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KENTUCKY TRUCKING
ASSOCIATION

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"To promote the trucking industry by educating government entities, the general public, customers and related industry groups through advocacy, career development, and the support of value-added programs that enhance industry safety and productivity."

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Chairman's Corner



Dewell Gossett
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“
We should take pride in the fact that we are the industry that keeps America moving forward. As we see winter come to an end, we should remind ourselves that we are very fortunate to be able to move forward in 2021 and leave 2020 as Hindsight.”

“Hindsight is 2020” is a phrase that we usually say after we wish we had done something a different way or we learned a valuable lesson in life. We have all used that phrase without ever thinking about how true it is to us until now. I, for one, am ready to leave 2020 as Hindsight! We all just came thru the most challenging year that we would ever have predicted, and now we can finally see the end of the pandemic in sight! Unfortunately, we still must deal with COVID-19 daily, but we have spent a year figuring out how. Masks and social distancing are more of a normal now than a suggestion or mandate. Vaccines are in sight, but it is still a struggle for some of us to get ourselves, parents, grandparents, and others vaccinated. Some have lost loved ones, both family and close friends, or know of someone who has ... such a sad time was 2020. I am ready to move into 2021.

Now to a positive, forward-looking perspective instead of the depressing memories of 2020. I am writing this as I sit in my office while it is 15 degrees outside, with 5 inches of snow on the ground and another storm on the way. As bad as that sounds and unpredictable as the weather is, we can deal with it

easier than what we faced in 2020. Like most of you, we have trucks on the road today because customers need our trucks to deliver the goods that they require for their respective businesses. I gave some deep thought to the fact that we are truly an essential part of our economy. Please stop and think about it, or better yet, pay attention to the trucks that we have on the road today. We are not in the same category as healthcare workers, first responders, etc., those are professions that deserve more credit, thanks, and respect than they get every day, but we are essential in our own way.

As I travel the highways, I see trucks of all types making deliveries, including food, medicine (including COVID-19 vaccines), general freight, fuel, building materials, etc., and of course, today, there are salt-trucks and snowplows. We should take pride in the fact that we are the industry that keeps America moving forward. As we see winter come to an end, we should remind ourselves that we are very fortunate to be able to move forward in 2021 and leave 2020 as Hindsight. I think we have all learned a valuable lesson; I know I have! 🚛



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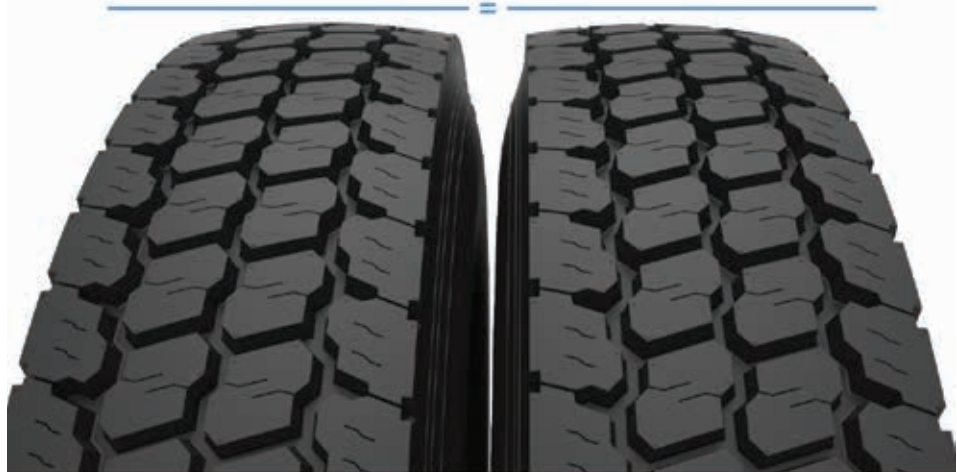
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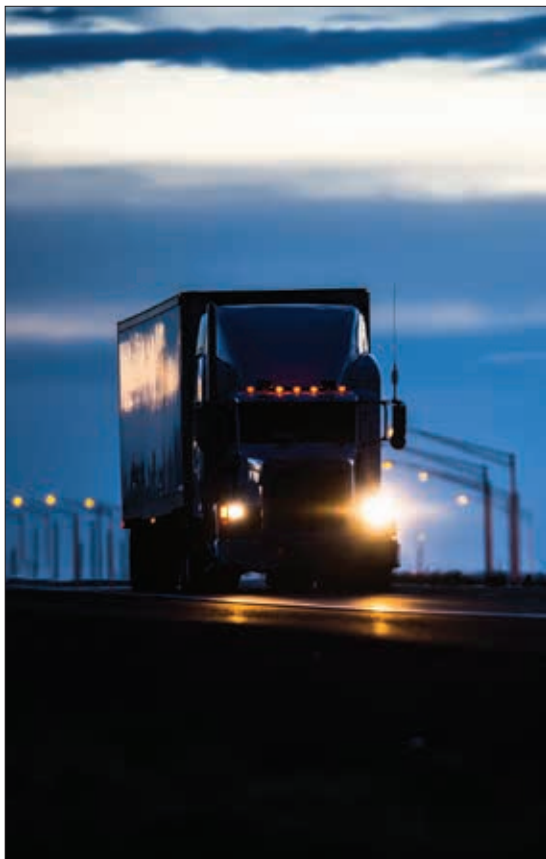
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Message from Rick Taylor



*Rick Taylor, President
Kentucky Trucking Association*



Moving Forward After the COVID 10



The most important thing is – YOU, the member. We want to keep you informed and engaged as much as possible in 2021.



