

# Law & *Dis*Order: Navigating Recovery - Workforce & Other Legal Issues

By Cindy Effinger



[www.mcbrayerfirm.com](http://www.mcbrayerfirm.com)

# Workforce Supply Issues

During the pandemic, the hospitality, tourism and entertainment industry suffered unique losses, and continues to struggle with recruiting a productive workforce. Some of these, however, predated the pandemic:

*Recruiting talented workers*

*Retaining workers*

*Keeping up with competition*

# Workforce Supply Issues

## Statistics:

- 40% of all\* jobs pay less than \$15/hour
- 50% of all jobs do not offer health insurance
- 70% of all jobs offer no retirement benefit
- 38% of all jobs offer no sick leave\*\*
- \$2.13/hour minimum wage for tipped workers has not been increased since 1991. Tips, overall are down.

\*Not limited to hospitality, tourism or entertainment

\*\*Source: Spectrum News, May 25, 2021

# Workforce Supply Issues

## Unemployment Benefits

In an effort to assist workers laid off due to the pandemic, especially in industries that completely shut down, Congress passed legislation providing an additional \$600 per week in unemployment benefits. This allowed some workers to earn more on unemployment than they did at their full-time jobs.

*What does this tell us?*



# Workforce Supply Issues

## Unemployment Benefits

This unemployment benefit has now been reduced to \$300 per week.

- *Does this provide an incentive to "not" work?*
- *If so, how and why?*

Now workers are also required to show proof of active solicitation of employment.

- *Is this working?*

# Workforce Supply Issues

## Unemployment Benefits

With the \$300 per week benefit about to expire, certain labor groups have asked the Governor to extend the benefits due to a continued work shortage.

- *This benefit would be extended for all applicants, not just labor forces.*

*Where does this leave the hospitality, tourism and entertainment industries?*

# Workforce Supply Issues

## Summer Travel

Trip Advisor reports that two-thirds of Americans are planning on summer travel, a 17% increase from spring 2021 travel.

Great news, right? Increases in travel should increase the revenue of hospitality, tourism and entertainment. But, the workforce shortage will greatly hamper quality of services.

# Workforce Supply Issues

## Creative Companies

### Southern Glazer's Wine and Spirits

- \$1000 sign on bonus

### Frisch's Big Boy, Louisville

- \$250 sign on bonus

### Drake's

- \$100 "Refer a Friend" bonus

### UK

- Minimum wage increasing to \$12.50; \$13.75 by July 1; and \$15 by January 1
- \$1000 employee bonus
- Paid leave for part-time employees to care for new child or a sick parent

### Chipotle

- Debt-free degrees

# Workforce Supply Issues

## Do's and Don'ts to Hiring Bonuses

- Don't offer bonuses in positions that typically experience high turnover regardless of external circumstances (temporary, seasonal work).
- Do offer bonuses to attract particular skills and talents.
- If the bonus is substantial, tie it to an agreement to repay if the individual does not work for a specified period of time.
- Do watch for applicants who are "bonus-chasers."
- Do use the bonus to bridge the gap with a competitive offer.
- Do consider staggered bonuses or "year two" bonuses.

# Workforce Supply Issues

## DRIVING FORCES

Issues facing workers in this industry:

- Health concerns
- Childcare concerns
- Low wages
- Underappreciated
- Few benefits
- Poor managers
- Limited growth potential
- Can make more doing gig work on a more flexible schedule

# Workforce Supply Issues

## DRIVING FORCES

Employees are seeking:

- Flexible hours
- Increase pay
- Paid time off
- Discounts
- Employee recognition

*Do you know the number 1 benefit employees are seeking?*

# Workforce Supply Issues

Training and advancement opportunities!



# Workforce Supply Issues

Employees seek the rise in management and executive-level income, but see hinderances to their own advancement.

Hinderances include:

- Lack of training
- Lack of internal promotions
- Culture/Toxic Environment
- Lack of Mentorship

Offering/advertising these opportunities may draw a new applicant pool.

# Workforce Supply Issues

## Outside-the-Box Recruitment/Retention Solutions

1. Happy customers = happy employees. Offer rewards for customer service and/or reviews.
2. Make employees your brand ambassador. Give them a buy-in, a reason to invest in your company's success.
3. Employee referral programs. Studies show that employee referrals have a longer retention than "off the street" hires.
4. Team Bonding activities. Increase employee engagement and willingness to help out.
5. Are you living your organization's mission?

# Workforce Supply Issues

## Outside-the-Box Recruitment/Retention Solutions

Don't overlook culture and environment.

- Are your employees engaged, and if not, why not?
- Do you communicate well to your employees? Meetings?
- Do you have in writing *and in practice* an open-door policy?
- Are you open to employee suggestions?
- Do you acknowledge employee anniversaries and important dates?
- Have you thought about healthy competition?

# Workforce Supply Issues

## Outside-the-Box Recruitment/Retention Solutions

What about benefits?

