

WEBINAR

RESTAURANT
LawCenter
National Restaurant Association

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SheppardMullin



TAKING A SHOT AT COVID-19:

What Restaurants Need to Know About Vaccinating their Workforce

Thursday, February 11, 2021 | 3:00 PM – 4:00 PM EST

Speakers



Derek Havel
Partner
Sheppard Mullin



Nora Stilestein
Associate
Sheppard Mullin



Kate Piche
Senior Director
Accreditation & Compliance
National Restaurant Association



Angelo I. Amador
Executive Director
Restaurant Law Center



Restaurant Industry State Vaccine Tracker

[Restaurant Law Center: Guidance for Restaurants: Legal Issues to Consider Regarding COVID-19 Mandatory Vaccine Policies](#)

Groups & Vaccine Distribution Stage
STATE LEVEL, COUNTY LEVEL, NOT DISTRIBUTING YET

→ UPDATED INFORMATION

State with Vaccine Plan (link)	How to get the Vaccine	Current Tier /Phase	Health Care Workers/ First Responders	Long Term Care Residents	Older Adults & Age they Qualify	High Risk Adults	Frontline Essential Workers	Restaurant Workers	Potential Time Frame for Restaurant Worker Vaccinations?	Notes	Employer must Register Employees to get Vaccine?
Alabama	Website Hotline: 1-855-566-5333	1B	YES	YES	75+	1C	1B	1C	Unknown	Beginning 2/8, ages 65+ and some critical workers will be eligible- Starting into Phase 1B	No
Alaska	Website Hotline: 1-907-646-3322	Phase 1B- Tier 1	YES	YES	65+	Not Yet	Not Yet	Phase 1B Tiers 2-4, if 50+	Unknown	State does not specify after 1B phase yet	No

- State Vaccine Plan Links
- How to Get the Vaccine- Appointment Scheduling & Hotline(s)
- Current Phase
- What Phase/Tier & Timeframe for Restaurant Workers Vaccination
- Is Employer Registration Required

Vaccine Creation and Distribution

- Background & Timeline
- Pfizer-BioNTech & Moderna Vaccines – Mid-December 2020
 - Food & Drug Administration - Emergency Use Authorization
 - mRNA Vaccines
 - Efficacy
 - Vaccination Goals for Herd Immunity
- Challenges to Distribution/Inoculation Goals
 - 59.3M Distributed/42.4M Administered as of Feb. 8, 2021
 - Current Supply
 - Cold Storage & Window for Use
 - Two Dose Process
 - Skeptics & Politicization
- The Role & Responsibility of Employers



CDC's Vaccine Rollout Recommendation

- Phase 1A
 - Healthcare Personnel
 - Residents in Long-Term Care Facilities
- Phase 1B
 - Frontline Essential Workers
 - Firefighters, Police Officers, Postal Service Workers, Manufacturing, Grocery, Education
- Phase 1C
 - People Aged 65-75
 - People Aged 16-74 with Underlying Health Conditions
 - Other Essential Workers
 - **Food Service Industry**, Transportation, Finance, Law, and other groups
- The CDC's Recommendations are Only Guidelines and the States Decide the Ultimate Allocation Plans

California State Distribution Program

- Phase 1A: In Progress
 - Health Care Workers
 - Long-Term Care Residents
- Phase 1B Tier One: In Progress (Counties Vary)
 - People Aged 65 & Older (Now Being Vaccinated)
 - Education and Childcare Workers
 - Emergency Services
 - **Food and Agricultural Workers (Not Yet Started)**
 - Includes Restaurant Industry
- Phase 1B Tier Two: Anticipated Spring 2021
 - Transportation and Logistics
 - Industrial, Commercial, Residential, and Sheltering Services and Facilities
 - Incarcerated and Homeless
- Phase 1C: Anticipated Spring 2021
 - People Aged 50 - 64
 - People Aged 16 - 49 with Underlying Health Conditions
 - Water, Defense, Energy, Chemical, Communications, Finance, Government Services



