

CAN I REQUIRE MY EMPLOYEES
TO GET THE COVID-19 VACCINE?



HOW DO I HELP WITH EMPLOYEE
MENTAL HEALTH AFTER PANDEMIC?



CAN I OFFER INCENTIVES TO
EMPLOYEES WHO GET VACCINATED?

HOW DO I RESPOND TO A COVID-19
INCIDENT IN THE WORKPLACE?



COVID-19 UPDATES:

*Meeting the challenge of
getting back to business*



COVID-19 UPDATES: MEETING THE CHALLENGE OF GETTING BACK TO BUSINESS

As employers move toward a post-pandemic workplace, getting back to business as usual might be a challenge. Employees may be reluctant to return onsite, refuse or be unable to get the COVID-19 vaccine, or struggle with residual physical and/or mental health issues.

Agencies like OSHA continue updating their COVID-19 guidance, meaning employers must continue to stay abreast of changes. The Centers for Disease Control and Prevention (CDC) continues to monitor the pandemic and update its requirements and guidelines.

Employers must stay committed to maintaining a safe and productive work environment. To achieve this, employers should follow these steps as employees return to the worksite:

- Monitor employee health status
- Follow masking and social distancing guidelines
- Provide for workplace sanitation
- Require proper handwashing
- Respond to a COVID-19 situation swiftly and safely

Having plans in place can help employers face challenges when they arise. Plans, however, should be flexible as situations evolve. A one-size-fits-all playbook will not work for every organization.

Since the pandemic began, many employers have gathered a select group of employees to act as their company's COVID-19 response personnel. This group typically includes stakeholders from executive, HR, safety, facilities, and the IT Department. This team should continue to tweak policies, develop procedures, and lead communication and safety efforts.

But what happens if employees won't comply with the rules or have a hard time adjusting? Are frontline leaders trained to recognize "red flags" and know how to intervene before problems get out of hand?

Although the worst of the COVID-19 pandemic is hopefully behind us, employers must still manage the side effects the virus has had on employee relations. Read on to learn how to meet the challenge of keeping employees safe while protecting their rights and managing sensitive issues.

REQUIRING EMPLOYEES TO GET THE COVID-19 VACCINE

The Equal Employment Opportunity Commission (EEOC) has said employers may require employees to be vaccinated against COVID-19 as a condition of going to work, but need to consider their obligation if an employee declines because of disability or a sincerely held religious belief.



MEDICAL CONDITIONS

If an employee says they cannot get the vaccine because of a medical condition, this is a request for a workplace change, such as an exception to a workplace policy under the Americans with Disabilities Act (ADA). When this happens, an employer needs to engage in an interactive process (i.e., talk with the employee focusing on identifying an effective reasonable accommodation).

As part of this process, the employer may ask for reasonable documentation. If the documentation supports the need for an accommodation and the accommodation is reasonable, the employer should allow for it.

But if that accommodation would cause an undue hardship, it doesn't need to be granted. For example, an accommodation may be to work remotely – which may or may not be feasible.

Undue hardship refers not only to cost, but also to accommodations that are extensive or would disrupt the nature or operation of the business. Employers must assess reasonable accommodations on a case-by-case basis, and not have a blanket policy in place.

RELIGIOUS BELIEFS

If an employee indicates that they cannot get the vaccine due to a religious belief, an employer also needs to stop and consider the request. An employer should not spend too much time determining whether the request is based on a belief or faith that is considered to be religious. The religion need not be a generally accepted faith. It need only be a sincerely held religious belief.

The employee might, for example, subscribe to veganism or something that prohibits vaccines with a sincerity equal to that of traditional religious views. That might be enough. Simply lacking belief in vaccines, however, is not enough.

As with ADA/medical accommodations, employers need not provide a religious accommodation that poses an undue hardship. This, however, is different from the ADA undue hardship. A religious accommodation may cause undue hardship if it is more than a minimal burden on operation of the business. An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.

