



# American Inns of Court

## The Hay-Sell Pittsburgh Chapter

### Employment & Discrimination *in 2020*

Pupilage Group Leader

**John Gisleson, Esq.** / Morgan, Lewis & Bockius LLP

Pupilage Group

**Larry Baumiller, Esq.** / City of Pittsburgh Dept. of Law

**Brian Baxter, Esq.**

**Jamey Belin, Esq.** / Charlton Law

**Mary Kate Coleman, Esq.** / Riley, Hewitt, Witte & Romano, P.C.

**Marilyn Lodico, Esq.** / Rothman Gordon, P.C.

**Cory Omata, Esq.** / Williams Coulson

**Daniel Twilla, Esq.** / Burns White

**Tamra Van Hausen, Pitt Law 3L**

**David Zwier, Esq.** / Marcus & Shapira LLP





# Teleworking

# Privacy Rights and Teleworking

- Generally, employers are free to monitor anything on employer provided equipment unless there is a reasonable expectation of privacy
  - Can monitor work email
  - Can monitor internet activity (while on an employer's network)
  - Likely cannot (and should not) turn on webcam when off to monitor an employee at home
    - Employee has a reasonable expectation of privacy
  - Likely cannot monitor other non-work uses (i.e., children using laptop for schoolwork) even though likely prohibited by employer's technology policy
- When using personal equipment to access work network, an employer can monitor its employees when they are accessing their network

## Americans with Disabilities Act and Teleworking

- Employers have the responsibility to provide a disabled employee with reasonable accommodations so they can perform their job
- If an employer provided accommodations while at the office and then instituted a mandatory work from home policy, the employer must likely provide them the same accommodation
  - Issue arises if the accommodation at home is no longer reasonable
- Employers are also required to provide reasonable accommodations to an employee who needs an accommodation *after* the institution of a mandatory work from home policy





# What rights do the employee and employer have?

Employees refusing to return to work over  
COVID-19 concerns

## Guidance from OSHA

- An employee may refuse an assignment if there are imminent dangerous situations, which could potentially apply to COVID-19.
- However, COVID-19 is not unique to the workplace.
- Even if it is deemed an “imminent danger”, employers do not have to pay employees who refuse to work. *Whirlpool Corp. v. Marshall*, 445 US 1 (1980).

## Guidance from OSHA

- **An Employee's right to refuse to work is subject to the following:**
  1. The employee has a good faith belief that an imminent danger exists that is likely to result in serious injury or death;
  2. The employee has notified the employer, when practical, of the hazardous condition and the employer has refused or failed to make the correction;
  3. A reasonable person would also conclude that there is a real danger of imminent death or serious injury; and
  4. There is insufficient time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an inspection by the OSHA.

## Guidance from OSHA

### **What does this mean with COVID-19?**

- Practically, it may be impossible to determine if the virus is present or that other employees contracted it from the workplace, which would hamper retaliation claims.
  - However, a rebuttable presumption may be created to find an unsafe workplace where a certain percentage of employees were diagnosed/tested positive.
- In workplaces frequented by the public, the various safety factors needed to prevent the spread are more difficult to control. Employers must wrestle with this fact and the presumption, even though it is out of their hands.



## Guidance from the NLRA

- Refusal to return to work will turn on whether the conduct constitutes a protected concerted activity under National Labor Relations Act (NLRA).
  - Occurs when an employee takes action with or on behalf of the other employees concerning terms and conditions of their employment.
- During COVID-19, mere fact that employees are engaged in collective action relating to workplace safety is sufficient to be protected.
- Employers believing that they have sufficient measures taken for safety, or a government agency deeming it sufficient, is not enough to make the conduct unprotected.

## Guidance from the NLRA

- Employees should have a “reasonable, good-faith belief” that working under certain conditions are not safe, and are protected if they are honestly mistaken.
- Unionized employees must have a “good faith belief” supported by **ascertainable and objective evidence** there is an **abnormally dangerous work condition**. These union employees are protected and cannot be permanently replaced.

## Guidance from the NLRA

- However, the clear language in Section 502 of the NLRA compels the employees to come forward with evidence establishing the conditions at issue that are abnormally dangerous and not just “work place hazards”.
- If an employer is in compliance with COVID-19 related directives, federal guidelines, and/or recommendations made by CDC and WHO, it will undermine the claim that the work environment is abnormally dangerous.





# HIPAA, Employment, & COVID-19

## What is HIPAA and why is it relevant to employment discrimination?

- Health Insurance Portability and Accountability Act of 1996
- Established a national platform for consumer protection, privacy, and marketplace reforms
- Most relevant to this discussion is the Privacy Rule, which established the national standard to address for “protected health information.”

