

CBA Labor & Employment Law Section

Roundtable on The Changing Employment Law Landscape in a Post-COVID Era

Speakers:

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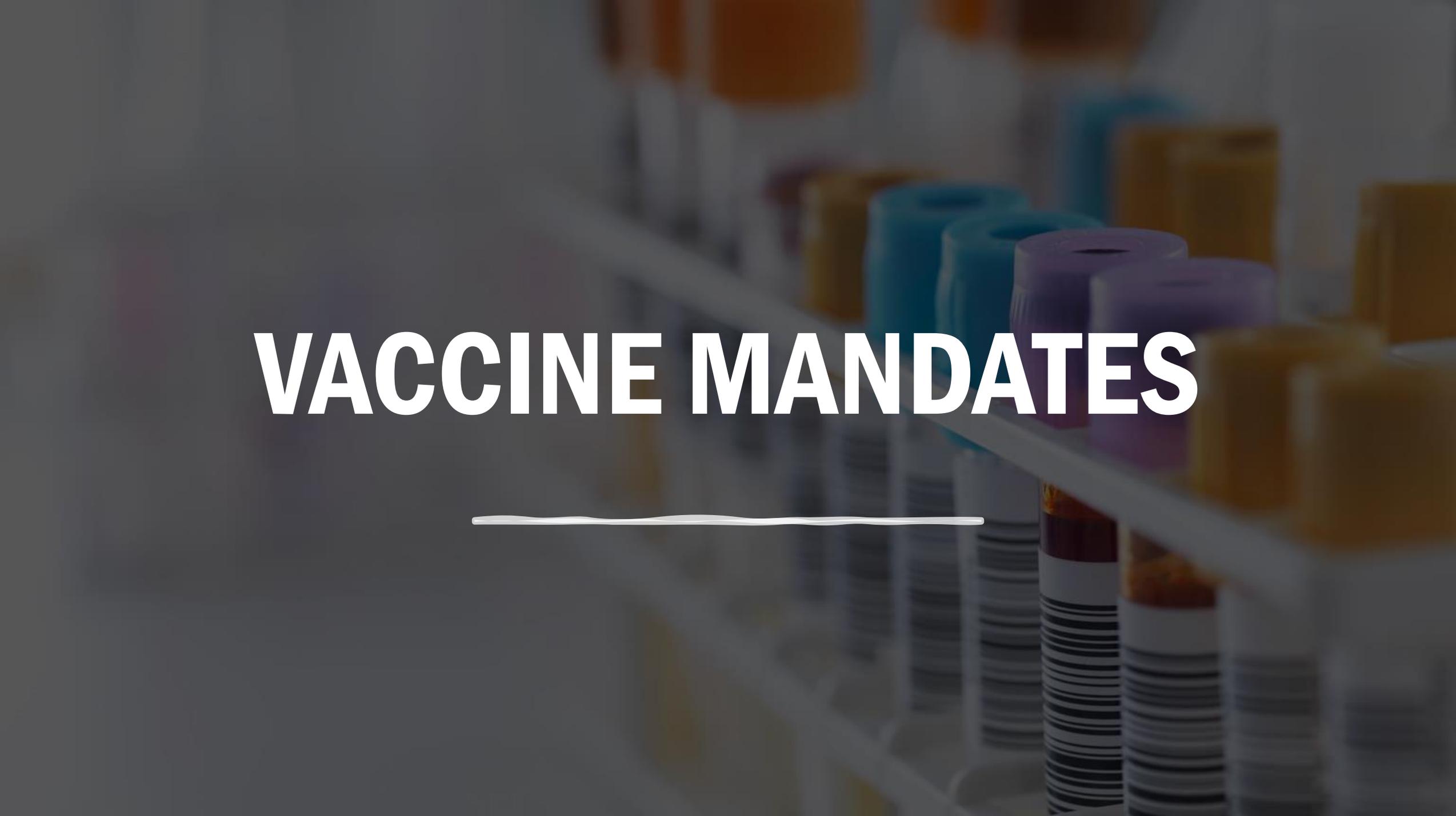
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Topics for Today's Discussion

- COVID-19 Vaccine Mandates
- Disability and Religious Exemptions
- Workplace Changes During the Pandemic and Beyond
- Common Employee Claims

VACCINE MANDATES



Vaccine Mandates

- **President Biden's COVID-19 Action Plan**
 - Executive Orders
 - DOL OSHA Healthcare Emergency Temporary Standard (“ETS1”)
 - DOL OSHA Large Employer Emergency Temporary Standard (“ETS2”)
 - CMS Emergency Regulations for Healthcare Employers
- **State Orders**
 - Colorado Department of Public Health Orders
- **Local Orders**
 - Denver Public Health Orders