WHAT IF A REASONABLE ACCOMMODATION ISN'T POSSIBLE?

If no accommodation is possible, then an employer may prohibit the employee from entering the premises, but not necessarily fire them. The employer must see if the employee has any other rights under federal or local laws.

Under the ADA, before an employer can bar a worker from the physical worksite, the employer must determine if the unvaccinated employee presents a significant risk in harm to health or safety that cannot be eliminated or reduced through reasonable accommodations.

PRIVACY ISSUES

Employers may ask workers if they have received a COVID-19 vaccine without implicating the ADA or the Genetic Information Nondiscrimination Act (GINA). The EEOC states that asking employees whether they have been vaccinated is not considered a "medical inquiry" under the ADA. However, employers must be careful if they are administering the vaccine in the workplace.

The CDC recommends asking screening questions before administering a vaccine to ensure there is no medical reason that would prevent a person from receiving it. Asking screening questions, however, is a "medical inquiry" that would have to meet the "business necessity" standard under the ADA.



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POLICIES ON VACCINE MANDATES

Employers that require employees to receive a vaccine should have policies regarding the mandate and inform employees what to do if they have any questions. Communication should include the reason for the vaccine mandate — which is to help curb the virus spread and keep the workplace and employees safe from recognized hazards. The policy should also indicate potential repercussions for failing to follow it. Employees must know what to expect. Of course, employers also need to look at their workplace and determine if such a mandate will be right. A policy encouraging the vaccine might work best.

OFFERING VACCINE INCENTIVES

To encourage the workforce to get vaccinated, employers may offer incentives — financial or otherwise — to employees to receive COVID-19 vaccines, according to EEOC guidance issued in May 2021. The incentives have some limitations, however.

Federal anti-discrimination laws do not prohibit an employer from offering incentives to employees who *voluntarily* provide proof that they have been vaccinated outside the workplace. They may have received the vaccine from a pharmacy, at their doctor's office, or at a public health clinic, for example.

However, if employers are providing a vaccination to employees (such as through an onsite clinic), there are limits on the incentives. The EEOC notes that if employees are rewarded for receiving a vaccine from employers, the reward cannot be so large that is considered coercive.

DO INCENTIVES CROSS THE LINE WITH GENETIC INFORMATION?

GINA prohibits employers from discriminating against employees because of genetic information. When it comes to vaccination incentives, the act allows employers to offer an incentive to employees who voluntarily provide vaccination documentation from a third party. This is allowed under the act because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member, nor is it any other form of genetic information.

CAN EMPLOYEES BE INCENTIVIZED FOR FAMILY MEMBERS WHO GET THE VACCINE?

An employer may not offer incentives to an employee in exchange for a family member being vaccinated by the employer, because the vaccinator would need to ask the family member medical screening questions. Asking such questions would lead to the employer having genetic information in the form of family medical history of the employee. However, an employer may offer an employee's family member the opportunity to be vaccinated by the employer if they take certain steps to ensure GINA compliance.



IF EMPLOYERS ARE PROVIDING A VACCINATION TO EMPLOYEES (SUCH AS THROUGH AN ONSITE CLINIC), THERE ARE LIMITS ON THE INCENTIVES.

Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is:

- Used only for the purpose of providing the vaccination,
- Kept confidential, and
- Not provided to any managers, supervisors, or others who make employment decisions for the employees.

In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

OPTIONS OTHER THAN INCENTIVES

Just because employers may incentivize employees to be vaccinated doesn't mean they should. Cash rewards can bring wage and hour compliance risks that could impact overtime pay and recordkeeping issues. A better option for employers who want to reward employees for being vaccinated might be a modest, nonmonetary gift, like a water bottle or company apparel. Employers that prefer to avoid the risks surrounding vaccine incentives may be better off providing employees and their family members with information to help educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.