New York State Distribution Program

- Phase 1A
 - Health Care Workers
 - Residents in Certain Group Living Facilities
- Phase 1B: Effective as of Jan. 11, 2021
 - People Aged 65 & Older
 - Teachers and Education Workers
 - First Responders (Police & Firefighters)
 - Public Safety Workers
 - Public Transit Workers
 - Grocery Store Workers
 - TBD: Other Frontline/Essential Workers
 - **Restaurant Workers (As of Feb. 2, 2021)**
- Phase 1C: Effective as of Feb. 15, 2021
 - Adults with Underlying Health Conditions and Other Essential Workers
- Phase 2: Summer 2021
 - Everyone Else



Mandatory vs. Encouraged

- Vaccination Can Be Mandatory
 - EEOC: Yes
 - OSHA: Likely Yes – Approved Mandatory Blood-born Pathogen Standard re: Hep B
 - Also, General Duty Clause: Furnish a Reasonably Safe Work Environment
 - National Labor Relations Act: Yes, but...
 - Mandatory Bargaining
 - Non-Union Environment – Protected, Concerted Activity if Oppose/Support Vaccination Program
 - Possible Federal/State Government Edict
 - *Jacobson v. Massachusetts* (1905): Upheld Authority of States to Enforce Compulsory Smallpox Vaccination Laws

Mandatory vs. Encouraged

- But Should It Be Mandatory?
 - Limited Availability of Vaccine Presents Barriers to Firm Requirement
 - Not to Mention Necessity of Two Doses
 - Union Organizing Activity
 - Physical Realities of Restaurant Setting
 - Outdoor vs. Indoor; Difficulty of Maintaining Physical Distance
 - Competing Views of Segments of Workforce: Pro- or Anti-Vax
 - Some Will Refuse Without Legal Reason
 - Some Will Refuse to Report if Others Refuse
 - How to Respond to Employee Refusals
 - Will You Really Fire 50% of Workforce?
 - Vaccine Injuries
 - Customer and Public Expectation
- Various Legal Pitfalls (ADA, Title VII, and GINA) Exist ***Whether Mandatory or Encouraged***

