

Reimagining the Workplace

Strategies for a Positive Way Forward
in the “New Normal”

April 1, 2021

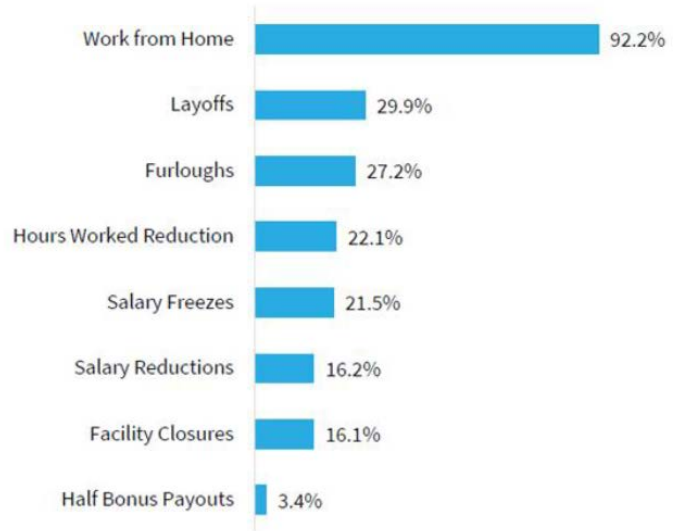
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Agenda

- Return-to-work developments
- Vaccine and other health and safety issues
- Reasonable accommodation considerations and strategies
- Q&A

Return-to-Work Strategies and Trends

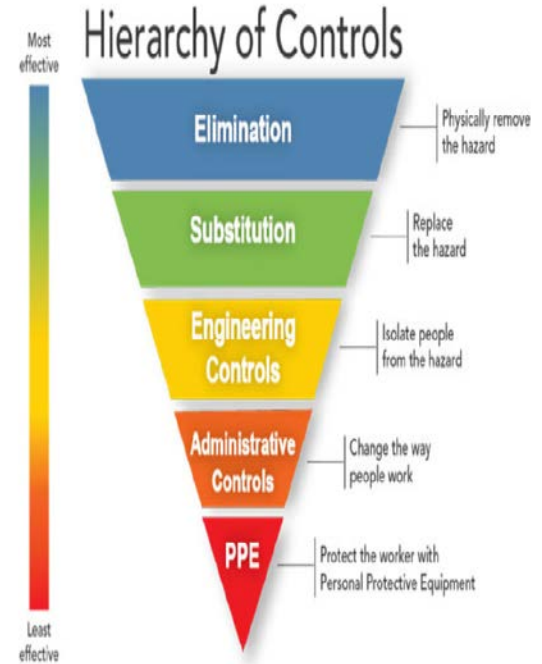
Where Are We At Now?



Source: Salary.com Pay Practices survey, Fall 2020

What Are the Rules?

- Current CDC guidance:
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- Current OSHA guidance:
<https://www.osha.gov/coronavirus/safework>



What Are the Rules?

- Current state guidance
- Immunity from liability
 - Varies by state
 - Often depends on “substantial compliance” with applicable guidance

Options

- Fully remote?
- Fully in-person?
- Hybrid?
 - By position
 - Alternating schedules

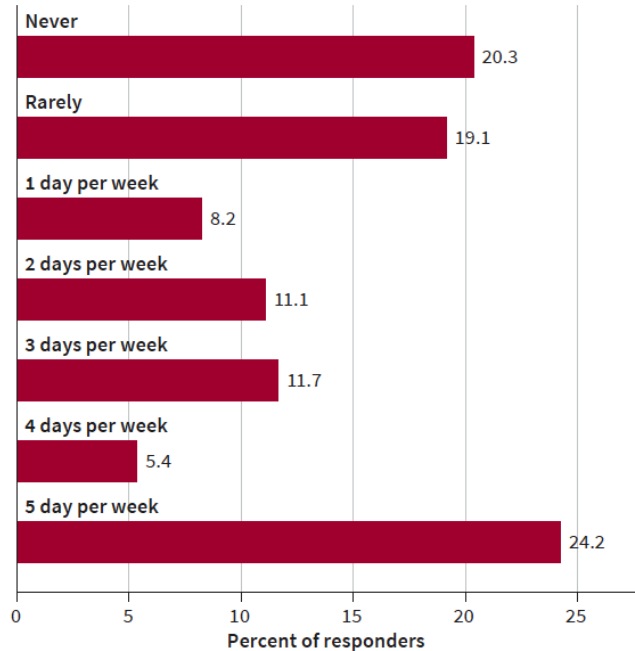
Remote Work

- Document: assess and decide
- Communicate
- Policies
- Protection of confidential information
- Stay on top of performance issues
- Consider employee reaction

