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# COVID-19 Legal Issues

Virginia Bankers' Association

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# Statutory/Regulatory Framework

## ➤ CDC

- Can detain and can medically examine people entering country or travelling between states to prevent spread of disease. Otherwise, the agency's policies are non-mandatory guidance to federal, state, local health authorities.

## ➤ OSHA

- Sets and enforces health/safety rules for private employers.
- Virginia is a “state plan state” which administers its own safety and health program.

## ➤ State/Local Government

- States/localities have broad police power functions to protect the health, safety, and welfare of persons within their borders, including the right to isolate and quarantine.

## ➤ Presidential Executive Orders

- Federal Contractors, e.g.

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# CENTER FOR DISEASE CONTROL

- COVID-19 Community Level
  - **Low** – vaccinate/get tested if symptomatic
  - **Medium** – vaccinate/wear a mask if at high risk for COVID-19/get tested if symptomatic
  - **High** – vaccinate/everyone wears a mask/high-risk may need additional precautions/get tested if symptomatic

- Exposed/Not up to date on vaccination
  - 5 day quarantine/get tested/watch for symptoms/wear a mask for 10 days
- Exposed/Up to date on vaccination
  - No quarantine/get tested/watch for symptoms/wear a mask for 10 days
- Exposed/Confirmed COVID-19 case in last 90 days
  - No quarantine/get tested/watch for symptoms/wear a mask for 10 days

- Test positive regardless of vaccine status or have symptoms regardless of vaccination status
  - Stay home for at least 5 days
  - Stay home beyond 5 days if still have a fever and/or other symptoms are not improving
  - Wear a mask for 10 days

***COLLECT AND MAINTAIN VACCINATION STATUS,  
INCLUDING BOOSTER***



# WHAT ABOUT EVERYTHING ELSE?

- Health Screening
- Social Distancing
- Capacity Limits
- Cleaning/Sanitation
- Handwashing
- Ventilation

CDC says look to OSHA -- OSHA says “Update Coming Soon”

*(Unlikely any of these issues will be removed from OSHA guidance)*

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**VIRGINIA OCCUPATIONAL  
SAFETY AND HEALTH, PART  
OF THE VIRGINIA  
DEPARTMENT OF LABOR AND  
INDUSTRY**

- Virginia is a “state plan state.”
- State plan states run their own OSHA programs.
- State plan OSHA programs must be at least as stringent as federal OSHA.
- OSHA (federal and VOSH) have a “General Duty Clause” which requires that employers provide a safe workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm.” Va. Code §40.1-51.1.A
- Hazards that are not otherwise addressed by a standard are addressed through GDC enforcement.

- Virginia had a “Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19.” *One of only 4 states in the country that had its own COVID standard (CA, MI, and OR were the others/NY has a slightly different legal requirement).*
- This standard was rescinded effective March 23 and replaced with a guidance document.
- Employers still are covered by the GDC.
- VOSH guidance and CDC guidance can be, has been, and will be enforced through the GDC.

- Replaces the rescinded COVID-19 standard.
- Expressly states that employers may implement rules more stringent than the guidance.
- VA and DOLI *“support and respect the rights of individuals to choose whether to wear masks or to not wear masks in non-federally mandated environments, unless required by law or as medically appropriate in cases of acute illness or in certain healthcare environments.”*
- VA and DOLI *“will not allow or condone illegal discrimination based on wearing or not wearing masks, and people should not be fired or terminated for not wearing a mask, except as noted above, or unless required by federal law.”*

*“Because the COVID-19 vaccine and booster reduces the risk of hospitalization and death from the COVID-19 virus, this guidance specifically recommends, but does not mandate, COVID-19 vaccinations and boosters for workers and encourages employers to permit workers and customers the choice of whether to wear a mask, except as otherwise required by their employer or VOSH pursuant to Va. Code §40.1-51.1.A.”*

Employers should engage with workers to mitigate COVID-19 transmission and the impact of contracting the virus, including:

