

## The Changing Employment Landscape amidst the Covid-19 Pandemic

[00:00:02] So thank you for joining us today. I'm Kim McCauley chief human resource officer of Narragansett Bay Insurance Company.

[00:00:09] I also handle the chief human resource forum that's governed throughout southeastern Massachusetts, as well as Rhode Island with Fred Studley from Transition Solutions. And joining me today is Andrew Prescott. He is the partner at Nixon Peabody's Employment and Law Division. Thank you, Andrew, for joining us. You're very welcome. I appreciate you having me.

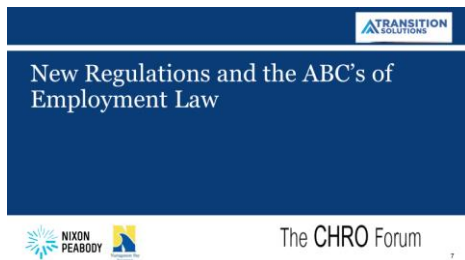
[00:00:31] So, Andrew, with this pandemic that seems to be unfolding and never ending, performance concerns were always a problem prior to the to the pandemic.



[00:00:40] And now they become an even more emphasized problem for employers to navigate through. **What advice do you have for managers out there regarding how to manage performance during a pandemic like this?**

[00:00:52] And given some of the excuses or issues that may come up as employees are trying to navigate not only their health concerns and their family concerns, but also trying to maintain performance at work, **managers need to take a deep breath and really start from the premise that the world has changed in so many ways and life has changed for them, the employer and the employees themselves, whether that's because they're now working at home or whether it's because they're just like the rest of us trying to navigate the world in the middle of this pandemic.** At the same time, employers want to make sure that employees are still doing the job and doing it well. So it's really a matter of continuing to enforce performance standards in a way that you always did while taking account for the fact that things may be much more challenging for employees, especially in some contexts. Never has communication been more important. It's particularly important now not to let something slide and to address

it sooner rather than later. **That's in part because the problem may be something that can be remedied and it may be something that's not necessarily the fault of the employee, but caused by external factors relating to the pandemic. Sure.**



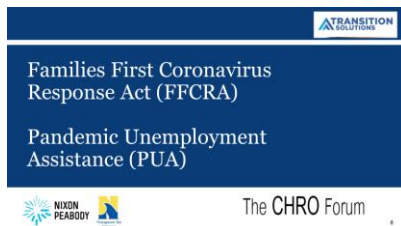
[00:02:16] So I would counsel early intervention patients where it can be exercised and all the sort of basic ABCs of employment counseling still apply, otherwise documentation, communication, progressive discipline and so forth.

[00:02:34] Sure. So it's interesting you speak about communication never being more important than it is right now. Oftentimes when managers have a co-located environment with members or staff members right outside their door. It's a lot easier to address the performance issue that's happening in the moment. Right now. You can walk outside your office and say, gee, that type of behavior or perhaps this type of report is late or this type of tone used is not appropriate. **A lot harder to do in a distance world. What advice do you have there?**

[00:03:08] **Make the effort to do it in real time, as much as possible. And sometimes that means picking up the phone, getting on Zoom sending the email.** I would counsel employers and managers in particular to try to keep the modality similar in the approach similar to pre pandemic. **So if something warranted a verbal discussion to walk out the walk out the door into the hallway kind of discussion you just referenced, then that be done by phone or through Zoom or something, as opposed to necessarily just instantly resorting to something that's written,** which of course includes email that may be more convenient sometimes, but you lose the sort of direct person to person, less formal sort of initial step in that process.

[00:03:55] So now there's a whole bunch of new regulations that have come up relative to Covid-19. We thought it was difficult keeping track of the ABCs of employment law

prior to Covid-19 in terms of FLSA and FMLA, etc., the whole alphabet soup, the whole alphabet soup. And now we have more alphabet soup to add to it.



[00:04:16] In terms of the **Family's First Act** and also the **Pandemic Unemployment Act**, how should employers navigate the waters relative to those laws in terms of time off and other types of considerations?

