



# 2020: The Year that Was - And What's Next?

James Curtis

Christina Jaremus

Joan Casciari

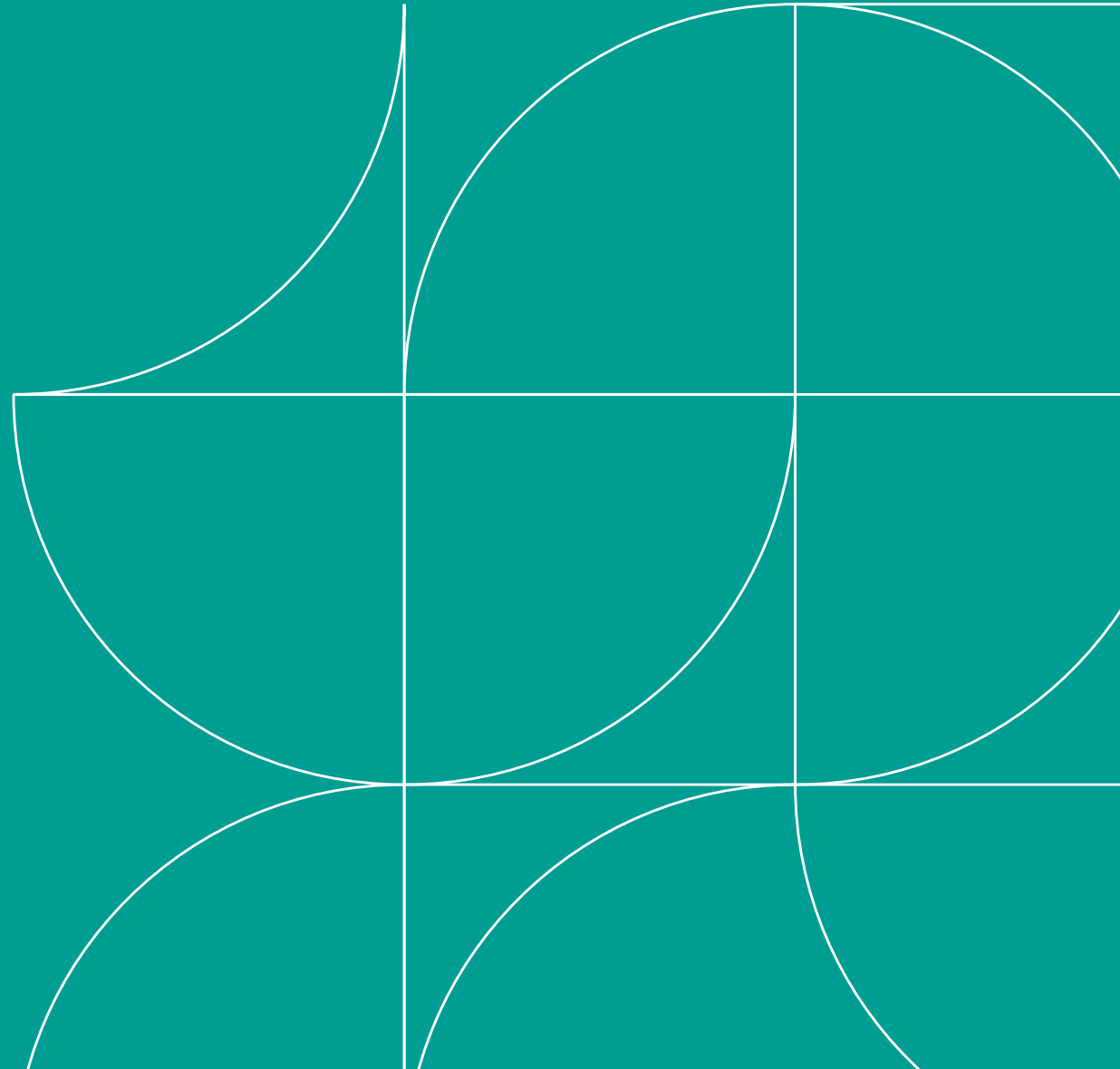
Thomas Posey

December 8, 2020

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





# Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

## Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

# Speakers

---



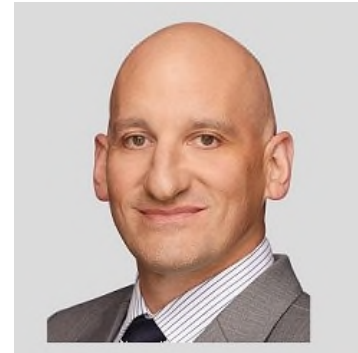
**James Curtis**  
*Partner*  
jcurtis@seyfarth.com