Exercise equipment and weights have been flying off the shelf this past year as people have been stuck at home, and they want to remain in shape or get into shape without risking exposure by going to the gym during the pandemic. I am not one of those people. Other than sports, I am not much of a TV watcher but, I have been busy catching up on Netflix shows that I heard people talking about or referencing, such as Ozark, Schitt's Creek, The Queen's Gambit, Dead to Me, All American, and Bloodline to name a few. My sedimentary ways have resulted in the dreaded COVID 10 – extra pounds. As I recommit myself to healthier habits, it crossed my mind that KTA should examine what is important for us in 2021.

The most important thing is – YOU, the member. We want to keep you informed and engaged as much as possible in 2021. I am looking forward to our Golf Classic on June 24th at Wildwood County Club and our Annual Membership Conference and Expo at the French Lick Resort in French Lick, Indiana, from August fifth through the seventh. These will be great opportunities to reconnect, network, socialize, and learn from each other.

Our highest priority issue will always be highway safety. We will certainly get back to Safety Management Council meetings as soon as it is prudent, and most people are comfortable attending this type of meeting. Additionally, we would like to offer North American Transportation Management Institute classes during 2021. Our Kentucky Road Team is a great resource to educate our teenagers



and adults, for that matter, about the operation of a commercial vehicle and the proper way to drive around it. Their message emphasizes the danger of distracted driving and the importance of seat belt usage. Our road team provides testimonials on how rewarding a trucking industry career can be for a young person to consider.

Advocacy on your behalf is undoubtedly a primary goal of the association. We have been actively monitoring legislative efforts and keeping you informed about national and state issues. A few items we have been watching on the stateside are HB 278; this bill will allow for the deduction of expenses paid with forgiven PPP loan proceeds. Without this bill, those that used PPP in Kentucky could receive a tax bill from the Department of Revenue. Hopefully, this bill will be signed into law while you are reading this message. Other state bills include the towing and storage bill, infrastructure bills, eliminate the \$34 clerk fee, and many bills with an impact on small businesses. A future discussion will include surtax as Kentucky is just one of two states that collects a surtax on fuel. On the federal side, we are watching how the Biden administration handles the preemption of state regulation of interstate trucking, specifically the meal and rest breaks. The Sixth Circuit upheld FMCSA's preemption under the previous administration. We are watching the Rhode Island truck-only toll case. This will have implications across the United States should the trucking industry lose this battle. The American Trucking Association litigation

center is fighting this on all our behaves. Please consider donating to the litigation center to make sure we win this case. You do not have to be an ATA member to donate. If interested, please visit <https://www.trucking.org/law-litigation>.

Also, we are monitoring transportation infrastructure funding – highway trust fund, lawsuit abuse issues – Kentucky's Constitution is very restrictive on limiting civil judgments, minimal level of financial responsibility, workforce development – including a graduated CDL program, driving training rules, driver health, and wellness. Other issues include autonomous vehicles, drug and alcohol clearinghouse rulemaking, redundant background checks, and truck parking.

There are so many opportunities for us to educate people on what we do. We need your continued support to keep the association moving in the right direction. It is a privilege to represent this incredible industry and to be able to meet and work with great people on a regular basis. I have learned so much over the past two years. I am looking forward to a wonderful 2021. 🚛

Rick Taylor, President/CEO
Kentucky Trucking Association

MEMBER FOCUS - GETTING TO KNOW JUDY KEMPER OF ROAMIN' ROADS



Celebration with the Grandkids



How did you become part of the trucking industry? Did you always aspire to be part of this industry?

I became involved in the industry when I married my husband, who was and is a truck driver. My husband got started in the industry when he and his brother were farmers; they wanted to haul their grain and fertilizer. They farmed and trucked together for about 25 years. After a few years, my husband decided to sell his part of the business to his brother and downsize.

We then started Roamin' Roads Transport in 1999. He was going to have just one semi-truck, but the new business grew, too. Now he has been trucking for more than 34 years.

I came along a few years after he began trucking. I've always tried to be supportive, even through some difficult times.

What is it like owning a trucking business in a male-dominated industry?

It's been fine as a part-owner. I have my husband to fall back on in difficult situations, and he is

the backbone of the company. The main area that I depend on him for is the maintenance of the equipment. He orders parts, schedules repairs, manages the shop and drives when needed. He and I both work with our current customers and with potential new customers in sales. Together we oversee all aspects of the business.