IDENTIFYING VACCINATED EMPLOYEES

Ah, the masks can come off for the fully vaccinated – according to the CDC, anyway. With updated guidance on masking and distancing, employers want to return to normal. What does this look like at work? If vaccinated employees can go without masks, should employers require them to somehow display their vaccination status? A sticker on a company ID card, a bracelet, a pin – all indicating that an employee is fully vaccinated. Only those with such an identifier can go mask-free. Sounds good, right? Not so fast.

VACCINATED STATUS MAY BE CONFIDENTIAL MEDICAL INFORMATION

Step one is first finding out which employees are vaccinated. Is asking employees for this information an issue under the Health Insurance Portability and Accountability Act (HIPAA)? Not likely, as the HIPAA privacy rules apply only to employers in their activities as group health care plan sponsors, but not in their activities as employers.



The ADA does, however, require that employers keep employee (and applicant) medical information confidential. The ADA does not, however, prohibit employers from asking if employees are vaccinated. Vaccination information is medical information, and employers are expected to limit who has access to employee medical information. Often, for example, only those in HR who enforce workplace conduct or health and safety protocols should have access to this information, which should be used only to enforce policies.

Is vaccinated status medical information? The EEOC has not specifically indicated. Some employment lawyers indicate that it is. Employers are struggling to figure out how to maintain an employee's vaccine status as confidential while enforcing a mask policy that allows only fully vaccinated individuals to go mask-free in the workplace. If vaccinated employees can remove their masks, won't their vaccine status become known? Possibly, but vaccinated employees may continue to wear masks, so it is generally their decision to display their vaccination status. Requiring them to display their status may go too far.

To complicate matters, employers must be aware of state, local, or other laws. Some locations have not lifted their mask mandates. Others consider vaccination status a protected class.

WEARING MASKS NOW AND IN THE FUTURE

Whether because of laws or company policy, employees may still be required to wear face coverings while at work. Some individuals may feel safer keeping masks on, and employers should support those decisions versus pressuring employees to remove their masks.

As companies move toward the end of the pandemic, employers may find employees choose to wear masks intermittently as part of an overall wellness routine when battling run-of-the-mill illnesses, like the common cold. As with COVID, employers should support employees' goals to keep themselves and the workplace healthy and safe for everyone.

TREATING UNVACCINATED EMPLOYEES DIFFERENTLY

Another risk of having varying mask protocols is the potential of treating employees differently. Will only the vaccinated be allowed back in conference, lunch, and break rooms? Will the unvaccinated go unchosen for projects, assignments, or other opportunities?

Employers must remember, some employees are unable to be vaccinated, perhaps due to a medical condition or a sincerely held religious belief. Treating them in a less-than-favorable manner could also risk a discrimination claim. If there will be differences in company protocols, managers must be trained on how to handle situations.

Have a well-communicated policy that prohibits employees from confronting one another about mask wearing. Instead, have employees report masking policy issues. The policy should also prohibit employees from asking each other about their vaccination status.

AMENDING THE OSHA RECORDABILITY RULES FOR VACCINE SIDE EFFECTS

In a major about-face, OSHA now says that employers do not have to record adverse side effects from COVID-19 vaccinations, even if employers mandate employees get the vaccine. The new guidance comes as an FAQ, which replaces three earlier FAQs. In those earlier FAQs, OSHA said that adverse reactions to employer-required vaccines were recordable while employer-recommended vaccines were not.

RECORDKEEPING WHEN COVID-19 IS CONTRACTED AT WORK

If an employee contracts COVID-19 at work, it must be treated as a work-related incident and recorded as such. Cases of COVID-19 are considered respiratory conditions for recordkeeping purposes.

An injury or illness is recordable on the OSHA 300 Log if it meets all three of the following conditions:

1. It is work-related according to OSHA's definition in 29 CFR 1904.5;
2. It is new according to OSHA's definition in 29 CFR 1904.6; and
3. It meets one or more of the general recording criteria.

