



# Remote to Reopening

Managing Privacy Issues With Remote Work & Returning to Operations in the COVID-19 Vaccine Era

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# Remote to Reopening

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# REMOTE WORKING

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# Remote Working: Trends

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- **Telecommuting** and **remote working** will likely continue even as the pandemic subsides.
- Surveys show knowledge workers want to incorporate some degree of remote work into their schedules on a more permanent basis
- PWC survey of 120 U.S. executives: 55% say most (60-100%) of employees can WFH at least 1 day/week
- Companies are announcing policies in response:
  - Citigroup: hybrid work, 3x/week
  - Google: hybrid work, 3x/week; 20% may work from home on permanent basis; 4 weeks/year work from anywhere with manager approval
  - Facebook: Zuckerberg expects as much as ½ workforce (currently 45K) to work from home within 10 years
  - Salesforce: reducing its office space



# Remote Working: Security Requirements

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- Relevant law that requires security for, and protection of, personal information:
  - Health Information Portability & Accountability Act (HIPAA)
  - FTC Act
  - Americans with Disabilities Act (ADA)
  - General Data Protection Regulation (GDPR)
  - California Consumer Privacy Act (CCPA)
  - State breach notification laws



# Remote Working: Security Best Practices

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- **Basic Security Hygiene**
  - Use **encrypted access points** (WAP2);
  - Require **multi-factor authentication**; and
  - Access limitations.
- **Technical Controls**
  - **Update** and **test** VPNs and network infrastructure devices;
  - Deploy **patches** and **upgrades**;
  - Persistent attack detection and log review; and
  - Consider **full-disk encryption**.
- **Training & Awareness**
  - **Alert employees** to an increase in phishing; and
  - Deploy **security awareness** or **refresher training**.
- **Review & Update Incident Response Plans**

# Remote Working:

## Best Practices for Protecting IP

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- **Measures to Implement**

- Clearly **identify** confidential information and trade secrets
- Be sure employees are bound by a **confidentiality agreement** or policy
- Provide **written reminders / warnings** to employees regarding confidentiality while working at home
- Create a **personal device usage policy** (also known as a BYOD Policy—bring your own device):
  - Authorized Use/Employee Responsibilities/Device Security Requirements

- **Consider Additional Measures**

- Monitor **copying/downloading** of data and company files
- **Check in/out** procedures
- Remote **wiping/inspection** capability

- **Training & Awareness**

- **Provide training** on policies – computer use, cybersecurity, social media, etc.
- **Alert employees** to classification of proprietary information and permissible uses of proprietary information

# Remote Working:

## Red Flags

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- Missing e-mail
- Programs recently uninstalled
- Recent e-mails to personal account
- Evidence of forensic programs used to delete information
- Evidence of cloud-based remote storage services
- Transfer of large amount of files from network to local hard drive / USB drive





# REOPENING STRATEGIES

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# Reopening Strategies

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With vaccination rates on the upswing, governments and companies are refocusing attention on reopening strategies.

## Reopening Initiatives

- Requiring vaccination
- Contact tracing – still relevant
- Mask mandates and office modifications for social distancing

**Federal, state, and local guidance or requirements remain in flux, and should be consulted prior to implementation.**

# Relevant Privacy & Security Laws

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## **Federal**

- Health Insurance Portability & Accountability Act (HIPAA)
- Americans with Disabilities Act (ADA) and EEOC Guidance
- FTC Act

## **State**

- California Consumer Privacy Act (CCPA)
- Illinois Biometric Information Privacy Act (BIPA)
- State Medical Privacy Laws
- State Data Protection and Breach Notification Laws

## **Cross-Border**

- EU General Data Protection Regulation (GDPR)

# VACCINATION REQUIREMENTS

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# Vaccination Policies:

## Overview

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- Equal Employment Opportunity Commission December 16, 2020 guidance: employers may require that employees receive an FDA-authorized COVID-19 vaccine.
  - Employer must offer medical (ADA) and religious exemptions.
  - Businesses have a legal and ethical obligation to provide a safe environment.
- Tech companies, including IBM, Microsoft and Oracle, have been working on vaccine credentials that can be flashed at ball games, concerts and airports for entry.
- BUT: Florida executive order bans COVID-19 vaccine passports, so confirm with state and local law.

# Vaccinations:

## Most U.S. companies will require proof

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- Arizona State University/Rockefeller Foundation survey of 957 facilities across 24 industry sectors in the United States. Most of the respondents were businesses with 250 or more employees.
  - A broad majority of U.S. employers, 65%, plan to offer employees incentives to get vaccinated and 63% will require proof of vaccination
  - Overall, 44% will require all employees to get vaccinated, 31% will just encourage vaccinations and 14% will require some employees to get vaccinated.
- Universities have been requiring vaccinations for students returning to campus
- Delta Airlines announced it would require all new hires to be vaccinated, unless they qualify for an accommodation.

