



➤ September 8th, 2021

COVID-19 Vaccinations

*Legal and Practical Considerations
for Employers*



Presentation By:
Christine Thelen
Shareholder



Presentation By:
Mike Kitson
Shareholder

Before We Begin



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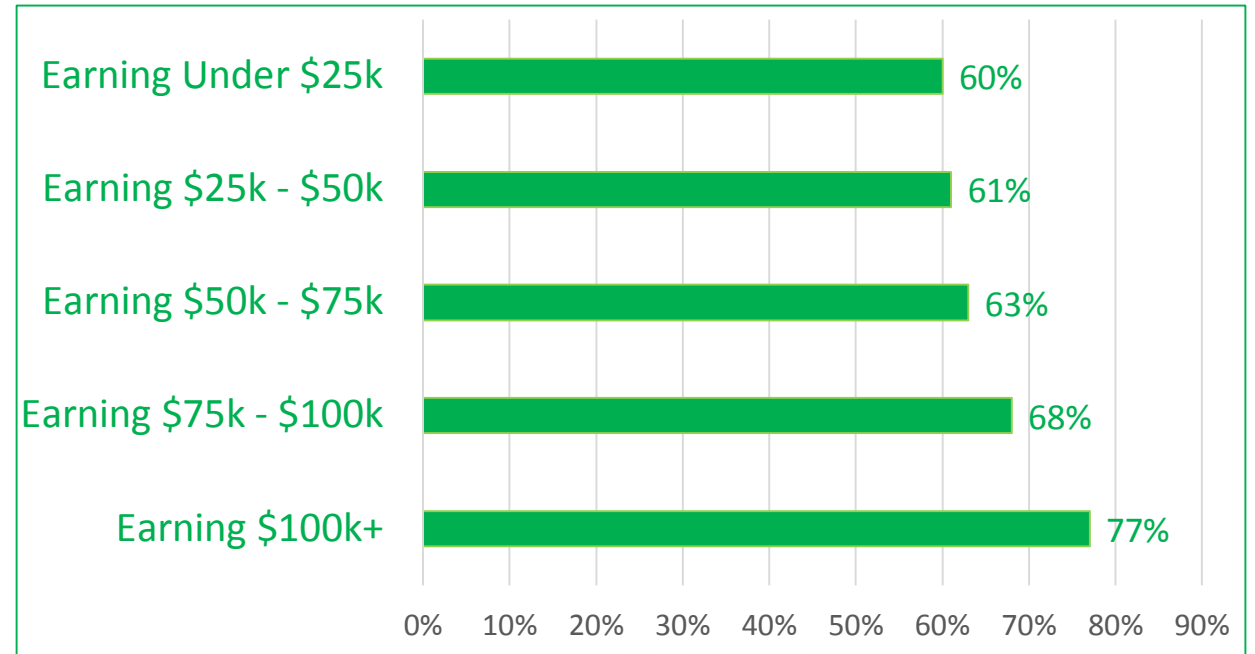
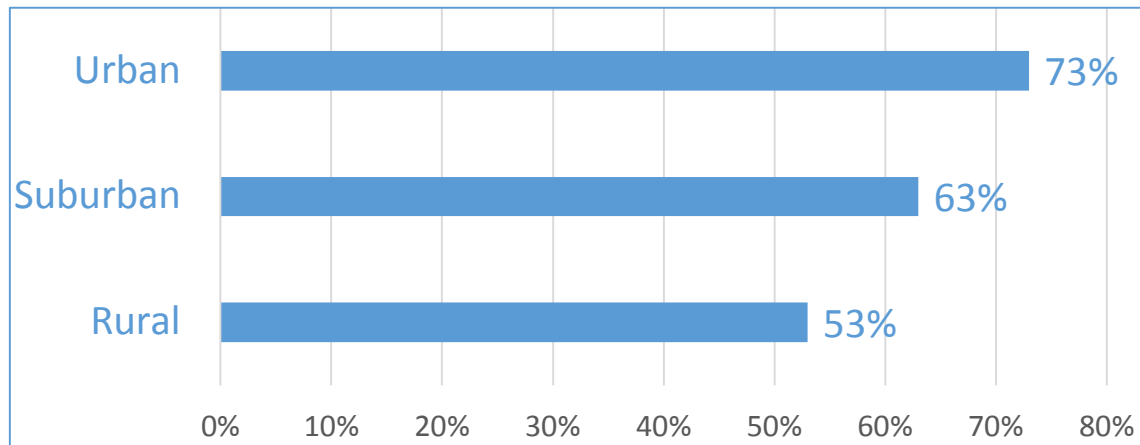
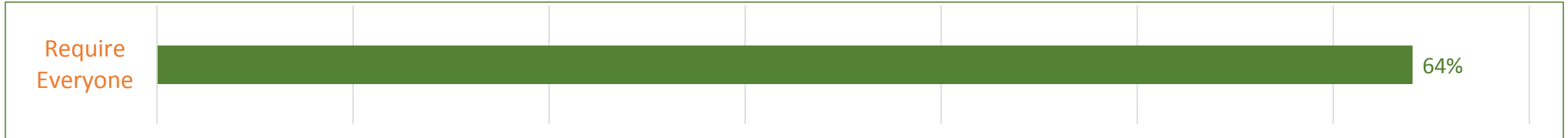
➤ Approaches to Vaccination Policies

