Alden J. Parker

Sacramento Regional Managing Partner

- Co-chair of Fisher Phillips hospitality industry group and member of COVID-19 taskforce.
- Counsels employers to assist them in avoiding litigation.
- Advises clients on a variety of issues, including leaves, harassment, retaliation, discrimination, workplace violence, employee discipline and termination, and wage & hour issues.

VIRTUAL

THE HOSPITALITY LAW CONFERENCE SERIES 2.0

JUNE 30, 2020

A *Grand* Re-Opening?

Litigation Risks When Bringing
Your Restaurant's Team Back to Work

RELIEF

RESTART

RECOVER

RISK

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Legal Alert

PDF

Fisher Phillips State-by-State Restaurant Guide to Reopening

5.8.20

The restaurant industry has been severely impacted by state shutdown orders. As states start reopening businesses, it is vital to know the applicable rules that apply to your location or locations. Whether you operate a single location or are a multi-unit operator, compliance will include assessing business operations, bringing employees back to work, and ensuring a safe operation for customers and employees. In an effort to assist the restaurant industry, our Hospitality Practice Group has prepared a comprehensive state-by-state chart that addresses your most commonly asked questions. For each state, we provide information regarding dine-in restrictions, face mask requirements, employee temperature-taking, customer health checks, sanitation, paid sick leave, and much more. Download the chart, find your state, and get ready to reopen!

Click here to download the chart *(last updated June 1, 2020).*

***Note:** This chart only outlines State requirements and guidelines. Your local county or municipality may have additional requirements – please check with your county or municipality for any applicable local rules.

ATTORNEYS

- Catharine Morisset
- Alden Parker
- Erin Price

SERVICES

- Hospitality
- Workplace Safety and Catastrophe Management

Litigation Risk Areas: Reopening Restaurants

- Face Coverings Employee Screening
- Employee temperature check
- Customer Health Screening
- Sanitation
- Permitted Occupancy Limits
- Wage & Hour
- Rehiring
- FFCRA Retaliation
- ADA

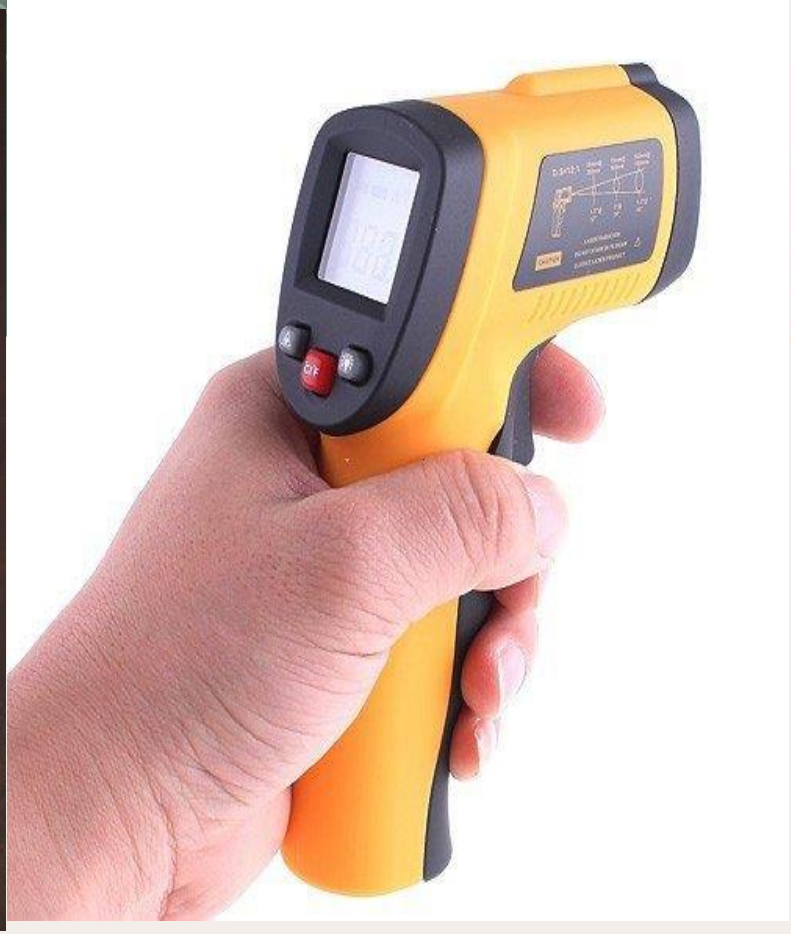
Emerging Litigation Trend?

