

## the HR DOCTOR

with Philpot  
& Winkeler

**B**ack to school. As a kid, that idea filled you with excitement or dread. Across the country, the first day of school can be as early as July or as late as September, depending on where you live. This year, as kids return to school while the pandemic intensifies all over again due to the Delta variant, the staggered starts allow us to see the impact of COVID-19 on another school year. According to an Indianapolis Star article from August 4, “just one week into the new school year and COVID-19 is already disrupting learning for Hoosier students. Three dozen positive cases in schools were reported to the state last week and already several school districts have had to send dozens of students home to quarantine after just the first few days of class.” According to King5, the NBC affiliate in Seattle, on August 4, “COVID-19 cases among children force Washington childcare centers to temporarily close.”

The reports of COVID’s resurgence are also impacting employers plans to return employees to the workplace. According to CNBC on August 5, Amazon corporate employees won’t return to offices until January 2022, after previously planning a return after Labor Day. So now, employees who were anticipating their return to the office are thrust into additional uncertainty, their plans and preparations changing as the Delta variant makes us once again pivot.

Employees have experienced much change over the last year and a half, personally and professionally. The rising COVID-19 cases and return of masks may feel like a setback when people were just seeing light at the end of the tunnel. With a return to school uncertain and vaccines for children and childcare unavailable, employees with children have many factors weighing on them. Even if kids return

to school, will the schools remain open? Employees with family members who work in healthcare and small businesses worry once again. These latest changes may challenge our patience, but we’re not through with this yet.

So now what do we do about returning to work?

Like the start of a school year, return to work dates are not uniform. Many employers have gradually brought employees back over the summer as restrictions eased and others have planned a return on the Tuesday after Labor Day. How do employers and employees navigate this latest change together?

First, much of the country is in substantial and high transmission again, meaning the CDC guidelines recommend everyone, regardless of vaccination status, wear masks while indoors. If your county has reinstated (or never revoked) mask requirements and other mitigation strategies, it is at least a change that employees have traversed successfully within the last year. While disappointing, the change is less severe because it is familiar. We know how to successfully wear masks, socially distance, meter lobbies and telework as needed.

Second, as employees receive COVID-positive test results, are departments being notified? Previously, some or-

ganizations sent messages to department staff to notify them of a positive test in the department so employees could get tested and to quickly respond, knowing contact tracing was working beyond its limits and vaccines were unavailable. Now, is department notification necessary? Contact tracing is currently able to keep up with demand in many communi-

### How do employers and employees navigate this latest change together?

ties, although that may change quickly. Also, CDC recommendations involve mask-wearing, social distancing and vaccination. Department leadership will need to weigh the pros and cons of notifications, with part of the consideration being the size of the team, what the positive employee has shared with co-workers, and operational needs.

Third, will your organization require vaccinations? In several states, governors or state legislatures have preempted counties from enacting vaccine requirements. If a vaccine requirement is still an option for you, you will still need to contend with what that means

for your employees. The federal anti-discrimination laws such as the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 and similar state laws may require exceptions in certain cases. In those cases, you may consider requiring regular testing or other mitigation strategies, as a substitute.

Fourth, if vaccines are not going to be required, can they be incentivized? On Thursday, August 5, the White House held a webinar on vaccine incentives and while that webinar focused on incentives for citizens and communities, some employers are considering doing the same for employees. Will employees be able to “double dip,” possibly receiving an incentive from both the city or state in which they live and their county employer? Or are you providing an incentive to both employees and citizens? It’s worth considering just how effective incentives are. A recent NPR article titled “Get \$100 For a Vaccine? Cash Incentives Work for Some, Others Not So Much,” suggested while there is some impact, it is limited and will likely not reach those strongly opposed to vaccines.

Throughout the pandemic, flexibility has been the key to success. Clearly, the shifts in the pandemic are neither entirely predictable nor linear. Employers will need to continue to embrace flexibility to

support their employees, serve their residents and simultaneously help their community get through this. To prevent reverting all the way back to closing county buildings, it may also help to give employees time off work to get their vaccinations. Or offer additional sick leave to ensure employees are not coming into county buildings while they’re feeling sick, have had a direct exposure or are having to care for someone who is sick.

