

# Employment Update: How COVID-19 Changed Your Workplace

January 25, 2022

Deborah Kelly

- **Then v. Now**
- **What Would a Return to “The Office” Even Look Like?**
- **What’s Different About Your Employees and Customers?**
- **What Will Be Your Policy on Covid Protections and What’s the Fallout?**
- **Anticipated Litigation**

# 62.8%

**of U.S. population  
is fully vaccinated  
as of 1/13/21**



Leana S Wen, NYT week of Jan 6

2/20



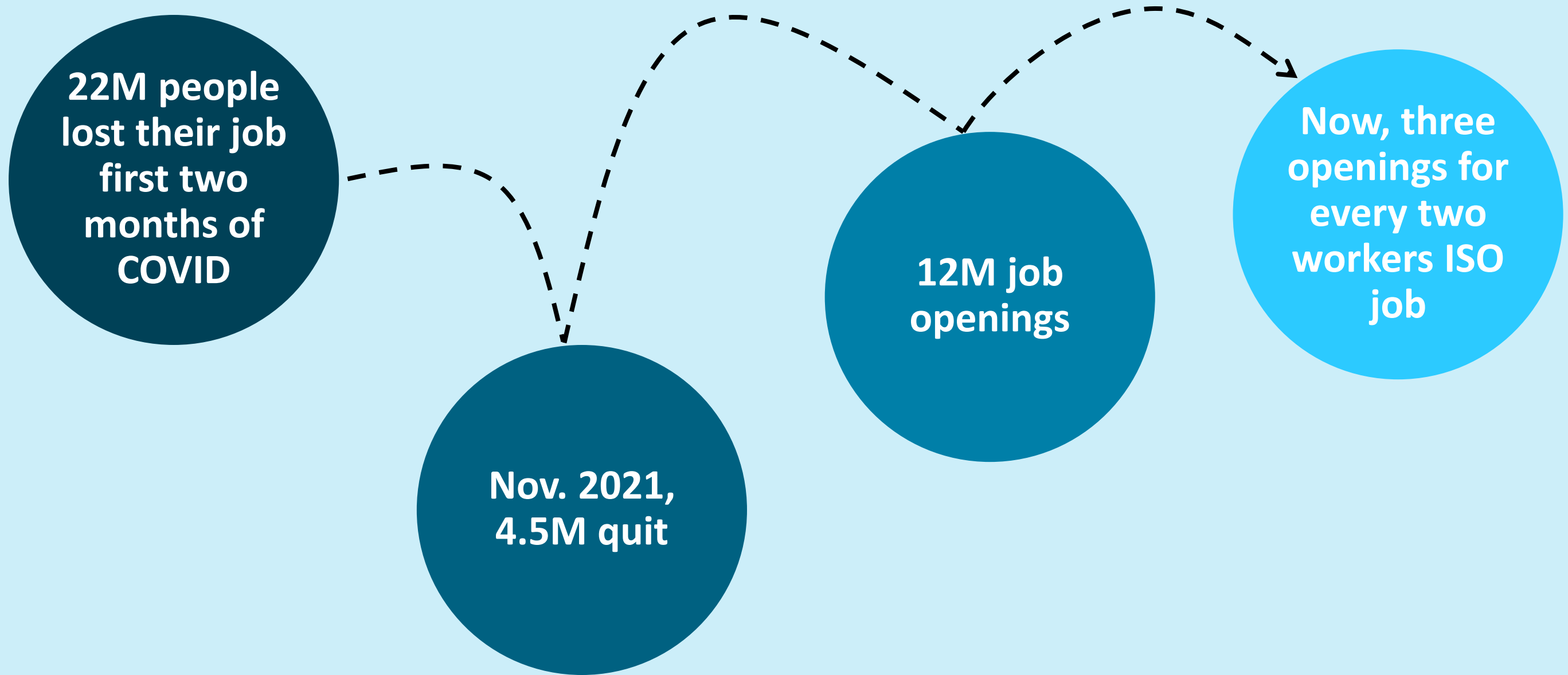
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# Story of Turnaround/Resilience

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People came rushing back to work

