or to the public such as through print, online, social, or any other media."

Similarly, on November 19, 2020, the California Division of Occupational Safety and Health adopted emergency temporary standards. The ETS requires employers to develop a written COVID-19 Prevention Program or confirm that the program elements are encompassed in an existing Injury and Illness Prevention Program. The written program must address the following topics: communication with employees about the COVID-19 prevention program; identification, evaluation, and correction of COVID-19 hazards; physical distancing; use of face

coverings; the reduction of transmission risk through engineering controls, administrative controls, and PPE; procedures for investigating and responding to COVID-19 cases in the workplace; the provision of COVID-19 training to employees; the provision of testing to employees who have been exposed to COVID-19; the exclusion of exposed employees from the workplace; return-to-work criteria; and the maintenance of records about CVOID-19 cases.

Other states which have implemented standards include:

- **Kentucky**. Through a series of Executive Orders, collectively referred to as the "Healthy at Work" Executive Orders, Governor Andy Beshear implemented minimum standards, effective April 19, 2021. The standards require that employers implement policies on physical distancing through social distancing and occupancy limits, require the use of facial coverings, make available handwashing and sanitizing supplies, maximize telework, maximize ventilation, reduce the use of common areas, consistently sanitize high-contact areas, and require employees to undergo self-administered or employer-administered daily temperature and health checks.

- **Massachusetts.** Governor Baker's COVID-19 Order No. 33, "Order Implementing a Phased Reopening of Workplaces and Imposing Workplace Safety Measures to Address COVID-19," requires that businesses operating brick and mortar premises: implement social distancing, require employees to use face coverings or masks, provide handwashing capabilities throughout the workplace and ensure that employees frequently wash their hands, provide training for employees on social distancing and hygiene protocols, exclude employees who display COVID-19-like symptoms from work, establish a return-to-work plan for employees who get sick from COVID-19, establish and maintain cleaning protocols specific to the business, and disinfect all common surfaces at appropriate intervals.

- **Michigan.** On October 14, 2020, the Michigan OSHA issued Emergency Rules for the Coronavirus Disease 2019. The Emergency Rules require businesses that resume in-person work to establish written COVID-19 preparedness and response plans, and provide employees training on workplace infection-control practices, the use of PPE, how to provide notice of COVID-19-related symptoms of diagnoses, and how to report unsafe working conditions. Similar to Virginia's regulations, Michigan requires employers to classify job tasks based on their potential exposure level, and provides corresponding requirements for each category. Michigan's regulations also provide industry-specific requirements for eleven industries.

- **Minnesota**. Governor Tim Walz issued Executive Order No. 20-74, "Continuing to Safely Reopen Minnesota's Economy and Ensure Safe Non-Work Activities During the COVID-19 Peacetime Emergency." The EO requires each open businesses to develop a COVID-19 Preparedness Plan that provides for work from home when possible, implements policies are procedures to prevent sick workers from entering the workplace, requires social distancing, establishes hygiene and source control policies for workers, and implements cleaning, disinfection, and ventilation protocols for areas within the workplace. The EO also provides industry-specific guidelines. It makes clear that local governments may provide for enhanced measures, but cannot reduce or relax the standards included in the Executive Order. Willful violation of the EO constitutes a misdemeanor and is punishable by a $1,000 fine or ninety days' imprisonment. Further, employers that encourage their workers to violate the EO are guilty of a gross misdemeanor and may face a $3,000 fine or one year's imprisonment. The EO also is enforceable by the Attorney General and city and county attorneys.

- **Nevada**. The Nevada OSHA promulgated standards for businesses that continue to operate during COVID regarding face coverings, limited access to common areas, occupancy limitations, handwashing, disinfecting and sanitation, PPE, and daily surveys of changes to staff health conditions.

- **New Jersey**. Governor Philip Murphy issued Executive Order No. 192 on October 28, 2020, which set forth numerous requirements for businesses, non-profits, governmental, and educational entities that require or permit their workforce to by physically present at work. Generally, the Executive Order requires employees to maintain six feet of social distancing, use face masks, practice regular hygiene, routinely clean and disinfect high-touch areas, complete daily health checks before each shift, and stay home if they appear to have any symptoms consistent with COVID-19. It also requires employers to provide sanitization materials and promptly notify employees of known exposure to COVID-19 at the workplace. Notably, the Executive Order supersedes any prior restrictions on an employer's ability to require an employee to produce medical documentation, or deny a customer entry, based on a refusal to wear a face mask. It further provided that an employer's failure to adhere to the protocols outlined in the Order may subject it to closure by the Commissioner of the Department of Health.

- **New York**. On June 22, 2020, New York enacted the Emergency Preparedness Law, which applies to public employers and requires them to prepare a written

plan for operations in the event of a declared public health emergency, including COVID-19. In their plans, employers must designate all "essential" positions, and specify the protocol they will follow to enable non-essential employees to work remotely, stagger work shifts, procure the necessary PPE, and respond to an employee's exposure to a known case of the communicable disease which is the subject of the public health emergency. Employers must make the plan available to employees and may not retaliate against them for "making suggestions or recommendations regarding the content of the plan."

