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by SAHAR SHIRALIAN

How Fares Hospitality in COVID-19?

Nationally, whistleblower claims are on the rise, with California having the highest number of virus-related workplace retaliation lawsuits in the country

A quote from American mathematician John Allen Paulos could well be the slogan of the hospitality industry as it continues to adapt to the proverbial "new normal" in the wake of the COVID-19 pandemic: "Uncertainty is the only certainty there is and knowing how to live with insecurity is the only security." It has been established that COVID-19 is here for the long haul, and studies by public health experts predict that intermittent periods the United States to keep the surge of people severely ill with COVID-19 from overwhelming the health care system.[1] Accordingly, intermittent lockdowns are now part of the "new normal" for restaurants, bars, hotels, entertainment, travel, and other hospitality businesses. However, how can an industry that is social at its core effectively engage in "social distancing"? How will hospitality businesses continue to function as a social gathering space in our society? One of the first to close during a lockdown and among

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the most heavily regulated in our new socially distanced world, hospitality businesses need to brace for long-term effects and continuing regulations. Responding to COVID-19 and any other changes that are to come in the future is essential.

Land Mines for Lawsuits

It will not come as a surprise, but the intermittent periods of lockdowns and social distancing in 2020 have devastated restaurants, bars, hotels, entertainment, travel, and other hospitality sector businesses throughout the country. As of October 2020, the national unemployment rate for the leisure and hospitality industry was 40 percent, compared with 5 percent just one year prior in May 2019.[2] As experienced in 2020, intermittent lockdowns led to a slowdown in business, and in an effort to reduce costs and protect the viability of business operations during lockdowns, many hospitality employers reduced their workforces by implementing temporary unpaid furloughs or layoffs. Further, the spikes in COVID-19 cases brought tighter restrictions from state and local governments. People are also less likely to mingle even at the patios and outdoor spaces of their favorite hospitality businesses when there is an increase in COVID-19 cases and when the weather is not agreeable. Since spikes in COVID-19 cases, safety fears, regulations, and a struggling economy will produce varying ripple effects, it is important that hospitality businesses are flexible and careful with their reorganization plans.

While furloughs and layoffs are often a necessary component in reorganization plans, they present a high risk of lawsuits in which laid-off or furloughed employees allege that they were laid off for impermissible or discriminatory reasons. It is critical for hospitality employers to understand how to implement furloughs and layoffs in a manner that lessens such risk when planning ahead for a cyclical pattern of intermittent lockdowns.

There are important differences among a furlough, reduction in force (RIF), and layoff, although these terms are often used interchangeably to describe staff cuts. Regardless of whether an employer decides to furlough or lay off an employee, employers should be clear about defining the status of the employee. In March 2020, the pandemonium of government orders and whirlwind of sudden closures resulted in a lack of clarity in communications between employers and employees when businesses "furloughed" workers. Consequently, claims by furloughed workers who do not understand their status will be on the rise.

A furlough is a mandatory temporary unpaid leave of absence due to lack of work. Employers should use furloughs when they do not have enough cash for payroll or when there is not enough work for all employees. As hospitality employers can recall from the confusing first months of the pandemic in 2020, both instances were common during the extremely slow periods that occurred during the mandated lockdowns, but by using furloughs, employers avoided the hard decision of terminating beloved staff members.

There are a number of ways in which employers may implement furloughs, but in each case employers must communicate to furloughed employees their full expectations that they will return to work or be restored from a reduced work schedule. Employers may require hourly (nonexempt) furloughed employees to take a specified number of days or hours off throughout the year. Employers with salaried employees must be careful not to jeopardize those employees' exempt status under the Fair Labor Standards Act (FLSA), which states that exempt employees do not have to be paid for any week in which they perform no work. In order not to violate the FLSA, which only exacerbates the slowdown, it is best for salaried employees to be furloughed for a full workweek.

In contrast, a layoff entails the permanent termination of an employee's employment due to an organization's decision to downsize personnel. While an employer may hope it will be able to return workers back to work from a layoff, there is no guarantee that the laid-off employee will return to work. It is recommended that employers offer continued benefits coverage if they want laid-off employees to remain available for recall. However, employers should clearly communicate to laid-off employees that a recall is not guaranteed. This guarantee of a recall is the difference between a layoff and furlough.

A reduction in force involves permanent termination of employees' positions and is generally a term applied when employers completely eliminate a particular position with no intention of replacing it.