[00:04:31] Right. So from a high level, again, **we have to step back and acknowledge that the world has changed in so many ways.** And if you read the CDC guidelines and you read OSHA guidance, the one thing that jumps out at you is the admonition, so to speak, that **if you have any Covid-19 symptoms, you stay home.** That's right. So the government is telling our employees to stay home if you have symptoms. And what does that mean? Well, there are 11 specifically delineated symptoms by the CDC, which include everyday kind of things like a runny nose, a cough, fatigue.

[00:05:14] Are we all tired all the time or allergies or seasonal allergies? Right. Upset stomach from something you may have eaten. Right. Those types of things.

[00:05:23] So looking at employee absenteeism through the same lens as before doesn't really work.

[00:05:30] It's not fair and it's not consistent with the governmental edicts to all of us to try to control the pandemic. So and fortunately, to some degree, staying at home and telework mitigates that because employees with some of those symptoms can work. They because they're home. So they're not it's not like they're coming into the workplace. But I think that we have to **rethink our standards regarding absenteeism and giving employees some more leeway, frankly, to follow the rules, because we're all in this together.** You know, we can't say to employees, **stay home if you have symptoms or don't work if you have symptoms and then come down on**

**them really hard if they do that.** That's right. At the same time, I think we need to look for patterns of abuse and we need to really think about whether somebody's absenteeism or failure to work is indicative of something other than just trying to comply with the Covid-19 rules. I would advise employers to have the conversations about why you're not working or why you're not coming to work. **It's perfectly appropriate to ask medical questions in this environment. The EEOC has said that those questions are fair game when there's some reason to believe that there's a business necessity to ask them.**

[00:06:57] So in terms of in the past, when you know the rule of thumb for managers, was to stay away from anything, any medical discussion at all with your employees because it was not job related. Right. What you're saying now is that that lens has almost changed in terms of the EEOC today.

[00:07:11] It's changed a lot. The ADA, the Americans with Disabilities Act, establishes various restrictions on employers making what the ADA calls medical inquiries. The **EEOC specifically has said that during the pandemic, as long as you're basically staying within the confines of the CDC guidance, again, back to the symptoms and so forth, that you're not violating the ADA.**

[00:07:35] If you have a specific reason to talk to an employee about their medical condition, then you just need a reasonable basis and sort of objective evidence to be asking the questions. So if an employee, for example, is showing up and they're, you know, they've got the giant box of tissues and they're blowing their nose and coughing all over the place, it's appropriate to ask that employee about they're feeling, you know, what's going on, certainly.

[00:08:02] So almost the publication of these 11 symptoms have given the managers the right, if you will, to almost use that as a checklist to come back to you displaying these types of symptoms.

## Manufacturing Environments: When employees can not work from home



[00:08:13] And if so, I do need to ask you to go home or not report to work today. That's right. That's right. Thank you for that guidance about encouraging employees to continue to work from home when and if they're able to. That certainly works well in office settings or those types of professions that have the ability to do so. But given the fact that **if a company is a manufacturing environment or has those types of jobs that just aren't conducive to working from home, how do they continue to manage these this absenteeism or mandate to stay at home?**

[00:08:48] If you're exhibiting any of the 11 symptoms that might not be Covid-19 related, you have a manufacturer who just wants to run a business and perhaps some labor force that they can't have a stabilized labor force reporting to work every day due to these restrictions. What advice do you have there?

[00:09:05] Well, and planning is **planning is everything**. Employers, especially with this second or maybe we're in the third surge, I'm not even sure. But, you know, things are getting worse right now rather than better, frankly, in terms of Covid. So the employers in the manufacturing sector **have to plan for increased employee unavailability**. They don't have, as you said, that telework option for people who are making things. So in that case, they just have **to accept the fact that the production may be diminished, that they may need to evolve into more staggered shifts or somehow structure the workforce so that not everybody's in at the same time like they used to be**.

[00:09:49] There may be parts of the operation that run at one time in parts of the operation that run it another time. I'm aware of a number of manufacturers taking that approach.