- Identity theft protection.
- Pet Care
- Child Care
- On-site fitness/membership
- On-site meals
- Discounts (family and friend promotions)
- Student loan assistance
- Cash
- Something unique to your industry
- Team up with complementary industries, services for benefits

# Workforce Supply Issues

## Outside-the-Box Recruitment/Retention Solutions

Engage your employees

Talk to benefits firms

Talk to competitors

Brainstorm with employees/managers to find out issues unique to your organization or industry.

# COVID-Related Policies for Businesses

All businesses have been operating under new and different policies to promote a safe workplace and to comply with our Governor's orders.

- Mask mandates
- Health screens
- Sanitization/Cleaning
- Social Distancing in work and common areas
- Alternative work schedules
- Modification of leave allowances

# Handling Positive Tests or Exposure

By far, the most complicated issue businesses have faced is what do to when an employee tests positive for COVID-19 or was in “close contact” as defined by the CDC and needs to quarantine.

**All of this is changing with the vaccine rollout:**

Vaccinated employees do not have to quarantine!

*How does this change the way you will do business?*

# Handling Positive Tests or Exposure

What do you do with employees who were not “exposed” but are “afraid?”

- Being “afraid” is not covered by any law.
- Assure them of the CDC rules and your safety measures
- Review your handbook policies for time off if they refuse to come into work
- Review your policies on work from home



# Handling Positive Tests or Exposure

## What about work from home?

- Consider whether you will allow work from home due to exposure or sickness and apply this consistently
  - What positions are suited for remote work and which are not
- Have a clearly defined policy in place for work from home rules and expectations
- Keep in mind Wage and Hour laws and confidentiality needs

# COVID-19 and Customers

Open questions for businesses:

1. Do you require masks for employees after June 11?
2. Do you require masks for customers after June 11? Unvaccinated only?
3. How do you handle objections?
4. What are your competitors doing?
5. Do you require vaccines?

# EEOC Releases Vaccine Guidance

- In mid-December, the EEOC released guidance that says employers generally CAN mandate that employees receive the FDA-approved COVID-19 vaccine.
- But it's not always simple.
- *Should* employers require employees to get the vaccine? What about access for customers?



# Considerations for Vaccine Mandates

Though EEOC guidance clarifies that requiring employees to receive the vaccine does not go against any EEOC law, they suggest that employers strongly encourage rather than require employees to get vaccinated.



# Considerations for Vaccine Mandates

## PROS

- Safe environment
- Limits worker's compensation/OSHA safe and healthy workplace liability
- Safety of public/clients/patients
- Reduced absences due to illness
- Employee morale

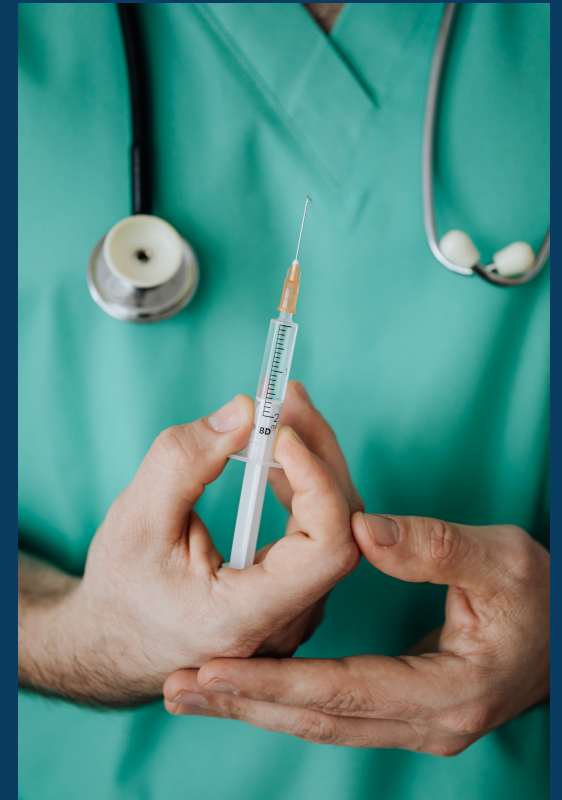
## CONS

- Complications with Disability Law, Title VII, etc.
- Emerging state legality issues
- Hiring and retention barrier
- Employee Morale

# ADA Considerations

If an employer offers a vaccination to employees on a voluntary basis:

- The employee's decision to answer disability-related screening questions must also be voluntary under the ADA.
- The employer may decline to administer the vaccine if an employee chooses not to answer these questions.
- The employer may not retaliate against, intimidate, or threaten the employee for refusing to answer the questions.



# Proof of Vaccinations

Asking or requiring an employee to show proof of receiving a COVID-19 vaccination administered by an independent third-party is not a disability-related inquiry. For example, individuals who receive a COVID-19 vaccine are given a COVID-19 vaccination record card that includes only the vaccine product name and vaccination date and site. However, if the employer asks subsequent questions (for example, asking why the individual did not get vaccinated), this may elicit information about a disability. To avoid implicating the ADA, employers should:

- Not ask these follow-up questions unless there is a reason for doing so that is job-related and consistent with business necessity.
- Warn employees not to provide any medical information when supplying proof of a COVID-19 vaccine.