One easy step for hospitality businesses to take to minimize risk during any future closure or other business slowdown is to have a plan in place so that when employees are furloughed or laid off, they are provided with the correct terminology in their status.

As 2020 drew to a close and Los Angeles entered another lockdown, many hospitality businesses—especially nightclubs, bars, hotels, and restaurants without outdoor space—faced the sobering reality that a magical elixir in the form of a vaccine was not coming as quickly as they hoped. Instead, hospitality businesses came to terms with the fact that the specter of COVID-19 was going to be a permanent patron for at least a few years. Businesses were and are restructuring for the long term and reassessing their personnel decisions made in 2020, such as making the hard decision not to keep employees on indefinite furlough status and terminating their employment. These tough decisions also bring a risk of potential discrimination lawsuits for those businesses.

Hospitality employers are not immune from scrutiny under Title VII of the Civil Rights Act of 1964, the California Fair Employment and Housing Act, and related discrimination laws simply because they assert that the implementation of (arguably discriminatory) layoffs were the result of budget cuts and shortage of cash flow due to an unprecedented pandemic. Title VII of the Civil Rights Act, as amended, protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin. Title VII protection covers the full spectrum of employment decisions, including recruitment, selections, terminations, and other decisions concerning terms and conditions of employment. Given that age and disability discrimination are relevant potential lawsuits in the context of COVID-19, it is important to understand the protections of the Age Discrimination in Employment Act (ADEA)[3] and Americans with Disabilities Act (ADA).[4] The ADEA applies to employers with at least 20 employees and prevents such employers from discriminating in employment against workers aged 40 or older, and makes it unlawful for such employers to discharge any individual or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions or privileges of employment.[5] Disability discrimination under the ADA occurs when a covered employer (one with 15 or more employees) treats a qualified individual with a disability who is an employee or applicant unfavorably because he or she has a disability.[6] Further, the ADA prevents covered employers from treating an employee less favorably because he or she has a history of a disability (e.g., a past major depressive episode) or because the employee was thought to have a chronic physical or mental impairment.[7] The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would

cause significant difficulty or expense for the employer ("undue hardship")[8]

California law provides similar protections. The California Fair Employment and Housing Act (FEHA) prohibits discrimination against applicants or employees because of a protected characteristic.[9] A "covered employer" under FEHA is one with at least five employees.

An employer may use any criteria to select employees for furlough or layoff, provided that the employer does not base the decision on an employee's age, disability, race, national origin, sex, pregnancy or pregnancy-related condition, religion or any other class protected by federal, state or local law. In this current climate of uncertainty, constant restructuring of work forces, and precarious budgets, it is easy for employers to run afoul of the above discrimination laws. In fact, even seemingly benevolent employment decisions can invite employees to bring claims under Title VII, ADEA, ADA, and the FEHA. By now, it is common knowledge that COVID-19 poses the gravest danger of serious complication from contracting the virus for the elderly, the immunocompromised, and individuals with preexisting conditions. For example, an analysis of more than 114,000 deaths associated with COVID-19 during May to August 2020 found that 78 percent of the people who died were aged 65 and older.[10] Selecting older workers, pregnant workers, or workers with known health issues and disabilities for furlough or layoff as a means of "protecting" them from COVID-19 likely will be deemed unlawful discrimination. It is not up to an employer to make such unilateral decisions for an employee. Instead, employers should wait for employees to approach them about possible accommodations in light of how the pandemic personally affects them and their current health condition.

During 2020, employers eliminated positions that could not be performed effectively on a remote basis, or to save costs, eliminated employees based on their seniority or inefficient performance, a practice that often targeted the elderly and disabled individuals who needed accommodations.[11] These employers' decisions could, and did, bring "disparate impact" and, in some instances, "disparate treatment" discrimination claims. Adverse impact is often used interchangeably with "disparate impact"—a legal term coined in a significant U.S. Supreme Court ruling.[12] Adverse or disparate impact can be a result of "systemic discrimination," which has received greater scrutiny from the Equal Employment Opportunity Commission (EEOC) in recent years and even more focus in the public sphere with the discussions of racial equality, social unrest, and intersectionality following the killings of George Floyd, Ahmaud Arbery, and Breonna Taylor, among numerous others. A disparate impact claim involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one protected group than another and cannot be justified by business necessity. Businesses may inadvertently employ a decision, practice, or policy that has a disproportionately negative effect on a protected group and be subject to a disparate impact claim. Disparate treatment is intentional employment discrimination and occurs when a company singles out individuals from a protected group and treats them differently from others.

