

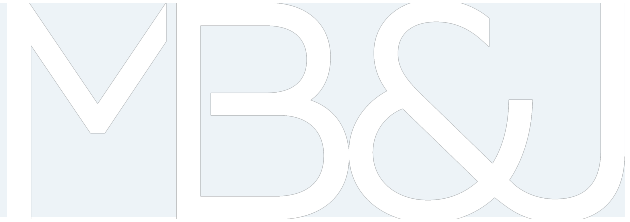


LEGAL CONSIDERATIONS FOR REMOTE WORK

May 6, 2021

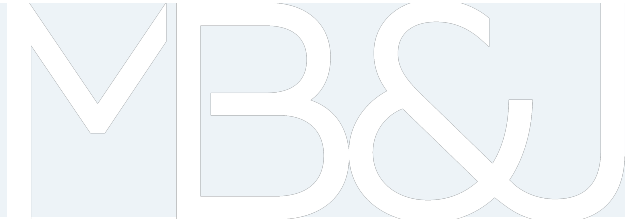
Danielle Jurema Lederman

Luke Blackadar



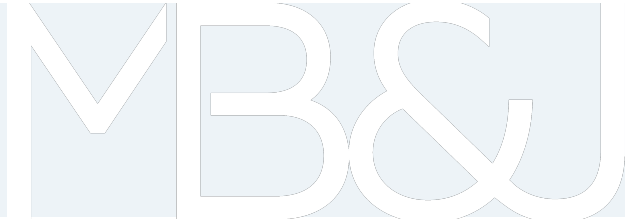
AGENDA

- Key Legal Considerations
- COVID-19 Issues
- Working from Home Best Practices
- Returning to the Workplace



KEY LEGAL CONSIDERATIONS

- Wage and Hour
- Expense Reimbursement
- Choice of Law
- Accommodations
- Workplace Safety
- Data Security
- Employee Privacy



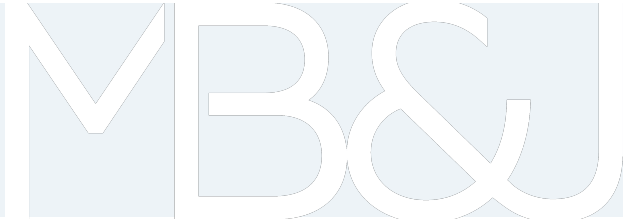
WAGE & HOUR BASICS

- Both FLSA and state laws apply to most workplaces
- The law that is more protective of employees will control, i.e., state minimum wage is higher, and therefore applies
- Exempt versus non-exempt
 - Non-exempt employees are entitled to overtime
- State and federal law expressly require accurate time records

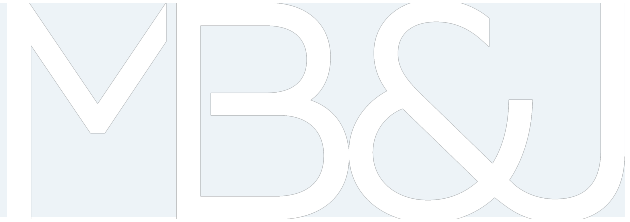
NON-EXEMPT – MINIMUM WAGE & OVERTIME

- Non-exempt workers are typically paid only for hours worked – but must be paid for all hours worked, including overtime, both under the federal FLSA and Massachusetts wage law
 - Remote work does not change the federal and state wage-and-hour laws
- Clear schedules and expectations in writing regarding hours, lunch, and breaks; record-keeping is legally required
- Policy strictly prohibiting off-the-clock work is recommended
- Continue to require overtime be approved by a manager, if consistent with pre-COVID policies

EXPENSE REIMBURSEMENT

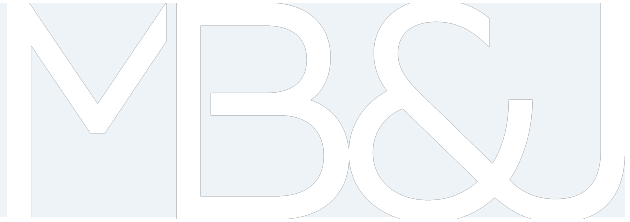


- Massachusetts law does not expressly require work from home expenses to be reimbursed
 - But does require reimbursement for certain travel expenses
- Employers cannot shift business costs to an employee if such shift reduces an employee's wages to below minimum wage
- Good practice for employers to provide employees with, or reimburse them for, the materials required to work from home



