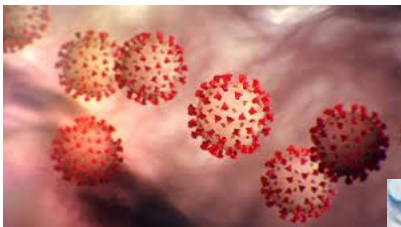


What Employers Need to Know for 2022



October 19, 2021

COVID HYGIENE



VACCINES!



VACCINES!

- Can you ask?
 - Yes.
- Can you get a copy?
 - Yes.
- Can employees be fired?
 - Maybe...
 - Exemptions and policy

Vaccines!

- Three vaccine rules coming down the road based on Executive Orders.



VACCINES!



Vaccines!

- The three vaccine rules coming down the road:
 - Federal Contractors;
 - Nursing Homes and most Medicare and Medicaid Recipients;
 - Employers with over 100 people.

Vaccines!

- Federal Contractors.
 - Executive Order issued on my birthday.
 - Safer Federal Workforce Task Force issued rules.
https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf
 - Find a FAQ here:
 - <https://www.saferfederalworkforce.gov/faq/contractors/>

Vaccines!

- Federal Contractors.
- Sec. 5. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:
 - (i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 - (ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 et seq.;
 - (iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or
 - (iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public;
- (b) This order shall not apply to:
 - (i) grants;
 - (ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;
 - (iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;
 - (iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or
 - (v) subcontracts solely for the provision of products.

Vaccines!

- Federal Contractors.
 - Covered contractor employees must be fully vaccinated no later than December 8, 2021, except in limited circumstances where an employee is legally entitled to an accommodation;
 - Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
 - Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Vaccines!

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Vaccines!

- Nursing Homes and most Medicare and Medicaid recipients.
 - The Centers for Medicare & Medicaid Services (CMS), in collaboration with the Centers for Disease Control and Prevention (CDC), will promulgate emergency regulations requiring vaccinations for nursing home workers, hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition for participating in the Medicare and Medicaid programs.

Vaccines!

- Employers with 100+ employees.
 - Getting very close.
 - Details still not clear quite yet.
 - Testing and Vaccine.

Vaccines!

- What to do?
- What to expect?
- Don't Panic!!



HOUSECLEANING



MAKE SURE YOU ARE REVIEWING CDC AND LOCAL GUIDANCE

- [Check the CDC's cleaning and ventilation guidance:
https://www.cdc.gov/coronavirus/2019-ncov/community/clean-disinfect/index.html](https://www.cdc.gov/coronavirus/2019-ncov/community/clean-disinfect/index.html)
- Keep up on most recent CDC guidance on isolation and quarantine:
<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>
- Check your local health department for local agreement to reduce time.
- Update your policies.

OSHA/MIOSHA

- OSHA
- Healthcare - Mandatory
- Non-Healthcare – Non-mandatory

OSHA/MIOSHA

- OSHA
- Healthcare - Mandatory
- Non-Healthcare – Non-mandatory
 - Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA

- CDC to update recommendations for fully vaccinated people to reduce their risk of becoming infected with the Delta variant and potentially spreading it to others, including by:
 - wearing a mask in public indoor settings in areas of substantial or high transmission;
 - choosing to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated; and
 - getting tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for 14 days after exposure or until a negative test result.

OSHA

- ***Suggest or require that unvaccinated customers, visitors, or guests wear face coverings in public-facing workplaces such as retail establishments, and that all customers, visitors, or guests wear face coverings in public, indoor settings in areas of substantial or high transmission.*** This could include posting a notice or otherwise suggesting or requiring that people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings.