- **Oregon.** On November 16, 2020, Oregon OSHA implemented a temporary rule addressing COVID-19 workplace risks, which will expire on May 4, 2021. On January 29, 2021, Oregon OSHA proposed a permanent rule. Both rules provide mandatory workplace guidance for industry-specific and activity-specific activities. Regardless of industry, they generally require social distancing; the use of masks, face coverings, or face shields; employer-provided PPE; regular cleaning and sanitation of common areas and high-touch surface areas; optimization of ventilation; the performance of exposure risk assessments; the development of an infection control plan; employee communication and training; processes of notifying exposed employees within 24 hours; and providing on-site COVID-19 testing for workers, when required by Oregon or a local public health agency.

  The permanent rule is substantially similar to the temporary rule. However, the proposed rule recognizes that face shields are not ideal and discourages their use, unless necessary for accommodation or feasibility purposes. It also requires that employers with more than ten employees certify that they are operating their ventilation systems in compliance with the rule. The permanent rule also requires employers to notify employees in writing of their return-to-work rights, following a quarantine, and *recommends* that employers provide employees information about leave options.

- **Pennsylvania.** On April 19, 2020, the Secretary of the Pennsylvania Department of Health issued an order, "Directing Public Health Safety Measures for Businesses Permitted to Maintain In-Person Operations." The order requires business to implement social-distancing, mitigation, and cleaning protocol, establish procedures for responding to probable or confirmed cases of COVID-19, and provide staggered work schedules and break times. It also requires employers to establish occupancy limits, including in employee common areas, conduct meetings and trainings virtually, provide access to regular handwashing, clean common areas on a regular basis, provide PPE to employees, mandate that

employees wear masks, prohibit non-essential visitors, and notify employees of the order's requirements.

With the exception of healthcare providers, Pennsylvania businesses also must conduct business with the public by appointment only, where feasible, or limit occupancy; alter business hours to allow sufficient time for cleaning and restocking; install shields or barriers at registers and checkout areas; provide delivery or pickup options to encourage online ordering; designate a time for high-risk and elderly persons to use the business; require customers to wear masks and deny entry to individuals not wearing masks (with some exceptions); schedule hourly handwashing breaks for employees; assign an employee to clean customer carts and baskets before making them available to other customers; and switch customers to every other register each hour, so that the employer can clean the unused registers and maintain sanitary conditions.

- **Washington.** Businesses must comply with the conditions set forth in the Safety and Health Core Rules, adopted under the Washington Industrial Safety and Health Act of 1973. WAC § 296-800-14035, "Novel coronavirus prohibited activities and compliance with conditions for operations," requires employers, through May 12, 2021, to comply with the conditions set forth for operation under the emergency proclamation, including all industry-specific requirements and the "Healthy Washington -Roadmap to Recovery" reopening requirements." "Healthy Washington" is a phased recovery plan, which Governor Jay Inslee established. Similar to other states' stay-at-home orders, Healthy Washington sets forth operational and occupancy limits for certain activities in each phase of Washington's reopening plan.

II. Potential Federal Approaches for Covid Protections in the Workplace.

The federal government has several statutes that can be used to require greater workplace protections against Covid in the workplace – the OSHA statute and a provision of the Public Health title governing communicable diseases.[5]

If the Department of Labor's OSHA were to promulgate regulations requiring the wearing of masks in the workplace to prevent the transmission of COVID-19, they would be authorized under OSHA's "general duty" clause, which provides that:

(a) Each employer –

[5] These would have to be regulations effective *after* a notice and comment period and *not* emergency regulations.

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; [and]
(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions.

29 U.S.C. § 654. Pursuant to this statute, OSHA has issued several workplace regulations that require certain employers to provide respiratory protections and eye/face protections, among other categories of personal protective equipment. *See*, *e.g.*, 29 C.F.R. § 1910.134 (respiratory protection); 29 C.F.R. § 1926.102 (eye and face protection). Although these regulations are limited to certain categories of heavy industry, construction, and related fields, these regulations show that OSHA can use the "general duty" clause as a basis for requiring respiratory and face protections in response to known hazardous substances in the workplace. The courts have routinely rejected challenges by employers to OSHA's personal protective equipment regulations. *See*, *e.g.*, *Vanco Constr. Inc. v. Donovan*, 723 F.2d 410 (5th Cir. 1984) (rejecting challenge to OSHA's eye and face protection regulation); *Ray Evers Welding Co. v. Occupational Safety & Health Rev. Comm'n*, 625 F.2d 726 (6th Cir. 1980) (rejecting challenge to OSHA's safety belt regulation).

The courts have also rejected efforts by employers to argue that it is up to the employee to decide whether to use safety equipment, since the burden is on the employer to ensure that each employee is using the proper safety equipment in compliance with the OSHA regulations:

> Leaving the decision to the discretion of the employee is not sufficient compliance with the regulation. As the legislative history shows:
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> > (a)n employer has a duty to prevent and suppress hazardous conduct by employees, and this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence. . . . The committee does not intend the employee-duty (to comply with the occupational safety and health standards promulgated under the Act) provided in section 5(b) to diminish in anyway the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. **Final responsibility for compliance with the requirements of this act remains with the employer**.