### What is HIPAA and why is it relevant to employment discrimination?

- “Health Information” means any information, whether oral or recorded in any form or medium, that—(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health condition of any individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
- “Individually Identifiable Health Information” is health information, including demographic information, that could be used to identify individual.



## What is HIPAA and why is it relevant to employment discrimination?

- “Protected Health Information” means any individually identifiable health information, transmitted or maintained in any form of media, with limited exceptions.
- Under the Privacy Rule, Protected Health Information may only be disclosed after approval by the covered individual, unless subject to limited exceptions.

## Implications of HIPAA Exceptions to Public Health

- Disclosure of Protected Health Information permitted without individual authorization permitted for 1) disclosures required by law; and 2) for “public health purposes.”
- “Public Health Purposes” includes disclosure to a public health authority that is authorized by law to collect or receive such information for the purposes of preventing and controlling disease . . . and the conduct of public health surveillance . .
- Such information can be disclosed to any governmental entity that is responsible for public health matters, which would include the Allegheny County Health Department

## COVID-19 and Confidentiality Issues

- May the employer store COVID-related information in the personnel file?
- Can the employer log temperature check information?
- May an employer disclose to a public health agency that a particular employee has COVID?
- May a public health agency disclose to an employer that one or more of its employees has COVID?
- May an employee disclose to an employer that he or she suspects that a co-worker has COVID-like symptoms?
- What employment actions, if any, can an employer make once it has this information?



## Two Recent Cases – Alleged COVID-19-Related Discrimination

- ***Phillips v. Engineered Floors, LLC*** (Northern District of Georgia)
  - Plaintiff began experiencing symptoms on July 1<sup>st</sup>, got tested, and told employer on July 6<sup>th</sup> that he needed to miss work
  - Told to come back to work while still testing positive
  - Told he was terminated after he recovered
  
- ***Prada v. Trifecta Productions*** (Eastern District of Michigan)
  - Began experiencing symptoms on June 24<sup>th</sup>
  - Tested positive and took time off to recover
  - Employer accused employee of being socially irresponsible and pointed to social media



**COVID-19's Effects on the Workplace**

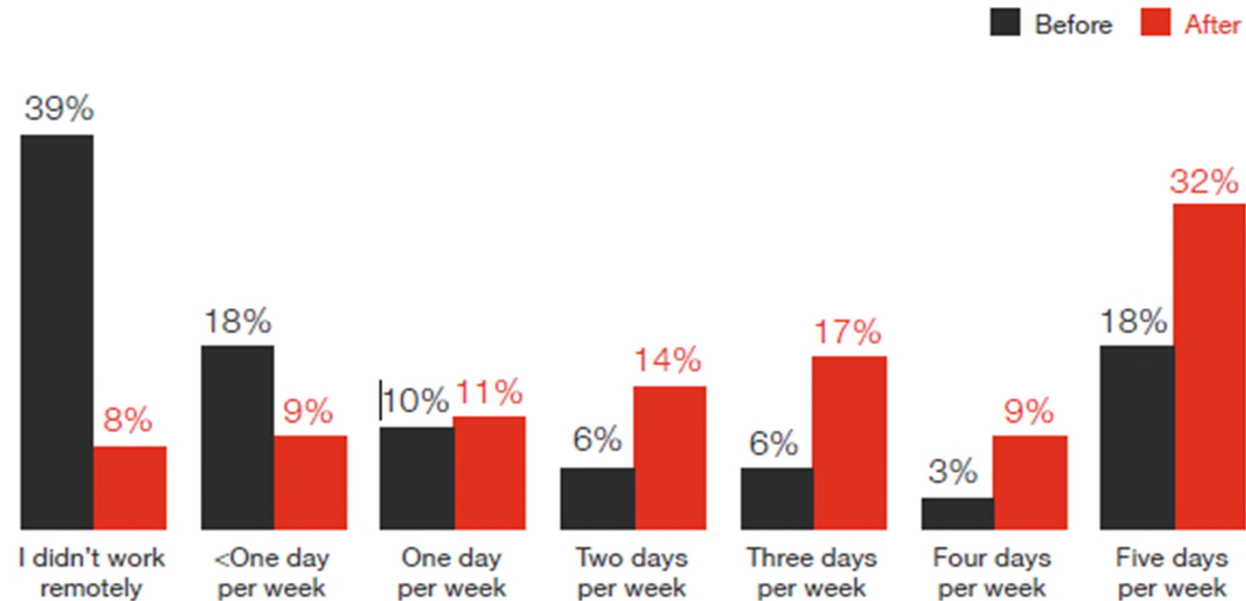
**&**

**Considerations Moving Forward**

# COVID Effects & Moving Forward

## Working Remotely

How often did you work remotely before COVID-19? How often would you like to once COVID-19 is no longer a concern?