Initially, I worked part-time for his first business. I became the dispatcher after we started our own business, and I would help with the bookkeeping and paperwork. Then, after our daughter was grown, I went back to college and worked as an elementary teacher for 10 years.

When our business began growing, my husband suggested that I come back to work full time with him; alternatively, we discussed downsizing. It worked well at that time for me to come back into the business. We had the potential for growth, so it made sense financially. It also gave me some flexibility with my schedule, and that was very important. We've doubled in size since that time — so much for downsizing. First, it was one truck, then it was two trucks, and now we have 10 trucks.

Describe your educational background.

I have a Master of Arts in elementary education, with an area of emphasis in reading and writing instruction.

Are there any specific individuals who had a major impact on your career?

Even though I was working in other fields, the work I did when I was younger was valuable because I had some awesome managers. They have been influential in how I try to manage. I don't have an MBA, and I didn't have experience as a manager, but I try to manage the same way they did.

When I was working in accounting, my manager was Dwight Louden. I'm not sure how many people worked under him because it was in an industrial factory setting. He was a great manager because he was very encouraging, patient and kind-hearted. I was in my 20s and had never done any work like the work I was assigned. Although I'm sure I made lots of mistakes, he handled it well. He knew how to treat people, and you never forget that. Also, the work I was doing then, accounts payable and accounts receivable, has helped me tremendously now.

Another boss I had who was very influential was Doug Oak. He was the principal who hired me when I completed my bachelor's degree, and I worked with him for a couple of years. The way he managed was a little more relaxed, but it was still good.

What is the most rewarding part of your career?

I'm a people person, and I enjoy the relationships I have with the drivers and customers. The mechanics and the office staff are wonderful, too. I appreciate their support.

Knowing we are doing a good job meeting the needs of our customers is very rewarding.



What do you think will be some of the dominant trends within the trucking industry in the next 5-10 years?

Autonomous trucking. It disturbs me a little to think about that because it will change the industry. Electric trucks are another trend that is already starting now. I am not sure how much is happening, but I do see more electric trucks out there.

Long-distance autonomous trucks won't affect us much because our company does not do long distance. Our drivers are home every night.

What is the biggest impact of being a KTA member? What makes it beneficial?

When I started working full time in this industry with my husband a little over five years ago, in late May or early June, someone suggested that I get in touch with KTA, and by July, I realized I needed help. I attended my first KTA monthly meeting, which just happened to be in Carrollton. After that, I continued attending monthly training meetings. At the very first meeting, I met people who had similar-sized companies, and I

was able to network. Having this opportunity to meet and share information was very valuable.

The training was absolutely amazing. At the time, the president of the chapter was a retired DOT officer, and he came to see me at our office. He provided on-site training and helped me with regulated FMCSA paperwork. At any time, if we had any questions or we didn't understand something having to do with regulations, we could send out an email and get an immediate response. It was a huge benefit. Another crucial benefit of being a member of KTA was the availability to attend specialized safety trainings.

KTA helps in other, smaller ways, too, such as saving a little money on small expenses. For example, if you are not using an electronic logging device, you can get a discount when you buy logbooks.

Collaboration and networking opportunities with KTA are still outstanding, but it has been tough this year because of COVID-19.

Tell us more about COVID-19.

We slowed down for about a week, and it has not slowed down

continued on page 12 →

since. The financial part of the business has stayed steady. There have been some slower times, but we just kept on trucking. If one customer needed less from us, another customer picked up.

The hardest part has been to understand what I need to do to keep my employees safe and also understanding my legal responsibilities. We, like so many others, want to keep everyone safe, so we have masks, and we do extra cleaning in our office even though we don't have a lot of foot traffic. We encourage drivers to use disinfectant wipes on the most used surfaces of their truck, use disposable gloves if needed, and also ask them to wear face masks when required. None are in places where they are exposed to a lot of people. Initially, we had a few concerns about some of the destinations that had been considered "hot spots." We reminded drivers to use extra protection and limit their interactions with people when they deliver.

We truly have been blessed that there hasn't been a huge negative impact on our small business. We've had to deal with a few changes in regulations. Due to COVID, we haven't had monthly KTA meetings, and I have missed those.

Maybe we can start using Zoom to get going again. We are using Zoom meetings for other things, and I would like to use Zoom for that as well.

If you look back at your professional life, what would be three things that you have learned that you would pass onto a

younger member looking at the trucking industry as a career?

Having integrity is the most important asset you can have when starting a career in trucking (or any other field). Also, know you are going to have to work long hours. When you own your own business, you wear many hats, and it's not a 9-to-5 job.

If they grow and have employees, training is crucial for success.

Also, if you're going to grow, you have to treat people the way you want to be treated. That's how my managers were. They knew how to treat people.

What are some professional moments that make you the proudest?