Otis Elevator Co. v. Occupational Safety & Health Review Comm'n, 581 F.2d 1056, 1058 (2d Cir. 1978) (emphasis added) (quoting S. Rep. No. 91-1282 (91st Cong., 2d Sess.) 10-11, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5187); *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (same).

Although rule-making by OSHA can take significant time, including the notice-and-comment period, a regulation requiring the wearing of masks in the workplace during a declared pandemic could result in protecting employees (and customers), not only in the current pandemic, but also in any future pandemics. The OSHA statute allows for injunctive relief by the Secretary of Labor for violations of the statute and its implementing regulations, 29 U.S.C. § 662, and provides for both civil and criminal penalties for willful violations. 29 U.S.C. § 666.

Another source of authority for regulating the workplace is in the public health statute that address communicable diseases. Section 264 of Title 42 allows the Surgeon General to issue regulations to control communicable diseases, which have been used in the past to address potential problems with persons entering from foreign countries, or persons believed to be infected. Section 264 was used as the basis for the Center for Disease Control's regulations implementing the Executive Order requiring the wearing of masks on public transportation. However, as Section 264 is limited to addressing "the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession," 42 U.S.C. § 264(a), then it may not be possible to use that statute to regulate workplaces that are not directly involved with interstate transportation.

III. Employers' Mandatory COVID-19 Vaccination Policies.

To prevent against further transmission of COVID-19, help ensure the safety of their workers, and provide for the continuity of operations, some employers have mandated vaccination of their workforces. To what extent are mandated vaccinations lawful, and what restrictions exist on mandated vaccines?

Generally, employers may impose mandatory-vaccination policies which apply to all employees, so long as they recognize exceptions for workers who require accommodations for disabilities under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"), and sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-1 *et seq*.

In response to an employee's request for exemption from a mandatory-vaccination policy as a reasonable accommodation under the ADA or Title VII, an employer could assert that an unvaccinated employee poses a "direct threat to the health or safety of the individual or others in

the workplace." 29 C.F.R. § 1630.15(b)(2). A "direct threat" exists when there is a "significant risk of substantial harm to the health or safety of the individual or others[.]" *Id.* § 1630.2(r). Whether an individual poses a direct threat is a fact-intensive inquiry, based on an "individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Id.* Further, an employer must base its assessment "on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Id.* In evaluating whether an employee poses a "direct threat," an employer must consider the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *Id.*

Recent guidance from the U.S. Equal Employment Opportunities Commission (EEOC), What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, clarifies that a direct threat exists if an employer concludes that "an unvaccinated individual will expose others to the virus at the worksite."

However, the inquiry does not end there. An employer may not exclude the employee from its workplace unless there is no reasonable accommodation the employer could offer—absent undue hardship[6]—that would eliminate or reduce the risk, such that the employee no longer poses a direct threat. 29 C.F.R. § 1630.2(r).

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[6] An undue hardship is a "significant difficulty or expense incurred by a covered entity, when considered in light of" the following factors:

(1) the nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(3) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(4) the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(5) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Even if an employer may bar an employee from entering its workplace, the employer may be prohibited from terminating the employee based on other federal, state, and local laws. For example, if an employer denies an employee's request for an exemption from a mandatory-vaccination policy, the employer still must engage in the interactive process to discuss other alternatives, such as the possibility of remote work. Further, an employee could qualify for leave under other statutes, such as the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, and the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified at 15 U.S.C. § 9001 (2020)).

Similarly, if an employee seeks an exemption from a mandatory-vaccine policy on the basis of her sincerely held religious belief, practice, or observance, under Title VII,[7] the employer must provide a reasonable accommodation, absent an undue hardship.

Notably, Title VII's definition of "undue burden" sets a lower standard than does the ADA. While the ADA defines an "undue burden" as a "significant difficulty or expense," 29 C.F.R. § 1630.2(p), Title VII defines it as "more than *de minimis*" cost or burden. *Trans World Airlines v. Hardison*, 432 U.S. 53, 61 (1977). Further, under the ADA, an employee bears the initial burden of proposing an accommodation and demonstrating that it is reasonable, 42 U.S.C. § 12112(b)(5)(A), but under Title VII, the employer bears the burden of showing that it is "unable to reasonably accommodate . . . an employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(c)(1) (after employee has notified employer of religious conflict, employer has duty to accommodate).

IV. Trends Among the States.

A majority of states have proposed legislation that would preclude employers from discriminating against employees or prospective employees on the basis of their immunization status and/or refusal to get vaccinated. Some states include only state agencies and political subdivisions in their definitions of "employer," while others apply the prohibition more broadly to private employers. For example:

- **Alabama.** House Bill 214 and House Bill 608, both of which are pending, would prohibit employers from mandating vaccines and from taking adverse action

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29 C.F.R. § 1630.2(p).

[7] Title VII defines "religion" as including "all aspects of religious observance and practice . . ." 42 U.S.C. § 2000e(j).

against employees or prospective employees based on their immunization status. House Bill 608 prohibits the same action, with respect to any vaccination that has not received full FDA approval.

- **Georgia.** House Bill 413 would prohibit the state or local government from ordering vaccination for any reason, including as a condition of employment or school attendance, unless a set of conditions are met, including that "[t]he vaccine has been licensed for use, not including emergency use authorization" by the FDA.