**Christina Jaremus**  
*Associate*  
cjaremus@seyfarth.com



**Joan Casciari**  
*Partner*  
jcasciari@seyfarth.com



**Thomas Posey**  
*Partner*  
tposey@seyfarth.com

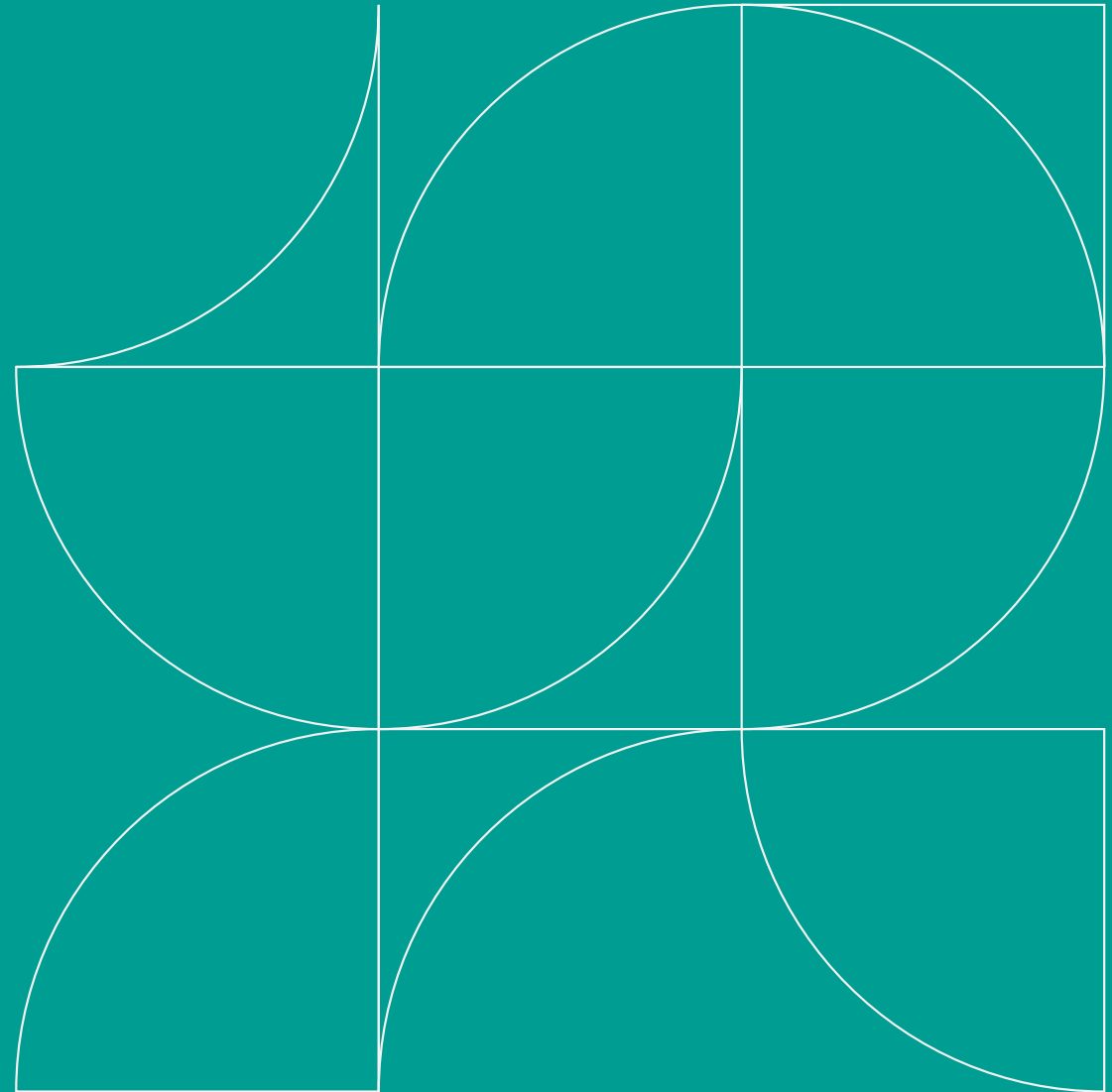
---

# Agenda

---

- 01 OSHA Update
- 02 The Department of Labor Guidance Related to the 2020 COVID-19 Crisis
- 03 Legal Issues Relating to Mandatory COVID-19 Vaccines
- 04 Paid Leave Laws
- 05 Labor Law in 2021 – What to Expect After Inauguration Day

# OSHA Update



# OSHA Update



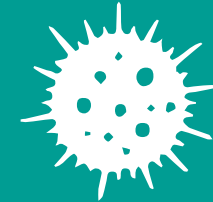
- 2020 Safety and Health Focus: COVID-19
- 2021 Expected Safety and Health Focus: COVID-19

## The Difference?

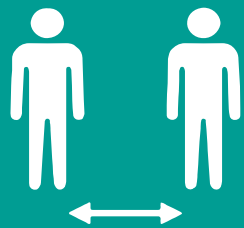
- We now understand the virus, how it is being transmitted and how to prevent/slow transmission
- A vaccine is imminent
- New administration in Washington, DC

