

# A Whole New Workplace

*HUMAN RESOURCE CHALLENGES AND CORRESPONDING LEGAL QUESTIONS BROUGHT ON BY THE PANDEMIC AREN'T GOING ANYWHERE, SAY SOME OF THE REGION'S TOP LAWYERS—AND THAT'S NOT NECESSARILY A BAD THING*

By Beth Hester

In the spring of 2020, the immediacy of the COVID crisis forced employers to develop new health-related policies and protocols. Companies had to act quickly. Businesses and organizations mobilized staff and leveraged their Human Resource departments in ways they'd never imagined in an effort to keep employees safe and slow the spread of the virus. COVID also had the effect of revealing the weak spots in an organization's working environment, which necessitated a rethinking of the traditional ways in which worker safety and health were considered.

We're now almost two years into the pandemic and what began as an immediate calamity has evolved into an ongoing reality. Employers and the attorneys who advise them recognize that there's no getting back to business as usual, and that to some extent, the situation remains fluid. "Right now we're carving out a new

normal," says Ann Sullivan, an attorney with expertise in the areas of employment and labor law, whose firm, Sullivan Law Group, recently merged with the firm of Babcock & Moore, where she is currently Of Counsel.

"What we do know is that where possible, employees are going to expect more flexibility in terms of where and when they get their work done," Sullivan explains. "Employers are going to need to snap out of the mindset that employees are lucky to have a job and instead adopt a much more proactive approach when it comes to making jobs attractive—this means not only offering competitive wages and benefits but also offering a more realistic work-life balance."

As businesses and organizations navigate an ever-changing landscape, what topics are emerging as primary concerns? Early on in the pandemic, one of the biggest problems employers had to confront was employee absences, either because

the employees had COVID or because the employees had been exposed to COVID.

"I think the days of employees being pressured to come in sick are mostly over—we have finally figured out that germs in the workplace are not beneficial to anyone," Sullivan says. "From a legal perspective, this means a sea change in recommended policies and practices. Right now, vaccine mandates are definitely the number one hot topic for most businesses—whether federally required or simply put in place to protect their workforce and clients."

Anne Bibeau is Litigation Practice Group Manager at Vandeventer Black, and her practice focuses on labor and employment law and alternative dispute resolution. Bibeau echoes Sullivan's sentiments. "The big issue is vaccinations and enforcing vaccination mandates with reluctant employees. For federal contractors, it's the vaccine mandate that the government has imposed on them. For



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employers with 100 or more employees, it's the OSHA Emergency Temporary Standard (ETS), which, if it ultimately goes into effect, will require employers to either mandate that all employees be vaccinated, or mandate that employees get vaccinated or get tested weekly. In both situations, employers are running into resistance from employees and, with the tight labor market, are struggling with the right response.”

Another concern for employers is how to document and communicate COVID-related policies and protocols. How comprehensive should the documentation be, and what essential information should be conveyed? Sullivan explains. “Employers need to clearly communicate to employees their workplace safety protocols (reporting and screening, masking, distancing, cleaning, etc.), requirements around isolating and testing in the event of exposure, their vaccination requirement, if they have one, how to seek an exemption, and their COVID-related paid or unpaid leave policies if they differ from their regular leave policies.”

Communications should be concise and straightforward, making clear what

responsibilities fall to the employee vs. the employer. “In most instances, placing these policies and protocols in writing is not only a best practice but also a legal requirement,” says Sullivan. “Communication should be made to employees in the manner employers use to convey other essential information—sometimes that's by email or an employee portal, sometimes by handing out a memo in-person. If the employer can document that the employee has seen and acknowledged the policy, ideally by the employee signing an acknowledgment of receipt, that's the gold standard.”

What might the legal consequences be should an employer fail to adequately document and communicate COVID-related policy? Bibeau states that if the employer is subject to the OSHA ETS, assuming it is upheld, there can be stiff monetary penalties for failing to comply with the numerous requirements, which include publishing a COVID policy. “The federal contractor vaccine mandate, and the Virginia Permanent COVID Standard also require that employers have a written policy on workplace