- **Illinois.** House Bill 3682 would create the "COVID-19 Workplace Vaccination Program Limitation Act." Under the Act, employers could not require employees to demonstrate they received a vaccine approved under emergency use authorization.

  Conversely, Senate Bill 2015 would require employees of Veterans Homes, hospitals' intensive care units, and nursing home facilities to receive a vaccine, if offered.

- **Indiana.** House Bill 1488 would prohibit an employer from requiring that employees or prospective employees receive immunizations that lack full FDA approval. Further, it would prohibit employers from inquiring into, or requiring the disclosure of, an employee's or prospective employee's reason for refusing an immunization that was approved only for emergency use and lacked full FDA approval. The proposed legislation also provides a private right of action with recovery for actual damages, punitive damages, and attorneys' costs and fees.

- **Maryland.** House Bill 1171 would prohibit an employer from terminating an employee "solely on the basis" of the employee's refusal to receive a COVID-19 vaccine. In addition, under the bill, an employee would waive her right to file a civil action against the employer if she refuses to receive a vaccination and contracts COVID-19 in the course of her employment.

- **New York.** Assembly Bill 4602 would prohibit mandatory vaccines as a condition of employment or continued employment with any business or non-profit organization.

  Conversely, Assembly Bill 2081, would *mandate* vaccines for employees and residents of residential healthcare facilities.

- **Pennsylvania.** House Bill 262, the Right to Refuse Act, would prohibit employers from taking adverse action against an employee or prospective employee because she refuses to get vaccinated. The Act also would provide a private cause of action against an employer who violates the Act, if initiated within *three years* of the date of violation.

Other states that proposed legislation prohibiting vaccination as a condition of employment include: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.[8]

V. Federal Law Preemption of State COVID Regulations.

If federal government regulations required public health protections, and state governments legislated against these requirements, the federal government regulations would prevail because of the doctrine of pre-emption.

The only way in which the United States would be able to recognize public health measures across the country is if the Department of Labor issues regulations requiring protections, including vaccinations or mask wearing. Congress is unlikely to act to institute these measures.

As of April 2021, the federal government has only imposed a few specific requirements affecting the workplace – probably the best known is the one requiring the wearing of masks while on public transportation, *i.e.*, commercial airplanes, trains, and buses. *See* Executive Order 13998 of January 21, 2021, "Promoting COVID-19 Safety in Domestic and International Travel," 86 Fed. Reg. 7205 (Jan. 26, 2021); Dept. of Health & Human Services, Centers for Disease Control and Prevention, "Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs," 86 Fed. Reg. 8025 (Feb. 3, 2021). This requirement thus encompasses and protects transportation workers who are in contact with the public.

If the federal government were to enact COVID-related workplace requirements, whether by statute or regulation, these federal requirements, such as permitting private employers to

[8] A comprehensive list of all state-proposed COVID-19 legislation is available at https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations#linktojump39.

institute mask requirements or vaccinations, would prevail over contrary state law.[9] Similarly, will state governments be able to control the ability of counties and cities to impose requirements that are contrary to those of the state government?

A. The Supremacy Clause of the U.S. Constitution and "Contrary" State Laws.

The Supremacy Clause of the U.S. Constitution, Article VI, clause 2, provides that federal law controls over any contrary state laws:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The U.S. Supreme Court and the lower courts have consistently recognized that the Supremacy Clause means that federal laws will override state laws that are "contrary" to the federal laws. The issue is whether it is "impossible for a private party to comply with both state and federal requirements." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019) (citations omitted). Thus, "it has long been settled that state laws that conflict with federal law are without effect." *Id.* at 1678 (citations omitted). In short, "where state and federal law directly conflict, state law must give way." *Pliva, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (FDA regulations precluded contrary state laws on drug labelling). In its most recent pronouncement, the Supreme Court reiterated that:

> If federal law "imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted."

Kansas v. Garcia, 140 S. Ct. 791, 801 (2020) (quoting *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018)).

B. Express Preemption by Federal Laws of Contrary State Laws.

Although the Supreme Court has recognized various approaches in its preemption analyses, the two that continue to command a majority are express preemption and implied preemption. Express preemption is where the federal law specifies that any contrary state law is

[9] However, any vaccination requirements would pre-empt state requirements only after the FDA fully approved the vaccine, but not in the current situation when the FDA has only approved emergency authorization.

preempted. For example, the Public Readiness and Emergency Preparedness Act of 2005 ("PREP Act"), which includes a provision providing for immunity for vaccination-related injuries during a declared public emergency, expressly preempts contrary state laws:

> (8) Preemption of State law. During the effective period of a declaration under subsection (b), or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—
>
> > (A) is different from, or is in conflict with, any requirement applicable under this section; and
> > (B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act.

42 U.S.C. § 247d-6d(b)(8). Thus, when the Secretary of Health and Human Services issued an emergency declaration in March 2020, which allowed state-licensed pharmacists to vaccinate individuals and be covered by the immunity provisions of the PREP Act of 2005, that federal action preempted the laws of several states that either prohibit pharmacists from giving vaccinations or otherwise limit the ability of pharmacists to do so. *See* U.S. Dep't of Justice, Office of Legal Counsel, "Preemption of State and Local Requirements under a PREP Act Declaration," 45 Op. O.L.C. ___ (Jan. 19, 2021) (noting the Florida and North Carolina laws that could preclude pharmacists from administering covid vaccinations).[10] However, the PREP Act does not have any provisions that would authorize employment-related regulations, since the focus of the PREP Act is on immunity for vaccination-related injury claims against those who administer the vaccinations, so that the PREP Act would not be a basis for a federal regulation governing the workplace environment.

