HR Updates for Employers in 2022

January 2022

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Presenters

Mike Bourgon

Employment & Labor Law Attorney

SYNERGY HUMAN RESOURCES

Gretchen Thompson

Sr. HR Generalist and Consultant

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Housekeeping

Please submit any questions by using the questions box on the control panel.

A short survey will pop-up when leaving the webinar. We appreciate you taking the time to provide feedback.

This session is being recorded and will be available and shared with you in a follow-up email.

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TOPICS INCLUDE:

- Update on the OSHA COVID-19 vaccination and testing mandate after the recent Supreme Court decision to block it – What is still in effect
- CMS Rule: Healthcare Staff Vaccine Mandate – What guidance and timeframe applies
- Pay Equity Update – What is coming and how to prepare
- Noncompete Agreements Update – What is "in the wind“
- Stopping Harassment and Bullying before it Starts – What to do to prepare
- Effectively Implementing Social Media Policies in Response to New National Labor Relations Board (NLRB) Rules
- Recommended Updates to Employee Handbooks for 2022

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Supreme Court Greenlights CMS Healthcare Facility Vaccine Mandate, Blocks OSHA Vaccine-or-Test Mandate

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COVID-19 Vaccination and Testing Mandate Update

On January 13, 2022, the U.S. Supreme Court ruled on two related appeals seeking emergency relief from COVID-19 vaccination mandates. In one ruling, the Supreme Court stayed enforcement of a rule that would have required workplaces with 100 or more employees to adopt "vaccine-or-test" requirements. In the other, the Supreme Court permitted the Centers for Medicare & Medicaid Services (CMS) to impose COVID-19 vaccination requirements in virtually all healthcare facilities – with no testing options.

COVID-19 Vaccination and Testing Mandate Update

On January 25, 2022, OSHA announced that it was withdrawing the ETS as an enforceable emergency temporary standard, noting that the decision was made after evaluating the Supreme Court's decision.

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COVID-19 Vaccination and Testing Mandate Update

Following the Supreme Court's ruling, CMS issued additional guidance with new compliance deadlines for its rule. Through its guidance documents issued 12/28/21, 1/14/22, and 1/20/22, CMS establishes three separate compliance timelines: one for states that were already subject to the vaccination mandate, one for states that were subject to the vaccination mandate pursuant to the Supreme Court's decision, and one for Texas, which was subject to an injunction that was lifted a week later following the Supreme Court's decision.

CMS Rule: Healthcare Staff Vaccine Mandate

Procedurally, the Supreme Court's ruling on the CMS Rule is a temporary stay of the lower court injunctions pending resolution of the merits of the case. Practically speaking, however, the Supreme Court's reasoning will likely be followed by the lower courts as the case continues on the merits, and healthcare facilities will need to come into compliance before the case is resolved to avoid potential enforcement action.

CMS Implements the CMS Rule – Different Compliance Timelines for Different States

When the Supreme Court agreed to hear the case on 12/22/21, the CMS Rule had been blocked in 25 states by three federal appellate courts. CMS issued guidance (including facility-type-specific guidance) on 12/28/21 setting forth CMS's plan to proceed with implementation and enforcement of the vaccination requirements in states where the CMS Rule had not been enjoined by court order—25 states, the District of Columbia, and the U.S. Territories. On 1/14/22, one day after the Supreme Court lifted the lower court injunctions, CMS issued additional guidance setting forth a modified timeline for providers and suppliers in states where injunctions were lifted by the Supreme Court's ruling.

CMS Implements the CMS Rule – Different Compliance Timelines for Different States

Except for compliance deadlines, the guidance documents are substantively the same. Notably, when the Supreme Court issued its ruling, one state—Texas—was still subject to an injunction against the CMS Rule pursuant to a 12/15/21 order from the U.S. District Court for the Northern District of Texas. Pursuant to the Supreme Court's precedent, the Texas district court lifted the injunction and dismissed the case on 1/19/21. Shortly thereafter, CMS issued a third guidance document outlining a compliance timeline specific to Texas.

CMS Implements the CMS Rule – Different Compliance Timelines for Different States

Please see handout for information on:

- What does the guidance say?
- Which CMS guidance document applies to which states?
- What are my compliance timeframes?

