

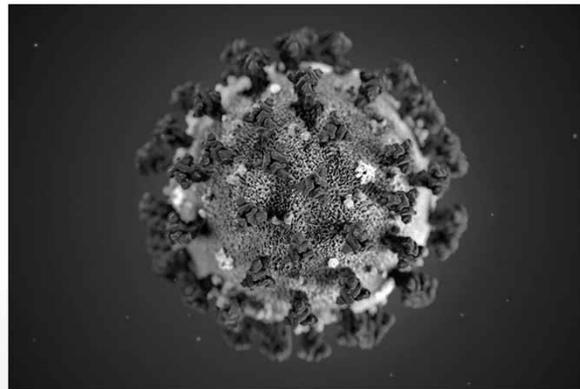
# So, It's 2022 . . . What Now?

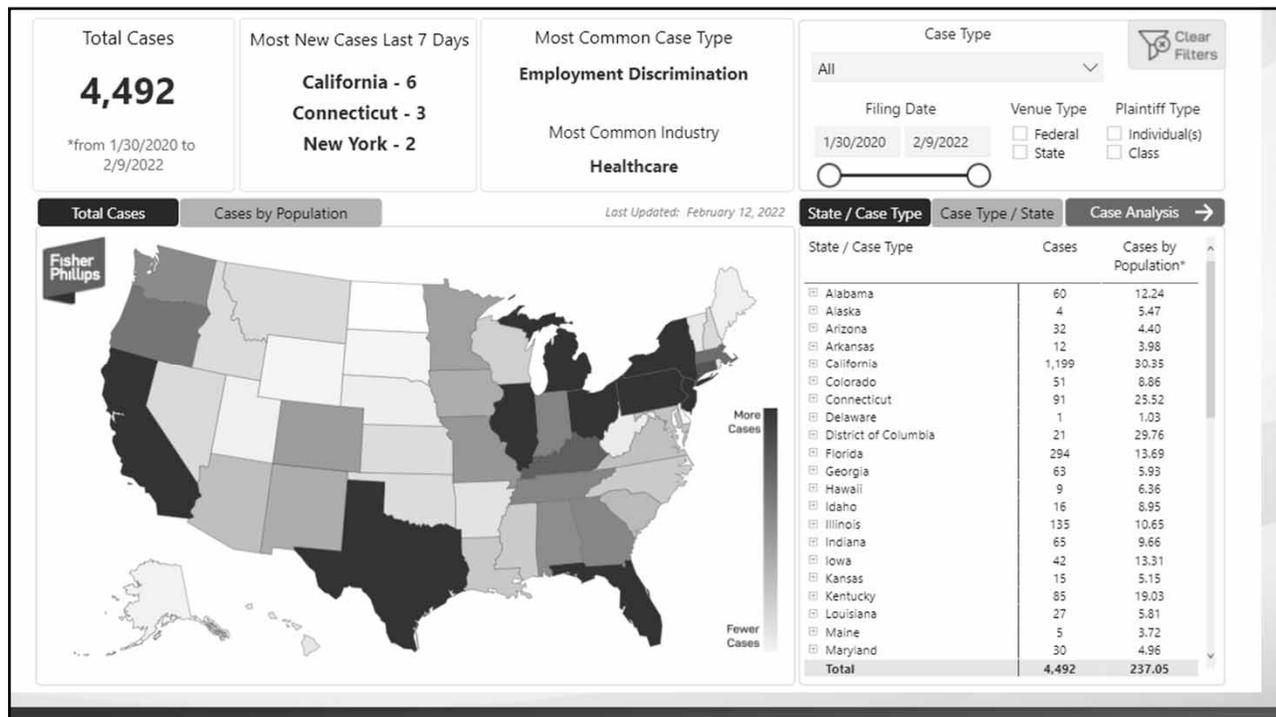
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## COVID-19 is Still Dominating





## Overview

- OSHA's COVID-19 Emergency Temporary Standards
- OSHA's "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace"
- Steps for Keeping Workers Safe and Avoiding Potential Citations.



