

EMPLOYMENT LAW UPDATE

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Employment Topics Covered Today

- The latest Covid-19 and other safety rules;
- Sexual harassment gone viral;
- Remote work and MIOSHA

THE LATEST COVID-19 AND OTHER SAFETY RULES

Federal Requirements

September 9, 2021: Vaccinating the Unvaccinated

- Federal Employees ✓
- Federal Contractors ✓
- Healthcare workers at Medicare and Medicaid participating healthcare settings ✓
- Private Employers (Coming soon)
- State and Local Governments



OSHA ETS: Imminent

- Two provisions:

1. Rule that requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis;
2. Rule that requires employers with more than 100 employees to provide paid time off for the time it takes workers to get vaccinated or recover from post-vaccination effects

OSHA ETS: Challenges Are Promised

- ETS Process

- Two determinations made in order to issue ETS:
 - Employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
 - Such an emergency standard is necessary to protect employees from such danger

- Paid Time Off

- Outside Agency Authority?
- Conflict with Congressional intent?

State & Local Requirements

Does ETS Apply To State And Local Governments In Michigan?

- No, not exactly
 - OSHA does not directly apply to the State of Michigan and Local Governments...BUT
 - MIOSHA does
 - MIOSHA has a state plan that requires it to either follow OSHA ETS within 30 days or create one at least as effective or stricter. 29 C.F.R. § 1953.5(b)(1)
 - We have heard from MIOSHA representatives that they will most likely follow OSHA ETS, meaning State of Michigan and local governments will be subject to that rule

Considerations if ETS is implemented

- 1. Cost
 - Who is going to pay for the test?
 - The ETS may specify who or if the employer is required to pay for the test.
- Availability
 - What is the availability of a rapid test?
- 2. Enforceability
 - How do you enforce this ETS if tests are not available?
- 3. Exemptions
 - ADA
 - Title VII

Pre-COVID-19: MIOSHA Standards

- Personal Protective Equipment Standard
- Sanitation Standard
- Respiratory Protection Standard
- Hazard Communication Standard
- Access to Employee Exposure & Medical Records
- Recording and Reporting Occupational Injuries and Illnesses

Pre-COVID-19: MIOSHA Standards (Cont.)

- General Duty Clause
 - Employers have an obligation to “furnish to each employee, employment and a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employees.”
 - MIOSHA says
 - Enforcement Guidance: When determining if there is sufficient evidence for a general duty clause violation, the employer’s COVID-19 program in its entirety will be evaluated. If after considering all the measures the employer has implemented, there still exists a recognized hazard, a general duty clause citation will be warranted.

Pre COVID-19: MIOSHA Standards (cont.)

- General Duty Clause

- **Point:** Your organization has to determine what it needs to do, in good faith, to keep COVID-19 out of and prevent the spread in the workplace
- How?
 - Review recommendations based on CDC guidance
 - Review OSHA guidance



March 2020*: COVID-19 Employment Rights Act

- Employee obligation not to report to work
- Employer duty to not discharge, discipline, or otherwise retaliate against an employee
- Three circumstances:
 - Tests Positive: Follow CDC isolation period (MDHSS or Local Health Departments)
 - Displays principal symptoms of COVID-19
 - Tests negative for COVID-19, or
 - Follow CDC isolation period
 - Close contact with individual who tests positive for COVID-19
 - Follow CDC quarantine period
 - Adopts differentiation between unvaccinated and fully vaccinated employees

Michigan: MDHHS Epidemic Orders

- Nursing Facilities, Homes for the Aged, and Adult Foster Care Facilities;
- Residential Care Facilities;
- Prisons

Local Public Health Orders

- Examples:
 - School/educational setting Mask Orders
 - School/educational setting Quarantine Orders
 - Childcare facilities

