

# State of Litigation

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# PFAS Environmental and Insurance Considerations: What You Need to Know



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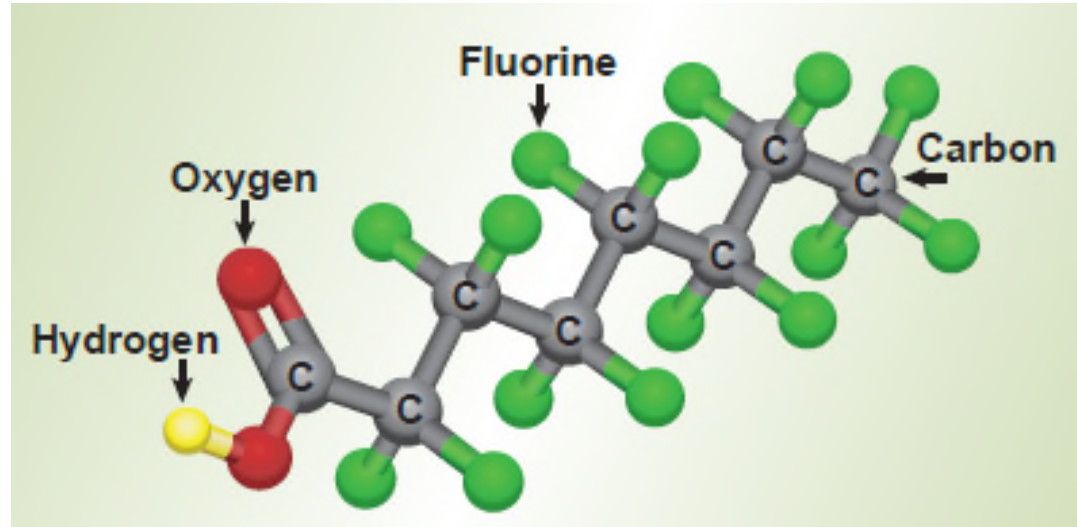


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# Agenda

- PFAS Background
- Current and future federal and state regulation
- Litigation Examples
- Mitigating PFAS liability through insurance





# What are PFAS?

- PFAS: Per- and Poly- Fluoro Alkyl Substances
  - Organic molecules, some or all C–H bonds replaced with C–F bonds
    - C–F bond very strong and hard to break down
- Used for water-proofing, stain-proofing, fire resistance, and corrosion inhibition, making them useful in many industries
- Have been linked to adverse health effects including:
  - changes in liver enzymes
  - increased risk of high blood pressure or pre-eclampsia in pregnant women
  - Small decreases in infant birth weights
  - Increased risk of kidney or testicular cancer
- Two most well known and widely studied are PFOA and PFOS



1 ppt = one square foot of floor tile on a kitchen floor the size of Indiana!