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Shorter COVID-19 Isolation And Quarantine Periods Will Impact Workplaces

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Shorter COVID-19 Isolation And Quarantine Periods Will Impact Workplaces

The CDC announced changes on December 27, 2021 to its isolation and quarantine period recommendations for those who test positive or are exposed to COVID-19. It later further modified that guidance on (i) December 29, 2021 without any formal announcement; and (ii) again on January 4, 2022 with updates to its "isolation" and "quarantine" definitions. Our guidance for the workplace follows.

Updated CDC Guidance: This guidance applies to all individuals, including those who physically enter or are expected to enter a workplace, although separate guidance applies to those working in the healthcare industry.

1. Isolation period may be reduced for certain individuals who test positive.

a. The CDC reduced its recommended isolation period from 10 to 5 days for an individual who tests positive, regardless of vaccination status, where the individual: (i) is not immunocompromised or a member of a high risk congregate setting (like a homeless shelter, cruise ship, or detention facility); and (ii) is asymptomatic, or has symptoms that are resolving (without fever for 24 hours). After the 5-day isolation period, if the individual is not immunocompromised or a member of a high risk congregate setting and is still asymptomatic or their symptoms are resolving (without fever for 24 hours), the individual no longer needs to isolate but should wear a mask for an additional 5 days when in contact with others to minimize the risk of infecting people they encounter.

1. Isolation period may be reduced for certain individuals who test positive.

If, however, symptoms appear after testing positive, the 5-day quarantine period will restart from the date symptoms first appeared. And, if existing symptoms are not resolving, the individual should remain in isolation consistent with current CDC or local public health authority guidance. (The CDC currently recommends that individuals with COVID-19 isolate until at least 10 days has passed since symptoms appeared (or 7 days after receiving a negative test result), the symptoms improve, and the individual is fever free for 24 hours without the aid of fever-reducing medications.)

1. Isolation period may be reduced for certain individuals who test positive.

b. In its January 4th update, the CDC advised that the "best approach" is for an individual who is isolating, "wants to test," and has testing access, to get re-tested with an antigen test at the end of the 5-day isolation period if they continue to be asymptomatic or they are fever-free without the use of fever reducing medications and symptoms (besides loss of taste or smell) have improved. Under this "best approach," if the second test is positive, the individual should continue to isolate for the full, original 10-day period. If the second test is negative, the individual can leave isolation but should continue wearing a well-fitting mask around others until after 10 days have passed since the initial positive test. The CDC's advice on re-testing seems intended to serve as an optional "best practice," but falls short of the more direct rules given elsewhere throughout the guidelines.

1. Isolation period may be reduced for certain individuals who test positive.

c. Travel must be avoided during the 5-day isolation period and is not recommended during the subsequent 5-day period. If travel is essential on days 6-10, the individual should wear a well-fitting mask. Individuals who are unable to wear a well-fitting mask should not travel for 10 days after symptoms appeared or the initial positive test.

1. Isolation period may be reduced for certain individuals who test positive.

d. Isolating individuals who tested positive or who have COVID-19 symptoms should not go to places where they are unable to wear masks (the CDC gives the example of gyms and restaurants) and should avoid eating around others until a full 10 days have passed since the initial positive test or symptoms first appeared.

1. Isolation period may be reduced for certain individuals who test positive.

e. Isolation guidance differs for individuals in high-risk congregate settings and for people who were severely ill with COVID-19 or have a weakened immune system (immunocompromised). For individuals in high-risk congregate settings that have high risk of secondary transmission and where it is not feasible to cohort people (such as correctional and detention facilities, homeless shelters, and cruise ships), the CDC recommends a 10-day isolation period. During periods of critical staffing shortages, facilities may consider shortening the isolation period for staff to ensure continuity of operations.