Back to work? County public servants have been working diligently to serve others all through the pandemic. How and where citizens receive service could still change several times as we navigate continuous change and acknowledge the continuous change residents are also experiencing. It is important to reflect on all of our success and how adaptable we have been for over a year. Utilization of employee assistance programs, flexibility and understanding are as important as ever. We will look back at this time with relief and awe at all we accomplished. We will realize the end of this pandemic together, with dedication, teamwork, communication and public service. That’s what we do and that is who we are. **CN**

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# Back to the Office?





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# VACCINES AND RELATED RETURN TO WORK ISSUES

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Morgan, Lewis & Bockius LLP

September 29, 2021

# Agenda

- Part 1: Planning for Return to Work
- Part 2: Vaccines & Workplace Issues

# **Part 1: Planning for Return to Work**

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# Common Questions...

- What should employers be doing as they plan or prepare for a return to work?
- What are the key steps employers, including those who have remained open or are already reopened, should take to mitigate risk?
- What are the common issues we are seeing as employees re-enter the workplace?

# Leadership & Planning

- Establish a team or task force to oversee planning, execution and monitoring
- Conduct COVID-19 risk/hazard assessment
- Create the Reopening Plan
- Communicate the plan and the right to modify the plan
- Undertake regular monitoring and updates
- Document the process

# Reopening Plan

- Health and safety mitigation measures
- COVID-19 response process
- Staffing
- Screening and testing (employees and visitors)
- Leave and other employee concerns
- Accommodation issues
- Communication and training plan

# Monitoring

- Regular and ongoing review of guidance – local and state public orders, CDC guidance, OSHA, etc.
- Address issues as they arise
  - Open door policies to report, investigate, remediate issues and complaints
  - Depending on size, appoint a COVID coordinator in each department
- Media/PR issues



# Protective Personal Equipment

- Considerations include:
  - Who provides?
  - What kinds?
  - Who will be required to wear it?
  - Under what circumstances?
  - What to do with people who refuse?
- State and local mask mandates
- Handling requests for religious or medical exemptions

# Testing and Screening Protocols

- What screening questions to ask?
- Testing considerations:
  - What to test?
  - Who to test?
  - How to test?
  - How often to test?
- Maintaining records; confidentiality
  - HIPAA
  - ADA
  - Consent
- Accommodations

# Wage and Hour and Related Issues

- Screening and testing time
  - Integral and indispensable vs. preliminary and postliminary activities
  - *De minimis* rules
  - State and local wage and hour laws
- Changes in job responsibilities
- Independent contractor and joint employment concerns

# Risks of Public Transportation

- Public transportation poses both practical (availability) and legal considerations
- Consider the reasons why the employee is nervous about public transportation
  - If the reason is based on the *employee's* disability, engage in the interactive process
  - Under the ADA, employees are not entitled to an accommodation due to a family member's illness or disability
- Employers can offer flexible work arrangements to make employees more comfortable and mitigate the risk

# Employees Who Refuse to Return

- Employees may not want to return:
  - Fear about contracting COVID-19 at work or during their commute
  - High risk employees or family members with high risk conditions
  - Childcare issues
  - Work from home as accommodation for other conditions
- Response depends on whether reason has legal protections

# General Fear v. Anxiety Disorder

- Is the condition a “disability” as defined in the ADA?
- According to the EEOC guidance, COVID-19 may exacerbate symptoms for some employees with a preexisting mental illness like anxiety, OCD, or PTSD
- Just like any other accommodation request, the employer may ask questions or offer an accommodation that is different from what the employee proposed

# General Fear

- Reassure employees that the office's health and safety protocols are in place and will be enforced
- Remind them of other protocols established to keep everyone safe (e.g., hand washing, social distancing, face coverings, congregation limits, etc.)
- Establish a COVID-response coordinator with whom employees can speak with if they believe protocols are being violated
  - Some state or local orders require the designation of "pandemic safety officers"

# Anxiety Disorder

- If employee demonstrates that they have anxiety that is a disability, accommodation must be considered
- Potential accommodations:
  - Install barriers between work stations
  - Stagger arrival times to reduce the number of employees entering the building and using the elevator at one time
  - Allow employee to use a private office space
  - Remote work, if feasible



# Attendance/Leave

- What about employees with childcare issues?
- Are you prepared to require employees to be there full-time?
- Will you provide additional leave?
  - ARPA FFCRA (voluntary)
  - State and Local leave laws (mandatory)
- How strictly will you enforce attendance policies? Discipline?

# Today's Remote Workforce

- According to a recent Pew Research study, prior to the pandemic 20% of U.S. employees worked from home.
- As of December 2020, approximately 71% of employees worked from home.
- The study found 54% of employees would want to work from home after the coronavirus outbreak ends.