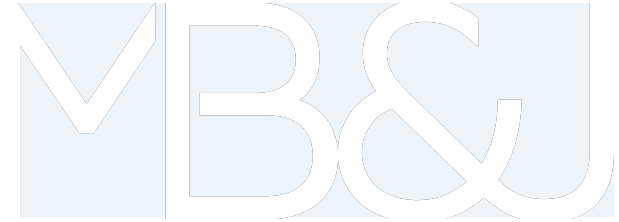
CHOICE OF LAW

- Be aware that many states have their own laws regarding employee pay, reimbursement, break time, leaves, sick time, and more
- If you have employees working remotely in other states, that may change your legal obligations
- Determine which state's rules may apply



ACCOMMODATIONS

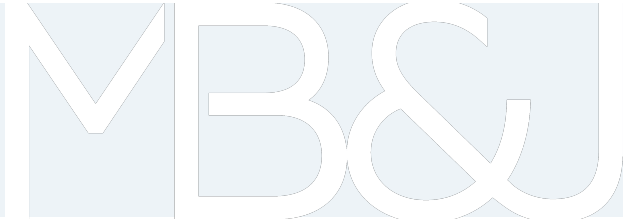
- Employees with disabilities and/or sincerely held religious beliefs may request reasonable accommodations
 - Such request for accommodation could include a request to work from home
- In assessing an accommodation request, an employer must engage in an interactive process
 - An informal process by which an employer can clarify the individual's limitations and determine whether there is an appropriate reasonable accommodation



WORKPLACE SAFETY

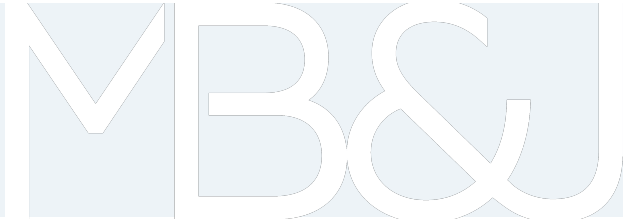
- Employers must provide a safe work environment
 - This includes remote workers
- Most states require employers to provide workers compensation coverage to their employees, including those who work remotely
- Clearly define remote workers' normal work hours and duties
- Establish guidelines for a home office or remote workspace

DATA SECURITY



- Employers collect a wide range of data
- Need to ensure that the data is protected and secure
- Be aware of the risks
 - Cyberattacks
 - Theft
 - Employee negligence, error, or misconduct
- Guard against them

EMPLOYEE PRIVACY

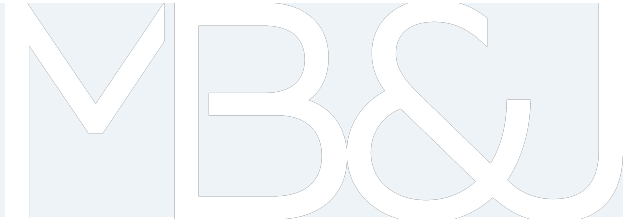


- Remote monitoring technologies are being used more and more to track employee time and activity
- Workplace monitoring is subject to a variety of federal and state laws regarding when employees have a right to privacy and what notice, if any, they should receive regarding workplace monitoring
- Disclosing the surveillance may be the best tactic
 - This removes an employee's reasonable expectation of privacy, often a necessary element in an invasion of privacy claim

COVID-19 Issues

The Do's and Don'ts of Vaccinating Your Employees

BENEFITS OF VACCINATION



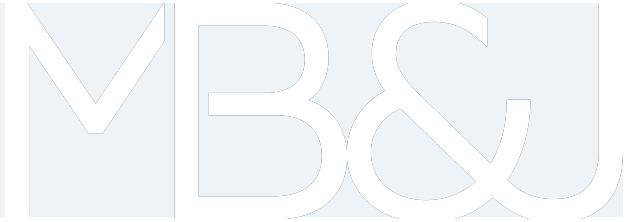
- Keep workforce healthy by preventing employees from getting COVID-19;
- Reduce absence due to illness;
- Reduce time missed from work to get vaccinated;
- Improve productivity;
- Improve morale.



CAN EMPLOYERS MANDATE THE COVID-19 VACCINE?

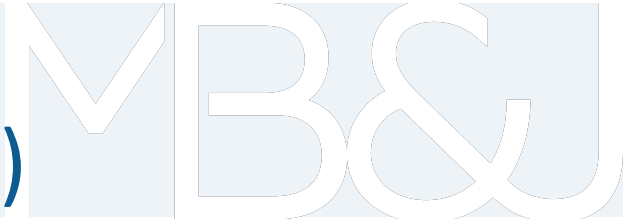
- Key Considerations:
 - Vaccination Mandates in Other Contexts
 - Emergency Use Authorization
 - Accommodations
 - Liability Concerns
 - Alternatives

EMPLOYER VACCINATION MANDATES

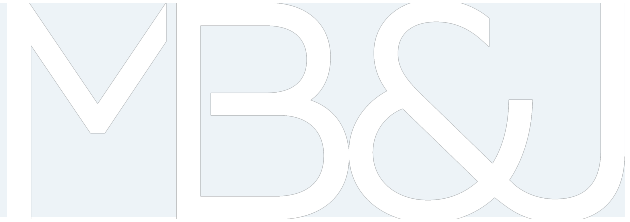


- In general, employers can and have implemented vaccine mandates as a condition of employment
 - E.g., influenza vaccines for healthcare workers, school.
- Why should employers be hesitant to do so now?

