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## HRMORNING

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## Can firms require COVID-19 vaccines? Feds weigh in

### ■ *EEOC, OSHA on policies and exemptions*

**A**s AstraZeneca, Moderna and Pfizer close in on FDA approval for their COVID-19 vaccines, employers must decide whether to require the vaccine to allow employees back into the workplace.

Employers can expect the EEOC, OSHA and other federal agencies to issue guidance once a vaccine becomes widely available, but there's no clear direction just yet, which leads to a lot of questions.

Can firms make them mandatory? Which employees qualify for an exemption? What happens if an employee gets sick after receiving the vaccine?

Here are some guidelines from the feds, as well as legal experts, as companies navigate this new territory on the road to getting employees back to work.

### **EEOC guidelines**

The EEOC hasn't published specific guidance on the COVID-19 vaccine, but it has updated its *Pandemic Preparedness for the Workplace* guidance, issued during the H1N1 outbreak back in 2009.

In the update, the EEOC said firms should consider "simply encouraging

*(Please see Vaccines ... on Page 2)*

## GAO: Unemployment numbers may be low

### ■ *Government watchdog says errors make it harder to respond*

**T**he DOL's weekly unemployment numbers may be inaccurate, according to watchdog group the U.S. Government Accountability Office (GAO).

If this data is wrong, the GAO says, it makes it difficult for lawmakers to properly handle the crisis at hand.

### **Weekly jobless reports**

So how is the data inaccurate? The GAO says the massive backlog of unemployment claims is the culprit.

Each week, the DOL publishes reports detailing the unemployment claims in every state and the total number of people claiming unemployment benefits nationwide.

But the GAO says that because there's such a delay in processing unemployment claims, the DOL's numbers are lower than they should be, making it impossible to get an accurate picture of just how many Americans are currently unemployed.

**Click:** [bit.ly/GAO570](https://bit.ly/GAO570)

# Vaccines ...

(continued from Page 1)

employees” to get the vaccine rather than requiring them to do so.

In addition, the EEOC has declared that COVID-19 meets the ADA’s “direct threat” standard, which permits employers to engage in broader procedures than normally allowed under the ADA. Firms can expect the EEOC to issue new guidance on a vaccine once it’s been approved by the FDA.

### OSHA guidelines

Like the EEOC, OSHA has yet to provide COVID-19 specific guidelines. However, in a 2009 letter of interpretation on flu vaccines, the agency said employers could mandate them, with exceptions for religious or medical reasons.

Also, in a 2014 guidance called *Protecting Workers During a Pandemic*, OSHA said “employers

may offer appropriate vaccines to workers to reduce the number of those at risk for infection in their workplace.”

Legal experts expect OSHA to use its General Duty Clause to issue citations to employers that fail to offer COVID-19 vaccines. It’s also expected the Biden administration will double the number of OSHA inspectors.

### State regs, vaccine rollout

Will states require employers to vaccinate employees? It will likely vary from state to state as it has in the past with flu vaccinations. During the 2019 measles outbreak, for example, some states passed laws to prohibit workers who couldn’t prove immunity from measles from working in schools.

The CDC has asked states to be prepared to expedite distribution of the vaccines.

However, many states are struggling with how to handle a Pfizer-like vaccine. For example, Washington doesn’t have a warehouse that can store the Pfizer vaccine at the -70 degree Celsius temperature, while Georgia is relying on local districts and counties to work out the details.

In the initial rollout of the vaccine, most states are prioritizing healthcare workers and other essential workers to get vaccinated first, followed by at-risk populations before it reaches the general public by spring of 2021, according to the CDC.

### ADA accommodations

If employers implement a mandatory vaccine policy, they’ll need a plan in place to handle ADA accommodation requests. This means engaging in the interactive process and finding reasonable accommodations, such as remote work.

Now’s the time for employers to outline a plan, giving employees a voice in the decision-making process and figuring out which employees should be first in line for the vaccine.