- COVID-19 has presented very fast moving safety and health issues for employers throughout 2020
- OSHA has no COVID-19 standard. Uses existing standards, including general duty clause, to enforce COVID-19 safety violations
- No emergency OSHA standard despite immense pressure
- Some state plan states have developed their own emergency standard/guidance (CA, MI, OR, VA, WA)
- OSHA has looked to CDC for guidance on appropriate safety measures employers should be taking. Challenging as CDC guidance has evolved
- Majority of COVID-19 enforcement activity to date involves healthcare, meatpacking and critical infrastructure employers

## OSHA 2020



# Key OSHA COVID-19 Guidance



- OSHA's guidance breaks employers into five categories based upon the potential risk of employee exposure to COVID-19: Very High Risk, High Risk, Medium Risk and Low Risk
- OSHA expects employers to conduct a “hazard assessment” to determine the level of risk to employees
- Employers should have a written action plan that follows current CDC guidance:
  - hazard identification
  - hazard prevention procedures (masks, social distancing, hygiene, screening, etc.)
  - employee training (employees must understand their training)
  - contact tracing and quarantine

***Practical Advice:*** Employers should keep a running chronology of the procedures that were implemented and when they were implemented. Without an OSHA standard, the best an employer can do is follow CDC current recommendations.



- Employers are required to record “work related injuries and illnesses on their OSHA 300 log
- Initially OSHA advised employers that it would not be citing for failure to record COVID-19 cases on OSHA 300 log
- May 19, 2020 OSHA issued revised enforcement guidance stating that employers were expected to conduct an investigation and make a “reasonable determination” of whether a COVID-19 case is work related. OSHA acknowledges it is often difficult to determine work relatedness.
- Employers need not record a case if employer cannot determine whether it is “more likely than not” a workplace exposure that caused the illness
  - Factors to consider: “Close contact” with other employees who are COVID-19 positive, any breach of company protocols and procedures, community spread and other potential sources of infection outside the workplace.

## OSHA COVID-19 Recordkeeping



## OSHA COVID-19 Recordkeeping (cont.)



- Workplace illness investigation should be documented
- Employers should be mindful that the work relatedness determination will likely be a key piece of evidence in subsequent work comp or civil litigation
- Based on existing data, the vast majority of COVID-19 cases are not work related
- Seek advice of counsel if there is determination that transmission may have been work related

- OSHA's enforcement of safety standards uneven
- Almost all investigations done remotely
- Increased use of Rapid Response Investigations
- No in-person informal conferences
- Citation contest litigation being largely delayed into 2021

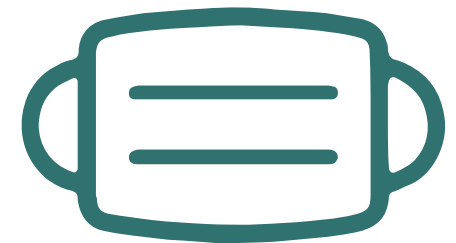
## 2020 Non- COVID-19 Activity



# What We Expect to See from OSHA in 2021 Under a Biden Administration

---

- Continued Coordination with CDC.
- Expect OSHA to Issue a COVID-19 Emergency Temporary Standard Requiring Employers to:
  - Develop and implement written preparedness and response plan;
  - Social distancing requirements;
  - Employee and third-party screening;
  - Hygiene;
  - Risk exposure assessment;
  - Masking;
  - Notifications to public health department about COVID-19 positive tests;
  - Recordkeeping;
  - Employee Training.



*Note: OSHA will likely adopt many of the requirements from existing state plan ETS.*

# Non COVID-19 Expectations for OSHA Under a Biden Administration

---

- Close Coordination with Organized Labor.
  - Several top candidates to head OSHA come from organized labor.
- Higher Penalties and Use of Egregious Penalty Policy (instance-by-instance citations).
- Pursuit of “Bad Actors.”
  - Including re-implementing public shaming policy.
- Increased Use of Multi-Employer Doctrine.
- Emphasis on Temporary/Contract Employees.



# Non COVID-19 Expectations for OSHA Under Biden Administration (cont.)

---

- Increased Whistleblower Protection.
- Recordkeeping.
  - More stringent requirements;
  - Expect records to be made public.
- Increased Budget to Allow for Increased Enforcement.