1. Isolation period may be reduced for certain individuals who test positive.

For individuals who were severely ill with COVID-19 or are immunocompromised, the CDC advises that isolation periods may be longer (at least 10 to 20 days), and that testing may be required to determine when such individuals can be around others. The CDC advises individuals with severe COVID-19 and immunocompromised individuals to consult with their healthcare provider about when they can resume being around other people.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

a. Individuals who had a close contact with someone with COVID-19 or suspected to have COVID-19 should quarantine for 5 days from the date of the last contact and then mask for an additional 5 days when around others if the individual is:

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

1) over 18 years old and completed the primary series of Pfizer or Moderna vaccine *but have not received a recommended booster shot or an additional primary shot if immunocompromised*, when eligible; or
2) over 18 years old and completed the first shot of the Johnson & Johnson vaccine over 2 months ago and has not received the booster shot or an additional primary shot if immunocompromised; or
3) between 5 and 17 years old and has not completed the primary series of Pfizer or Moderna vaccine; or
4) unvaccinated.

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2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

The CDC noted in its press release that if a 5-day quarantine is not feasible (without explaining what "not feasible" means), the individual does not have to quarantine - but that language is not included in the more recent guidance, suggesting that the CDC favors adherence to the shortened quarantine period. Nevertheless, the CDC emphasizes that it is critical that the individual wear a well-fitting mask at all times around others for 10 days after exposure. Individuals who are unable to wear a mask around others should continue to quarantine for 10 days.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

b. Individuals who (i) have received their booster shot and/or additional primary shot (if immunocompromised); (ii) are between 5 and 17 years old and have completed a primary series; (iii) had a confirmed case of COVID-19 using a viral test within the last 90 days; or (iv) are within the 6-month and 2-month vaccination periods do not have to quarantine, but should wear a mask for 10 days after their exposure.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

c. The CDC recommends, however, that exposed individuals who do not develop symptoms should get tested on the 5th day after close contact to the extent possible and cautions that, if the individual tests positive or develops symptoms, the individual should isolate for at least 5 days from the date symptoms began or, if asymptomatic, from the date of the positive test. If testing is inaccessible, the individual can leave quarantine if symptoms have not appeared and masks are worn for the additional 5 days.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

d. The CDC also recommends that exposed individuals not travel until they are able to get tested on the 5th day after close contact and only resume travel upon receipt of the negative test and upon confirmation that no COVID-19 symptoms have appeared. If exposed individuals cannot get tested, they should avoid travel for 10 days. If travel is essential, well-fitting masks should be worn for the entire 10-day period. If masks cannot be worn, the CDC recommends that the exposed individual not travel.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

e. Like isolation guidance, quarantine guidance is different for individuals in high-risk congregate settings. The CDC recommends a 10-day quarantine for individuals in certain congregate settings with a high risk of secondary transmission (such as correctional and detention centers, homeless shelters, or cruise ships) regardless of vaccination and booster status. During periods of critical staffing shortages, facilities may consider shortening the quarantine period for staff to ensure continuity of operations.

2. Some individuals must quarantine when exposed to an infected or suspected infected person, while other may not.

f. Finally, the CDC recommends that exposed individuals try to avoid other people (including those in their own home), avoid going to places where masks are unable to be work (e.g., restaurants, gyms, etc.), and to avoid eating around others until 10 days have passed since exposure.

What this means for the Workplace

These changes reflect the CDC's recommendation based on current science developed around COVID-19 and the Omicron variant, including currently known information regarding the COVID-19 booster shot's ability to restore effectiveness against infection and the currently understood period of when individuals are most infectious. The CDC also acknowledged that the shortened isolation and quarantine periods were aimed at alleviating the staffing and economic burdens imposed on employers by the lengthy employee isolation/quarantine periods required for asymptomatic individuals or individuals who were only mildly ill. But, as discussed below, the new recommendations may have a limited impact without enforcement of employer masking and COVID-19 reporting policies.

What this means for the Workplace

Employers may update their existing COVID-19 isolation and quarantine protocols and policies to reflect these new recommendations and should send appropriate communications to their workforce. However, employers should also remember to confirm whether any stricter state or local requirements are still in effect - a point the CDC made in its recently updated guidance. Further, unless prohibited by applicable law, employers may adopt their own more rigorous isolation and quarantine requirements, including testing conditions before an exposed or infected individual may return to the workplace.

What this means for the Workplace

The CDC's updated recommendations underscore the importance of enforcing masking and COVID-19 reporting policies in the workplace. Infected or exposed employees may be returning to work early or not quarantining at all, and the risk of infection can only be further minimized by diligent enforcement of these policies. The failure to do so could result in additional workplace exposures and COVID-19 cases.