EMERGENCY USE AUTHORIZATION (EUA)

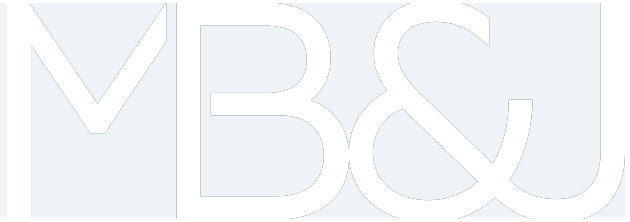


- EUA allows for the use of unapproved medical products during public health emergencies
- EUA status is not the same as FDA approved
- The FDA must inform vaccine recipients:
 - That the vaccine is only authorized for emergency use
 - Of the known and potential benefits and risks
 - That they have the *option to accept or refuse the vaccine, and to be informed of the consequences of refusing*, and
 - Of the alternatives available.



ACCOMMODATIONS

- Employers are legally required to provide certain reasonable accommodations to persons with:
 - Disabilities
 - Sincerely held religious beliefs
- Employers may be required to make exceptions to a mandatory vaccination policy if an employee requests an accommodation based on disability or sincerely held religious belief



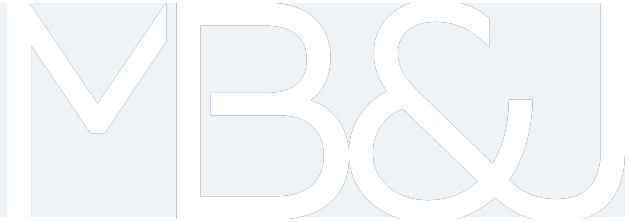
ACCOMMODATIONS: DISABILITIES

- The ADA permits employers to exclude employees that pose “a direct threat to the health or safety of individuals in the workplace.”
- However, to exclude an employee who cannot be vaccinated due to a disability from physically entering the workplace, an employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists:
 - The duration of the risk;
 - The nature and severity of the potential harm;
 - The likelihood that the potential harm will occur; and
 - The imminence of the potential harm.
- If an employer determines an employee does pose a direct threat, the employer should then assess whether the employee can be provided a reasonable accommodation that would eliminate or reduce the risk, without causing an undue hardship.



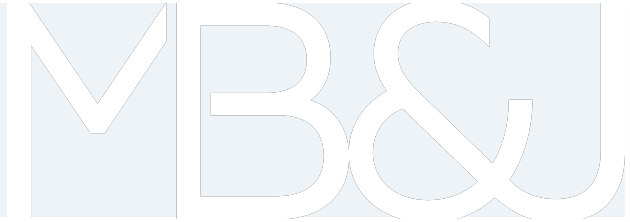
ACCOMMODATIONS: SINCERELY HELD RELIGIOUS BELIEF

- Once an employer is on notice that an employee's sincerely held religious belief, practice or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation unless it would pose an undue hardship
- A religious practice or belief is defined as "moral or ethical beliefs as to what is right and wrong which are sincerely held. ..."



ADDITIONAL CONSIDERATIONS

- Liability Concerns
 - OSHA, Negligence, Workers' Compensation claims
 - Public Policy and Civil Rights claims
- Workforce
 - Union, non-union
- Industry
 - Healthcare
 - School/Daycare
 - Eldercare
- Vaccine Availability
- Employee Buy-In



ALTERNATIVES

- Legal and practical risks posed by mandating the vaccine may outweigh the potential benefits
- Consider encouraging rather than mandating employee vaccination programs by:
 - Implementing vaccination education campaigns;
 - Covering any costs associated with getting the vaccine; and/or
 - Providing incentives to employees who get vaccinated, like paid time off.

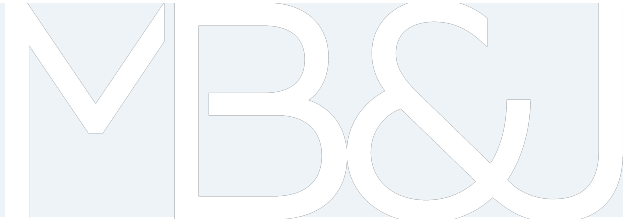


WHERE CAN WE GET MORE DEFINITIVE GUIDANCE?