INSTEAD

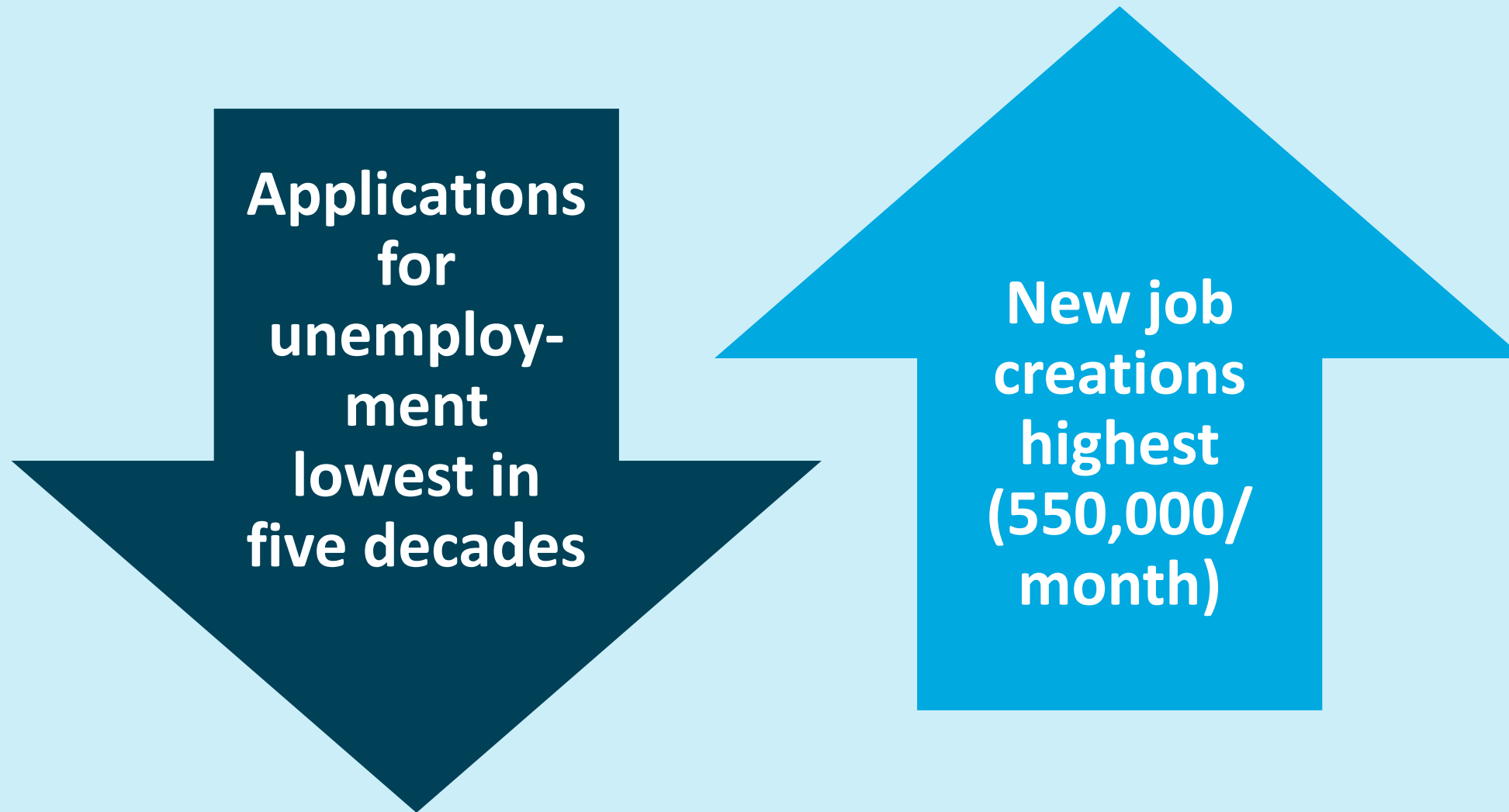
AMERICA  
CALLED IN SICK



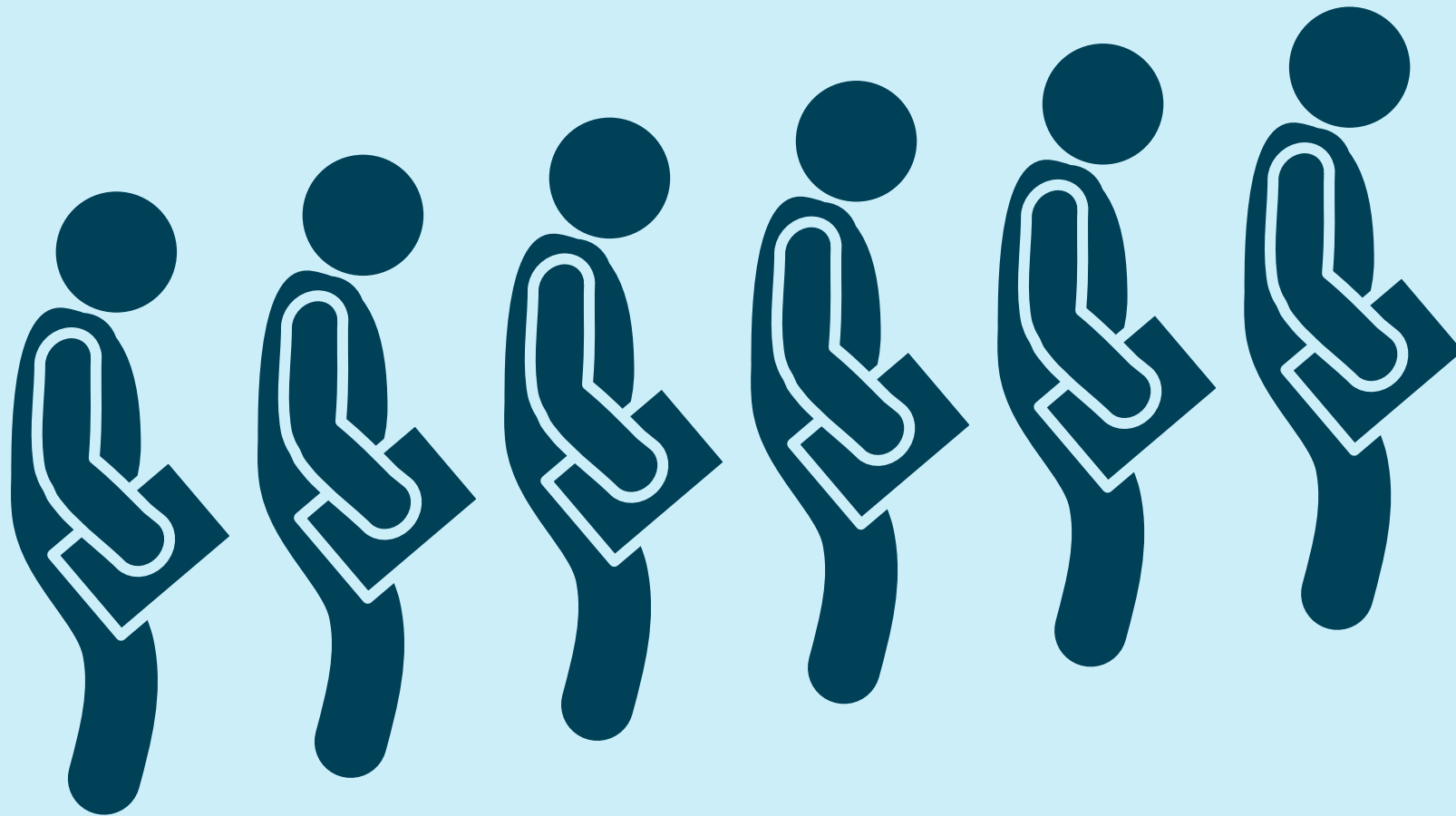


# THE BIG QUIT / THE GREAT RESIGNATION





Source: WSJ 12/31/21.