Pay Equity Update

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Pay Equity

- Federal contractors and other employers should anticipate greater scrutiny related to their compensation policies and practices as a result of recent policy shifts.
- President Biden has made it clear that a key priority of his administration is closing **the gender and racial wage gap** that currently exists in the United States, and that he plans to encourage changes at both the state and federal levels.

Pay Equity

At the federal level, that means:

- The reintroduction of the Paycheck Fairness Act,
- the rollout of new policy initiatives, and
- the issuance of executive orders.

This prioritization of pay equity will likely result in renewed enforcement efforts related to pay discrimination from the Office of Federal Contract Compliance Programs (OFCCP).

State legislatures also continue to pass laws enhancing pay equity and transparency.

Pay Equity - Background

- Already in place, The Equal Pay Act (EPA), passed in 1963, was one of the first anti-discrimination laws enacted and was intended to abolish wage disparity based on sex.
- The act prohibits wage discrimination between men and women who perform jobs that require substantially the same skill, effort and responsibility within the same company.
- Despite the existence of the EPA, however, the gender-wage gap still exists with the focus on pay disparities across both gender and race, as evidenced by statistical data.

Pay Equity – Biden Priority

- Created:
  - White House Gender Policy Council via Executive Order, to ensure that gender equity and equality are pursued in domestic and international policy.
  - The Council is tasked with advancing gender equity and equality by coordinating federal policies and programs that address the structural barriers to women's participation in the labor force and by decreasing wage and wealth gaps.

Pay Equity – Biden Priority

- The President has promised additional funding for agencies such as the Equal Employment Opportunity Commission (EEOC),
- the U.S. Labor Department's Office of Federal Contract Compliance Programs, and
- the Justice Department's Civil Rights Division to investigate violations and enforce pay equity laws.

Pay Equity – Federal Legislation

In process:

- Federal - Paycheck Fairness Act was reintroduced to the U.S. House of Representatives.
  - The act amends the equal pay provisions and requires the OFCCP to collect compensation data from federal contractors and to evaluate the pay practices of not less than half of all non-construction contractors each year.
- State – Introduction of legislation containing pay disclosure requirements.
  - Indiana, South Carolina, Massachusetts, and Connecticut all seek to require that employers disclose to job applicants requesting a wage range for their posted and current positions.
  - A similar bill in Virginia was not enacted.

Pay Equity – What federal contractors can expect

Federal contractors are required by 41 CFR 60-2.17(b) to:

- perform in-depth analyses of their total employment processes that include an analysis of their compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities.

Pay Equity – Key Takeaways

- Pay equity is top priority and will remain under scrutiny.
- Federal contractors should anticipate greater scrutiny related to their compensation policies and practices and should expect OFCCP changes related to pay equity.
- Federal contractors should consult with counsel and determine whether having a voluntary pay equity audit to identify and resolve race and gender-based compensation disparities makes sense and if so, who should conduct it.
- Consult with counsel to implement business practices that will remove barriers to pay equity that they identify.

Noncompete Agreements Update

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Noncompete Agreements

As we close the book on 2021, we take a few moments to reflect on the past year's developments of the law on noncompete agreements ("NCAs"), offer a few predictions as to what we think 2022 may have in store, and leave you with a valuable piece of advice.

Noncompete Agreements

The year saw President Biden sign an Executive Order ("EO") entitled "Promoting Competition in the American Economy." This EO does not in itself change the law, but it encourages the Federal Trade Commission ("FTC") to take steps to limit or ban NCAs in the country, which if adopted will be a game-changer. The FTC has begun this process and is currently pondering what action, if any, to take. We expect the FTC to make its decision this year and we will, of course, keep you updated.

Noncompete Agreements

Congress also attempted to act on NCAs in 2021. In what has become a pattern in recent years for new congressional sessions, both the House of Representatives and the Senate introduced the Workforce Mobility Act. This bill, if enacted, would drastically limit the use of NCAs throughout the United States. While the bill did not pass, the appetite for federal legislation for some members of Congress remains strong. Expect these efforts to continue into the new year as lawmakers continue this push.