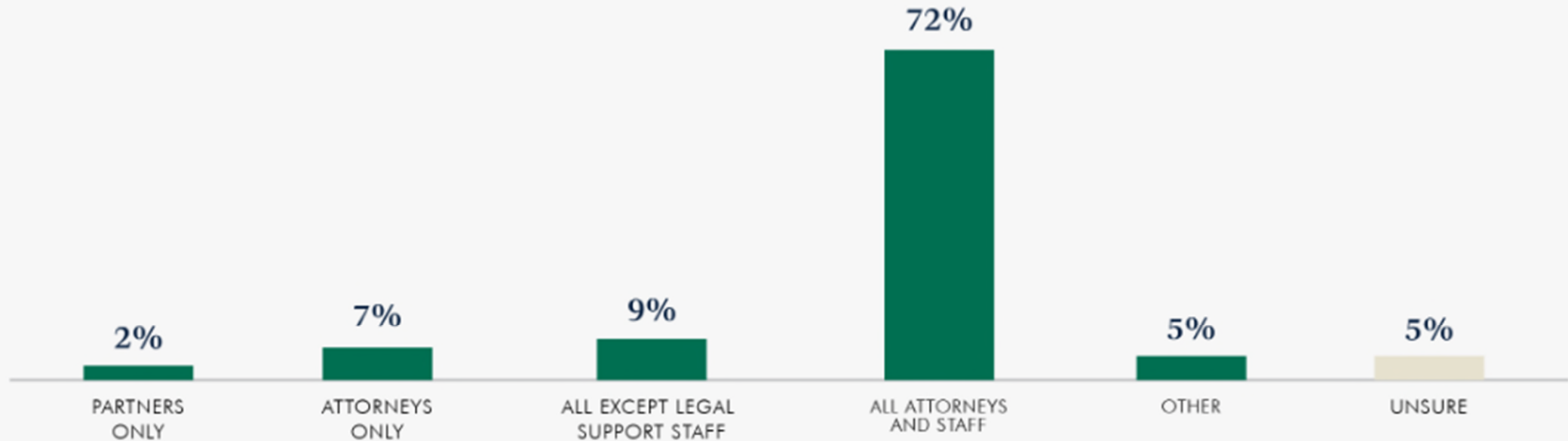
Source: PwC US Remote Work Survey  
June 25, 2020. Base: 1,200 US office workers.

72% of office workers would like to work remotely at least two days a week



## What About Law Firms?

Figure 4 – Post-COVID, which functions/departments within your firm do you imagine will have some degree of remote working flexibility?

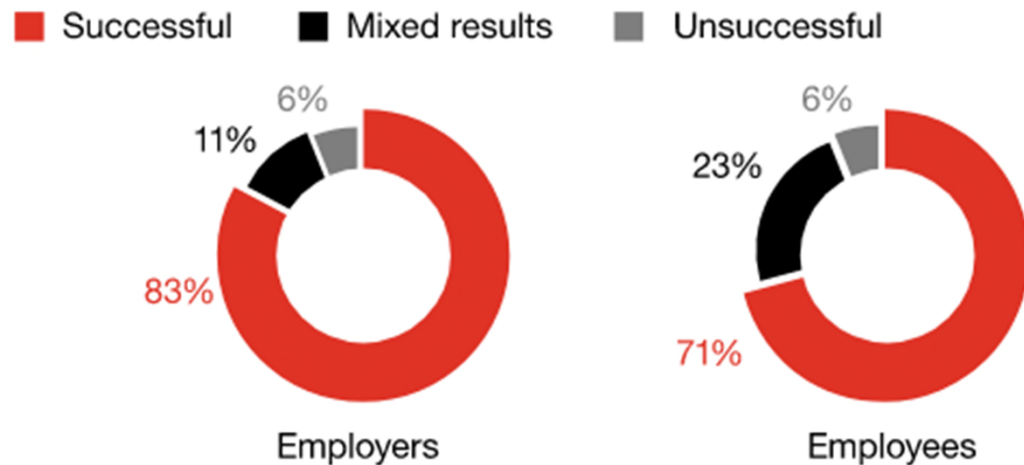


Source: CBRE Virtual Roundtable Survey Questions, "The Legal Workplace in the Era of COVID-19," September 16, 2020, n = 164