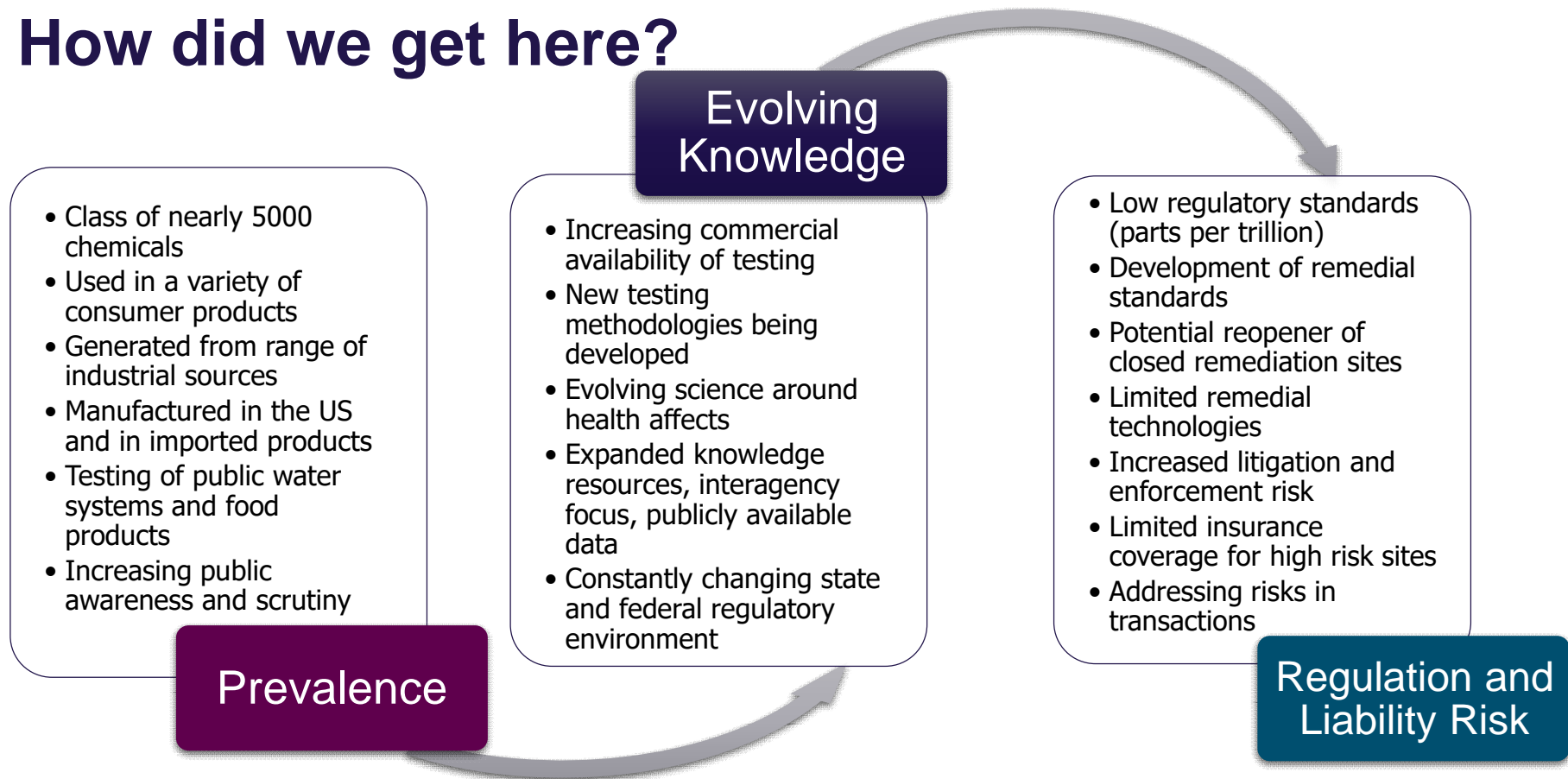


# Applications for PFAS

- Semiconductor Manufacturing
  - Photolithography
- Onsite Fire Response at Large Industrial Facilities
  - Aqueous Film Forming Foam
  - Airports, military sites, fuel terminals, oil and gas facilities
- Metal Plating and Etching
  - Corrosion prevention, wear reduction, electroplating,
- Plastics Manufacturing
  - Coating, flame retardant, fluxing, food products
- Textiles and Paper Production
  - Coating to repel water, oil, and stains clothing, architectural materials, carpets
- Oil and Gas Development and Mining
  - Injected surfactants in oil and gas wellheads



# How did we get here?



# Federal and State Regulatory Environment

## Preventative

- Voluntary phase out by manufacturers of certain PFAS and in food packaging
- State laws banning PFAS in consumer products
- Federal law requires notification before using or importing certain PFAS containing products
- Reporting requirements under Toxic Release Inventory

## Regulatory Compliance

- Federal drinking water health advisory levels and proposed enforceable standards
- State enforceable drinking water standards
- Federal requests for information and guidance to develop wastewater discharge limits
- State permit limits for discharges to wastewater utilities (i.e. Michigan)




## Remedial/ Corrective Action

- Federal guidance of cleanup standards for sites impacted by PFAS
- Anticipated regulation of PFOA and PFOS under federal superfund cleanup law this year
- State and federal scrutiny over PFAS destruction methods
- Proposed legislation for medical monitoring of persons impacted by PFAS