- Recent lawsuits filed across the United States are starting to show a particular trend of litigation regarding employees with preexisting health care conditions.
  - Lawsuit filed in federal court in Florida at the end of May alleges that an employer failed to provide FMLA leave for an immune-compromised employee during the COVID-19 quarantine. In that case, the employee alleged that he was terminated shortly after inquiring about FMLA leave due to his own risk factors.
  - A recent similar case filed in Pennsylvania also claims an employee with an elevated risk for COVID-19 was terminated after he attempted to inquire about the option of using leave under the FMLA.
  - On the same day, a separate action was filed in New Jersey alleging that yet another employer terminated an employee with a preexisting heart condition rather than provide him with requested leave under the Family and Medical Leave Act (FMLA), or as an accommodation under the Americans with Disabilities Act (ADA).
- Be diligent in quickly responding to employees requesting time off due to a COVID-19 related issue, or otherwise requesting an accommodation due to COVID-19 or another underlying health condition.
- Where more and more employees are returning physically to work, inquiries to continue to remain on leave (if furloughed) should be treated as a possible request for a reasonable accommodation under the ADA.

- Masks

Even in Texas?

- Employee claims her employer prohibited her from wearing a face covering at work despite federal recommendations and local orders that such coverings should be worn by employees.
- This Texas cook just sued the restaurant that she says took her off the schedule after she objected to the company policy.
- Court granted cook's TRO to allow her to wear a mask at work until this is sorted out in court. TRO means the court found she has a likelihood of succeeding on the merits.



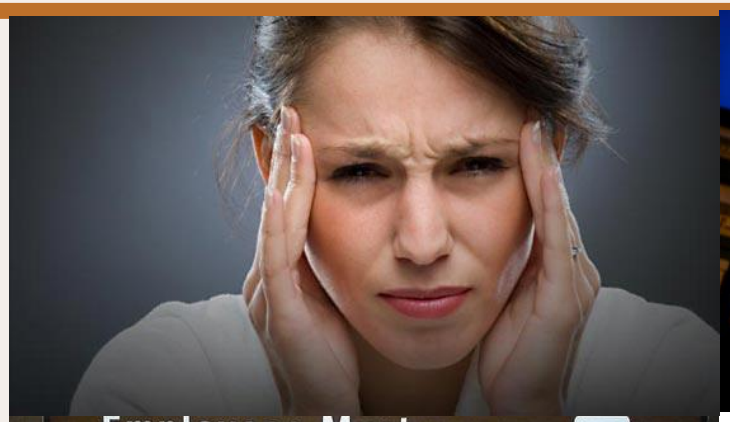
Temperature Checks

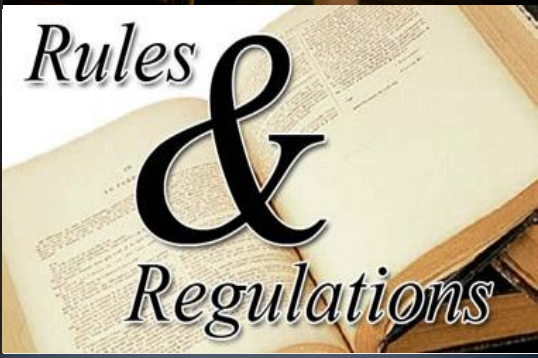
Measuring Worker Temperatures Could Lead To Wage And Hour Claims

