



Coalition of Franchisee Associations:

COVID19 *Sticking Points*: Mandatory Vaccines and Other Developing Issues (Including PPP)

November 19, 2020

Presented by:

Andria L. Ryan, J. Hagood Tighe and Patrick Dennison

alureryan@fisherphillips.com htighe@fisherphillips.com pdennison@fisherphillips.com

Vaccines and the Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are very fact-specific.
- Always take state and local law into account.
- This situation is very fluid and could change rapidly due to a variety of factors.
- No approved COVID-19 vaccine is currently available in the U.S.

Vaccine Issues – An Overview

- Flu Shots
 - CDC guidance
- CDC comments regarding the flu
- Possible Exemptions?
 - Medical
 - Sincerely-held religious beliefs
 - Other?
- COVID-19 vaccinations



Legal Landscape

- Employer must keep workplace free of recognized hazards while respecting employees' individual rights
- Generally, with some critical limitations, employers can enforce mandatory vaccine policies
- Always consider state and local law
- *Contrast* vaccinations with employee screenings (medical examinations)



Legal Landscape -

Screening vs. Vaccinations

- Employers' right to screen is generally more limited than the right to require vaccinations.
 - Current permissible practices of temperature checks, symptom screening, and COVID-19 testing are based on the severity of the pandemic – the significant risk of substantial harm that someone with the virus or symptoms of it would present in the workplace.



OSHA General Duty Clause

- Describes the employer's duty to maintain a workplace free of recognized hazards



ADA – American with Disabilities Act

- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits employer’s rights to inquire/conduct medical exams
 - Must be job related, consistent with business necessity
 - Significant risk of substantial harm
 - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information

- Similarly, **Title VII** may require accommodation of an employee’s sincerely-held religious beliefs or practices.

What Does the EEOC Have to Say?

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (Issued in 2009, *updated* in response to the COVID-19 pandemic – March 21, 2020)

Excerpt from response to Question No. 13, regarding whether employers covered by the ADA and Title VII may require flu shots:

“Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. ***As of the date this document is being issued, there is no vaccine available for COVID-19.**”

Policy Addressing Vaccine Expectations

- Consider *required* v. *strongly encouraged*
- Any requirement should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.
 - Clearly describe expectations and rationale
 - Explain how to seek an exemption as an accommodation
 - Follow the *individualized* accommodation process diligently
 - Ensure no retaliation (or appearance of retaliation)
 - Safeguard all medical information - separate from general personnel files

Mandatory *Flu Shots*

- Subject to some limitations, employers *may* require employees to get the flu vaccine.
- Some jurisdictions *require* flu shots for employees in certain positions, e.g., healthcare workers with patient contact. Others prohibit mandatory vaccines.
- CBA (collective bargaining agreements) may limit vaccine requirements; employer must communicate with the union

MANDATORY

Limitations

- EEOC (Equal Employment Opportunity Commission):
 - An employee may be entitled to an exemption from mandatory flu shots due to an ADA-covered disability or other medical circumstance
 - An employee may be exempted from a flu shot requirement based on sincerely-held religious beliefs, practices, or observances
 - In either case – engage in and document communication with employee to determine whether a reasonable accommodation is needed and feasible
 - The *process* may be as important as the final decision
- Consider potential reasonable accommodations

Anti-Vaxxers, Other Considerations?

- Some state laws expressly protect employees' rights to engage in legal outside activity, including political activity.
- Other state laws may affect employer's vaccination policies.
 - i.e., Oregon – some vaccines must be *offered*, but generally may not be *required*
- Remain mindful of employees' Section 7 rights to band together regarding terms and conditions



May Employers require a *COVID-19 Vaccine*?

- *Probably* – subject to the same exceptions as the flu vaccine.
- Policy should explain expectations, rationale, job-relatedness and availability of exemptions as a *reasonable* accommodation.
- Always consider state laws.
- Safeguard employee medical information.



Should an Employer Require Vaccinations?

- Good employee relations are vital for many reasons:
 - Clients, customers and the public notice
 - Critical to maintaining focus, productivity and community relations
 - Consider possible susceptibility to union organizing efforts
- Validate approvals and appropriate delivery of the vaccine.
- Employer pays for mandatory vaccines.
- Evaluate the likely response of your employees.
- Think through logistics (i.e., on-site?)
- Do not underestimate the importance of effective communications.