# Advantages of a Remote Workforce

- Saves money on overhead
- Lowers absenteeism
- Improves continuity of operations
- Enhances productivity
- Aids in recruiting
- Remote workers report higher job satisfaction

# Disadvantages of a Remote Workforce

- Difficulty in supervision
- Concerns over change in corporate/organization culture
- Few opportunities for team synergy
- Start-up costs
- Possible burn-out issues
- Some remote workers may miss out on advancement opportunities
- Tax and employment law obligations

# Remote Work Policy Contents

- Logistics
- Work Expectations
- Expenses
- Safety and Security

# Logistics – State Law Issues

- A number of states encourage remote work programs, provide support to build remote work programs, and/or provide incentives to employers for creating remote work programs to reduce traffic, improve work-life balance, and improve opportunities for people with disabilities.

# Logistics - Eligibility

- Which employees will be eligible for remote work?
  - Keep in mind:
    - Operational needs;
    - Strategic considerations;
    - The employee's role;
    - Requested work location;
    - Job performance; and
    - Other factors may result in the denial of a particular request.
  - In addition, changes in circumstances may result in a change to previously approved requests.

# Logistics – Eligibility (cont'd)

- What may disqualify employees from working remotely?
  - Physical presence needed
  - Sufficient experience
  - Performance concerns
  - Training needs
  - Ability to measure work output or outcome
  - Work is highly confidential
  - Compliance concerns



# Remote Work Agreements

- What will the arrangement entail?
  - Formal or informal? Short or long term? Fixed schedule or flexible arrangement?
- Will there be a probationary period for remote work?
- Performance Expectations
  - Statement that employees are expected to meet all the responsibilities, perform all the duties and comply with all the policies that apply to any workers in similar roles, regardless of the location, or be subject to disciplinary action
  - Tell employees how performance will be measured, if applicable

# Remote Work Agreements (cont'd)

- Scheduling
  - Will employees be required to work certain “core hours” and be accessible during those hours or will employee be allowed to set their own work hours?
  - Will employees be on-call beyond regular work hours?
- In Office Work
  - Is it required? If so, on a fixed schedule or as needed?
- Support
  - What type of equipment and support is being offered?

# Remote Work Agreements (cont'd)

- Other Items

- Reiterate employment at will
- Ensure process for accurate tracking of time by non-exempt employees and require employees to agree to abide by it
- Require employees to ensure a safe work environment
- Require employees to commit to following confidentiality and data security protocols
- Reserve right to revoke remote work privileges at any time
- Warn employees that breach of remote work policy is cause for disciplinary action, including termination

# Wage and Hour Compliance

- Employers must pay for all time that it ***knows or should have known*** an employee is working, regardless of the location
- Companies must have clear timekeeping policies and practices in place and train employees on those policies to minimize their risk of liability for wage and hour claims

# Wage and Hour Compliance (cont'd)

- At the federal level, you can reach a written agreement with a teleworking employee in advance over what hours will be considered working time and how they will report any hours worked outside of their normal working time
  - It should reflect reasonable expectations of hours and not be a device to avoid paying for hours worked
  - Ideal is to have non-exempt employees record all actual hours, if practical

# Wage and Hour Compliance (cont'd)

- Ensure that employees are not working through unpaid meal and rest breaks
- Travel time may have to be paid in some situations, such as where an employee has to travel to a meeting during the work day
- State laws may impose additional requirements

# **Part 2: Vaccines & Workplace Issues**

**Morgan Lewis**

# Topics To Cover

- Voluntary Programs
- Vaccine Mandates
- Handling Requests for Medical Exemption under the ADA
- Handling Requests for Religious Exemption under Title VII
- Other Issues:
  - Applicants
  - Payment for Testing



# Common Questions...

- What can employers ask their employees when it comes to vaccination status?
- Can employers mandate vaccines?
- Should they?
- What accommodations must be made?

# Asking the “V” Question

- Can you ask employees if they have been vaccinated? **Yes**
- EEOC has said this is not a “disability inquiry”
  - But this information, once provided, presumably is confidential medical information
- Can you ask – “Why not?” This is a medical inquiry
- What will you do with the information?

# Voluntary Programs – Can You Offer Incentives?

- Yes ... but, the extent of permissible incentives remains unclear.
- The U.S. Department of Labor has said incentives can qualify as “gifts” that can be excluded from the regular rate
- EEOC Proposed Wellness regulations – now withdrawn – would have limited incentives to de minimis level (modest gift card or water bottle!) for certain “wellness programs.”

