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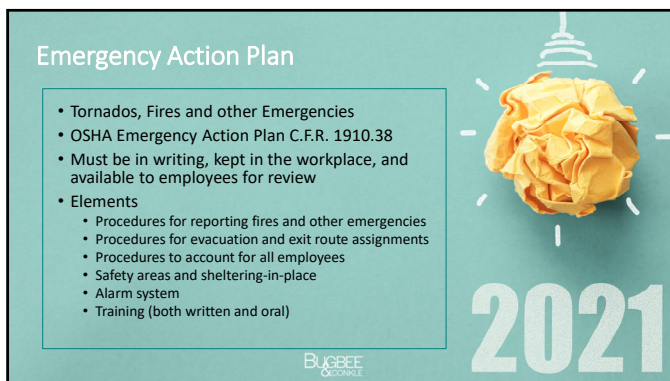
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### Cannabis and the Workplace

**Legal Background**

- Illegal Schedule I drug under federal law pursuant to the Controlled Substances Act Of 1970
- Federal law controls over state law
  - No accepted medical use
  - High potential for abuse and dependence
- State laws legalizing cannabis (marijuana) are in conflict with federal law

**Workplace Issues**

- Patchwork of state and even local laws
- Drug testing: pre-employment, random, impairment
- Reimbursement under workers' compensation for medically recommended treatment

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### Cannabis Laws and Employer Concerns

- Each state jurisdiction is different
- Cities are developing laws
- Federal ADA v. state ADA laws
- Testing: allowed? If so, when and under what circumstances?
- Case law or administrative regulations
- Cannabis Administration and Opportunity Act introduced 7/14/21 in U.S. Senate

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## Testing for Cannabis

Breath	Recent use within past 2-3 hours
Oral	Within past 24 hours
Blood	Within past 2 weeks
Urine	Within past 3-4 weeks
Hair	Within the past 3 months

**Problem:** THC, unlike alcohol, is highly fat soluble, stored in fat tissue and takes a long time before it is eliminated from the body

**Question:** Testing for presence or impairment?



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## The Challenge of Testing

- Testing technology and science has not yet confirmed an agreed upon level of active THC for impairment
- Active versus inactive THC metabolites
- Legal cannabis use and risk of employment discipline
- Safety sensitive positions only
  - Defined by federal or state statutes?
  - Common sense
  - U.S. Supreme Court definition "endangering people's lives"
  - D.O.T. positions



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## Reimbursement Under Workers' Compensation

- New York and New Jersey allow it but do not require it
- Ohio does not allow it
- The workers' compensation insurance industry continues to struggle with it



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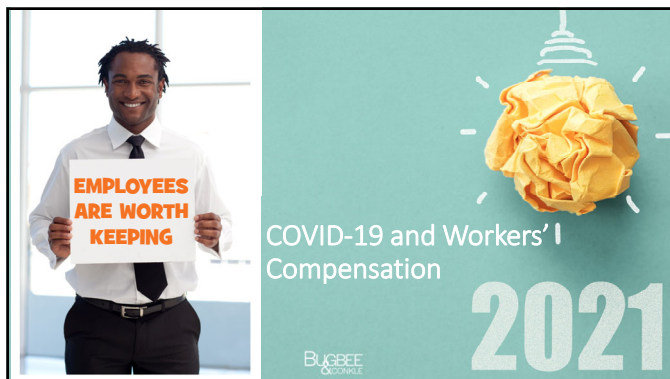
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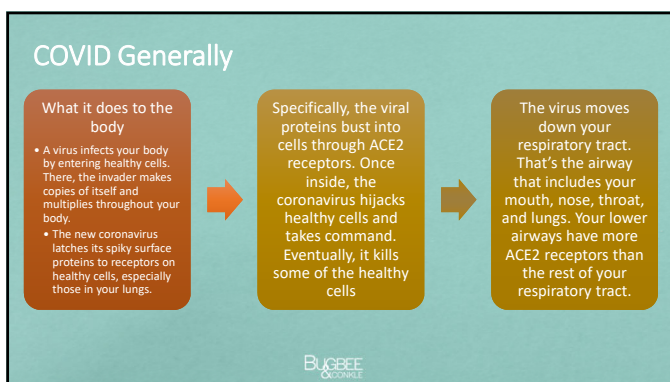
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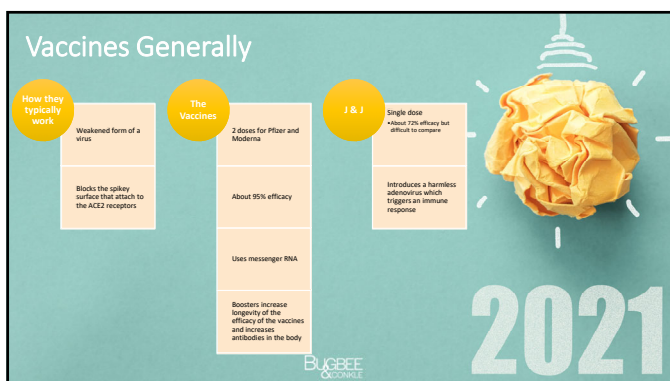
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Burden of Proof in Ohio Workers' Compensation COVID-19 Claims

