

# The Delta variant and the workplace: Employer risks, challenges and opportunities

LOCKTON CORONAVIRUS ADVISORY PRACTICE

Aug. 24, 2021

# Lockton's Coronavirus Advisory Practice

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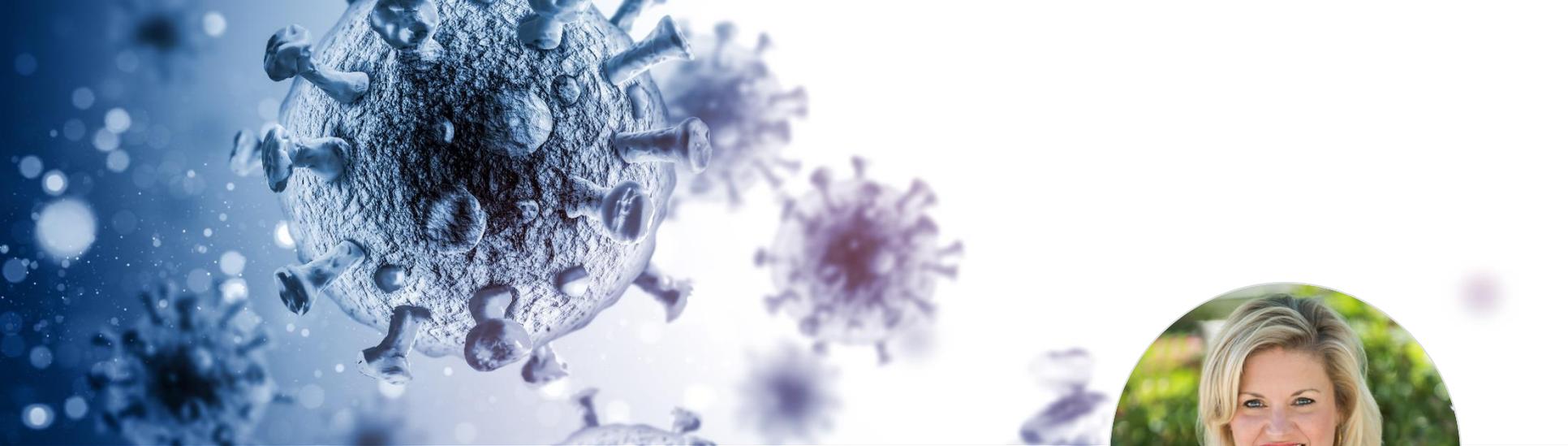