- In 2014, the U.S. Supreme Court narrowed the definition of compensable preliminary and postliminary activities. In *Integrity Staffing Solutions v. Busk*, the Supreme Court held that post-shift security checks for Amazon warehouse workers was not compensable under the federal Fair Labor Standards Act (FLSA).
- The Court explained only activities that constitute a "principal activity" under the FLSA that must be compensated. Under the statute, principal activities include all activities that are "an integral and indispensable part of the employee's principal activities."
- This is a long way of saying that temp checks under the FLSA may not be a "principal activity." However, it is an unknown that will undoubtedly be tested through a lawsuit against some employer.
- **Watch Out for State Laws?**
- State laws vary on this issue and the scope of some states' wage laws are currently being determined by courts across the country. For example:
- On February 4, 2020, a federal court of appeals held that time spent by detention officers in pre-shift and post-shift security screenings were compensable under the FLSA and the New Mexico Minimum Wage Act.
- On February 13, 2020, the California Supreme Court held that post-shift security checks of Apple employees were compensable under state wage laws.
- Here it seems much more likely a state will find temperature and health screens to be compensable time.

WORKPLACE SAFETY FOR RESTAURANTS

Workers Compensation
State Guidelines
City Ordinances
CDC Guidance
OSHA Compliance





- Customer Health Screening
  - Lawsuits by customers.
  - Liability Waivers/ Assumption of the Risk Agreements

FAMILIES FIRST RESPONSE ACT FOR YOUR RESTAURANT EMPLOYEES

- Emergency Paid Sick Leave
- Emergency Family And Medical Leave Act
- Retaliation

FFCRA DOES NOT STAND FOR FREE FLYING & CRYING RETALIATION ACT

In ***Stephanie Jones v. Eastern Airlines***, an airline's former Director of Revenue Management filed claims against her former employer and two executives alleging that she was illegally fired for requesting time off to care for her child under the FFCRA.

- In mid-March 2020, Jones alleges she started contacting various members of management at Eastern to request that she be allowed to continue working from home. She wanted this flexibility, and alterations to her work schedule, to help with her 11-year old son, who was unable to attend school due to COVID-19 issues. According to her lawsuit, Jones made at least eight inquiries regarding her request to continue working from home and for two hours per day of "flex time." She says she reached out to at least four members of the Eastern management team in making these inquiries.
- On March 24, 2020, Jones alleges she "formally requested" paid leave under the FFCRA. She alleges that her March 24 request resulted in Eastern's acting Chief Human Resource official responding via email with "open hostility," including stating that "the new laws are there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself."
- On March 27, 2020, Eastern terminated Jones during a phone call in which she alleges she was told it was "in the best interest of the parties to part ways" and that there appeared to be a "conflict between" Jones and others at the company. Within three weeks of being terminated, Jones filed a six-count FFCRA lawsuit in the Eastern District of Pennsylvania federal court, alleging both FFCRA interference and retaliation.

WAGE AND HOUR ISSUES FOR THE RESTAURANT INDUSTRY DURING A TIME OF RECOVERY

Compliance

- State laws
- Bonuses
- Pay adjustments
- Meal & Rest
- Maintaining exempt status
- Off the clock work
- Reimbursement for business expenses related to app based time & attendance platforms.

EMPLOYERS BEWARE: COVID-19 LITIGATION MAY SPARK ADDITIONAL CLAIMS

- May 6 federal lawsuit filed in Orlando. Plaintiff worked as an air-conditioning technician.
- Plaintiff alleges that, on April 1, he sent an email to management objecting to being required to work in the field without being provided with any PPE. He said he pointed out that the Occupational Safety and Health Administration's (OSHA's) PPE standards require using gloves, eye, face, and respiratory protection when job hazards warrant them.
- Plaintiff claims that these complaints to management were protected activity under state law, but that approximately three weeks later, the Company informed him that it was terminating his employment, effective immediately, and without reason. He alleges that the real reason his employer terminated him was in retaliation of his safety complaints.
- This Plaintiff went on to make claims that the Company misclassified him as an employee exempt from overtime when he regularly worked 50 to 60 or more hours per week. He claims that he performed a number of non-exempt duties; had no authority to hire, fire, or evaluate employees; could not determine or change the schedules or rates of HT employees; and did not exercise independent judgment. In other words, he claims he should not have been exempt from overtime.

Who is going to sue you for misclassification?

