

## FP SNAPSHOT ON HEALTHCARE INDUSTRY: APRIL 2022

Insights

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Welcome to our latest Healthcare Snapshot, where we take a quick look at some of the most pressing issues facing employers in the industry. Even though COVID-19 numbers are generally trending in a positive direction, employers in these settings still face intense scrutiny and range of questions related to the pandemic. Other emerging issues have little or nothing to do with the pandemic. Some of these areas are more pressing than others, but all of them merit continuing attention.

### COVID-Specific Directives from Federal Agencies

The Centers for Medicare & Medicaid Services (CMS) continues to oversee administration and enforcement of [vaccination requirements for all staff at CMS-certified facilities](#).

Further, the Occupational Safety and Health Administration (OSHA) has not only announced a [permanent COVID-19 Standard for healthcare settings](#), it has also directed [increased scrutiny toward some hospitals and skilled nursing facilities](#). Both CMS and OSHA still view COVID practices and protocols as high-priority items. Thus, even as many businesses may be tempted to relax their standards, healthcare employers cannot even begin to let down their guard when it comes to [protecting their patients and employees](#).

### The EEOC is on Alert for Various Forms of Pandemic-Related Discrimination

The Equal Employment Opportunity Commission (EEOC) is discussing a variety of scenarios related to COVID-19, each

### Related People



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of which it warns may lead to unlawful discrimination.

These scenarios include [disputes over employers' vaccine policies](#). After vaccines became widely available to healthcare workers in early 2021, employers began receiving unprecedented numbers of [requests for accommodations \(exemptions\) based upon employees' religious beliefs, a topic that we have discussed in various Insights](#). The CMS mandate for certified participants to have all staff vaccinated, except those legally entitled to accommodation, has driven that volume of requests even higher. The [EEOC recently updated its guidance on responding to requests for religious accommodation](#).

### **Potential Caregiver Discrimination in the Spotlight**

The EEOC also recently issued detailed guidance identifying [circumstances under which a person with caregiver responsibilities may experience unlawful discrimination](#). Even though discrimination based solely upon caregiver status is not prohibited, this issue is clearly on the Commission's radar.

And while the total number of discrimination charges filed was down in 2021, [the EEOC's Annual Report showed an increase in COVID-related charges](#), the majority of which cited alleged violations of the Americans with Disabilities Act (ADA). Many discrimination and failure-to-accommodate claims appear to now be in the pipeline, though relatively few have proceeded to litigation, according to [our litigation tracker](#). Nonetheless, an [employment litigation boom is beginning to affect healthcare](#) and a few other industries, according to our most recent Flash Survey of about 350 companies.

### **More Mental Health Concerns Are Emerging**

EEOC data also shows that allegations of discrimination based upon mental health reasons jumped substantially among all ADA-related charges, accounting for almost one-third of all charges alleging disability discrimination. Anxiety and PTSD were the most frequently mentioned conditions cited among those charges.

We have been [discussing and advising on the mental health aspects of the pandemic since the early stages of the pandemic](#). Employers should therefore review their policies and resources, being alert for opportunities to respond to

employees experiencing stress or mental health disorders. Another critical point is that healthcare employers must continue to evaluate and respond to requests for accommodation on an individualized basis, regardless of how time-consuming it can be.

## **Wage and Hour Traps**

Although they may have little or nothing to do with the pandemic, Wage and Hour issues continue to draw plenty of attention from the U.S. Department of Labor, particularly in healthcare settings. FP's Patrick Dalin, a former Senior Trial Attorney with the DOL, [has identified 7 of the biggest landmines that healthcare employers face – and more importantly, provided suggestions on how to avoid stepping on them.](#)

## **The National Labor Relations Board's Announcement**

If all these issues had not already given healthcare employers enough to be concerned about, the National Labor Relations Board's (NLRB) general counsel just bucked almost 75 years of legal precedent, [issuing a memo that would severely limit employers' free speech rights](#) in the face of union organizing activity. Employers who want to preserve their union-free status should therefore take note of this development and confer with their counsel to determine what actions they should now be considering.

## **Don't Overlook Applicable State Laws**

Since the pandemic began, many states have enacted statutes or other measures that in some cases would limit an employer's ability to require vaccinations. [Our state trackers](#) can be helpful in considering these questions, which will be most important in settings *not* covered by the CMS vaccination mandate. And while it may be tempting, those and other employers [must think carefully before relaxing their pandemic policies.](#)

Finally, like many others, employers in healthcare are continuing to struggle with staffing shortages and [COVID Fatigue](#). Amidst financial pressures and competition from the allure of travel assignments and nurse staffing agencies, hospitals, nursing homes, home health agencies and other providers must continue to be nimble and innovative in order to attract and retain necessary staffing.

## Conclusion

In sum, it remains a demanding time for healthcare employers. But that is something that industry veterans have grown accustomed to. These and other issues continue to present challenges that must be navigated.

We will continue to monitor developments and publish Insights as warranted, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information directly to your inbox. In the meantime, contact your Fisher Phillips attorney, the author of this Snapshot, or any attorney on our [Healthcare Industry Team](#) regarding questions on these or other workplace questions.