**Michael Kerridge**  
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## COMMUNICATIONS

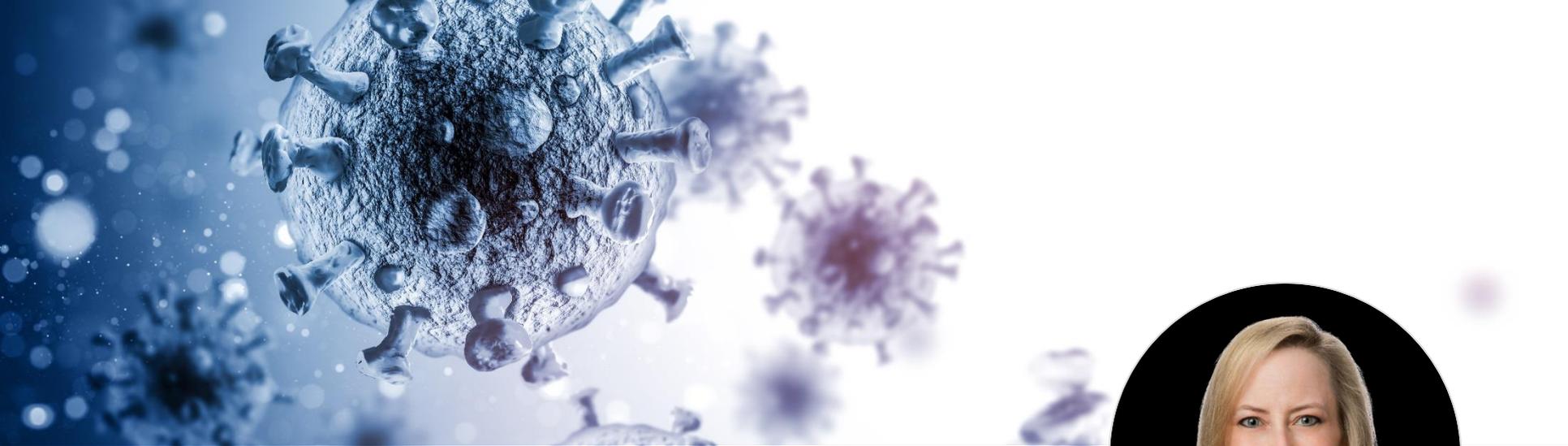


**Julie Gibson**  
Executive Vice President  
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# Introduction

**Julie Gibson**  
*EVP, Director*  
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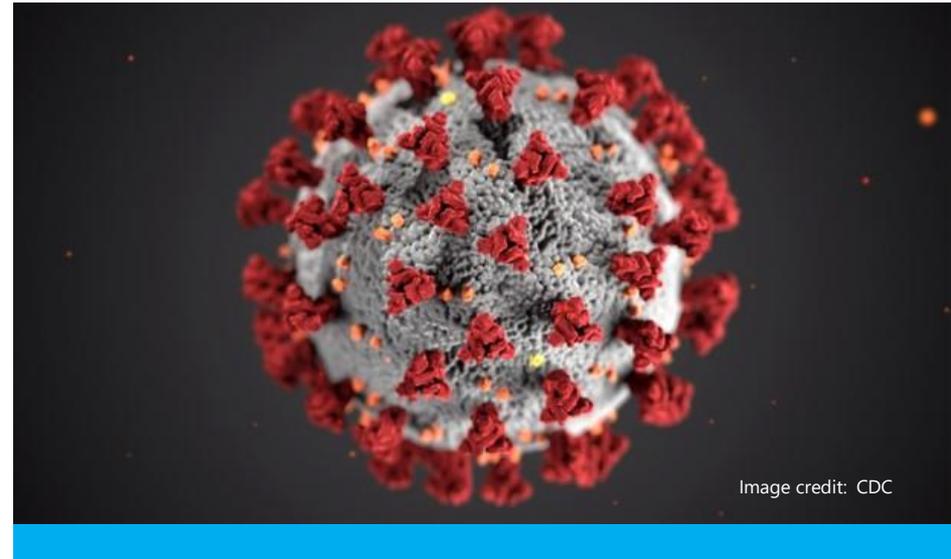
# Clinical aspects of the Delta variant



**Christine Hale, M.D.**  
*VP, Clinical Consulting*

# *COVID-19 Delta variant*

- As virus spreads, spontaneous mutations can lead to more aggressive strains
  - More contagious, and/or
  - More pathologic, and/or
  - Less susceptible to prevention/treatment
- Delta variant
  - Currently dominant strain in U.S.
  - Estimated 2x more contagious, similar to chickenpox (> 1000x viral load)
  - TBD whether more pathologic
  - Breakthrough infections are occurring



# *Clinical presentation has changed*

- COVID ICU cases are rapidly accelerating.
- Breakthrough cases appear to be increasing — vaccinated patients may still spread virus.
- The sickest patients are now **younger** and **unvaccinated**.
- Better therapeutics exist, both pre-hospitalization and during hospitalization.



# *What has not changed (much)*

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- Vaccines still convey protection
  - 5x decreased risk of infection
  - 25x decreased risk of hospitalization
  - Immune-suppressed individuals who have not mounted an adequate response to the vaccine may still be vulnerable
- Other preventive measures still convey protection\*
  - Masks — type of mask matters
  - Social distancing
  - Hand hygiene
  - Testing and quarantine
- Situation is rapidly evolving — continued surveillance is necessary

\*for both COVID and other common respiratory illnesses

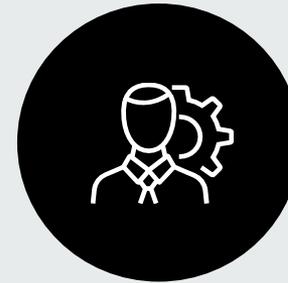
# *Potential impact to employers*



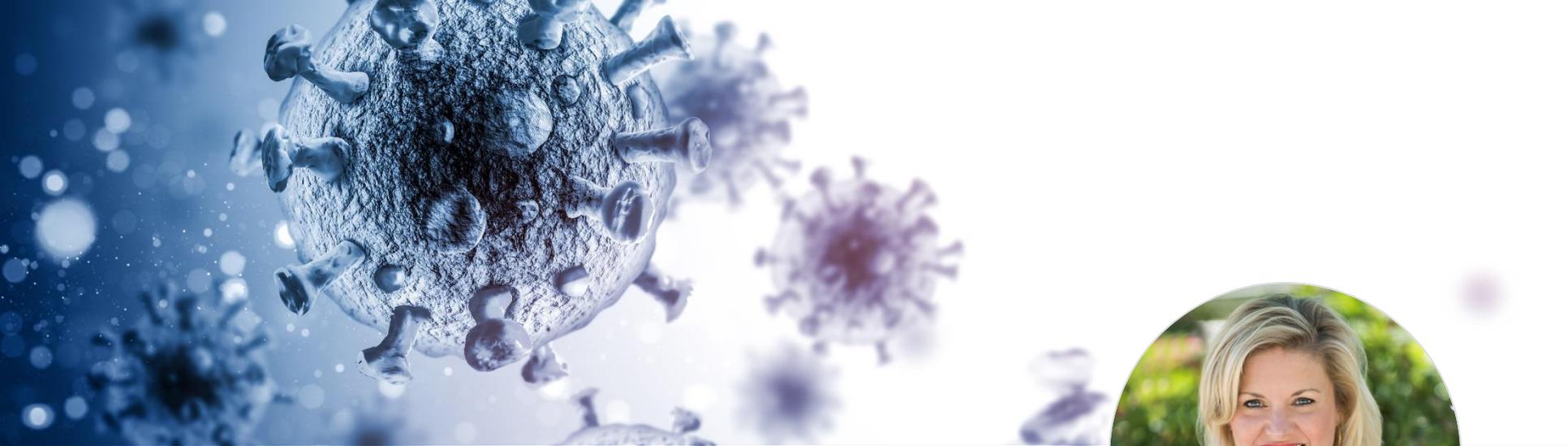
More complex, high-cost claimants



Potential for business disruption



Absenteeism and presenteeism from residual symptoms (“long-haulers”)



