

A D I F F E R E N T A P P R O A C H

# Hot Employment Topics for Long-term Care Providers in 2022 and 2023

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Pennsylvania Coalition of Affiliated Healthcare & Living Communities  
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[SaxtonStump.com](https://www.SaxtonStump.com)



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Stephen J. Fleury, Jr., Esq. focuses his practice on labor and employment law, post-acute & long-term care, and healthcare litigation. He represents employers and insurers in state and federal courts with claims pertaining to Title VII of the Civil Rights Act, the Family and Medical Leave Act, and the Fair Labor Standards Act. Steve has also represented clients before the Department of Labor and Industry in matters involving workers' compensation and unemployment benefits..



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Rick also frequently litigates claims of discrimination, harassment, and retaliation under Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Relations Act, the Americans with Disabilities Act and the Age Discrimination in Employment Act. Rick further routinely defends employers in class and collective action lawsuits brought under the Fair Labor Standards Act and Pennsylvania Law. Rick represents entities of all size and type, including healthcare organizations, manufacturers, retailers and service industry businesses.



# Perils of “Outsourcing” Resident Care

- ▶ Independent contractors increasingly asserting they are employees
- ▶ Changes to definition of “joint employer” increasing potential liability for labor law violations

# Independent Contractors

## Benefits:

- ▶ No income tax withholdings
- ▶ No social security and Medicare taxes
- ▶ No workers' compensation
- ▶ No unemployment taxes
- ▶ Shielded from liability underemployment laws (e.g., FLSA, Title VII, etc.)

DOL estimates approximately 19 million independent contractors nationwide



# Independent Contractors

## Drawbacks

- ▶ Misclassification can lead to significant liability
- ▶ Repay:
  - Income tax withholdings
  - Social security and Medicare taxes
  - Cover under Workers' Compensation
  - Unemployment Taxes
  - Subject to FLSA and overtime requirements and Title VII, etc.

# Healthcare Staffing Agencies

## Common Industry Setup

- ▶ RNs, LPNs, and CNAs, are independent contractors of the staffing agency
- ▶ BUT, Dept. of Labor increasingly pushing back with success
  - E.g. – Jan. 2022 – Norfolk, VA medical staffing agency (RNs, LPNs, CNAs) - \$7.2 million judgment in back wages and liquidated damages





# Economic Realities Test

## Big Picture Under the FLSA

- ▶ “[A]n employee is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves.”
- ▶ “The employer-employee relationship... is tested by “economic reality” rather than “technical concepts.”

FLSA Fact Sheet 13 (Rev. March 2022)



# Economic Realities Test

## Non-Exhaustive List of Relevant Factors:

- ▶ 1. Nature and degree of the worker's control over the work;
- ▶ 2. Opportunity for profit or loss;
- ▶ 3. Skill required for the work;
- ▶ 4. Permanence of the working relationship; and
- ▶ 5. Whether the work is part an integrated unit of production.

86 F.R. 1168 ("Final Rule" – 3/8/21). The first two factors carry greater weight

A blurred photograph of a person in a dark suit and light-colored shirt walking away from the camera, carrying a grey briefcase. The background is a blurred city street with other pedestrians and buildings, suggesting a fast-paced, busy environment.

# Economic Realities Test

## Nature and Degree of Worker's Control Over the Work

- ▶ Does the potential employer exercise substantial control over key aspects of the performance of the work (E.g. setting work schedules, selecting projects, etc.)?
- ▶ If so, this factor weights in favor worker being an employee

# Economic Realities Test

## Opportunity for Profit or Loss

- ▶ Does the potential employee have the ability to affect his earnings by means other than working more hours or more efficiently?
- ▶ If not, this factor weights in favor worker being an employee
- ▶ Typically, workers who have ability to increase their earnings exercise “managerial skill or business acumen or judgment”





# “Joint Employers”

- ▶ What is It?
  - Two employers that share responsibility and liability for an employee or group of employees
- ▶ Example:
  - A CCRC could be held liable as a “joint employer” for the staffing agency’s misclassification of its workers