- Mandatory Vaccination for All
- Mandatory Vaccination for Those in the Workplace (“Quasi-Mandatory”)
- Voluntary Vaccination



➤ Attitudes About Vaccine Mandates

Should the Government mandate vaccination?



*The COVID States Project #58: High public support for mandating vaccines (<https://osf.io/6wcn9/>)
June/July 2021*

➤ Attitudes About Vaccine Mandates

Vaccine Eligible, Unvaccinated Respondents

- 14.9% Unlikely to Get Vaccinated
- 4.5% Somewhat Unlikely to Get Vaccinated



Mandatory and Quasi-Mandatory Vaccination

➤ Impact on Your Workforce

- Politically polarizing issue
- Misinformation
- Employees are facing pandemic fatigue
- The newness of the vaccine is a concern for many
- Demographics such as race, age, and family planning could impact willingness to get vaccine



➤ Surveying Your Employees

- You can ask if an employee is vaccinated
- Do not ask why they are not getting vaccinated



➤ Legal Consideration

Issues related to vaccine approval status

State laws mandating or prohibiting vaccination

Legal risks related to the ADA and state-equivalent laws

Pay and paid time off

OSHA

Workers Comp

Unions



➤ FDA Approval Status

Full FDA Approval

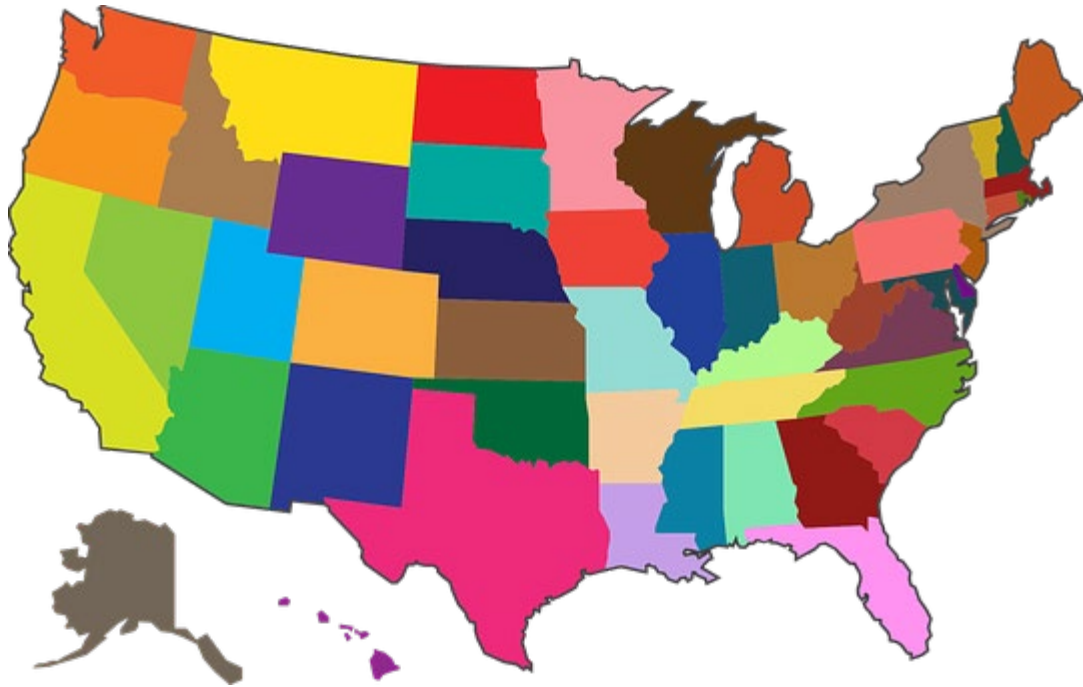
Pfizer = Approved August 23, 2021

Moderna = Application Submitted

J & J = Partially Submitted



➤ State Laws



- Some states are requiring vaccines for state employees, healthcare workers, and educators
- Others are requiring certain workers be vaccinated or subject to regular testing
- Most have no requirements
- Others, like Montana, prohibit employers from imposing a vaccination requirement

➤ EEOC Guidance

- May require all employees physically entering the workplace to be vaccinated
 - Regardless of whether the employer administers the vaccine
 - Must provide reasonable accommodations for medical conditions and religious beliefs