# Employment Benefits Not Reason for Unemployment

# From Employer's to Employees' Market

2/20

employees

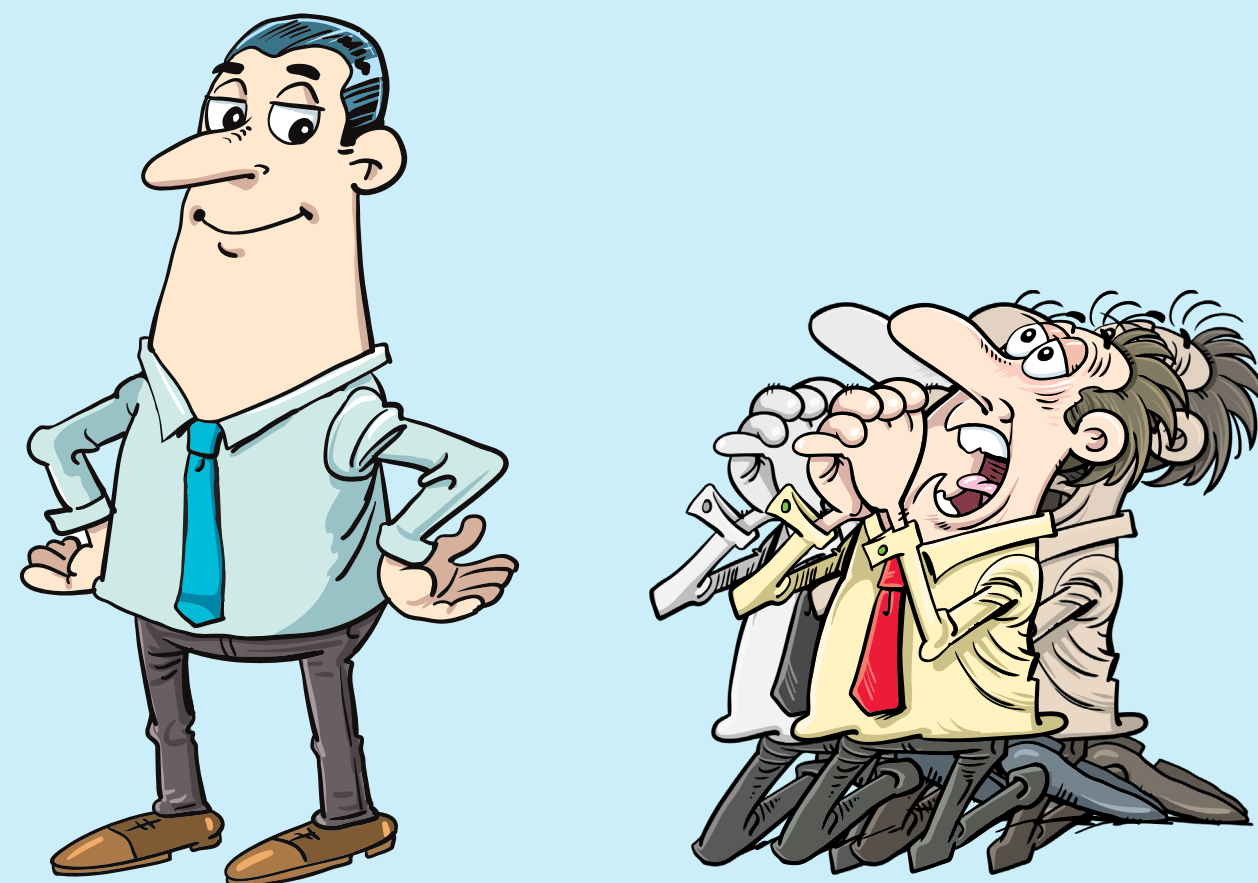
employer



1/22

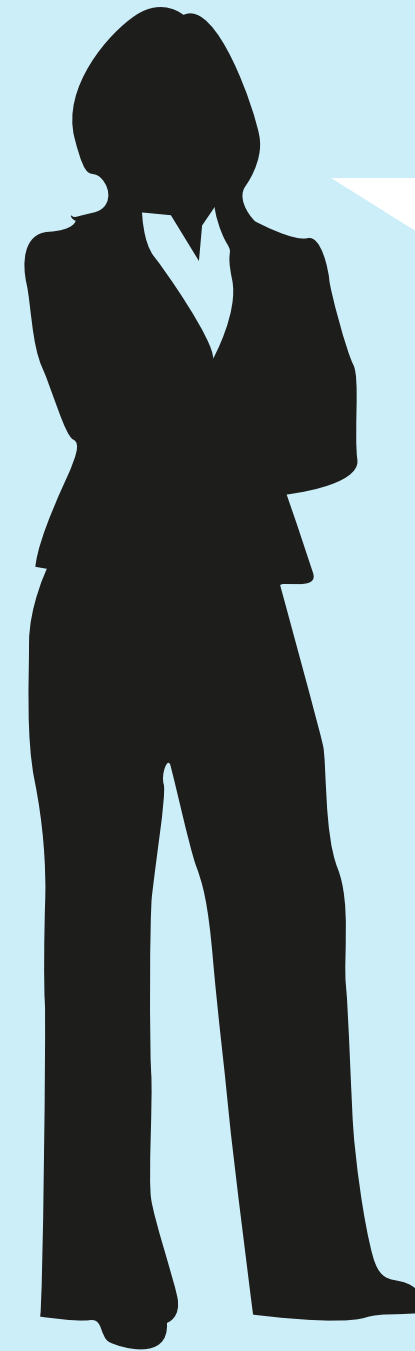
employee

employers





**Get back to  
the office!**



No, thank you.  
I'm going to  
continue working  
from home.  
Kthxbye.