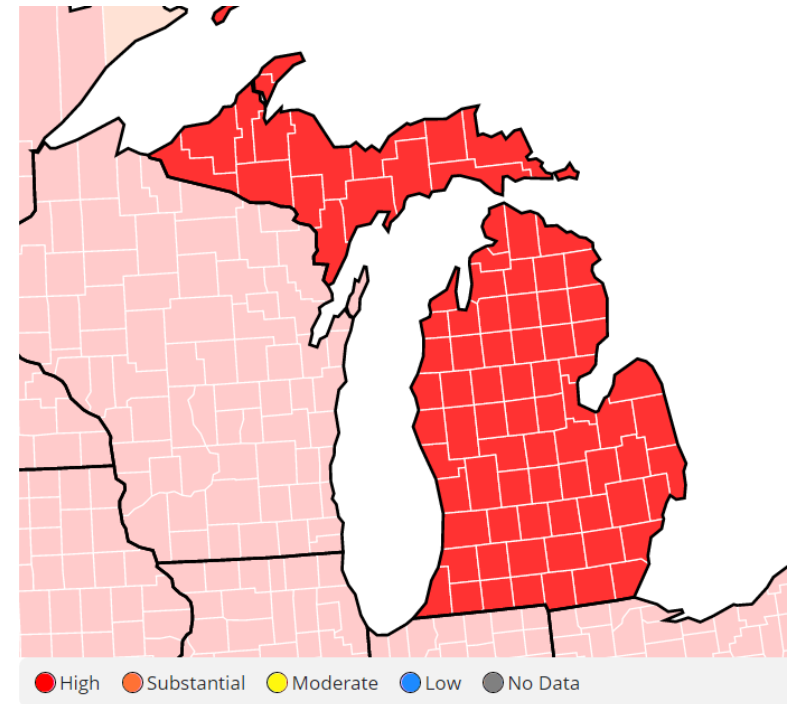
Masks Requirements?

- CDC - only recommendation
- MDHSS - only recommendation
- MIOSHA - only recommendation

Practical Considerations

Should We? - Employer Mask Policies

- CDC:
 - Effective July 27, 2021
 - Added recommendation for fully vaccinated people to wear a mask in public indoor settings in areas of substantial or high transmission
- MIOSHA General Duty Clause
 - **Point:** Your organization has to determine what it needs to do, in good faith, to keep COVID-19 out of and prevent the spread in your workplace



Can We? - Employer Vaccination Policies

Federal Government

The EEOC says:

- The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19 (subject to accommodation provisions)

OSHA says:

- 2009 Standard Interpretation: Flu vaccine
 - Although OSHA does not require employees to take the vaccines, an employer may do so

NLRA says:

- Protected, concerted activity
- Current CBA permit mandatory vaccination policy?

Should We? - Employer Vaccination Policies

Pros

- Disruption to our business if we don't
 - Stability:
 - Return to in-person work
 - Lessened quarantine requirements
- FDA status: Pfizer approved in Sept.
- MIOSHA General Duty Clause

Cons

- Disruption to our business if we do
 - Stability:
 - Recruitment and retention challenges
- FDA status: Currently EUA

What If We Do? - Employee Exemption Requests: ADA

- Employees with an ADA-covered disability may be entitled to exemption if disability prevents them from complying with employer's COVID-19 safety requirement
- Establish an interactive reasonable accommodation process
 - Can require medical documentation
- Employers can select alternative accommodations
 - Work alone/physical distancing
 - COVID testing
 - PPE
 - Reassignment
 - Remote work
- Not required to accommodate if undue hardship
 - Current public health and economic circumstances are relevant to this analysis

What If We Do? - Employee Exemption Requests: Title VII

- Title VII requires employers to reasonably accommodate an employee's sincerely-held religious beliefs
 - Unless it would be an undue hardship on business operations
 - Undue hardship is “more than *de minimis* cost,” which is a much lower standard than under the ADA
 - Religion: Very broad definition, but more than personal preferences, medical beliefs, or political philosophies
 - Moral or ethical beliefs as to right or wrong that are sincerely-held with the strength of traditional religious views
 - Does not have to be widely practiced
 - Can require additional supporting documentation if there is an objective basis for questioning the religious nature or the sincerely-held religious belief.