# “Joint Employers” – A Brief History

- ▶ Historically (arguably) / 2015 – 2020: NLRB – Entity can be joint employer even where it has exercised “indirect control,” OR
  - Where it “reserved” but did not actually exercise control over workers
- ▶ Trump-Era 2020 – 2022 (?): NLRB - Entity can be joint employer only when it actually exercises “direct and immediate control” over workers
  - This is a heightened employer-friendly standard

# “Joint Employers” – The Present

- ▶ NLRB Seeks to Restore Pre-2020 “Reserved or Indirect Control” Standard with Proposed Rule
  - Two or more employers would be joint employers if they “share or codetermine those matters governing employees’ essential terms and conditions of employment.”
  - Share or co-determine is defined to include “**authority** to control”





# “Joint Employers” – The Present

- ▶ NLRB Seeks to Restore Pre-2020 “Reserved or Indirect Control” Standard with Proposed Rule
  - Also, non-exhaustive list of essential terms and conditions of employment:
  - “Wages, benefits / other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment and work rules and directions governing the manner, means, or methods of work performance.”

# “Joint Employers” – The Present

- ▶ NLRB proposed rule public comment period closes Nov. 7, 2022
- ▶ Final Rule expected to take effect early 2023
- ▶ DOL has parallel proceedings





# “Joint Employers” – Department of Labor Proceedings

- ▶ Trump-Era 2020 Four Factor Test for Joint Employment - Whether potential joint employer:
  - 1. Hired/fired the employee;
  - 2. Supervised and controlled the employee’s work schedule or conditions of employment;
  - 3. Determined the employee’s rate and method of payment; and
  - 4. Maintained the employee’s employment records.
- ▶ Curtailed consideration of other factors
- ▶ Requires joint employer to **actually exercise** control over the employee



# Joint Employers – Department of Labor Proceedings

- ▶ July 29, 2021 – Biden Administration Revokes Trump-Era Rule
- ▶ We still have no Final Rule replacing Trump-Era Test – NLRB Taking Lead
- ▶ NLRB “reserved and indirect control” standard applies

# Impact of Changes:

- ▶ 1. More healthcare staffing agency “independent contractors” will be considered employees; and
- ▶ 2. CCRCs are at increasing risk of being found a “joint employer” of personnel supplied by staffing agencies





# Steps to Minimize Potential Risks of Liability:

- ▶ 1. Review and revision of:
  - a. existing contracts with staffing / temp agencies;
  - b. Independent contractor agreements; and
  - c. Relevant policies and procedures
- ▶ 2. Internal audit by legal counsel
- ▶ 3. Risk assessment

# Challenges in Long-Term Care

- ▶ Mandated vaccination and booster requirements for staff
- ▶ Juggling staffing needs based on leave





# CMS Requirements

- ▶ If you are Medicare or Medicaid provider or supplier, the CMS staff vaccination requirements apply to you – this includes long term care providers