President Biden's Executive Orders

- Executive Order 13999 (1/21/2021)
 - Health care and other essential workers
 - Prevention strategies
- Executive Order 14042 (9/9/2021)
 - Federal employees
 - Must be fully vaccinated by November 23, 2021 (75-day ramp up period)
- Executive Order 14043 (9/9/2021)
 - Federal contractors and subcontractors
 - “In connection with” a covered contract
 - New or renewed contracts on or after October 15, 2021 to include new contract clause

Occupational Safety and Health Administration (OSHA) Regulations

- **DOL OSHA Emergency Temporary Standards (ETS)**
 - Effective immediately and for 6 months until superseded by permanent standard
- **ETS1 covers healthcare employers**
 - Published and effective June 21, 2021; corrected July 14, 2021
 - Employees who provide healthcare services or healthcare support services
 - Prevention strategies, not mandatory vaccination
- **ETS2 will cover employers with 100 or more employees**
 - 80 million private sector employees
 - Employees must be fully vaccinated or test negative on a weekly basis
 - Paid time off for vaccination and to recover from vaccination side effects
- **ETS2 is imminent, open questions**
 - How do you count 100 employees?
 - What qualifies as a weekly COVID-19 test and who will pay for weekly testing?
 - What level of vaccination is sufficient (one shot, two, boosters)?
- **Expected legal challenges to ETS2**
 - Injunctions
 - Conflicting state vs. federal standards

Centers for Medicare & Medicaid Services Emergency Regulations

- Interim Final Rule will be issued in October 2021
- Covers healthcare providers that receive Medicare or Medicaid reimbursement
- Nursing homes, hospitals, dialysis facilities, ambulatory surgical settings, home health agencies
- Effective either 45 or 60 days after publication
- Mandatory vaccination
- Not expected to include a voluntary weekly testing option

Colorado Department of Public Health & Environment

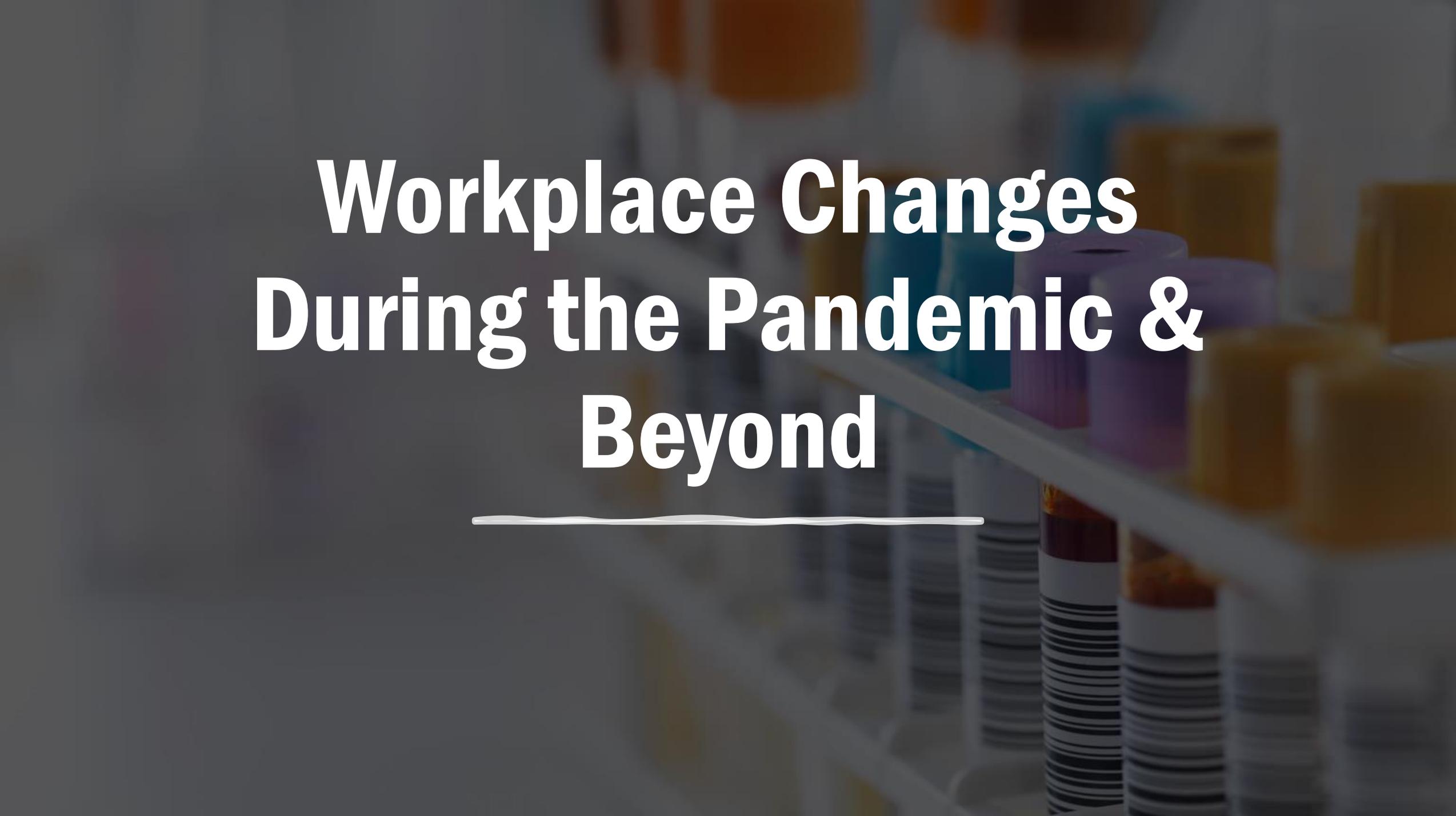
- **State Employees**
 - Must be fully vaccinated by September 20, 2021, or participate in twice-weekly testing
- **Staff at High-Risk Public Healthcare Facilities and Hospitals**
 - Acute treatment units, ambulatory surgical centers, assisted living residences, behavioral health entities, birth centers, community mental health centers, community clinics, community integrated health care services agencies, dialysis treatment clinics, home care agencies, home care placement agencies, hospices, hospitals, facilities for individuals with intellectual and developmental disabilities, nursing homes
 - First dose of vaccine by September 30, 2021; must be fully vaccinated by October 31, 2021
- **Public and Private Colleges and Universities**
 - Schools and school districts will have individual requirements
- **Compare Denver Public Health Order of August 21, 2021**
 - Mandatory vaccination required for all city employees, care facilities, hospitals, clinical settings, limited healthcare settings, congregate living facilities (homeless shelters, jails), correctional facilities, schools, childcare centers, any entity providing home care to patients, any entity providing first responder services
 - Must be fully vaccinated by September 30, 2021