Our business celebrated its 20-year anniversary last year, and achieving that milestone made me proud. I also think just being able to help in our community and to support people. We don't receive awards from our customers. But I've had times when customers have made me aware when our drivers go above and beyond.

We have a larger company that we haul for that is close to us. They are less than a quarter of a mile down the road. We've told them that if they have drivers here, we have a parking lot and a garage. If a driver comes through and needs something, we will help. That ability to offer help to other drivers whenever they are in need is a good thing.

One day a gentleman knocked on our door whose truck had broken down across the road from our



terminal. I was able to make some phone calls to help get him the repairs needed to get his truck started again. This driver spoke very little English, and he had to be in Dallas in the morning. After reaching his dispatcher, we started working on getting him help. About 20 minutes later, the driver came back, knocking again. He told me he got his truck running, so I canceled the service call.

Was there an "aha" moment in your career that defined you?

There have been many "aha" moments for me in this industry. The first is that I had to realize that the trucks are pieces of equipment, and they are going to break down. They are machines, and they don't always run the way you want them to run, so you just have to be prepared. I learned to step back and work with my husband a whole lot more when something goes wrong. That was big.

The other realization was the need to get to know the employees better and what motivates them. Without good drivers and employees, I would still have a job, but not this job. My relationship with them is crucial to running this business. We are blessed to work with great people. 🚛



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Lindell Sharp and his son Scott

MEMBER FOCUS - GETTING TO KNOW LINDELL SHARP OF GIVENS-HOUCHIN INC.

Sim Houchin was a Kentucky dairy farmer and entrepreneur who started a trucking business in 1953 to haul milk for himself and other dairies located locally and in adjoining counties. When the dairy business began producing Grade A milk instead of canned milk, he adjusted his tanks and continued his business.

Mr. Houchin invested in other local ventures over the years and needed a partner to help with the milk hauling business. He approached Charles Givens, a company employee, and told Mr. Givens that he would make him a partner if he would manage the operations and his wife would handle the bookkeeping. Mr. Givens and his wife agreed, and Givens-Houchins Inc. was established.

Mr. Givens retired in March 1991. Mr. Houchin needed another partner so he could keep the business going. He chose Lindell Sharp.

Lindell was in the finance industry, not in the trucking business. He started his professional career as an office employee, working for a local contractor and retail lumber yard while at the same time attending the University of Kentucky Elizabethtown Community College (after 2004, the Elizabethtown Community and Technical College). He was approached by a local savings and loan association manager who offered him a job as their accountant. He worked for the savings and loan association for 11 years and was promoted to vice president and assistant manager.

Lindell was in his local bank one day to discuss some business. The bank president told him they needed a loan officer, and Lindell accepted the offer. After working eight hours a day at the bank, he would then do appraisals locally and in the surrounding counties during the evenings. He also continued taking classes until he received his associate degree. Lindell credits Joe Tobin, the community bank's majority stockholder,



L-R, Lindell, Spencer, Keegan and Scott Sharp

for Lindell's promotion in January 1997 to president and board chair. He served in that position for 23.5 years. On June 30, 2020, he retired from the finance industry but continued his work with Givens-Houchin.

The company currently has 15-18 employees, and for Lindell, having the ability to employ them is a very rewarding part of his career. One employee is Lindell's son, Scott, who is involved in the business and helps with daily operations. Lindell is proud to see his son following in his footsteps with a trucking industry career.

The pandemic inevitably affected Givens-Houchin because it affected the dairy farmers. Also, one employee did miss three weeks of work because of the coronavirus. But the business has survived. Lindell does not think that will change in the next 5-10 years. The shortage of qualified drivers in the industry will continue, and so will a continued demand for service.

As Lindell looks back on his professional life, he has three recommendations for younger KTA members who are looking at the trucking industry as a career:

1. Learn to use and stay up-to-date on changes in technology such as computers, smartphones and social media.
2. The trucking industry is always changing. Understand those changes and adapt to them.
3. As with anything else, hard work pays off. Although the trucking industry is not easy and can be very demanding, it is also highly rewarding.

Lindell appreciates being a KTA member because KTA is an advocate for the trucking industry on both the state and national levels. It provides excellent training opportunities to help members stay current on changing regulations, and it is a great resource to rely on for anything dealing with the trucking industry. 🚛

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TRUCK DRIVERS ARE ESSENTIAL



Truck drivers are an essential part of what keeps America moving. Nearly every product that is sold and bought has been transported at some point via a commercial truck. Despite the big demand for experienced truckers, there is a nationwide shortage of people willing to take charge behind the wheel.

To fill that gap, Hopkinsville Community College (HCC) offers truck driver training, as a certificate program. The intent is to train students with little to no commercial driving experience and prepare them for a high-demand job. The four-week, entry-level course prepares students for the trucking industry. It teaches students to drive tractor trailer trucks, apply their knowledge of commercial driving regulations, prepare receipts for loads, maintain truck logs in accordance with state and federal guidelines, inspect the truck and equipment as well as load and unload. Most importantly, the program teaches students how to be safe and reliable drivers.