BEST PRACTICES FOR REDUCING RISKS WHEN RETURNING EMPLOYEES TO YOUR RESTAURANT

- Furloughed employees
- Re-hiring terminated employees (new hire paperwork)
- Revised employee handbooks
- Wage and hour audit (meal/rest)
- Ensuring paystubs are correct
- Mandatory Arbitration agreements
- Employment contract revisions

IS COVID-19 A DISABILITY?

- In ***Tihara Worthy v. Wellington Estates LLC***, a former employee alleges that she was wrongfully terminated and not permitted to return to work because of COVID-19, which she argues is a "disability."
- According to Worthy, she learned on April 19 that she tested positive for COVID-19, immediately notified her employer, and began a leave of absence.
- A few weeks later, on May 11, Worthy alleges that she tested negative for COVID-19 and was cleared to return to work on May 16. Worthy claims that before she could return to work, she was terminated and told that she was not welcome back because she contracted COVID-19 and "could have gotten everyone sick."
- What does the EEOC say?
  - During a March 27, 2020 webinar called "Ask the EEOC," the agency declined to answer the question of whether COVID-19 constitutes a disability under the ADA, stating that it is "unclear" whether the virus is or could be a disability given that it is a new virus that medical experts are still learning about.
- What do the states say?
  - States generally take a more expansive disability protections have taken a more definitive stance. For example, the New York City Commission on Human Rights has stated that it "considers actual or perceived infection with COVID-19 to be protected as a disability under the New York City Human Rights Law."

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Visit FISHER PHILLIPS RESOURCE CENTER for Employers

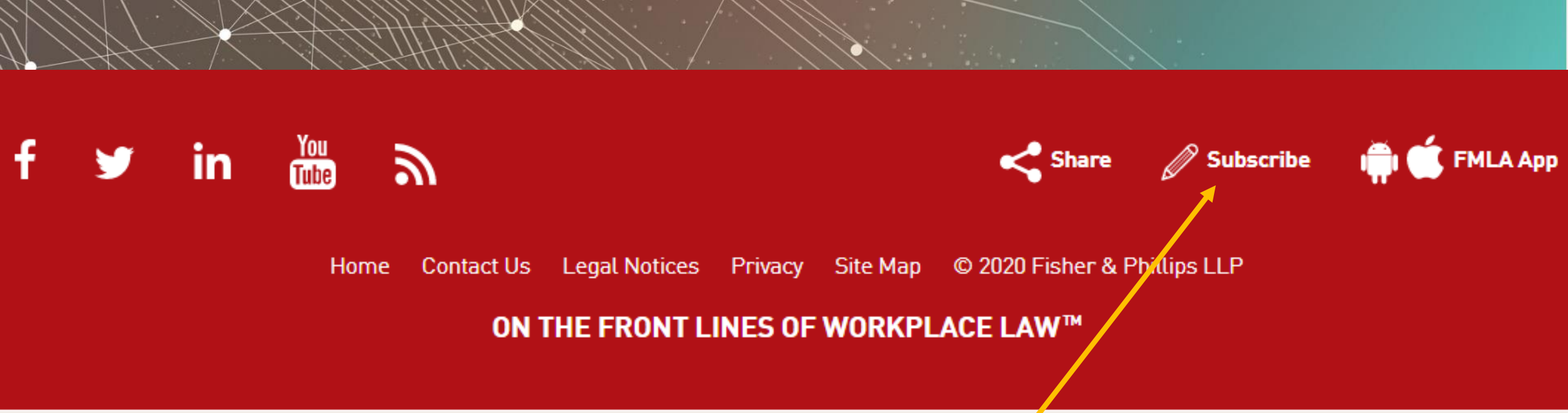
Post-Pandemic Back-To-Business FAQs For Employers

Comprehensive set of FAQs that will be continually updated throughout the recovery period. not only do we go deeper on all these topics, but we also have detailed information about:

- SBA Loans
- Paid Sick Leave and E-FMLA
- Benefits
- Unemployment
- I-9s and Immigration Issues
- International Workplaces
- Trade Secrets Concerns

…and more

Please rely on fisherphillips.com for up-to-date information



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FINAL QUESTIONS

ALDEN J. PARKER
Sacramento Regional Managing Partner
Fisher Phillips, LLP

aparker@fisherphillips.com
916.210.0404