OSHA  
Federally one size fits all

State Law has filled the void to  
inspect workplaces



[00:09:59] But they have to make really the same calls in terms of whether it's appropriate to have somebody in the workplace, **all employers are governed, for example, by the OSHA general duty clause, which mandates generally that all employers provide a safe work environment. And in the middle of a pandemic, permitting or encouraging employees to be at work when they're exhibiting symptoms of Covid-19 doesn't satisfy that obligation.**

[00:10:30] Thank you for bringing up OSHA. There is some contradiction in the workplace right now. It's particularly in terms of human resource professionals that **OSHA may not have taken as strong of a stand as we wish they had in terms of declaring or identifying a safe place to work or not a safe place to work in terms of Covid-19 in the symptoms** and the types of restrictions that employers should make. Can you speak to your opinion on that? And **how should an employer navigate a safe place to work without clear, strict conditions by which they have to abide by?**

[00:11:03] The states have largely filled the void in that respect. And in some ways that may be more appropriate because by definition, OSHA standards are federally one size fits all. And so while **it's appropriate in normal times to have common standards across industries and across types of employment during a pandemic, that may not work as well. And so you see states, Rhode Island and Massachusetts, for example, inspecting workplaces and requiring specific plans about how to keep the workplace safe** and to protect employees. So I think that we've done OK in that regard. Filling the void.

[00:11:50] You see other states with their own state, OSHA systems also jumping in here, California and Virginia and some other states. So those states have taken a sort of more formal and structured approach. I think largely that's been good for employers.

You can debate whether it's been good for employees, but hopefully employers are doing the right thing anyway.

[00:12:13] Yeah, I'm glad you brought up the fact that the state governments have jumped in to fill the gap relative to OSHA. Many of the organizations that I work with who do have facilities in Rhode Island and Massachusetts that you've just described and also facilities elsewhere in the United States have adopted the state laws on the state controls that Rhode Island and Massachusetts have put into place, despite the fact that they're state that they're currently headquartered in or have facilities and aren't utilizing those same types of stringent guidelines.

[00:12:48] So to your point that **OSHA, while it may be mandated across the entire broad geographic U.S., many of the employers are continuing to utilize the state laws that a little bit more strict and and adhere to the control plans** and good for them.

[00:13:03] Right, because, you know, they're going the extra mile even sometimes where they don't have to to try to protect the employees.



[00:13:09] And what better way to say we have a safe place to work? Right. So **how should an employer handle situations where employees knowingly or continually violate those types of restrictions that are put into place are coming to work?**

[00:13:23] I've had this question from clients.

[00:13:26] You know, unfortunately, despite employers best efforts and in most cases clear communication about what the protocols are, some employees, for varying reasons, will ignore those protocols and come into work when they're not feeling well or

exhibiting symptoms of Covid-19. **And that puts an employer in a very difficult box, because on the one hand, you know, we want employees to come to work, but on the other hand, they're endangering others in the workplace, in the business and potentially customers as well to the extent that customers are in the workplace.** So the employer has a wide range of disciplinary options available like any situation in that case.

[00:14:13] One consideration is sending a message to the workplace that these protocols are serious and can't be ignored. To the extent that an employer just ignores this or or treats it very lightly, you you might be concerned that that sends a message to other employees, you know, come on in. You know, we'd rather have you here than following the rules. That's right. I'm aware of some employers who have taken very strict disciplinary actions when somebody knowingly comes to work feeling a symptom, experiencing a symptom of Covid-19. **If somebody is employed at will, which, you know, most employees in this country are, they can be terminated for violating these protocols. A couple of things to keep in mind. Most employers do try to follow. Progressive discipline and so taking into consideration the factors, the circumstances of that situation, you know, how serious were the symptoms? To what extent did the employees present in the workplace expose others to their symptoms? What compelled the employee to come in where they under some particular pressure, did a manager or a supervisor contribute to that, although circumstantial things should be taken into consideration.**

[00:15:30] But at the end of the day, it's the employer's right to decide how far to go in terms of discipline in that situation.

[00:15:36] Sure, this certainly puts employers and human resource professionals in a very tough spot. To your point, on one side, you have the business who wants to maintain a certain amount of production levels and a certain amount of goals. On the other side, you have employees who want to maintain a paycheck and may have types of obligations at home that encourage them to come to work when they may experience a Covid-19 symptom that they may feel is just natural.