*Info: [bit.ly/vaccine570](https://bit.ly/vaccine570)*

## Sharpen your JUDGMENT

*This feature provides a framework for decision making that helps keep you and your company out of trouble. It describes a recent legal conflict and lets you judge the outcome.*

### ■ Can it be retaliation if worker said she wasn’t harassed?

“Hi, Eric,” HR Manager Lynn Rondo said as she saw the company’s attorney walking down the hall. She noticed his frown. “Someone doesn’t look happy.”

“We’re being sued for retaliation,” Eric said with a sigh. “Danielle Livingston claimed she got fired because of the incident that happened with Hudson.”

“What?” Lynn asked, incredulous. “Danielle herself said that wasn’t harassment. How can we retaliate against someone who wasn’t sexually harassed?”

### No harassment occurred

“Remind me exactly what happened,” Eric said.

“One of our employees witnessed a strange encounter between Danielle and Hudson,” Lynn replied. “Apparently Hudson grabbed her hand and held onto it, looking at her engagement ring and asking questions about her romantic life.”

“I see,” Eric said with a frown.

“While Danielle said it was a bit uncomfortable, she didn’t feel like she was harassed,” Lynn explained. “I investigated this, but Danielle wanted to drop it, so we did. She was later fired for performance issues. End of story.”

“Well, since Danielle didn’t claim to be harassed, it’ll be hard to prove retaliation,” Eric decided. “We’ll fight this.”

When Danielle sued for retaliation, the company fought to get the case dismissed. Did it win?

■ *Make your decision, then please go to Page 4 for the court’s ruling.*

### What’s Working in HUMAN RESOURCES

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# Was disabled worker entitled to a reassignment? Court rules no

■ *4th Circuit said that ADA considers new post a 'last resort'*

When a disabled employee needed an accommodation in order to continue doing his job, his employer suggested one.

But when the employee had other ideas, he took his company to court.

### Demanded new position

Charles Elledge worked at a Lowe's in North Carolina conducting store inspections. This involved a lot of walking.

After undergoing knee surgery, Elledge wasn't able to walk for extended periods of time. It was clear he would need an accommodation.

Lowe's suggested that Elledge use a motorized scooter to help him get around the stores, but Elledge declined that option without giving a reason. Instead, he requested a

reassignment. Lowe's tried to match him to a new position, but upon learning all available positions would be demotions, Elledge quit and sued for an ADA violation.

Elledge tried to argue that Lowe's failed to accommodate him because he wasn't offered a reassignment he wanted, but the 4th Circuit disagreed.

First, the court pointed out that Lowe's had participated in the interactive process by offering Elledge the motorized scooter as an accommodation. Elledge is the one who disrupted the process by outright declining that.

The court went on to say that the ADA considers reassignment as a "last resort," seeing as it could severely disrupt company processes.

*Cite: Elledge v. Lowe's, 11/18/20.*

# Terminated transgender employee wins lawsuit in landmark SCOTUS decision

■ *Supreme Court ruled transgender discrimination is sex discrimination*

Seven years after an employee was fired for coming out as transgender, her employer is finally paying to settle the lawsuit, after SCOTUS's landmark ruling back in June.

The Supreme Court decided that transgender discrimination is prohibited by the Civil Rights Act. Here's a reminder of the case.

### Fired for transition

Back in 2013, Aimee Stephens worked for R.G. and G.R. Harris Funeral Homes as a funeral director when she announced she'd be transitioning from male to female.

Upon this announcement, Stephens told her bosses she'd be dressing in women's clothing and would like to

be called Aimee.

It wasn't long before the funeral home fired Stephens, making it no secret that her termination was due to her transition. Stephens sued, claiming sex discrimination.

A lengthy legal battle ensued, with several courts disagreeing over whether transgender discrimination went against the Civil Rights Act. Back in June, SCOTUS finally ruled in on this issue, equating transgender discrimination with sex discrimination – which the Civil Rights Act prohibits.

The funeral home will pay \$250,000 to settle this lawsuit, seven long years later.

*Cite: EEOC v. R.G. and G.R. Harris Funeral Homes, 12/1/20.*

### ■ Company owes \$375K for firing pregnant employee

Firing an employee right after she reveals she's pregnant is a surefire way to get the EEOC's attention.