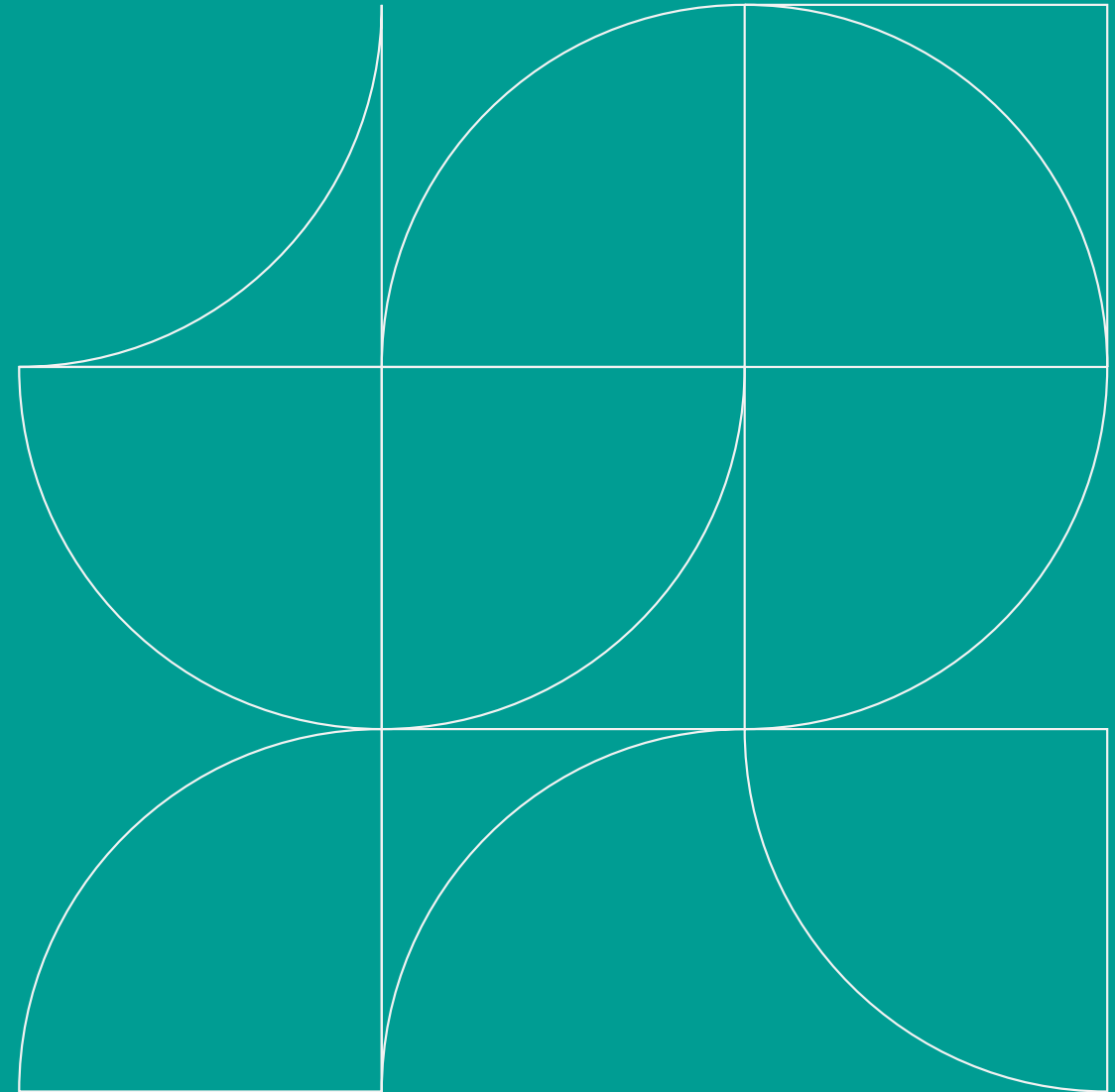
# Impact of Vaccine

---

- Expected Roll Out to Begin with Healthcare in Late December 2020.
- Do Not Anticipate General Public will have Widespread Access Until Late Spring, Early Summer 2021.
- CDC Recommendations to Stay in Place Until Vaccine is Widely Distributed.
- Unclear Where OSHA Will go Once Vaccine is in Place.
  - Employer mandate employees get vaccine?
  - Continued need for workplace controls?
  - Situation will evolve greatly over next six months.



# The Department of Labor Guidance Related to the 2020 COVID-19 Crisis





# Wage and Hour Tips During COVID-19 Pandemic

## Reduced Workweeks Without Running Afoul of the Salary Basis Test

- Reducing the workweek as a cost cutting measures.
- Exempt employees generally must receive their full salary in any week in which they perform any work. Reduce salary commensurate with reduced workload:
- Salary is: **long-term**;
- Salary **does not vary** based on the hours the employee works;
- **>\$684/week** (or higher applicable state salary threshold).

## Exempt Staff Performing Non-Exempt Job Duties

- During the period of a public health emergency, exempt employees may temporarily perform nonexempt duties that are required by the emergency, without losing the exemption. Rules of thumb:
- California: **50% or more** on nonexempt duties
- Federal Law: **"primary duty,"** viewed holistically.

## Hazard Pay – Part of Regular Rate

- Hazard pay should be included as part of a federal employee's **regular rate** of pay in computing the employee's overtime pay;
- Limited exception: bonuses that are a percentage of total earnings.
- Cannot be used to evade FLSA OT compensation.

# Wage and Hour Tips During COVID-19 Pandemic

## Continuous Workday

- During COVID-19 pandemic, **flexible concept** while teleworking.
- Need not count as hours worked all the time between an employee's first and last principal activities in a workday. Consider:
- Establishing a schedule of agreed upon hours and working times;
- Timekeeping software;
- Monitoring productivity.

