



# Fringe Benefit Plans, Inc.

*Legal Update: Staffing During Mandate Mania*



**WILSON MCCOY** P.A.  
— WORK MATTERS —

Presented by Attorney  
Nathan A. McCoy



*Hosted by:*  
**Tina Craft**



- ▶ We are built on our shared principles of **culture, service, advocacy, education and partnership.**
- ▶ We are committed to serving our community employers and leaders with meaningful education and communication.
- ▶ We are a comprehensive financial services firm **specializing in employee benefit programs** and executive benefits. Our scope of services is focused on consultation, financial strategy, compliance, technology and wellness.
- ▶ We help employers recruit, retain, and reward good employees.
- ▶ We strive to make insurance a positive and professional experience.
- ▶ We work for our clients. Our team consists of knowledgeable professionals working together to provide the best strategies to achieve success.
- ▶ We possess the tools to analyze each employer's unique situation and offer solutions that complement their short-term and long-term goals and objectives.

# Legal Update Experience

- ▶ There will be an opportunity to ask questions via the Chat Options after each speaker has presented
- ▶ We will share the presentation after the event via email
- ▶ Introducing: Nathan McCoy



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# Nathan A. McCoy

Few attorneys can say they have done it all in their area of practice – Nathan A. McCoy can. From defending Fortune 500 companies at one of the nation's largest and most distinguished management defense firms to practicing with one of Florida's most well-known "Plaintiffs Firms," Nathan has gained invaluable experience from every angle of the courtroom. Because he represents both plaintiffs and defendants, Nathan has developed a breadth of legal and business knowledge and a true balanced perspective on legal matters. His diverse experience has given him keen insight into the minds of corporations (both large and small), individuals, and their counsel as they position themselves in legal battles and negotiations.

Nathan has parlayed such experience into co-founding and serving as Managing Shareholder of Wilson McCoy, P.A., a law firm dedicated to coaching, counseling, and representing businesses and individuals in employment and business-related matters. Since its inception in 2012, Wilson McCoy, P.A. has been named by and featured as a "Best Law Firm" by U.S. News & World Report from 2013 – the present. As a true "lawpreneur," Nathan enjoys working with entrepreneurs, startups, and small businesses to ensure complying with the law does not interfere with the creativity needed to succeed in today's legalistic business environment. He also vigorously advocates the rights of individuals and whistleblowers who have been subjected to discrimination and retaliation in the workplace.

Nathan graduated with a Bachelor of Science degree in General Business Administration, magna cum laude, from the University of Central Florida ("UCF") and obtained his law degree from the University of Tennessee, where he served as Managing Editor of Transactions: The Tennessee Journal of Business Law and was a member of the Board of Editors for the Tennessee Law Review.