C. Implied Preemption by Federal Laws of Contrary State Laws.

Although variously analyzed, implied or conflict preemption arises when the federal statute does not expressly prohibit state laws or regulations in the same field, but it is "impossible for a private party to comply with both state and federal requirements." *Merck*

[10] Online at: https://www.justice.gov/olc/file/1356956/download.

Sharp & Dohme Corp. 139 S. Ct. at 1672 (2019); *accord Pliva, Inc.*, 564 U.S. at 618 (same). The Supreme Court has addressed this most recently with respect to the labeling of drugs: the FDA has issued somewhat general regulations governing what must be included on a label, such as for generic drugs, while some states have attempted to require additional labeling on drugs that are sold or consumed within the state border. Although the FDA's governing statute and the drug labelling regulations did not have an express preemption provision, the Supreme Court found implied or conflict preemption: "It was not lawful under federal law for the Manufacturers to do what state law required of them." *Pliva, Inc.*, 564 U.S. at 618.

Here, the federal Occupational Safety and Health Act (OSH Act) does have a preemption provision, but one that the Supreme Court has interpreted as being implied preemption, not express preemption. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Section 18b of the OSH Act provides that if the federal government has not issued a standard or regulation governing an "occupational safety or health issue," then the state governments have free reign to enact state statutes or regulations governing those issues that the federal government has not regulated. 29 U.S.C. § 667(a). However, if the federal government has regulated as to a specific "occupational safety or health issue," and a state government wants to enact its own regulations, then the state government must get approval from the Secretary of Labor for the "State plan for the development of such standards and enforcement," 29 U.S.C. § 667(b), with such approval requiring the Secretary to find that the State standards "are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated [by OSHA]," along with certain other guarantees. 29 U.S.C. § 667(c)(2). The Supreme Court thus struck down an Illinois statute that governed the licensing of employees at hazardous waste facilities (and was more protective of workers than the federal standard), because Illinois enacted this without getting approval of the State plan from the U.S. Department of Labor. *Gade*, 505 U.S. at 108-09.[11] Thus, while the state governments are free to provide for greater workplace protections than those afforded by the OSHA regulations, the state governments must get approval for their "state plan" from OSHA.

D. Problem of Emergency Use Vaccines and Emergency DOL Regulations.

Pursuant to President Biden's January 21, 2021 Executive Order, DOL is considering whether to issue emergency temporary standards on COVID-19. To date, DOL has not issued any such ETS, but DOL officials confirmed that the agency intends to do so. Most likely, an ETS would adopt many of the "best practices" that the CDC and many states have recommended.

[11] Although *Gade* was a plurality opinion finding implied preemption, Justice Kennedy wrote a separate concurring opinion finding that the OSH Act expressly preempted contrary state laws, so the result was that a majority of the Court agreed that this Illinois law was preempted by the OSH Act. The four dissenting justices did not find any preemption by the OSH Act with respect to this Illinois law.

However, emergency regulations will not pre-empt contrary state laws. Therefore, even if DOL promulgated an ETS, in the short term, it will have little impact in the states where it is needed the most.

On April 21, 2021, President Biden called on employers to provide paid leave for their employees to get vaccinated and recover from the vaccine. He announced a new paid leave tax credit which will fully offset the cost for employers with fewer than 500 employees.

Complicating the question of whether employers can mandate COVID-19 vaccinations is the fact that none of the three vaccines, Pfizer-BioNTech, Moderna, and Johnson & Johnson's Janssen, has full FDA approval. Rather, the FDA only provided Emergency Use Authorization (EUA) for the vaccines. According to the FDA, an EUA is a tool that helps make medical countermeasures, including vaccines, available during public health emergencies. As the FDA explained, "Under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives." Before providing an EUA, the FDA requires a manufacturer to participate in a "rigorous development process" and perform tens of thousands of tests to generate the clinical, non-clinical, and manufacturing data the FDA needs to evaluate the product.

Practically speaking, it is only after the FDA has given full approval to any COVID vaccine that employers may require their employees to take the vaccine.

E. State Law Preemption of Municipal Laws and Ordinances.

In general, most state governments have their own "supremacy clause," in either the state constitution or in the state statutory codes. These state-level supremacy clauses preclude counties, cities, and other political subdivisions from enacting laws and ordinances that conflict with state statutes and regulations. Thus, for example, the Texas supremacy clause has been used to challenge the attempts by cities or counties in Texas to impose mask-wearing requirements, given that the Texas governor, by executive order, has attempted to prohibit such a requirement.