# COVID Effects & Moving Forward

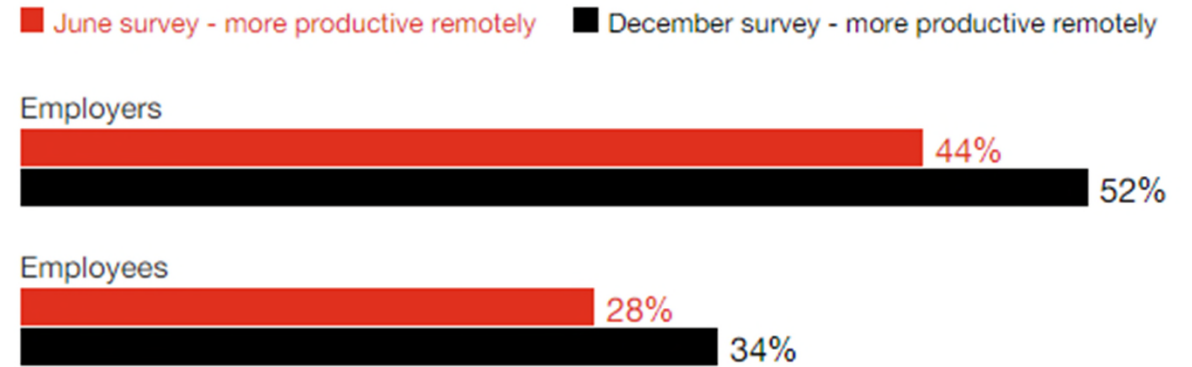
## Is remote work Effective?

### Remote work has been a success



Q: How successful would you say the shift to remote work because of COVID-19 has been for your company? (Responding 'successful' and 'very successful')  
Source: PwC US Remote Work Survey  
January 12, 2021. Base: 133 US executives, 1200 US office workers

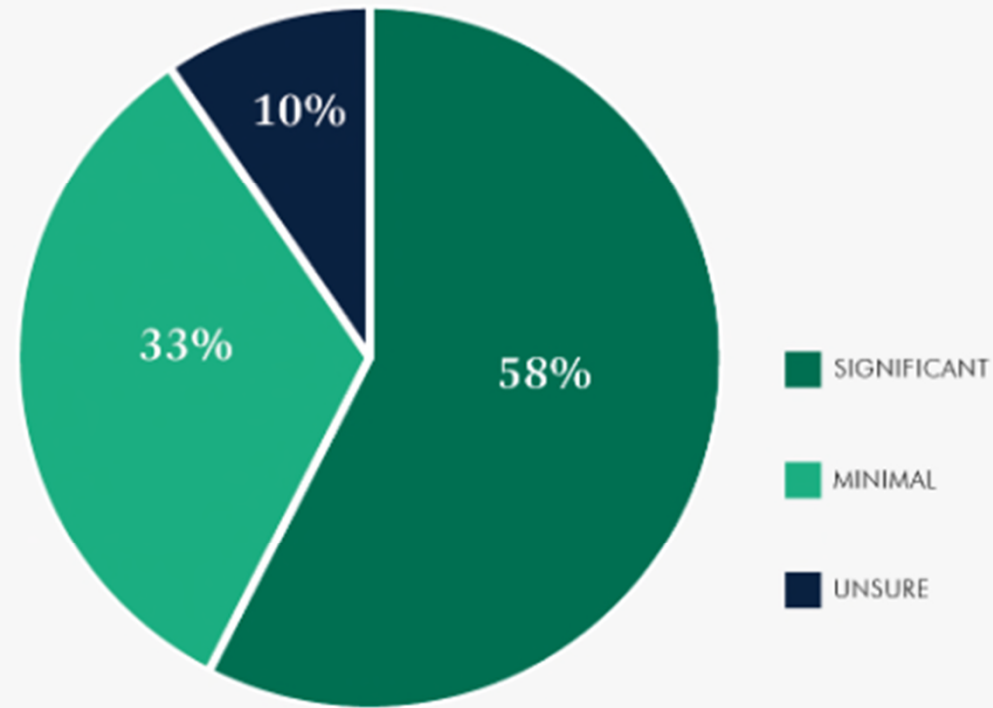
### Productivity improved over prolonged work-from-home period



Q: Which of the following best describes your productivity working remotely compared to before COVID-19?  
Q: How has average employee productivity changed (compared to pre-COVID-19)? (Responding 'more productive' and 'much more productive')  
Source: PwC US Remote Work Survey  
June 25, 2020, Base: 118 US executives, 1,200 US office workers  
January 12, 2021. Base: 132 US executives, 1,200 US office workers

## Will everything just go back to normal?

Figure 7 – Three years from now, what impact do you think COVID-19 will have had on the workplace?