For a COVID-19 case to be recordable, it also must be a confirmed case. This generally means it has been confirmed by a laboratory test. OSHA says that a case is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a preexisting injury or illness. Basically, if an injury or illness happened at work, or while the employee was doing work for the employer, the case will be work-related.



**IF AN EMPLOYEE
CONTRACTS
COVID-19
AT WORK,
IT MUST BE
TREATED AS A
WORK-RELATED
INCIDENT AND
RECORDED.**

HOW TO DETERMINE WORK-RELATEDNESS

Per OSHA standards, if an exposure to COVID-19 in the workplace led to an employee's illness, that exposure is considered a "discernible cause" and makes the case work-related. In some cases, it may be easy to make this determination. Health care workers, for example, may be regularly exposed to people carrying the virus. In other cases, an employer may have an employee exposed to a coworker who tested positive for COVID-19. If the employee later becomes sick with COVID-19, that's work-related.

WHAT HAPPENS IF AN EMPLOYEE DIES FROM COVID-19?

If in the worst-case scenario the employee dies from a workplace exposure to COVID-19, the employer must update the 300 Log to reflect the changes and report the work-related fatality to OSHA within eight hours. The eight-hour timeframe applies from the time the worker died, from the time the employer learns about the death, or from the time the employer learns the COVID-19-related death was work-related. If an employee dies more than 30 days after the workplace exposure, the death does not have to be reported to OSHA. (Note that some states do not recognize this 30-day reporting exemption.)

Additionally, work-related cases of COVID-19 that result in in-patient hospitalizations must be reported to OSHA within 24 hours of the work-related exposure. If the employee is hospitalized after the 24-hour period has elapsed, the employer does not have to report to OSHA, but must still make sure the case is recorded accurately on the 300 Log.

IMPLEMENTING THE OSHA COVID-19 EMERGENCY TEMPORARY STANDARD

Those working in health care, take heed. In June, OSHA released the long-awaited COVID-19 Emergency Temporary Standard (ETS). The rule covers only health care operations. This standard creates many new obligations for health care employers such as creating a COVID-19 Log, addressing ventilation, and implementing a written plan.

The health care ETS is aimed at protecting workers facing the highest coronavirus hazards — those working in health care settings where suspected or confirmed coronavirus patients are treated. This includes employees in hospitals, nursing homes, and assisted living facilities, as well as emergency responders, home health care workers, and employees in ambulatory care settings where suspected or confirmed coronavirus patients are treated.



**DO YOU WORK IN
HEALTH CARE?**

***IN JUNE, OSHA RELEASED THE
LONG-AWAITED COVID-19
EMERGENCY TEMPORARY
STANDARD (ETS).***

UPDATED GUIDANCE FOR OTHER (NON-HEALTH CARE) INDUSTRIES

For those not in a health care setting, OSHA has some updated guidance. The agency's guidance for non-health care employers focuses primarily on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces).

Unless required by another federal or state law, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. However, many workplaces will have both vaccinated and unvaccinated workers, at least for the foreseeable future. The guidance provides steps employers should take in these situations, as well as in situations where employers have "at-risk" workers – for example, those taking immune-weakening medications.