- Facilitate employees getting vaccinated and boosted;
- Encourage any workers with COVID-19 symptoms to stay home from work and seek advice on testing and treatment from their physician;
- Require all workers infected with COVID-19 virus to stay home;
- Provide workers with face coverings or surgical masks, as appropriate;

- Encourage good sanitary work habits such as frequent hand washing;
- Educate workers on your COVID-19 policies and procedures using accessible formats and in languages they understand;
- Operate and maintain ventilation systems in accordance to manufacturers specifications to achieve optimal performance;
- Record and report COVID-19 infections and deaths which are mandatory under VOSH regulations part 1904; and,
- Follow other applicable mandatory VOSH standards



# VOSH REPORTING OBLIGATIONS

- Virginia Code § 40.1-51.1.D requires all employers to report any work related incident resulting in a fatality or catastrophe within eight (8) hours to the Virginia Department of Labor and Industry (DOLI).
- Employers must report within 24 hours any work-related incident resulting in (i) the inpatient hospitalization of one or more persons, (ii) an amputation, or (iii) the loss of an eye, as prescribed in the rules and regulations of the Safety and Health Codes Board.”
- Medical events (e.g., heart attacks) are also required to be reported. If an employer does not learn of a fatality or catastrophe at the time that it occurs, and the incident would otherwise be reportable to DOLI, the employer is required by law to report the incident within 8 hours/24 hours of the time that it is made known to any agent or employee of the employer.
- If an employee dies as a result of an incident already reported, the employer is required to report the death to DOLI within 8 hours of learning of the death.

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# VACCINATION MANDATES

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- Is your Bank a federal government contractor?
- If yes, pursuant to President Biden's September 9 Executive Order, as implemented by the Safer Federal Workforce Task Force, you were obligated to enter into a contract modification with your contracting agency requiring all workers at any site where government contractor work was performed to be vaccinated or have a reasonable accommodation.
- This obligation has been enjoined by a number of Courts.
- Georgia v. Biden, 111 Fed. R. Serv. 3<sup>rd</sup> 809 (SD GA 12/7/21) imposed a nationwide injunction.

- On December 17, 2021, the Eleventh Circuit denied the government's request to stay the preliminary injunction pending appeal as it could not demonstrate "irreparable harm" caused by the injunction. *See Georgia v. Biden*, No. 21-14269-F (11th Cir. Dec. 17, 2021). Oral argument is scheduled for April 4, 2022
- The government argues on appeal that 1) the Procurement Act gives the President broad flexibility to ensure "an economic and efficient system" of federal contracting and there exists a nexus between a vaccine mandate and operation of the federal contracting; 2) that the plaintiffs have failed to show irreparable injury (Georgia originally claimed cost of compliance and termination of unvaccinated as the harm); and, 3) that the Court erred in enjoining the EO nationally.

- If your bank is not covered by the federal contractor EO, you have no current or pending legal obligation to have a vaccination mandate.
- Many employers have voluntarily imposed vaccination mandates on their workforces.
- Those remain lawful under federal and VA law, subject to the obligation to permit reasonable accommodation.
- However, employers have been sued.

# Sambrano v. United Airlines

- The plaintiffs in this case pending in TX sued to enjoin United from enforcing as a reasonable accommodation for asserted religious/disability based exception to mandatory vaccination indefinite unpaid leave to stop only when the pandemic receded.
- This case went up to the 11<sup>th</sup> Circuit and then was remanded to address the “ongoing coercion” by United to force employees to choose between their religious convictions or losing pay indefinitely. *Id.* The District Court will now consider the plaintiff’s preliminary injunction with this guidance from the Circuit.
- Most recently, United announced that it would allow unvaccinated workers exempted for religious or medical reasons to return to work at the end of March.

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# REASONABLE ACCOMMODATION

- Vaccine Mandate
- Return to Work
- Telecommuting
- Masks
- Travel
- Customer interaction



# ADA REASONABLE ACCOMMODATION BASICS

- Disabled employees who are unable to perform the essential functions of the job may be entitled to a reasonable accommodation unless would cause an undue hardship.
- “Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.
- Employees must still be able to perform the essential functions of their positions (do not have to eliminate essential functions).
- Whether a reasonable accommodation exists is determined by engaging in the interactive process.