## Executive Order (“EO”) on Protecting Health and Safety

- Signed by Biden on Jan. 22, 2021 – instructs OSHA to revise its COVID-19 safety recommendations.
- The EO declared that ensuring the health and safety of workers is a national priority and a moral imperative.
- The order directed OSHA to take action to reduce the risk that workers may contract COVID-19 in the workplace.

## OSHA's Vaccine or Testing ETS

**November 5, 2021**: OSHA's COVID-19 Vaccine or Testing Emergency Temporary Standard (ETS) took effect.

- Rule takes the form of an ETS.
  - Allows the agency to enact regulations it can enforce immediately if a "grave danger" to worker safety is present.
- The ETS would have immediate effect in the 22 states where federal OSHA has jurisdiction.
- Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation.
- The ETS can remain in place for six months before it must be replaced by a permanent OSHA standard.

## ETS Legal Challenges



- Over a dozen legal challenges to OSHA's vaccine or testing ETS after its November 5 effective date.
- Fifth Circuit issued order blocking the ETS from taking effect on a nationwide basis.
- Sixth Circuit selected to hear consolidated claims after Multidistrict Litigation Panel process.
- December 17: Sixth Circuit lifted Fifth Circuit's stay of ETS.

## The Supreme Court Blocks OSHA's Vaccine or Testing ETS



- January 13, 2022: In a 6 to 3 decision, SCOTUS blocked OSHA's vaccine ETS from being enforced for the foreseeable future.
- SCOTUS noted that "although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."
- It also stated that "a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, 'cannot be undone at the end of the workday.'"

## Secretary Walsh's Statement on the SCOTUS's Ruling on Vaccine or Test ETS



"We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation."

"Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause."

## OSHA Withdraws Vaccine or Testing ETS



January 25, 2022: OSHA announced it was withdrawing the ETS, likely in reaction to SCOTUS's ruling putting a halt on enforcement.

- OSHA indicated it will push forward with using the ETS as a proposed permanent rule.
- Long term, OSHA could use the framework of the ETS as the basis for a broader infectious disease standard going well beyond just COVID-19.



## What Should You Do?

### **Prepare for OSHA Complaints and Inspections:**

- We are seeing increased complaints to OSHA, more inspections.
- Keep in mind general compliance duties related to COVID-19 prevention and mitigation.
- OSHA will ask for your COVID-19 response plan and training records.
- Develop a COVID-19 policy and communicate its requirements to your employees.
- Train managers and supervisors on what to do and say if OSHA arrives for an inspection.

## Workplace Safety Update

- Doug Parker as new head of OSHA – what to expect, generally:
  - More enforcement inspectors;
  - *More willful citations and criminal referrals;*
  - Seeking enterprise-wide abatement agreements;
  - Focus on heat safety;
  - Focus more resources on whistleblower protection;
  - Enforcing OSHA's largely dormant 2016 anti-retaliation rule; and
  - Aggressively enforcing COVID-19 regulations.

## OSHA's National Emphasis Program ("NEP") on COVID-19



- Adopted on March 12, 2021 (revised on July 7, 2021)
- NEPs allow OSHA to focus resources on particular hazards or high-hazard industries.
- OSHA's NEP calls for additional inspections concerning a variety of hazards and standards related to COVID-19.
- Inspections likely to be initiated immediately.
- OSHA strongly encourages State Plans to adopt the NEP, but does not require identical adoption.
- Most inspections likely to occur in general industry (non-construction sites), particularly in healthcare.

## What Will Inspections Look Like Under the NEP?

- **Opening conference** – Will take place in a designated, uncontaminated administrative area or outdoors, and face coverings and PPE will be worn at all times.
- **Document review** - OSHA Compliance Safety and Health Officers ("CSHOs") will review employers' written safety and health plans; hazard assessment and protocols for PPE use; social distancing policies and procedures; respiratory protection program and policies; and medical records related to worker exposure.
- **Walkaround** - CSHOs will walkthrough identified areas of the worksite, looking for hazards and violations.