## Expense Reimbursements When the Home is the Office

- No federal law.
- Some, but not all, states have expense reimbursement laws. Some states are very strict, while others are more relaxed.
- Strict: California and Illinois
- Ordinary Risks of the Business are not Compensable: Montana
- Reimbursement for What Employer Authorizes: Iowa, New York State, New Hampshire
- Reimbursement Under Specific Circumstances: Alaska, District of Columbia, and North and South Dakota
- Case Law can Create Expense Reimbursement Obligations: Massachusetts
- **Best Practices.**

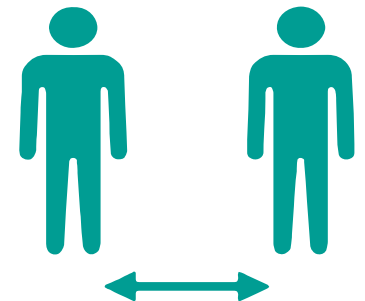
## Temperature Checks: Compensable Time?

- Open question.
- Temperature checks may be interpreted akin to bag checks and security screens.
- *Compare Busk v. Integrity Staffing Solutions*, 574 U.S. 27 (2014), which found time spent undergoing bag checks non-compensable under FLSA,
- with *Frlekin v. Apple, Inc., No. S243805* (Cal. Sup. Ct. Feb. 13, 2020), which found the time to be compensable under California law.

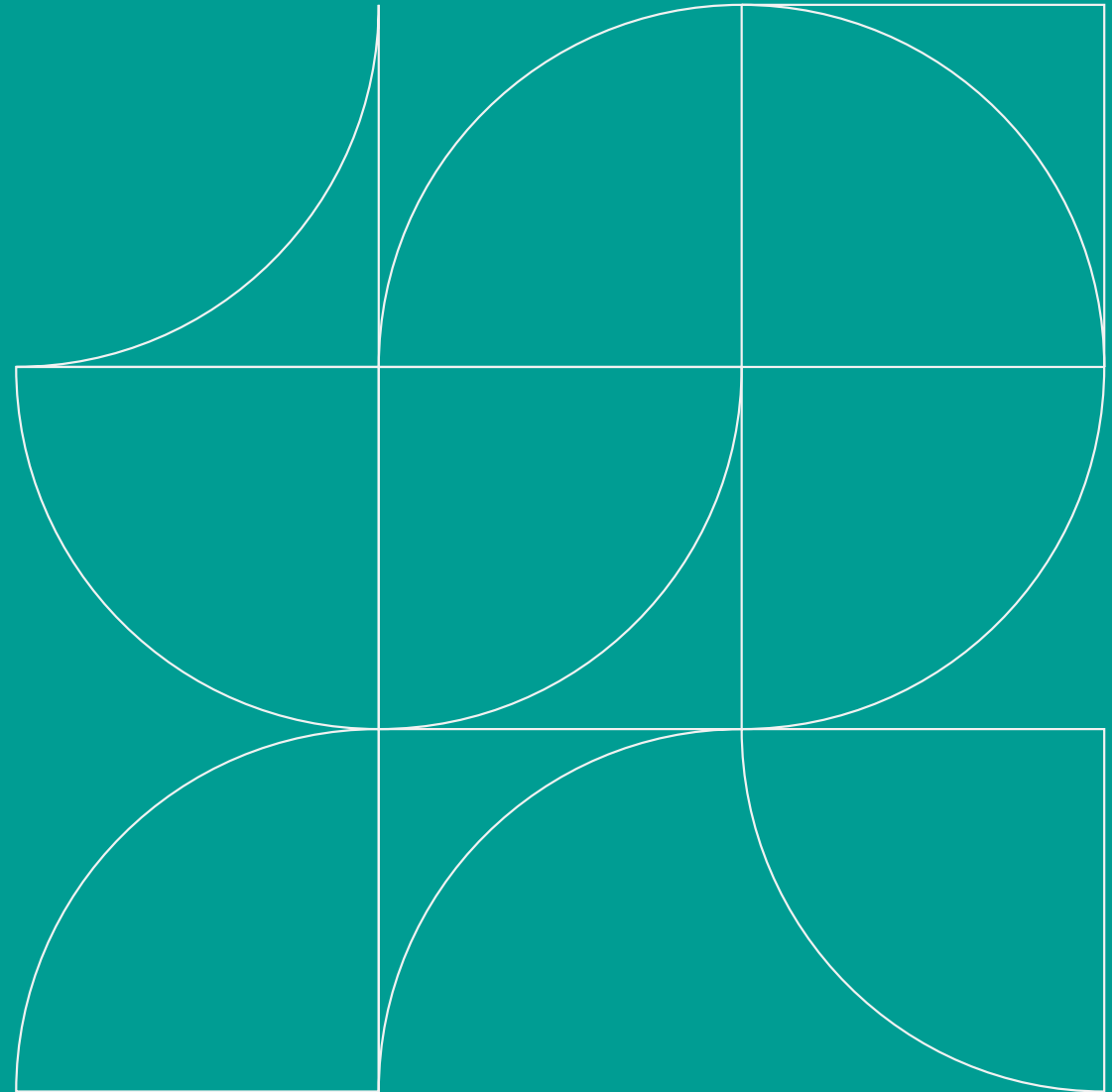
# Wage and Hour Tips During COVID-19 Pandemic