 - Must avoid discrimination and disparate treatment
- Recommend exception for 100% remote workers



➤ EEOC Guidance

Vaccine Verification

- **CAN** ask employees if they have been vaccinated
- Requesting proof is not a disability-related inquiry
 - BUT, subsequent questions like why an employee did not receive a vaccination must be “job related and consistent with business necessity”
 - Must maintain appropriate confidentiality of the information
- Collecting this information can help assess whether to mandate vaccinations for some or all, and to satisfy direct threat analysis



➤ EEOC Guidance

Vaccine Administration/Pre-Screening Questions

- A COVID-19 vaccination is not a “medical examination”
 - BUT- pre-screening questions may implicate ADA
 - If employer, or third party hired by the employer, administers vaccine, must show that pre-screening questions are “**job related and consistent with business necessity**”
 - What is “job related” and “business necessity”?
 - Employee who does not answer questions and therefore does not receive the vaccine “**will pose a direct threat to the health or safety of her or himself or others**”
- If employee receives a mandatory vaccine from a third party that does not have a contract with the employer, these requirements do not apply

➤ EEOC Guidance

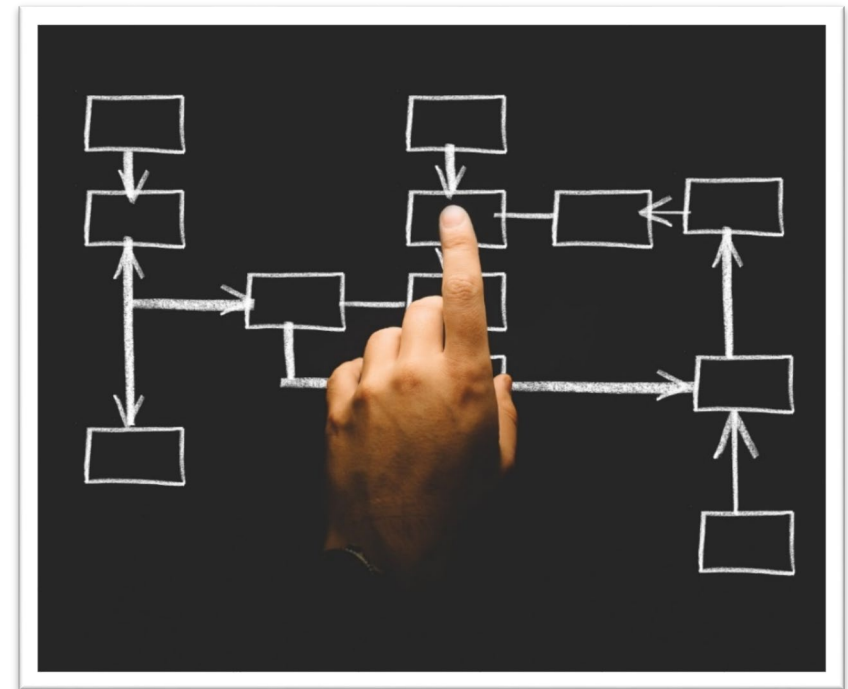
Reasonable Accommodations

- Reasonable accommodations must be provided for employees with disabilities and closely held religious beliefs that prevent them from being vaccinated
- Cannot exclude employees from the workplace, or take any other action, unless there is no way to provide a reasonable accommodation absent undue hardship
- If direct threat, can exclude employee from the workplace, BUT this does not mean employee can be terminated