## Expect Increase in General Duty Clause Citations

- Employers must furnish “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”
- OSHA can cite employers for violation of the General Duty Clause if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard.
- The General Duty Clause is used only where there is no specific OSHA standard that applies to the particular hazard, like the COVID-19 pandemic.

## Guidance for Employers

### **Encourage unvaccinated and at-risk workers to help protect themselves by:**

- Promoting vaccinations. Inform employees about opportunities for paid leave, if necessary, to get vaccinated and recover from any side effects.
- Properly wearing a face covering over your nose and mouth.
- If working outdoors employees may opt not to wear face coverings in many circumstances; however, employees should be supported in continuing face covering use if they choose, especially if they work closely with other people.
- Staying far enough away from other people so that they are not breathing in particles produced by other people – generally at least 6 feet (about 2 arm lengths)
- Monitoring their health daily and be alert for COVID-19 symptoms (e.g., fever, cough, or shortness of breath).

## Guidance for Employers

Most employers no longer need to take steps to protect their workers from COVID-19 exposure where **all** employees are fully vaccinated.

Key controls to help protect unvaccinated and at-risk workers include:

- Separating from the workplace all infected people and people experiencing COVID symptoms, and any unvaccinated people who have had a close contact with someone with COVID-19.
- Implementing physical distancing
- Maintaining ventilation systems
- Properly using face coverings or personal protective equipment (PPE) when appropriate.

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## Guidance For Employers: Retaliation and Discrimination

- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.
- Be aware that Section 11(c) of the Act prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer.
- 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related illness.

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## Higher-Risk Workplaces

- OSHA specifically identifies:
  - Manufacturing
  - Meat and Poultry Processing
  - High-volume retail and grocery
  - Seafood processing
- Where there are unvaccinated or at-risk workers:
  - Stagger break times in high-population workplaces
  - Stagger workers' arrival and departure times
  - Provide visual cues to maintain physical distancing

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## Greater Oversight of State OSHA Plans

- States and OSHA have not always seen eye to eye.
- Kentucky, Indiana, North Carolina and South Carolina, have refused to adopt federal OSHA's increased maximum penalties, originally adopted under the Obama Administration.
- Other states like Virginia, Michigan, California, and Oregon adopted their own Emergency Temporary Standard for COVID-19 (some have become permanent).
- Expect federal OSHA to work more closely with the state OSHA plans and seek more aggressive enforcement from their state counterparts.

## Citations

Types	State Penalties	Federal Penalties
1. Failure to abate/correct	1. Up to \$7,000/day	1. Up to \$14,502/day
2. Other than serious	2. Up to \$7,000	2. Up to \$14,502
3. Serious	3. \$500 - \$7,000	3. Up to \$14,502
4. Repeat	4. Up to \$70,000	4. Up to \$145,027
5. Willful	5. \$5,000 - \$70,000	5. Up to \$145,027
6. Willful violation causing death	6. Criminal penalties - fines and prison terms.	6. Criminal penalties - fines and prison terms.

## COVID-19 Update

### COVID-19 Reasonable Accommodation (EEOC Guidance)

- Employee **may** be entitled to exemption from “required” vaccines:
  - Due to an ADA-covered disability or other medical circumstances (e.g., those for whom a vaccine is contraindicated or for whom medical necessity requires a delay in vaccination); or
  - Under Title VII, based on sincerely-held religious beliefs, practices, or observances;
- Interactive process is critical (maybe as important as your decisions);
- Employer must consider reasonable accommodations;
- Document communications with employee;
- Employer’s right to make medical and religious inquiries is limited;
- Supervisor training is vital – avoid inadvertent medical inquiries;
- Sample forms are available at the FP Vaccine Resource Center.