## Don't Overlook Cafeteria Closures

- Pandemic has spurred rules related to eating at one's desk, closed cafeterias, not leaving once on premises to reduce exposure.
- However, some states *require* employees to have the option to leave the workplace for their meal period (and even rest breaks) for the break to be considered *bona fide*.
  - [California](#): On-duty meal period permitted, but time must be paid and the employee must agree to the on-duty break, in writing.
  - [Wisconsin](#): Employees must be paid for “on duty” meal periods; (not given at least 30 fee minutes or if cannot leave premises).
  - Similar laws in [Massachusetts](#) and several other jurisdictions.



# Legal Issues Relating to COVID-19 Vaccines



# EEOC's Position on Medical Exams/Disability Related Inquiries



- Disability related inquiries and medical examinations
  - Pre-employment – prohibited
  - Pre-employment/post offer – generally permissible and need not be job related and consistent with business necessity
  - During employment – must be job related and consistent with business necessity (typically very limited)

- Revisions to 2009 Guidance (issued during H-1N-1 Pandemic)
  - Key changes (applicable during a pandemic)
    - May take employee temperatures
    - May ask about COVID-19 symptoms
    - May require COVID-19 testing but not antibody testing
    - May ask about exposure to COVID-19
    - May ask about traveling to other areas
- Left unanswered – Is COVID-19 a direct threat such that a mandatory vaccine might be permissible?
- EEOC stated in March 2020 that COVID-19 met the direct threat at that time (but could change)
  - Direct threat
    - “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.”
    - If someone poses a direct threat, despite reasonable accommodation, not protected by ADA.

## Pandemic Changes by EEOC in Enforcement Position



# What do we expect as exceptions?



- ADA – consider an accommodation if the inability to take vaccine is due to an ADA-covered disability
- Title VII-religion – consider an accommodation if inability to take vaccine is based on sincerely held religious belief.
- Note new EEOC proposed guidance touches on the issue and cites cases involving religious exemptions to flu and other vaccines. Cases cited by EEOC:
  - Worries about health effects by Christian Scientist not sufficient
  - Vegan opposing a vaccine that was animal tested could be religious belief if subscribed to with a sincerity equating to traditional religious views.
- Hardship burden might be lesser for religion (more than de minimus cost) than disability, but both are highly fact driven.
- EEOC has sued several employers over mandatory flu vaccines.
- Note EEOC updated Guidance was written before a vaccine was created.

- Historically, the accommodation in health care was “wear a mask”
- Working remotely is an obvious solution for some but not all
- Herd immunity might lessen the risk of allowing unvaccinated employees in the workplace

## Accommodations





## Other Potential Risks



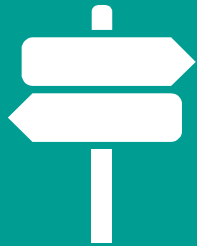
- National Labor Relations issues
- OSHA issues
- Tort issues – customers/third parties
- Workers' compensation – for those who become ill at work or who have adverse reaction

- State or local municipalities may mandate vaccines, but expect exceptions
- NY State Bar issued a resolution that NY make it mandatory for all in state to have the vaccine even if they object on religious grounds.