➤ The Interactive Process

- **Gather** information using form
 - Can continue to exclude from workplace until decision is made
- **Discuss** request with employee
 - Only ask for clarifications if needed
- **Consider** possible accommodations
- **Decide** what, if any, accommodation to provide
- **Document** process with letter (1) acknowledging request and form, (2) mentioning conversations had, (3) stating decision made, and (4) providing basis for decision



Reasonable Accommodation For Medical Reasons



- Subject to state law, may require documentation from a health care provider
 - Recommend COVID-19 specific form
- Should rely on health care professional's advice
- Can require vaccine if:
 - There is a direct threat and no reasonable accommodation reduces that threat, or
 - The accommodation causes undue hardship to the employer (“an action requiring significant difficulty or expense”)
- Must go through the motions even if you know reasonable accommodations are not available

➤ Reasonable Accommodation For Religious Reasons

- Religion is broadly defined as “all aspects of religious observance and practice as well as belief”
 - New or uncommon beliefs
 - Beliefs not part of a formal church or sect, only subscribed to by a small number of people
 - Can seem illogical or unreasonable to others
 - Can be “religious” even if the employee is affiliated with a religious group that does not espouse the same beliefs, observances, or practices, or if few or no other people adhere to the same beliefs
- Must be a “sincere and meaningful” belief



➤ Reasonable Accommodation For Religious Reasons



- Assume that a request is based on sincerely held religious belief
- Can request supporting documentation if:
 - Have a “**bona fide doubt**” or an “**objective basis**” for questioning the religious nature or sincerity of the belief
 - Verification from a third party does not have to come from a clergy member or fellow congregant; a first-hand explanation may be sufficient
- Can require vaccination if no reasonable accommodation can be provided without undue hardship to the employer (“more than a de minimis” cost or burden)

➤ Examples of Religious Exemption Requests



- Pro-life beliefs
- Avoidance of medical intervention
- “God told me”

➤ Examples of Reasonable Accommodations

- Reassignment to more isolated work location
- Enhanced PPE
- Regular COVID-19 testing
- Telework
- Reassignment to open position



➤ Pay and Paid Time Off For Getting Vaccinated

- Likely must pay current employees for time spent getting a mandatory vaccine; include in overtime calculations
- OSHA recommends granting paid time off to get vaccinated and recover from vaccinations
 - OSHA Healthcare standards suggest 4 hours per shot to schedule, travel, and receive vaccination; 8 hours per shot for side effects from vaccination
- American Rescue Plan tax credits
 - Up to 10 days of paid leave to obtain and recover from a COVID-19 vaccination
 - Applies to employers with fewer than 500 employees
 - April 1, 2021-September 30, 2021
 - Must provide time off for other reasons