Commentators have recognized that there are three ways in which state governments have preempted the efforts of local governments to provide protection that is greater than that under state law:

> Many state COVID-19 executive orders include express preemption that has hampered localities' ability to protect their communities. State executive orders, including stay-at-home orders, have included three forms of preemption: floor, ceiling, and vacuum.
>
> In some states, governors issued statewide stay-at-home orders but allowed local governments to implement additional restrictions based on local conditions. By establishing a **regulatory floor**, the executive orders did not prevent local governments from taking additional action to protect their residents. For example, Maryland's governor lifted the state's stay-at-home order but allowed for a flexible community-based approach, with local leaders making decisions regarding the timing of reopening. Prince George's County, Montgomery County, and the City of Baltimore . . . opted to reopen more slowly.
>
> Unfortunately, this collaborative approach is not the norm. In many states—Arizona, Florida, Georgia, Mississippi, South Carolina, Tennessee, Texas, and West Virginia, among others—the statewide stay-at-home orders established a **regulatory ceiling**. That is, the statewide orders prevented local governments from imposing stricter requirements than the state. For example, Arizona's governor issued an executive order prohibiting any county, city, or town from issuing any order or regulation "restricting persons from leaving their home due to the COVID-19 public health emergency." Similarly, the Texas attorney general warned officials in Austin, Dallas, and San Antonio to roll back "unlawful" local emergency orders that imposed stricter COVID-19 restrictions—and hinted that litigation would ensue if they did not.
>
> Some states, such as Iowa, did not have any statewide stay-at-home orders in effect but still preempted local governments from issuing their own orders, creating a **regulatory vacuum**. For example, although the Iowa governor did not issue a statewide stay-at-home order, she and the state attorney general informed local officials that cities and counties lack the authority to close businesses or order people to stay at home.

See Kim Haddow et al., "Preemption, Public Health, and Equity in the Time of COVID-19," in (S. Burris et al., eds.), *Assessing Legal Responses to COVID-19* (Aug. 2020).[12] Commentators have also noted that "States with higher levels of preemption tend to be in the Southeast and Midwest," with the result being that "states that preempt local laws more often tend to have passed fewer COVID-19-related restrictive or supportive policies" that would favor workers.

[12] Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675886.

See Mark Treskon & Benjamin Doctor, "Preemption and Its Impact on Policy Responses to COVID-19: Local Autonomy During the Pandemic," Urban Institute (Sept. 2020).[13]

Thus, even if local governments wanted to provide greater protection to employees, they may be prevented from doing so by the state-level supremacy clause, even if the state government has not itself enacted laws or executive orders addressing COVID-19 issues in the workplace.

VI. Trends Among Employers.

The current trend among employers, including law firms, is to strongly encourage, but not require, that employees be vaccinated. As of February 21, 2021, Davis Wright Tremaine was the only Am Law firm that publicly committed to mandatory vaccination for its attorneys who seek to return to the office.

Similarly, Gartner surveyed 236 Human Resources, real estate, legal, compliance and privacy leaders in December 2020 and January 2021 about their return-to-office plans. Seventy-one percent reported that they planned to encourage employees to get vaccinated before returning to the workplace, but would not require it. Only eight percent planned to require employee vaccination. Further, fifty-three percent did not plan to track the employees who received vaccinations, while twenty-five percent will ask employees to self-report their vaccination status, without requiring verification. Six percent will require employees to show proof that there are vaccinated before they return to the workplace.

Moreover, at the time of the survey, forty-five percent planned to cover or subsidize the cost of employee vaccination, while twenty-one percent said they would cover or subsidize the cost for employees *and their families.* Further, thirty percent reported that they would facilitate distribution of the vaccine to employees.

Fisher Phillips also surveyed over 700 employers about their COVID-19 vaccination policies. Similar to Gartner's findings, Fisher Phillips reported that only nine percent of employers were considering mandating the vaccine, while sixty-four percent decided against it. At the time of the survey, twenty-seven percent were unsure. Seventy-eight percent planned to encourage the vaccine, while nine percent reported that they would not, and thirteen percent had not yet decided. In addition, twenty-one percent reported that they would offer incentives to employees who got vaccinated, most commonly cash/gifts or paid time off.

[13] Online at: https://www.urban.org/research/publication/preemption-and-its-impact-policy-responses-covid-19.

According to Gartner and other sources,[14] most employers in the legal industry plan to begin transitioning their workforces back to the office in the Fall of 2021, after vaccines have been more-widely distributed and herd immunity is achieved. However, many employers already have pushed their predictions back to "sometime in 2022." Based on Gartner's survey, "Legal and HR leaders are generally taking a wait-and-see approach."

With respect to remote work, Gartner reported that more than half of the employers surveyed stated that a hybrid model of remote and in-person work would outlast the pandemic. Chris Audet, a Senior Director in Gartner's Legal and Compliance practice, observed, "Many of the changes that seemed temporary at the time have become established ways of working, and it's crucial to ensure that the legal policies and procedures put in place at the start of the pandemic are suitable for the long-term."

European law firms also recognize the "massive shift" to remote work, which will outlast the pandemic. For example, Linklaters announced a new global policy that will permit employees to work from home twenty to fifty percent of the time. Similarly, Herbert Smith Freehills will allow its employees to work remotely forty percent of the time, even when its offices are fully open and social distancing is no longer required. Slater & Gordon also reported that remote working will be "the norm" for its 2,000 staff.