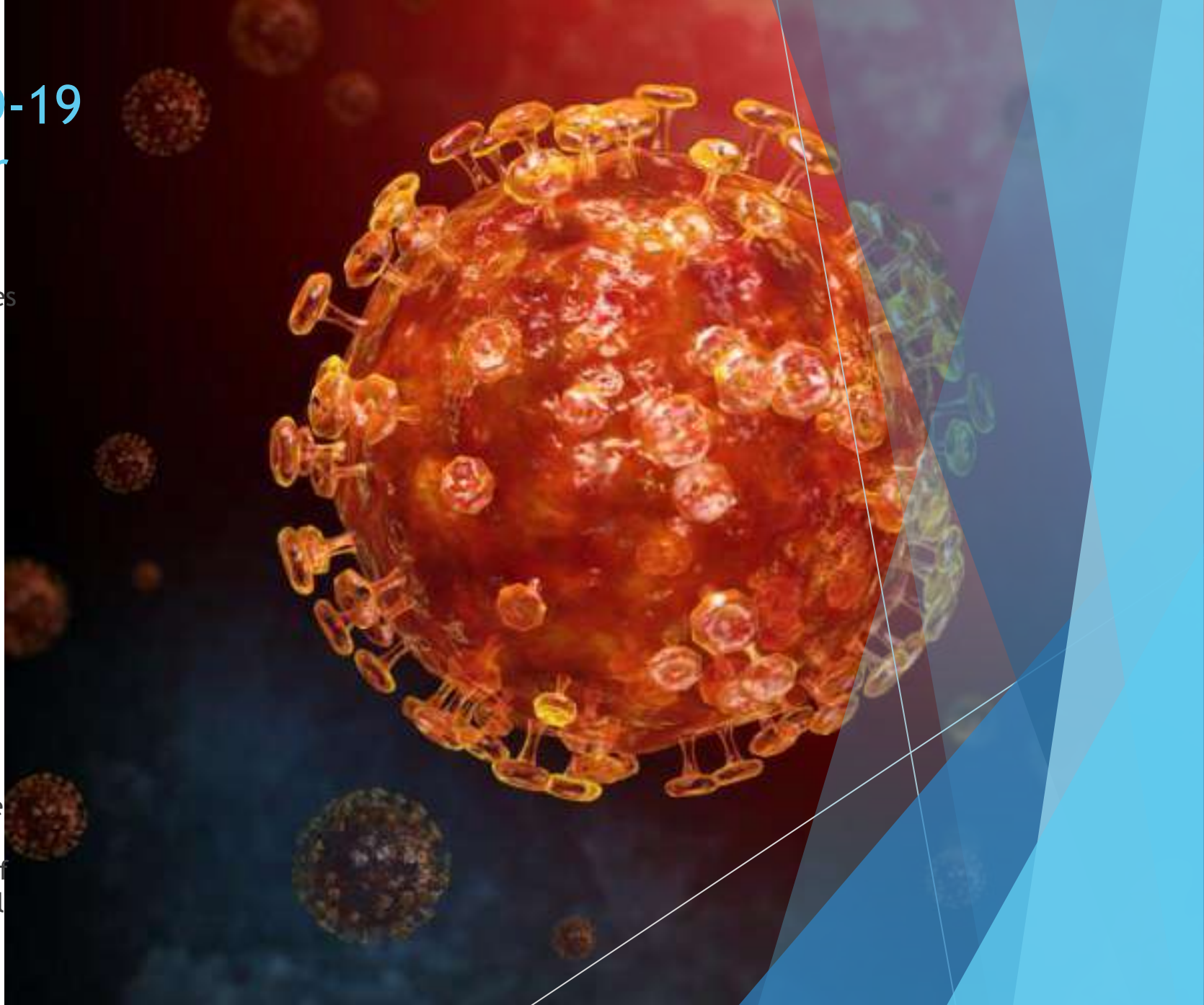
Nathan has also been publicly heralded as a "Best Lawyer" in Florida by U.S. News & World Report, a "Best Attorney" in Orlando, and is a contributing author to the best-selling book, "Get in the Game," a publication offering perspective to aspiring entrepreneurs. Nathan has also served as a guest professor on contracts for UCF, and he often lectures at legal seminars. He is married to his wife of 19 years, a proud father of two, and an endurance obstacle race enthusiast.

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# 18 Months Later... COVID-19 Remains a Threat to Our Labor Market

- ▶ Coronavirus/COVID-19 has and continues to impact nearly every business across the nation.
- ▶ Bureau of Labor Statistics shows there were 83 unemployed workers for every 100 job openings.
- ▶ To make things worse for employers seeking to fill these vacant positions, millions of Americans are quitting their jobs each month in what has been dubbed the “Great Resignation.”
- ▶ A recent Indeed poll of 750 recruiters, managers and decision-makers from diverse industries across the U.S. indicates 74% of those surveyed believe the Great Resignation is a “real and present” issue, with a significant 41% of employers fearing that resignations will remain unusually high well into the future.



# Indeed Survey Results

## Why are Workers Heading Toward the Exit Door?

The survey found that employers report their workers' top five priorities are:

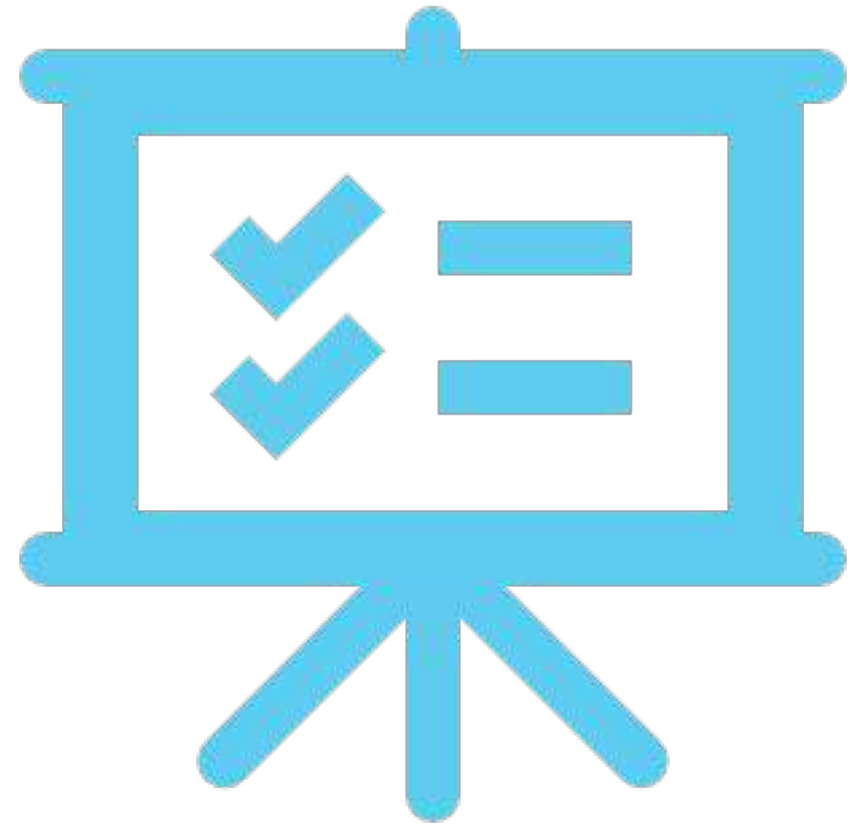
- ▶ higher pay (59%)
- ▶ schedule flexibility (58%)
- ▶ better work/life balance (56%)
- ▶ remote work options (54%) and
- ▶ the ability to focus on personal and family responsibilities (50%).