J.P.Morgan

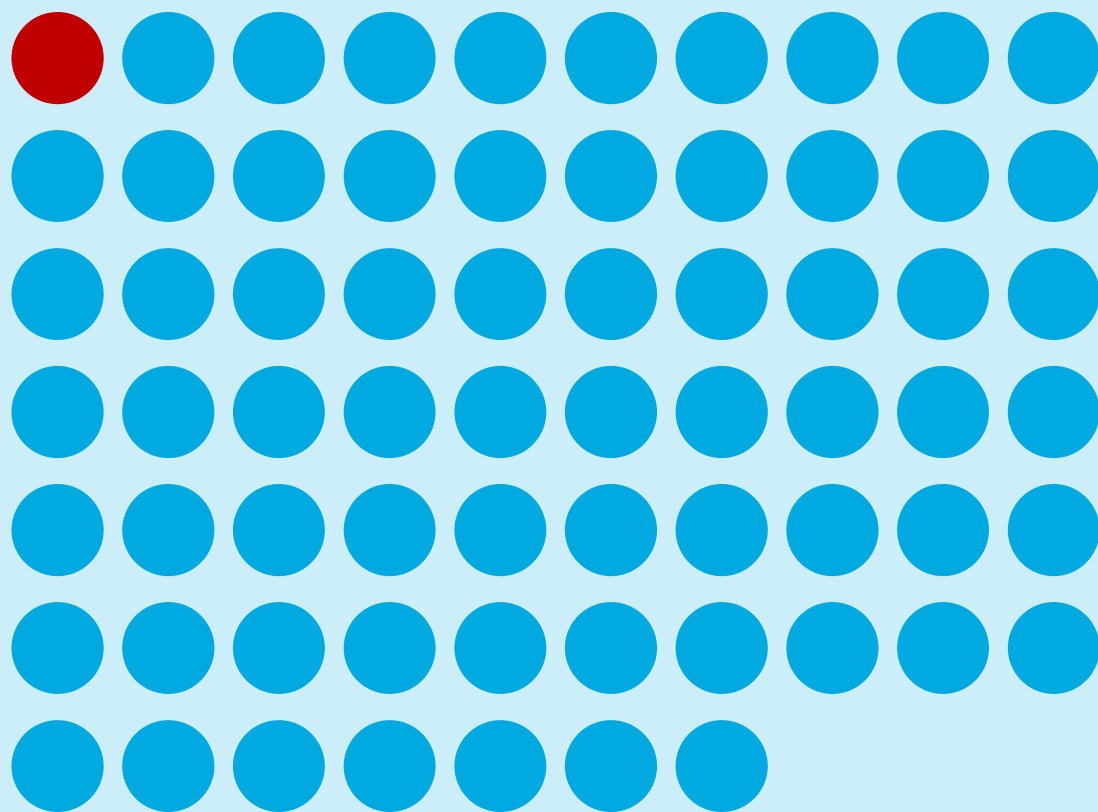
Goldman  
Sachs

# Remote Working Flips From “You’re Lazy” to “Or Else”

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## Before 3/20

- 1 in 67 jobs remote



## Now

- 1 in 7 jobs remote



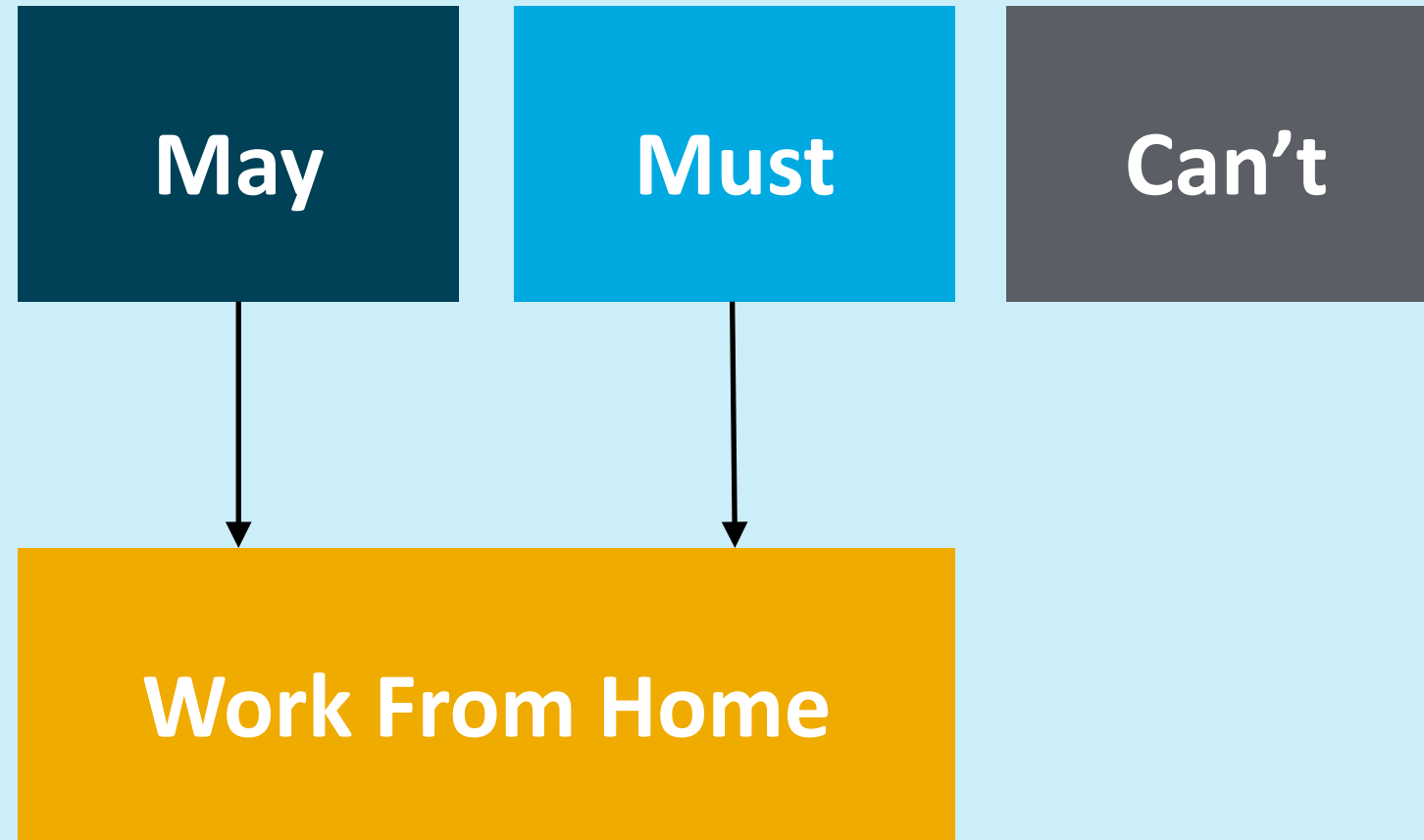
# What Can/Should You Require to Return to the “Workplace”?

14



# Who May/Must/Can't Come Back to the Workplace?

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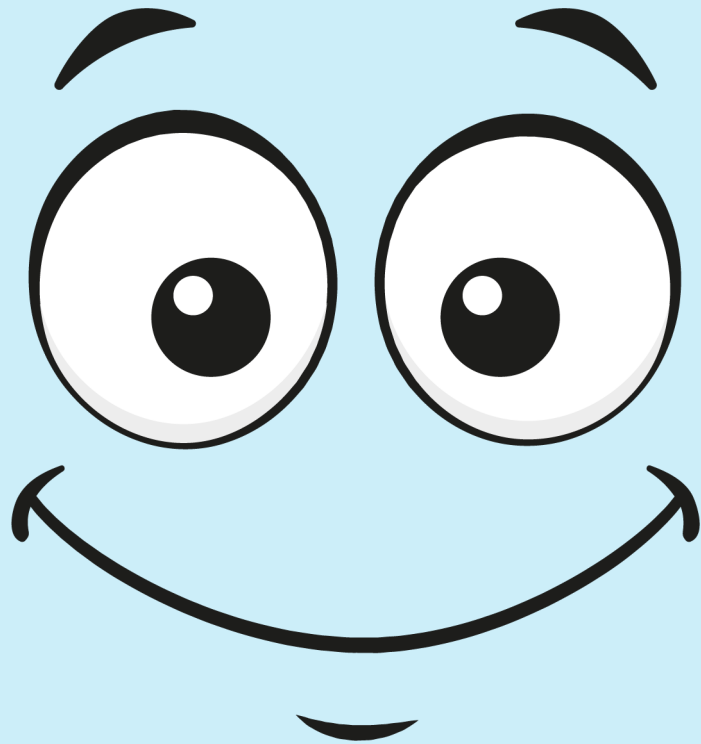