The course is designed to help the students acquire their Kentucky CDL-A learner's permit during the first week of class. Once students receive their permit, they are ready to transition to the range to begin training for their driver's license exams and eventually earn their CDL-A license. Nearly 700 students have been trained in CDL through HCC since 2013. The mission of the program is to provide a successful transition into a rewarding career in transportation. The accelerated and accredited program offers six credit hours, a TRU100 certificate and job placement assistance.



HCC partners with several trucking companies that hire entry-level drivers. Recruiters can meet with the students during class to provide their company information and how to apply with the organization.



HCC holds monthly CDL classes, January through November, and students receive DOT physicals and drug screenings prior to enrollment into the course. The curriculum for the program is broken into 40 hours of classroom instruction and 120 hours of range and over-the-road training to fulfill the 160-hour requirement. It qualifies for several financial options open to students who need assistance with the fee, such as WIA program, Kentucky Farm Worker programs, Montgomery GI Bill or Post 9/11 funds, Vocational Rehabilitation program or WorkReady Kentucky scholarships. HCC's CDL program follows the state requirements for CDL permit holders such as age, ability to read, write and speak English, having a valid driver's license and being able to pass a DOT physical and drug screening test.

Through partnerships with Kentucky Trucking Association and the New Driver Coalition, HCC's CDL program has continued to grow. Most importantly, HCC has continued to focus on improving training by bringing the program under the college's umbrella of certificate programs and offering it in-house and not through a third-party provider. HCC hires qualified program instructors and staff and operates with equipment donated from several trucking association partners.

In 2017, Hopkinsville Community College entered into an agreement with Fort Campbell, Kentucky, to train military service members in commercial trucking. The Army's program is known as the Career Skills

Program and their role is to assist service members in acquiring work-ready skills to join the civilian workforce once their military service is complete. About 85% of HCC's CDL classes are comprised of active-duty service members or veterans. At least 95% of HCC students go to direct employment once they receive their CDL and the course pass rate is 97.5%.

HCC partners with several trucking companies that hire entry-level drivers. Recruiters can meet with the students during class to provide their company information and how to apply with the organization. Class sizes are restricted due to the current pandemic. Students and instructors adhere to social distancing guidelines, are required to wear masks during training and practice good hygiene.

HCC is part of the Kentucky Community and Technical College System which is made up of 16 colleges. Thirteen of those colleges offer CDL training through their own programs and one college uses a third-party vendor for the training. 🚚



For more info reach out to Lanita Wilson, Director of Program Facilitation, Workforce Solutions Hopkinsville Community College at (270) 707-3743 or lanita.wilson@kctcs.edu.



TAT BY THE NUMBERS

2,692 CALLS MADE INTO THE NATIONAL HUMAN TRAFFICKING HOTLINE

708 LIKELY CASES OF HUMAN TRAFFICKING GENERATED

1,296 VICTIMS IDENTIFIED

1,014,367 REGISTERED AS TAT TRAINED

AMERICA'S TRUCKERS ARE AN IMPORTANT LINE OF DEFENSE AGAINST HUMAN TRAFFICKING

On any given day, there are tens of thousands of people being trafficked into and within the United States. A large percentage of these victims are minors, often young females, who are brutally forced to perform commercial acts of sex or labor against their will.

January is National Human Trafficking Awareness Month. At its core, this month is about raising awareness for a crime that far too often goes undetected.

The trucking industry has stepped up. Professional truck drivers are the eyes and ears of America's roadways, playing a vital role in ending modern-day slavery. Over the past decade, America's trucking industry has placed itself on the frontlines of this important fight and has made meaningful contributions in the comprehensive effort to identify the victims and perpetrators of this heinous act.

The Kentucky Trucking Association, along with the American Trucking Associations, are partners

with Truckers Against Trafficking. This nonprofit organization trains professional truck drivers on best practices to recognize and report the red flags of human trafficking.

Due in large part to its partnership with this important organization, our industry has served as an effective and powerful ally and as an asset to law enforcement who seek to identify and prosecute these crimes. To date, at least 708 likely human trafficking cases have been generated by truck drivers who witnessed suspicious activity and reported it. Truck drivers have identified 1,296 human trafficking victims and made nearly 2,700 calls to the national hotline after noticing questionable activity while out in the field.

Because of the oppressive nature of human trafficking, perpetrators often commit their crimes during broad daylight, out in the open, and undetected by the general public. It is necessary that our communities are able to recognize the subtle signs of the crime and know how to report it. America is fortunate that truck

drivers, the professionals who spend the most time on the road, are so committed to this cause, helping law enforcement catch these criminals and saving the lives of innocent people.

While January is Human Trafficking Awareness Month, the American public must remain vigilant and committed year-round to battling the human trafficking crisis that plagues our communities and destroys lives. Despite the trucking industry making outstanding strides this last decade, there is a limit to how far individual drivers can carry this progress on their own. We need all Americans to join the fight.