To minimize risk, employers should conduct an "impact analysis" or "demographic" of the employees selected for furlough or layoff and the employees retained, thus determining whether the criteria utilized adversely impacts individuals of a certain protected class. Otherwise, employers are potentially at risk for both disparate treat-

Tips for Reducing Likelihood of Whistleblower Claims and Lawsuits

- Ensuring that the workplace is compliant with both CDC and OSHA guidelines. OSHA recently released an Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19),[1] which covers general recommended safety and health guidelines to prevent employee exposure to COVID-19, details about the workplace investigation process, a sample employer letter for COVID-19 activities, a sample hazard alert letter (Attachment 3), and a sample alleged violation description for a citation.
- Strictly abiding by and following local, state, and federal health guidelines.
- Being proactive on the basic COVID-19 prescribed precautions by providing employees with personal protective equipment such as face shields, masks, and gloves as well as placing hand sanitizers in conspicuous places for both employees and patrons.
- Enforcing social distancing measure as best as practicable in the hospitality setting.
- Encouraging employees to report health and safety concerns and establish procedures through which employees can immediately raise health and safety concerns. Employers should appoint a neutral, detached supervisor who is tasked with receiving such reports.
- Documenting all health and safety complaints.
- Taking health and safety complaints seriously and establishing an "open door" policy by ensuring that employees are comfortable raising their health and safety concerns, including any discriminatory practices by other employees and patrons, and feeling confident that their voices are heard and valued.
- Never disciplining or terminating an employee because he or she raised or escalated complaints about a COVID-19 health safety regulation violation.
- Creating a "COVID-19 Infectious Disease Outbreak Plan" that outlines the company's compliance with health and safety regulations in detail, which is distributed to, and signed by, all employees.
- Updating the company's procedures for referring or escalating health and safety complaints and the company's policies and procedures that prohibit retaliation, including appointing a COVID-19 taskforce or point person.
- Providing additional training time now to help reinforce the company's anti-retaliation rules and to prevent retaliation claims.

[1] Memorandum re Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) from Acting Director Patrick J. Kapust fpr Regional Administrators and State Plan Designees through Deputy Assistant Secretary Amanda Edens (May 19, 2020), *available at* https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

ment and impact claims. For example, employers seeking to make budget should be cautious when deciding to lay off the highest-paid employees. In many companies, seniority tends to correlate positively with age. Thus, a RIF that eliminates the highest paid employees may resemble disparate impact discrimination because a disproportionate number of employees aged 40 and over would likely be laid off. When employers unintentionally target older or disabled employees in their RIF or lay-off decisions, they are left with a workforce that looks like it was engineered to get rid of particular groups of people who are specifically protected under Title VII and FEHA.

As a result, businesses should pay special attention to potential claims for disparate impact under the ADA and ADEA. For employers seeking to implement a RIF that may disproportionately affect employees over 40 to cut the costs of high salaries paid to the most senior employees, proving an age discrimination case is significantly more difficult than proving a Title VII case. At first glance, the ADEA seems to mirror the language of Title VII that pertain to employment discrimination: It prohibits an employer from taking actions that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[13] However, the "reasonable factors other than age" provision of the ADEA, as well as the qualitative differences between age discrimination and other forms of discrimination, raises a significant question as to whether the ADEA should be judicially interpreted in the same way as Title VII with respect to disparate impact claims. The U.S. Supreme Court in *Smith v. City of Jackson* held that there is no such thing as a "disparate impact" age discrimination claim.[14] Specifically, the Supreme Court stated that even if a plaintiff showed that a specific employer practice had a disparate impact on older workers, the employer can avoid liability by showing that the practice was justified by a reasonable factor other than age.[15]

This escape hatch provided by the "reasonable factors other than age" defense provides employers the opportunity to furlough or to create a RIF for the highest paid employees without violating the ADEA unless the true motivation is to target age, not wages. Nevertheless, it may be counterintuitive to conduct a RIF that disproportionately impacts older employees only to defend an expensive lawsuit. Despite the uphill battle plaintiffs face when bringing disparate-impact ADEA claims, employers should still scrutinize any employment decision that may cause a disparate impact on the basis of age. In addition, unlike age discrimination, a plaintiff can file a disparate impact claim under the ADA for disability discrimination. If an employer conducts a RIF to eliminate the "least productive employees," such a decision may impact those who are most vulnerable to COVID-19 as a result of underlying health conditions, which may be defined as "disabilities" under the ADA.