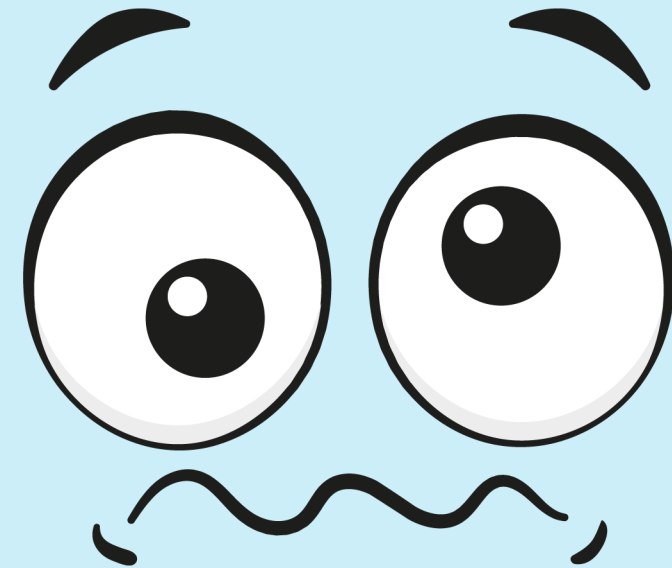
# The 2020 Worker Is Not the 2022 Worker