# CMS Requirements

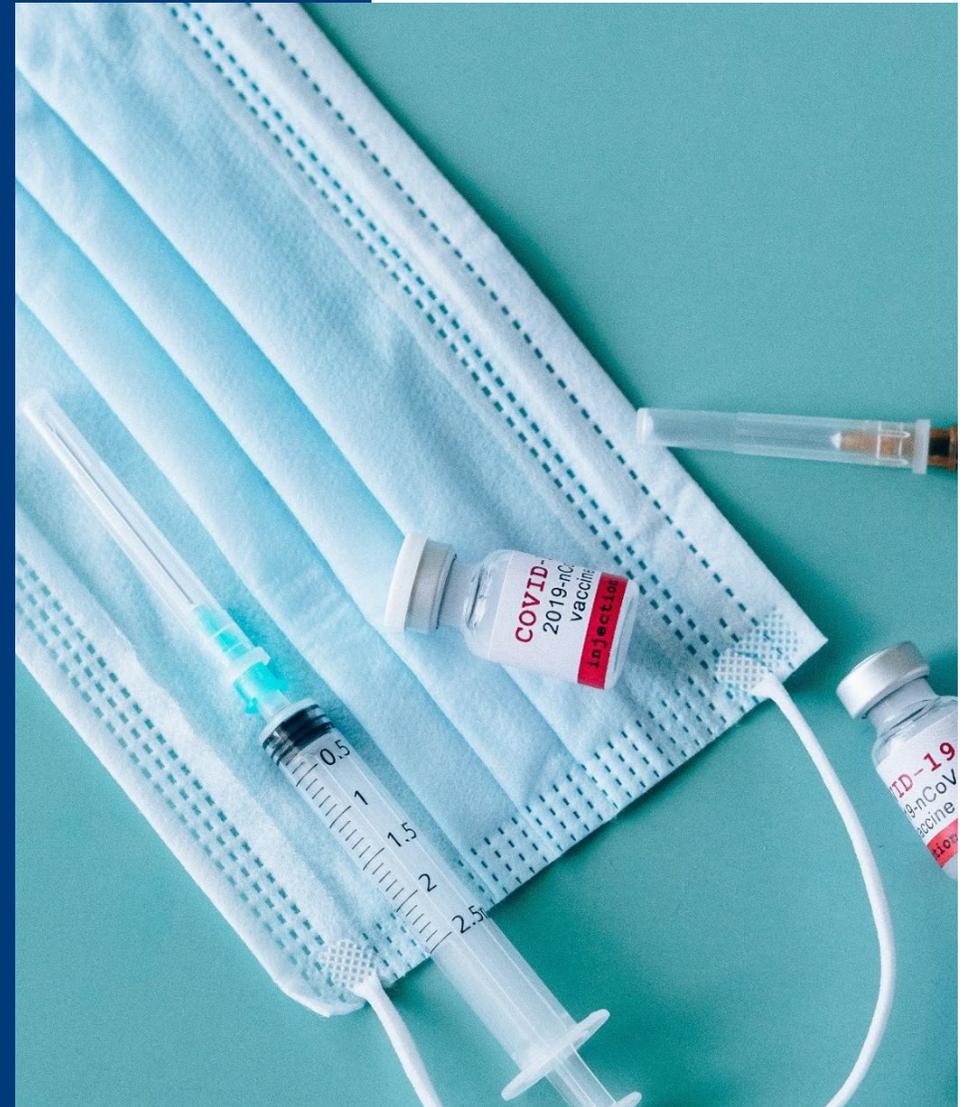
- ▶ Must have all policies and procedures in plan:
  - Ensuring staff are fully vaccinated
  - Providing exemptions and
  - Tracking staff vaccinations
- ▶ Must have 1<sup>st</sup> dose before providing care or other services
- ▶ Many states have challenged the mandate but the requirements have been consistently upheld
- ▶ Enforced through money penalties

# States versus Federal

- ▶ However ... some states have ended vaccination mandates for healthcare workers
  - E.g. Colorado – determined 94% of all healthcare workers had been vaccinated and essentially anyone who was going to get vaccinated had already done so
  - Related to staffing shortages
  - CMS rule still applies

# Boosters

- ▶ CMS mandate does not specifically reference or require boosters
- ▶ However, some states do require boosters
  - New Jersey
  - New York
  - Connecticut
  - California
  - New Mexico
- ▶ March 2022
  - National booster rate for nursing facility staff varied from 93% in MA to 24% in MS (avg. 44%)