## Other Significant Findings:

- ▶ 85% of employers agree that the pandemic has altered beliefs about what constitutes a good job—and the number rises to an eye-opening 96% of respondents in hospitality and tourism. In that sector, 80% of employers have observed a recent uptick in resignations.
- ▶ 86% of respondents believe employers need to take action now to reduce further churn.
- ▶ 76% say resignations are contagious—once a few employees resign, others typically follow.
- ▶ 86% of employers say they should be more worried about resignation now than in past.
- ▶ **51% percent of those surveyed believe their companies' handling of the pandemic resulted in later resignations.**

# How are You Handling Covid-19 in Light of Mandates?

- ▶ What are the new mandates?
- ▶ Are your practices in compliance with the recent mandates?
- ▶ Can I mandate vaccines if I have less than 100 employees?
- ▶ How will mandates impact hiring and retention?



# New Mandate: “Path Out of the Pandemic” (POP)

- ▶ COVID-19 action plan is big on concept but thin on details pending yet-to-be-issued regulations.
- ▶ Generally, POP applies to large employers (100 or more employees), federal contractors, and healthcare organizations
- ▶ Announced intent is to:
  - ▶ Vaccinate the unvaccinated
  - ▶ Further protect the vaccinated
  - ▶ Keep schools safely open
  - ▶ Protect our economic recovery
  - ▶ Improve care for those with Covid-19



# POP (continued)

- ▶ Employers with 100 Employees
  - ▶ Vaxx or Test
    - ▶ Covered employees must be full vaccinated; or
    - ▶ Produce a negative test result on at least a weekly basis before coming to work
  - ▶ Type of Test
    - ▶ Antigen, PCR, rapid, etc? Unspecified.
  - ▶ Method and Type of Documentation
    - ▶ Unspecified
  - ▶ Employer must provide paid time off (PTO)
    - ▶ Time off to get vaccinated.
    - ▶ Time off to “recover” from vaccination.
    - ▶ Can employers require employees to use existing PTO? Unspecified.
    - ▶ Maximum and minimum time off? Unspecified.

# POP FAQs

- ▶ **Q: Under the proposed “vaccinate or test” requirement for companies with 100 or more employees, can employers adopt a stricter approach and mandate COVID-19 vaccinations *without* a testing option?**
- ▶ A: Yes, the federal OSHA Emergency Temporary Rule (ETS) will be the legal floor. Private employers can always implement stricter COVID-19 protocols (i.e., vaccination alone) than what is minimally required, subject to applicable state law limits. However, testing as an alternative to vaccination could be a potential disability or religious accommodation.
- ▶ **Q: What about vaccination exceptions for disability and religious accommodations?**
- ▶ A: These statutory exceptions still apply. Under the Americans With Disabilities Act (ADA) and Title VII, there are legal limits, such that a proposed accommodation can be denied when it would impose an “undue hardship” on the employer or a significant risk of substantial harm to the health or safety of the employee, the employee’s co-workers, customers or others that cannot be eliminated or sufficiently reduced by reasonable accommodation. Further, the undue hardship test under Title VII for religion is different (and lesser) than the test under the ADA — i.e., triggered when an employer is forced to undertake “more than a *de minimis* cost.” This can potentially include economic costs (such as lost business or hiring additional employees) and non-economic costs (such as compromising the integrity of a seniority system, increasing safety risks, or increasing the risk of legal liability from employees, customers and others). Tread carefully.