## What's Next: Alternatives to the Traditional Office

Figure 5 – Traditional Occupancy Design Compared with Hoteling and Activity-Based Working (ABW)

### Current State



- 26 Offices
- 6 workstations
- Supports 26 attorneys, 6 staff

### Hoteling



- 26 Offices (10 Hoteling)
- 6 workstations
- Supports 36 attorneys, 6 staff

### ABW



- 13 Offices
- 4 focus rooms
- 8 workstations
- Supports 26-36 attorneys, 4 staff

## The Compliance Puzzle





# COVID Effects & Moving Forward



HR

- Update policies and apply them neutrally & consistently
- Electronic workplace anti-harassment training
- Dispute resolution mechanism



Taxes

- Corporate tax implications for employees' work in a different state or country
- Employer's payroll withholding obligations

# COVID Effects & Moving Forward

- Local wage and hour laws for nonexempt workers
- Non-discrimination laws
- Reimbursement of home office expenses
  
- Confidentiality:
  - R. 1.1: Duty of competent representation
  - R. 1.6(c): Duty of confidentiality



Local  
Laws



Confiden-  
tiality



Recent decisions

**Pennsylvania Supreme Court  
and U.S. Supreme Court**

# PA Supreme Court

## ***Harrison v. Health Network Labs. Ltd. P'ship*, 232 A.3d 674 (Pa. 2020).**

Decided June 16, 2020, Justice Kevin M. Dougherty

Issue: Can a plaintiff bring a claim of retaliation under the Pennsylvania Whistleblower Law after being terminated for reporting conduct unlawful under the Pennsylvania Human Relations Act (PHRA)?

Holding: Yes. PHRA does not preclude a wrongfully terminated employee from filing a court action for retaliatory discharge under the PA Whistleblower Law when the plaintiff reported discriminatory conduct made unlawful by the PHRA (here, the plaintiff was not herself the subject of the underlying discrimination).

Practical Effect: Employees alleging retaliatory termination after reporting PHRA violations on behalf of another person can bypass PHRA's administrative process and instead bring their retaliation claims directly to court under the PA Whistleblower Law. The Whistleblower law only protects state and local government employees or employees of publicly funded employers. Since both routes have the same statute of limitations and offer plaintiffs the same damages, it is unlikely this holding drastically alters the climate of litigation in this area.

# PA Supreme Court

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## ***Renner v. Court of Common Pleas of Lehigh Cty., 234 A.3d 411 (Pa. 2020).***

Decided July 21, 2020, Justice Debra Todd

Issue: Can an employee of a state court bring discrimination claims against the court and its employees under the PHRA or does application of the PHRA to the state judiciary violate separation of powers?

Holding: Application of the PHRA to court personnel would violate separation of powers principles where it would impact the judiciary's constitutional right to select, discharge, and supervise its employees. State court employees are protected only by the courts adopted policies (e.g., the Court's *Code of Conduct*, the Unified Judicial System's Policy on Non-discrimination and Equal Employment Opportunity)

## ***Nicole B. v. School Dist. of Philadelphia, 237 A.3d 986 (2020).***

Decided September 2020, Justice Debra Todd.

Holding: Under its equitable tolling provision, the Pennsylvania Human Relations Act's limitation periods may be tolled during a child's period of minority.



# U.S. Supreme Court

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## ***Babb v. Wilkie*, 140 S. Ct. 1168 (2020).**

- The ADEA's federal sector provision demands that personnel actions be untainted by any consideration of age, but to obtain forms of relief that are generally available for differential treatment in the end result of an employment decision, a plaintiff must show that age was a but-for cause of the challenged employment decision.

## ***Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).**

- The ministerial exception, grounded in First Amendment's Religion Clauses, barred the teachers' employment discrimination claims.

## ***Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).**

- An employer who fires an individual merely for being gay or transgender violates Title VII.

# U.S. Supreme Court

## ***Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).**

- The ACA authorized Health Resources and Services Administration (HRSA) to exempt or accommodate employers' religious or moral objections to providing no-cost contraceptive coverage.

## ***Comcast v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020).**

- A unanimous court held that the plaintiff in a § 1981 suit must prove discrimination was the actual, but-for cause of their injury at all times during the lawsuit. Section 1981 does not follow the "motivating factor" test used in Title VII.
- The court did not answer the question of whether § 1981 protection extends to early contract-formation activities, or is limited to the final decision to enter a contract. In her concurrence, Justice Ginsburg made clear she would interpret the statute to protect activities during all stages of the life of a contract. The majority opinion (J. Gorsuch) eluded that it does not share similar views.



