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# COVID-19 Laws and Regs: Midyear Scorecard For Employers

By **Vin Gurrieri**

Law360 (July 2, 2021, 6:29 PM EDT) -- Employers have struggled to abide by a constantly evolving patchwork of federal and state rules since the coronavirus was declared a pandemic almost a year and a half ago, but falling infection rates have recently prompted governments and businesses to loosen the reins.

Here, experts look at where key workplace virus guidelines and mandates stand heading into the second half of 2021.

## EEOC Sheds Light on Vaccine Incentives

In May, the U.S. Equal Employment Opportunity Commission **updated its running COVID-19 guidance** to make clear that employers won't run afoul of the Americans with Disabilities Act if they offer workers an incentive to get vaccinated by a third party, such as a pharmacy or a vaccination clinic. COVID-19 is the respiratory ailment caused by the coronavirus.

If employers set up a system in which they administer the vaccine themselves on a voluntary basis, businesses can also offer employees incentives — be they perks or penalties — as long as they are "not so substantial as to be coercive," according to the EEOC's guidance.

In another section of its guidance, the commission cautioned that documentation showing an employee received a vaccination does qualify as confidential medical information under the ADA, subjecting it to a heightened level of protection.

Carole Spink, a partner at McDermott Will & Emery LLP and a leader on the firm's COVID-19 employment task force, said the May iteration of the EEOC's guidance essentially confirmed what employment lawyers had already been advising businesses to do as best practices for offering vaccination incentives.

"There was nothing surprising in the guidance, it finally just laid it out — what we had already been advising or what had been said in the past just not so plainly," Spink said. "The guidance was important because it did clarify that employers can provide incentives for voluntary programs. [There] was a big open question about, 'Am I going to get into trouble because I'm trying to incentivize people to be vaccinated?'" Spink said, noting that most employers have been providing things such as paid time off to get and recover from the shot or other low-value perks.

Blank Rome LLP partner Jason Reisman said he believes incentives are being used by a majority of employers. But even though the EEOC didn't set an upper limit for providing incentives for voluntary vaccinations not administered by an employer, it still may not be wise for businesses to dole out overly elaborate perks if the goal is to encourage workers to get the shot.

"The thing that has always given me a little bit of a queasy feeling in my stomach, even before this new guidance came out, was if the employer offers a very large incentive, some employees may actually perceive increased risk in getting the vaccine," Reisman said. "If an employer is actually paying them a lot of money to take it, they may think, 'The employer is giving me all this money because it really is dangerous.' It's kind of the opposite impact that you want to have because there

are certain segments of the population that are quite scared of the vaccine."

### **CDC Says Masks Can Come off for Some**

A few weeks before the EEOC's guidance, the Centers for Disease Control and Prevention made waves when it issued **guidance of its own** recommending that safety restrictions be loosened for people who have been fully vaccinated.

Specifically, the CDC said people two weeks removed from their final shot don't have to wear a mask or physically distance indoors or outdoors save for certain exceptions so long as no laws require otherwise. Although the guidance, which included numerous other elements, wasn't aimed directly at employers, it became the foundation for businesses to start pulling back the reins on worksite mask mandates and other precautions for workers and customers.

The CDC's guidance effectively forced employers to reevaluate and reset their policies, particularly as they pertain to having looser rules for those who aren't inoculated against the virus, said Ruth Rauls, a partner at Saul Ewing Arnstein & Lehr LLP.

"It's really triggered this cascade of discussions about what we can and can't do with respect to vaccinated and unvaccinated individuals," Rauls said, adding that the guidance caught some states somewhat off guard and **playing catch-up** to modify their own policies in light of the new CDC recommendations.

Spink similarly said that the CDC's guidance was a "game changer" in part because the agency's recommendation that vaccinated people can abide by looser rules effectively nullified the need for a sweeping mandatory federal safety standard.

"When the CDC came out with that, it really sent the message that we're moving back to reopening," Spink said. "I do think that will stay in play. The only way I could see [the CDC] peeling back on that is if we start seeing people that are vaccinated getting sick. So far that hasn't happened."

### **OSHA's Emergency Rule**

In a long-awaited move, the Occupational Safety and Health Administration **on June 10** issued a so-called emergency temporary standard, or ETS, which laid out exactly what employers must do to protect health care workers from COVID-19.

Although the U.S. Department of Labor agency's move to impose an emergency standard only on employers in the health care industry took some employers by surprise, the agency did release in concert with the ETS a set of voluntary recommendations for employers in other industries.

But labor advocates quickly argued that the DOL's actions weren't good enough, with the AFL-CIO and the United Food and Commercial Workers Union filing a joint petition on June 24 with the D.C. Circuit arguing that the emergency rule is too narrow. National Nurses United filed its own petition at the Ninth Circuit asking that OSHA's rule be reviewed.

The D.C. Circuit is the same court that **last year** denied the AFL-CIO's bid to revive a suit seeking a court order that would have forced the DOL during the height of the pandemic to issue an ETS that covered all industries. But the labor federation and the UFCW argued this time around that the DOL isn't doing enough to protect workers beyond the health care sector from the virus.

"Specifically, the UFCW and the AFL-CIO petition for review on the ground that the ETS, which protects health care and health care support service workers from occupational exposure to COVID-19, fails to protect employees outside the health care industry who face a similar grave danger from occupational exposure to COVID-19," the petition said.