[00:16:04] I've had a headache for three days or I always get headaches or I'm feeling a little nauseous today while I may have eaten something that I shouldn't have. And in



those cases, I think I've heard you say it's really about communication of the clear parameters by which people are doing their self checks prior to coming into work and H.R. and managers and forcing those to ensure that everyone understands that the organization is taking these types of restrictions very seriously.

[00:16:31] So not only has Covid-19 been a continuing, unfolding, changing blob of mess, that's a good I like that blob of mess.

[00:16:39] It is better proof of that that we thought was ending. And it keeps going on and on. And here we are approaching the holidays.

[00:16:46] And I bring that up because the question comes up as to **how far employers should go in ensuring that employees follow social gathering rules and guidelines that are set, i.e. as they continue to think about preparing for the holidays and gathering with families and getting together with loved ones.**

[00:17:08] When you may have a state or a government mandate that is limiting those types of social gatherings. But it's not a law specifically preventing anybody from breaking the law.

TRANSITION SOLUTIONS

When is it OK to ask an individual employee questions about their COVID-19 status ?

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[00:17:19] So how far should employers go per say that if they know employees are gathering in larger gatherings in the state, restrictions at their home, **where do you draw the line from an employment perspective?**

[00:17:30] Right. Because normally we would look at this and say that's out of work conduct. It's their own decision to make and it's not our business as employers. That's right.

[00:17:42] The old golden rule, if it's not job related, you stay away from the conversation. That's right.

[00:17:47] Like many things in this Covid-19 era, that's changed. So your question is a difficult one in the sense that, again, **that private behavior, that off work behavior can have serious impacts for a business and for the other employees, many of whom will be following the rules and making sacrifices not to gather with their families or, you know, extended friend networks during the holidays. So what's fair and how far does an employer go in theory anyway? Again, getting back to employment at will, an employer can terminate or discipline an employee who doesn't follow those guidelines about gathering during the holidays. Should an employer do that? It is a more difficult question that we get into as much the law as employee relations.**

[00:18:43] And practically speaking, how will employers police this activity, you know, or are you going to just act when you find out through Facebook or workplace gossip,

[00:19:01] And also, I mean, can you imagine the employee relations or the culture that you might create as an employer if you terminated an employee because they gathered with their grandmother and grandfather and siblings in a home for Thanksgiving?

[00:19:13] Yeah, exactly. And you asked me about manufacturers earlier. I've had this question come up specifically from some of my manufacturing clients who have that, as we discussed earlier, that inability oftentimes to telework. So the impacts for them of somebody violating the rules and becoming sick and potentially infecting the workplace is heightened. I think the best approach to this is for the leader, whoever that may be, whether it's the **CEO or the CEO, to communicate in in the most effective way possible that, you know, these folks know how they can sort of speak best to their workforce and just urge people to follow the guidelines and talk about the consequences to.**

[00:20:01] The workplace and the business and talk about shared sacrifice for everyone, and hopefully people will do the right thing.

[00:20:08] If you find out that somebody didn't know, you need to think long and hard before actually imposing disciplinary action. Maybe the best result is to exclude somebody from the workplace for a period of time, because now we have a diminished confidence in whether they might be more likely to transmit the disease in the workplace than others.

[00:20:32] So that's a very good angle that you've just suggested is rather than a strong arm such as termination, perhaps if you as an employer are aware that an individual has violated your social gathering protocols, that you as an employer have done a very good job communicating, which is what you started the conversation with, that perhaps you look at other alternatives, such as a leave of absence or an unpaid time off or even taking advantage of the Rhode Island Unemployment Assistance Program during the pandemic for the two week period of time. Right. So that you can maintain a safe place to work. Right. Because that's what you're speaking about. **Our job as human resource executives or CEOs is to ensure that our workplace is a safe place to work. And the way that we do that is if knowingly we know somebody has violated some of the protocols that we've clearly communicated is to identify ways to remove them.**

[00:21:27] Right. And we need to be consistent in all of this to so making sure that we **treat similarly situated people the same in this regard is important because of concerns not only of fairness, but also liability for discrimination.** You obviously can't be harsher with people in protected classes than you would people who are not in those protected classes.