Warning signs that all people should be aware of include an individual not having knowledge of their whereabouts or control of their identifications; restricted and controlled communications or not being allowed to speak for himself or herself; CB radio chatter about “commercial company” or flashing lights that signal a buyer location; signs of branding or tattooing of a trafficker’s name (often found on the victim’s neck); a van or RV that seems out of place or a vehicle dropping someone off and picking them up after 15 or 20 minutes.



The victim you save could be somebody’s daughter, niece or nephew, or a next-door neighbor.



All individuals who believe they have witnessed or are aware of human trafficking should call the National Human Trafficking hotline at 1-888-373-7888.

We urge you to join the trucking industry in the fight against human trafficking. The victim you save could be somebody’s daughter, niece or nephew, or a next-door neighbor. 🚛

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AT LAST, A VACCINE!

WHAT DOES IT MEAN FOR EMPLOYERS?

With the FDA's issuance of an Emergency Use Authorization (EUA) for multiple COVID-19 vaccines and vaccines becoming more widely available, many U.S. employers, eager to safely transition employees back to work or transition workplaces back to normal, are considering implementing vaccine recommendations or mandates in the workplace. The fluidity of the pandemic has yielded yet another decision point for employers — can employees be required to obtain a COVID-19 vaccine as a condition of employment?

At this point, the answer is generally yes — although there are a number of caveats, open questions, and policy decisions to keep in mind as vaccines become more widely available and federal, state, and local agencies and corresponding legal issues continue to morph and take shape. Here is a look at some of the employment-related considerations with mandating a COVID-19 vaccine in the workplace.

1. Equal Employment Opportunity Commission (EEOC)

On Dec. 16, 2020, the U.S. EEOC issued a revised version of its ongoing COVID-19 guidance publication, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” addressing questions related to the administration of COVID-19 vaccinations in an employment context. The new information, outlined in Section K of the publication, clarifies that

employers may require, as a condition of employment, that employees receive the COVID-19 vaccine. However, there are many open questions and significant legal issues for employers to consider under the EEOC's guidance. Some key takeaways for employers from the updated EEOC guidance include:

- (a) The COVID-19 Vaccine is NOT a medical exam under the Americans with Disabilities Act (ADA)

First, the EEOC's guidance clarifies that the vaccine itself is NOT a medical exam. Under the ADA, “medical exams” which are a condition of employment must be job related and consistent with business necessity or be necessitated by a direct threat in the workplace. The EEOC stated that by simply administering a COVID-19 vaccine, employers would not be seeking medical information from the employee, and thus this would not rise to the level of a “medical exam” under the ADA.

- (b) Prescreening Vaccination Questions MAY Implicate the ADA

For employers who choose to implement a mandatory vaccine requirement, the EEOC guidance provides some additional cautions related to prescreening questions (which are recommended by the CDC prior to administering a COVID-19 vaccine).

In order to pass muster under the ADA, the prescreening questions must be “job-related and consistent with

business necessity,” and to meet this standard, employers will need to have a “reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.”

In assessing whether there is a “direct threat,” the EEOC advises employers to conduct an individualized assessment in taking into considerations the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

The EEOC makes clear that the concerns about the prescreening questions will not implicate the ADA where (1) an employer has offered a vaccine on a voluntary basis (i.e., employees choose whether to be vaccinated), which would mean that an employee’s refusal to answer the questions would only mean the employer could refuse to administer the vaccine; or (2) an employee receives an employer-required vaccine from a third party that does not have a contract with the employer (i.e., a pharmacy, broker or other health care provider), the ADA would not apply to prescreening questions.

(c) Confidentiality Issues

The EEOC also makes clear that the prescreening questions (whether voluntary or mandatory) and the responses to those questions should be maintained as confidential information, in a separate file (i.e., not the personnel file), in accordance with the provisions of the ADA. Those employers who administer vaccines themselves, or contract with a third-party provider to administer vaccines, should also be wary of their obligations under the Health Insurance Portability and Accountability Act (HIPAA) as to employee-provided information and vaccination records.

(d) Employee Proof of a COVID-19 Vaccine

Employers may request and require employees to show proof of receipt of a COVID-19 vaccination. Such a question does not amount to a disability-related inquiry in and of itself. The EEOC cautions employers who ask “why” an employee has not or cannot receive a vaccine. These follow-up questions may elicit information about a disability and would need to be “job-related and consistent with business necessity” in accordance with the ADA. Employers who do wish to require that employees furnish proof of vaccination should instruct employees

not to provide any medical information in connection with the vaccination record in order to avoid implicating the ADA.

(e) Disability-Related Exemptions to a Mandatory Vaccine Requirement

The new EEOC guidance also provides some direction to employers for responding to employees who indicate they are unable to receive a vaccine due to a disability. The EEOC reiterates that employers can require that employees “not pose a direct threat to the health or safety of individuals in the workplace.” However, if a mandatory vaccine requirement has the effect of screening out individuals with disabilities, the “employer must show that an unvaccinated employee would pose a direct threat due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’”

The EEOC instructs employers to conduct an individualized assessment of four different factors to determine whether a “direct threat” exists. These include considering: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.”