Summary

- CDC: Vaccinating now is important, to protect the workplace *and* reduce strain on nation's healthcare system.
- Flu shots should, ideally, be administered soon.
- Formalize vaccination policies now.
- Over 80% of employees get flu vaccines when *required* – almost twice the rate as when vaccines are *strongly encouraged*.
- Anticipate issues, questions and level of pushback, if and when an approved COVID-19 vaccine becomes available.



PPP Developments

SBA Form 3509

- Loan necessity questionnaire for borrowers that received \$2 million or more from the Paycheck Protection Program (PPP).
- Stated purpose is to “facilitate the collection of supplemental information....to inform SBA’s review of good-faith certification that economic uncertainty made loan request necessary to support [borrower’s] ongoing operations.”
- Requires significant information not previously required and to certify the accuracy of all information and supplementary documents submitted.
- 10-days to complete and submit supporting documentation from the time borrower receives questionnaire.
- Failure to complete may result in the SBA’s determination of ineligibility, resulting in loan repayment or other available remedies (False Claims Act, 31 U.S.C. § 3729 et sq.)

SBA Form 3509

- Information Sought:
 - Whether on the date of application borrower or its parent company was publicly traded;
 - Whether on the date of application any publicly-traded company, private equity firm, venture capital firm, or hedge fund owned 20% or more of any class of borrower's outstanding equity securities;
 - Whether on the date of application at least 50% or more of borrower's common equity, or equivalent equity interest, was owned, directly or indirectly, by another company or by a foreign, state-owned enterprise;
- Additional Questions:
 - Borrower's "approximate additional cash outlays" for various alterations to its operations;
 - Whether between 03/13/2020 and end of covered loan forgiveness period borrower "paid any dividends other capital contributions (other than for pass-through estimated tax payments)" to its owners;
 - Whether during the same period borrower prepaid any outstanding debt; and
 - Whether during the forgiveness period borrower paid any employees compensation exceeding \$250k on an annualized basis.

SBA Form 3509 Issues

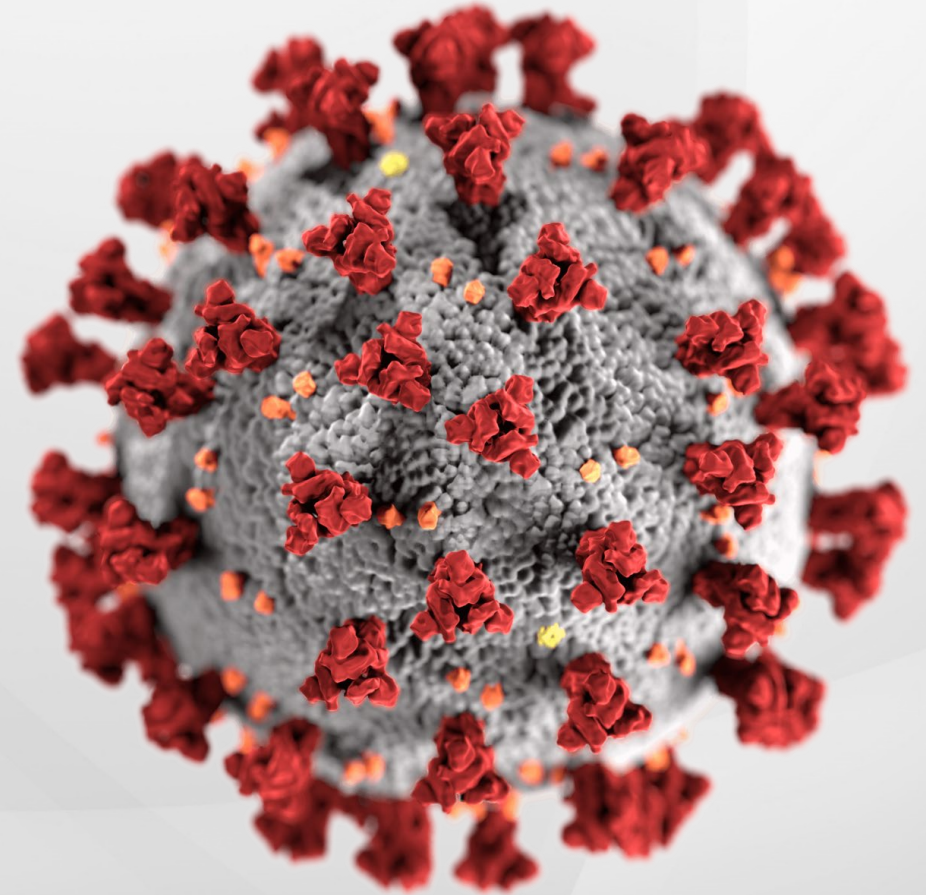
- Applications based on info available at the time of application, but questionnaire focuses on how borrowers were actually affected by pandemic, and whether loans (& forgiveness) were/are needed.
- Unclear whether SBA will retroactively apply unknowns at the time of application when evaluating good-faith certification and forgiveness.
- Important for borrowers to provide timely and accurate answers/documentation to avoid false, incomplete, or seemingly misleading information.
 - 18 U.S.C. §§ 1001 & 3571 (false statements to federal officials)
 - 18 U.S.C. § 1014 (false statements to a lending institution)
 - 18 U.S.C. § 1344 (bank fraud)
 - 31 U.S.C. § 3729 et sq.) (civil false claims)