## State or Local Mandates

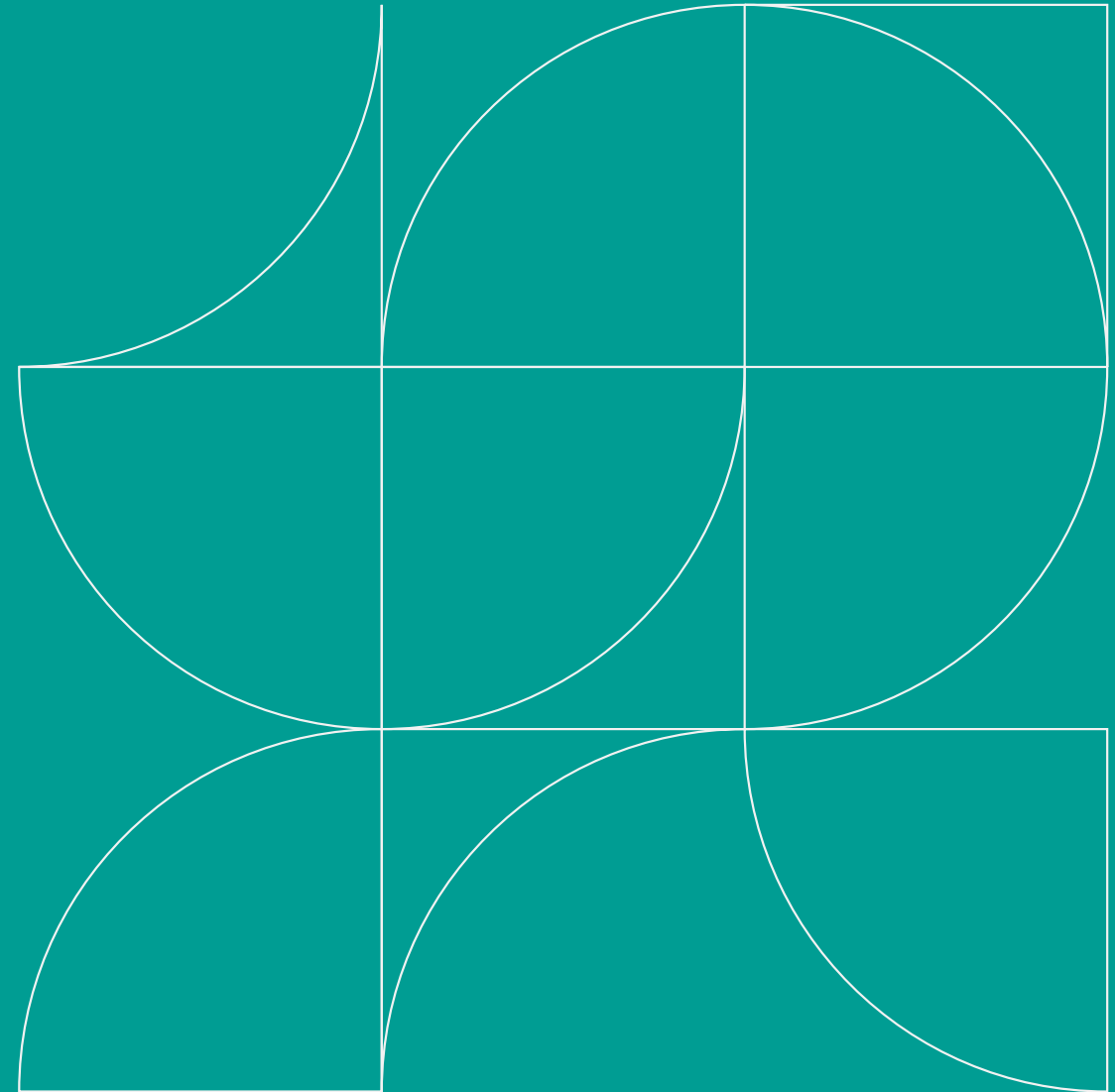


## Change in EEOC Enforcement



- Changes in current guidance may not happen in 2021 due to 3/2 majority of Republican Commissioners through mid-2022
- Expect a Democrat commissioner to be appointed as Chair
- Expect additional guidance on mandatory vaccines once they are approved
- New EEOC Commissioner Samuels (D), stated recently that EEOC priorities will be LGBTQ issues, COVID-19, and collecting wage data on the EEO-1 reports