Employee Views on Vaccinations

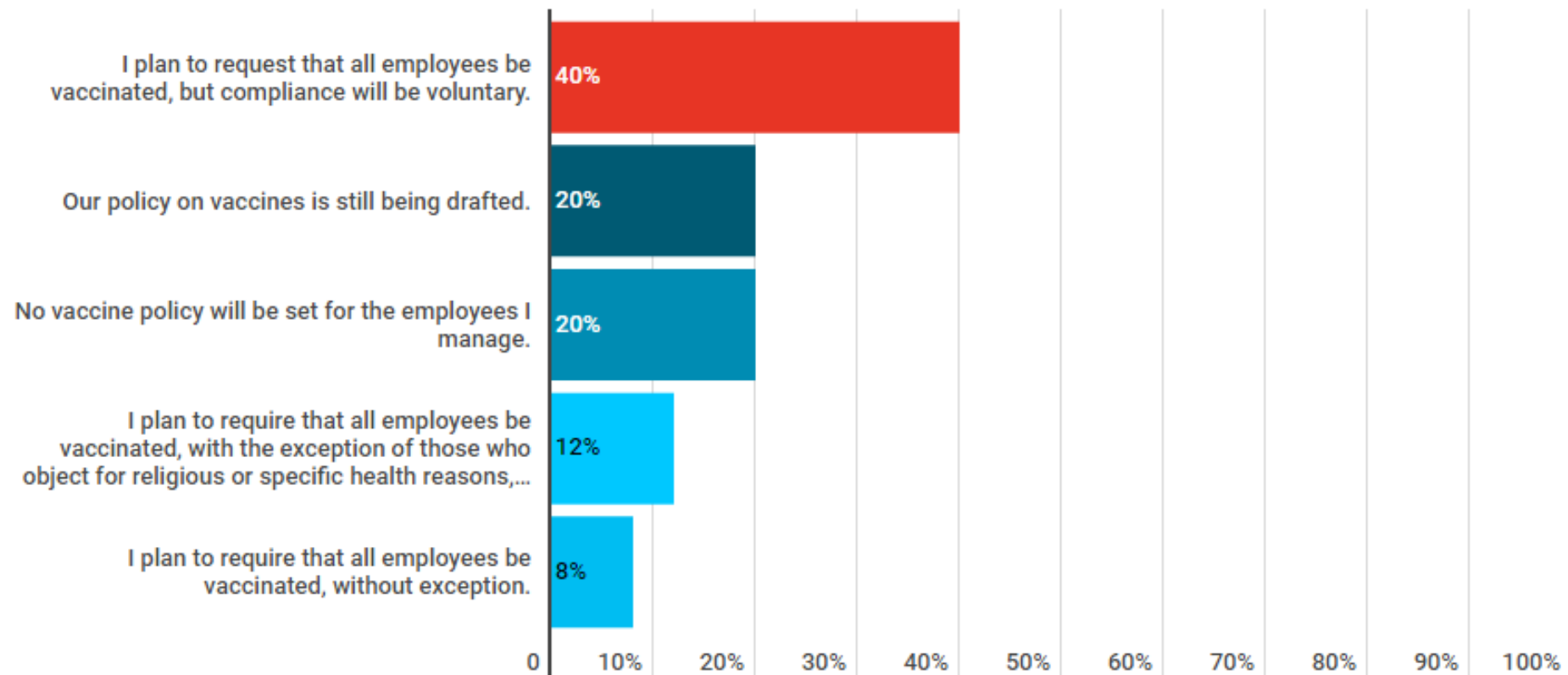
When asked if “you would accept a vaccine if it were recommended by your employer and was approved safe and effective by the government?”

Level of Agreement	Response Rate
Completely Agree	14.0%
Somewhat Agree	34.1%
Neutral/No Opinion	26.0%
Somewhat Disagree	17.1%
Completely Disagree	8.8%

* Nature Medicine Journal. Lazarus, J.V., Ratzan, S.C., Palayew, A. et al. “A global survey of potential acceptance of a COVID-19 vaccine”. (2020).