In-Person

- Consider first *who* you are going to bring back
- Consider reopening in phases and/or alternating schedules
- Continued safety measures and related discipline
- Consider offering remote *option* under certain circumstances
- What aspects of remote work do you want to keep?

Figure 5: There is wide variation in employee demand for WFH post-COVID



Source: Response to the questions: “In 2021+ (after COVID) how often would you like to have paid work days at home?”
Data from a survey of 2,500 US residents aged 20 to 64, earning more than \$20,000 per year in 2019 carried out between May 21-25, by QuestionPro on behalf of Stanford University.
Sample reweighted to match the Current Population Survey.

<https://siepr.stanford.edu/research/publications/how-working-home-works-out>

Hybrid

- What most employers plan to offer and what most employees are looking for
- Structure in a way that fits your business/workplace
- Consider how you may want/need to restructure your physical office

Other Considerations

- Compensation
- Benefits
 - PTO and other leave
 - Telehealth and other mental health programs
 - Retirement
 - Other

Vaccine and Other Safety Initiatives

COVID-19 Preparedness Plan

- Required in MN before employees return to in-person work: *“All Minnesota businesses must establish and implement a COVID-19 Preparedness Plan per [MN: Emergency Executive Order 20-74 \(PDF\)](#).”*

COVID-19 Preparedness Plan

- Even if not required in your state, worth considering
- If you have one, time to refresh

COVID-19 Preparedness Plan: Requirements

- Detailed instructions, recommendations and templates:
<https://www.health.state.mn.us/diseases/coronavirus/businessesplan.html>
- General business plan AND industry specific plans

COVID-19 Preparedness Plan: Requirements

- Designate one person from your leadership team or staff to be the “Plan Administrator” to prepare, evaluate, monitor, execute, and update the plan

COVID-19 Preparedness Plan: Requirements

- The plan must be posted onsite in an easily accessible location so all leadership, staff, and volunteers can easily review it
- Ensure that all activities held in your building(s) follow your practices and protocols

COVID-19 Preparedness Plan: Requirements

- Policies and procedures that help to identify sick workers and ensure sick workers stay home
- Protocols for flow of activity to maintain social distancing of at least 6 feet between people

COVID-19 Preparedness Plan: Requirements

- Staff/worker hygiene procedures and source controls, including face coverings where and when required
- Building and ventilation protocols
- Cleaning and disinfecting protocols for work and gathering spaces

COVID-19 Preparedness Plan: Requirements

- Safe practices and protocols for drop-off, pick-up, and deliveries
- Communications and training practices and protocols for all staff

COVID-19 Preparedness Plan: Tips

- Know what is in the template – don't just adopt it wholesale
- Templates were updated in July – when was your plan adopted and last updated?
- Training – refresh and implement for employees returning to the office

COVID-19 Preparedness Plan: Tips

- Follow it – Enforce it, for these reasons:
 - Minimize exposure/illness in the workplace
 - Minimize employee complaints, and retaliation/whistleblower allegations
 - Reduce likelihood of OSHA investigation/fines

COVID-19 Preparedness Plan: Tips

- Minimize liability to third parties who contract COVID at your place of business (e.g., negligence claims)
- Employee illnesses will most likely be covered exclusively by workers' compensation
- Avoid bad PR

Masks in the Workplace

- Recent CDC guidance says that vaccinated individuals can gather indoors with other vaccinated individuals without masks
- BUT MN statewide mask mandate still applies and has not been amended (yet)
- OSHA says masks should be worn at work and forthcoming ETS may require
 - <https://www.osha.gov/coronavirus/faqs>