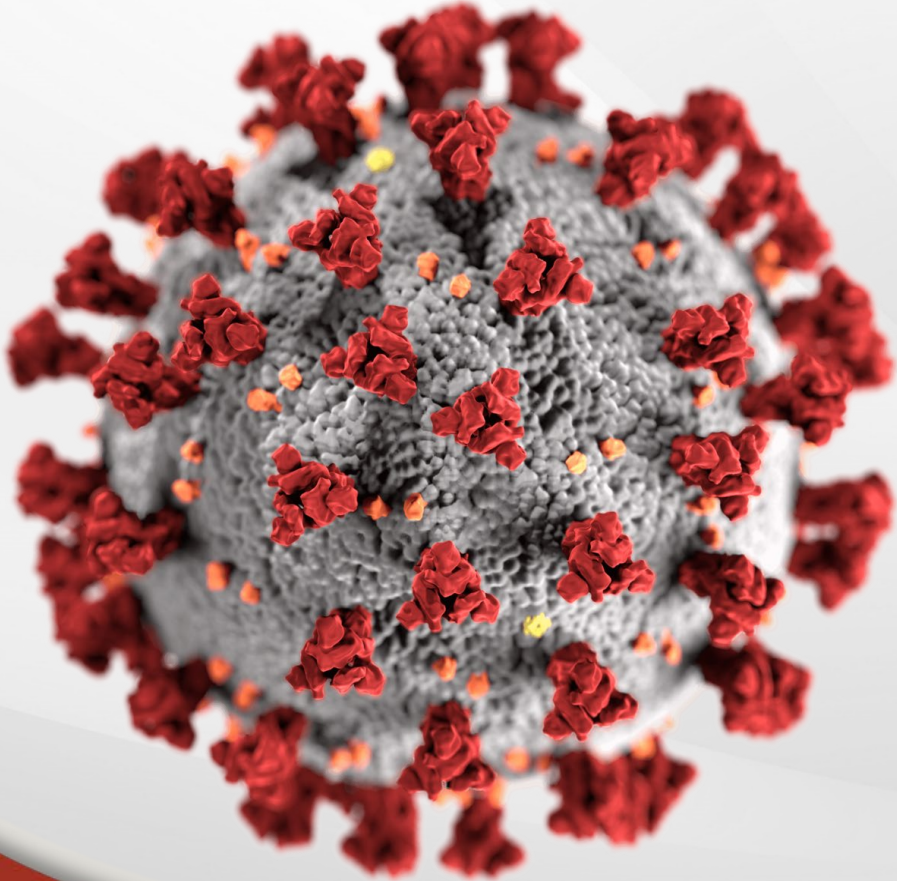
COVID Lawsuits

COVID Lawsuits - Is this part of the “new normal”?