If an employer concludes there is a direct threat, the EEOC indicates that the employer may “exclude” the employee from the workplace, but cautions employers against terminating the worker without first considering whether there may be an accommodation available. The EEOC advises that employers should engage employees “in a flexible, interactive process to identify workplace accommodation options” and also notes that one factor that warrants consideration may be the prevalence of employees in the workplace who have already received the vaccine.

Practically speaking, it seems this analysis will still hinge on individual circumstances related to things like the nature of the employee’s disability, the work conditions, and the ability to mitigate potential hazards through job modifications such as increased social distancing, PPE, telework, etc.

Employees working in high-risk environments or with high-risk populations (i.e., food service and food processing, health care, nursing homes, and schools) may have fewer options for accommodating vaccine

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← continued from page 23

exemptions, especially given the risk surrounding the efficacy of PPE measures in industries requiring constant exposure and close face-to-face contact. But again, the EEOC guidance makes clear that the number of employees vaccinated will have a bearing on this analysis.

(f) Religious Exemptions to a Mandatory Vaccine Requirement

Similar to the disability-related exemptions, the EEOC guidance reiterates that employers who plan to require a vaccine also provide an exemption where the employee maintains a “sincerely held religious belief” or observance which prevents them from taking the vaccine. This standard is fairly broad and encompasses more than traditional organized religions, but the protection would not extend to employees who seek an exemption due to political beliefs, personal objections to vaccinations, or safety-related concerns with the vaccine. The EEOC notes that as in the case of the ADA, Title VII also allows employers to deny an employee’s request for an exemption to a mandatory vaccination if the employer can show an “undue hardship” by allowing the employee to forgo the vaccine. Again, the EEOC makes clear this would hinge on the individual circumstances applicable to each case but would largely depend on the employer’s ability to provide alternative protections for the employee, the rest of its workforce and, where necessary, members of the general public.

(g) Genetic Information Nondiscrimination Act (GINA) Implications

Lastly, the EEOC makes clear that simply administering the COVID-19 vaccine to employees or requiring employees to provide proof that they received the COVID-19 vaccine does not implicate Title II of GINA because it does not involve genetic information as defined by the law. Under Title II of GINA, employers may not use, acquire or disclose an employee’s genetic information in connection with their employment, subject to six narrow exceptions.

As with the ADA, prescreening questions, or where an employee provides more than just proof of vaccination, may still implicate GINA. Accordingly, the EEOC advises that employers should avoid prescreening questions which implicate genetic information (which should be fairly easy to do) or require employees to obtain the

vaccine through their own means and simply provide proof of the same to their employer, without any extraneous medical information.

While the updated EEOC guidance provides certain clarification for employers contemplating workplace vaccination strategies, the exceptions and exemptions under the ADA and Title VII are fact-intensive and will vary widely. Employers who do intend to adopt mandatory vaccination programs are advised to review potential reasonable accommodations for disabilities and sincerely held religious beliefs and strategize how they will respond to such requests in order to minimize legal exposure under Title VII and the ADA.

2. Occupational Safety and Health Administration (OSHA)

While OSHA has also not yet provided specific COVID-19 vaccination guidance, its longstanding position regarding the flu and other vaccines indicates support for employer mandates so long as employees are “properly informed of the benefits of vaccinations.” The agency has caveated this by clarifying that an employee who refuses a vaccine due to a medical condition that the employee reasonably believes would cause serious illness or death may still be protected by Section 11(c) of the OSH Act, which governs whistleblower claims based on workplace health and safety.

Furthermore, it is worth noting that in its interim guidance issued in May of 2020, OSHA had encouraged its own investigators to obtain the COVID-19 vaccination as soon as it becomes available. There is likewise widespread speculation that OSHA may look to apply the General Duty Clause, OSHA’s general citation standard, to issue citations to employers who fail to offer the COVID-19 vaccination to its workforce as an enhanced safety measure. As with the EEOC, additional guidance is expected to shed light on the direction of OSHA’s enforcement position on this topic.

3. Workers’ Compensation

On a similar note, what happens if an employer recommends or requires a COVID-19 vaccine for its employees and the employee is injured due to the vaccine?

Most likely, state workers’ compensation coverage would come into play to cover any physical injury, whether due to a vaccine side effect or other physical injury to the employee caused by the vaccine. This would generally be true in the case where an employer recommends,

requires, pays for, or administers the COVID-19 vaccine at its worksite. On the flipside, workers' compensation coverage would likely not apply in a scenario where an employee obtains a COVID-19 vaccine without the recommendation, mandate or sponsorship from the employer.