OSHA Enforcement

- President Biden: [Executive Order on Protecting Worker Health and Safety](#)
- Directs the OSHA to increase enforcement of existing agency standards
- OSHA to “consider” whether any emergency standards related to COVID-19 are necessary, particularly whether masks should be required in the workplace

OSHA Enforcement

- The COVID-19 stimulus bill signed by President Biden on March 11 allocates \$100 million for OSHA; \$10 million for training grants and \$5 million for enforcement activities
- March 12: OSHA issued a new National Emphasis Program (NEP)
- Emergency Temporary Standard is coming

OSHA Enforcement

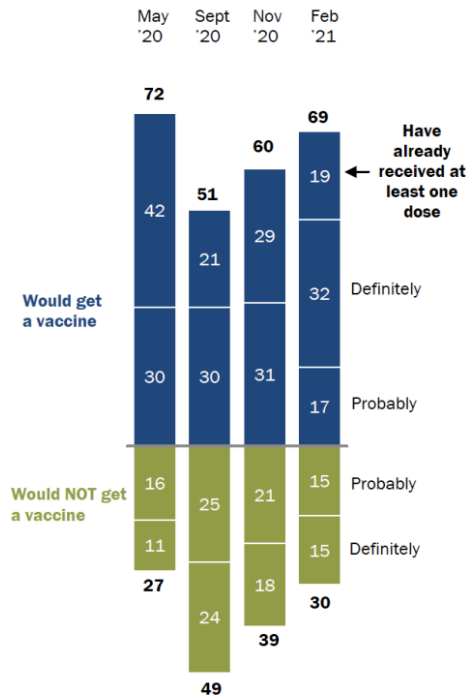
- NEP target industries:
 - Healthcare: offices of physicians and dentists, hospitals, facilities for nursing care, assisted living and retirement, home health care services, ambulance services
 - Non-healthcare: meat and poultry processing, grocery stores, discount department stores, general warehousing and storage, restaurants, correctional institutions, temporary help services

Vaccine Policies

- Employer options:
 - Option 1: Require vaccination
 - Option 2: Encourage vaccination
 - Option 3: Incentivize vaccination
 - Option 4: No position/policy

Half of Americans intend to get a COVID-19 vaccine; 19% already have

% of U.S. adults who say, thinking about vaccines to prevent COVID-19, they ...

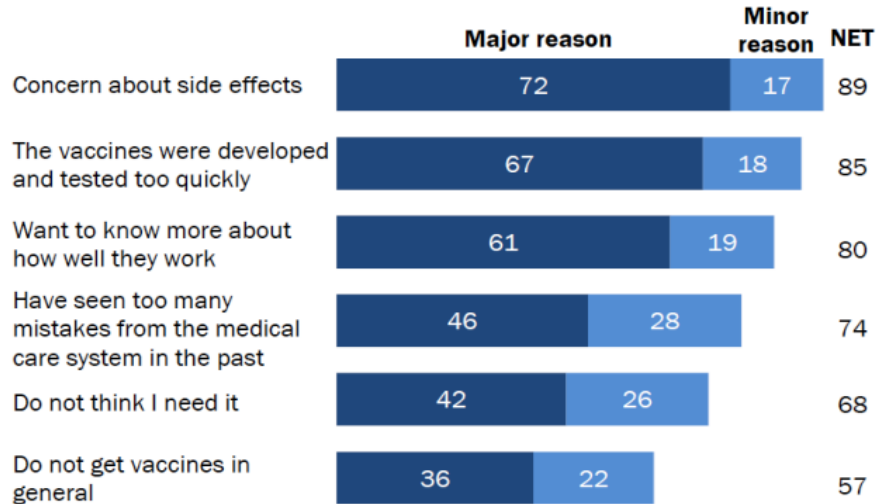


Note: Respondents who did not give an answer are not shown.
 Source: Survey conducted Feb. 16-21, 2021.
 "Growing Share of Americans Say They Plan To Get a COVID-19 Vaccine – or Already Have"

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Those disinclined to be vaccinated cite concerns about side effects, pace of vaccine development and desire for more information as top reasons why

Among the U.S. adults who say they probably/definitely will NOT get a vaccine to prevent COVID-19, % who say each of the following is a major/minor reason



Note: Based on those who say they definitely/probably will NOT get a vaccine to prevent COVID-19. Respondents who gave other responses or did not give an answer are not shown.

