



Stopping The Spread Of COVID-19 Hate Crimes In Reopened Restaurants

Insights

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As restaurants continue to reopen out of economic necessity despite a global pandemic, employers and employees alike remain concerned about the possibility of COVID-19 outbreaks in the workplace. No longer are bad Yelp reviews and failed health department inspections the worries that keep restaurant owners up at night. Now, a single cough by an infected employee can put a restaurant that has survived depressions, recessions, and world wars forever out of business.

Due in large part to such fear and uncertainty, employees and independent contractors throughout the country have increasingly found themselves being harassed, discriminated against, and even threatened with physical violence by business owners, co-workers, or customers who suspect them of being infected with COVID-19. In some instances, these actions have occurred because the victims exhibited physical symptoms that others believed were evidence of a COVID-19 infection, but which were often due to unrelated medical conditions. In other instances, these actions occurred because the victims were members of a group of people who others believed were likely to be infected with COVID-19, including individuals of certain races or national origins.

Regardless of how justified employers or employees believe their actions might be, subjecting an employee, independent contractor, or customer to hostile or disparate treatment based on their actual or suspected infection with COVID-19 is almost always prohibited by law – and is always bad business.

Harassment, Discrimination, And Retaliation In Violation Of The ADA And Title VII

The Americans with Disabilities Act (ADA) and similar state laws prohibit employers and employees from harassing any employee on the basis of any disability. The ADA defines the term “disability” to mean any “physical or mental impairment that substantially limits [the employee’s ability to perform] one or more major life activities.” The ADA also prohibits employers from discriminating against or retaliating against any employee for possessing any disability, or for opposing any harassment, discrimination, or retaliation made illegal by the Act.

However, the ADA permits employers to deny jobs to individuals who pose a direct threat to the health and safety of other employees in the workplace. It also permits you to refuse to continue assigning jobs involving food handling to individuals who possess diseases that cannot be accommodated.

In contrast, Title VII of the Civil Rights Act of 1964 and similar state laws prohibit employers from harassing, discriminating, or retaliating against any employee on the basis of their race, color, religion, sex, or national origin. It also offers protection for those who oppose any harassment, discrimination, or retaliation made illegal by the Act.

Where an employee can prove a violation of the ADA or Title VII, they are entitled to seek actual damages, emotional distress damages, punitive damages, attorneys' fees, and/or injunctive relief from or against the responsible parties. In certain circumstances, employers could be held vicariously liable for any harassing actions performed by their managerial or supervisory employees.

Importantly, whether an employee is actually infected with COVID-19 or is actually of the same race or national origin as individuals from a country with a high COVID-19 infection rate is entirely irrelevant to the question of whether any harassment, discrimination, or retaliation has occurred. Treating an individual differently based on their "perceived" status is just as illegal under the law as treating an individual differently based on their actual status. Indeed, such treatment is likely worse, as an employer or employee could be found liable for harassing, discriminating against, or retaliating against that individual on the basis of their perceived *and* actual status.

Federal Hate Crimes Statute

Where an act of harassment, discrimination, or retaliation includes any actual or threatened violence against an individual, it may also qualify as a "hate crime" under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (HCPA) and/or similar state laws. As set forth in the HCPA, any individual who causes bodily injury or attempts to cause bodily injury to any person because of their actual or perceived race, color, national origin, religion, gender, gender identity, sexual orientation, or disability is guilty of committing a hate crime under federal law.

While the HCPA appears similar to the ADA and Title VII, significant differences exist between those statutes. Unlike the ADA and Title VII, the HCPA applies to actions performed by every type of individual and entity, as well as actions taken against every type of individual. Also, performing an action that violates the HCPA exposes an individual or entity to criminal liability, whereas the ADA and Title VII have no such provisions.

Importantly, an individual need not have suffered physical harm for a HCPA violation to have occurred. Rather, actions that potentially qualify as "hate crimes" under the Act include "attempts" to cause bodily injury. Further, while the HCPA does not prohibit attempts to cause harm that is solely emotional or psychological in nature, many state hate crime statutes prohibit such actions as communicating verbal or written threats of violence to an individual; advocating for violence against an individual; threatening or committing assault against an individual (including hitting, spitting, kicking, and forcibly interfering with an individual); and vandalizing, damaging, or placing graffiti on an individual's property.

Likewise, whether an individual acted with “hate” is irrelevant to the issue of whether a violation of the HCPA occurred. While the Act is technically classified as a “hate crime” statute, by its own terms, the government is not required to prove that the aggressor acted with “hate” in order to succeed on a claim. Instead, even an action performed with good intentions could potentially be considered a violation of the Act if it was ultimately motivated by the victim’s actual or perceived disability, race, national origin, or other protected condition.

Prevention And Treatment

How then should you and your employees act in order to avoid violating state and federal harassment, discrimination, retaliation, and hate crime laws? First, you should review and update your policies and procedures to ensure that they are written without reference to any individual’s possession of a protected condition, except where explicitly permitted by law. Generally speaking, policies for requesting medical leave, keeping the workplace clean, social distancing, and wearing personal protective equipment should apply equally to all employees, independent contractors, and customers regardless of any actual or perceived conditions that they might possess.

Second, you should educate your employees and independent contractors on your policies and procedures. Policies should be contained in employee handbooks or clearly marked standalone documents that are distributed to employees or independent contractors with advance notice, documentation of receipt, and the opportunity to ask questions. Procedures should be described in clear and unambiguous language and should reflect the business’s actual practices.

Third, you should train your managers to enforce your policies and procedures in a neutral and non-discriminatory manner. While it may be tempting for managers to treat individuals who they suspect are infected with COVID-19 differently from other individuals, they must not do so. Further, where an individual fails to comply with a restaurant’s policies and procedures – including by harassing, intimidating, or threatening others who they suspect have COVID-19 due to their actual or perceived medical condition, race, national origin, or other protected condition – you and your managers must be sure to take swift and appropriate action to remedy the situation.

Finally, you should educate yourself regarding the rights and duties that you have when an individual informs you that they are infected with COVID-19. While you may have the right to ask an employee who has tested positive for COVID-19 to stay home from work for the purpose of complying with your legal obligation to protect other employees from getting sick, you may also be required to allow that employee to continue working from home, to keep that employee’s medical condition confidential from other employees, and to reasonably accommodate that employee upon their return to work.

Conclusion

Importantly, because it is not always clear how newly passed COVID-19 related laws interact with other existing labor and employment laws, you should be sure to consult with your Fisher Phillips attorney before taking any adverse action against any employee or independent contractor who has tested positive for COVID-19.

For more information, [contact the author here](#).

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