# Employment Counsel's Perspective on COVID-19 Employment Cases

with **Emily E. Town, Esq.**

# Employment Counsel's Perspective

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**What trends are you currently seeing in COVID-19 related Employment cases?**

# Employment Counsel's Perspective

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**Please tell us about a COVID-19 related employment case you took on this year and why you decided to take it.**



# Employment Counsel's Perspective

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**Please tell us about a COVID-19 related employment case you declined to take and why.**

## Employment Counsel's Perspective



**Your practice also includes advising employers.**

**Can you give us a sample of some of the types of questions employers are asking and how you are advising them?**

## Employment Counsel's Perspective

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**Do you see types of inequalities occurring in employer-employee relationships related to the COVID-19 pandemic that cannot be resolved through employment law litigation?**

## Employment Counsel's Perspective



**The COVID-19 pandemic has had a devastating impact on women in the work force.**

**Do you have any predictions on how this increase in gender inequality will affect the types of future employment litigation cases you'll see in the future?**

**Do you think employers will become more susceptible to discriminatory behavior due to less women in the labor market?**



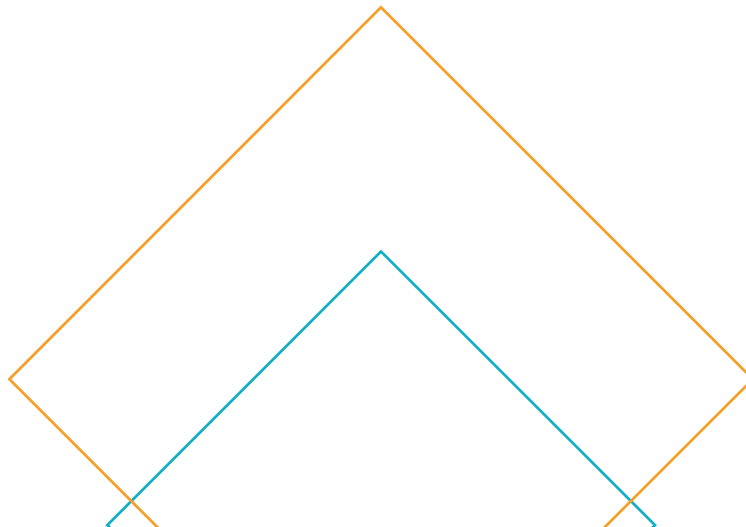
# Employment Counsel's Perspective



**Employment law deals with the complex power dynamics between employers and employees.**

**Do you think the COVID-19 pandemic has made an impact on the existing power dynamics?  
For better or for worse?**

**SAMPLE OF  
TYPES OF COVID-19 RELATED  
EMPLOYMENT CASES FILED IN PENNSYLVANIA**





# Vaccine Mandates

## Vaccine Mandates & Exemptions

- The Food and Drug Administration (FDA) does **not** mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.
- *Jacobson v. Massachusetts*, 197 US 11 (1905).

# Vaccine Mandates

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## Adult Population

- Vaccine must be recommended by the Advisory Committee on Immunization Practices
- Most think mandatory vaccinations are unlikely on the state level.
- Possibility of mandatory vaccinations in “hot-spot” areas.
- New York Bar Association Resolution.



## School Children

- While the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices is responsible for adding vaccines to the recommended schedule of childhood immunizations, individual state legislatures mandate which vaccinations are required for school.
- ‘Mandating a vaccine for a virus that creates very low risk of serious side effects in this age group [about a 0.2% chance] would not be as easy as other vaccines that are known to greatly impact this demographic.’
  - Reagan Anderson, FAOCD, FAAD, FASMS, MPH

# Vaccine Mandates

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## Workplace

- EEOC Guidelines

Q.

Can an employer require that employees receive one of the new FDA-authorized COVID-19 vaccinations?

A.

*Generally, yes.*

# Vaccine Mandates

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## Exemptions

- Medical exemptions
- Religious exemptions

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker.