# PA Health Network Alert

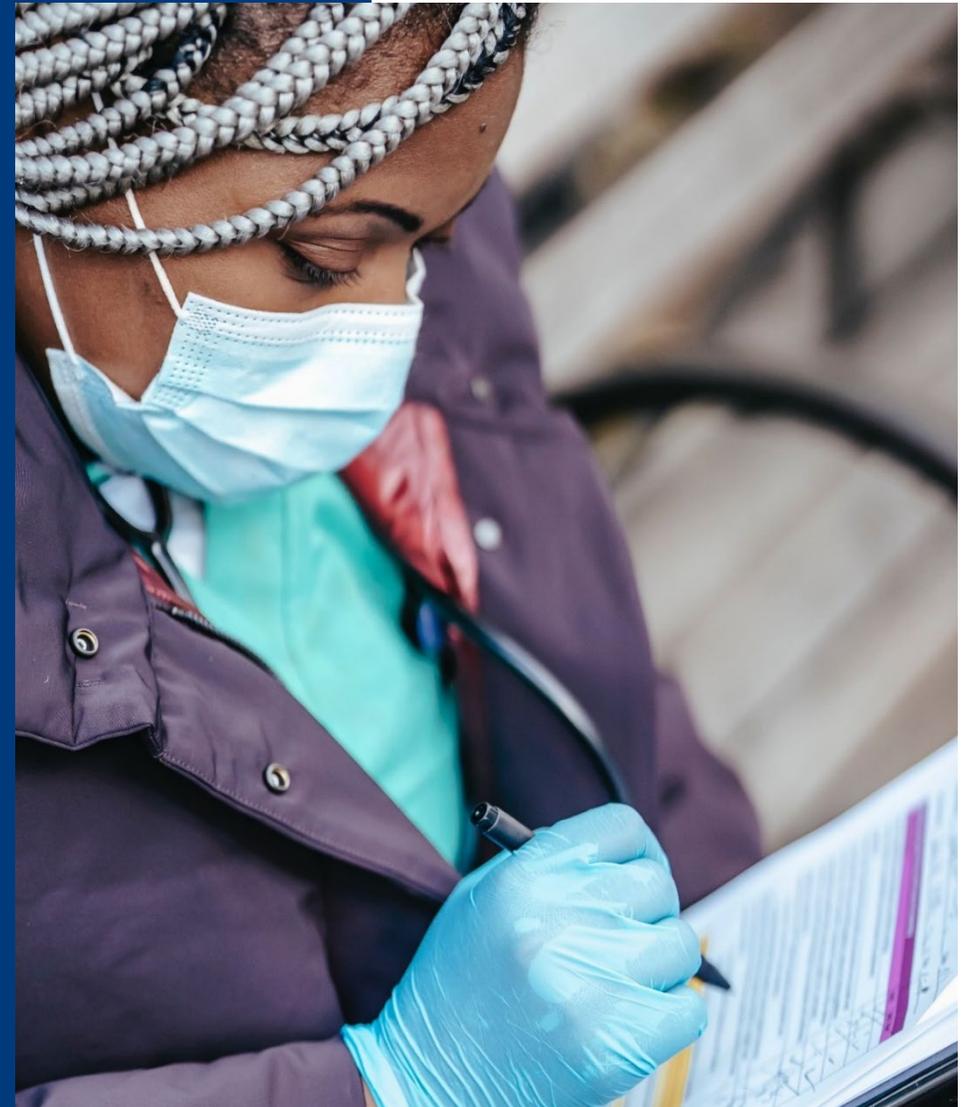
## – 2/8/22

- ▶ Follows CDC recommendation regarding boosters
- ▶ The term “fully vaccinated” changed to “up to date” with all recommended COVID-19 vaccine doses
  - Being “up to date” with all recommended COVID-19 vaccine includes persons who have completed a primary vaccine series at least 2 weeks prior but are not yet eligible for a booster shot per current CDC guidelines
  - A person is considered up to date immediately after receipt of the booster dose