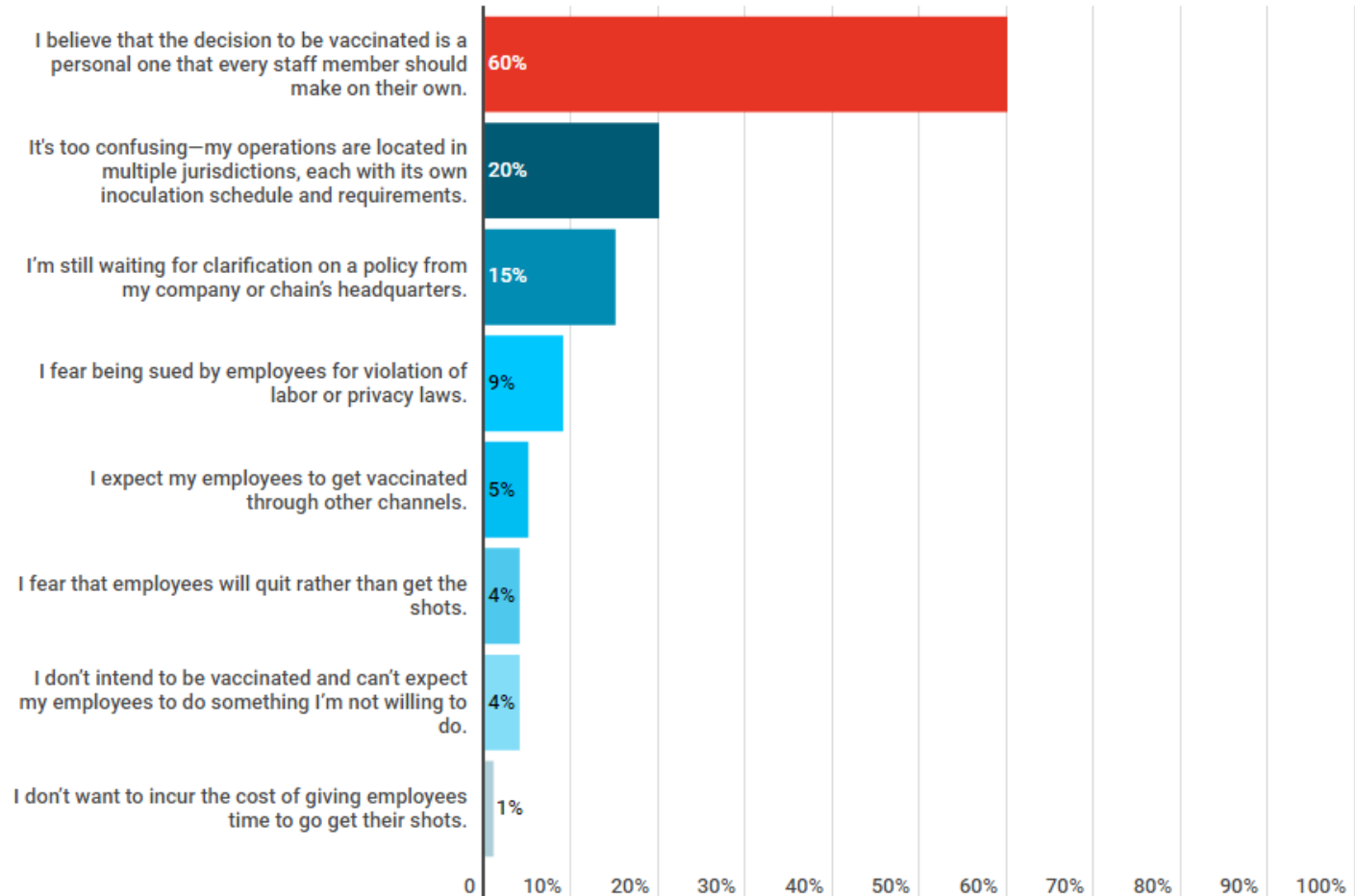
Restaurant Industry's Vaccination Plans

Which statement below best describes your current plan in regard to vaccinating the employees you manage?



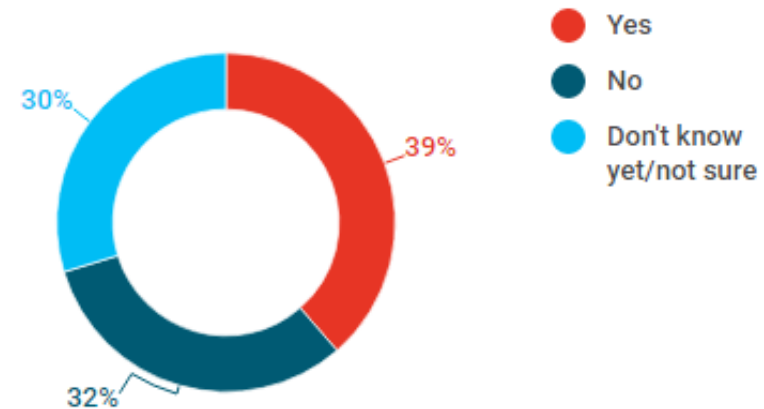
Restaurant Industry's Vaccination Plans

If you DON'T plan to require vaccines, please indicate your primary reason for not doing so.