# Vaccine Mandates

## What Human Resource Leaders Say

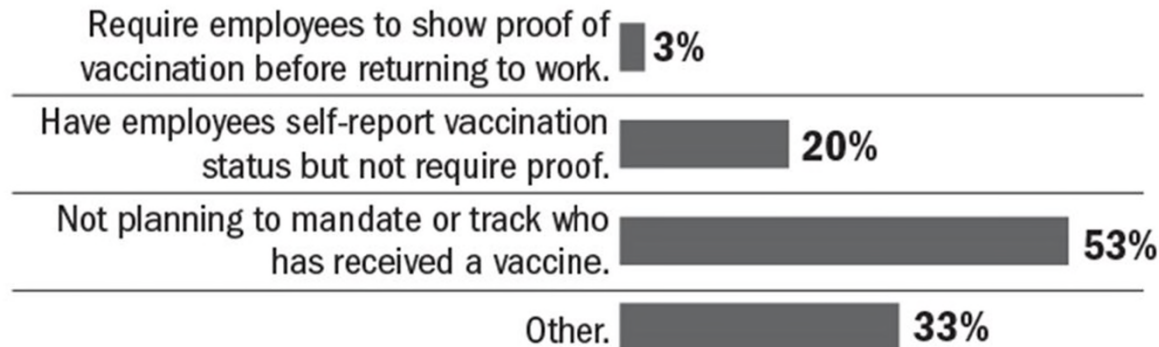
### IS IT ETHICAL TO MANDATE A COVID-19 VACCINE?

In a Dec. 9, 2020 poll by Gartner, a global research and advisory firm, 110 human resources leaders responded to the question, “Do you agree that it is ethical for your organization to mandate that employees receive a COVID-19 vaccine before returning to the workplace?”



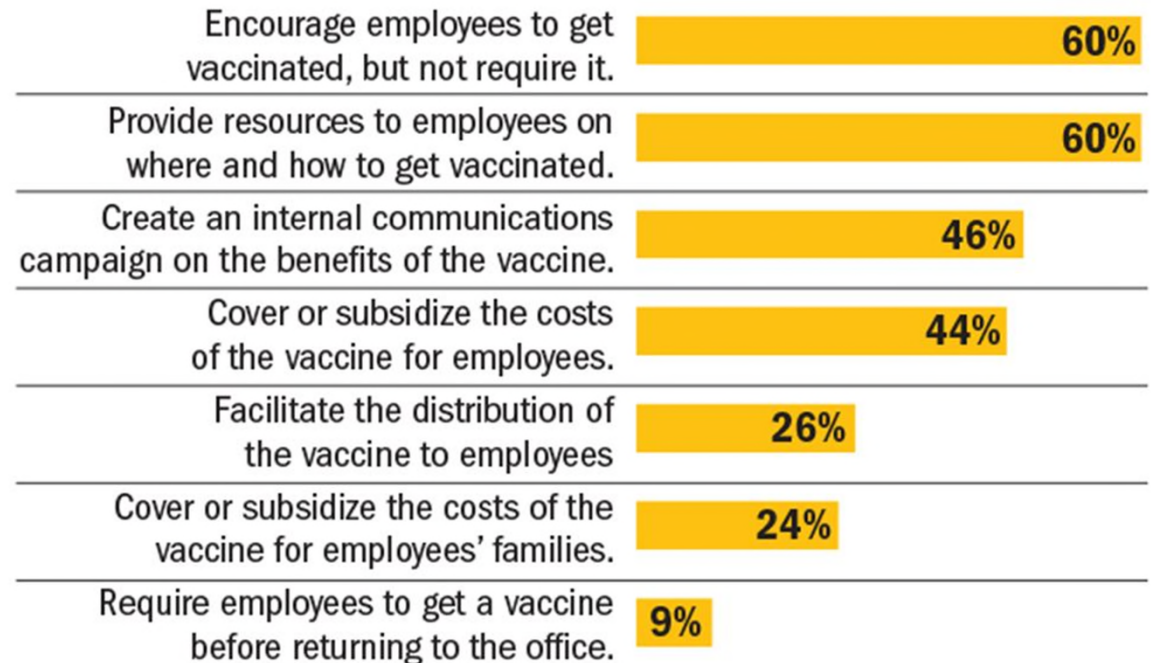
### WILL COMPANIES TRACK EMPLOYEE VACCINATION STATUS?

103 HR leaders responded to the question, “Do you plan to take any of the following actions to track employee vaccination status?”



### HOW WILL COMPANIES RESPOND TO VACCINE AVAILABILITY?

116 HR leaders responded to the question, “What actions will your organization take in response to COVID-19 vaccine availability?” (Multiple responses allowed.)







# Vaccines for Lawyers




# A Wonderful Day!

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**COVID-19 Vaccination Record Card**

Please keep this record card, which includes medical information about the vaccines you have received.  
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.