RESPONDING TO A COVID-19 INCIDENT IN THE WORKPLACE

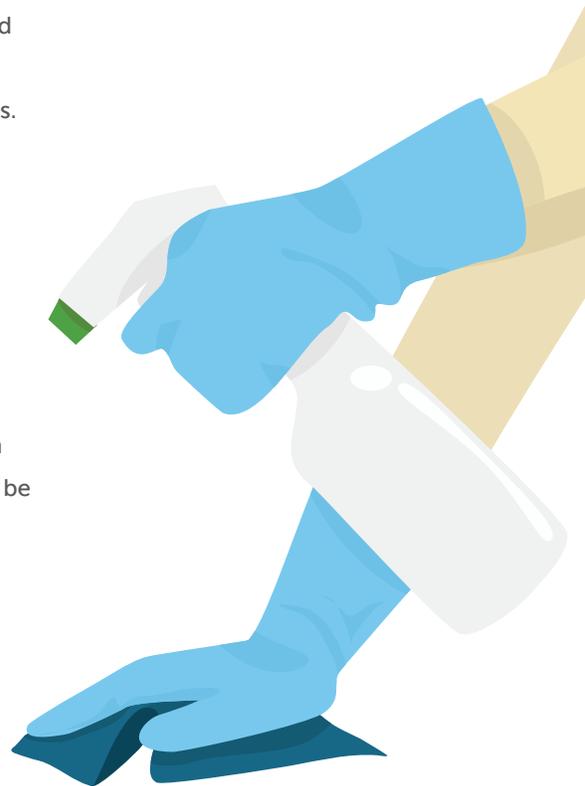
Sometimes the best laid plans aren't enough, and an employee could come down with COVID-19 in the workplace. Responding quickly and appropriately to a case of COVID-19 is key. If an employee reports that a coworker looks ill, the employer should immediately investigate to determine the next steps. If the coworker appears to have or reports symptoms, they should be isolated and sent home. Contact tracing should follow. Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC-recommended precautions.

SANITIZING THE WORKPLACE

If an employee complains of feeling ill, determine where the employee was in the workplace so the area can be cleaned and disinfected. This means that all items and surfaces the employee came in contact with need to be addressed, such as workstations, breakrooms, bathrooms, etc. If the ill employee was coughing excessively, that must be taken into consideration as droplets can travel and land on surfaces up to six feet away. Items or surfaces that have visible dirt on them need to be cleaned with soap and water before being disinfected.

SAFETY PROTOCOL

Personal protective equipment (PPE) may be needed to safely apply disinfectant. Those responsible for cleaning should follow the manufacturer's recommendations concerning any hazards. Appropriate gloves should be worn when handling chemicals. In some instances, personnel with specialized training and equipment may be required to apply disinfectants, such as fumigants or fogs.



MONITORING THE WORKPLACE GOING FORWARD

As more employees head back to the workplace, some measures put in place to stem the spread of COVID-19 can continue to be used to support employee health.

ESTABLISH BOUNDARIES AS NEEDED

Employees may be excited to get back to a physical worksite and see coworkers again. There are many ways for employers to foster that environment while creating some distance within the workplace, often at no extra cost, such as:

- Setting limits on the number of attendees at meetings,
- Shortening the duration of meetings in conference rooms,
- Staggering break or meal periods,
- Expanding common areas where employees congregate, and
- Allowing more space between workstations.

WORKPLACE STANDARDS

Designate someone at work (like a manager) who will be responsible for determining distancing standards. This person will monitor interactions at work and address any concerns or issues. To reduce the spread of germs, this person may also set limits on nonessential work-related activities like shared treats, company picnics, celebrations, and potlucks. Employees can be expected to comply with the standards set at work, as well as be prepared to adapt based on safety and health protocols. To maintain the highest level of health and safety at work, employers should encourage employees to follow all public health guidelines while off work.

LINGERING MENTAL HEALTH EFFECTS

Employers and employees who have been coping with the pandemic's challenges may now be dealing with lingering mental health effects. Some who return to brick and mortar worksites will jump right back into the routine of being away from home and around coworkers again, while others may not adjust as quickly. Employees who continue to work remotely may feel isolated.

Managers may be tasked with leading a hybrid workforce, with some employees onsite and some remote. Developing those leadership skills may create some levels of anxiety as managers who often are spread thin now must learn to juggle even more. Employees may be missing coworkers who have chosen to stay working remotely, while learning to adjust to new processes and procedures.