[00:21:51] So, Andrew, you keep sharing with us the fact that communication is key. Clarity is key to ensuring that these protocols and restrictions are known almost top of mind. And we know some of the states like Rhode Island and Massachusetts provide Covid-19 control plans is what they call them. Each employer fills out and makes public to their employees and posts throughout their buildings. But those don't speak specifically to the question we just spoke about relative to social gatherings or relative to even travel that has now just come up some of these travel restrictions. What advice do you have for employers to ensure that they are communicating that consistently and clearly in a world that constantly is changing? Which state is on the forbidden can't travel to state list? Or is social gatherings at 10 or five or 20? Right. You know, how

should employers keep that fresh and communicate that so that you don't have your employers violating something that you're trying to adhere to?

[00:22:54] Right. So **one thing I recommend is that somebody internally be designated as the person who keeps continually abreast of all those developing and fluctuating requirements.** It's nice to think that everybody watches the news and pays attention to all this.

[00:23:14] But really, there needs to be **somebody internally who's accountable for knowing at any point in time what the current requirement is and whether it has shifted.** Then you have the ability to, in a timely fashion, get that out to employees. And so then it becomes a question of how I mean, is it I think studies show that adults learn best through repetition and also by receiving information through various modalities. So I would encourage employers to **use of a variety of communication tools to mix it up** so that people don't just start, you know, clicking on the email and not paying attention.

[00:23:52] And we have fortunately today, because of technology, so many different modalities of communication. I think it's most effective, at least from time to time, for someone at higher levels of the organization to get on the Zoom call or the WebEx and virtually look employees in the eye and talk about what's important and why following the protocols are critical and what the impacts are of not doing so on the business and also the concern for employees and their safety.

[00:24:23] I think that goes a long way in this period where employees can feel isolated and sort of disengaged for leaders to be, you know, really proactive with that kind of communication.

[00:24:36] Yeah, just along those lines, **I've seen some great work done by the human resource departments in terms of online training for managers** that are really geared specifically towards Covid-19, **specifically about how to identify symptoms, how to reinforce social distancing and ensuring it's almost a compliance training where each manager has to complete that.** Then have a discussion with their H.R. representative about how to manage and handle some of these combinations in situations that are unfolding, so that was great advice that you just had about leaders, particularly higher executives getting on calls or zoom meetings

or looking people virtually in the eye to show that they have a great concern about their safety and not their employee well-being is very important to them.

If an employer knows that an employee who is coming to work is pregnant, what should the employer do?



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[00:25:26] I think it and in sharing that type of advice, we may go too far. Sometimes they go too far. Right. And blend that line. And executives or employees or managers may step over that boundary and **start asking about people's health or protecting their safety if they know an individual is pregnant, per say, and trying to advise or encourage them not to come to work because they really do care about their safety.** Sure. Or if somebody had an attack or may have another underlying condition, then an employee, a manager steps in to try to protect that employee.

#### Americans with Disabilities Act ("ADA")

The ADA protects "qualified individuals with a disability."

- The ADA prohibits employment discrimination based upon a mental or physical disability against an employee or job applicant with respect to positions for which the individual is qualified.
- The ADA requires "reasonable accommodations" in hiring process and during employment, certain limitations on obligation



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[00:25:59] Is that the right thing to do it? **It is not with pregnancy. So pregnancy is considered or discrimination against somebody based on pregnancy or pregnancy related condition is considered sex discrimination under Title Seven.** So you have to be very careful about not acting based on just pregnancy. On the other hand, it may be that the **persons with pregnancy complications have the right to reasonable accommodation under the ADA.**

[00:26:33] So it sort of works both ways in this regard. **But employers should not direct pregnant employees not to be in the workplace. That is fairly clear sex discrimination and violative of Title Seven.**