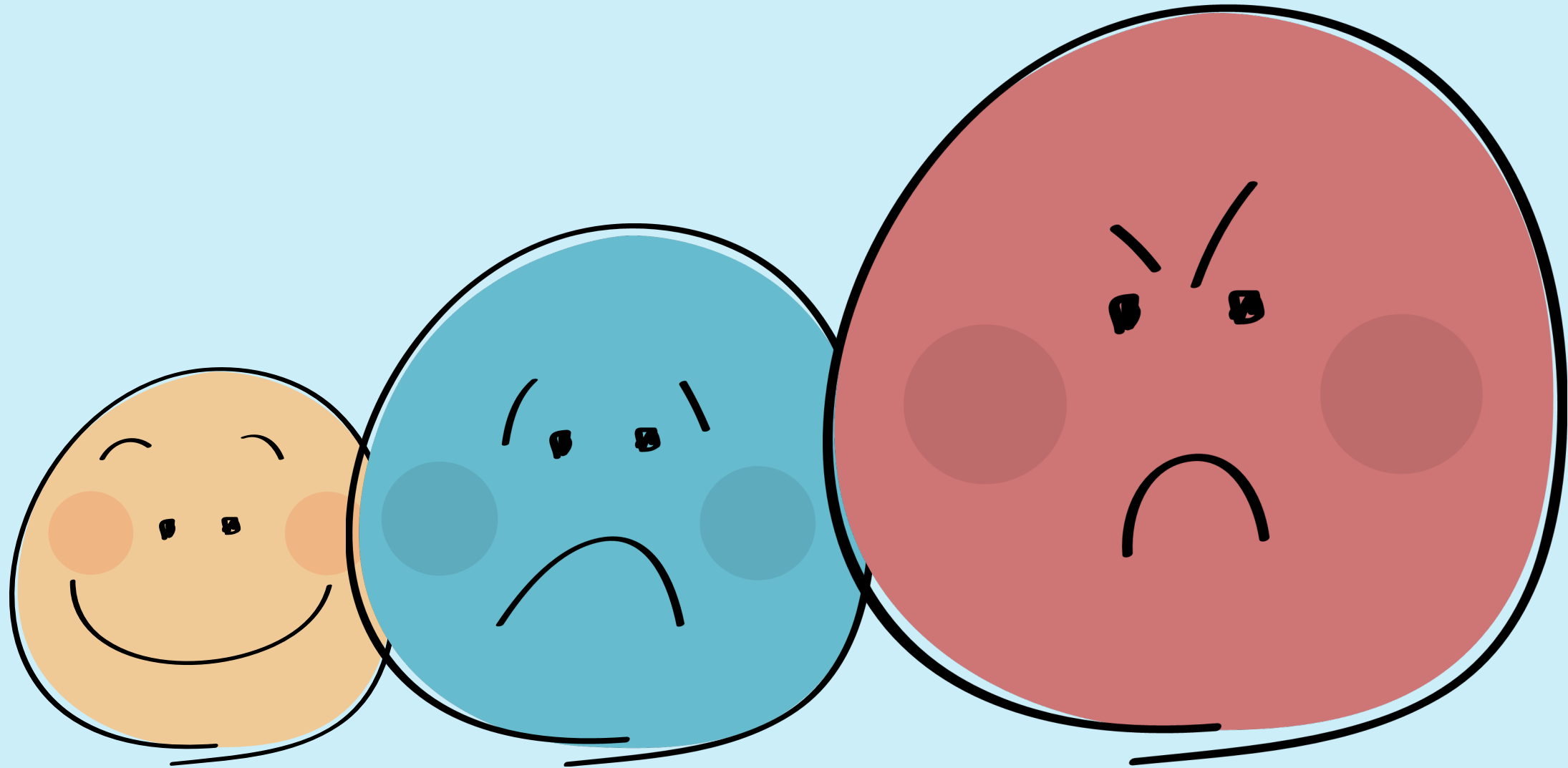
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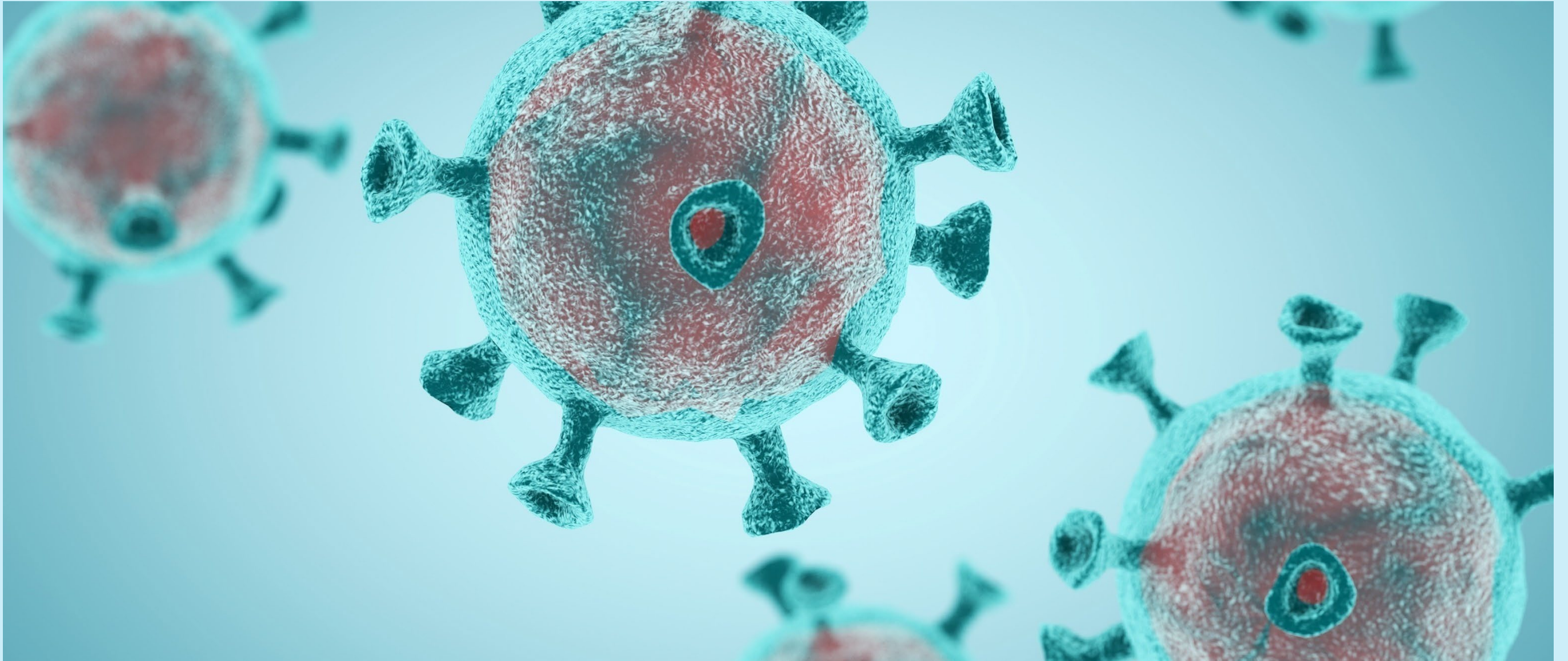
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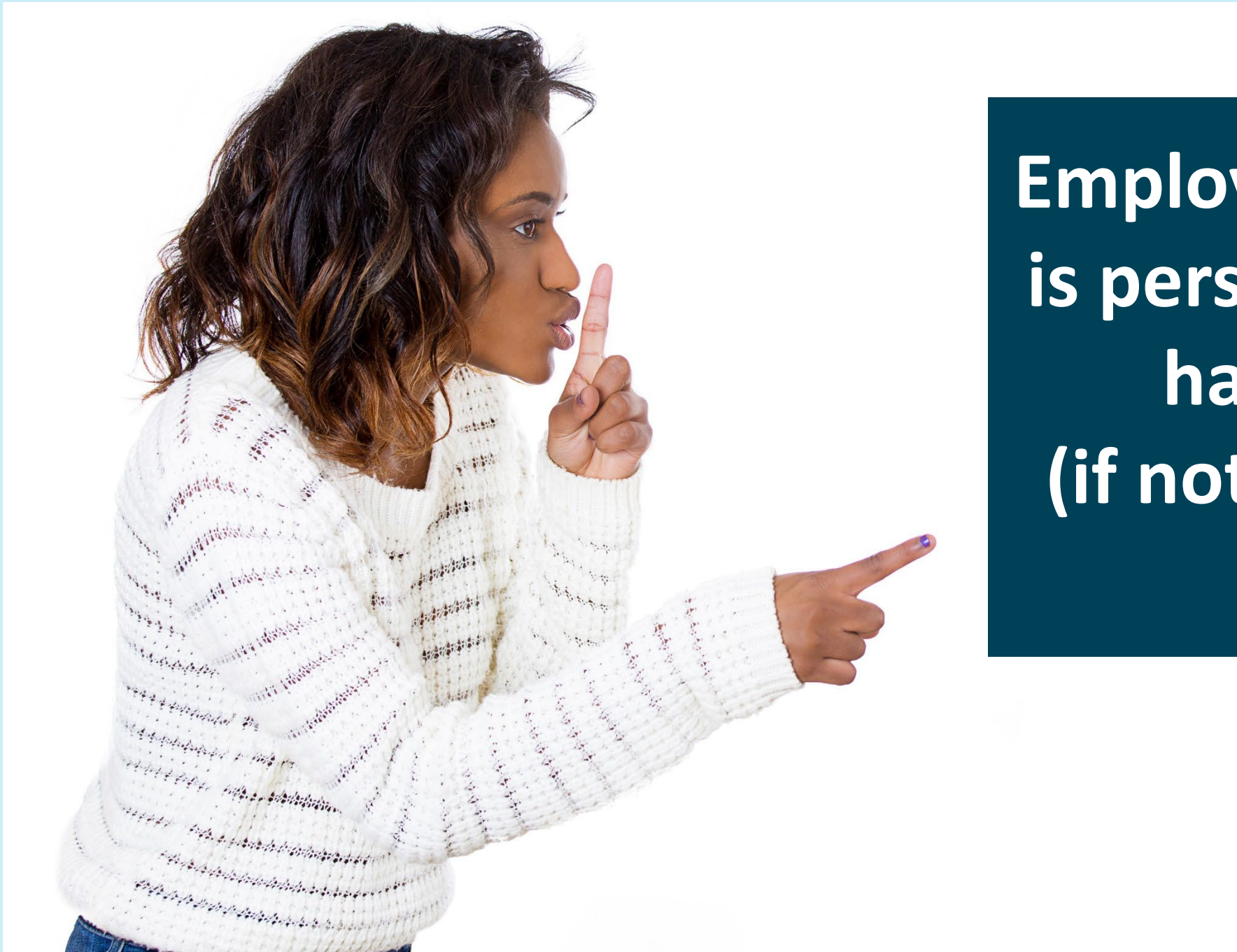