Communicating  
with employees

**Julie Gibson**  
*EVP, Director  
Marketing, Communications  
and External Affairs*

# From the headlines ...

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**Back to the office? Not yet. Companies scramble to adjust to the delta variant**

*-NPR, July 30, 2021*

**From Apple and Google to Indeed, COVID-19 variants delay the return to office**

*-CBS News, July 28, 2021*

**'Pivotal' moment for businesses considering back-to-office plans**

*-ABC News, Aug. 15, 2021*

**Companies are already pushing their return-to-office dates to 2022—why some experts say it's a 'smart approach'**

*-CNBC, July 30, 2021*

# *The Delta variant ... 18 months*

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- COVID and Delta are dominating the headlines — employees are experiencing information overload.
- Every company is different.
- Every return to office strategy should be made to best meet that organization's objectives.
- The pandemic has caused weariness and confusion — the lack of certainty can result in anxiety.

*Communications can help.*

# *Internal communications*

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## **Leadership owns the message**

- Establish vision
- Share decisions with context and answer the “why”

## **Enable and empower people managers to address questions**

- Scenario planning
- Q&A documents
- Training sessions with managers

## **Maintain regular communications; leverage variety of channels**

- Communicate even when information isn't new
- Meet people where they are; don't just rely on emails

# *Internal communications*

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## **Listen**

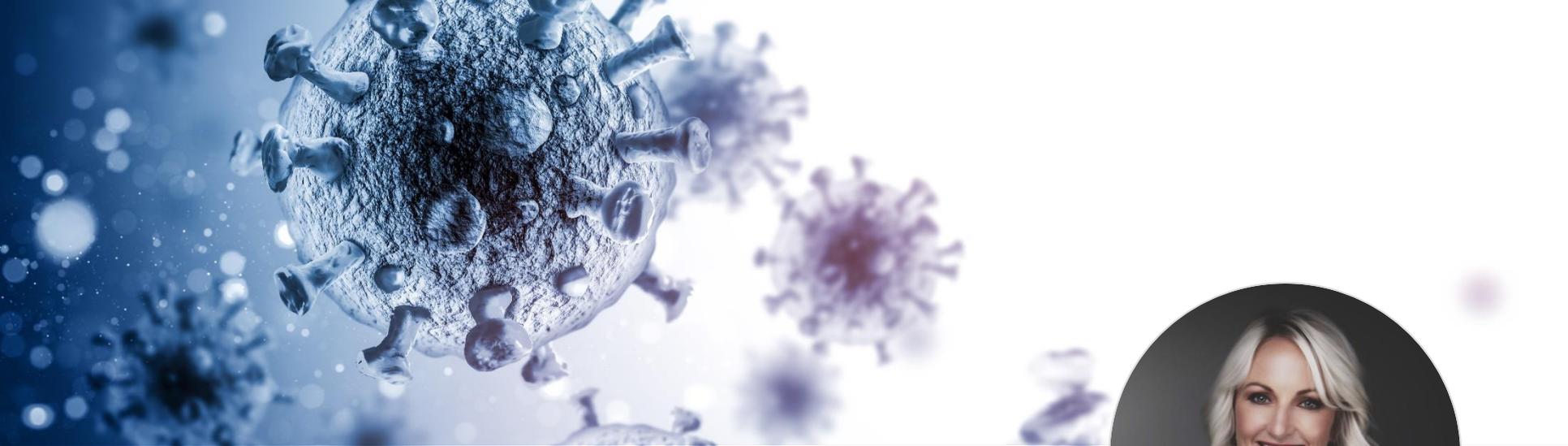
- Pulse surveys
- Manager one-on-ones
- Maintain flexibility