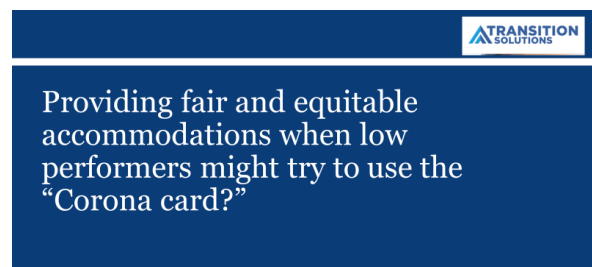
[00:26:51] So that's a very good point. So what I think you're saying or what I'm hearing you say is even if an employer or a manager steps in because they want to care for the employee who's pregnant, they really should not be discussing that or asking that person to work from home. Right. **Unless they're doing that universally throughout their workplace, to any individual that has an underlying condition and support them working from home.**

[00:27:15] Right. So your point is don't just identify the pregnant individual in the in the business and ask them to be treated differently than the rest of the workplace.

[00:27:24] Right.

[00:27:25] And to be clear, again, **pregnancy in of itself is not a disability under the ADA, complications from pregnancy, childbirth maybe, and require an individualized assessment like any disability situation in terms of the obligation to reasonably accommodate and the direct threat analysis under the ADA.**

[00:27:48] Yeah, tricky, tricky slope that we are all on right now. Call your employment lawyer. Yeah, that's a very good one at Nixon Peabody for sure.



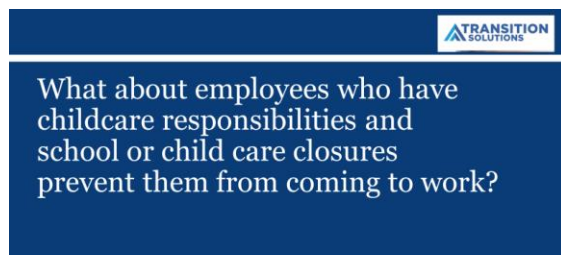
[00:27:57] So excellent advice as this slope continues to get deeper and deeper. And, you know, one thing that we really haven't spoken about is individuals who may utilize the excuse that they live in an environment or live with somebody who may have underlying conditions, which then prevents them from coming to work, which really isn't directly related to that employee, but is related to the environment with which they live. **In other words, employees who try to use the “Corona Card.”**

[00:28:26] Right. So how do employers successfully navigate that type of accommodation or request?

[00:28:32] So let's just start out with the legal rules that apply to this legally. **An employee is not entitled to reasonable accommodation because they have a relative with whom they live or somebody else with whom they live, who has a disability and may be particularly susceptible to Covid-19.**

[00:28:53] So let's take, for example, some sort of breathing issue, COPD or severe asthma or something of that nature.

[00:29:02] That person at home is clearly more susceptible to Covid-19 than the average person in the population. **But the employee, him or herself or their self is not disabled and thus not entitled to reasonable accommodation.** So to the extent that an employer can be flexible and allow that person to be at home and telework, fantastic, that's understandable why that person may want not to come into the office. And, you know, that may be a great employee relations opportunity and create goodwill, but it's not a legal requirement at that point.



[00:29:40] Wonderful for you to speak about the difference between employee relations and legality. Right. Because I think that's the fine line we really are balancing throughout this Covid-19 Pandemic. And so interesting that you just spoke about underlying health conditions at home. **What about employees who have childcare responsibilities and the pressure that is on?**

[00:30:01] And right now, whether that be school environments or virtual child care environments that may have had an outbreak and have to shut down, how do we as employers balance those types of requests and accommodations, even though it's not directly related to the employee's inability to work? Right. But it is their family responsibilities that is preventing them from coming to work.

[00:30:22] So first and foremost, we need to comply with the FAFSA. So it **may be that under the circumstances, the employee is eligible for paid time off or Emergency Family and Medical Leave Act leave because of the unavailability of child care.** And so we need to make sure we're complying with those requirements, which, by the way, will expire in December 2020 unless Congress acts.

[00:30:50] So stay tuned on that. But employers need to be thinking about, you know, what do I do if that doesn't continue to apply? How am I going to meet those really serious dilemmas that employees find themselves in?

[00:31:04] Right. And what happens in a situation that somebody who you know, we all I think when all of those regulations were created, it was in the perspective that the Pandemic would have been under control by now. Exactly. And so some of those protections for employees were built in a short term duration versus a longer term. And so some people may have expired those types of protections. How does an employer balance that in terms of employee relations and legality?

