

Expert Analysis

## Employment and HR Law in 2021: What To Expect

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Employers were faced with unprecedented challenges in 2020, ranging from ensuring a safe workplace in light of the COVID-19 pandemic and evolving CDC and New York State guidance to managing suddenly remote workforces to significantly reducing workforces. Who would have accurately predicted those challenges in January 2020 as among the primary issues to be faced by employers over the ensuing year?

While most of us eagerly bid a socially distanced adieu to 2020 with the hope that 2021 will bring a return to some semblance of normalcy, employers are not out of the woods just yet. Looking to the year ahead, the issues to be faced by employers will continue to be dominated by the COVID-19 pandemic and its aftershocks, while the shift in the federal administration will bring with it a new set of challenges. Below

is a summary of issues and challenges employers faced in 2020 and can expect in 2021.

**Remote Workforce Issues.** Employers whose workforces went fully or partially remote in 2020 will continue to deal with related challenges. Accurately tracking the time worked by non-exempt remote employees is imperative to ensure compliance with wage and hour laws, including overtime, meal break and day of rest laws. If they have not already, employers should implement a remote work policy and communicate with their non-exempt remote workforce to set expectations regarding work hours, which will help employers better manage or minimize the overtime hours being worked by such employees.

It is tempting, but not prudent, to delay workplace trainings until a time when it is safe for a critical mass of employees to gather together. New York's annual anti-

harassment training requirement remains in effect and can be easily satisfied remotely. Such trainings should be updated to address new situations presented by remote work, including for example, appropriate behavior on video meetings.

**In Person Workforce Issues.** Similarly, employers whose workforces are working from or returning to their physical work location will continue to deal with related challenges in light of the on-going pandemic. Employers' obligation under OSHA to maintain a safe and secure workplace has not changed, yet the application of this obligation in January 2020 was significantly different than in January 2021. Employers must adopt, follow and enforce ever-changing COVID-19 protocols issued by the CDC, the Department of Health and New York State in order to provide an appropriately safe workplace and operate lawfully. Specifically, per New York State guidelines, employers must develop and implement a written safety plan, which outlines what the employer is doing to prevent the spread of COVID-19 and sets expectations of employees.

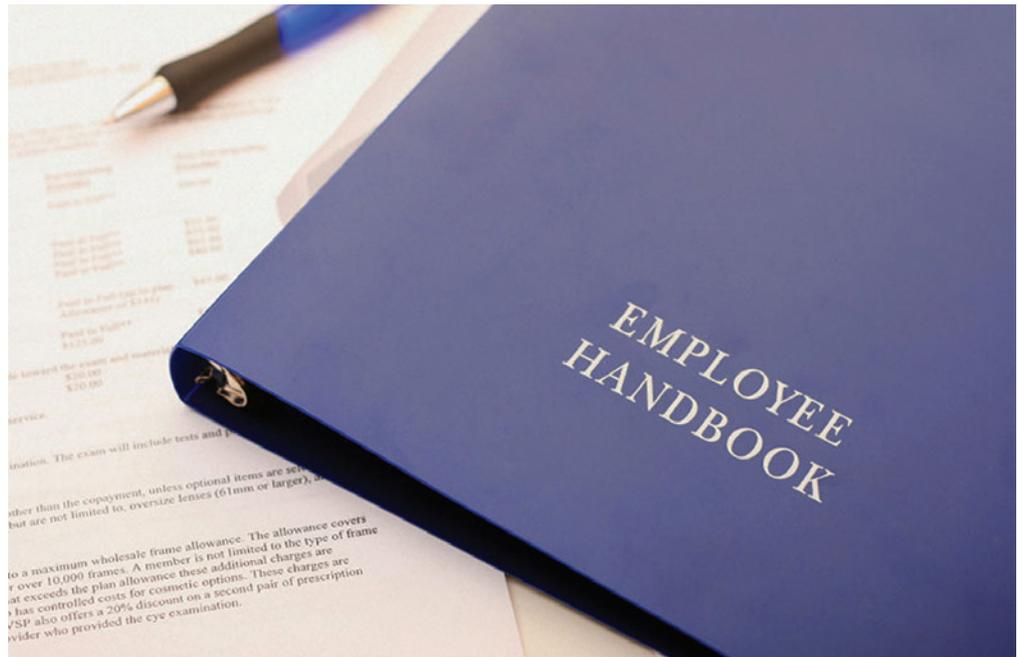
The requirement to physically report to work invariably results

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in some employees requesting an accommodation to that requirement, whether it be for a disability, a home schooling/child care situation or to care for themselves or a family member diagnosed with COVID-19. This was an issue in 2020 that will continue to be an issue into 2021. Notwithstanding an employee's right to an accommodation for certain reasons, multiple leave laws were passed in 2020 to ease the burden of COVID-related absences on individuals, but correspondingly increased the burdens on employers.