Noncompete Agreements

State governments have followed the lead of the federal government and taken their own steps to limit or ban NCAs. The past year witnessed an unprecedented effort in dozens of states to chip away at, or eliminate, the protections employers enjoy from NCAs. For example, Illinois enacted a law that bans NCAs for employees making less than $75,000 per year, and nonsolicitation agreements for employees making less than $45,000 per year. Other states, such as Oregon and Nevada, passed laws to substantially limit the permissible scope of NCAs, while the District of Columbia banned NCAs in virtually all circumstances.

Noncompete Agreements

Many other states introduced bills that would limit or eliminate NCAs. For example, New Jersey introduced a bill that would eliminate NCAs for a large part of the working population; limit permissible NCAs, both geographically and temporally; and, most importantly, require employees to be paid in full for the duration of the NCA.

Noncompete Agreements

Pennsylvania, on the other hand, took a different approach and singled out one category of workers—physicians—and proposed that NCAs not be enforceable against them. While the efforts in these states fell short in 2021, we expect that the legislatures in both states will continue to attempt to restrict or ban NCAs in those states (as well as in other states throughout the country). The efforts on both the state and federal levels are likely to continue into the new year.

Noncompete Agreements

We cannot say whether and to what extent these efforts will be successful, but we can say the efforts to chip away at the protections provided by NCAs will undoubtedly continue, and we will follow any relevant developments and update you accordingly.

Noncompete Agreements

In the meantime, any employer that uses NCAs, or any other type of restrictive covenant (such as a nonsolicitation agreement, anti-piracy agreement, or nondisclosure agreement, etc.), or is contemplating using them, should take steps right now to ensure they have enforceable agreements in place before any changes to the law take effect. Often new laws contain grandfather clauses, which would protect NCAs that are enforceable on the date that the change to the law goes into effect. Be proactive and take steps now, even before the law changes, as today's employees may become tomorrow's former employees.

Stopping Harassment and Bullying Before it Starts

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Stop Harassment and Bullying Before It Starts

What makes a workplace toxic?

- Behavior that is intimidating, demeaning or belittling, and is either severe, ongoing, or both.
- It typically involves someone taking advantage of a power difference, real or perceived.
- The power difference may come from official position or title, it may come from long tenure with the organization, it may come from namedropping or sense of connections to power within the organization, and it may come from being a rainmaker, superstar, or someone identified as high potential.

Stop Harassment and Bullying Before It Starts

- A toxic workplace can be especially difficult to deal with because rude (or worse) behavior, unless tied to a protected characteristic, is not necessarily harassment or discrimination under the law.
- The Supreme Court says companies are not required to be manners police, and most certainly do not want to be tasked with managing the manners of our coworkers.
- We hesitate to call out the poor behavior in someone else, either to avoid embarrassment or confrontation, because it's not a good time and then it's too late, or because it could be us the next time.
- Unfortunately, this tolerance likely contributes to a bigger problem, allowing the poor behavior to grow into illegal harassment.

Bullying – Proactive Prevention

- Make sure your training programs address behaviors that are common precursors to harassment or discrimination (either as part of EEOC training or something separate).
- Consider whether your complaint process would allow or even encourage complaints that do not fit the typical paradigm of unlawful discrimination or harassment.
  - If not, consider broadening your process or developing something different that can help address concerns before they become formal complaints. (And be prepared to hear and listen more.)

Bullying – Proactive Prevention

- Consider how to ensure appropriate confidentiality but also have a way to recognize a pattern of poor behavior attributed to an individual or group.
- Don't communicate tolerance as a bystander. If you recognize someone is uncomfortable, intervene.
  - Intervention does not have to be an admonition or correction; it can simply be a diversion.

Bullying – Proactive Prevention

- Foster dialogue about how to improve, starting with yourself and those comfortable with you.
  - Are you quick to apologize if you were short with someone?
  - If you made a remark or told a joke that someone that was too stereotypical or otherwise offensive, would someone tell you they had been uncomfortable?
- More dialogue means more opportunity for everyone to improve and recognize what or who might be a real problem.
- Set the tone from the first day of work of appropriate work expectations and behaviors.