OSHA

- ***Maintain Ventilation Systems.*** Improving ventilation is a key engineering control that can be used as part of a layered strategy to reduce the concentration of viral particles in indoor air and the risk of virus transmission to unvaccinated and otherwise at-risk workers in particular. A well-maintained ventilation system is particularly important in any indoor workplace setting and when working properly, ventilation is an important control measure to limit the spread of COVID-19. Some measures to improve ventilation are discussed in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace. These recommendations are based on American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Guidance for Building Operations and Industrial Settings during the COVID-19 Pandemic. Adequate ventilation will protect all people in a closed space. Key measures include ensuring heating, ventilation, and air conditioning (HVAC) systems are operating in accordance with the manufacturer's instructions and design specifications, conducting all regularly scheduled inspections and maintenance procedures, maximizing the amount of outside air supplied, installing air filters with a Minimum Efficiency Reporting Value (MERV) 13 or higher where feasible, maximizing natural ventilation in buildings without HVAC systems by opening windows or doors, when conditions allow (if that does not pose a safety risk), and considering the use of portable air cleaners with High Efficiency Particulate Air (HEPA) filters in spaces with high occupancy or limited ventilation.

OSHA

- ***Perform routine cleaning and disinfection.*** If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19 follow the CDC cleaning and disinfection recommendations. Follow requirements in **mandatory OSHA standards 29 CFR 1910.1200** and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

OSHA

In all workplaces with heightened risk due to workplace environmental factors where there are unvaccinated or otherwise at-risk workers in the workplace:

- Stagger break times in these generally high-population workplaces, or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks. Such workers should maintain at least 6 feet of distance from others at all times, including on breaks.
- Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers in parking areas, locker rooms, and near time clocks.
- Provide visual cues (e.g., floor markings, signs) as a reminder to maintain physical distancing.
- Require unvaccinated or otherwise at-risk workers, and also fully vaccinated workers in areas of substantial or high community transmission, to wear masks whenever possible, encourage and consider requiring customers and other visitors to do the same.
- Implement strategies (tailored to your workplace) to improve ventilation that protects workers as outlined in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace, and ASHRAE Guidance for Building Operations and Industrial Settings During the COVID-19 Pandemic.

OSHA

In high-volume retail workplaces (or well-defined work areas within retail workplaces) where there are unvaccinated or otherwise at-risk workers, customers, or other people:

- Ask customers and other visitors to wear masks—or consider requiring them--especially in areas of substantial or high transmission.
- Consider ways to promote physical distancing between unvaccinated or otherwise at-risk people and/or limiting occupancy to allow for physical distancing consistent with CDC guidance.
- Move the electronic payment terminal/credit card reader farther away from unvaccinated and otherwise at-risk workers in order to increase the distance between customers and such workers, if possible.
- Adjust stocking activities to limit contact between unvaccinated and otherwise at-risk workers and customers.

OSHA

- **Record and report COVID-19 infections and deaths:** Under **mandatory OSHA rules in 29 CFR part 1904**, employers are required to record work-related cases of COVID-19 illness on OSHA's Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers must follow the requirements in 29 CFR part 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA. More information is available on OSHA's website. Employers should also report outbreaks to local health departments as required and support their contact tracing efforts.
- In addition, employers should be aware that OSHA prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer. In addition, mandatory OSHA standard 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related illness.

OSHA

- ***Facilitate employees getting vaccinated.***
Employers should grant paid time off for employees to get vaccinated and recover from any side effects.

OSHA

- **Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work to prevent or reduce the risk of transmission of the virus that causes COVID-19.**

OSHA

- ***Provide workers with face coverings or surgical masks, as appropriate, unless their work task requires a respirator or other PPE.*** In addition to unvaccinated and otherwise at-risk workers, CDC recommends that even fully vaccinated people wear masks in public indoor settings in areas of substantial or high transmission and notes that fully vaccinated people may appropriately choose to wear masks in public indoor settings regardless of community level of transmission, particularly if they are at risk or have someone in their household who is at risk or not fully vaccinated.

