

WIT AND WISDOM OF WINTHROP

IN THE NEWS

WILL THE DELTA VARIANT PAUSE RETURN TO OFFICE PLANS?

With many offices re-opening their doors (or set to reopen in the near future), mask mandates and emergency executive orders lifted, and everyday life returning to “normal,” how will the new Delta (B.1.617.2.) COVID-19 variant upset employers’ current return to office plans? In short, the broad effects of the new Delta variant are still unknown, however, it is more contagious than other virus strains and is rapidly spreading across the country amongst those who are still unvaccinated, accounting for 51.7% of new cases according to the Centers for Disease Control and Prevention (“CDC”). Current studies, however, show that the current vaccines are effective against the Delta variant and as of the date of this article, the CDC does not yet recommend a booster shot for those who are fully vaccinated.

At this point, the Delta variant’s impact on employers remains the same as with other variants, and the best defense against the spread of the Delta variant continues to be vaccination. Whether this new variant impacts your return to office plan will depend on the vaccination status of your employees and the community in which your business is based. If you are located in an area with lower vaccination rates, including low rates of vaccination amongst your employees, you may want to implement stricter COVID-19 prevention policies, such as social distancing and mask-wearing, or continue to offer employees the ability to telework if applicable. However, if you are located in an area that has a high vaccination rate and low community spread of the virus, and a high vaccination rate amongst your employees, you are likely able to proceed with your return to office plan as scheduled. In all instances you should have a written return to work plan and a communicable disease policy.

CDC RECOMMENDS VACCINATED INDIVIDUALS TO “MASK UP” WITH NEW DELTA VARIANT

As research and data continues to develop on the Delta variant, this past week the CDC changed course, now recommending that even fully vaccinated individuals wear masks indoors if they live in areas with significant or high spread of the Delta COVID-19 variant. Early data collected by the CDC shows that both vaccinated and unvaccinated individuals can transmit the Delta variant of the virus at the same degree. This data is particularly worrisome in areas of the country with low vaccination rates, which are experiencing an increased number of infections. So what should you do as an employer? Again, it will depend on where you are located, and the vaccination rate and level of community spread in that area. If your business is located in an area with a low vaccination rate and/or high community spread, and your local government does not currently have a mask mandate in place, you should strongly consider encouraging or requiring all of your employees, even those who are vaccinated, to “mask up” once again.

EMPLOYMENT UPDATE

COVID-19 VACCINATIONS

- > **Requiring COVID-19 Vaccination:** The FDA has not yet issued full approval of the Pfizer, Moderna, or J&J vaccines. It is still best practice for employers to wait for full FDA approval before mandating vaccines, although they are permitted to do so as long as the reasonable accommodations are evaluated as set forth below.
- > **Reasonable Accommodations:** The EEOC has updated its guidance regarding reasonable accommodations employers must make available for those employees who cannot be vaccinated for a protected reason such as for disabilities or sincerely held religious beliefs. The employee may be entitled to a reasonable accommodation as long as it does not pose an undue hardship on the operation of the business. Examples of possible reasonable accommodations are: wearing a mask, working at a social distance, modifying the employee’s shift, periodic COVID-19 tests, the opportunity to telework, or reassignment.
- > **Pre-Vaccination Screening Questions:** If a vaccination program is administered by an employer or its agent and the employer requires the employees to be vaccinated by the employer or its agent, the restrictions set forth under the ADA, which prohibit disability-related inquiries unless they are job-related and consistent with business necessity, are applicable to pre-vaccination screening questions by the employer or its agent.

CLASSIFICATION OF WORKERS, DOL WITHDRAWS INDEPENDENT CONTRACTOR RULE

Effective May 6, 2021, the U.S. Department of Labor withdrew the “Independent Contractor Rule” which was intended to clarify the definition of employee under the Fair Labor Standards Act (“FLSA”) as it related to independent contractors. The Department explained the withdrawal stating that the Rule was inconsistent with the FLSA’s text and purpose and would have been confusing and disruptive to workers and businesses due to its departure from judicial precedent. Nevertheless, the Department of Labor’s prior guidance regarding the distinction between employees and independent contractors under the FLSA remains in effect.

SUPREME COURT NARROWS APPLICATION OF “ANTI-HACKING” LAW

On June 3, 2021, the Supreme Court, in a 6-3 decision authored by Justice Barrett, found that the Computer Fraud and Abuse Act (“CFAA”) does not extend to an employee’s use of information for an improper purpose if the employee would be entitled to access that information for a proper purpose in the first place. The potential implications of this decision are still unknown, but employers may want to reevaluate the information accessible to their employees and determine whether certain categories of information that may have previously been accessible should now be limited based on whether that information is necessary for the employee to carry out their respective job duties.

REVIEW OF NON-COMPETE AGREEMENTS

President Biden asked the Federal Trade Commission (“FTC”) to ban or limit clauses in employment contracts that restrict worker’s ability to change jobs. To date, there is no timeline or process that has been announced by the FTC. We will continue to monitor and provide additional information in upcoming newsletters.

SPOTLIGHT ON OLIVIA COOPER



WHAT WAS YOUR FIRST JOB? I babysat and worked as a waitress as a teenager. I think it should be a requirement for everyone to work in a service-related role at some point in their lives. I learned some valuable lessons, and now as an employment attorney I often rely on the perspective I gained from those experiences.

WHAT’S THE BEST ADVICE YOU’VE EVER BEEN GIVEN? My parents have given me a lot of great advice over the years. The one that first comes to mind is from my dad, and I follow it in both my personal and professional life, especially when counseling clients: “Always be honest and tell the truth. They may not like what you have to say, but let them know you will never lie to them.”



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Put the law to work.