Bullying – Proactive Prevention

- These are just a few suggestions and none of them are very easy to accomplish, but
  - they do not cost much and may save a lot of money.
  - No one wants to deal with the publicity or litigation that often comes with making the headlines for having a toxic workplace.
- The more common costs are low productivity and high turnover.

Effectively Implementing Social Media Policies in Response to New NLRB Rules

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Social Media Policies

Social media platforms provide new and convenient ways for employees to discuss working conditions and engage in other protected activities. Given the collective nature of social media, employers must carefully comply with the National Labor Relations Act (the "Act") if they want to effectively implement company-wide social media policies.

Social Media Policies

The stated goal of the National Labor Relations Board ("NLRB") is to ensure that employers are not violating Section 8(a)(1) of the National Labor Relations Act (the "Act") by implementing a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." In particular, the NLRB has focused on the precise wording and language used in employment handbooks. Although the NLRB's yardstick in this area is apparently flexible rather than rigid, a careful understanding of applicable NLRB opinions can help employers regulate social media usage more effectively.

Employer Policies and the NLRB Boeing Standard

The Act prohibits employers from infringing on employees' rights to discuss their employment. The Act further protects the right of employees to engage in "concerted activity" with respect to wages and working conditions. Clearly, if a policy is developed in response to union activity or employed to restrict employees from engaging in concerted activities, the NLRB will view the policy to be violative of the Act. However, when the NLRB evaluates a facially neutral policy, rule, or handbook provision that may interfere with the exercise of NLRA rights, it will employ the Boeing standard detailed below.

Employer Policies and the NLRB Boeing Standard

Pursuant to the Boeing standard, the NRLB will evaluate two things: "(i) the nature and extent of the potential impact on NLRA rights; and (ii) legitimate justifications associated with the rule." Additionally, the NLRB has laid out three categories of employee handbook rules to provide greater clarity and certainty to employees, employers, and unions.

Employer Policies and the NLRB Boeing Standard

Category 1. *Category 1* includes rules that are lawful "because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." For example, category 1 includes prohibitions on speaking on behalf of the employer online and rules requiring employees to abide by basic standards of civility.

Employer Policies and the NLRB Boeing Standard

Category 2. *Category 2* includes rules that "warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." For example, category 2 includes broad privacy rules that may be lawful in workplaces handling confidential patient information, but unlawful in workplaces that engage in clothing sales.

Employer Policies and the NLRB Boeing Standard

Category 3. *Category 3* includes rules that are unlawful "because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." For example, category 3 includes rules that prohibit employees from discussing wages and speaking negatively about their employer.

Effectively Implement Category 2 Social Media Policies

The NLRB has released numerous advice memoranda (i.e., prior NLRB decisions) detailing how it determines the category of employee handbook rules and if such rules are lawful under the Boeing standard. Typically, the NLRB's discussions focus on the determination of category 2 rules as lawful or unlawful.

Effectively Implement Category 2 Social Media Policies

Social Media Policies. In such advice memoranda, the NLRB found lawful the Bemis Company's social media rule requiring employees "*to exercise judgment* in their [online] communications relating to [the employer] so as to effectively safeguard the reputation and interests of [the employer]." In contrast, the NLRB found unlawful Boeing's policy that stated employees' "[p]articipation in social networking and other online activities *must not negatively* affect . . . the [employer's] business interests." Given the foregoing, when evaluating employer social media policies, the NLRB now considers whether the social media policy at issue is similar to that of Bemis or Boeing.

Effectively Implement Category 2 Social Media Policies

Non-disparagement Provisions. Frequently, employees' social media activities trigger employers' non-disparagement provisions. Employers should note that the NLRB has found clauses that prohibit employees from criticizing, ridiculing, or disparaging the company (i.e., in effect, the employer) to unlawfully interfere with their Section 7 rights. To increase the effectiveness of such provisions, employers should limit their non-disparagement policies to criticism of other employees, customers, and the employer's products and services.

Effectively Implement Category 2 Social Media Policies

As demonstrated by the above discussion, it is important that employers exercise considered judgment in implementing or revising a company's social media usage policy. The NLRB has created a minefield for employers seeking to regulate their employees' social media usage. Without a thorough understanding of NLRB rulings, an employer may inadvertently run afoul of the law in trying to control employee social media usage.