- ❑ Require medical documentation every time. Carefully evaluate this documentation. Often, it is appropriate to ask for additional information.
- ❑ The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.
- ❑ Particular challenge addressing medical conditions that are not disabilities.

# Disability Accommodation

- Long haul COVID-19 is likely a disability.
- An employee whose disability puts them at higher risk for COVID-19 may need an accommodation (or may not be entitled to an accommodation because they do not have a disability).
- You may have to alter accommodations that pre-existed COVID-19 to account for COVID-19 related changes.
- You may receive requests for accommodations related to PPE (on religious grounds as well)
- Employees have no right to reasonable accommodation based upon the health or vaccination status of people in their household.

- Is working from the office an essential function?
- This question must be answered and that answer documented for you to successfully defend telework discrimination claims or failure to accommodate claims.
- This is a business decision that if you have not already answered, leadership should answer soon as a priority.

- ❑ Sincerely held religious belief, practice or observance
  - Distinct from beliefs that are” essentially political, sociological, or philosophical.”
  - NO requirement that this view be aligned with the organized religion to which the employee belongs
  - Difficult decisions
    - Does a letter the employee pulls off the internet an expression of a sincerely held religious belief?
    - Can an employee who has received all other required vaccinations now religiously oppose all vaccination?
    - Can there be a religious objection to masks?

- Very different standard than for disability even though same words as for disability:
  - *Trans World Airlines, Inc. v Hardison* (SCOTUS – 1977) -- “neither give religious employees an advantage nor cause the employer undue hardship”
  - Undue hardship *de minimis* standard
  - Advantage issue – cannot give an advantage to religious employees at the expense of the rights of other employees

Some state laws have different standards.

Virginia law unclear.

# COVID Related-harassment/retaliation

- Employees are protected against retaliation for requesting or receiving an accommodation exempting them from the COVID-19 protocols based upon religion/disability.
- Employees are protected against harassment regarding an employee's decision regarding vaccination if that decision was due to a disability or a sincerely held religious belief.

***INCLUDE INSTRUCTION TO EMPLOYEES IN YOUR COVID-19 MATERIALS THAT THEY SHOULD BE RESPECTFUL OF CO-WORKERS VACCINATION STATUS. CO-WORKERS SHOULD NOT ASK AND IF THEY LEARN NOT VACCINATED, SHOULD NOT ASK THE REASON AND SHOULD NOT SPECULATE.***

***THIS COULD QUALIFY AS LEGALLY ACTIONABLE HARASSMENT.***

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**CONFIDENTIALITY**



- HIPAA almost never applies to COVID-19 information given to the employer.
- The ADA prohibit employers from disclosing COVID-19 status, vaccination status, or the fact that an employee is receiving a reasonable accommodation to anyone outside a “need to know” group.
- OSHA contains similar protection for occupational health information.

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# RETALIATION

# Whistleblower Law

## Va. Code Ann. § 40.1-27.3(a)

Effective July 1, 2020, the Virginia Whistleblower Law prohibits retaliation against an employee who:

- In *good faith* reports a violation of *any* federal or state law to a supervisor, governmental body, or law enforcement official
- Is requested to participate in investigation, hearing or inquiry OR provides information or testimony in the same
- Refuses to engage in criminal acts that would subject the employee to criminal liability
- Refuses employer's order to perform action that violates federal or state law (and informs employer that is the reason for refusal)

- Unlike similar laws, there is no requirement to exhaust administrative remedies; an employee may go straight to state court
  - Litigation Costs ↑
- Relief available in court:
  - Injunctions
  - Reinstatement if discharged, back pay, benefits, other remuneration (all with interest) and attorney's fees
  - Compensatory damages are *not* capped, but punitive damages not authorized by law (courts could read it into statute in the future)

- OSHA protects employees from retaliating against workers for raising a health and safety concern
- Employees should be encouraged to raise COVID-related health or safety concerns (or any other health/safety concern)
- Employees should have a process for reporting workplace safety issues using the helpline or web portal.

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**QUESTIONS?**