In a recent RSG survey of sixty-two European law firms, more than a quarter found that remote working *increased* productivity. About half reported that they expected a long-term change in their use of office space. Respondents also noted that COVID-19 accelerated the use of technology, including video calls, electronic signatures, and document-management systems, in their practices.

VII. Personal Jurisdiction and Remote Work.

During the COVID-19 pandemic, employers have maximized employees' remote work to limit the spread of the virus. Under what circumstances will remote work subject an employer to liability in a foreign jurisdiction, *i.e.*, a jurisdiction different than the one in which an employer maintains its offices?

In order for a court to exercise personal jurisdiction over a defendant, it must have sufficient "minimum contacts" with the forum "such that the maintenance of the [claims] does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A non-resident employer's purposeful establishment of "minimum

[14] https://www.loeb.com/en/insights/publications/2021/04/countdown-to-re-entry-the-return-to-work-punch-list#Whenshouldwereturn; *see also* https://abovethelaw.com/2021/03/ropes-gray-september-reopening/.

contacts in the forum State" ensure "that [it] should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Purposeful availment requires "some act" by the employer to "purposely avail[] itself of the privilege of conducting activities within the forum state." *Id.* at 475.

In *Perry v. National Association of Home Builders of U.S.*, the U.S. District Court for the District of Maryland recently addressed whether it had personal jurisdiction over an out-of-state employer by virtue of an employee's remote work:

> In addressing whether a court may exercise specific jurisdiction over a nonresident employer in a dispute involving remote work by an employee in the forum state, courts may find purposeful availment where the employer intentionally directed contact with the forum state, such as through some combination of [1] affirmatively recruiting the employee while a resident of the forum state, [2] contracting to have the employee work from the forum state, [3] having the employee attend meetings with business prospects within the forum state, and [4] supplying the employee with equipment to do work there.

Civil Action No. TDC-20-0454, 2020 WL 5759766, at *4 (D. Md. Sept. 28, 2020). However, the court recognized, "[i]n remote-work cases, however, a defendant's mere knowledge that an employee happens to reside in the forum state and conduct some work from home does not constitute purposeful availment."

In *Hall v. Rag-O-Rama, LLC*, 359 F. Supp. 3d 499 (E.D. Ky. 2019), the U.S. District Court for the Eastern District of Kentucky held that it had personal jurisdiction over a non-resident employer with respect to the plaintiff's employment claims. *Id.* at 506-07. Specifically, the Court found that specific jurisdiction existed under Kentucky's long-arm statute because the non-resident employer "transact[ed] business" in Kentucky. *Id.* at 505. The court reasoned that: (1) the employer purposefully reached out to the employee in Kentucky to begin a long-term business relationship; (2) the employer hired the employee knowing that she "would be working primarily from her home in Kentucky"; (3) the employer frequently contacted the employee in Kentucky by phone, email, and regular mail; and (4) the employer sent a computer, monitor, and cellphone to the employee's home in Kentucky, to enable her to work remotely. *Id.* at 506.

Further, in *Williams v. Strategic Distribution, Inc.*, No. 1:06-CV-1361-BBM, 2006 WL 8435836 (N.D. Ga. Sept. 13, 2006), the U.S. District Court for the Northern District of Georgia found that a Pennsylvania-based employer purposefully availed itself of the benefits of conducting business in Georgia. *Id.* at *5. There, the employer recruited a Georgia resident to join the company. *Id.* at *6. Although the employee "chose" to live in Georgia, the employer "contemplated that she would, and in fact acquiesced in her decision to, work out of a Georgia

home office—a home office subsidized by the employer." *Id.* The court reasoned that the employee "did not buy a product from [the employer] in Pennsylvania and then take it to Georgia; nor did she unilaterally leave Pennsylvania and move to Georgia during her employment with SDI. Rather, SDI recruited and hired Ms. Williams in Georgia, and allowed her to conduct business on behalf of SDI from her home office in Georgia." *Id.*

The *Perry*, *Hall*, and *Williams* decisions align with other holdings which have addressed personal jurisdiction over non-resident employers by virtue of their remote employees. In *Cossart v. United Excel Corp.*, 804 F.3d 13 (1st Cir. 2015), the U.S. Court of Appeals for the First Circuit explained that whether the employee was a resident of the forum state at the time of recruitment, and whether the employee's remote work in the forum state was specifically negotiated and contemplated are two factors to consider in evaluating purposeful availment of a non-resident employer.

In *Stuart v. Churn LLC*, No. 1:19-CV-369, 2019 WL 2342354, at *4 (M.D.N.C. June 3, 2019), the U.S. District Court for the Middle District of North Carolina found purposeful availment where the non-resident employer never mentioned the need for the North-Carolina-based employee to relocate or travel to the employer's primary location in New York as a requirement of the position, never offered him an office in New York, never contemplated that the employee would work anywhere other than his home in North Carolina, and facilitated his work in North Carolina by paying for his phone and internet expenses.

In *Winner v. Tryko Partners, LLC*, 333 F. Supp. 3d 250, 259–60 (W.D.N.Y. 2018), the U.S. District Court for the Western District of New York denied the non-resident employer's motion to dismiss for lack of personal jurisdiction, where (1) the employer "hired [the employee] with the express agreement . . . from the outset . . . that she would work from New York"; (2) the employer provided the employee a laptop to enable her to perform work from her home in new York"; and (3) and the employee alleged that she regularly performed all of her job duties from her home in New York.