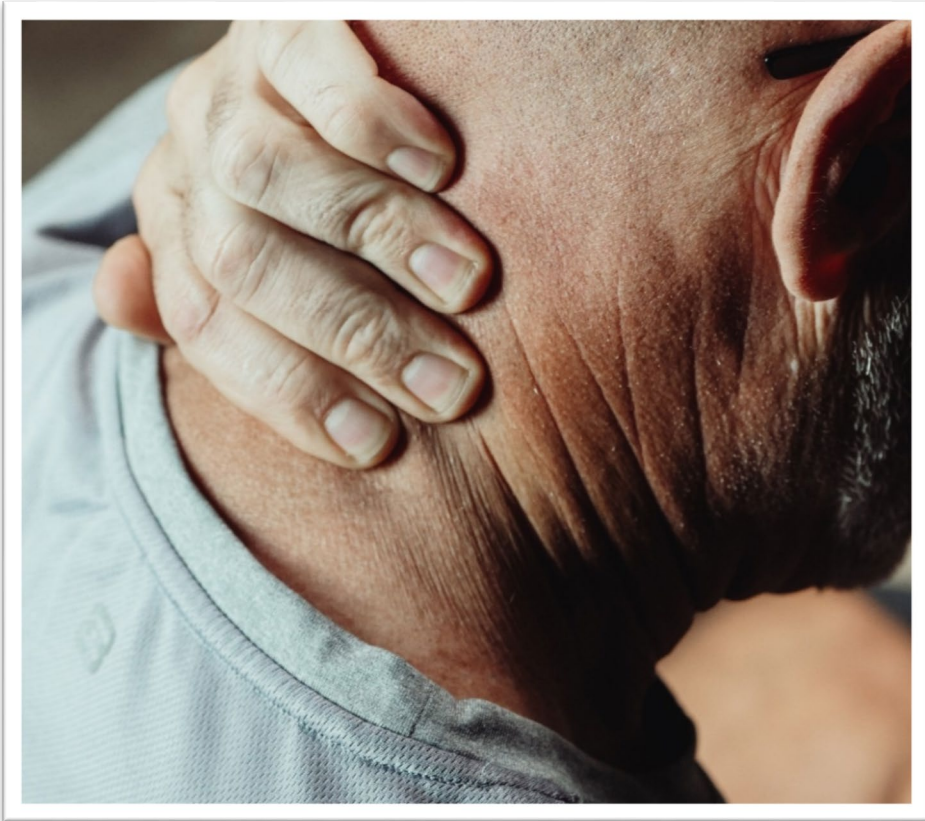
➤ OSHA

- General Guidance
 - Suggests requiring vaccination or regular COVID-19 testing – in addition to mask wearing and physical distancing
 - Recommends more strenuous safety precautions for unvaccinated employees
 - Do not need to report reactions to vaccine
- Guidance exists for specific industries
- Healthcare has more onerous required standards



<https://www.osha.gov/coronavirus/safework>

➤ Worker's Compensation



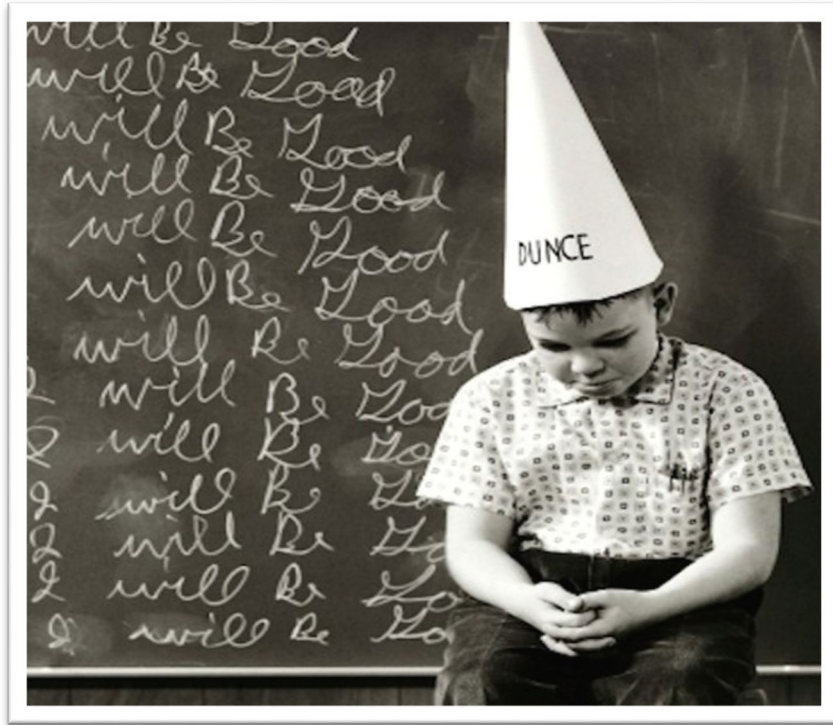
- Employees who become ill due to employer-mandated vaccines could file a worker's compensation claim

➤ Collective Bargaining

- Employers with unions would likely have to engage in bargaining before implementing mandatory COVID-19 vaccinations
- Beware of “effects” issues
- Important to have buy-in from unions