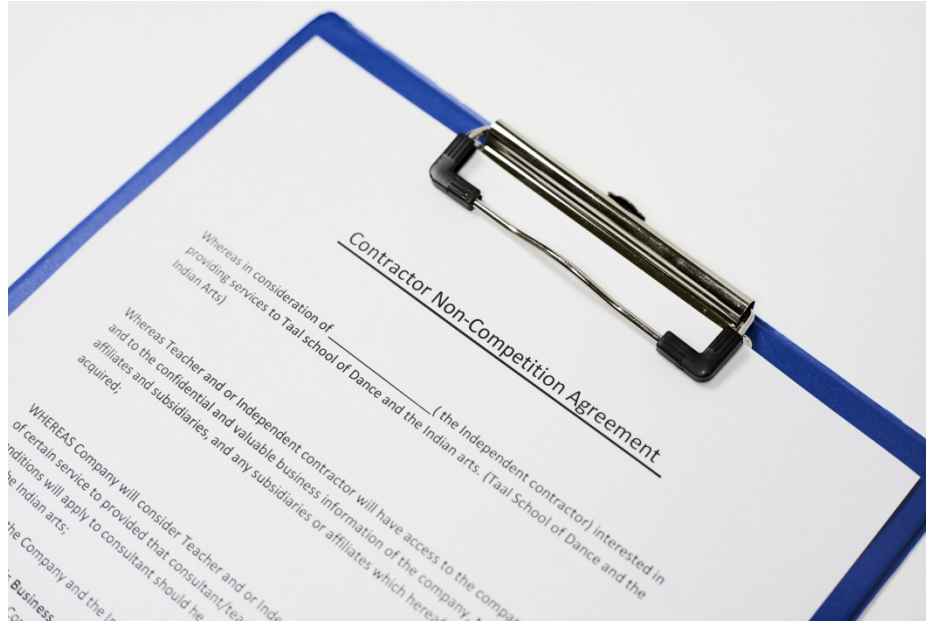
OSHA

- ***Educate and train workers on your COVID-19 policies and procedures:***
 - Training should be directed at employees, contractors, and any other individuals on site, as appropriate, and should include: Basic facts about COVID-19, including how it is spread and the importance of physical distancing (including remote work), ventilation, vaccination, use of face coverings, and hand hygiene.
 - Workplace policies and procedures implemented to protect workers from COVID-19 hazards.

OSHA

- In all workplaces with heightened risk due to workplace environmental factors where there are unvaccinated or otherwise at-risk workers in the workplace:
 - Stagger break times in these generally high-population workplaces, or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks. Such workers should maintain at least 6 feet of distance from others at all times, including on breaks.
 - Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers in parking areas, locker rooms, and near time clocks.
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Noncompete and No-Poaching Agreements



Noncompete Agreements

- A noncompete agreement is a contract:
 - Prohibits a person from engaging in the same type of business with another employer if they leave their current job.
 - Protects the employer from a former employee using the knowledge or trade secrets learned from one employer to compete with that employer elsewhere.

Noncompete Agreements

- Under current Michigan law, a noncompete agreement must:
 - Be narrowly drawn
 - To protect a reasonable competitive business interest
 - Be reasonable in its:
 - Duration
 - Geographical area
 - Type of restricted employment or line of business

MCL 445.774a

Noncompete Agreements Under the Biden Administration

- President Biden supports legislation that would eliminate most noncompete agreements.
- New standard for enforcement would be that the noncompete is absolutely necessary to protect a narrowly defined category of trade secrets.

Noncompete Agreements Under the Biden Administration

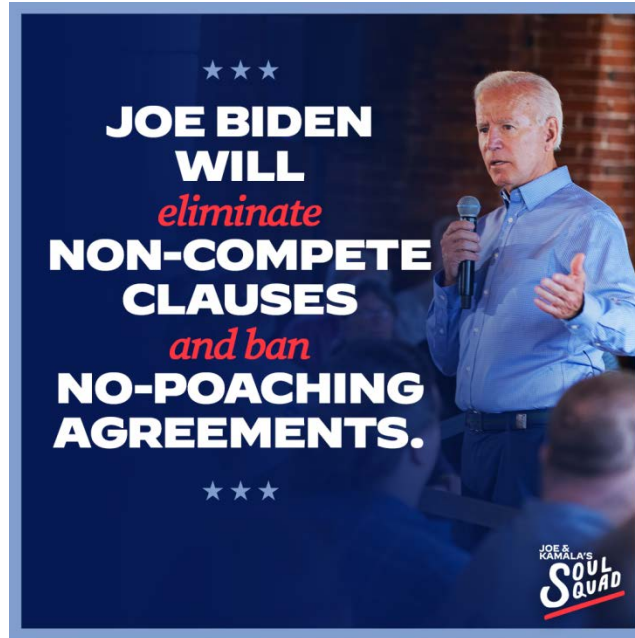
- Rationale for limiting enforcement of noncompete agreements:
 - Reduction of competition among businesses.
 - Stifling of workers' job mobility and wage growth.