[00:31:36] it's a hard call to make and you **have to ascertain how far you can go in being flexible and allowing people either the time off they need or the teleworking opportunity. And at the end of the day, make the best decision for both the employee and the organization.**

[00:31:54] I don't there's no magic answer to that, except, you know, keep in mind that employee retention and employee relations and, you know, fairness in the workplace are also important considerations, even when you're not legally mandated to provide something to an employee.

[00:32:12] That's right. And I think what we're learning is definitely in the H.R. community, the more we can air on **the generosity side of working from home, it really is the win on the war for talent.** You know, **we started to see employee candidates who the very first question is, do you provide some type of flexibility to work from home arrangements and is it full time?** And so the more we can continue to keep our businesses running, whether that be in a remote status or a hybrid status, that's really the winning ticket.



[00:32:40] Right. And employees, when it comes to this kind of a thing, have long memories. I mean, these go to sort of the fundamentals of their lives, their kids, their families, their health, and so doing the right thing. And I know that's easier to say because employers have needs, but doing the right thing now will go a long way.

[00:33:00] Conversely, you know, not being patient enough and not being flexible enough will be something that employees remember and that may manifest itself in them looking for another job. It may manifest themselves in other sort of less favorable behavior in the workplace.

[00:33:17] So, Andrew, as you suggested just moments ago, you know, creating a great place to work or a great culture where we have flexibility and allow people to balance their lifestyle needs in terms of working from home and also coming into work when needed is really the key. **I'm seeing more and more employers doing like a hybrid schedule where people are still working remotely and then coming into work on a hybrid part time basis.** And in that that has created the risk of exposing folks to a positive Covid-19 case by an employee coming into work. And one of the things that we are navigating through is protecting employees rights via HIPPA laws and other privacy laws regarding if they are diagnosed to a Covid-19 positive case. So examples of if their employee does come into work and reports recently that they have been Covid-19 positive. You know, employers are following the CDC rule in terms of social distancing, in terms of contact tracing to identify who else in the workplace may have been affected, affected by this, and then encouraging those individuals not to report back to work for the duration of the quarantine time.

TRANSITION SOLUTIONS

Protecting employee health privacy while contact tracing at work

NIXON PEABODY

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[00:34:34] In doing so, **that creates a lot of chit chat and chatter across the workplace of who might have become Covid-19 positive. Right.**

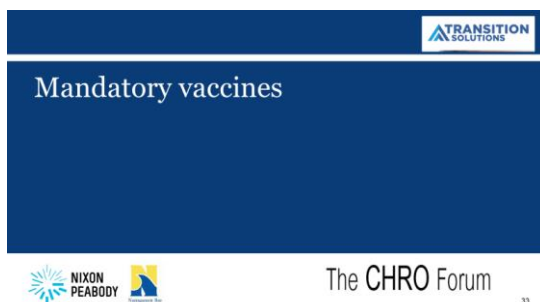
[00:34:44] What suggestions do you have for employers in terms of how to protect the employees rights who may be Covid-19 positive and also create a safe place to work by not identifying that individual, but still following the CDC rules?

[00:35:01] Yeah, I think I think the CDC and other governmental authorities in **addressing this issue have urged employers to communicate in a way that provides sufficient information to the other employees without individually identifying a Covid positive employee.**

[00:35:21] So saying to folks, you know, **someone on the 14th floor has tested positive for Covid** or in other ways, giving people information that within their immediate work area or scope of contacts, a coworker may be positive, but not going any further than you need to in that regard to give people the information they need to be careful or tested or do whatever they're supposed to do because they had direct contact.

[00:35:53] It may be in a particular work environment that just having somebody on your same floor may not mean that you had direct contact. Another in other work environment, it may mean that you did. So you have to be workplace specific to about that in terms of legal liability. You know, **a lot of employers are not covered entities when it comes to HIPPA. So HIPPA may not apply.** And probably other confidentiality of health care laws at the state level may also not apply because those typically apply to information that's coming directly from a health care provider.

[00:36:29] So there are there is some flexibility, but it is important, out of respect and for other reasons, not to give individual names and other information unnecessarily.