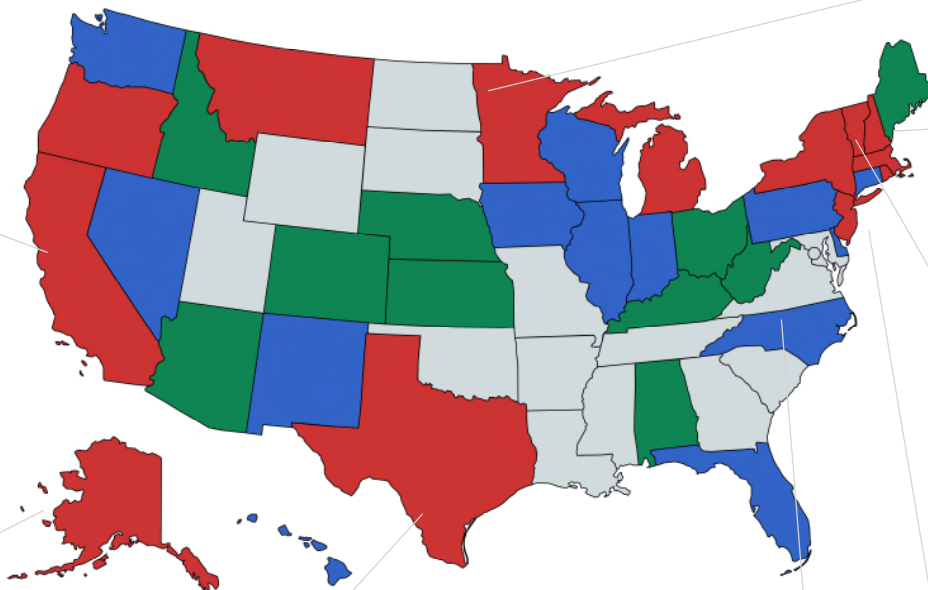
# A Patchwork Approach: State PFAS Standards

**California** (drinking water notification and (response level))  
5.1 (10) ppt for PFOA  
6.5 (40) ppt for PFOS

 Proposed or Guidance Standard  
 Enacted Standard  
 Adopted USEPA Guidance

**Alaska** (Cleanup Standard)  
400 ppt for PFOA and PFOS

**Texas** Tier I Protective Concentration Level for 14 different PFAS, in addition to PFOA and PFOS



**Minnesota** (health based standard)  
35 ppt for PFOA  
15 ppt for PFOS

**New Hampshire** (DW standard (stayed per court order))  
12 ppt for PFOA  
15 ppt for PFOS  
18 ppt for PFHxS  
11 ppt for PFNA

**Vermont** (GW enforcement standard)  
20 ppt for PFOA and PFOS, HAL for sum of 5

**New Jersey** (MCL)  
14 ppt for PFOA  
13 ppt for PFOS  
**Interim Class II GW**  
10 ppt for PFOA and PFOS

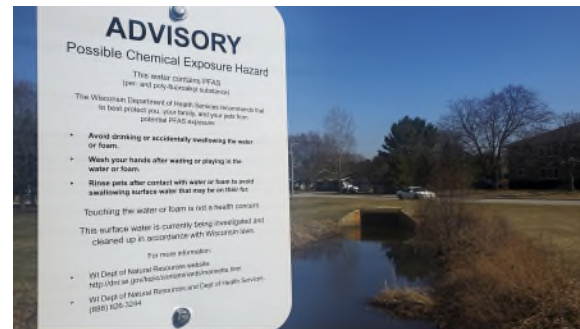
# State of Litigation



Production Plated Plastics Site - Richland, MI



*Nguyen v. Amazon.com, Inc.*, 4:20-cv-04042 (N.D. CA, June 17, 2020)



*Campbell v. Tyco Fire Products, et al.*, No. 2:19-cv-00422-RMG



Highland Dairy - *Schaap v. 3M Co.*, No. 2:19-cv-00105 (D. N.M. Feb. 7, 2019)

# The General Liability Policy

- “Third-party” coverage: intended to address risk the insured’s business poses to others
- Tremendous insurance asset for policyholders facing environmental liability
  - “Occurrence”-based
- Provides both defense and indemnity for bodily injury and property damage claims asserted against the insured
  - Later policies include coverage for personal injury and advertising liability
- Groundwater pollution is covered property damage



# Gather Policies/Insurance Archeology

- Insurance Archeology -- searching for policies and secondary evidence to prove the existence and terms of coverage
- Where to look?
  - Risk management
  - Accounting
  - Business Contracts
  - Board Meeting Minutes
  - Defense counsel
  - Incident Reports
  - Broker(s)
  - Insurer(s)



# Common Coverage Issues

- The insured has the initial burden to prove a claim falls within coverage. If met, the burden shifts to the insurer to prove that an exclusion applies to bar coverage.
- **Issues:**
  - Pollution Exclusions
  - What constitutes a “suit?”
  - What law governs?
  - How many occurrences are there?
  - Allocating damages