# Vaccine Passports

- Digital apps, like IBM's Excelsior, verify one's vaccinated status
- Biden Administration will not issue mandated vaccine credential
- Seven states are looking to provide a digital solution for storing proof of vaccinations.
- Meanwhile, 21 states have implemented bans on vaccine passports in some capacity, according to an Aug. 31 *MIT Technology Review* report.

# Employer Vaccine Mandates – Basics

- An increasing number of employers are requiring that employees be fully vaccinated against COVID-19 in order to enter employer facilities
- Federal law permits employers to mandate vaccinations in this circumstance if they offer accommodations to persons with disabilities and sincere religious objections
- EUA status of vaccines does **not** affect an employer's ability to mandate vaccination

# Employer Vaccine Mandates – Varieties

- Varieties of vaccine mandates:
  - Limited/Targeted: vaccination mandatory for certain classes of employees (e.g., those interacting with public) or new hires
  - Soft: Employees have option of receiving a vaccine or submitting to weekly testing requirements
  - Hard: All employees entering facilities must be fully vaccinated or qualify for an exemption due to disability or sincere religious belief
  - Very Strict: All employee must be fully vaccinated or qualify for an exemption due to disability or sincere religious belief

# **Medical Accommodations and COVID-19 Vaccine Mandates**

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# Verifying Need for Accommodation

- Under the ADA you can request documentation from a healthcare professional showing that:
  - The person has a medical condition, and
  - The person needs the requested accommodation as a result of functional limitations stemming from that condition



# Verifying Need for Accommodation

- Common issues with requests for exemption from COVID-19 vaccination:
  - Vagueness: Documentation doesn't clearly explain need for exemption based on limitations
  - Conclusory: Documentation merely says exemption is required due to medical need with no further information
- If initial documentation is insufficient you can request additional information from the employee or the employee's healthcare provider
  - This will most often involve information explaining the *need* for an exemption as opposed to presence of an underlying disability or condition

# Verifying Need for Accommodation

- In **rare cases** where you have objective information from reliable sources indicating that the employee or healthcare provider is providing false information, you may request an independent medical examination.
- Employer must pay for examination in those cases

# Do you have to provide it?

- Employers only need to provide accommodations that do not impose an undue hardship on the finances or operations of the employer
  - Undue hardship is defined as “significant difficulty or expense”
- Employers can also require that employees not pose a direct threat to themselves or others

# Undue Hardship

- Factors relevant to an undue hardship determination related to a vaccine exemption include:
  - Inability to maintain social distancing given the nature of the job
  - Diminished capacity at certain facility due to need to implement social distancing
  - Diminished productivity at same facilities due to need to implement social distancing
  - Increased costs associated with cleaning and testing protocols
- Unlikely to meet ADA standard in most cases

# Direct Threat

- Employers can require that employees not pose a direct threat to the health and safety of themselves or others
- COVID-19 infection and the unmitigated risk of COVID-19 is a direct threat according to EEOC
- The key question is whether there are measures that can sufficiently mitigate that threat, such as:
  - Masks
  - Social distancing
  - Testing
- Public health guidance constantly fluctuating and that affects this calculation

# **Religious Accommodations and COVID-19 Vaccine Mandates**

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# Verifying Need for Accommodation

- Employees must show that a sincere religious belief, practice, or tenet conflicts with a work requirement
- You **can** request documentation to verify this, examples include:
  - Letter from a pastor
  - Employee statement/explanation of religious beliefs

# Verifying Need for Accommodation - Sincerity

- Title VII protects *sincerely* held religious beliefs
- The concept of religion is broad, but it does **not** include:
  - Political, economic, or social beliefs; or
  - Mere personal preference
- Employers usually will not have reason to question sincerity of an employee's belief, but the following can undermine sincerity:
  1. Actions inconsistent with beliefs
  2. Desirability of accommodation for secular reasons
  3. Questionable timing of request/moving target



# Verifying Need for Accommodation

- Common issues with requests for exemptions to vaccine mandates include:
  - Requests tied to “Accommodation-Mill” churches or websites
  - Vague requests
  - Requests combining religious and political beliefs
  - Requests contrary to announced church positions on receiving the COVID-19 vaccine
- Employers can ask for follow-up information in these instances, such as whether an employee has received vaccines in the past, etc.