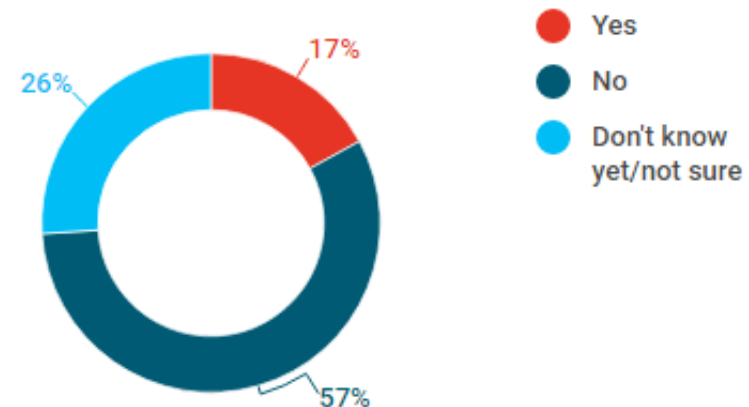


Restaurant Industry's Vaccination Plans

If you DO plan to require vaccines, do you intend to inform consumers of your policy?



Do you intend to ask third-party delivery drivers if they've been vaccinated against COVID-19?



Mandatory vs. Encouraged

- How to Encourage Vaccination Without Mandate
 - Incentivize Employees
 - Develop Vaccination Education Campaign
 - Make Obtaining Vaccine Easy
 - Cover Costs
 - Provide Paid Time Off for Shot and Recovery



December 16, 2020 EEOC Guidance

- Americans With Disabilities Act (“ADA”)
 - Regulates Disability Related Inquiries & Medical Exams
 - Prohibits Employers From Excluding Covered Individuals Unless They Pose a “Direct Threat” to the Workplace
 - Requires Reasonable Accommodations That Do Not Impose Undue Hardship
- Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - Requires Reasonable Accommodations for Sincerely Held Religious Beliefs and/or Practices
- Genetic Information Non-Discrimination Act (“GINA”)

EEOC: ADA & Vaccination

- Vaccination Is NOT a Medical Examination Under the ADA
 - Medical Exam Seeks Information About an Individual
 - Vaccine Seeks Nothing/For Protection of Others
 - Does Not Matter if Employer Administered/Third Party Administered
 - Requiring Proof of Vaccination Is Also Not a Medical Examination Under the ADA
- But, Pre-Screening Vaccination Questions?
 - May Elicit Information Concerning Disabilities
 - Must Be Job-Related & Consistent With Business Necessity
 - Must Have Reasonable Belief Based Upon Objective Evidence That Employee Who Does Not Answer and Does Not Receive Vaccine Will Pose a Direct Threat
- Potential Pitfall Counsels Against Employer/Employer Designee Administering Vaccine
 - Does Not Apply if Employer Requires Vaccination/Proof From HCP

EEOC: ADA & Vaccination

- Employee Refusals Because of a Disability
 - Must Show Unvaccinated Employee Would Impose Direct Threat to Workforce Due to Significant Risk of Substantial Harm
 - Consider:
 - Duration of Risk
 - Nature and Severity of Potential Harm
 - Likelihood of Potential Harm
 - Imminence of Potential Harm
 - Analysis Must Conclude that Unvaccinated Worker Would Expose Others to Virus at Worksite
 - Will Not Always Be the Case: Outdoor Dining, Remote Workers, Physical Layout, Etc.
 - As More Customers and Employees are Vaccinated, the Direct Threat of Harm May Become Less Severe
 - Cannot Be Eliminated by Reasonable Accommodation

EEOC: ADA & Vaccination

- Reasonable Accommodations That Should Be Explored Before Excluding a Worker Unvaccinated Because of Disability
 - Masks, PPE, Social Distancing
 - Submission to Testing
 - Leaves of Absence
 - Remote Working Arrangement Where Available
 - Difficult to Say Not Reasonable Given Past Practice
 - Job Accommodation Network: <https://askjan.org/topics/COVID-19.cfm>
- Undue Hardship Consideration
- Even if Undue Hardship, Do Not Automatically Terminate
 - Employee May Have Other Protections