## **Overthink inclusive and equitable communications**

- In-person vs. virtual vs. hybrid

## **Culture**

- Double down on employee engagement and experience



The employer's perspective:  
Vaccines, testing, incentives  
and more



**Paula Day, J.D.**  
*VP, Director*  
*HR Compliance Consulting*

# *Vaccine mandates: Where we are today*

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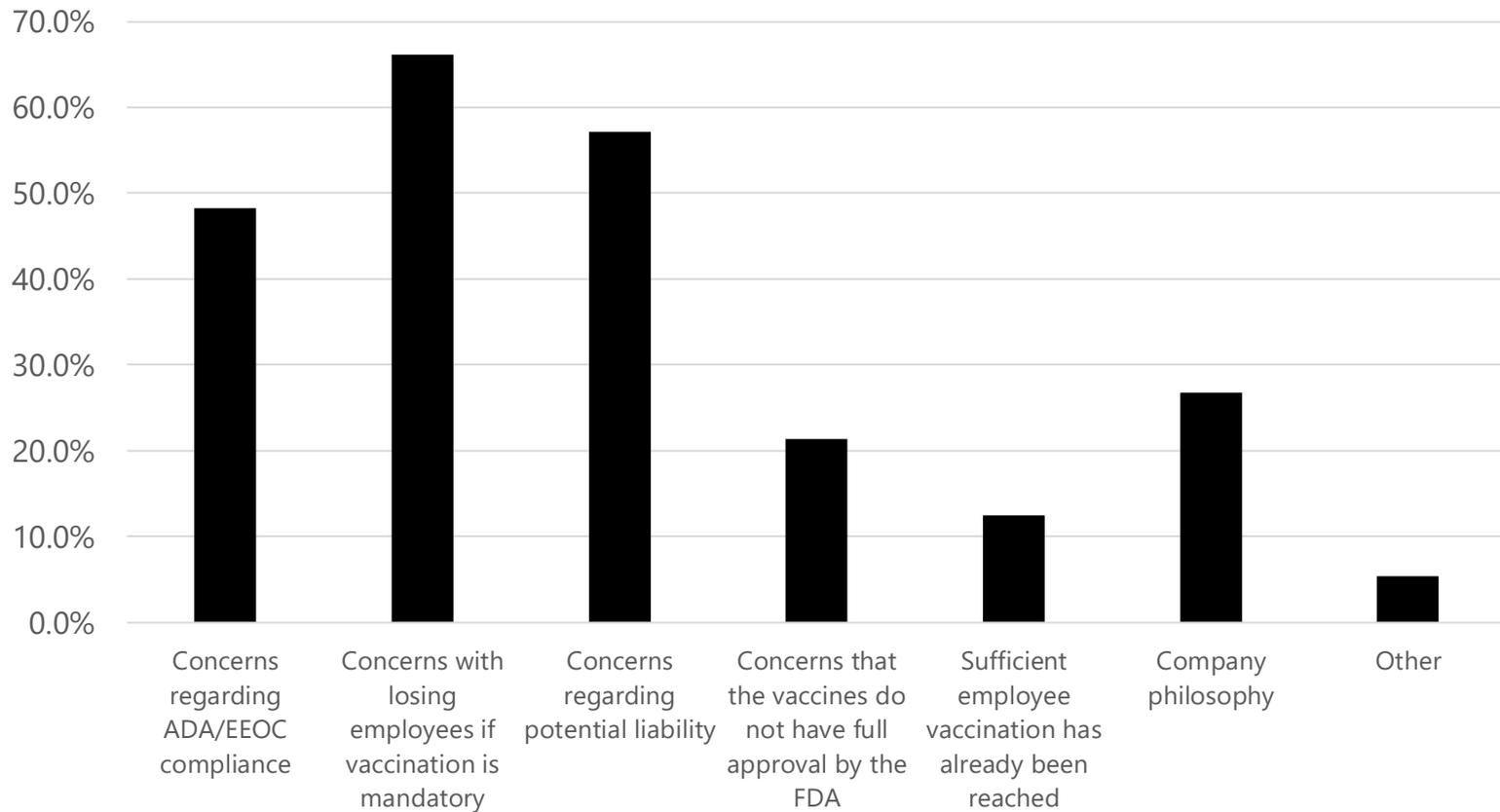
## **Federal law**

- Title VII/ADA
- FDA approval status
- OSHA guidance

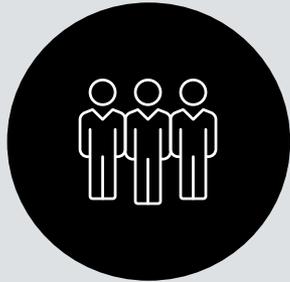
## **Government mandates**

- Federal
- State

# *Vaccine mandate concerns*

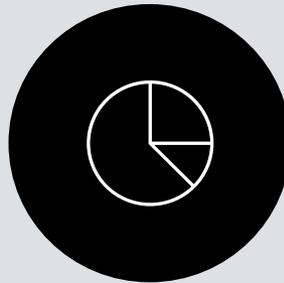


# *Vaccine mandates: Available options*



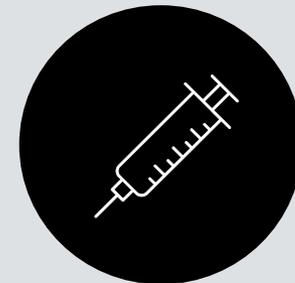
MANDATE FOR ALL  
EMPLOYEES

OR



MANDATE FOR CERTAIN  
EMPLOYEE GROUPS

OR



MANDATE THE VACCINE  
OR REQUIRE TESTING

# *Vaccine mandates: Compliance concerns*

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## Compensable time issue

- FLSA
- State/local law

## Paid leave for side effects

- State/local COVID-19 specific paid sick leave laws
- State/local general paid sick leave laws
- Employer policy

## Workers' compensation liability

- Likely a compensable claim
- Limited liability

## *Vaccine mandates: Developing an accommodation process*

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### **Important takeaways**

- Fact intensive
- Case-by-case basis
- Document



# *Vaccine mandates: ADA accommodations*

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## **The basics:**

- What can an employer request?
- What would be a legitimate medical reason for not being vaccinated?
- What problems are employer's encountering?
- When are accommodations required?