What If We Do? - Exemptions: State Law

- Example: Pending legislation in Idaho
 - “HB 443 would prohibit any employer or company that has entered into a contract with the State, from discharging, refusing to hire, or taking any action directly or indirectly related to employment on the basis of an employee’s refusal to be vaccinated due to medical contraindications or reasons of conscience. Such reasons of conscience include religious or philosophical beliefs.”

What If We Do? - Liability - Workers Compensation Statutes

- *Likely* to be the exclusive remedy
 - Cases considering different vaccines have determined that adverse reactions to mandatory vaccinations may result in workers' compensation claims
 - Exclusive remedy: Provides that recovery of workers' compensation benefits will be the employee's exclusive remedy against an employer for a personal injury or occupational disease.
- If not exclusive remedy: Plaintiff must still prove causation

What If We Do? - Liability - OSHA Recording / Reporting Adverse Reactions

- “The DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination and also does not wish to disincentive employers’ vaccination efforts.”
- As a result: No requirement to record adverse reactions until May 2022

HR Checklist

Analysis Steps / Framework:

- Who is the employee? (job responsibilities)
- Who is the employer?
- Where is the work being performed?
- What federal requirements apply?
- What state requirements apply?
- What local requirements apply?
- Do any of our organization's policies apply?
- What employee relations concerns should we be considering?

Analysis Steps / Framework (Cont.):

SEXUAL HARASSMENT HAS GONE VIRAL!

What Is Remote Sexual Harassment?

Remote Sexual Harassment - What Is It?

- Sexual harassment that occurs from a remote distance using digital tools, such as:
 - Facebook;
 - Texting; Instant Message
 - Instagram;
 - Email;
 - Snapchat;
 - What;
 - Twitter;
 - Zoom; Teams; Meet



Is It Really An Issue?



- More common since the increasingly widespread use of social media platforms to communicate and COVID-19
 - *Rights of Women Study*
 - 45% of women experiencing sexual harassment reported experiencing the harassment remotely
 - 42% of women experiencing sexual harassment at work have experienced some to all of the harassment online
 - 23% of women who have experienced sexual harassment reported an increase or escalation while working from home, since the start of lockdown
 - 15% of women who have experienced sexual harassment reported that some or all of the harassment has moved online while working from home

What's Behind The Increase In Remote Harassment?

- Several factors that may enable and even facilitate Remote Sexual Harassment:
 - The harassed employee may be isolated, making the harassment more difficult to prove and help feel further away
 - EEOC Select Task Force – Isolated work environments are “risk factor”
 - Overall increase in harassment and lack of civility
 - Pew Research Center – Women reporting online sexual harassment has doubled since 2017
 - Since COVID, 41% of food service workers reported noticeable increase in frequency of unwanted sexualized comments; 25% noticed “significant change”

More Factors That May Enable And Even Facilitate Remote Sexual Harassment

- The “remote workplace” feels less formal
- Remote sexual harassment is a lot “easier” to do in terms of raw, physical effort. It’s also more difficult for the harasser to be caught in the act.
- Remote sexual harassment is easier to maintain, again, because it takes less effort.
- At home, people are able to access recreational substances—such as alcohol—that may lower their inhibitions and impair their decision-making, leading them to sexually harass a coworker

Remote Sexual Harassment Examples

1. Bob texts Laura, his co-worker, pictures of his genitalia
2. Jill repeatedly direct messages Amy, her worker, asking to “hook up” after they had drinks with a group of co-workers after work
3. A boss jokes about always wanting to be invited into a female employee’s bedroom (but seeing the inside of her house is “close enough”) during a video meeting while she is working from home

Remote Sexual Harassment Examples (cont.)