Source: Survey conducted Feb. 16-21, 2021.

"Growing Share of Americans Say They Plan To Get a COVID-19 Vaccine – or Already Have"

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Option 1: Requiring Vaccines

- Private employers may require (even non-healthcare)
- Reasonable accommodations required under the ADA for disabled employees
- Reasonable accommodations required under Title VII for religious objections

Option 1: Requiring Vaccines

- Proof of vaccination
- Need to be ready to enforce

Option 1: Requiring Vaccines

- Benefits:
 - Minimize COVID transmission to third parties and employees
 - Contribute toward goal of herd immunity (80%)
 - Retention and recruiting: some employees want vaccines to be required
 - (Mostly) eliminates need to consider “restrictions” on non-vaccinated employees

Option 1: Requiring Vaccines

- Drawbacks:
 - Unpopular with many employees
 - Difficult decisions including:
 - Exempting people who have antibodies?
 - Required for all employees, or only customer-facing?
Traveling? Non-remote?

Option 1: Requiring Vaccines

- Exemptions tricky to manage/accommodations hard to determine
- Unprepared to terminate employees who refuse, but who do not have disability or religious exemption
- Administrative headache of collecting proof of vaccination
- Need to verify each year

Option 1: Requiring Vaccines

- Emergency Use Authorizations (EUA) at this time
- Potential for adverse impact claims (e.g., racial minorities have been vaccinated at much lower rates)
- See NYT article, 3/5/21 “[Pandemic’s Racial Disparities Persist in Vaccine Rollout](#)”; MPR article, 3/5/21, “[State data shows disparities in race, ethnicity of who's getting COVID-19 vaccine](#)”

Option 1: Requiring Vaccines

- Best practices
 - Communicate, communicate, communicate
 - Gauge employee reaction *before* announcing the policy
 - Determine process for evaluating exemption requests
 - Consider not providing onsite

Option 1: Requiring Vaccines

- Consistent enforcement
- Err on the side of granting an exemption
 - “[EEOC guidance](#) explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, *“the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief”*”

Option 1: Requiring Vaccines

- Consider adopting policy modeled off school vaccination laws (broader, but simpler and easier to administer, exemptions)
- Vaccination believed to provide protection for 6 months; maybe up to 1 year; need to “repeat” annually
 - [CDC](#): “We don’t know how long protection lasts for those who are vaccinated.”

Option 2: Encouraging Vaccines

- Communication from the top – more than once
- Education on effectiveness, vaccine options

Option 3: Incenting Vaccines

- Many employers opting for incentives vs. requirements
- Cash bonus
- PTO time for obtaining vaccine
- Extra PTO days

Option 3: Incenting Vaccines

- Incentive cannot be coercive
- Need to consider whether exempt employees (disabled, religious) are entitled to the incentive
- Need to consult with benefits counsel

Different Rules for Unvaccinated Employees?

- Employers contemplating masks, social distancing, remote work requirements for non-vaccinated employees while removing those barriers for vaccinated employees

Different Rules for Unvaccinated Employees?

- Will likely see state and federal guidance on this in the coming months, but right now ALL must wear masks. ALL must social distance. ALL are allowed to return to work in-person April 15.

Different Rules for Unvaccinated Employees?

- Recent studies showing that vaccination is 90% effective, which may prompt loosening of restrictions for vaccinated individuals, including in employment settings

Different Rules for Unvaccinated Employees?

- Different set of rules could give rise to disparate treatment claims (pregnancy, disability, religious discrimination) or disparate impact claims (race discrimination, pregnancy, disability, religious)

Different Rules for Unvaccinated Employees?

- EEOC: employers CAN request proof of vaccination without violating the ADA
- However, proceed with caution. State anti-discrimination laws may not allow. Courts may disagree. Subsequent questions (e.g., “why not?” may violate ADA).