# Pros and Cons of Mandating Boosters

## ► Pros:

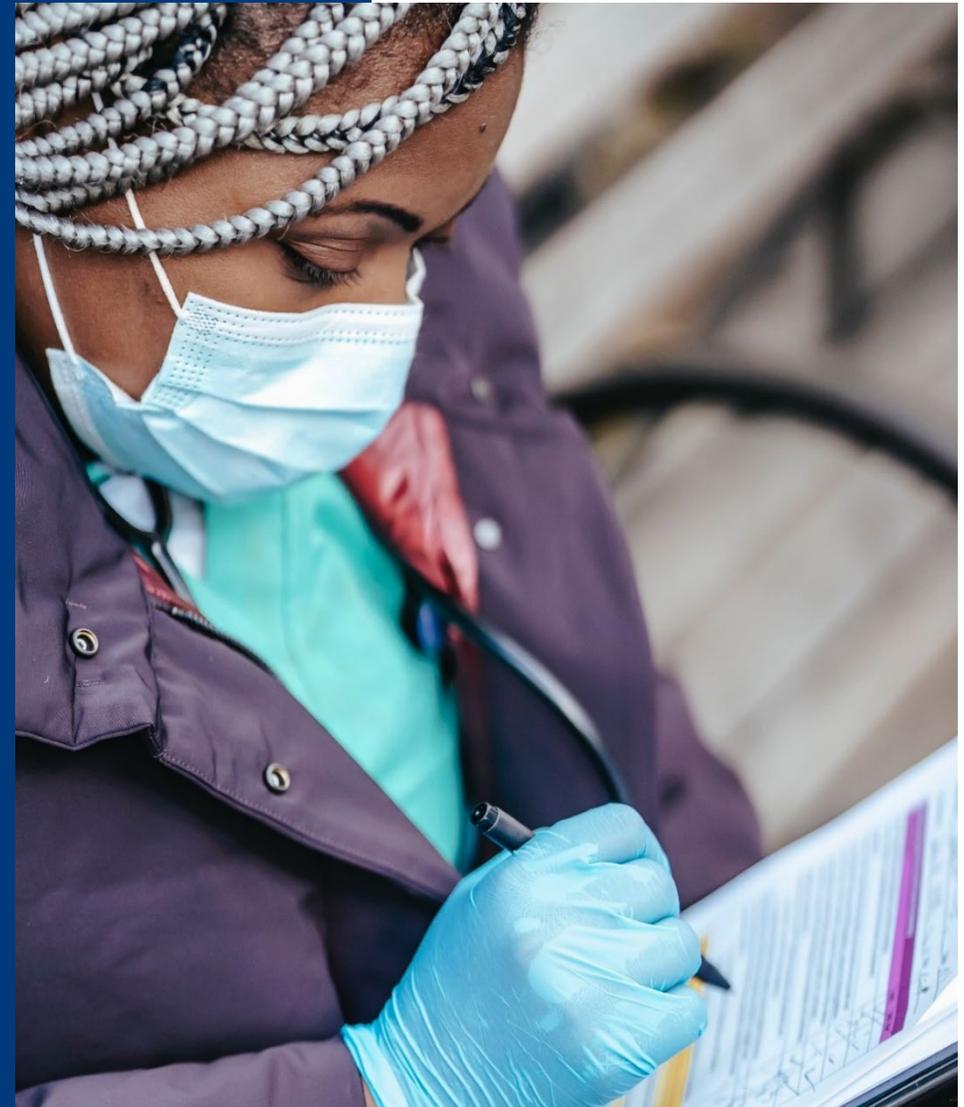
- Decrease risk of severe illness to employees
- Decreased severity = less time away from work
- Lower healthcare costs
- Consistent with CDC guidance
- “Up to date” (fully boosted) staff can avoid quarantine