Recommended Employee Handbook Updates for 2022

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2022 Handbook Update Topics

- Drug use and Employee Testing
- Discrimination
- Safety Policies
- Leave Policies
- Remote Work Policies
- State Specific Laws
  - Addendums
- Minnesota Specific: Lactation Accommodation

Drug abuse and testing in employee handbooks

There are now 36 states that have legalized medical marijuana, and 15 legalizing recreational use.

- No states require employers to allow use of marijuana on the job, but some do protect medical marijuana users from discrimination.
- Employers should ensure their substance abuse policies comply with all state laws.
- To reduce legal risk, companies may want to remove marijuana from their drug testing and treat its usage similarly to alcohol use in their employee policies.

Discrimination in employee handbooks

Employers should ensure that they now address new protected classes,

- including sexual orientation and gender identity (which the U.S. Supreme Court determined falls under “sex discrimination”).

Employers must check relevant state laws to ensure full compliance by learning about other protected classes, such as those related to military and marital status.

If organizations have employees working remotely in other states, policies should reflect the state-protected classes or categories.

Safety in employee handbooks

It will be vital to create COVID safety addendums for the employee handbook to protect workers, managers, and the organization from legal action.

- Policies could incorporate the OSHA guidance for limiting workplace exposure to COVID.
- Beyond OSHA standards, employee safety policies should include any other requirements set by individual states, which may be more stringent.

Safety in employee handbooks

Most COVID safety policies should address:

- Hygiene protocol
- Face coverings
- Social distancing
- Safety outside the workplace
- Protocol for quarantining and COVID testing
- Business travel

Leave policies and sick policies in employee handbooks

With employees desiring increased flexibility, a tightening labor market, and competition amongst employers offering generous benefit packages, now is a good time to revisit your company's leave and paid time off policies.

- With any employer-provided paid leave, be sure to clearly communicate whether such leave may be rolled over from year-to-year and/or be payable upon termination and if so, under what conditions.

Leave policies and sick policies in employee handbooks

You should also revisit your leave policies to ensure they account for any updates in the law.

- For instance, effective October 1, 2021, the Maryland Flexible Leave Act (MFLA) has been amended to authorize employees to use paid leave for bereavement leave upon the death of an immediate family member.

Leave policies and sick policies in employee handbooks

Some states have passed permanent paid leave laws in reaction to the pandemic.

- Employers should develop leave policies for all relevant state leave laws, include the process for requesting leave and who will oversee related paperwork.
- These policies should include language that acknowledges interaction with paid family and medical leave laws and the Family and Medical Leave Act (FMLA).
- Review sick leave policies and expand sick day allotments to ensure that ill employees either work from home or take a day off to prevent the (potential) spread of COVID in the workplace.

Remote work policies in employee handbooks

Address potential liability risks associated with the move towards a remote workplace, whether it be on a full or partial basis, in the telecommuting policy in your employee handbook.

- Address timekeeping, confidentiality and security of company information, protection of company property, applicability of company policies in a remote working environment, flexible work arrangements, remote workplace safety, employee productivity, and more.

Remote work policies in employee handbooks

An optimized telework policy will include:

- Expectations for handling resources like laptops, headsets, and phones
- How and when work is delivered
- How meetings are conducted
- How employees communicate with managers
- General hours, schedules, and expectations for availability

New Operations in Multiple States

Do you suddenly find your company operating in multiple states?

- If so, you may need to adopt state-specific provisions in your handbook to account for laws that apply in the states in which your company operates.
- Add State-specific addendums.

New Laws effective 2022 in NRP States

Synergy HR has surveyed all five NRP states for new laws effective in 2022. This is the only new one. Stay tuned, we are expecting that recreational marijuana will see the light of day in Minnesota…

Law	Main Topic	Summary	Effective Date
Minnesota SB 9	Lactation Accommodation	Clarifies that an employer cannot reduce an employee's pay during lactation breaks; requires an employer to provide reasonable accommodation to an employee for health conditions related to pregnancy or childbirth. Employers shall not require employees to take leaves or accept accommodations.	01/01/2022

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