# Comparison of Pollution Exclusions to Use of PFAS

## History and Use of Per- and Polyfluoroalkyl Substances (PFAS) *continued*

Table 2-1. Discovery and manufacturing history of select PFAS

PFAS <sup>1</sup>	Development Time Period							
	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s
PTFE	Invented	Non-Stick Coatings			Waterproof Fabrics			
PFOS		Initial Production	Stain & Water Resistant Products	Firefighting foam				U.S. Reduction of PFOS, PFOA, PFNA (and other select PFAS <sup>2</sup> )
PFOA		Initial Production		Protective Coatings				
PFNA					Initial Production	Architectural Resins		
Fluoro-telomers					Initial Production	Firefighting Foams	Predominant form of firefighting foam	
Dominant Process <sup>3</sup>		Electrochemical Fluorination (ECF)						Fluoro-telomerization (shorter chain ECF)
Pre-Invention of Chemistry /			Initial Chemical Synthesis / Production			Commercial Products Introduced and Used		
<b>Notes:</b> 1. This table includes fluoropolymers, PFAAs, and fluorotelomers. PTFE (polytetrafluoroethylene) is a fluoropolymer. PFOS, PFOA, and PFNA (perfluorononanoic acid) are PFAAs. 2. Refer to Section 3.4. 3. The dominant manufacturing process is shown in the table; note, however, that ECF and fluorotelomerization have both been, and continue to be, used for the production of select PFAS.								
<b>Sources:</b> Prevedouros et al. 2006; Concawe 2016; Chemours 2017; Gore-Tex 2017; US Naval Research Academy 2017								

- Chart from ITRC website
- PFAS invented 1930's
- PFOS, PFOA, PFNA used from 1940s-1990s
- Sudden & Accidental Pollution Exclusion first introduced in 1973
- Absolute Pollution Exclusion introduced in 1986





# Questions? Thank you!

Follow PFAS developments at <https://www.lathropgpm.com/PFASPlaybook>

# Avoiding Employment Litigation in the Next Phase of Pandemic Response



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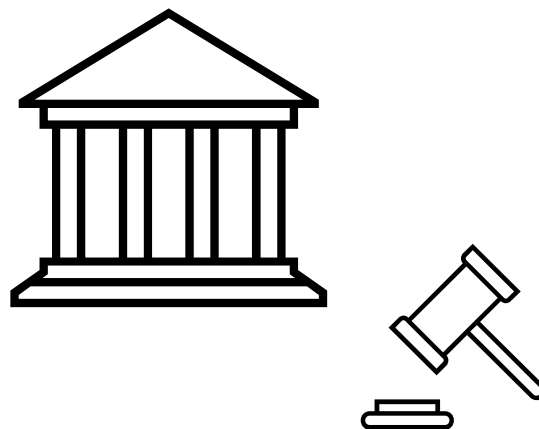


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# Litigation Risks

- Over 2400 COVID-19 related lawsuits filed by workers since January 2020
- Typical types of claims:
  - Employment discrimination
  - Retaliation / whistleblower
  - Wrongful discharge
  - Unsafe workplace
  - Negligence/wrongful death
  - Remote work / leave of absence conflicts
  - Wage and hour
  - Breach of contract
  - Traditional labor law
- Filed against a variety of types of employers



Data source: <https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html>



# Employer Safety Obligations

- Satisfy legal obligations to employees, vendors, customers and visitors and reduce risk of claims
  - OSHA
  - Workers' compensation
  - Negligence
  - Consider assumption of risk and liability waivers from non-employees, although may not be enforceable in all jurisdictions and can be off-putting
- Business Considerations
  - Reduce employee refusal or resistance to coming into work
  - Improve employee morale and productivity
  - Reputational considerations

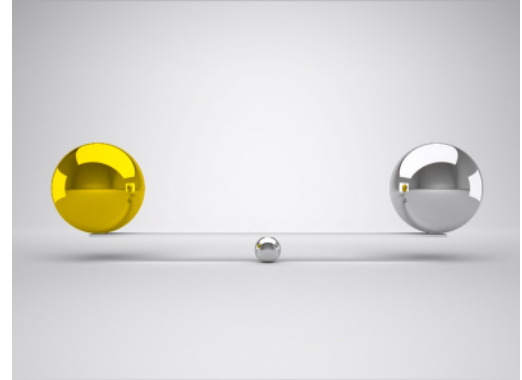
# Employer Safety Obligations

- What would a reasonable employer do, taking into account its industry, operations and worker risks?
  - Consider any legally binding COVID-19 prevention and response measures
  - Consider CDC, OSHA, and state/local guidance on workplace safety measures, both generalized and by industry / employer type
  - Have a written COVID-19 safety plan
  - Communicate with and train employees