# *Vaccine mandates: Religious accommodations*

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## **The basics:**

- What is required?
- What can an employer request?
- When might an employer question an employee's claimed religious belief?
- When are religious accommodations required?

# *Mandatory vaccine policy provisions*

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- ✓ Clearly identify the scope
- ✓ Include the rationale
- ✓ Identify the deadline for all doses (consider addressing boosters)
- ✓ Provide information about the available resources/locations for the vaccine
- ✓ Compensable time issues
- ✓ How to provide proof of the vaccine
- ✓ Identify the accommodation process
- ✓ Consequences for noncompliance



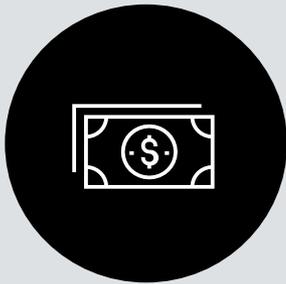


## *Collecting vaccine information*

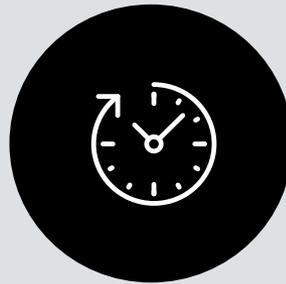
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- **Can employers collect vaccine information?**
  - Generally, yes
  - Check state or local law
- **What can employers ask?**
  - Are you fully vaccinated?
  - If no, have you had at least one dose of the COVID-19 vaccine?
  - If no, will you be vaccinated in the next 30 days? 60 days?
- **What information can be collected?**
  - Vaccine Card (no medical records)
  - HR verification of card
  - Attestation of vaccine status
  - Third-party collection
- **How should the information be maintained?**
  - Maintain confidentiality/separate file

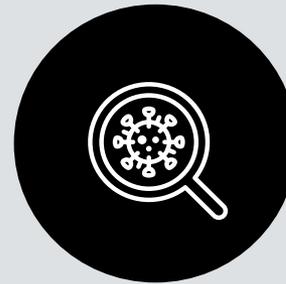
# *COVID-19 testing: Compliance concerns*



Do employers pay for the routine COVID-19 tests?



Are employees paid for the time spent taking a COVID-19 test?



What happens when an employee tests positive?



## *Vaccine incentives*

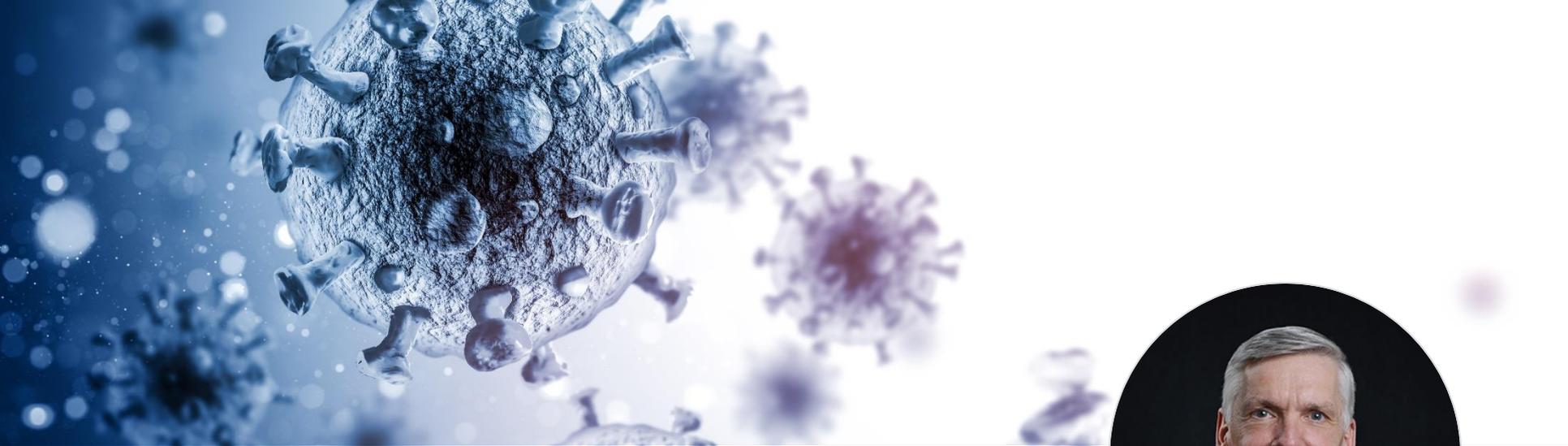
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- **What are employers offering?**
  - Cash
  - Gifts
  - Paid time off
- **What are the limitations?**
  - Vaccine offered by third party: No limitations
  - Vaccine offered by employer: Cannot be so substantial as to be coercive
- Offer accommodations
- Maintain the confidentiality of vaccine records