[00:36:41] Ok, Andrew, let's talk about the real headline news with a vaccine that's likely to go to nationwide distribution very soon. Naturally, **employers are wondering, can they mandate that their employees become vaccinated?**

[00:36:54] There is no general federal law that answers this question across the board. So we have to look at other existing laws and determine whether or not mandating vaccination would be legally problematic. **The EEOC has said that an employer cannot impose a “no exception” mandatory vaccine requirement, and that's because there are laws that would require accommodation of an employee under some circumstances who was refusing to be vaccinated.**

[00:37:31] **The Title Seven Protection Against Religious Discrimination, for example, may require that an employer accommodate an employee who was refusing to be vaccinated on religious grounds in Americans with Disabilities Act.**

[00:37:47] Similarly, **may require accommodation of an employee who's refusing to be vaccinated because the vaccination may cause them harm in light of a pre-existing disability.** So we need to be careful about not violating those laws and not retaliating against employees who assert their rights under those laws not to be vaccinated. The other major statute that we ought to be thinking about here is the **National Labor Relations Act, which protects employees who are engaged in concerted, protected activity. A group of employees who were joining together in resistance to a mandatory vaccination policy would indeed be engaging in concerted protected activity.** And therefore, an employer who took adverse employment action against those employees could possibly be violating the National Labor Relations Act. We also have **workers compensation laws at the state level and the possibility that adverse reaction to vaccines may trigger an employee's right to compensation under those statutory schemes.** We also have to take into consideration that information will continue to emerge about the safety of the vaccines for particular populations.

[00:39:12] There is already some indication that the Pfizer vaccine may cause some moderate to severe allergic reactions in folks who have pre-existing allergic conditions. And in fact, the **recommendation from health care providers may be that some of those folks do not get vaccinated.** So any policy that would be put into place would also have to take into consideration such situations. We recommend for all of these reasons that employers not mandate vaccination, but instead strongly encourage it. **The**

**other thing that employers may want to do is to consider paying any costs that employees may incur in getting vaccinated.**

[00:40:02] The law is that health care providers must provide the vaccine that no charge but can impose an administrative fee for being vaccinated. To the extent that private insurance or Medicare or Medicaid don't cover those costs, an employer may also want to reimburse them as another way to encourage widespread vaccination in the workplace.

[00:40:26] Thank you so much for all your advice and counsel today. You know, the whole time we've been talking, it really has reinforced to me that, as you know, executives in the H.R. space for years we have been able to "play in the employment legal space" fairly competently. We've kind of, you know, already gotten our punches and scrapes in terms of FMLA and ADA. And so oftentimes in H.R. departments, we can play employment lawyer and can do it very well, especially those level one or level two type cases that are clean and cut clear and dry. And as long as you know the employment law, you can navigate through them. What has become evident to me is Covid-19 has thrown a complete curveball and with the constant changing regulations and the intertwining and messy spaghetti bowl that wraps itself around employment law, we really, really need a hotline partnership to an employment lawyer. And as H.R. professionals, quite frankly, we shouldn't be navigating these choppy waters alone, which I'm sure you've got a perspective on that.

[00:41:38] Yeah, I mean, I do agree. I think that that so much has changed in such a short amount of time that even employment lawyers who are sort of dedicated one hundred percent of the time and keeping up on all of it struggle to do so, it's just not realistic to expect that HR professionals, who have so many other things on their plate to be as up on all the nuances of all the laws. And we spent so much time immersing ourselves in FFCRA when it first came out. And then, you know, as you alluded to, then the guidance comes out.

[00:42:12] You need to learn that. **You need to figure out how old laws apply to this new situation.** And that's just not something even you know, that the H.R. professionals with decades of experience can necessarily do without and without some

help. So we employment lawyers are here to help. And it's important to utilize our knowledge and consult that resource.

[00:42:38] And so if an organization doesn't currently have a relationship with an employment lawyer or it doesn't feel they need an employment lawyer's guidance in terms of other types of employment law, you're available for Covid-19 hotline. Quick, quick question.

[00:42:54] Yeah, spent a lot of my time doing it.

[00:42:56] Thank you so much for joining us today. I found this extremely interesting and completely, completely helpful.