# Pros and Cons of Mandating Boosters

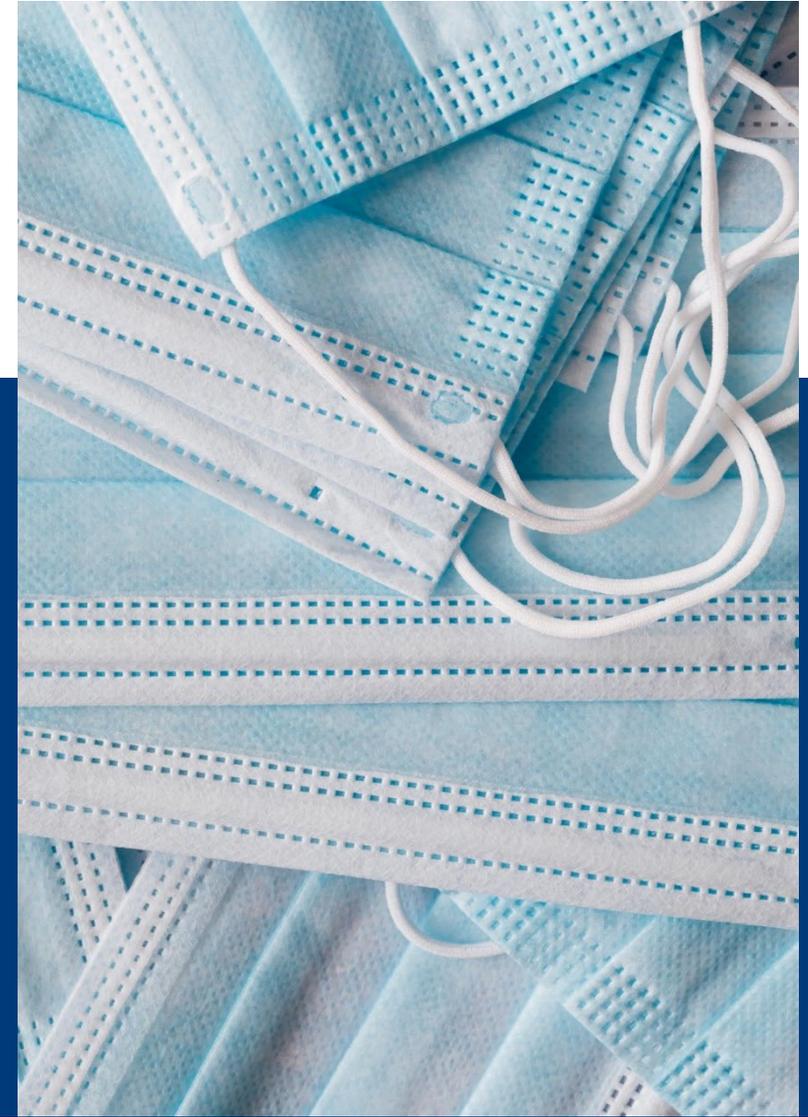
## ► Cons:

- CDC does not require boosters
- Breakthrough cases cause staff to question effectiveness
- Ongoing administrative tracking
- Staff objections to as what is seemingly never-ending boosters
- Staffing shortages related to those who decline the booster



# If Mandating Boosters

- ▶ Plan accordingly:
  - Replace “fully vaccinated” in your policy to “up to date”
  - Ensure an adequate tracking system for those who are boosted
  - Continue to make required accommodations





# Return to Work Guidance

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# Work Restrictions for HCP With SARS-CoV-2 Infection and Exposures

“Up to Date” with all recommended COVID-19 vaccine doses is defined in [Stay Up to Date with Your Vaccines | CDC](#)

For more details, including recommendations for healthcare personnel who are immunocompromised, have severe to critical illness, or are within 90 days of prior infection, refer to [Interim Guidance for Managing Healthcare Personnel with SARS-CoV-2 Infection or Exposure to SARS-CoV-2](#) (conventional standards) and [Strategies to Mitigate Healthcare Personnel Staffing Shortages](#) (contingency and crisis standards).

## Work Restrictions for HCP With SARS-CoV-2 Infection

Vaccination Status	Conventional	Contingency	Crisis
Up to Date and Not Up to Date	10 days OR 7 days with negative test <sup>†</sup> , if asymptomatic or mild to moderate illness (with improving symptoms)	5 days with/without negative test, if asymptomatic or mild to moderate illness (with improving symptoms)	No work restriction, with prioritization considerations (e.g., types of patients they care for)

## Work Restrictions for Asymptomatic HCP with SARS-CoV-2 Exposures

Vaccination Status	Conventional	Contingency	Crisis
Up to Date	No work restrictions, with negative test on days 1 <sup>‡</sup> and 5–7	No work restriction	No work restriction
Not Up to Date	10 days OR 7 days with negative test <sup>†</sup>	No work restriction with negative tests on days 1 <sup>‡</sup> , 2, 3, & 5–7 (if shortage of tests prioritize Day 1 to 2 and 5-7)	No work restrictions (test if possible)