Noncompete Agreements Under the Biden Administration

- “It's simple: companies should have to compete for workers just like they compete for customers.”
- “We should get rid of noncompete clauses and no-poaching agreements that do nothing but suppress wages.”

Joe Biden - December 2019

Promises Made



No-poaching Agreements

- Employers agree not to hire workers from each other.
- Makes it harder for workers to obtain employment with competitors.
- DOJ/FTC Antitrust Guidance for Human Resource Professionals: “It is against the law for employers to fix wages or to not hire one another’s workers.”

<https://www.justice.gov/atr/file/903511/download>

Antitrust Guidance for Human Resource Professionals

- It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs.
- HR professionals should take steps to ensure that interactions with other employers competing with them for employees does not result in an unlawful agreement not to compete in terms of employment.

Antitrust Guidance for Human Resource Professionals

- An individual is likely breaking the law if he or she:
 - Agrees with individuals at another company about employee salaries or other terms of compensation;
 - Agrees with individuals at another company to refuse to solicit or hire that company's employees.
- Sharing information with competitors about terms and conditions of employment can also run afoul of antitrust laws.

Antitrust Penalties

- Individuals harmed by an illegal agreement among potential employers can bring a civil lawsuit for treble damages.
- The DOJ could bring a criminal prosecution against individuals, companies, or both.
- *United States v. Jeeraj Jindal* (E.D. Tex. 12/09/20). Indictment obtained charging former owner of physical therapists staffing company with wage fixing.
- *United States v. Surgical Care Affiliates, LLC* (N.D. Tex. 01/05/21). Two-count indictment obtained charging three outpatient medical care centers with suppressing competition through no-poach agreements.

Michigan Court Action

- *Schexnaildre v. Munson Healthcare and Traverse Anesthesia Associates, P.C., Case 1:21-cv-00660-RJJ-RSK (Western Dist. Of Mich., 08/02/2021)*
 - *Certified Registered Nurse Anesthetist (CRNA) filed proposed class action over allegedly unlawful no-poach agreement.*
 - *Seeks treble damages, plus costs and attorneys' fees.*

How ready are you for 2022?



Conduct a self-audit of your employment practices to find out

We can help you help yourself!

Start by asking yourself three basic questions ...

- Do I have appropriate employment policies, practices and forms?
- Do I know which employment related statutes apply to me?
- Am I keeping the right records?

Employment Policies, Practices, and Forms Checklist

Policies, Practices, Forms	Have	Need/ Update	Notes
Written job descriptions, including essential job functions			
Training for interviewers regarding interview questions			
Offer and rejection letters			
Employment agreements			
Non-competition / confidentiality agreement			
I-9 Employment Eligibility Verification procedure			

Hiring / orientation checklist			
Acknowledgment of receipt of company property			
Authorization to withhold money for unreturned company property			
COBRA forms (if applicable)			
FMLA forms (if applicable)			
Employee Handbook			
Acknowledgment of receipt			

Policies, Practices, Forms	Have	Need/ Update	Notes
Acknowledgment of employer right to change policies			
Hours and overtime			
Employee benefits			
Social Security Numbers			
Fair Labor Standards Act			
Unlawful harassment			
Non-discrimination			

Reporting of harassment or discrimination			
Other			
Employee evaluation form			
Employee discipline / counseling / termination form			
Disability accommodation request form			
Response to request for accommodation form			
Resignation form			
Separation checklist			

Do I know which employment-related statutes apply to me?