EEOC: Title VII & Vaccination

- Employers Must Provide Reasonable Accommodation for Vaccination Refusal Based Upon a Sincerely Held Religious Belief
 - Do Not Challenge Sincerity Unless Have Objective Basis for Questioning
 - Religious Belief Is Not Secular, Medical or Political Belief
- Undue Hardship
 - Lesser Standard Than ADA
 - Anything Having More Than a “De Minimus” Burden or Cost to Employer
- If No Reasonable Accommodation, Employee Can Be Excluded from Worksite
 - Do Not Automatically Terminate

EEOC: GINA & Vaccination

- Requiring Vaccine or Proof of Vaccination Does Not Implicate GINA
 - Does Not Require Disclosure of Genetic Information
 - CDC: mRNA Vaccines Do Not Interact With DNA/Enter Nucleus of Cells
- But, Pre-Screening Vaccination Questions?
 - Information About Genetic Tests
 - Genetic Tests of Family Members
 - Manifestation of Disease/Illness in Family Members
- Potential Pitfalls Counsel Against Employer Administering Vaccination

EEOC: GINA & Vaccination

- Requesting Proof of Vaccination Does Not Implicate GINA
- However, Protect Against Inadvertent Disclosure of Genetic Information

“The [Genetic Information Nondiscrimination Act of 2008](#) (GINA) prohibits [employers](#) and other entities covered by GINA Title II from requesting or requiring [genetic information](#) of an individual or [family member](#) of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any [genetic information](#) when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual's [family medical history](#), the results of an individual's or [family member](#)'s genetic tests, the fact that an individual or an individual's [family member](#) sought or received [genetic services](#), and [genetic information](#) of a fetus carried by an individual or an individual's [family member](#) or an embryo lawfully held by an individual or [family member](#) receiving assistive reproductive services.”

Alternatives to Vaccination Requirements

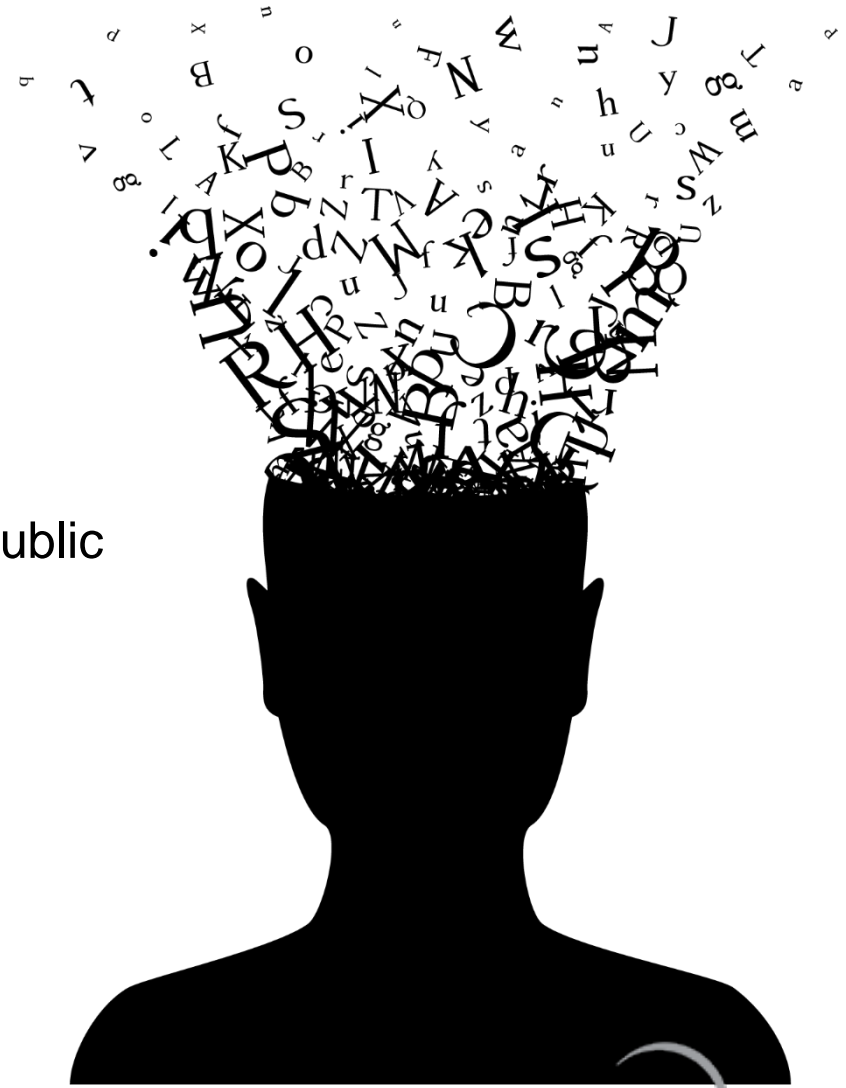
Can	Ask On-Site Employees if Experience Symptoms
Can	Ask On-Site Employees About Diagnosis/Test Results
Can	Take Temperatures/Require COVID-19 Tests for On-Site Employees
Can	Require On-Site Employees to Provide Doctor's Note
Can	Refuse Entry to Employee Who Refuses Test/Does Not Answer Questions
Cannot	Use Antibody Tests
Cannot	Ask About Status of Family Members ("GINA") - But Can Ask "Have You Had Contact With Someone Diagnosed/Showing Symptoms"
Cannot	Preemptively Exclude Over 65/Pregnant Employees