- Federal Government
 - CDC
 - OSHA
 - EEOC
- Massachusetts
 - Department of Public Health
- Local Guidance

Work from Home Best Practices

CREATING A WORK FROM HOME POLICY



- Eligibility
- Home Workspace Inspection
- Trial Periods
- Performance Management
- Equipment
- Technology
- Expense Reimbursement
- How to Deal with Loss of Connectivity or Other System Issues
- Security
- Safety
- Tracking Hours Worked
- Income Tax Obligations
- Compliance with Other Policies



WRITTEN INFORMATION SECURITY PROGRAM (WISP)

- Required by Massachusetts law
- Use this policy to prevent, detect, and respond to information security issues
- The WISP should contain administrative, technical, and physical safeguards that are appropriate to:
 - (a) the size, scope and type of business of the person obligated to safeguard the personal information under such comprehensive information security program;
 - (b) the amount of resources available to such person;
 - (c) the amount of stored data; and
 - (d) the need for security and confidentiality of both consumer and employee information

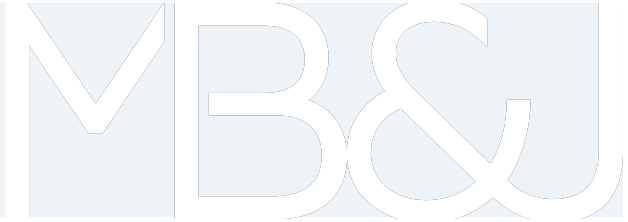
ADDITIONAL REMOTE WORK BEST PRACTICES



- Accurately track all time worked
- Administer remote work policies in a consistent and non-discriminatory manner
- Ensure job descriptions are up to date and they identify the essential functions of each position
- Review workers' compensation policies to ensure coverage of injuries that occur while employees work remotely in another state
- Comply with all federal, state and local obligations

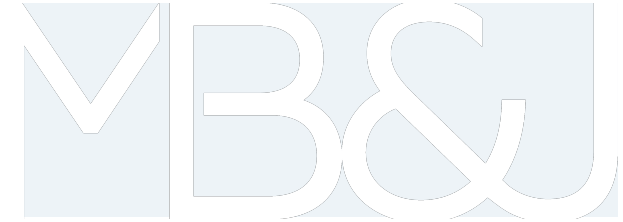
Returning to the Workplace

COMMON ISSUES WITH EMPLOYEES BEING TOLD TO RETURN TO WORK

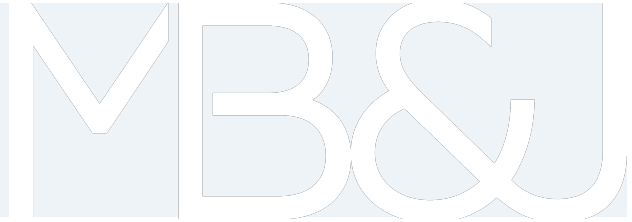


- As employees are being required to return to the workplace, these are the most common types of reasons not to return:
 - I am scared to go into the office
 - I live with someone in a high risk category
 - I have a condition that makes me high risk
 - I still don't have child care
 - I'm vaccinated, but worried others will not be

RETURNING TO WORK CONSIDERATIONS



- Communication is critical
- Flexibility is encouraged
- Work with employees to develop solutions
- Be mindful of workplace safety



LEGAL CONSIDERATIONS

- **OSHA (Occupational Safety and Health Act)**
 - OSHA has issued guidance on best practices/precautionary measures to help employers better protect their work forces.
- **ADA (Americans with Disabilities Act)**
 - ADA medical exam/screening/inquiry rules apply to employers analyzing situations in the workplace.
- **FLSA (Fair Labor Standards Act)**
 - Among other things, FLSA dictates when employees must be paid (or do not have to be paid).
- **Corresponding/additional state laws:**
 - State family and medical leave laws, etc.
 - *See also* MA Earned Sick Time Law: Most workers in Massachusetts have the right to earn and use up to 40 hours of job-protected sick time per year to take care of themselves and certain family members
 - Voluntary extension of FFCRA



Thank You!

Luke Blackadar
luke@artsandbusinesscouncil.org

Danielle Jurema Lederman
dlederman@morganbrown.com

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, should not be construed as legal advice or a legal opinion on any specific facts or circumstances by the Arts & Business Council's Volunteer Lawyers for the Arts, Morgan, Brown & Joy, LLP and/or their attorneys. This presentation is intended for general information purposes only and you should consult an attorney concerning any specific legal questions you may have. Employers should be mindful that these issues remain fluid and should ensure that decisions are made based on the most up-to-date information available.