The claimant is required to establish compensability by a "preponderance of the evidence"

The claimant must meet this burden for each element of the claim

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Occupational Disease

O.R.C. 4123.01(F)  
3-part test

A disease contracted in the course of employment;

The disease is peculiar to the employment by its causes and the characteristics of its manifestations or the condition of employment results in hazard which distinguishes the employment in character from employment generally; and

The employment creates a risk of contracting the disease in a greater degree and in a different manner from the public in general

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Occupational disease claims generally result from repeated work-related exposure which has a harmful effect on the employee

and

there is a causal relationship between the exposure and the harmful effect which is confirmed by a medical diagnosis

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Communicable Diseases Like COVID-19 are not Typically Compensable

*Example: the flu*



**Question:**  
Is a positive COVID-19 test alone sufficient evidence for allowance without a causal relationship statement from a doctor?



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Definition of Injury

O.R.C. 4123.01(C)

**"Injury"** includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.

**Question:**  
Is a claim for COVID-19 compensable as an injury or occupational disease?

**Answer:**  
COVID-19 is primarily a respiratory disease more closely resembling an occupational disease claim.



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COVID-19 claims require a factual analysis of the employment environment, the likelihood of a hazardous exposure to the novel coronavirus (COVID-19) greater than the public in general, and medical causation evidence relating the diagnosis to the hazardous exposure



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### Additional Considerations Regarding COVID-19 “Long Haulers”

- Permanent lung damage
- Neuropathy in lower extremities
- Myocarditis
- Psychological conditions

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### COVID-19 Vaccines and Workers’ Compensation

Mandated by the employer

OR

Voluntary choice by employee

Does it make a difference?

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### Vaccine Mandates and Workers Compensation

	House Bill 401	House Bill 435
Compensable Injury?	No	Yes, but a claimant cannot receive both worker’s compensation and CICP
Sunset?	No	Yes; June 30, 2023
Likely to pass?	Likely no	Possibly...

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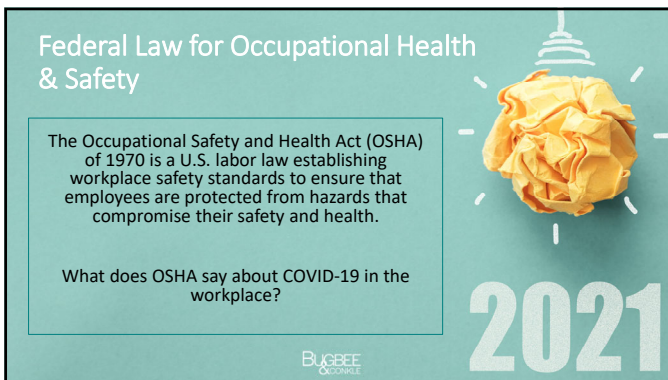
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### The General Duty Clause Section 5(a)(1) of OSH Act

All employers are required to provide a work environment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm”

- Used by OSHA when there is no applicable standard or regulation. Example: workplace violence

Is COVID-19 a recognized hazard **in the workplace**?

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### Four Elements of a General Duty Clause Violation

The employer failed to keep the workplace free of a hazard to which its employees were exposed.

The hazard was recognized by the employer.

The hazard was causing, or was likely to cause, death or serious physical harm.

There was a feasible and useful method to correct the hazard.

Are COVID-19 vaccines a feasible and useful method to correct the hazard?

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### OSHA's Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

Posted on January 29, 2021; updated June 10, 2021

Updated August 13, 2021 to reflect the Center for Disease Control (CDC) mask and testing recommendations for fully vaccinated people

- Multiple layers of controls recommended such as mask wearing, distancing, and increased ventilation.
- Vaccines recommended
- Removal of infected people from the workplace

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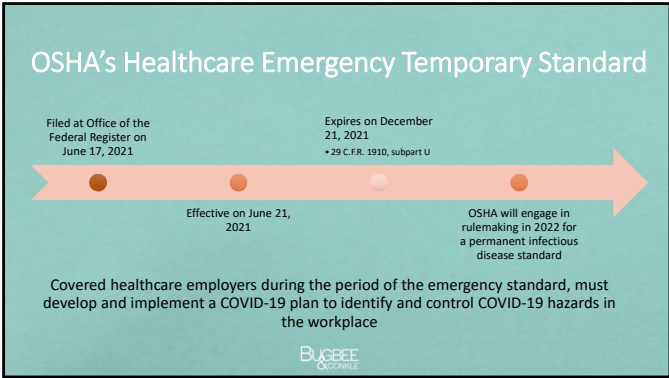
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### OSHA's Emergency Temporary Standard for Employers with 100 or More Employees