- Steady rise in COVID-related lawsuits
- 1,035 COVID-related employment lawsuits filed to date
- Most common case type – remote work/leave conflicts

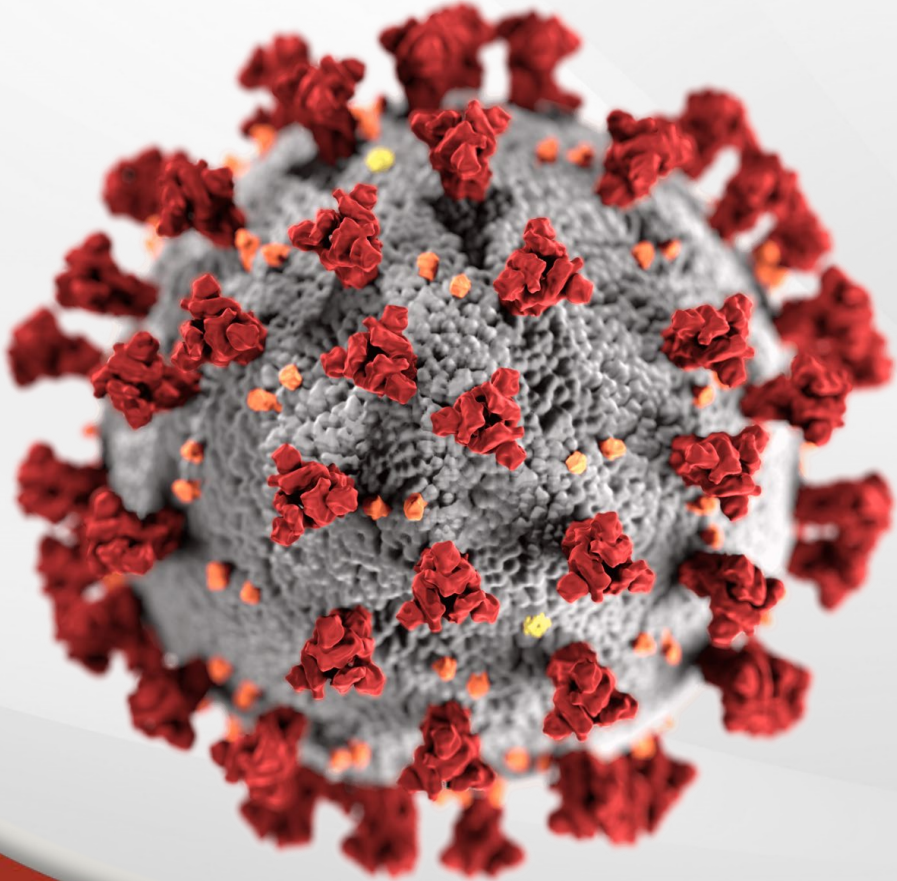


COVID Lawsuits



- Of 776 COVID-related employment lawsuits filed to date – 69 filed against hospitality employers
 - Nearly 7% of all COVID-related employment litigation
- Smaller companies in the hospitality industry are disproportionately impacted
 - Less than 50 employees – 37% of all cases
 - Less than 100 employees – 56% of all cases

COVID Lawsuits in Hospitality



- Most common case types :
 - Retaliation / Whistleblower (26%)
 - Employment Discrimination (24%)
 - Remote Work / Leave Conflicts (20%)
 - Wage & Hour (13%)
- States with the most hospitality defendants:
 - California (23)
 - New Jersey (7)
 - Florida (6)
 - Texas (5)
 - Georgia (4)

First Families COVID-19 Response Act (FFCRA)

- Law remains in effect until 12/31/20
- Covers private sector employers with fewer than 500 employees
- Emergency Paid Sick Leave – 80 hours paid for 6 reasons
- Emergency Family and Medical Leave – up to 12 weeks of job-protected leave paid at 2/3 pay
 - School and child care unavailable only
- Cannot require employee to use PTO/vacation/sick pay before EPSL/EFMLA

Take Precautions to Protect Your Business

- Require strict compliance with CDC, OSHA, state and local guidance/requirements
- Regularly train (and retrain) employees on safety precautions
- Frequently monitor compliance with your safety protocols
- Review and update your policies – anti-retaliation, FFCRA leaves, wage and hour
- Carefully consider vaccination policies

Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit **fisherphillips.com** for up-to-date information



Share



Subscribe



FMLA App

[Home](#) [Contact Us](#) [Legal Notices](#) [Privacy](#) [Site Map](#) © 2020 Fisher & Phillips LLP

ON THE FRONT LINES OF WORKPLACE LAW™

To subscribe to [Fisher Phillips' Alert system](#) visit www.fisherphillips.com
scroll to bottom, click on **Subscribe**

Final Questions



Andria L. Ryan, J. Hagood Tighe and Patrick Dennison

alureryan@fisherphillips.com htighe@fisherphillips.com pdennison@fisherphillips.com