➤ Consequences For Employees Who Do Not Get Vaccinated



- Employers who adopt mandatory policies must be prepared to deal with employees who refuse to be vaccinated and don't qualify for an accommodation
- Consider leave for employees who:
 - Are making efforts to get vaccinated
 - Are making efforts to seek an exemption
- All others: Leave or termination?
 - Consider other state or local laws before termination
 - Consider leave to maintain relationship with employee

➤ Testing Alternative

- Must pay for testing time and costs
- ADA/State equivalent laws apply
 - COVID-19 testing is a medical exam
 - Allowed if employee's presence in the workplace poses a direct threat to others
 - EEOC says testing administered consistent with current CDC guidance will meet the ADA's standard
- Confidential medical records and information



Voluntary Vaccination



➤ Legal Considerations

(subject to state laws)

ADA/state equivalent laws not implicated, unless employer administers the vaccine

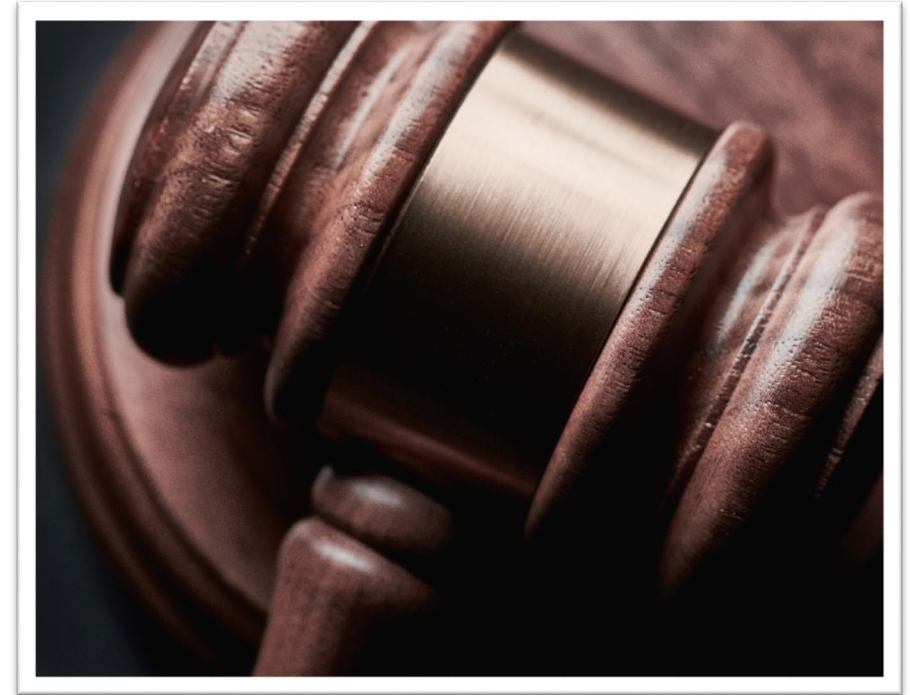
Not required to pay for time related to getting vaccine or provide paid time off

OHSA guidance is still just guidance, but wise to follow

Worker's compensation likely not triggered for vaccine-related illnesses

Union bargaining likely not required, but good to get their buy-in

Some incentives allowed



➤ Types of Incentives

- Money
- Education
- Encouragement and excitement
- Easy access to vaccination
- Time off for vaccination and related illness
- Group goals



➤ Incentive Programs

- Incentives for Reporting
 - EEOC says employers may offer an incentive to voluntarily provide documentation or confirmation of a vaccination
- Incentives to Get Vaccinated
 - EEOC say employers can provide incentives so long as it is “not so substantial as to be coercive”
 - Does not apply if an employer offers incentives to confirm that they received a voluntary vaccination from a third-party provider



➤ Differing Views on the Efficacy of Money Incentives

- Lack of data on the “appropriate” amount for an effective incentive
 - Common employer incentive = \$100 - \$200
- High incentive amounts can cause potential participants to perceive higher level of risk



➤ Incentive Programs



- Providing an incentive could be treated as a non-discretionary bonus under the FLSA
 - Non-discretionary bonuses must be included in regular rate of pay when calculating OT
 - **Result:** In the pay period where the vaccination incentive is paid, there would have to be an adjustment to the employee's regular rate of pay