Last Name: **BAXTER** First Name: **BRIAN** H  
MEDICARE NO: 4569-153-7552

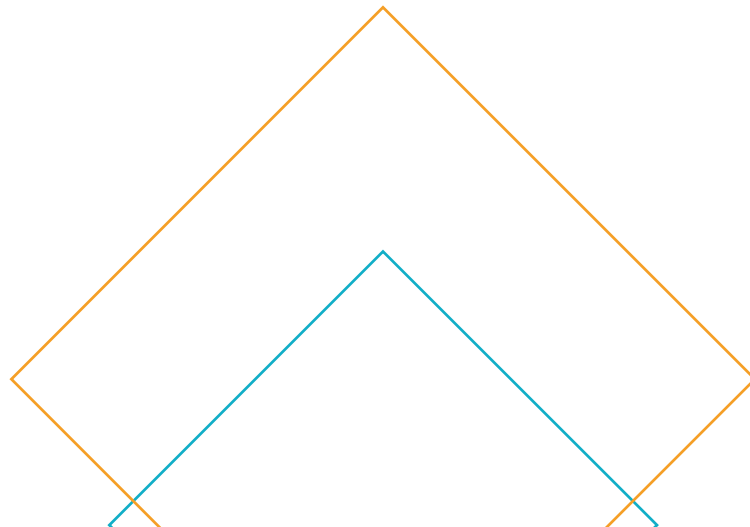
Date of birth: **1/1/71** Patient number (medical record or IIS record number):

Vaccine	Product Name/Manufacturer Lot Number	Date	Healthcare Professional or Clinic Site
1 <sup>st</sup> Dose COVID-19	<b>012M2019 moderna</b>	<b>1/24/21</b> mm dd yy	<b>Wilson's</b>
2 <sup>nd</sup> Dose COVID-19	<b>013A21A MODERNA</b>	<b>2/26/21</b> mm dd yy	<b>WILSON'S PHARMACY 4101 PENN AVE. PITTSBURGH, PA 15224 (412) 621-6471</b>
Other		mm dd yy	
Other		mm dd yy	

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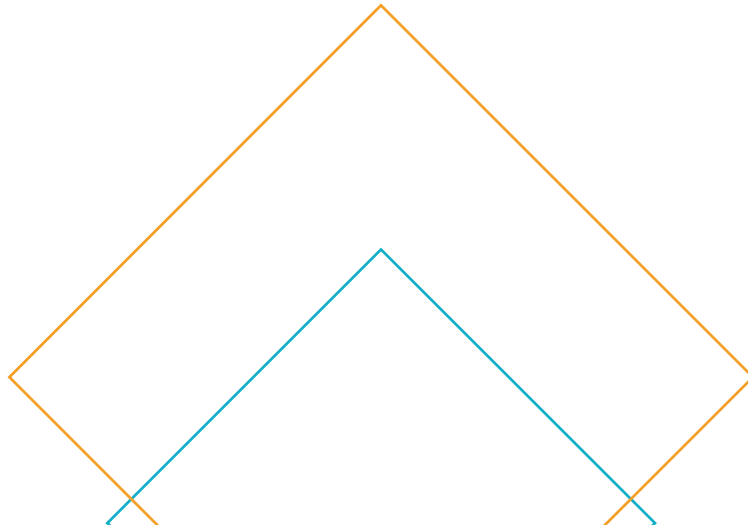
# PA Department of Health



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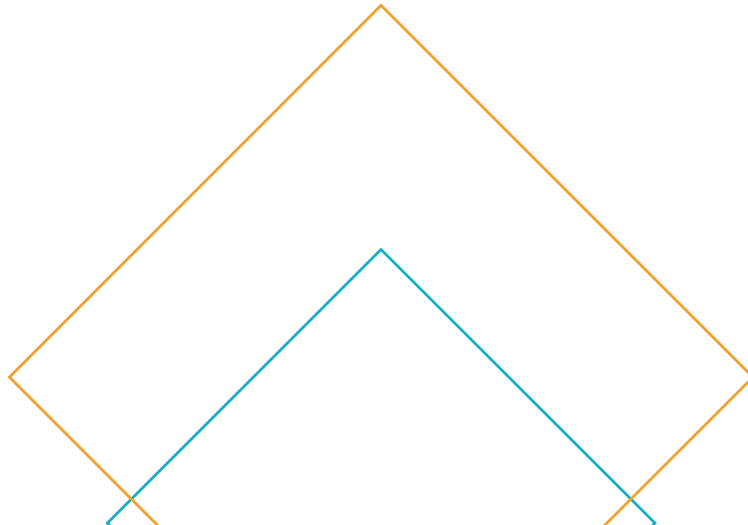
# Good Information



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# Bad Information



# Tips To Get An Early Vaccination

## **CAST A WIDE NET**

- Large vaccination locations  
Ex. UPMC, AHN, & Allegheny County Department Of Health
- Small vaccination locations





**Questions?**