# Paid Leave Laws



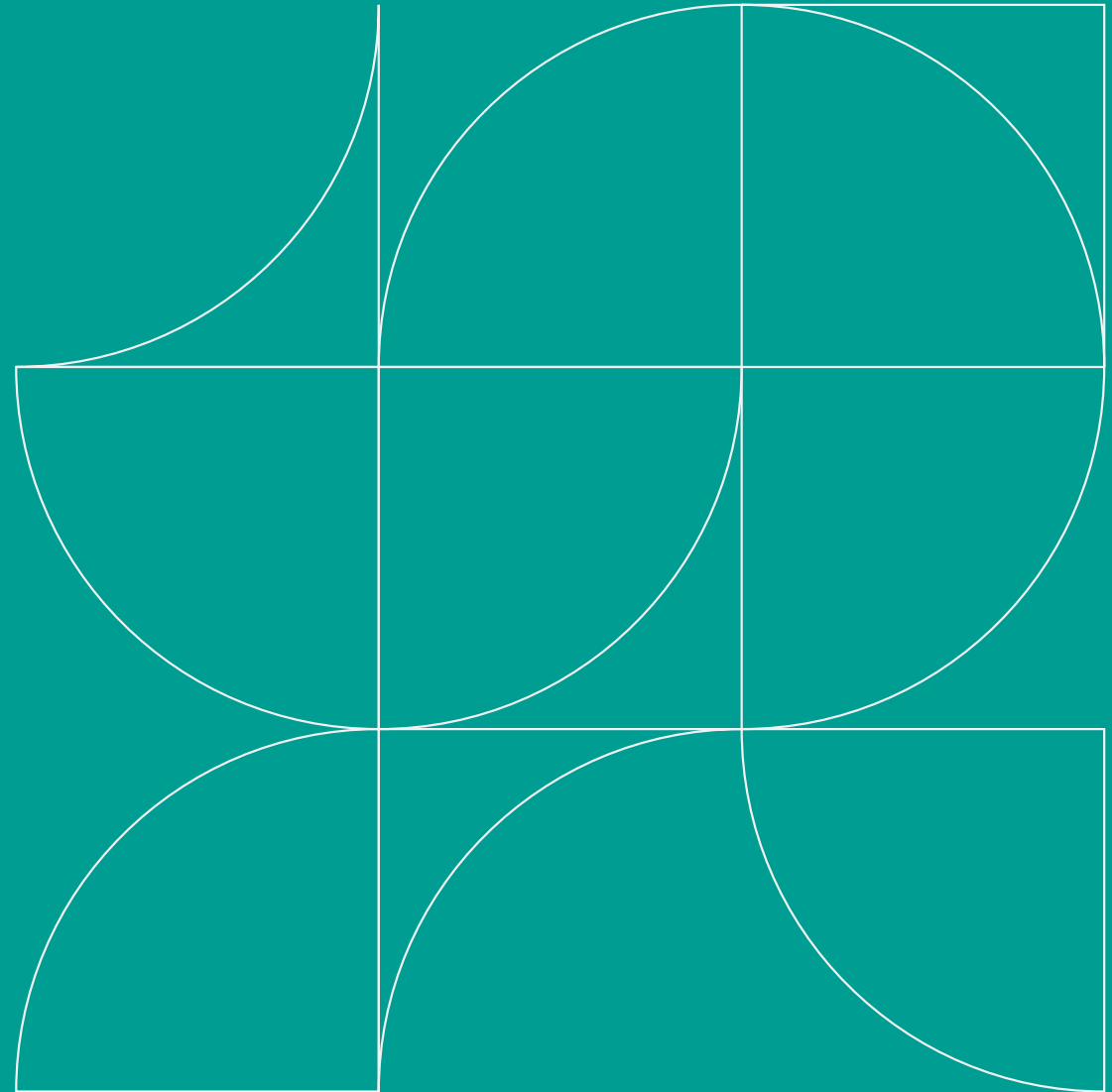
# Paid Leave Laws

---

- Advancing Support for Working Families Act (Bi-Partisan)
  - parents of newborn or newly adopted child under six entitled to *acceleration* of tax credits and could receive \$5000 immediately
- FAMILY Act (Family and Medical Insurance Leave) (Democrat proposal)
  - Based on a payroll tax, similar to laws in others states and DC
  - Jointly funded by employer and employee
  - Capped at 66% of wages up to \$1000 per week
  - 12 weeks
- Biden's website shows support for concepts similar to FAMILY Act
- Federal employees began receiving paid family leave as of 10/1/20
- Families First to expire on 12/31, but may be extended.



# Labor Law in 2021: What to Expect After Inauguration Day



# What Has Biden Told Us To Expect?

---

- “I want you to know I’m a union guy. Unions are going to have increased power.”
- He has promised to be the "strongest labor president you have ever had.”
- And also to create a Cabinet-level working group made up of labor representatives "that will solely focus on promoting union organizing and collective bargaining in the public and private sectors.”

**HOW WILL THIS  
AGENDA BE  
IMPLEMENTED?**





# The Biden Plan for Strengthening Worker Organization, Collective Bargaining and Unions



- **Hold corporations and executives personally accountable for interfering with organizing efforts and violating other labor laws.**
- **Aggressively pursue employers who violate labor laws, participate in wage theft, or cheat on their taxes by intentionally misclassifying employees as independent contractors.**
  - By funding a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort
- **Encourage and incentivize union organizing and collective bargaining.**

- **New General Counsel**

- Peter Robb's term expiring **November 2021**
- Has been very aggressive and is “despised by labor”
- Not clear whether Biden can replace him
  - But even if he can, he might decline for political reasons

- **Two New Board Members**

- Open seat (term expiring August 2023)
- Member Emanuel's term expiring **August 2021**

## National Labor Relations Board:

### New Appointees



# NLRB: Reversal of Key Decisions by Trump Board

---

## Non-Union Employers\*

- Strict scrutiny of workplace policies
- Right to use email for union activity
- Leeway for offensive statements
- Return to micro-units in organizing

## Unionized Employers

- Requirement to bargain over discipline and discharge after union election
- Increased hostility to defense that union has no right to bargain over changes
- No inherent ability to stop dues check-off upon contract expiration

*\* would apply to unionized employers, too*

# Labor Relations Law: Anticipated Changes



## –Legislative Priorities

- Multiemployer Pension Fund Reform
- PRO Act

## –Possible Rulemaking Priorities

- Joint Employer
- Quickie Elections
- Persuader Activity

# Questions?

---



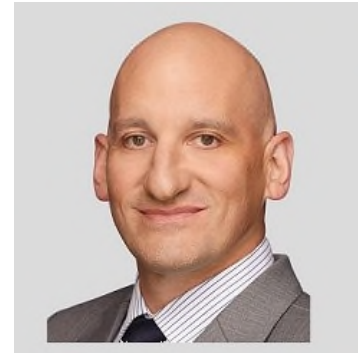
**James Curtis**  
*Partner*  
jcurtis@seyfarth.com



**Christina Jaremus**  
*Associate*  
cjaremus@seyfarth.com



**Joan Casciari**  
*Partner*  
jcasciari@seyfarth.com



**Thomas Posey**  
*Partner*  
tposey@seyfarth.com

---

# Thank You!

