



California Attorney General Xavier Becerra on June 1, 2020.  
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## State AGs Intensify Focus on Employee Rights in the Pandemic

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The Covid-19 pandemic has caused state attorneys general to accelerate their workplace enforcement efforts and is reshaping the issues businesses must consider to avoid regulatory risk. Cozen O'Connor partners Maria Colsey Heard and Ann-Marie Luciano explain what steps businesses should take to respond.

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State attorneys general have increasingly pursued enforcement actions against businesses for labor and employment-related violations ranging from employee misclassification and wage theft to workplace safety and conditions.

The Covid-19 pandemic has spurred an acceleration of these efforts and is reshaping the issues businesses should consider to avoid regulatory risk and navigate a changed post-pandemic landscape.

State AGs' interest in the workplace is an outgrowth of their civil rights, labor, and consumer protection responsibilities and powers under state law. Urged on by groups such as the non-partisan think tank, the [Economic Policy Institute](#), they have stepped in to interpret state executive orders and new legislative protections for workers, and provide guidance and resources to help employers address workplace safety and workers' rights.

## **AG Action Stepped Up in the Pandemic**

For almost a year now, employers have grappled with interpreting and complying with state restrictions while battling to keep their businesses running, and AG offices have issued thousands of cease-and-desist orders relating to labor practices and consumer protection violations.

Given both workers' and consumers' heightened concerns about their safety, attorneys general are eager to take steps to help workers report health and safety concerns, with many AGs creating resources for workers' rights, employer guidance, and centralized complaint-reporting tools.

For example, California Attorney General Xavier Becerra (D) [announced](#) on Jan. 29 that his office had created a Worker Rights and Fair Labor Section, which follows an earlier [announcement](#) by Massachusetts AG Maura Healey (D) that her office has devoted additional resources to addressing unsafe working conditions related to Covid-19. Massachusetts also implemented [mandatory safety standards](#) applicable to all workplaces that require a [written plan](#) as to how each business will comply with those standards before reopening.

On Jan. 27, Virginia [announced](#) that it was the first state in the nation to adopt permanent, as opposed to temporary, Covid-19 workplace safety and health standards.

## **Preparing for Return to the Workplace**

As public discussion shifts to safely returning to work and school, AGs will continue to be active. Businesses should provide written Covid-19 health and safety protocols for employees, customers, and other visitors to their premises governing:

- Use of personal protective equipment (PPE), physical distancing requirements, occupancy limits notices, disclosures, and other written signs and information;
- Cleaning and sanitizing; proactive and transparent reporting of Covid-19 data affecting their location(s) and employees, including a potential exposure notification system for employees and customers; and
- Employee health screening and vaccination policies.

Many businesses already have addressed issues such as PPE for employees, physical distancing requirements, and reporting of Covid-19 information. Vaccines, however, present a host of new issues for businesses to address.

## **Vaccination Considerations**

As explained in our [guide](#) on Covid-19 vaccination, employers evaluating a mandatory vaccine policy should be mindful of the EEOC's recent guidance regarding Covid-19 vaccination of employees, including employees seeking an exception under the Americans with Disabilities Act (ADA) or due to a sincerely held religious belief under Title VII of the Civil Rights Act.

As employees return to the workplace, employers must consider how to appropriately screen for Covid-19 risk while also ensuring they are protecting the individual privacy of their workers. Specifically, businesses should consider whether obtaining employee health information such as vaccine status and

asking employees to respond to questions regarding Covid-19 symptoms and temperature will expose them to privacy concerns.

Inquiries about vaccine status may—depending on how vaccine priority is being administered in the state or locality—reveal confidential employee health information, and therefore employers should comply with the ADA, HIPAA, and state privacy laws in handling this information.

Employers also should evaluate their existing privacy and data security policies to ensure that the policies reflect all information being collected and how that information will be secured and destroyed when no longer needed.

It is important that employers identify and address employee concerns quickly before they escalate to an AG's office. With AGs sensitized to employee allegations of retaliation for health or safety-related complaints, it is vital that employers have a procedure in place to fairly address employee concerns.

### **Additional Challenges from Remote Work**

The surge in remote working has created issues related to employee classification, payment of overtime, and taxation. Some states have tried to resolve these issues, but ongoing questions remain around taxation of workers who are either working remotely on a temporary basis without a clear ending point, or on a long-term or permanent basis.

In addition, employers evaluating providing financial incentives to employees for obtaining a vaccine must be mindful that such incentives may be taxed as wages and could affect the calculation of overtime for non-exempt employees.

A business's obligation to protect data of customers and employees also continues despite the switch to remote working. Employers must ensure that systems and files that contain protected personal information that an employee accesses via his or her unsecured home internet network or personal computer are not compromised due to insufficient antivirus and other security protections.

Understanding AGs' workplace enforcement priorities can help businesses respond to the changing regulatory environment under Covid-19. The practical steps outlined above will help mitigate the risk of regulatory action by AGs as well as help businesses generate goodwill.

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