Seattle-based company Oatridge Security Group was sued by the EEOC after dismissing an employee solely because of her pregnancy.

According to the lawsuit, the employee shared with her manager that she was expecting and would need maternity leave soon. Upon hearing this, the manager told the employee security work was "not proper" for a pregnant woman, and fired her.

The employee tried to get her job back several times, but the company refused. This conduct violates the Pregnancy Discrimination Act (PDA), the EEOC said.

Oatridge Security Group will pay \$375,000 to settle the suit. It also must put anti-discrimination policies and training into place.

*Info: bit.ly/pregnant570*

### ■ Racial harassment, slurs cost company \$70K

When one manager subjected her employee to racial slurs and harassment, the EEOC taught the company an expensive lesson.

Icon Burger Acquisition LLC, doing business as Smashburger in Long Island, NY, was sued by the EEOC for a racially hostile work environment.

According to the lawsuit, a manager frequently directed racial slurs toward an African-American employee. She also harassed him for being in an interracial relationship. The employee complained, but nothing was done to correct the manager's behavior. This is a violation of the Civil Rights Act.

The company will pay \$70,000 to settle the lawsuit and also must revise its anti-discrimination policies.

*Info: bit.ly/racebias570*

## ANSWERS TO TOUGH HR QUESTIONS

HR professionals like you face new questions every day on how to deal with workplace conflict and employment law. In this section, experts answer those real-life questions.

### Can we control employees' personal travel at all?

**Q:** Despite many warnings from our governor, I know at least one employee has plans to travel out of state. I've asked them to quarantine for two weeks when they return. Is there anything else I can do? Can I prevent others from doing this?

**A:** Since some states prevent employers from restricting employees' personal travel, it's safer not to do that, says employment law attorney and managing partner Todd Scherwin of the firm Fisher Phillips. Here's what you can do instead.

Typically, employers can require traveling workers to get a COVID test before returning to the workplace. It's important to note that you may have to pay for that test, depending on your state.

Requiring employees to quarantine and work remotely can also be an option. If your employee can't work from home, you might be required to pay them to stay home.

And while you can't restrict personal travel, you can strongly

discourage it. You can tell your employees something along the lines of, "While we don't prohibit travel, right now we're recommending that you don't, due to CDC and state guidelines."

### Is it OK for an employee to breastfeed on Zoom calls?

**Q:** We have an employee who has breastfed her baby several times during Zoom meetings, and it's bothered some employees. Can we ask her not to?

**A:** Really it comes down to how much of this process you're actually seeing on camera, says HR expert and author of *Evil HR Lady* blog, Suzanne Lucas.

For example, if your employee stripped down to breastfeed or spent long periods of time with her breast exposed, that would be an issue. But, if all you see is a baby's head, you shouldn't say anything.

An easy fix would be asking your employee to adjust her camera angle – a view from the shoulders up is the typical framing for these meetings anyway.

If co-workers are having a problem with this still, remind them that a crying baby would be more distracting than a quiet baby who is feeding.

### CDC changed guidance again: What should we do?

**Q:** I noticed that, once again, the CDC has changed its recommendation for quarantine periods for those exposed to COVID-19. How long should exposed employees be asked to quarantine for?

**A:** Here's a rundown of this new guidance, says employment law attorney Fiona Ong of the firm Shawe Rosenthal LLP.

The revised guidelines still say the 14-day quarantine is the safest way to go. However, the CDC now says if an exposed person receives a negative COVID test, they can end quarantine after seven days.

With no test, the exposed person should quarantine for at least 10 days.

*If you have an HR-related question, email it to Rachel Mucha at: [rmucha@HRMorning.com](mailto:rmucha@HRMorning.com)*

### Sharpen your judgment...

## THE DECISION

(See case on Page 2)

No. A district court initially sided with the company, but an appeals court reversed that decision and ruled in favor of Danielle, allowing her case to continue.

The company argued that Danielle didn't engage in a protected activity, since she never claimed that sexual harassment occurred. Therefore, her firing wasn't retaliation for her part in the harassment investigation.