# Non-Discrimination and Accommodation Obligations

- Cannot treat applicants/employees differently based on a legally protected characteristic under federal, state, and local laws
  - E.g., can't mandate that older or other more vulnerable workers stay away or treat them differently based on age, disability, etc.
  - E.g., can't discriminate based on applicant/employee's own protected characteristic or association with a person of a protected class (e.g. a household/family member with a disability)
- Must grant reasonable accommodation for disability, pregnancy or sincerely held religious belief/practice unless doing so is an undue hardship
  - Remote work and/or leave of absence for someone with a disability that creates high COVID-19 risks
  - On the job accommodations (e.g. plexiglass, isolated workspace, extra protective gear, special equipment, exceptions to workplace policies on face covering, vaccines or other measures)



## ***Peeples v. Clinical Support Options, Inc.* 487 F. Supp. 3d 56 (D. Mass. Sep. 16, 2020)**

- Plaintiff worked as manager for organization that provides social services to vulnerable, at-risk populations.
- Plaintiff has asthma and asked to work remotely. Employer initially granted, but then later refused accommodation because it claimed to need managers “in the building and supporting operations.”
- Plaintiff sued under the ADA and sought injunction to require employer to allow Plaintiff to telework for duration of the pandemic.
- Court granted injunction



# ***Peeples v. Clinical Support Options, Inc.* 487 F. Supp. 3d 56 (D. Mass. Sep. 16, 2020)**

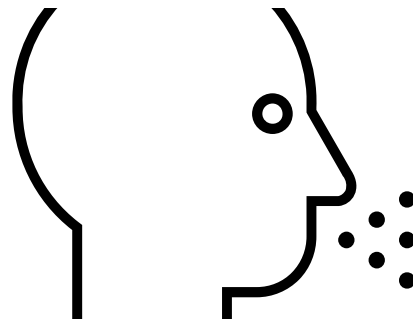
- Asthma is a likely a “disability” that substantially limits major life activity, particularly during pandemic
  - No mention of how Plaintiff was limited in performing duties
- Employer failed to engage in interactive process
- Providing face masks, sanitizer, and wipes were not accommodations—just “workplace safety rules” that applied to everyone
- Other managers were working on-site that could handle on-site duties
- Employee’s supervisor had written letter of support for Plaintiff, stating he could do essential duties from home

# Employee Privacy Obligations

- Consider legal limits on medical tests and disability-related inquiries
  - Permitted only after conditional job offer or during employment
  - Must be job related and consistent with business necessity
  - Must be narrowly tailored
  - Medical data must be treated as confidential
- EEOC guidance on COVID-19
  - A limited inquiry about COVID-19 exposure, illness, symptoms, test result, and/or vaccination status are not a disability-related inquiry
  - Can screen for COVID-19 symptoms, take temperatures, test for COVID-19, and ask for vaccine information
  - Guidance available at: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# Employee Time Off Rights

- Legally Protected Rights to Time Off
  - Individual employment contract or collective bargaining agreement
  - Employer policies (e.g. vacation, sick, PTO, and/or disability benefits)
  - Federal, state, and or local leave laws
    - FMLA or state/local medical leave laws
    - State and/or local sick leave laws
    - COVID-19 specific laws
    - Voluntary FFCRA
  - Disability, pregnancy and/or religious accommodation leave



# Employee Time Off Rights

- Usually not legally protected:
  - Generalized fear and anxiety common to much of the U.S. population (so long as not severe enough to be an FMLA serious health condition or disability and employer is satisfying safety obligations)
  - Personal disagreement with safety measures employers is taking (e.g. does not want to wear mask, social distance, etc.)
  - Employee or household member/loved one has underlying serious condition or other factors that make them at greater risk for a bad COVID-19 outcome
  - Child care or elder care obligations
  - COVID-19 or other illness of employee or household member/loved one), but employer may want to keep employee out of work due to workplace safety obligations



## ***Payne v. Woods Servs., Inc.*, 2021 WL 603725 (E.D. Pa. Feb. 16, 2021)**

- Plaintiff worked for a medical services group. After testing positive for COVID-19, Plaintiff was ordered by a care provider to quarantine for 14 days.
- Six days later, his director told him to return to work. Plaintiff refused, saying that he had not finished quarantining according to his nurse and the CDC's guidelines. He was fired the next day after he did not return to work.