- Issued November 5, 2021
- ETS issued under authority found at section 6(c)(1) of the OSH Act, 29 U.S.C. 655(c)(1)

Issued when employees are subject to grave danger from exposure to substances or agents determined to be toxic or physically harmful, and an ETS is necessary to protect employees from such danger

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### Emergency Temporary Standard

- Employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy; or
- Adopt a policy requiring employees to get vaccinated or undergo regular COVID-19 testing and wear a face covering at work
- On November 6, 2021, the Fifth Circuit of the U.S. Court of Appeals issued an order temporarily blocking the ETS requiring vaccines
  - The 5<sup>th</sup> Circuit suspended the ETS stating only that the petition "gave cause to believe there are grave statutory and constitutional issues with the vaccine mandate". The ETS is stayed pending further action by the court.

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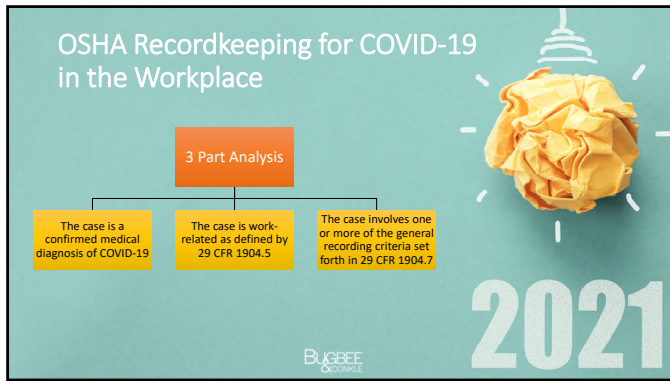
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## HIPAA and Asking About Vaccination Status

- “Are you fully vaccinated?” Not a HIPAA violation!
- EEOC confirmed an employer can lawfully ask about vaccination status
  - Question limited to a “yes” or “no” response
  - The vaccination status is confidential medical information under the ADA

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## Vaccine Mandates: The Law

Yes, private employers can mandate the vaccine.

Exemptions:

- Religious Accommodations
- “sincerely held religious belief” taking the place of a typical religion in one’s life
- Not: political beliefs, personal preference
- Disability Accommodations

Applicable Laws:

- Title VII of the Civil Rights Act of 1964
- The Americans with Disabilities Act
- The Ohio Civil Rights Act

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## Vaccine Mandates: The Law (continued)

Religious Accommodations under Title VII

- Undue hardship
- “de minimis cost”

Disability Accommodations under the ADA

- Interactive Process

Accommodation Examples:

- Employee works remotely
- Employee works in separate office away from others
- Mask wearing in office

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## Vaccine Mandates: Enforcing the Policy



When drafting a vaccine mandate policy, consider:

- Multiple steps to termination with multiple deadlines
- Having it drafted by counsel
- Having the policy signed by the employee

Employees are protected from retaliation from the employer for requesting an exception to the vaccine mandate policy

- So you cannot:
  - Terminate an employee for requesting an accommodation
  - Demote or suspend the employee
  - Give negative or lowered evaluations
  - Use threats against these employees

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## Vaccine Mandates and Protests



In March, the NLRB issued Memorandum GC 21-03

- The NLRB will become more aggressive

Employee protests and walkouts related to vaccine mandates will likely be deemed protected concerted activity

- Even protests related to government policies are protected

What does this mean?

- Educate supervisors and managers
- Do not prohibit the conversations
- Double check solicitation and distribution policies

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## Vaccine Mandates: Practical Considerations



Culture

Committee/Employee Designation

Policy

Tracking

Collective Bargaining Agreement?

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### Suggested Actions

Provide paid time off for employees to get vaccinated	Quarantine unvaccinated workers who experience close contact and all workers who experience COVID symptoms or test positive	Implement physical distancing for unvaccinated workers	Provide unvaccinated and other at-risk workers w/ face coverings	<i>Implicit recommendation to verify vaccination status (see ETS for how)</i>
Train workers on COVID-19 policies and procedures	"Suggest" that unvaccinated customers/guests wear face covering	Maintain existing ventilation systems and perform routine cleaning and disinfection	Record and report COVID-19 cases as applicable	Retaliation protections (e.g., set up an anonymous complaint)
Follow other applicable mandatory OSHA standards				



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### Incentive Pay and the FLSA

- The Fair Labor Standards Act applies to wage and hour laws, overtime, etc.
- Both incentive pay and temporary bonuses (i.e., temporary increases in the hourly wage) are likely non-discretionary bonuses
- Must be included in employer's overtime calculations



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## Diversity Training: Why It is Important

- What is going on today
  - Black Lives Matter
  - Social Justice Movement
- Retention of the Workforce
- Increased Bottomline
  - Companies in the top quartile for racial and ethnic diversity are 35% more likely to have financial returns above their respective national industry medians
- Prevention and defense
- Innovation

**"An ounce of prevention is worth a pound of cure."**

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## QUESTIONS?

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