Checklist for Compliance with Employment Related Statutes

Statute	<u>Yes</u> applies to us	No does not apply to us	Not sure if it applies to us
Title VII			
Elliot Larsen Civil Rights Act			
Age Discrimination in Employment Act			
Americans With Disabilities Act			
Michigan Persons with Disabilities Act			

Immigration Reform and Control Act			
Fair Labor Standards Act			
Equal Pay Act			
Michigan Workforce Opportunity Wage Act (replaced Minimum Wage Law)			
Michigan Occupational Safety and Health Act (MIOSHA)			
Federal Occupational Safety and Health Act (OSHA)			
Family Medical Leave Act (FMLA)			
Consolidated Omnibus Budget Reconciliation Act (COBRA)			
Uniformed Services Employment Reemployment Rights Act (USERRA)			

Michigan Military Leave <u>Reemployment</u> Protection			
Michigan Wage and Fringe Benefit Act			
Health Insurance Portability and Accountability Act (HIPAA)			
Patient Protection and Affordable Care Act (PPACA)			
Worker Adjustment and Retraining Notification Act (WARN)			
Employee Retirement Income Security Act (ERISA)			
Vietnam Era Veteran's Readjustment Assistance Act			

Genetic Information Nondiscrimination Act (GINA)			
Personal Responsibility and Work Opportunity Reconciliation Act			
Michigan Bullard Plawecki Right to Know Act			
Michigan Social Security Number Privacy Act			
National Labor Relations Act			
Michigan Eavesdropping Statute / Federal Wiretapping Act			
Michigan Internet Privacy Protection Act (IPPA)			

What records should I be keeping?



Records Retention Requirement Chart

Personnel Data That Must Be Retained	For How Many Years										
	Title VII ¹	FLSA ²	ADEA ³	ADA ⁴	IRCA ⁵	MPWDA ⁶	ELCRA ⁷	MIOSHA ⁸	FICA/FUTA ⁹	EPA ¹⁰	FMLA ¹¹
Employment Applications and Pre-Employment Records (includes advertising, resumes, job applications, Form 1-9, and applicant processing records such as interview notes and applicant contacts).	1		1		3	3	3				

Payroll Records (includes time sheets, attendance records) Note: keep name, address, ZIP code, DOB if under age 19, sex, occupation, day/time workweek begins, hours worked (non-exempt), overtime comp, SS#, compensation rates, total wages, deductions, additions to wages, payments for travel and business expenses.	1	3	3	1				4	2	
Employment Action Records (includes training records, promotion/demotion, transfers, layoffs/recalls, discipline, discharge, leaves of absence, minors' work permits). Retain temporary workers' records for 90 days.	1		1			3	3			3
Job Descriptions (includes job analysis to justify job descriptions). These are important for showing essential job functions in particular job positions.				2		3				
Injury, Illness, and Medical Records (includes log of injuries on the job, medical records, log of exposure to hazardous material).			5				5			
Employment Pension and Benefits Records (includes pension plans, seniority plans, merit plans, payroll and benefit records).			6							

Employment Reference Records (includes written release of information by employees, phone logs of reference checking and correspondence from prospective employers of former employees, but NOT if they contain the identity of person giving the reference).						3	3				
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- | | | | |
|---|--|----|---|
| 1 | Title VII, Federal Discrimination Laws | 7 | Elliott-Larsen Civil Rights Act |
| 2 | Fair Labor Standards Act | 8 | Michigan Occupational Safety and Health Act |
| 3 | Age Discrimination in Employment Act | 9 | Federal Insurance Contribution Act / Federal Unemployment Tax Act |
| 4 | Americans with Disabilities Act | 10 | Equal Pay Act |
| 5 | Immigration Reform and Control Act | 11 | Family and Medical Leave Act |
| 6 | Michigan Persons with Disabilities Act | | |

Our general advice is to simplify record retention policies by keeping all of the listed employment related records for six and half years.

What can you do now to get ready for 2022?

- Complete self-audit
- Adopt or update written policies
- Review employment agreements
- Review non-compete agreements

What can you do now to get ready for 2022?

- Become familiar with laws which apply to you
- Standardize employment related forms
- Review record-keeping practices

Questions?



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