## COVID-19 Update

### COVID-19 Reasonable Accommodation (EEOC Guidance)

- Consider reasonable accommodations for employees whose disabilities put them at **greater risk** from COVID-19.
- Accommodation is not required based on an employee's family member's disability.
- Inquiries/medical exams ok if:
  - job-related and
  - consistent with business necessity
    - E.g., direct threat to health or safety.
- Employer's actions must be consistent with CDC and public health guidance for that type of workplace at that time.

## COVID-19 Update

### COVID-19 Reasonable Accommodation (EEOC Guidance)

#### **The Interactive Process (for disability and/or religious accommodation)**

- (1) Review request for accommodation regarding vaccine, masking, and/or testing requirements to determine if it implicates ADA and/or Title VII obligations;
- (2) Consult employee to ascertain what, if any, accommodations may be needed;
- (3) If appropriate, consider consulting with health care provider or religious leader;
- (4) Determine whether the employee has an ADA disability or a sincerely held religious belief;
- (5) Determine whether the requested accommodation (or any other) poses a direct threat or creates an "undue hardship";
- (6) Notify the employee of your decision and document process.

## COVID-19 Update

### COVID-19 Reasonable Accommodation (EEOC Guidance)

- EEOC identified the following factors for evaluating credibility of religious accommodation requests:
  - Inconsistent with past religious observance (but “scrupulous observance” is not required)
  - The accommodation is “desirable” (e.g., weekends off)
  - Timing is suspicious (e.g., requested only after “political” objection failed)
- Prior inconsistent conduct is relevant, but not conclusive
- Deviation from “commonly followed tenets” not sufficient

**The CDC’s latest guidance is...**

## COVID-19 Update

CDC's Updated COVID-19 Guidance

### • Quarantine Following Close Contact:

- “Close contact” = within 6 feet of a person with COVID-19, a total of 15 minutes in 24 hours during the 2 days before the person showed symptoms or tested positive.
- If you are “up-to-date” with vaccinations:
  - You do not need to quarantine following close contact, **unless** you have COVID-19 symptoms (in which case, follow CDC's isolation guidance).
- If you are not “up-to-date” with vaccinations:
  - Stay home and quarantine at least 5 days after “day 0” (the date of your most recent close contact).

## COVID-19 Update

CDC's Updated COVID-19 Guidance

### • Quarantine Following Close Contact:

- Following close contact, *regardless of vaccination status*, everyone should:
  - Watch for symptoms and wear a mask for ten full days following day 0;
  - Get tested at least 5 days after day 0;
  - Do not go to places where you are unable to mask, and avoid eating near others;
  - Avoid travel and avoid being around people who are at high risk from COVID-19 exposure.
- *If you develop COVID-19 symptoms or test positive during the 10-day period after day 0, follow the CDC's isolation guidance.*

## COVID-19 Update

CDC's Updated COVID-19 Guidance

- **Isolation of persons “with COVID-19”:**

- A person “with COVID-19” means anyone who tested positive or has COVID-19 symptoms.
  - *Vaccination status is irrelevant.*
- Stay home at least five days after “day 0” and isolate from others in your home.
  - “Day 0” is the date your positive sample was collected or your symptoms first appeared, whichever is later.
- Wear a mask if you must be around others.

## COVID-19 Update

CDC's Updated COVID-19 Guidance

- **Isolation of persons “with COVID-19”:**

- An asymptomatic person may end isolation five days after day 0.
- A symptomatic person may end isolation five days after day 0--**if** they have been fever-free for 24 hours (without using fever-reducing medication) and other symptoms are improving.
- If you were severely ill, isolate at home at least ten days and consult your doctor before ending isolation.