Before Q&A



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QUESTIONS





Mike Kitson

SHAREHOLDER

206.223.7081

kitsonm@lanepowell.com

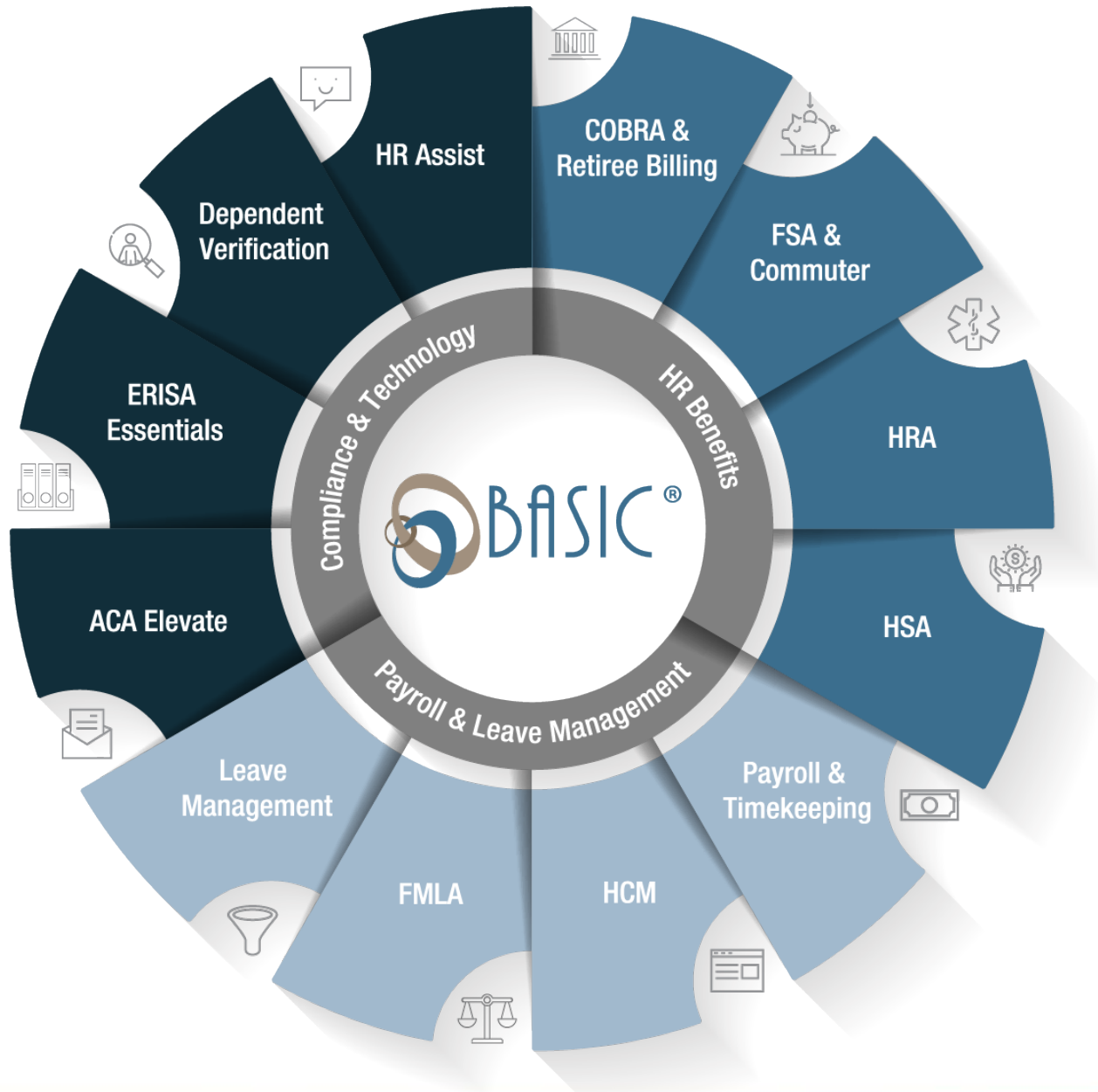


Christine Thelen

SHAREHOLDER

503.778.2139

thelec@lanepowell.com



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