4. Jerry posts on his Facebook that he is dragging today because he got to bed late after being at a white supremacist rally. He then posted several racially derogatory videos on his Facebook account, one of which uses the “n” word.
5. Larry, a supervisor, posts on his Twitter account that he never has a closed-door meeting with a woman or is alone with a woman that is not his wife (for religious reasons)

Do Sexual Harassment Laws Still Apply?

Do Sexual Harassment Laws Apply the Same Way?

- Yes.
- All of the legal definitions, standards, burdens of proof, and damages are the same
- The only difference is the setting



Remote Sexual Harassment, Is It Really An Issue?

- Very similar to the types of sexual harassment someone can experience in a physical workplace
- Unlike at work in person, remote sexual harassment can seem unending and inescapable



Remote Sexual Harassment

- Despite lack of physical interaction, remote sexual harassment is still traumatizing and can result in significant employer liability
 - “Having to let colleagues into my bedroom (via video meetings) means I feel my privacy has been invaded and nowhere is safe. The men now have more ammunition to mock me with.”
 - “The director of the company uses Zoom to take screenshots of myself and other women which he shares with colleagues making derogatory statements and implying the photos look like we’re doing sexual acts.”
 - “The fact it’s on Zoom in front of others in a jokey manner makes it difficult to address.”

What About Off-Duty Conduct?

Off-Duty Conduct As Harassment

- Off the clock/off premises harassment has long been recognized
 - Question is sufficient “nexus”: whether the conduct creates a hostile work environment for an employee with respect to the workplace
 - “After work hours and away from the work setting?”
 - “Is employee forced to work for, or in close proximity, to someone harassing her outside of work?”



Remote Work Scenarios

- Remote “Off Duty” Conduct May Result In Sexual Harassment
 - Virtual “Happy Hours”
 - “Revenge Porn” on Social Media
 - Late Night Text Messages



Unlawful Harassment

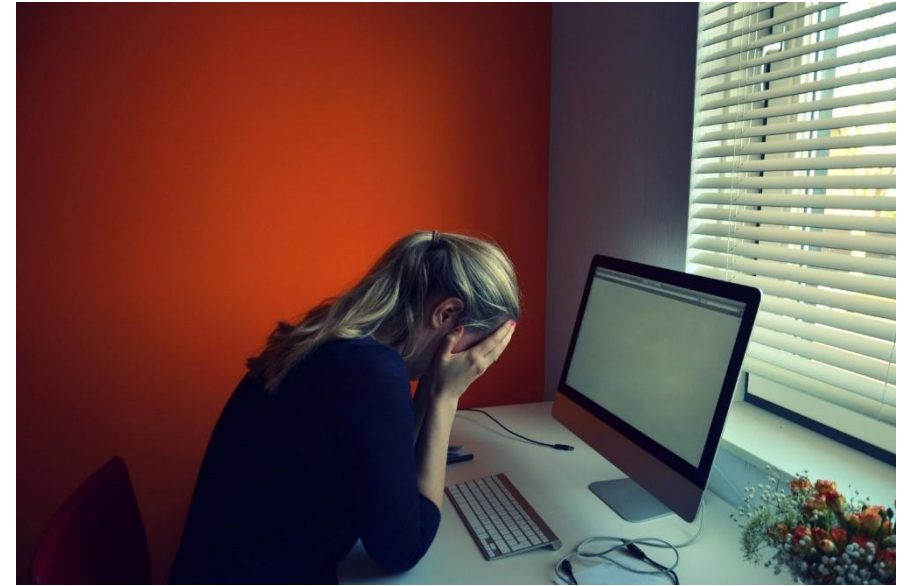
Quick Refresher: What Is Unlawful Harassment?