# Proof of Vaccination: Recommendations & Best Practices

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- Observe **data minimization principles**.
  - Consider a health declaration policy that records or logs no personal information.
  - Only collect personal information essential to protect public health.
  - Retain collected personal information for only as long as necessary.
- Observe **disclosure limitations**.
  - Limit access to discrete personnel (*e.g.*, HR, management, security).
  - If possible, disclose personal information to third parties only when absolutely necessary or when required by law.
- Implement **high security protocols** and issue cybersecurity reminders to employees to help **protect personal information**.
- Policy must allow for **exceptions**.
  - Individualized assessment required for persons declining to vaccinate due to disability: direct threat vs. possibility of reasonable accommodation (absent undue hardship)

# Contact Tracing

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- Employers still have general obligation to maintain safe workplaces per OSHA.
- Especially if choose not to adopt vaccination requirement, should track COVID-19 positive cases among workforce.
- **Best practices:**
  - Third-party apps have not all been vetted for compliance with applicable laws and may have been rolled out hastily.
  - Liability and exposure in the agreements to use third-party apps are extremely important—many contain virtually no protection for the end-user or the company.
  - Take a hard look at where and when you need the information to keep your employees and customers safe.
  - Take the least intrusive option.





# MASK MANDATES AND PHYSICAL DISTANCING

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# Mask Mandates:

## Overview

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- May 13, 2021 CDC Guidance
  - Fully vaccinated people do not need to wear a mask or physically distance during outdoor or indoor activities, large or small;
  - Fully vaccinated people should continue to wear a mask while traveling by plane, bus or train; and
  - Guidance doesn't apply to certain places like hospitals, nursing homes and prisons.
- Dr. Anthony Fauci: expects CDC to issue additional guidance with "significant clarification" of the foregoing, including specific guidance for mask-wearing protocols in a workplace
- Costco, WalMart will no longer require vaccinated workers and shoppers to wear masks in stores



# Physical Distancing: What Now?

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- May 13, 2021 CDC Guidance drops requirement of physical distancing indoors for vaccinated persons.
- Several states have announced full reopening policies, removing all requirements on mask wearing and social distancing (Texas, Massachusetts)
- May choose to accelerate return-to-office plans
- Modify office plan: e.g., open more desks on certain floors than originally planned
- Most important factors to consider: employee preferences and state and local guidance



# MANAGING HYBRID WORKPLACE

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# Managing Hybrid Workplaces:

## Recommendations

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- Set guidelines for “office required” and “office optional” circumstances
- Consider office “weeks” as well as office days
- Rotate teams, not employees
- Encourage workdays at home to be focused on big projects
- Normalize online communication (i.e., GoogleDocs vs. whiteboard brainstorming)
- Mini-offsites – smaller groups can get together in the office
- Employees’ individual circumstances matter
- Policy must be fair (e.g., childless workers shouldn’t feel less favored for WFH)

# KEY PRIVACY CONSIDERATIONS

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# Key Privacy Considerations

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- Observe transparency about the purpose for collection, the data elements collected, the retention period, and disclosure practices.
- Ensure privacy policies are updated or supplemental policies provided.
- Collect data only for public health purposes, and only data necessary to maintain a safe environment.
- Provide appropriate safeguards to secure the data.
- Do not share data or health status without consent, and minimize the data shared.
- Delete data as soon as it is no longer needed for the crisis – third-party attestation is ideal.
- Consider employing anonymization or pseudonymization techniques.
- Observe, respect, and respond to data subject rights, where applicable.



# Q&A

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Cynthia J. Cole is currently Special Counsel at Baker Botts in Palo Alto, California. She has 19 years of experience as CEO and General Counsel in public and private companies, particularly related to technology, corporate transactional and data privacy issues such as the California Consumer Privacy Act of 2018 (CCPA) and the EU's General Data Protection Regulation (GDPR). She counsels clients on technology transactions and deals, big data, data privacy, data sharing and IP licensing, often creating bespoke agreements in novel technology fields. She has led the firm's initiative in GDPR, CCPA and data protection counseling for US Companies. Cynthia is certified as an Information Privacy Professional (CIPP/E) by the International Association of Privacy Professionals.

## EDUCATION/HONORS

- J.D., Northwestern University Pritzker School of Law
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Cynthia is a recognized thought leader in data privacy, named a "California Trailblazer 2019" for her work building a transactional data privacy practice at Baker Botts and a "National Women in Law Honoree for Thought Leadership" by Corporate Counsel in 2018.

# Christina Rose Andersen

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Christina Andersen's practice focuses on advising and representing employers in all manner of labor and employment matters, including in corporate transactions, litigation of disputes and workplace investigations.

Ms. Andersen regularly advises clients on the labor and employment issues relevant to mergers, acquisitions and sales, including post-closing workforce integration matters. Her clients have included private equity sponsors, public companies, and private companies in the United States and internationally.

Ms. Andersen has experience defending employers and individual executives against workplace discrimination and retaliation claims, as well as claims arising out of executive compensation arrangements and restrictive covenants. She has also represented clients in state and federal courts, arbitration forums, and before administrative agencies. She also regularly counsels' clients on all aspects of the employment relationship, including employee discipline and discharge, sexual harassment and employment discrimination, and non-competition, non-solicitation and confidentiality agreements

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