Although it would be impossible for any employer to ever completely eliminate the risks in implementing workforce reductions, hospitality businesses should begin thinking about layoff, furlough, and RIF policies. A carefully orchestrated downsizing plan can save hospitality businesses the hassle and stress of making last-minute risky decisions, especially when scrambling to adjust to restrictions suddenly issued by the state and local governments or during the chaos of a lockdown. A few best practice tips for hospitality employers are helpful to keep handy when making the difficult decision to cut staff.

Employers should identify and document objective criteria for the layoffs and select neutral, unbiased decision makers. Some objective criteria could include job performance, documented disciplinary history, the status of the worker (e.g. temporary, part-time, or contract employees), and seniority-based selection (the "last hired/-first fired" concept).

With respect to the job performance criterion or "merits-based selection," employers can lay off or reduce in force employees who are not pulling their weight, but it is important for employers not to use a layoff as an opportunity to weed out employees who are performing poorly or who are simply disliked. Employers should establish objective criteria to evaluate an employee's performance at a company and the skills they bring to the table. For instance, employers should avoid vague and subjective criteria such as "enthusiastic" or "shows initiative" and use objective merit-based criteria such as an employee's attendance history, productivity, and disciplinary record. Employers should also be aware that this method is prone to rater biases and therefore direct managers or supervisors should not necessarily decide who gets laid off. Instead, another neutral detached decision maker should act as an internal check as a means to lessen the risk of claims of retaliation or discrimination. Employers choosing to use this method should carefully document the decisions for retaining or reducing all employees in the selection pool and should ensure that there is a legitimate business purpose to explain the criteria chosen. Using performance as a criterion is usually the safest route for employers because they are typically business-related. By contrast, decisions that focus on seniority or wages, such as laying off workers based on tenure and who earn the most present a higher risk for litigation.

Employers should always engage in an adverse impact analysis to determine which employees would be laid off if the above criteria were to be implemented. Before making a final decision, businesses should analyze whether certain protected classes are affected more than others by comparing the percentage of the protected class scheduled for layoff with the percentage of the protected class in the employer's entire workforce. For example, if workers over the age of 40 comprise 30 percent of an employer's workforce but 80 percent of the employees scheduled to be affected by the RIF, this disparity would make the RIF ripe for an age discrimination lawsuit. Employers should calculate the rate of selection for each group that belongs to a protected class, then divide the number of people selected from a group by the number of applicants from that group. After engaging in this calculation, employers should determine which group has the highest selection rate and which group has the lowest and highest rate of selection in the layoff decision. Consulting with a knowledgeable employment lawyer to craft a reorganization strategy that minimizes the likelihood of claims is always a good idea. While engaging in an adverse impact analysis may seem cumbersome, expensive, and time-consuming, it will save hospitality businesses hundreds of thousands of dollars that would be spent defending a discrimination lawsuit during the economic recession caused by the pandemic.

Navigating Whistleblowers

Before the pandemic, hospitality businesses prioritized providing memorable experiences for guests in which they could escape the stressors of a hectic work week or the routine of everyday life. Whether it was hotels specializing in the art of the getaway or nightclubs offering the rush of a rock star's life to the "9-5er," the hospitality industry operated in the world of magic and illusion. When COVID-19 restrictions placed on the hospitality industry were lifted in 2020, guests still flocked to those spaces for escapism. Hospitality spaces are perhaps needed now more than ever as people seek to escape the mundane and stressful existence of social distancing during a pandemic.

However, the smoke and mirrors that once defined the hospitality space simply do not work anymore. Now, guests demand transparency with respect to safety and health guidelines. Hospitality employees, who are perhaps at a higher risk for contracting COVID-19 than employees in other industries, also demand the same. After all, hospitality employees face a deluge of strangers whenever they work a shift. Even more than before, hospitality businesses must now prioritize safety and compliance with the Centers for Disease Control and Prevention (CDC) and local and state health department guidelines even if masks, face shields, and gloves seriously "kill the vibes." If not, a hospitality employer can expect a whistleblower lawsuit or an investigation under the auspices of the Occupational Safety and Health Act (OSHA) and/or Cal-OSHA to definitely ruin the party mood.