Disability and Religious Exemptions

- Legal Precedence: Vaccine Mandates Generally Lawful
- **Limited Scope in Employment Settings** (see, e.g., *Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania*, 200 F. Supp. 3d 553 (E.D. Pa. 2016), aff'd, 877 F.3d 487 (3d Cir. 2017) (deeply held personal beliefs are not protected under Title VII)).
- Steps:
 - Requests
 - Interactive Process
 - Supporting Documentation
 - Undue Hardship Analysis
- Current Test Case: *Barrington v. United Airlines, Inc.*, No. 21-CV-2602, 2021 WL 4840855 (D. Colo. Oct. 14, 2021) (religious objector denied injunction).

Frequent Questions

- **What about HIPAA?**
 - **Employers are not generally governed by HIPAA**
- **What about the ADA?**
 - **Employers can ask about COVID-19 vaccination status**
 - **Limited confidentiality of medical/disability information continues to apply**



Workplace Changes During the Pandemic & Beyond

Workplace Changes During the Pandemic

- **Wages and Work Hours**
 - Donning and Doffing
 - Time Tracking
 - Determining Applicable Laws
- **Privacy**
 - Video Technology
 - Work/Home Sphere Disintegration
- **Return to Work Policies**
 - Employee Pushback
 - The Future of Disability Accommodation Law and Telecommuting

RECENT CASES

- Attendance Before v. Now: Essential Function v. Reasonable Accommodation Analysis
- See *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020) (injunction granted in favor of employee's telecommuting request).
 - See generally *Brownlow v. Alfa Vision Ins. Co.*, No. 3:18-CV-01241, 2021 WL 1087475, at *1 (M.D. Tenn. Mar. 22, 2021) (noting in dicta that the landscape of remote working has changed vastly during the pandemic).
- But see *Frantti v. New York*, 850 F. App'x 17, 18 (2d Cir. 2021) (affirming summary judgment in part because telecommuting was found not to be a reasonable accommodation when the essential functions of the job required plaintiff at work).

Permanent Workplace Changes

- Changes to the Workplace Because of COVID-19 are Here to Stay
 - Hybrid Workplaces and Flex-Time
 - Means of Communications
 - Employee Mental Health Issues
 - Vaccine Wellness and Incentive Plans
 - More Stringent Recordkeeping
 - Healthy Families & Workplace Act (HFWA)
- Other Changes...



IN THE COURTS: CURRENT LITIGATION TRENDS

Employee Claims

- **Public Health Emergency Whistleblower Act (PHEW)**
- **Discharge in Violation of Public Policy**
- **ADA/CADA/DADO**
 - Disability Discrimination
 - Associational Claims
- **Rehabilitation Act**
- **Occupation Safety and Health Act (OSHA)**
- **Paid/Unpaid Leave**
 - Litigation Springing from Federal and State Laws/Regulations in 2020
 - Family Medical Leave Act (FMLA)
 - Current COVID/Vaccination Effects
 - Retaliation
- **Required Postings**



QUESTIONS?



THANK YOU