# GINA Concerns

- Employers should also consider whether their vaccination program implicates GINA, which contains prohibitions on using, acquiring, or disclosing genetic information (29 C.F.R. § 1635.3(c)).
- Pre-vaccination medical screening questions, however, may violate GINA if they ask about or elicit genetic information (for example, questions regarding family members' medical histories or immune systems).





# Title VII Considerations

- Employees protected under Title VII of the Civil Rights Act of 1964 may refuse vaccination under their protected identity such as:
  - **Sincerely** held religious beliefs
  - Pregnancy, due to a lack of certainty about the effects of the vaccine on pregnant people
  - Disability/Medical issues



# Title VII Considerations

- There are ADA issues as well for providing access to your customers who need an “accommodation” for the vaccine. But, what does this mean? How do we implement this?



# Reasonable Accommodation

- The EEOC's COVID-19 guidance suggests that mandatory vaccination programs are lawful under EEO laws, subject to employers' **reasonable accommodation** obligations.
- Employers with mandatory vaccination policies should be prepared for objections and accommodation requests from employees, including claims that they cannot get vaccinated because of the employee's:
  - Medical condition (which may or may not be an ADA-covered disability).
  - Religion.

# Reasonable Accommodation

- If any employee needs reasonable accommodation, employers should follow the interactive process:
  - Review the accommodation request from the employee. While documentation is not required by the ADA or Title VII, recording the request is a good practice.
    - Identify the employee's limitations (here, the employee's inability to receive the COVID-19 or other vaccine). This may include reviewing the vaccine's:
      - contraindications (conditions in a vaccine recipient that increases the risk for a serious adverse reaction); and
      - precautions (conditions in a vaccine recipient that might increase the risk for a serious adverse reaction, cause diagnostic confusion, or compromise the ability of the vaccine to produce immunity).
  - Employers may ask for documentation from an employee's healthcare provider for ADA accommodations. Employers may not directly contact the provider without written permission from the employee.
  - Employers may ask for an explanation of sincerely held religious beliefs and their conflict with the vaccination. Documentation from a religious leader may be sought.

# Reasonable Accommodation

Examples of reasonable accommodation for employees who qualify might include:

- Adjusting work hours to allow employee to avoid contact with others during peak entering/exiting
- Allowing remote work until the virus threat is contained
- Enforced social distancing and wearing PPE in common areas
- Modifying an employee's non-essential job duties
- Temporary reassignment





# Reasonable Accommodation

- For employees who refuse the vaccine but are not disabled or who do so for non-religious personal reasons, EEO laws and employers' accommodation obligations are not implicated.
- Personal medical beliefs and secular beliefs about the vaccine are not covered by EEO laws.



# Vaccine Refusal

- Employers should not automatically terminate or take other adverse employment action against an employee who refuses to vaccinate. Before doing so, the employer should gain a better understanding of the employee's objections and evaluate the employee's potential legal rights under federal, state, or local law.
- Options for employees who refuse to get the vaccine when a mandatory policy is in place include:
  - Requiring the employee to work from home
  - Moving the employee to a position that is not public-facing
  - Termination



# Best Practices for Creating a Vaccine Policy

Consider including:

- Incentives (Kroger offering \$100, Starbucks offering two hours of PTO per shot)
- Contingency language for possible vaccine shortages
- Nondiscrimination and non-retaliation provisions
- A documented process for medical and religious exemption requests





# Looking forward: The future of masks

- After the SARS outbreak in East Asia in 2003, mask-wearing became a largely cultural norm.
- While mask requirements in the U.S. have become a politically-charged topic, it is possible that wearing a mask when you feel ill will continue as a normal phenomenon.
- **Do not mask-shame!**



# Workplace Safety Measures Review

- Review your policies and share updates with employees.
- Create a clear vaccination policy.
- Update your mask and quarantine policies to reflect new guidance.



# COVID Limited Liability Legislation (SB 5)

A quick word on limitations on liability'

- Is this bill necessary?
- Limits liability to a narrow group of essential service providers and businesses open to the public.
- Personal injury immunity to providers who have “reasonably attempted” to comply with state COVID-19 orders and regulations. No immunity for gross negligence.
- Protects businesses that allow others on premises from liability for personal injury arising from the pandemic.
- Retroactive to March 6, 2020; end after December 31, 2023.
- One-year statute of limitations.

## Lexington

201 East Main Street, Suite 900  
Lexington, KY 40507

859.231.8780

Contact: Cindy Effinger

## Louisville

500 West Jefferson Street, Suite 2400  
Louisville, KY 40202

502.327.5400

Contact: Cindy Effinger

[www.mcbrayerfirm.com](http://www.mcbrayerfirm.com)

[ceffinger@mcbrayerfirm.com](mailto:ceffinger@mcbrayerfirm.com)

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