**1 IN 5
ADULTS
lives with
mental
illness**

PLAYING CATCH-UP

The freedom that comes with an easing of pandemic-related social distancing requirements may be bringing new stressors to the workforce. From routine medical care that was delayed to using up accrued paid time off (PTO) for vacations, employees may be scrambling with fitting it all in, leading to stressful feelings. Many have gone from a year of having nothing to do but binge watch TV shows to having full calendars again. This transition will be different for everyone. Compassion, communication, and understanding will be key.

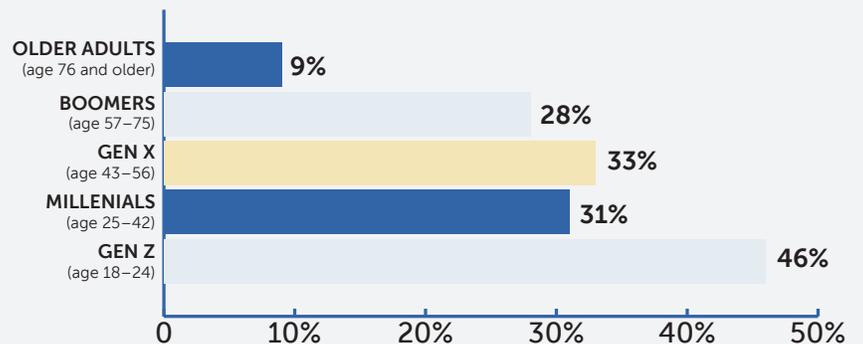
SUPPORTING GOOD MENTAL HEALTH

Mental health has been strained over the past year and employers need to understand the importance of prioritizing and supporting good mental health. Company leaders should be ready to listen to employees and know when there's a need to dig deeper. This is especially important when having a conversation with an employee about performance issues. These issues can be a sign that an employee is suffering from mental health problems.

Signs might include:

- Changes in work habits; tardiness
- Reduced work quality
- Lower work output
- Deteriorating appearance
- Moodiness
- Avoiding social interaction
- Fatigue
- Accidents and safety problems
- Changes in attitude

All age groups say their **MENTAL HEALTH GOT WORSE** during the COVID-19 pandemic:



Source: American Psychological Association survey, February 2021

When employees are struggling, point them to resources that may help them cope. To uncover issues and spot warning signs early on, regularly check in with workers to see how things are going and have ready access to information about employee assistance programs or other mental health resources.

BREAKING DOWN THE STIGMA OF MENTAL HEALTH IN THE WORKPLACE

It's important to help employees cope with mental health issues, but the topic of mental illness comes with a stigma that could be weighing down the workplace. More than half of those with mental illnesses don't receive help, often because

they are afraid of losing their jobs or being treated differently, according to the American Psychiatric Association. This can hold people back from getting the treatment they need, resulting in lower productivity and more absenteeism and turnover. To keep the stigma of mental illness from having a negative impact on the workforce, employers should take steps to create a culture that supports mental health. This involves three Ps: Programs, Policies, and People.

PROGRAMS

Employee assistance: An employee assistance program (EAP) is a popular and effective way to give workers a confidential means of getting help with mental health issues for themselves or family members.

Benefits: A health benefits package should provide easy access to mental health support and care. Assess the plan to make sure it complies with the Mental Health Parity and Addiction Equity Act.

Services: Wellness services such as health coaching, stress management resources, and mental health screenings provide more options for individuals to get the help they need.

PEOPLE

Leadership: Leaders should understand the importance of mental health issues and how they impact the workforce. They can set a proactive tone by championing policies that support mental health and by prioritizing their own mental health care.

Training: Train managers to recognize warning signs of mental health issues. They should know how to respond appropriately and refer individuals to resources. In addition, training in communication and emotional intelligence fosters a supportive work environment.

POLICIES

Leave: Be flexible. Allow sick days to be used for reasons relating to mental health and provide periods of leave for therapy appointments. The ADA and Family and Medical Leave Act (FMLA) can apply when leave is requested for mental health care; make sure managers understand this.