- Conduct that is three things:
 1. Unwelcome
 2. Based on a legally protected characteristic; and
 3. Either:
 - Includes a tangible job detriment; or
 - Creates a hostile work environment



Forms of Sexual Harassment

1. Harassment that creates a “tangible job detriment,” also called “quid pro quo” harassment
2. Harassment that creates a “hostile work environment”



Tangible Job Detriment

- Harassment with a Tangible Job Detriment (Quid Pro Quo)
 - Unwelcome harassment, most often sexual in nature, that when refused or stopped results in a tangible adverse employment action to the victim
 - Must be able to carry out the promise / threat
 - Usually means a person in a position of power or authority
 - Usually means an agent of the company
 - If so, **strict liability** for the employer
 - Individual liability for the employee

Hostile Work Environment

- Unwelcome harassment that is sufficiently **severe** or **pervasive** and has the **purpose** or **effect** of creating an intimidating, hostile or offensive work environment.
- Does not require tangible harm to employment



Hostile Work Environment: Severe or Pervasive?

What constitutes “severe” conduct?

- In person conduct, such as sexual assault, grabbing, fondling, flashing, kissing
- Can remote conduct be severe?
 - Videos
 - Self-displays
 - Slurs or hate speech
 - Extremely vulgar or offensive language (if sufficiently extreme)

What constitutes “pervasive” conduct?

- A pattern of repeated behaviors
- Remote conduct lends itself to pervasive, unwelcome conduct:
 - Instant and effortless
 - Easily sharable
 - Easily maintained
 - Viewed repeatedly
 - Sense of freedom from being off premises or off the clock
 - People still type things that they wouldn't say

What Can You Do To Educate?

Encourage Human Resources Conduct Regular Leadership Training For Awareness And Accountability

- How *leaders'* social media activity and electronic communications can create liability for the company and potentially the leader
- How *employees'* social media activity and electronic communications can create liability for the company and potentially the leader



Education (cont.)

- Every report of harassment is taken seriously
- Report to be communicated to human resources, the leader's supervisor, or both
- Done Immediately
 - The statute requires that action to be "prompt"
- Confidentially

Draft and Maintain A Strong Policy

- State commitment to a safe and comfortable working environment
- Define prohibited conduct in detail – include virtual examples
 - Do not limit to “unlawful” conduct
- Make plain that off duty conduct can violate the policy
- Provide multiple avenues for reporting harassment
- Provide assurances of confidentiality and no retaliation
- Make certain every employee knows how to access it



IF YOU SEE

SOMETHING,

SAY SOMETHING.

Unlawful Harassment: What Can You Do?

Quid Pro Quo Harassment

- Not much
- Fix it if you can or write a check

Hostile Work Environment

- You can avoid liability if you take prompt and appropriate remedial action when you knew or should have known of the harassment

What Can You Do Reactively?

- Conduct a confidential, thorough, effective and prompt investigation
- Consider legal privilege
- Reach a conclusion about whether a hostile environment exists or policy was otherwise violated
- If it does, take action that is sufficient to permanently eliminate the behavior(s) causing the hostile work environment

The Golden Rule / Guiding Principle For Your Social Media Life

- Assume that everything posted, e-mailed, tweeted, snapped, or blasted about an employee will someday be read by the employee and ...
 - His or her lawyer
 - A government agency
 - A judge
 - A jury
 - Your parent, spouse and child



My Home is My Castle: Workers' Compensation and OSHA Safety

Workers' Compensation: General Rule

- An employee's injury or illness is covered by workers' comp if it "arises out of and in the course of employment."
- Michigan: "An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment."
- For employees working in other states, you will need workers' compensation coverage in those states

OSHA: General Rule

- “You must consider an injury or illness to be work-related if an event or exposure *in the work environment* either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.” 29 CFR § 1904.5
- What’s the “work environment”?



OSHA: Work Environment

- The work environment is “*the establishment and other locations where one or more employees are working or are present as a condition of their employment.*” 29 CFR §1904.5(b)(1)
- Working at Home: “*Injuries and illnesses that occur while an employee is **working at home**, including **work in a home office**, will be considered work-related if the injury or illness occurs while the employee is **performing work for pay or compensation in the home**, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.*” 29 CFR §1904.5(b)(7)

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