<sup>†</sup>Negative test result within 48 hours before returning to work

<sup>‡</sup>For calculating day of test: 1) for those with infection consider day of symptom onset (or first positive test if asymptomatic) as day 0; 2) for those with exposure consider day of exposure as day 0





# Mitigating Personnel Shortages

- ▶ Postpone elective time off from work
- ▶ If staff well enough to return before the recommendations of the CDC and PA
  - Have staff with suspected or confirmed COVID-19 perform job duties where they don't interact with others
  - Have staff confirmed positive provide direct care to patients who are confirmed positive

# COVID—Protecting Employees

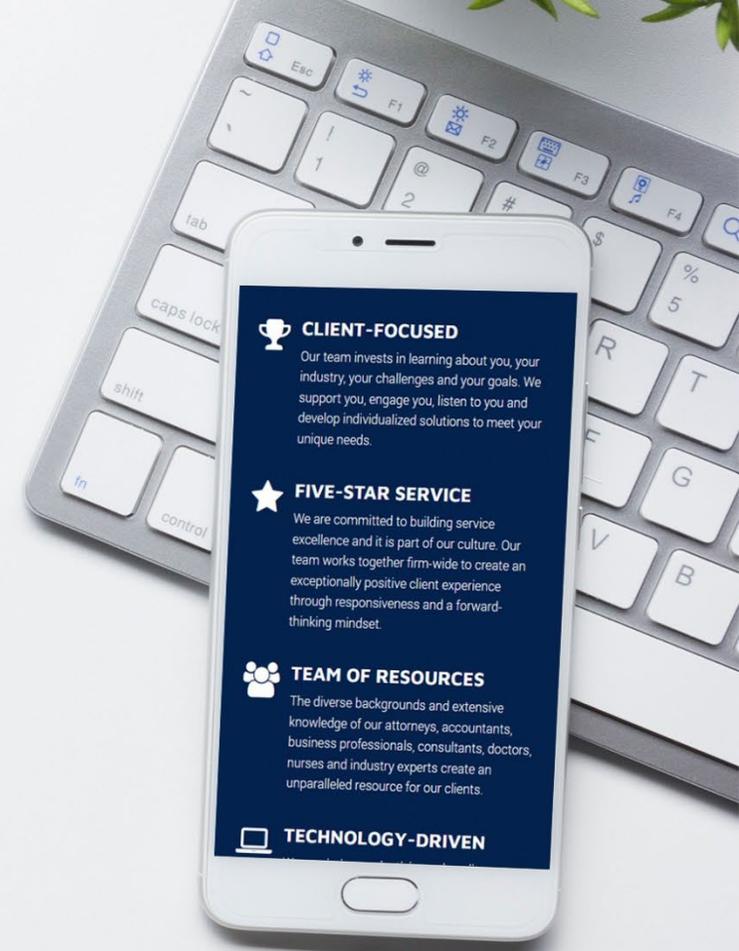
▶ Still permissible:

- Asking staff if they are experiencing symptoms
- Taking temperatures
- Requiring staff to stay home if experiencing symptoms
- Requiring testing to return to work
- Asking all staff their booster status
- Barring employees who refuse to allow their temperature to be taken or who are not “up to date” with vaccinations
- Requiring PTO or unpaid leave



# ADA Obligations

- ▶ Information received from staff regarding symptoms or vax status disclosed must be kept confidential
- ▶ Accommodations required (this applies to both the vaccination and booster)
  - Sincerely-held religious belief
  - Disability
- ▶ Simply not trusting the vaccine is not a valid reason for exemption
- ▶ Must make reasonable accommodation unless it is an “undue hardship”
  - Can request information from physician regarding disability exemption
  - Cannot request further information regarding religious exemption



# Employee Complaints

- ▶ Tread carefully
  - Investigate issues raised
  - Confirm compliance
  - No retaliation





# COVID Conclusions

- ▶ Establish practices and policies
- ▶ Ensure equal application

# QA

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## Questions?

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