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# PENDULUM SWING FROM PANDEMIC TO ENDEMIC: WHAT IT MEANS FOR YOUR BUSINESS

## Coronavirus Resources

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With the number of COVID-19 cases on the steady decline, many jurisdictions are celebrating as the pendulum swings from pandemic to endemic. For many, the turning point was seeing pictures of politicians without masks at NFL playoff games. In one instance, Los Angeles Mayor Eric Garcetti excused his behavior by claiming that he was “holding his breath.” This photograph, and others, are cited as a flashpoint of a gradual rollback of remaining COVID restrictions around the country.

On February 17, 2022, California Governor Gavin Newsom released California’s plan for living with COVID-19 moving forward, called the SMARTER Plan. The SMARTER acronym stands for Shots, Masks, Awareness, Readiness, Testing, Education and Rx, or mediations. The goal of the SMARTER Plan is to avoid future business closures or interruptions should the state be faced with another variant arising or surge in cases.

Other states have mostly lifted COVID restrictions and declared themselves “fully open.” A few states and counties still impose mask mandates indoors, mainly for the unvaccinated, but these restrictions are now the exception rather than the rule. Recommendations for the unvaccinated to take additional precautions are still in place nationally, however, and those who test positive are still required to stay home and isolate until five days after symptoms subside.

## THE INCREASE IN REMOTE WORKERS IS HERE TO STAY

As the world emerges from the COVID-19 pandemic, businesses are operating in a new climate entirely. Although the government is no longer asking employees to work from home when they can, many employees continue to wish to do so and many federal unions have successfully lobbied for a range of telework options. A survey completed by Harvard Business School revealed that more than 80% of its respondents hoped that the work from home model would continue after the resolution of the pandemic. Many believe that the nature of work has shifted

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permanently and will never return to the pre-pandemic “normal.” Only about 18% responded that they would like to go back to the office full-time.

Through the challenges of the pandemic, many businesses implemented new opportunities for remote collaboration. Businesses able to quickly adapt weathered the pandemic with the least damage to the bottom line. Part of their success was the ability to quickly pivot to the virtual world and continue to service clients from remote, often creative locations. Moving forward, it is critical for businesses to assess individual client’s preferences and levels of comfort to determine if interaction should be conducted in person or remotely.

Another important consideration for businesses that employ remote workers is the remote employees’ state and local residence. Businesses must be cognizant of differing wage and hours laws, business expense reimbursement provisions, minimum wage rates or salary thresholds, taxes and withholdings, and workers compensation requirements, as well as any particular workplace safety rules or insurance requirements in that location. Businesses who employ nonexempt staff remotely must also implement appropriate systems to track hours actually worked and compliance with meal and rest break laws.

### **KEY QUESTIONS FOR EMPLOYERS TO CONSIDER IN CONTINUING WITH REMOTE WORKERS LONG TERM:**

- Considering turnover and labor shortages across industries, will the business have enough employees agreeable to coming back in person full-time to sustain the operational costs of maintaining a physical workspace?
- Is the business less, as much, or more productive and profitable under a remote or hybrid working model versus a traditional in-person model?
- How do current employees feel about returning to the office full or part-time? Would they be more amenable to a hybrid approach with flexible, part-time hours in office and some continued remote days?
- What safety protocols and/or additional health-related policies do you need implement to ensure a safe work environment for employees moving forward?
- What changes need to be made regarding employee work expectations, conduct, and other considerations such as eligibility for bonuses, etc.,?
- Is remote work an option for all employees or only some? What are the factors considered in that determination?
- How do you monitor actual time worked for exempt and nonexempt remote staff? Do you have appropriate systems and checks in place? Is there an audit process per pay period or less frequently?

### **STATUS OF MASK MANDATES**

Mask mandates are now lifted in most if not all areas around the country. The decision whether to require employees to mask indoors is also now left up to individual businesses. Depending upon your workplace and employee preference, employers may find it difficult to enforce a mask mandate if the government in that area does not have the same requirement in place.

In determining whether a mask mandate is appropriate, leadership should consider the layout of the physical space, the type of work in which your business engages, physical distancing options, client and employee perceptions, current variants and case surges in your area, and exposure to the public. Also consider possible changes in the layout of your office or other precautions you could take that would it more feasible to achieve physical distancing or a mask-free work environment, particularly if a mask mandate is likely to cause discord in the workplace.

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If you choose to require masks, establish a written policy, including any exceptions (working alone, in restrooms, while eating or drinking, etc.) and provide masks at no cost to your employees. Most employers will transition to a mask-free work environment if they have not already, but it is vital to consider your employees and other stakeholders as the world progresses to the endemic stage of COVID.

### **MAY EMPLOYERS REQUIRE VACCINATIONS AS A CONDITION OF EMPLOYMENT?**

In January 2022, the U.S. Supreme Court blocked the Biden Administration's vaccine mandate for all employers with 100+ employees, but many companies decided to require employee vaccinations regardless of the high court's ruling. Of those who chose this option, many have mandated vaccinations as a condition of returning to in-person work absent a religious or medical exemption. For some such as Delta Airlines, employees who refuse to comply may face termination.

Currently, private employers may lawfully require employees to get vaccinated, but some states have limited that right by passing laws banning vaccination passports for patrons to enter certain facilities and venues. If your business decides to require vaccination for in-person work, it is critical to develop a written policy that explains the proof of vaccination required, exemptions from vaccination, a thoroughly-documented exemption process, and assurances of confidentiality. It is also important for managers to partner with human resources or legal professionals as the policy is implemented and tested by individual employees. Taking these steps will minimize potential legal liability for discrimination or accusations that an employer has failed to engage in the interactive process or provide a reasonable accommodation. Employees who refuse vaccination will continue to test the legality of vaccine mandates, and vetted policies and procedures are a strong first line of defense.

### **BEST PRACTICES FOR BUSINESSES MOVING FORWARD**

- Consider extending remote work arrangements to accommodate employees who desire to work remotely, even if only a couple of days a week. Employers can and should promote collaboration, goodwill, and morale-boosting flexibility in proactively suggesting flexible remote work arrangements that empower employees to choose from stated options that may work best for them.
- Provide remote workers with written goals and expectations that reflect the unique challenges and expectations that come with remote work.
- Ensure that your business implements sufficient tracking of hours worked for remote employees, including any mandated meal and rest breaks and audits to ensure employee acknowledgment and compliance.
- Determine if goal-setting and incentives and/or bonuses need to be altered for remote workers.
- Increase physical space in the workplace where possible to allow for social distancing.
- Determine appropriate mask and vaccine policies for your business with Human Resources and legal professionals and employ proper measures to grant exemptions for those employees who qualify.
- Monitor local, state and federal laws – including those in which remote employees reside – for changes in business requirements as we continue to emerge from the pandemic to endemic stage of the COVID virus.

The attorneys at Wood, Smith, Henning and Berman are prepared to provide the latest updates and requirements to all of our clients. The members of our team are available to assist you in best practices and limiting liability as we exit the pandemic and enter this endemic stage. Strong legal counsel in this area is sure to prove paramount as developments and changes in statutes and business requirements evolve quickly.