# Expanded ADA Obligations/Leave

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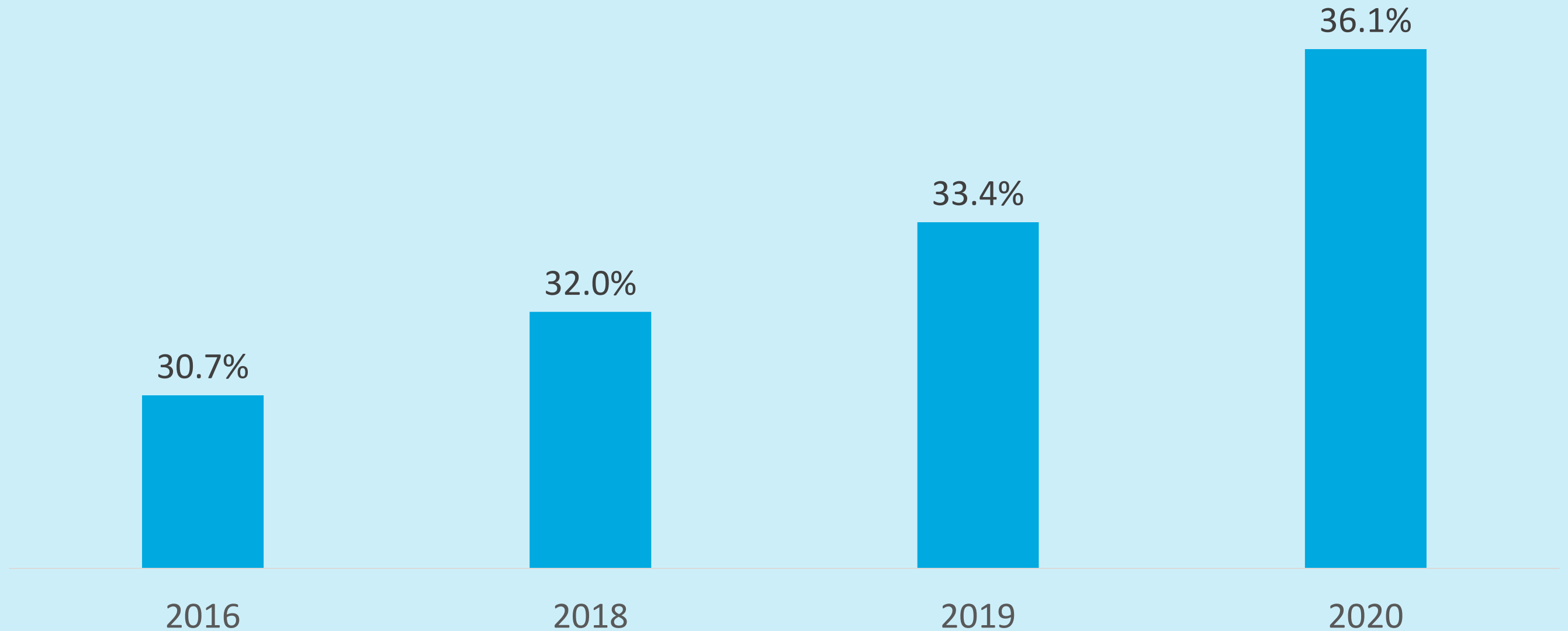




**Employee's personal life  
is personal – they don't  
have to tell you  
(if not COVID-related),  
unless...**

# Expansion of Disability Claims

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## Employer

- Coronavirus = direct threat
- Questions, once barred, now appropriate
- “You don’t have the right to infect me”



## Employee

- Fewer requirements for doctor’s verification
- Sensitivity to emotional issues
- Hard to argue working from home isn’t work





# Customers Take It Out on Workers

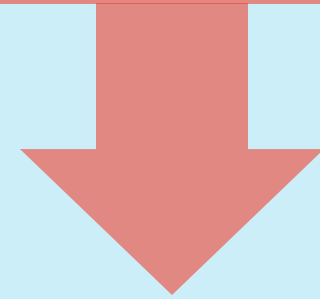
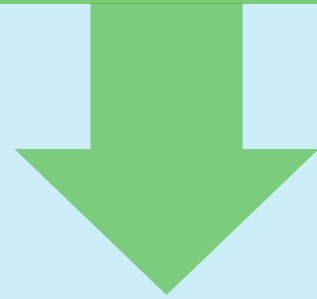
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# Customer Is NOT Always Right

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- Employees who don't have to work with customers are happier than those who do



Source: WSJ 1/2/22.



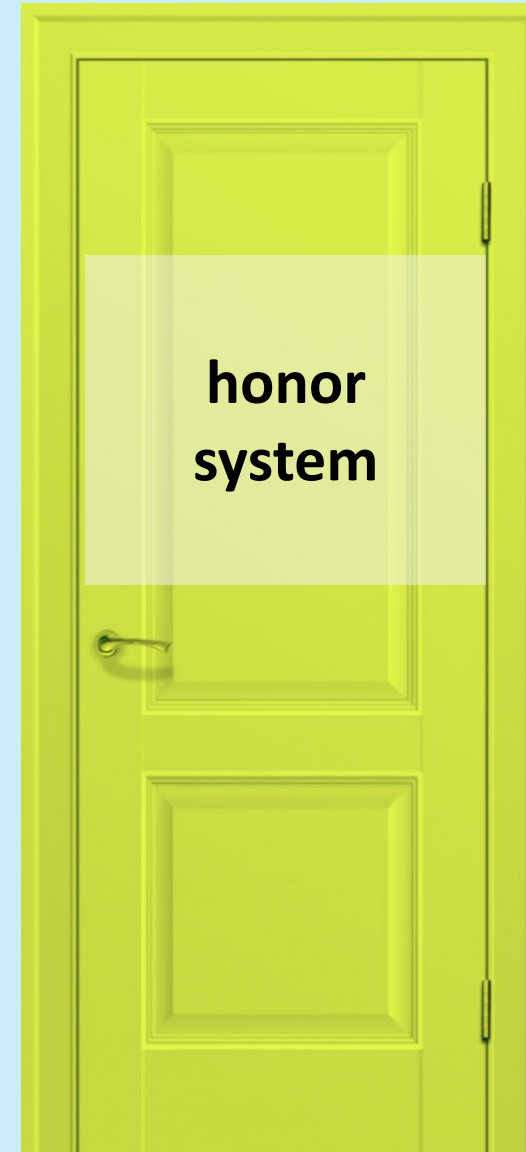
# Pushback From Employees

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**What should  
our policy be?**





**Can I mandate  
that all employees  
be vaccinated?**

**Yes, you can mandate.**



# Who Requires Vaccination?

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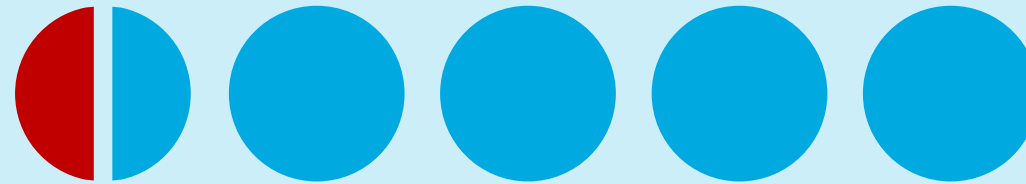


**NYC on-site workers**

Source: Willis Towers Watson.