### **FFCRA Nearing End of the Line**

The Families First Coronavirus Response Act was **one of the first steps** Congress took to respond to the pandemic, signing it into law in March 2020. The law included two components: The Emergency Paid Sick Leave Act and The Emergency Family and Medical Leave Expansion Act.

In short, the law required employers with fewer than 500 employees to give workers short-term paid sick time for various reasons tied to COVID-19, and long-term paid leave to care for kids whose schools or child care facilities were closed. Businesses covered by the law could also seek reimbursement of any qualifying FFCRA leave through tax credits.

When President Joe Biden **earlier this year** signed the American Rescue Plan Act, **one of the elements** in the legislative package was to extend employers' ability to keep offering employees FFCRA leave on a voluntary basis and continue claiming the tax credits through Sept. 30. The FFCRA would have expired at the end of 2020 if Congress had not extended it. The ARPA also expanded the list of reasons workers can cite to qualify for FFCRA leave and reset workers' allotted bank of leave time.

While offering FFCRA leave is only voluntary for employers, Spink said its unlikely that lawmakers will push to renew it if the vaccines remain effective and infection rates remain low, lawyers say.

"Do I see that extending? The thing with that is we need a congressional act, and I don't think you're going to see that happening unless, unfortunately, we get hit with some horrible strain and there are bigger problems ... that would necessitate some sort of omnibus bill," Spink said. "Otherwise, if things keep going positively, I do see that phasing out."

### **NY's 'First-of-its-Kind' Safety Law**

While the federal government has taken various steps to respond to the pandemic, many of the legal requirements imposed on employers — and the compliance struggles that accompanied them — were enacted on the state and municipal level. That trend has continued even as vaccination rates have risen and infection rates have decreased.

One notable example is in New York, where Democratic Gov. Andrew Cuomo in May signed into law the NY Hero Act, which he described as a "first-in-the-nation" statute that requires employers to have plans in place for preventing the spread of airborne infectious diseases — be it COVID-19 or some other pathogen.

The law directs the New York State Department of Labor in tandem with the state's Department of Health to create model safety standards for preventing airborne infectious diseases across different industries that employers can adopt. Within 30 days of those standards being published, employers must either adopt them or create their own plan that at least matches the state's requirements. The law also allows for the creation of joint labor-management committees where workplace safety issues can be discussed with input from workers, and it gives workers a private cause of action to haul employers into court if they believe a workplace airborne disease plan isn't being followed.

As the calendar turns to July, the New York Department of Labor is poised to issue model standards for employers in different industries, which will be closely watched by businesses in the state, said Carol Goodman, the New York-based chair of Herrick Feinstein LLP's employment practice.

Employers will soon be able to "look up their industry guidelines and see the minimum standards for health and safety," Goodman said.

Employers will then have 30 days to either accept the state's plan or adopt their own and another 60 days to provide the safety plan to their workforce, Goodman said.

Although the NY Hero Act is intended largely to guard against future airborne virus outbreaks, Goodman noted that the extent to which the state's model standards address future scenarios or focus on the particular dangers caused by COVID-19 remains to be seen.

"I suspect the Department of Labor is thinking about whether this safety plan for infectious airborne diseases will be more for the future and setting workplace standards in advance of the next pandemic, or whether it's going to apply ... to where we are today. If it [is the latter], there will be lesser requirements in New York. If it applies to an airborne infectious disease that's commencing, there will be more restrictions. So, I wonder if it will have different tiers."

## Cal/OSHA Charts New Path

The California Division of Occupational Safety and Health, known as Cal/OSHA, on June 17 **revised** its emergency temporary standard that **was adopted** in late November.

The updated rules, which are mandatory for employers in the state, say that fully vaccinated people don't have to wear masks, save for certain situations. They also eliminated most physical distancing requirements that prior iterations of the ETS had imposed, among other changes.

Andrew Turnbull of Morrison & Foerster LLP said that Cal/OSHA has been "fairly aggressive" in seeking compliance with its COVID-19 safety standards, which means companies in the state should make sure they aren't running afoul of the current rules.

"I think a lot of employers in California have to think about how, if they are returning to offices ... or if they are already in office ... are going to be able to comply with this," Turnbull said. "They can obviously continue to comply with all the restrictions that are out there, including having everybody wear face coverings in the workplace, or they could choose to go figure out who is vaccinated versus who is unvaccinated ... and try to implement policies and procedures around that."

Although Lindsay Ryan, a Los Angeles-based principal at Polsinelli PC, described the recent update of Cal/OSHA's ETS as a "roller-coaster" process, the revisions the agency ultimately settled on were intended to conform with Democratic Gov. Gavin Newsom's orders to reopen the state and somewhat tracked recent guidance by the CDC and the DOL. While the updated Cal/OSHA standards took effect on June 17, Ryan noted that it has no expiration date and could be further revised as the year moves along.

"One of the notable requirements in the Cal/OSHA ETS as revised is that if [employers] want to relax mask standards for fully vaccinated employees, you have to collect vaccination status information for employees," Ryan said. "Then you have to figure out exactly what you're going to collect and make sure to maintain it confidentially."

But as has been the case throughout the pandemic, the situation changed for some employers in California as the Los Angeles County Department of Public Health recommended shortly after the ETS took effect that all employees still wear masks indoors regardless of their vaccination status.

"So, I think now, at least in Southern California, employers are pausing again and thinking, 'OK, wait, are we ready to relax mask standards or not?'" Ryan said. "But the state of affairs in California is that per Cal/OSHA guidance you can start to relax the standards if you've collected vaccination status."

--Editing by Haylee Pearl and Neil Cohen.