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## FEATURE

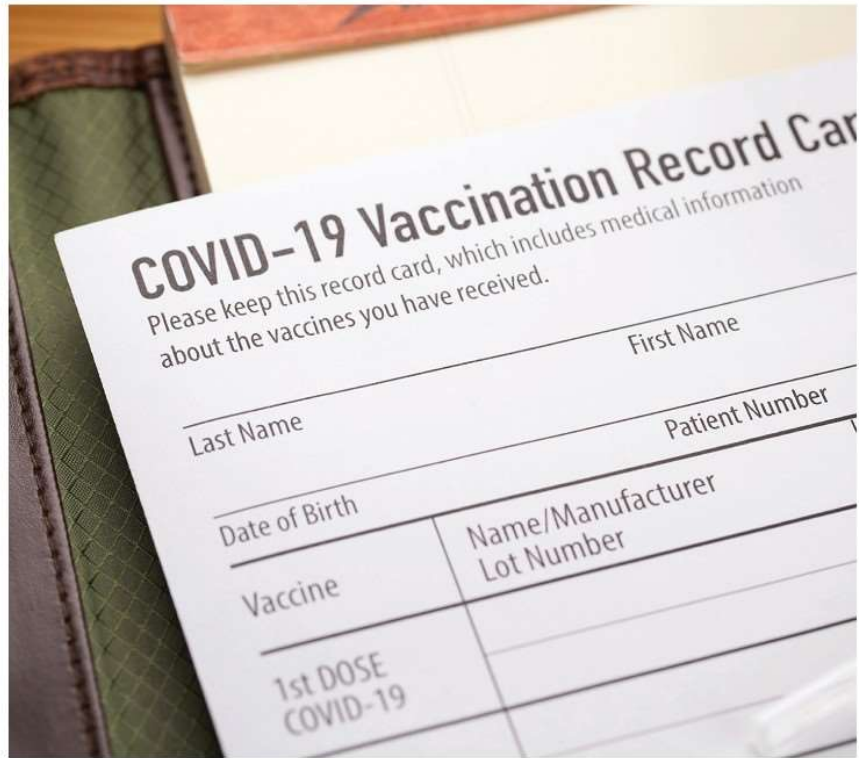
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COVID issues. The content of those policies depends upon the requirements to which the employer is subject. And, as with all workplace policies, employers need to make sure that they're consistent and non-discriminatory. That may mean that the employer has to make accommodations for employees with disabilities or sincerely held religious beliefs that preclude them from compliance."

During the early days of the pandemic, the leadership team at Norfolk Botanical Gardens (NBG) made the decision to stay open. Public access to the grounds and gardens proved to be a welcome balm for COVID-rattled souls, but keeping it open took a combination of creativity, patience and flexibility to keep everyone safe, and the experience reinforced the notion that "it takes a village" to steer large organizations through an evolving legal scene. NBG has approximately 110 employees, and private contractors are often working on-site, which poses additional challenges. Amanda Wells is Human Resources Manager at NBG, and Peter Schmidt is the organization's CFO. They share what contributed to their COVID strategy's success.

"At the beginning, when we made the decision to stay open, we were in constant contact with our legal advisors, with other organizations in our field that had similar processes and systems, with the American Public Gardens Association, with the Department of Health, and with the state and federal organizations that were starting to provide guidance," Wells relates. "In coordination with leadership we connected with local HR experts and talked things through: how to safely support the community, what if any special cleaning equipment was needed, how best to communicate with our employees. We were early adopters of new tech and techniques to stay ahead of the curve. Transparency was key, and if anything, we decided to overcommunicate. We didn't want to be wrong."

Wells says that there were some very long days and nights as staff members grappled with ways to retool operations to meet COVID safety requirements. "Every division at NBG, from IT and facilities management, to educational staff, to our



gift shop—everyone was involved in the process. We devised a touchless ticketing system, took the gift shop online, and planned for remote class offerings and remote work. Our HR department was at the table from the beginning, which was key to smooth policy rollouts. We were determined to care for our employee's mental health as well as their physical wellbeing, as this was a stressful time for everyone psychologically."

To these ends NBG hosted a vaccination clinic and made the Employee Assistance Plan (EAP) available to every employee regardless of status. All employees were given paid time off to get vaccinated and to recover from any side effects. Schmidt is proud of the fact that no employees were laid off: "We had to make some very tough financial choices to keep and protect staff, but we made it work. We wanted to continue to be a valued resource for the community, and we're so thankful for all the support we've received."

Schmidt indicated that while there were some challenging moments with private contractors whose employees didn't always choose to adhere to masking and other policies, but the transition to pandemic operations went remarkably well. "In terms of vaccinations, we've been fortu-

nate in that we're a scientifically based organization," Schmidt explains, "and the majority of staff have embraced the efficacy of the vaccine. We strive to provide people with the best, and most current information available so they can make prudent decisions about their own health. We have nothing but gratitude toward all of our team members."

Both Wells and Schmidt credit the ability to "plan, adapt and pivot" as crucial to NBG's COVID-related operations, and that policies and procedures will continue to evolve as new information and new legal guidance becomes available.

As a fitting coda to this feature, Ann Sullivan shared this: "It's been my observation that employers are approaching these issues with the health and safety of their employees foremost in their minds. In many ways what businesses and their employees have gone through since the pandemic began has brought people together, which I suppose is bonding through adversity. It's been nice to see."

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