Scheduling: Offer flexible scheduling options that give workers more control over when work gets done. Set boundaries around after-hours emails and other communication.

Anti-harassment: Use anti-harassment and antibullying policies to support a respectful workplace. A negative work environment strains mental health and worker well-being.



Use the three
Ps to create a
culture that
supports
mental health:

✓ Programs

✓ People

✓ Policies

CONCLUSION

Employers should keep in mind that concerns related to COVID-19 may continue for the foreseeable future. In fact, some employees may be afraid to return to the facility, despite the steps taken to ensure a safe work environment.

While refusal to return to work (absent extenuating circumstances) may be considered insubordination, employers should try their best to work with employees and help determine reasonable alternatives.

Working safely during the COVID-19 pandemic has challenged employers and employees in many ways. To move forward together, everyone must follow recommended best practices and safe habits to reduce the risk of exposure and minimize issues. As health professionals continue to learn more about the virus, businesses must adapt to new processes and ways of maintaining safe and compliant workplaces, especially as employees return to being onsite.

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EMPLOYEE HEALTH & WELLNESS TRAINING ADVISOR NEWSLETTER

This newsletter provides informative, easy-to-understand materials to help educate employees on healthy habits. The program also encourages employees to make positive lifestyle choices, which can help your company control insurance costs and employee attrition.

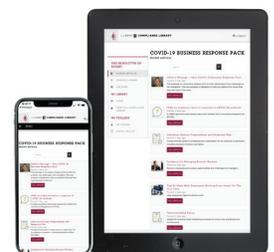
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COVID-19 BUSINESS RESPONSE PACK

Ensure the health and well-being of both your business and employees with the help of this invaluable online collection. Developed by our trusted team of in-house experts, it provides unlimited access to a wide range of ready-to-use pandemic management resources, including checklists, safety plan templates, FAQs, action plans, and more.

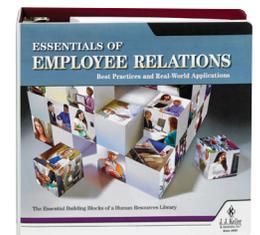
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HANDWASHING: HOW TO PROPERLY WASH YOUR HANDS

Washing your hands is one of the most effective ways to prevent the spread of germs. This training course is designed to provide employees with step-by-step instructions to properly wash their hands to remove dirt, grease, and microbes.

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COVID-19 PREVENTION FOR EMPLOYERS: HOW TO KEEP A SAFE WORKPLACE

With this course — which takes into consideration OSHA's General Duty Clause and state-specific COVID-19 standards from Virginia and Oregon — you can provide managers and supervisors with the action steps they need to assess risk and protect workers from COVID-19 exposure on the job.

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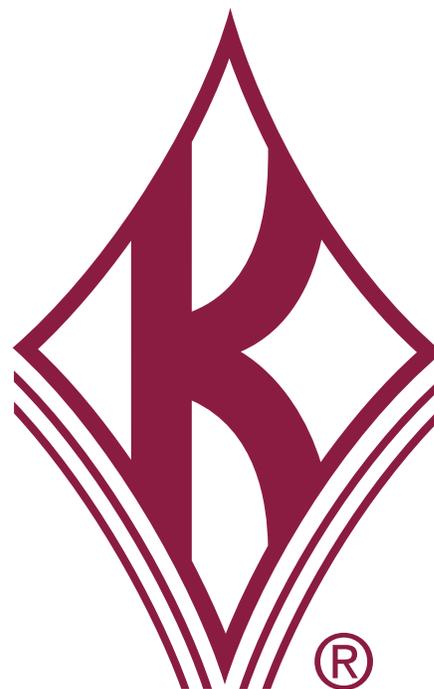
Michelle also contributes content on compliance and best practices for use in J. J. Keller & Associates, Inc. products including the *Wage & Hour Compliance* manual and the *Benefits & Compensation Regulatory Alert* newsletter.



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