The availability of leave under certain laws, such as the federal Families First Coronavirus Response Act (FFCRA), expired at the end of 2020 and thus navigating the interplay among COVID-19 specific leaves of absence, state or local mandated sick leave laws and employer paid time off policies should be slightly simpler in 2021. (While employers are not required to provide leave under the FFCRA in 2021, employers who voluntarily provide such leave for qualifying reasons may continue to take advantage of the tax credits available under the law through March 31, 2021.)

Beyond those lawfully entitled to an accommodation limiting or postponing their physical return to the workplace, there will be employees who are simply uncomfortable with such a return. Whether the reason behind this stems from their commute or a reluctance to be among co-workers, it is a novel issue employers will need to address while being conscious not to treat



anyone differently based on a protected class. For example, it would be unlawful for a sympathetic employer to allow older employees to continue to work from home, while not extending the same allowances to younger employees based solely on their age.

As COVID-19 vaccines become more accessible, employers will need to deal with the question of whether or not to require vaccinations for employees who do not qualify for a religious or disability based exemption. Unless there is a mandate issued by New York State or another applicable government entity, employers will be left to make this decision on their own. One yet to be answered question, is whether the presence of unvaccinated individuals in the workplace will render it unsafe for purposes of the general duties clause under OSHA. The answer to whether an employer should require vaccinations may vary workplace to workplace based upon factors such as the physical

space where employees work and their interaction with the public or other populations.

**Reduced Workforces.** Among the tragedies of 2020 was the surge in unemployment. Many employers were faced with the need to reduce their workforces, in many cases at such scales that WARN laws were triggered and attendant notices needed to be given. The greater than normal uncertainty of what the future held, rendered the use of "furloughs" more common than ever before in the private sector. This often allowed employers to maintain employees' group health insurance coverage and keep such employees as a ready resource for ramping up when needed. 2021 will bring with it a new perspective and clearer vision for many employers now better able to identify critical roles and where there is excess within their workforces.

The new year is upon us, a new administration is taking the helm in Washington, D.C., and COVID-19 vaccines are being disseminated

across the United States. As 2021 progresses, we will see issues not directly related to the pandemic moving toward the forefront of employers' radars.

**Diversity and Inclusion.** Diversity and inclusion are buzzwords with substance. The Black Lives Matter movement woke enough people that employers now more commonly realize the value of maintaining a diverse workforce and see that it is an investment they cannot afford to pass on. Employers will need to be intentional in their actions and will be held accountable by their customers and employees if they do not support a workforce that reflects the demographics of their customers, clients and community. The need for diversity spans all protected categories, including race, sex and gender. Employers who prioritize such efforts may need to be flexible and creative in the development of policies, practices and opportunities that foster a diverse workplace.

**Pay Equity.** On the heels of diversity and inclusion initiatives is pay equity. Although the Equal Pay Act was passed in 1963 with the intent of eliminating pay disparities between men and women, such disparities remain a problem. New York's ban on salary history inquiries was designed to address historical pay inequities that had become self-perpetuating. Employers should expect to see an increase in claims related to equal pay. Employers would be well served by engaging in an internal audit to ensure there are no inadvertent disparities among

compensation packages that adversely impact employees of any particular protected class.

**Mental Health.** The past year has been tumultuous for all, and many employers were forced to address (and perhaps found a new appreciation for) employee mental health issues. Supporting the mental health of employees by making available resources, such as an Employee Assistance Plan, and eliminating stigmas associated with self-care makes good business sense—in addition to benefiting the well-being

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of employees, such initiatives help employers retain talent and improve productivity.

**Independent Contractors.** Many unemployed individuals may consider working as consultants (classified as independent contractors rather than employees), even performing the same services as they did when employed though for different entities, in order to get back to work. Businesses may see this as an attractive option to “try out” a worker since independent contractors generally are not subject to employment laws and are not entitled to employee benefits. However, it is crucial

for businesses to analyze the applicable factors to distinguish between employees and contractors and ensure each worker is properly classified as the penalties for misclassification can be significant and include, for example, unpaid overtime, back taxes, and unemployment insurance contributions.

While the issues and challenges identified above are applicable to employers generally, there are employers in certain industries, such as hospitality, that must deal with a litany of other challenges beyond the scope of this article. Nevertheless, as employers look forward to a new year, there will undoubtedly be lingering and prevalent effects from 2020, including in the form of challenging COVID-related HR issues. Moreover, a new Democratic administration and control of Congress will likely result in employee-friendly legislation and additional burdens for employers. Those employers who are able to adapt and evolve to remain in compliance with ever-changing employment laws will greatly mitigate their risk of costly employment and HR legal issues.