# Do you have to provide it?

- Employers only need to provide accommodations that do not impose an undue hardship on the finances or operations of the employer
  - Undue hardship is defined as more than "*de minimis*" costs
  - This is **LOWER** than the ADA standard
- Employers can also require that employees not pose a safety risk, which is the same as direct threat

# Do you have to provide it? Undue Hardship

- Factors relevant to undue hardship under Title VII are the same as under ADA
- The difference is these can easily add up to more than *de minimis* costs for religious requests

# Other Issues

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# Vaccine Mandates and Applicants

- You **can** alert applicants to vaccine policies and ask if they are or intend to become vaccinated as part of an application
- You **can** inform applicants that you will consider requests for accommodation to this policy due to disability or sincerely held religious beliefs
- You **cannot** ask applicants *why* they do not want to receive a vaccine
- You **should not** start the interactive process on this question prior to an offer as ADA prohibits pre-employment medical exams and inquiries.

# Who Pays for Tests?

- For employers that mandate testing, a frequent question is whether they can ask employees to pay for the test.
- If testing is done in accordance with an ADA or Title VII accommodation, employer **must** pay for testing
- In other situations, it will depend on state and local rules on employee compensation

# Questions?

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# Biography



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Russell R. Bruch defends corporate clients in employment litigation, including collective and class actions and wage and hour matters, in US federal and state courts. He represents clients at the district court and appellate levels in claims under the FLSA, ADA, ADEA, and Title VII. He also arbitrates and litigates matters relating to the enforcement of noncompetition agreements and employment contracts.



# Biography



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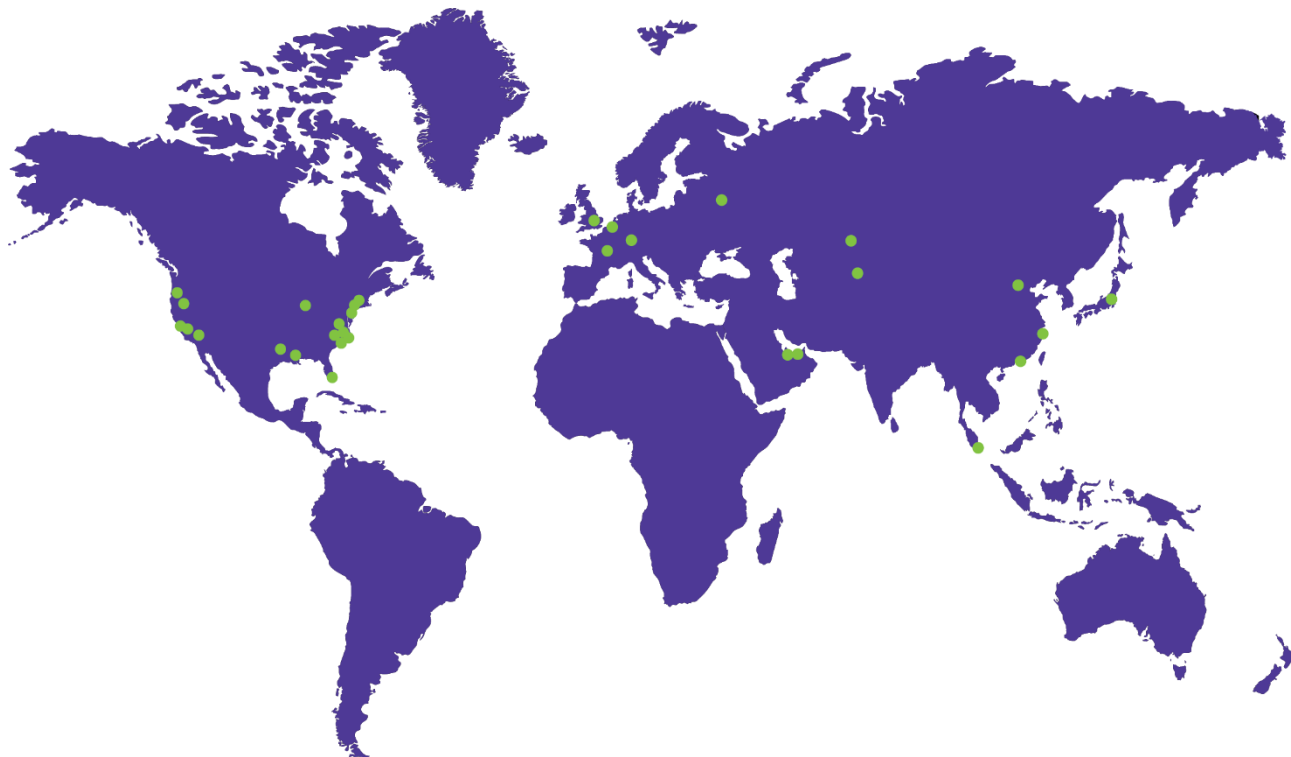
Alana Genderson advises clients on labor and employment best practices and defends clients in all phases of federal, state, and administrative employment litigation. Among other matters, Alana defends employers in whistleblower proceedings and against claims of discrimination, harassment, retaliation, and wrongful discharge. Alana is a key member of the firm's Occupational Safety and Health Administration (OSHA) practice, representing clients in matters ranging from initial investigations to trials and appeals.