## ***Payne v. Woods Servs., Inc.*, 2021 WL 603725 (E.D. Pa. Feb. 16, 2021)**

- Court declined to dismiss FMLA interference and retaliation claims at the pleadings stage because Complaint adequately alleged that Defendant had an obligation to allow Plaintiff to cure deficiencies in his FMLA request (even though he did not describe it as an FMLA request).
- Court declined to dismiss FFCRA counts because Plaintiff did not meet health care provider exemption
- Court dismissed ADA discrimination claim because Plaintiff did not allege how his COVID-19 diagnosis substantially impaired a major life activity
- Court dismissed ADA retaliation claim because seeking FMLA leave is not seeking a reasonable accommodation, and therefore Plaintiff did not engage in protected activity.

# Face Coverings or Not?

- May 2021 CDC Guidance loosens restrictions for the fully vaccinated (see: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>)
  - No face covering or social distancing, except where otherwise required by law or local business and workplace guidance
  - Can refrain from being tested/quarantining after known exposure
  - Can be excluded from routine screening tests
  - Can resume domestic travel without testing/quarantining and can travel internationally without any U.S. based requirements before or after the trip
  - But, healthcare settings must continue to follow prior CDC guidance
- Awaiting more detailed OSHA guidance (see: <https://www.osha.gov/coronavirus/safework>)



# Face Coverings or Not?

- Face Coverings

- Employers should consider what is reasonable to promote safety in their workplaces
- Employers should consider whether to have different approaches for the vaccinated versus the unvaccinated
  - Employers should consider how they would lawfully collect vaccination data
  - Employers should consider how to protect those who cannot get vaccinated for disability, pregnancy, religious or other protected reasons
  - Retaliation, discrimination and harassment should not to be tolerated





# Vaccine Approaches

Educate and  
Encourage

Educate and  
Incentivize

Mandate

# Mandatory Vaccine Program

- EEOC guidance says vaccines can be mandated so long as done on a nondiscriminatory basis
  - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Reasonable accommodation obligations for disability, pregnancy and religion
- Potential risks
  - FDA emergency use authorization law
  - State or local bans on mandatory program
  - State or local lawful activity laws
  - Practical considerations if employees refuse / resist vaccines



# Mandatory Vaccine Program

- Other considerations:
  - An employer who makes a vaccine mandatory must pay non-exempt workers for the costs and time spent getting vaccinated
  - Any complications related to vaccination may be covered by worker's compensation



# Educate, Encourage, and Incentivize

- Develop vaccination education campaigns, with regular updates
  - Share links to resources on vaccine benefits, safety, side effects, effectiveness, what is unknown, and vaccine providers
  - Consider vaccine “champions”
  - CDC Toolkit at [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor\\_1612717613578](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717613578)
- Consider incentives / wellness program issues
  - Newly updated EEOC guidance OKs vaccine incentives: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
  - Vaccine incentives are not a disability-related inquiry if only ask about vaccine and require proof from outside clinic / provider
  - Onsite or other employer-run vaccine program may be a wellness program and may carry disability/religious accommodation, health law, and HIPAA compliance considerations

# Practical Considerations

- Absent employee legal protections, employer can require a return to work if taking the steps a reasonable employer should to create a safe workplace
- Think about business priorities and workplace culture
- Dialogue about safety measures, potential gaps, and address gaps
- Dialogue about voluntary furlough or resignation and impact on unemployment benefits
- Provide EAP or other support resources (e.g. wellness programs, virtual access to providers, etc.)
- Consider “hazard” pay or other incentives if affordable
- Provide accommodations wherever possible



# The Mansfield Rule and Other Ways Legal Departments Can Collaborate with Outside Counsel on D&I Initiatives



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FIGURE 8 | The Deloitte diversity and inclusion maturity model