## COVID-19 Update

CDC's Updated COVID-19 Guidance

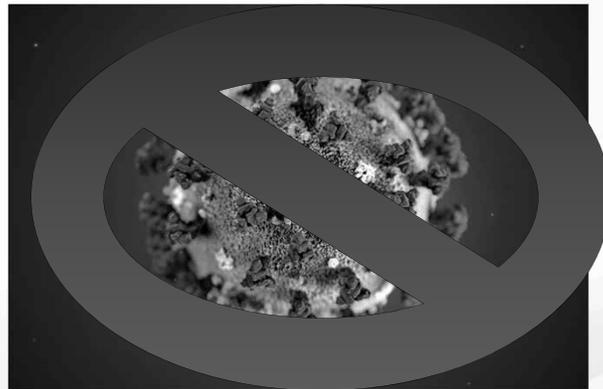
- **Isolation of persons “with COVID-19”:**

- In **all** cases of isolation:

- Wear a mask through day ten;
- Avoid travel; and
- Avoid being around people who are at high risk.

- Remember: the isolation rules are the same for everyone, *regardless of vaccination status.*

## Non-COVID-19 Related Updates



## EEOC Shifting to the Left

- Biden administration plans to double EEOC funding and "empower the EEOC to initiate investigations for all areas of discrimination."
- Already restored Obama administration's effort to expand EEOC's collection of earnings data by race and gender, a program the Trump administration scaled back.
- On September 1, 2021, the Office of Federal Contract Compliance Programs (OFCCP), which enforces affirmative action and non-discrimination requirements on federal contractors, announced it would again be using EEO-1 "Component 2" compensation data collected the EEOC collected (from employers of  $\geq 100$  employees) for calendar years 2018 and 2019.

## EEOC Shifting to the Left

- In January 2021, the EEOC issued a Final Rule requiring the itself, during the pre-suit conciliation process, to disclose to the employer:
  - Non-privileged information EEOC used to reach its "reasonable cause" finding;
  - List of key witnesses;
  - Criteria the EEOC would use in adding other parties;
  - The EEOC's theory of liability - "systemic, class, or patten or practice";
  - EEOC's legal analysis of why the facts of the case support liability;
  - EEOC's calculation of damages; and
  - All known non-privileged exculpatory facts favoring the employer.
- On June 30, 2021, President Biden signed a joint Congressional resolution voiding the Final Rule (under the Congressional Review Act) and leaving in place the EEOC's existing statutory obligations.

## National Labor Relations Board: Changes Ahead

- **New/Old Joint-Employer Standard:** NLRB expected to issue proposed rule on joint-employment standard soon (this month).
- Expected to make it easier to hold multiple entities liable, as employers, for violating employees' rights.
  - Obama-Era Rule: 2015 *Browning-Ferris* decision – employer need only have the *right* to control an employee's working conditions.
  - Trump-Era Rule: In 2020, the Trump-era Board reversed *Browning-Ferris*. Joint employers must *actually* share or co-determine essential terms and conditions of employment.
  - Board likely to restore Obama-era rule, if not something more restrictive.

## National Labor Relations Board: Changes Ahead

**Making Life Easier for Unions:** The Biden Administration and Biden's NLRB appointees are openly pro-union, and have said they intend to:

- Make it easier for unions to organize employees and harder for employers to remain union free;
- Increase penalties for unfair labor practices, including punitive damages;
- Share information across agencies, including with the Wage and Hour Division;
- Make it easier to find employers guilty of anti-union bias, while further protecting pro-union employee outbursts; and
- Increase scrutiny of handbook rules and severance agreements, including non-disparagement, confidentiality, and other provisions affecting Section 7 rights.

## Fair Chance to Compete for Jobs Act

41 U.S. Code § 4714

- “Ban the box” law for federal contractors, eff. December 20, 2021.
  - Before conditional offer of employment, employers can’t ask about:
    - arrests or indictments;
    - formal criminal charges;
    - disposition of any of these actions including sentencing, correction, supervision, or release decisions; or
    - sealed or expunged records available to State or local criminal justice agencies.
  - Employer may ask such questions after extending an offer of employment conditioned on the results of a criminal history inquiry.
  - Exceptions to prohibited questions:
    - if required by law;
    - the position has access to classified/law enforcement/national security info; or
    - the position “involve interaction with minors . . . or managing financial transactions.”