Conversely, an employee's "unilateral" decision to begin working from an out-of-state location generally will not "suffice to confer personal jurisdiction over a defendant." *Burger King*, 471 U.S. at 474; *see Grainer v. Smallboard, Inc.*, No. CV 16-4866, 2017 WL 736718, at *2 (E.D. Pa. Feb. 24, 2017) (finding no jurisdiction over a foreign employer when the plaintiff's out-of-state residence was "nothing more than a fortuitous circumstance").

In *Fields v. Sickle Cell Disease Ass'n of Am., Inc.*, 376 F. Supp. 3d 647 (E.D.N.C. 2018), the Plaintiff decided to "complete her work in North Carolina for her own reasons," and made "a unilateral decision that cannot be fairly attributed to the defendant as an attempt to avail itself of

the privileges of conducting business in North Carolina." *Id.* at 653, *aff'd*, 770 F. App'x 77 (4th Cir. 2019).

Likewise, in *Listug v. Molina Info. Sys., LLC*, Civil No. 14-386 (DWF/SER) (D. Minn. Aug. 8, 2014), the "Plaintiff was permitted, but not required, to work from home in Minnesota on occasion." *Id.* at *7-8. However, the court found that "Plaintiff's decision to work from home in Minnesota d[id] not confer jurisdiction." *Id.*; *see also Callahan v. Wisdom*, 2020 WL 2061882, at *12 (D. Conn. Apr. 29, 2020) (finding no personal jurisdiction where the employee's work location in Connecticut was "purely incidental"); *Listug v. Molina Info Sys., LLC*, 2014 WL 3887939, at *3 (D. Minn. Aug. 8, 2014) ("An agent's decision to work from home in the forum state generally does not bind an entity to personal jurisdiction in that state where the purpose of the arrangement is merely for the agent's personal convenience").

VIII. Sampling of Court Protocol.

During the pandemic, federal courts individually coordinated with state and local health officials and issued orders concerning their operating status and restrictions. A comprehensive list of all COVID-19-related federal court orders is available at the following link: https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic.

Many federal and state courts have started to reopen and hold jury trials. However, due to operational restrictions, such as social distancing and retrofitting courtrooms, a limited number of courtrooms are available for jury trials. Because of this limit and the prioritization of criminal trials, few civil trials have proceeded in recent months.

Most judges have discretion to require in-person attendance at proceedings or conduct them virtually, depending on the circumstances of each case. Where in-person attendance is required, the lawyers must follow established protocol about wearing masks and/or facial shields, social distancing, handwashing, and the use of barriers. Below is a sampling of the COVID-19-related orders from several district courts.

Under General Order No. 21-07 (Apr. 15, 2021), in the U.S. District Court for the Central District of California, the assigned judge *may* permit in-person hearings or may conduct them by telephone or video. Jury trials will commence on May 10, 2021, in the Southern Division, and June 7, 2021 in the Eastern and Western Divisions. The Order specifies that everyone in the courtroom must wear a mask, and removal of masks is permitted only for testifying witnesses, jurors being questioned individually, and in-court identifications, as permitted by the judge. Anyone who removes his or her mask must use a face shield and/or speak from behind a plexiglass barrier while social distancing.

The U.S. District Court of Maryland has resumed some in-person proceedings, including jury trials, but it also continues to conduct proceedings virtually. The court determines whether to conduct a proceeding virtually or in-person on a case-by-case basis. The court continues to enforce mandatory mask usage, the six-foot physical distancing requirement, use of plexiglass barriers, use of "listen/talk" electronic communication devices in the courtrooms, and occupancy limits in courtrooms, restrooms, and elevators.

The U.S. District Court for the District of Columbia has continued and postponed all civil jury trials through June 1, 2021. After June 1, 2021, the court will continue to prioritize the scheduling of criminal trials through August 31, 2021. https://www.dcd.uscourts.gov/sites/dcd/files/COVID%2019%20Standing%20Order%2021-10%20limited%20resumption%20of%20criminal%20jury%20trials.pdf.

Pursuant to the U.S. District Court for the Eastern District of Virginia's General Order No. 2021-04 (Mar. 18, 2021), civil jury trials will resume on May 3, 2021. However, they will only be conducted in retrofitted trial courtrooms, and criminal trials will continue to take precedence. Therefore, civil jury trials may be scheduled only when a retrofitted courtroom is not being used for a criminal trial. https://www.mssd.uscourts.gov/sites/mssd/files/Special_Order_%2313_as_docketed.pdf

The U.S. District Court for the Southern District of Mississippi has developed a jury-resumption plan, which requires staggered jury selections, a limited number of trials in each courthouse, social distancing, masks, face shields, retractable shields in the courtrooms to separate jurors and trial participants, deep cleaning of the courtrooms, and the availability of hand sanitizer. As a result of the need to observe these measures, in April and May 2021, the court will begin allowing jury trials in single-defendant criminal cases expected to last no longer than one week. In June 2021, the court will permit longer trials and those with multiple defendants. The court's criminal docket will take precedence, and "all civil jury trials [have been] continued unless the presiding judge orders otherwise."