## *Vaccine status or mandates: Considerations for job applicants and new hires*

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- Comply with applicable state or local law.
- Make sure you have a legitimate business reason for asking.
- Decide when to address the issue with the applicant.
  - If vaccines are mandated, include this in the job posting (along with reasonable accommodation statement).
  - Ask a simple “yes” or “no” question on the application (include reasonable accommodation language).
  - Ask the applicant in the interview (provide a script to your hiring team).
  - If you are not mandating the vaccine, ask as a new hire.



# Incentivizing vaccinations



**Edward Fensholt, J.D.**  
*SVP, Director  
Compliance Services*

# *Incentivizing vaccinations ...*

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- *Outside* the health plan — “all vaccinated employees are entered into a lottery!” — is an employment law issue; *inside* the health plan is an ERISA/HIPAA issue
  - By “inside the health plan” we mean the incentive is a plan-related incentive, such as a premium differential or adjustment to other cost-sharing features, etc.
- **Advantage** of incentivizing *inside* the health plan: ERISA likely preempts state-imposed restrictions on workplace discrimination based on vaccination status
- **Disadvantage** of incentivizing inside the health plan: There are only so many levers you can pull, and limits on how far you can pull them

*A vaccination incentive initiative under a workplace wellness program tied to an ERISA plan has several advantages, including likely ERISA preemption of state-based restrictions (e.g., vaccine rights laws), and a fairly clear set of rules.*

# *Vaccination status as a wellness program: Do's*

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- Do treat the program as an *activities-based* wellness program
  - Offer reasonable alternatives or waivers to those who can't or shouldn't be vaccinated due to health status or can't/shouldn't in the allotted time frame
- Do offer a religious accommodation
- Do limit the value of the incentive, *when aggregated with other activities- or outcomes-based wellness incentives*, to 30% of the baseline
  - Baseline if only employees are incentivized: Total cost of self-only coverage for the coverage option in which the employee is enrolled
  - Baseline if family members are incentivized: Total cost of the coverage tier that includes the family members

## **HOW TO TREAT EMPLOYER HSA CONTRIBUTIONS AS INCENTIVES**

*If an employer's incentive in exchange for getting vaccinated is an HSA contribution, does that contribution count against the 30% limit?*

There are arguments that the HSA contribution is not adequately medical plan-related to count against the 30% (HSAs are not ERISA plans, for example), but **best practice** — and the likely view of federal regulators — is that the HSA contribution should count against the 30% limit.

# *Vaccination status as a wellness program: Do's*

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- **Best practice:** Do provide the incentive to those already vaccinated at the time the program is announced
  - Don't forsake or ignore the "early adopters" for voluntarily doing earlier what you now want the holdouts to do.
- Do maintain the confidentiality of vaccination status/records

## **WATCH ACA ISSUES:**

*Retroactive rewards:* To avoid having to retroactively supply a reward or remove a surcharge, best practice is to:

- Announce the program
- Give employees and, as applicable, dependents a reasonable time to comply
- Implement the incentive after the close of that reasonable time

Do the same for new hires ... give them a reasonable opportunity — 60 days? 90 days? — to achieve your goal before providing the incentive or imposing the surcharge.

# *Vaccination status as a wellness program: Don'ts*

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- Don't condition medical plan *eligibility* on vaccination status
- Don't impose premium or cost-sharing differentials *outside of a wellness program structure* ... HIPAA nondiscrimination rules will bar that
- Don't *exclude or limit coverage of COVID-19 treatment* for unvaccinated individuals who contract the virus... even if you think not being vaccinated is a "dangerous activity"
  - ADA issues; "court of public opinion" issues?
- Don't run the vaccination program's prescreening questionnaire process or ask a vendor for that information
  - The prescreening information is a "medical inquiry" under the ADA and potentially "family medical history" under GINA

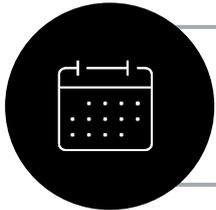
## **WATCH ACA ISSUES:**

**Affordability:** For ACA affordability purposes, everyone is deemed to be *unvaccinated* and thus the surcharge is added to the cost of coverage reported on line 15 of the Form 1095-C.

It's a moot point for individuals who enroll in the employer's plan anyway, are enrolled nowhere, or are enrolled in coverage elsewhere (other than an ACA marketplace), as they can't trigger an ACA penalty based on unaffordability of the employer's coverage offer ... that penalty is triggered by ACA marketplace subsidies, and subsidies are not available to individuals enrolled elsewhere.