## Changes to Employment Arbitration Agreements

### Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- On February 10, 2022, Congress passed this Act strong bipartisan support. President Biden has already voiced his support for the bill and is expected to sign it into law.
- Prohibits employers from unilaterally enforcing arbitration agreements for disputes involving sexual harassment or sexual assault.
- Means that employees will have the right to unilaterally choose to bring covered claims in arbitration or in court.
- The Act also allows an employee to bring these sexual harassment or sexual assault claims individually or on behalf of a class.

## California Law Update

### SB 331 – “Silenced No More Act” Extension

- Follow-up to **SB 820** (which banned NDAs in settlement agreements for claims of sex discrimination or harassment).

#### Three changes:

- 1) Expands prohibition** of confidentiality provisions in agreements entered on or after Jan. 1 for discrimination, harassment, or retaliation beyond sex (race, religion, color, national origin, ancestry, disability, medical condition, age and other protected characteristics).
- 2) Prohibits non-disparagement** agreements required as a condition of employment that prevent employees from disclosing information about unlawful acts in the workplace, as against public policy and unenforceable.
- 3) Also applies to severance agreements** containing any provision preventing an employee from discussing unlawful acts in the workplace.

## California Law Update

### SB 331 – “Silenced No More Act” Extension

A nondisparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language:

“Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”

## California Law Update

### SB 331 – “Silenced No More Act” Extension

- Effective January 1, 2022 - will nullify and make void provisions within any agreement entered on or after that date that prevent or restrict an employee from disclosing factual information on any type of harassment, discrimination, or retaliation.
- Assumes NDAs used to protect repeat offenders, but often used as part of a business decision to resolve claims early – now public perception of guilt may force employers to take a case to trial merely to maintain company integrity.

## Federal Campaign Against Non-Compete Agreements

- On July 9, 2021, President Biden issued Executive Order 14036, entitled “Promoting Competition in the American Economy,” to the Federal Trade Commission (“FTC”):
  - Not the sweeping prohibition of non-compete restrictions some expected.
  - Asked the FTC to consider a “ban” on “the unfair use of non-compete clauses,” not on non-compete clauses altogether.
  - Biden administration has since indicated non-competes for low wage-earners should be prohibited.
- What to expect next? The FTC may decide:
  - use of non-compete restrictions is prohibited;
  - all related restrictive covenants, such as customer non-solicitation provisions, are also prohibited;
  - to prohibit non-compete restrictions on lower-wage employees; or
  - other changes to use of non-competes, such as requiring advanced disclosure.



## Federal Minimum Wage

- Currently \$7.25/hour (but \$11.25/hour for federal contract workers)
- In January 2022, federal agencies were directed to implement President Biden's \$15 minimum wage for government workers, but no action to increase the federal minimum wage for all workers has been able to move in Congress.

*\*Don't forget to double check any state increases! California is currently \$14.00/hour for employers with 25 or less employees, and \$15.00/hour for employers with 26 or more employees*

## New Minimum Wage Rates for Federal Contracts

- **Existing Contracts:** Biden administration invoked Obama's EO 13658 (allowing annual increases) to raise the minimum wage for workers performing work "on or in connection with" existing covered contracts to \$11.25 per hour (\$7.90 per hour for tipped workers) as of January 1, 2022.
  - Work "on" a covered contract = directly performs contracted services.
  - Work "in connection with" a covered contract = spends at least 20% of work week performing indirect work necessary to performing the contracted work.
- **"New" Contracts:** Biden's EO 14026 set a minimum wage of \$15.00 per hour for covered contracts entered/renewed/extended on or after January 30, 2022.
- **Penalties:** Withholding contract funds to reimburse underpaid workers, terminate contract, held liable for costs, and barred from future contracts for three years.

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