But a circuit court disagreed. It said the fact that Danielle denied sexual harassment occurred is irrelevant. She still took part in a sexual harassment investigation, which is a protected activity. Therefore, retaliation is still

possible, despite the outcome of the investigation.

"The plaintiff's description of the behavior and participation in the investigation could support a retaliation claim under Title VII," the court said.

### ■ Analysis: Many types of protected activity

This case acts as a reminder that there is a wide range of protected activity an employee can engage in.

According to EEOC guidance, if a worker is involved in a complaint about discrimination or harassment, or requests an accommodation, they have engaged in protected activity. This means employers must proceed with caution, and be mindful of the timing of terminations.

**Cite:** *Archuletta v. Corrections Corp. of America, U.S. Ct. of App. 9th Circ., No. 19-27546, 11/13/20. Fictionalized for dramatic effect.*

# Social justice issues in country shined spotlight on our diversity efforts

### ■ Our CEO took a stand and led by example

The past year has been tough on everyone because of the pandemic, and back in the spring, things got worse as racial tensions boiled over.

After the murder of George Floyd and the nationwide protests, we realized that as a company, we couldn't remain silent on the issue. It felt wrong to not address it and continue on, business as usual, while employees could be struggling with it.

Our CEO decided to take a public stance on the issue, making it clear we were strongly against racial injustice. He also shared with our employees what personal steps he was taking to fight racism.

We knew it was important to have this message come from the top. Our CEO wanted to lead by example.

### D&I council

After that, we announced we'd be overhauling our diversity efforts. We wanted to promote a culture of inclusion, to both our current employees and future ones.

So, we formed a diversity and inclusion council. It would be comprised of employee representatives from every area of the organization. They'd come up with D&I goals for the company and work to make it a part of the culture.

We wanted to be sure the employees on this strategic council wanted to be a part of it. So, we asked our managers from each department for recommendations on who would be the best fit.

Upon reaching out to these nominees, we found every single one wanted to be a part of the council.

They were excited for the opportunity and passionate about

improving companywide diversity efforts – they wanted to be a part of something meaningful.

### Implementing strategies

With our D&I council officially forming back in June, it first focused on three main strategies to guide its plan for the rest of the year:

- increased diversity in hiring
- resource groups for minority employees, and
- promoting an overall culture of inclusion.

While the council came up with these ideas, we had “diversity champions” at every site in charge of executing ideas.

### Honest conversations

While the bulk of our employees were on board with these efforts, it wasn't all smooth sailing. We had a few people who felt uncomfortable that racial injustice had become a topic discussed so prominently in the workplace.

To tackle this, we encouraged employees to have an open dialogue with their managers, who would help educate them on why this was necessary.

After having these talks, many employees got on board with our efforts. It also helped to have colleagues share personal experiences with hesitant employees about why this topic was so important to discuss.

It's too soon to see a ton of results yet, but we've already had so many prospective employees tell us how much they appreciate our diversity and inclusion stance.

*(Tami Wolownik, head of HR, Siemens Mobility, Atlanta)*

## REAL PROBLEM REAL SOLUTION

### ■ Fixed automated processes to better hire hourly workers

Whether it be method or time frame, there's a big difference between hiring hourly workers and salaried employees.

With hourly workers, there's often pressure there to fill a post as quickly as possible. But you also want to ensure you're making the best hire, too.

This is easier said than done. The small time frame can pressure hiring managers into decisions they aren't sure about. In fact, about 70% of the time, the hiring manager isn't confident in the hire they just made.

And when a new hire fails in the first month or two, the process starts all over again. This was happening to us, and we knew there had to be a better way.

### What data really matters?

We used ATS, which has many advantages such as automating tedious tasks. But there are also pitfalls. And we discovered our automated system was mimicking our past hiring methods – but this included any mistakes, too.

We had to reprogram our system. And in order to do it successfully, we looked at the post-hire data from our best new workers.

We examined what kind of experience and characteristics our most successful hires had, and asked the system to look for that.

For example, one data point we found to be significant was how close a worker's home was to our company. The further away the hire lived, the less likely they were to stick around.

By seeing what data truly mattered, we were able to be more confident in our hires instead of just hoping it worked out.