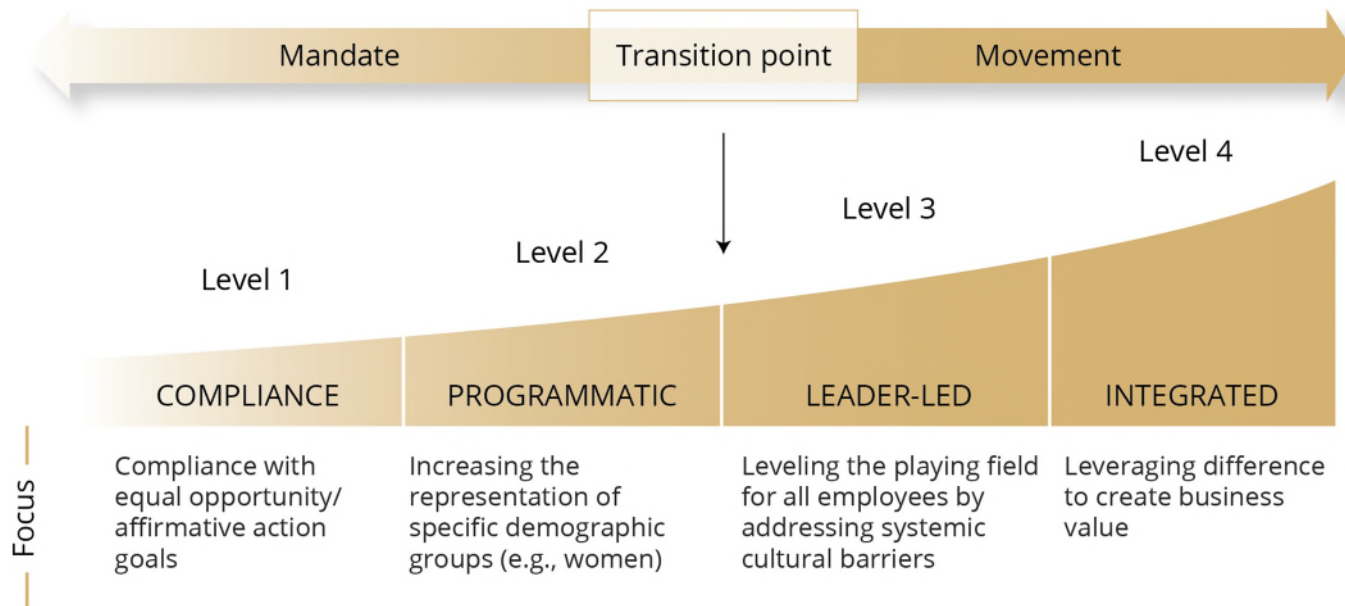
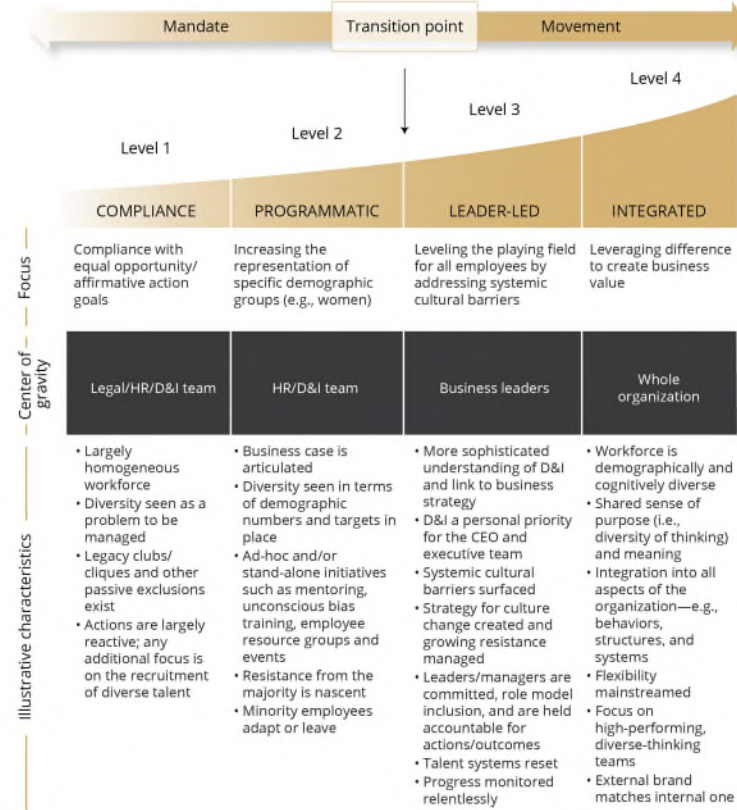


FIGURE 8 | The Deloitte diversity and inclusion maturity model



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