Different Rules for Unvaccinated Employees?

- Ask yourself: If we are not requiring vaccination, why are we asking for proof of vaccination?

Different Rules for Unvaccinated Employees?

- Four questions to ask your task force/committee:
 - Do we have a good grasp on how many employees this will impact?
 - Are we prepared to consistently enforce these rules – no exceptions for top performers, high level employees, etc.?

Different Rules for Unvaccinated Employees?

- Will we be creating two “classes” of employees and is that desirable?
- Will we lose employees we don't want to lose?

Which Option is Best for our Company?

- Consider anonymous employee survey
- Polls reflecting public attitudes about COVID-19 vaccine have shifted – time to update your data?

Which Option is Best for our Company?

- Consider vaccine policies in the context of your return to work plan – does our policy undermine or support our ultimate objective?

Reasonable Accommodation Considerations and Strategies

The New Face of Reasonable Accommodation

- A balancing act
 - Business needs, considerations
 - Expanding employee rights and expectations
 - Precedent from pandemic experience
 - Awareness and sensitivity = increased requests

The New Face of Reasonable Accommodation

- Trends - Factors
 - Executive Orders and OSHA work safety guidelines setting expectations for accommodation
 - <https://www.osha.gov/coronavirus/safework>
 - https://mn.gov/governor/assets/2a.%20EO%2020-54%20Signed%20and%20Filed_tcm1055-443858.pdf

The New Face of Reasonable Accommodation

- Trends - Factors
 - EEOC guidelines
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

The New Face of Reasonable Accommodation

- Trends and Factors
 - Anticipated step-up in enforcement – OSHA, DOL, EEOC, state and local human rights agencies
 - Potential expanded protections and requirements on the horizon, paid family leave
 - Increasing number of internal/external claims

The New Face of Reasonable Accommodation

- Strategies
 - Excellent time to review policies, practices and strategies related to reasonable accommodation
 - What are the company's goals
 - Where on the spectrum does the company wish to be/What level of risk is acceptable
 - Anticipate return to work needs/challenges

The New Face of Reasonable Accommodation

- Strategies
 - Develop/tweak policies and practices based on the decisions made/goals identified
 - Preparedness plans
 - Develop a framework for process and communication
 - Active management, strict process? Or a more casual, flexible process?

The New Face of Reasonable Accommodation

- Communication Strategies
 - Discussions with employee
 - Follow up email/memo to set the parameters for expectations
 - Active communication and documentation
 - Time frames established and escalating consequences

The New Face of Reasonable Accommodation

- Communication Strategies
 - Forms/templates for use at various stages
 - Designated individuals to manage the process from beginning to end and to coordinate with third party administrators where applicable
 - Management of confidential information

The New Face of Reasonable Accommodation

- RA comes into play at every turn
 - ***Vaccines*** and accommodation
 - ***Safety*** and accommodation
 - ***Employee mental health, physical illness/disability*** and accommodation
 - ***Mental health, physical Illness/disability of family members*** and accommodation

The New Face of Reasonable Accommodation

- Proactive approach - Vaccines, safety and return to work strategies
 - Policies, preparedness plans
 - Privacy
 - Workplace safety protocols and special circumstances

The New Face of Reasonable Accommodation

- Approximately a fifth of U.S. adults (21%) experiencing high levels of psychological distress
- Nearly three-in-ten (28%) indicate their lives have changed significantly

Pew Research, 3/16/ 2021, <https://www.pewresearch.org/fact-tank/2021/03/16/many-americans-continue-to-experience-mental-health-difficulties-as-pandemic-enters-second-year/>

The New Face of Reasonable Accommodation

- Mental health
 - Stress, anxiety, depression
 - Pandemic effects
 - Exacerbation of existing conditions
 - Family/children, aging relatives, sick family and relatives, unemployment/underemployment

The New Face of Reasonable Accommodation

- Employee illness/disability and illness/disability of family members
 - FMLA, federal and state discrimination laws, sick and safe leave laws
 - Leave, remote work, reduced schedules
 - Workplace structure, safety accommodations

Presenters



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