# *Odds and ends*

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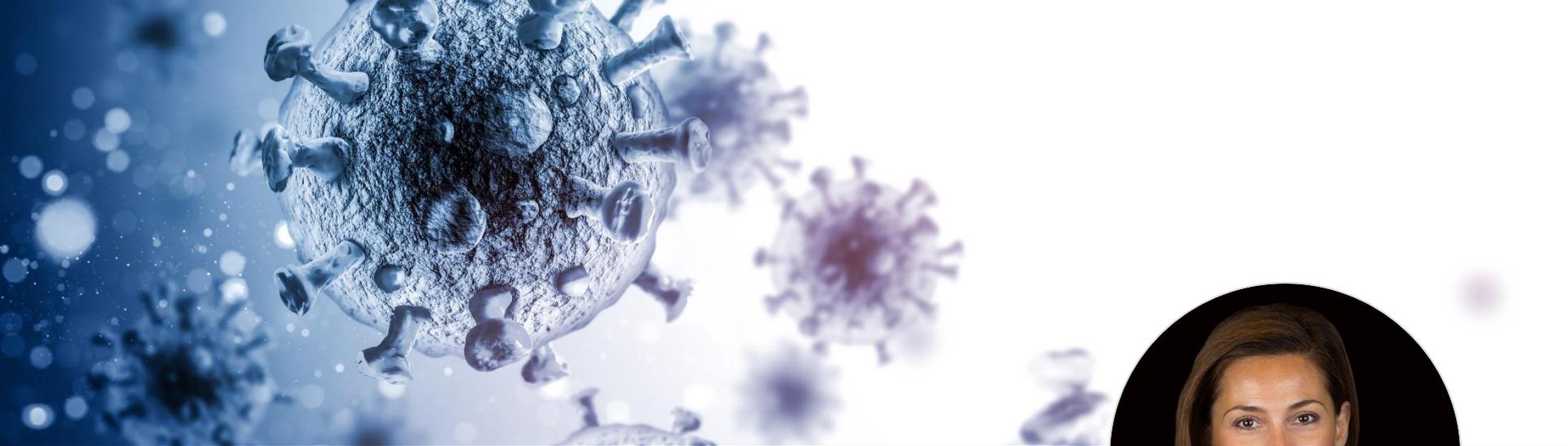
**Boosters are now recommended after 8 months, even for those not immunocompromised**

- Will you require the booster if it is available for the employee?
- Will you push the booster deadline out far enough that the individuals who get their *initial* vaccination series in response to the incentive program will have the same booster deadline as those already vaccinated?
  - E.g., set Jan. 1, 2022, as the deadline for the initial vaccine doses, Jan. 1, 2023, for the booster ... individuals receiving their initial vaccine in Sept.-Dec. won't qualify for the booster until mid-next year ...
  - ... or provide an additional incentive for the booster and tell folks who can get it now (or soon) to do that within 90 days of their eligibility for it?
  - How much complexity do you want to administer?

# *Odds and ends*

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- The *federal mandate* to cover **COVID testing** at no cost remains in effect (because the HHS-declared national health emergency remains in effect).
  - Out-of-network testing is payable at the provider's published retail charge, unless there's a network or other agreement; *litigation around this*
- Carriers that last year voluntarily waived cost sharing for COVID-19 treatment are rescinding that policy.
- Some states are implementing "vaccine rights" laws; ERISA preemption?
- The suspension of COBRA, HIPAA, and claims and appeals deadlines remains in effect (because the *presidential* national emergency remains in effect), subject to a 12-month outer window per action.
- *ARPA COBRA subsidy window is closing Sept. 30 (in most cases); notice due by **Sept. 15** (no less than 15 days before the window closes).*
- *Telehealth benefits below a high deductible are non-HSA disqualifying but only through the end of the plan year beginning in 2021.*
- *Cafeteria plans should be amended for COVID-related accommodations by Dec. 31, 2021... Lockton model amendment will be available very shortly.*



**Marie-France Gelot, J.D.**  
*SVP, Insurance & Claims  
Counsel*

The employer's response and  
its impact on employment  
practice liability risks

# *Transition back to in-person work*

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## **Claim risks, potential liability and EPLI coverage**

- Safety concerns
- ADA/discrimination
- FMLA/leave
- Harassment and retaliation
- Other

## **EPLI coverage limitations**

- No coverage for bodily injury claims
- No coverage for OSHA and FMLA claims, unless retaliation or discrimination alleged
- No coverage for WARN Act violations (affecting layoffs; RIFs)

# *Mandatory vaccinations*

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## **Claim risks, Potential Liability and EPLI Coverage**

- Discrimination based on disability (ADA) or religion (Title VII)
- Retaliation
- Harassment or hostile work environment
- Wrongful termination or constructive termination
- Wage & hour
- Invasion of privacy
- Third-party claims
- Other