# Who Requires Vaccination?

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**Fewer than one in five  
companies said they  
would mandate  
enforcement regardless  
of OSHA outcome**

**Must I mandate  
that all employees  
be vaccinated?**

**No. Unless you are a health  
care provider or the state  
requires, you do not have to  
mandate vaccination.**





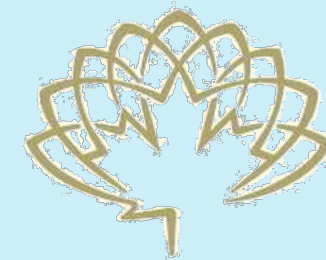
**What if I  
mandate vaccination  
and some employees  
won't get vaccinated?  
Can I fire them?**

**Yes. Unless there is a  
medical or religious reason  
why they can't.**





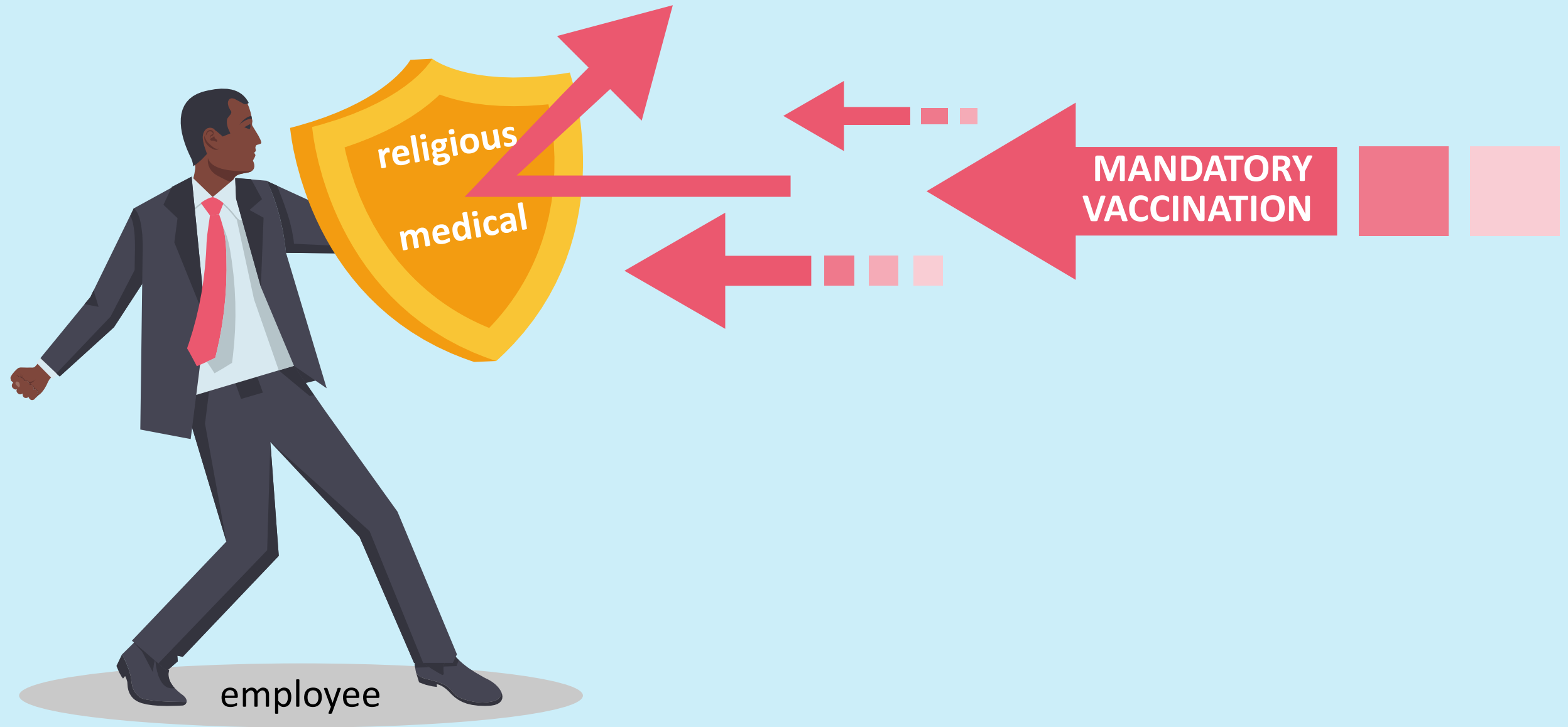
- Chair, Credit Suisse (**Antonio Horta-Osorio**) fired
  - Broke rules on trips abroad
- **Djokovic** out of Wimbledon and possibly more...
- Canadian pension fund CEO (**Mark Machin**) resigns
  - Queue-jumped to Dubai to get early COVID vaccine



CPP  
INVESTMENT  
BOARD

# Mandatory Vaccination Exceptions

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**If there is a  
medical or religious  
reason, do they get  
to come to work  
like everyone else?**

**No. You can require they  
always wear a mask  
and test frequently.**



**Do I have to  
pay for the test?**

**Yes. Just like you have  
to pay for other  
accommodations.**



**Didn't the  
Supreme Court say  
mandatory vaccinations  
are illegal?**

**No. Here's what the  
Court said...**





# OSHA Rules for Private Employers

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# OSHA Rules for Private Employers

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- Option to more narrowly tailor to specific jobs
  - Would have affected 80M workers
- Majority (6-3) blunt instrument that makes no distinction based on industry or risk of exposure
- Fed agency can't authorize requirements not set by Congress
- Dissent: SCt is telling the agency charged with protecting worker safety that it may not do so
- Upheld mandatory vax for health care workers at facilities receiving federal money (5-4)





**What can OSHA do  
if the ETS is  
dead for good?**

- Draft permanent regs on infectious diseases
- Draft narrower regs
- Cite employers under OSHA general duty clause to protect workers from “recognized hazards”





**State laws would have been pre-empted by OSHA legislation; now it's a patchwork quilt**



- **FLSA claims:** OT claims from working remotely (how will you track); changing tasks, off the clock, safety checks, paying for personal equipment and testing
- **OSHA claims** for unsafe workplaces/workers' comp
- **Discrimination** for treating people differently in work arrangements
- **ADA claims** (expanded definition of reasonable accommodation)