Vaccine Injuries & Employer Responsibility

- Like Any Medical Procedure, Vaccines Can Cause Injuries or Adverse Reactions
 - Vast Majority Will Be Minor and Temporary: Fever and Aches
- Workers' Compensation
 - Exclusive Remedy if “Arise Out Of or In The Course Of Employment”
 - Exceptions for Gross Negligence/Intentional Conduct
 - Employer Required/Encouraged/Administered vs. Not Required
- PREP Act
 - Current Coverage
 - Private Employers Administering the Vaccine are Program Planners Under the Law
 - Potential Expansion of Civil Immunity From Liability

Crafting an Appropriate Message re: Vaccination

- Understand Your Workforce
 - Some Ardently in Favor of Vaccination
 - Some Skeptical of Safety & Anti-Vax Contingency
 - Tread Carefully – Whistleblower/Public Policy Claims
 - Stance May Prompt Union/Organizing Activity
- Understand Your Company
 - Nature of Services Provided
 - The Restaurant Industry Has Significant Contact with the Public
 - The Expectations of the Public
 - Potential for Backlash for Either Stance
- One Size Does Not Fit All
 - Physical Circumstances of Restaurant
 - Remote Work Environments
- Avoid Politicization – Instead, “Best Path Back to Normalcy”
- Leadership: Roll Up Your Sleeves!



Crafting an Effective Vaccination Policy

- Statement of Purpose & Rationale for Vaccination Stance
- If Different Requirements for Different Segments of Workforce
 - Detail and Explain Why
- Expectations Concerning Manner of Vaccination
 - Employer Administered vs. Third Party vs. Employee HCP & Proof
 - Timing/Availability of Vaccine
- Accommodation Requests
 - Disability and Religious
- Consequences of Failure to Follow Policy
 - Not Necessarily Automatic Termination

Thank you for joining us!



Derek Havel

Partner

Sheppard Mullin

(213) 617-5424

dhavel@sheppardmullin.com



Nora Stilestein

Associate

Sheppard Mullin

(213) 617-5589

nstilestein@sheppardmullin.com



Kate Piche

Senior Director

Accreditation & Compliance

National Restaurant Association

(312) 485-6925

kpiche@restaurant.org



Angelo I. Amador

Executive Director

Restaurant Law Center

(202) 492-5037

aamador@restaurant.org

SheppardMullin