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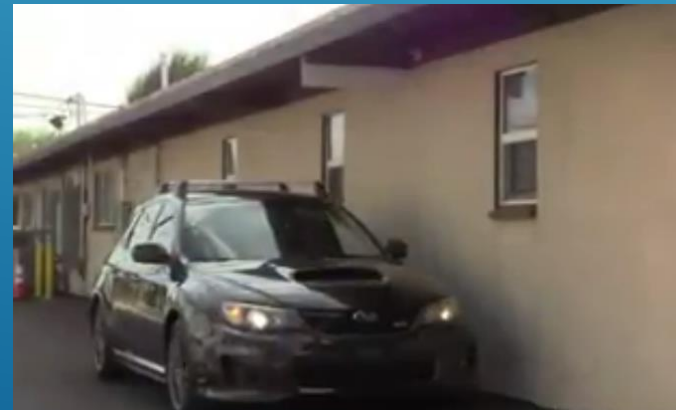
# Change Helps You To See Your Values Shine

- Collaboration
- Service
- Caring
- Flexibility
- Dedication
- Community



# How Do We Meet Customers Where They Are?

- Open Drive Thru Window
- Metered Lobbies
- Fewer Buildings to Visit

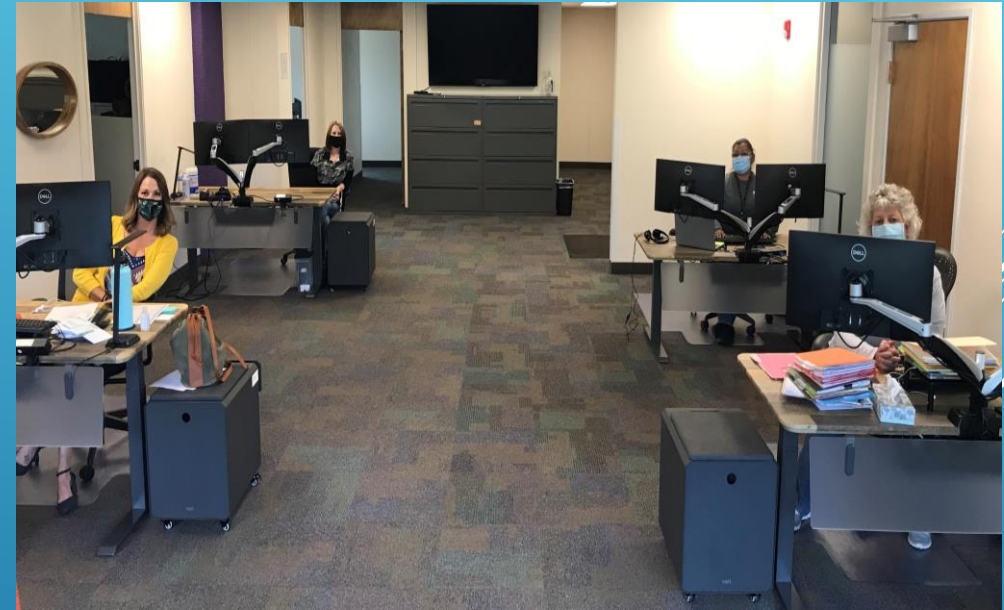




# How Do We Meet Employees Where They Are?

## Re-Entry began July 1, 2021

- Leadership Re-Entry Team
- Employee Re-Entry Team
- Phased Re-Entry
- Surveys/Town Halls
- Commitment to Remote Work
- Open and Shared Space



## What Were Some Silver Lining Outcomes?

- Increased Our Heritage Lunch and Learn Attendance
- EAP Partnership
- Added Mental Health and Self Care to New Employee Orientation