*(Jim Buchanan, CEO, Cadient Talent, as presented at the ERE 2020 Digital Conference)*

**Case Study:**  
**WHAT**  
**WORKED,**  
**WHAT**  
**DIDN'T**

## WHAT WOULD YOU DO?

Companies face competing agendas when dealing with their employees. They must find ways to inspire their people to excel, while controlling costs and staying within the law. Here we present a challenging scenario and ask three executives to explain how they'd handle it.

### Star employee arrested, claims he's innocent: Should he be fired?

#### The Scenario

HR Manager Stu Capper shook his head as he read through the string of emails that had just flooded his inbox. He was just about to pick up the phone to call department manager Casey Jones when she walked into his office.

"Stu, did you see the news about Kyle?" Casey asked, sitting down.

"Just did," Stu replied with a frown. "I can't believe he was arrested."

#### Jumping the gun?

"Me neither," Casey said with a sigh. "He's one of our best employees. Responsible, level-headed. I never would've expected him to get mixed up in some bar brawl."

"He's accused of beating up someone pretty badly," Stu continued as he scrolled through the emails. "The police had enough to make an arrest, but Kyle is maintaining his innocence. He's claiming he wasn't involved, and the victim is mistaken."

Casey frowned. "I really don't know what to do here, Stu. He hasn't been convicted yet, so I don't want to jump the gun with termination. But this is a serious charge."

"I know," Stu replied. "Once word gets out, I'm sure other employees will have strong opinions on the matter. Some might feel unsafe working with him."

"I'm so conflicted," Casey said.

*If you were Stu, what would you do next?*

#### Reader Responses

**1** Maria Reyes, HR manager, Wallenius Wilhelmsen Solutions, Oxnard, CA

*What Maria would do:* I would place Kyle on a leave of absence until the legal matter is resolved. If he ended up being convicted, then we'd proceed with termination. In the meantime, if employees came to me with concerns, I'd answer their questions with a simple response, such as "We are handling this employee's personal matter to the best of our knowledge, and can't disclose any more information."

*Reason:* We don't want to jump the gun and terminate Kyle, because he may very well be cleared of the charges. However, we know people would be concerned about having him in the workplace during this time, so a leave of absence would be best for

everyone involved. It's also important to be there to listen to employees' concerns, but we can't reveal too much information, so a prepared statement is necessary.

**2** HR manager from a media company in the Northeast, name withheld upon request

*What she would do:* Before making any quick decisions, I'd find out as much information about the situation as I could from Kyle. In the meantime, if anyone came to me with concerns, I'd assure them I was doing everything I could to find a solution. Depending on the circumstances of the fight, I may have to suspend Kyle.

*Reason:* It's important to hear Kyle's side of the story first. It's possible there were extenuating circumstances that led to the assault. But it's also crucial to look out for employees' safety – we can't have a potentially dangerous person on-site.

## HR OUTLOOK

### ■ Can we really work from home forever? Maybe not

More than half the people who work remotely now would like to keep it that way. But is that realistic?

Despite employees' desire to stay put some or all of the time, the hard truth is it might not be a reality forever.

At least, according to Stanford economist and researcher Nicholas Bloom.

Bloom says working from home results in some "challenging circumstances," and argues employees need to at least be in the office part-time.

#### Major remote issues

Here are long-term problems Bloom and other researchers have pointed out:

**1. Lower productivity.** At the start of the pandemic, studies showed people were more productive at home. Now? Not so much. Most employees struggle to focus, particularly on Mondays and Fridays.

**2. Lack of necessary tech.** Many workers' at-home internet connection isn't strong enough to handle frequent Zoom meetings. They also don't have access to every piece of equipment in the office.

**3. Lack of space.** With entire households home at once, a quiet, designated office space is hard to come by.

**4. Increased isolation.** A lot of people are feeling the loneliness set in the longer they're away from the office. This can impact mental health, as well as productivity.

**5. Increased burnout.** With the lines between work and home blurring together, employees are getting into the habit of working longer hours than they would in the office. Without that clear separation, workers are burning out a lot faster.

*Info:* [bit.ly/remotework570](https://bit.ly/remotework570)