## **EPLI coverage limitations**

- No coverage for bodily injury claims
- Limited or no coverage for wage and hour claims
- Third-party claims by clients, customers vendors: coverage limited to only discrimination and harassment/sexual harassment claims

# *Coverage for COVID-19 claims under other management liability policies*

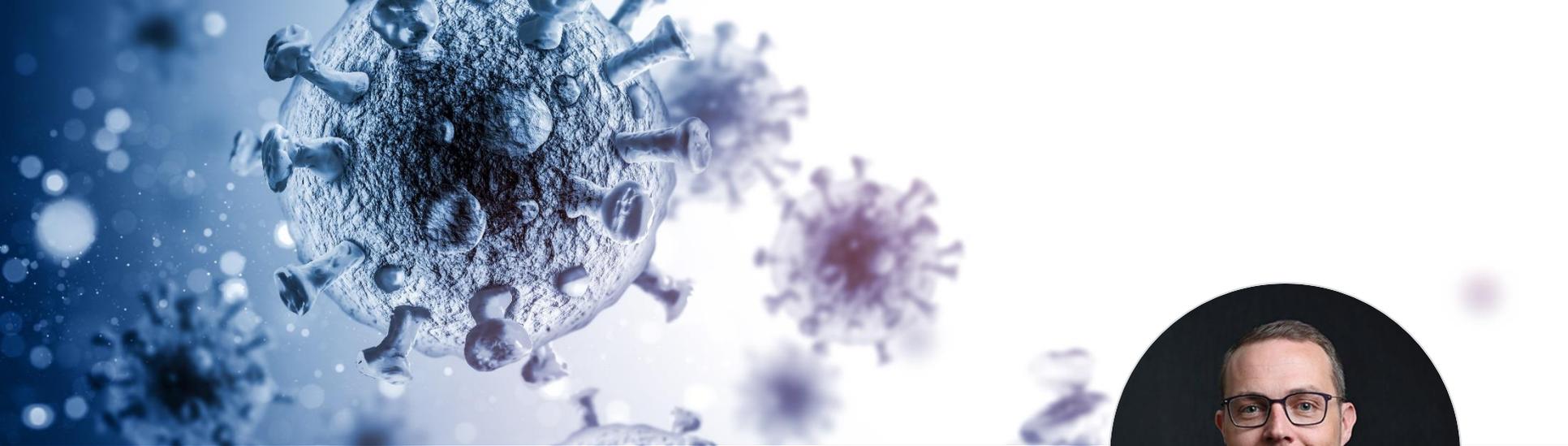
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- D&O
  - Some overlap possible with EPLI for claims against directors and officers
  - Breach of contract claims
  - Possible regulatory investigation regarding a company's response to the pandemic
  - Possible claim for breach of fiduciary duty or misrepresentations to investors as a result of a mandated COVID-19 corporate vaccination policy
- Cyber
  - Some overlap possible with EPLI for claims resulting from a cyber breach event that involves the personally identifiable or confidential information of employees

# *COVID-19 employment claim statistics*

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- Over 2,800 complaints filed since March of 2020 through early August 2021 in State and Federal Courts combined.
  - 112 were class actions relating primarily to Wage & Hour, Workplace Safety and Disability and Leave issues.
  - The remaining 2,700 are single plaintiff actions, the majority of which allege disability, leave & accommodation, discrimination and retaliation.
- Filings have steadily increased since March 2020, with the most recent peak being in April 2021.
- States where the most complaints have been filed are CA, NJ and NY, followed by FL and OH.
- The healthcare, retail and manufacturing sectors top the list in terms of highest numbers of Covid-related suits filed by sector.
- Technology, Life Sciences and Hospitality sectors have seen the most COVID-related class actions.



# Legislative and regulatory responses



**Scott Behrens, J.D.**  
*SVP, Director  
Government Relations*

# *What are governments doing?*

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- Biden-Harris administration and Congress are largely out of levers to pull
  - Boosters and full authorization at FDA
  - The bully pulpit and advertising
  - Continued updated guidance as data from new studies come in
  - Extension of mask mandates, mandatory vaccinations at federal facilities, participation in federal programs tied to masks/vaccines
- State and local battles remain
  - State statutes limiting local decision-making (e.g., masks and schools)
  - Full FDA approval limits the reach of some state laws

# *More federal relief?*

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- Primary focus is on infrastructure packages
  - Bipartisan “hard” infrastructure reallocates prior COVID-related funds (e.g., unused unemployment, small business loans, industry-specific relief)
  - Democrat-only “soft” infrastructure allocates funds (~\$30B) for “future pandemic preparedness”
- Congress is monitoring the economic impacts, but no chatter about a new large relief package
  - Don’t expect immediate relief (e.g., PPP, unemployment, COBRA subsidies, employee retention tax credit)
  - A federal pandemic backstop remains far off
- The future of pre-deductible telehealth and HSA eligibility beyond 2021 plan year remains unclear

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*Q&A*

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*Independence changes everything.*



**LOCKTON®**

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UNCOMMONLY INDEPENDENT