# POP FAQs (continued)

- ▶ **Q: Will the presence of antibodies attributable to a prior diagnosis of COVID-19 give employees a “pass” on any vaccination mandate, at least for a time?**
- ▶ A: This would be a logical exclusion to the vaccine and testing requirements, but there has been no indication the rules will include this exception.
- ▶ **Q: Will employers be required to pay for the cost of COVID-19 testing for employees who opt for weekly testing instead of receiving the vaccine?**
- ▶ A: It is likely employers will be required to pay. Currently, federal and most state benefits laws do not require employers to cover the cost of a COVID-19 test administered as part of “return to work” or other general operational programs. Federal regulations only require health plans and insurers to cover the full cost of a COVID-19 test for insured individuals if there is a medical reason to be tested (i.e., the individual has symptoms of COVID-19). Likewise, most state executive orders to date do not address who pays for testing.
- ▶ That said, EEOC ADA guidance suggests that employers must pay for mandatory COVID-19 testing as a medical examination if the testing is because of an employer’s belief that the employee poses a direct threat of substantial harm to the employee or others.

# POP FAQs (continued)

- ▶ **Q: Can employers still provide incentives to employees to receive the COVID-19 vaccine?**
- ▶ A: Yes. As the EEOC has explained, employers may provide incentives for employees to receive the vaccine without running afoul of federal non-discrimination statutes, provided the incentive is not “so substantial as to be coercive” and complies with rules regarding employee wellness plans, if applicable. It is unlikely that this general rule will be impacted by the OSHA ETS or any other part of the administration’s employee vaccination plan. Indeed, it may be more cost-effective for employers to pay their employees to receive the vaccine than to pay for weekly testing (assuming the ETS requires employers to pay for employees’ tests, which remains to be seen, as explained above).
- ▶ **Q: Will unionized employers need to bargain over the vaccination requirement before implementation?**
- ▶ A: If a workforce is unionized, the National Labor Relations Act (NLRA) generally requires employers to bargain with a covered union over the terms and conditions of employment. Although the National Labor Relations Board has not addressed whether COVID-19 vaccinations are a mandatory subject of bargaining (this is being litigated), it has required unionized employers to bargain over similar policies, such as requiring employees to obtain a flu vaccine or wear a mask while working. Thus, under usual circumstances, an employer likely is required to bargain with a union over a vaccination requirement prior to implementation.
- ▶ Even if the vaccine itself is required by law (or permitted under the applicable collective bargaining agreement), the employer may still have a bargaining obligation on the “effects” of the vaccine program, such as who pays for tests for the unvaccinated, whether and how employees will receive time off to get the vaccine, and the procedure for potential vaccination

# Can Employers with less than 100 Employees Force Employees to Receive a COVID-19 Vaccine?

- ▶ The short answer: Yes, but restrictions and exception remain the same.
- ▶ An employer can mandate vaccination as a condition for employment. But there are statutory exceptions to this rule.
- ▶ Restrictions generally are tied to the ADA and Title VII.
- ▶ If employees have medical reasons or sincerely held religious beliefs that prevent them from taking a potential coronavirus vaccine, employers could be legally required to give the workers some reasonable alternative to continue to work (i.e., personal protective equipment, working separately, or working remotely).



# What can you do?

- ▶ 1. Determine the regulatory box (or boxes) under which you fall • E.g., Confirm your employee + independent contractor counts; federal contractor status; type of contracts; etc.
- ▶ 2. If you have not already, review and update your disability and accommodation processes and forms - tailored for vaccinations and testing
- ▶ 3. Begin developing draft policies that comply with the federal plans
- ▶ 4. Consider added staffing and other support you may need to address during and after implementation.
- ▶ 5. Research local vaccination and testing options, vendors and pricing

**NOTE: Remember the Indeed survey, 51% percent of those surveyed believe their companies' handling of the pandemic resulted in later resignations**

# Hiring/Retention

- ▶ If not covered by POP, consider whether you should adopt COVID-19 vaxx and/or testing mandates, or develop policy which fit your culture and business needs
  - ▶ Considerations:
    - ▶ How much of your work is or can be done remotely?
    - ▶ How much face-to-face exposure with clients is required?
    - ▶ How has your organization run to date with existing operational changes?
    - ▶ Anonymous Surveys
- ▶ Are you considering vaccination status when interviewing?
  - ▶ Many applicants placing vaccination status on resume
  - ▶ Be careful - ADA or Title VII discrimination claims



# ▶ Questions?

Send via chat at bottom of screen and Tina Craft will serve as a moderator.

# Thank You!

- ▶ We will share the presentation after the event via email.

- ▶ Additional questions?

For legal inquiries:

- ▶ Nathan McCoy

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We are here to serve you every step of the way. Be Well!