Typically, subject to some state-specific exceptions, workers' compensation serves as the exclusive remedy for employees who sustain physical injuries within the course and scope of employment. In other words, an employee would be limited to pursuing workers' compensation benefits and cannot pursue tort claims against the employer absent a showing of willful or more serious conduct. While workers' compensation laws may apply to shield employers from tort claims (i.e., personal-injury type claims) brought by employees who sustain physical injuries as a result of an employer-sponsored COVID-19 vaccine, these same laws may not preclude tort claims against third party entities, such as the vaccine manufacturer.

4. National Labor Relations Board (NLRB)

Finally, there are labor considerations for both union and nonunion employers in mandating a COVID-19 vaccine. For union employers, requiring a COVID-19 vaccine may be considered a mandatory subject of bargaining, triggering an employer's duty to bargain prior to implementing such a requirement. Employers should review any existing labor agreements for language which precludes or permits such a mandatory vaccination scheme. Second, nonunion employers must also be mindful of how implementing a vaccine requirement could implicate Section 7 of the National Labor Relations Act (NLRA), which provides employees the right to engage in "concerted activities" for the purpose of "mutual aid and protection." Practically speaking, employees who join together to speak out for or against a mandatory vaccine requirement, who collectively create outside social media postings or other organized interoffice communications regarding the requirement, or simply discuss the employer-imposed requirement would be protected by federal labor law and, generally, cannot be subject to discipline or termination as a result of this conduct. Notwithstanding, even if employees band together in concerted activity under the NLRA and cannot be disciplined for that concerted activity, they could still be disciplined for refusing to take the vaccine or even permanently replaced if they choose to go out on a work stoppage.

Typically, subject to some state-specific exceptions, workers' compensation serves as the exclusive remedy for employees who sustain physical injuries within the course and scope of employment.

While the current legal landscape suggests employers, especially those in certain high-essential industries, may be able to require employees to obtain a COVID-19 vaccine, the legal landscape changes almost daily, and there are many open questions, potential public relations pitfalls, and employee morale issues with doing so. Until there is more guidance from the federal, state, and local level on this topic, and more widespread use and availability of the vaccine beyond the healthcare industry, employers may want to consider promoting rather than requiring a vaccine as a condition of employment just as they would a flu vaccine. 🚗



Abbey Moland is an attorney at McGrath North and counsels Fortune 500, midsize and startup businesses, colleges and universities, and nonprofits on a wide range of labor and employment matters. Her practice spans across the country in areas including wage and hour compliance, workforce reductions, employee leaves of absence, FMLA and disability accommodations, workplace investigations, hiring practices, disciplinary actions and employee terminations, immigration and workforce authorization, management and employee training on workplace issues, policy formation, union organization, noncompete issues, OSHA investigations and employee class-action litigation. She is also experienced in defending employment-related litigation and providing day-to-day counseling to avoid unlawful employment practices. Moland can be reached at (402) 633-9566 or amoland@mcgrathnorth.com.

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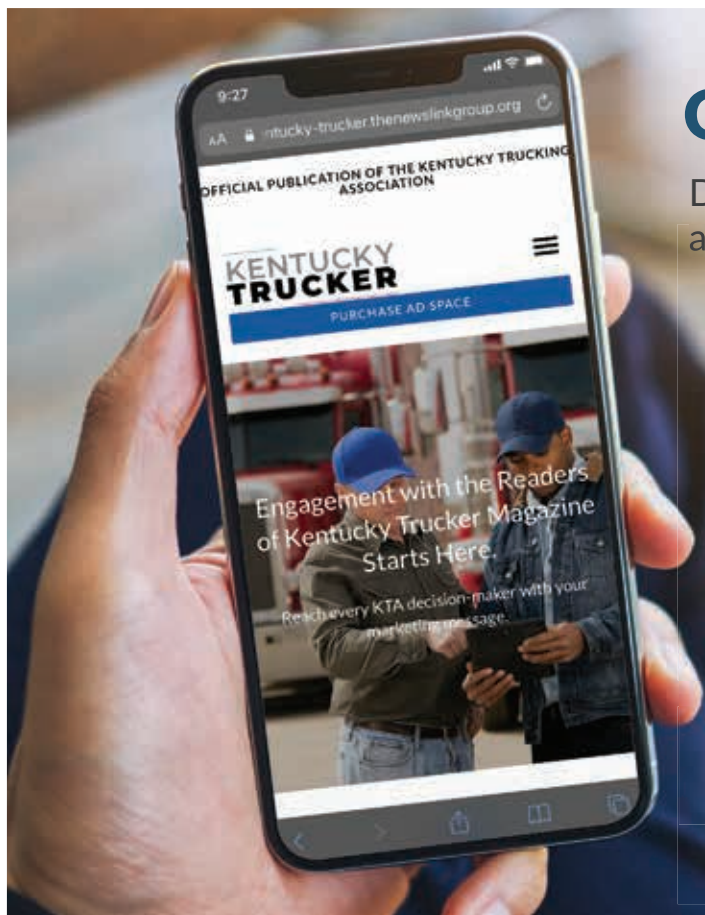
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