As expected, COVID-19 OSHA whistleblower claims have been on the rise since the beginning of the pandemic in March. In September 2020, the U.S Department of Labor Office of Inspector General issued a report finding that the number of OSHA whistleblower claims increased by 30 percent between February and May 2020 as compared with the same period during 2019, jumping from approximately 3,150 complaints in 2019 to approximately 4,100 complaints in 2020.[16] The pandemic is the obvious culprit for this significant increase: The report noted that 39 percent of whistleblower complaints filed from February 2020 through May 2020 (approximately 1,600) were directly related to COVID-19.[17] As of mid-October 2020, 136 of the 674 employment-related lawsuits are whistleblower complaints filed in federal or state court.[18] California had 30 virus-related workplace retaliation lawsuits, the highest number in the country. In both OSHA reports and complaints filed in court, the employees allege that they either were disciplined or terminated after reporting allegedly unsafe work practices or conditions. Given that this surge in COVID-19 litigation is likely to continue, employers would be wise to acquaint themselves with the different types of whistleblower/retaliation claims under OSHA and Cal-OSHA.

There are two types of whistleblower claims under OSHA: retaliation claims and claims directly related to an employee's perception of workplace safety. The latter occurs when an employee refuses to work because he or she reasonably believes that engaging in the required work presents "a real danger of death or serious injury."[19] Employees alleging this kind of whistleblower complaint must prove that they:

- had a reasonable apprehension of death or serious injury;
- refused to work in good faith;
- had no reasonable alternative besides refusing to work (i.e., cannot do the task in a safe way, such as through remote work);
- had insufficient time to eliminate the condition through regular statutory enforcement channels; and
- where possible, sought from their employer, and were unable to obtain, a correction of the dangerous condition.

The second type of OSHA whistleblower claim resembles equal employment opportunity-related retaliation charges. Section 11(c) of OSHA establishes an employee's rights regarding the filing of complaints of workplace safety, namely protections from discrimination and retaliation. This type of claim requires the claimant to prove the following:

- The claimant participated in activity protected by OSHA;
- The employer subjected the claimant to an adverse employment action; and
- A causal connection exists between the protected activity and the adverse action.

While Section 11(c) of OSHA provides employees with the above protections, remedies under Section 11(c) are limited. A private cause of action is not available to the complaining party, and a worker must file a retaliation complaint within 30 days of an adverse job action.[20] Employees may file retaliation complaints in either federal or state court. Moreover, in California, employees may be entitled to significant damages if they prevail in a private action and prove that an employer took adverse action against them because they raised a health and safety concern to a government or law enforcement agency.[21] Even a successful whistleblower claim can yield large damages that will prove to be costly for hospitality employers already feeling squeezed by an economic recession. A successful whistleblower claim can result in back wages, employee reinstatement, employee reimbursement for attorney and expert witness fees, and other remedies.

An example of a case that showcases the dangers of trivializing and brushing off an employee's safety and health concerns (and also highlights the concept of "impermissible layoffs") is *Clark v. Calson Management, LLC, et al*., which was recently filed in Kern County, California.[22] The plaintiff, a former employee of a senior living community, asserts that she was wrongfully terminated in violation of Labor Code 1102.5 for reporting safety concerns to corporate and refusing to work certain assignments because she felt unsafe and uncomfortable conducting in-person assessments of residents at other senior living facilities to determine if they were a good fit for defendant's senior living community. When the plaintiff requested via e-mail to postpone assessments, the defendant responded that the assessments should continue because defendant "still [has] a business to run." Shortly thereafter, the defendant asked the plaintiff to voluntarily resign and when she declined to do so, the defendant terminated the plaintiff's employment, calling it a "layoff." While the case is still pending, the business nevertheless must spend the time and money necessary to defend the lawsuit, which undermines its "show must go on" logic expressed to the plaintiff. Even without a final decision on this case, there is one main lesson to be learned by from it: Hospitality employers must ensure that employees feel as safe, happy, important, and heard as patrons.

The key to preventing employees from filing such claims and complaints while gaining employee trust and confidence is to focus on cultivating a culture that emphasizes the safety and health of employees and patrons above all else. This "new normal" should be simple for hospitality businesses whose success already depends on making patrons feel welcome and valued.

While hospitality businesses have had their hands full managing squeezed finances and creating safe spaces for their patrons and employees, they still need to remain vigilant about wage and hour issues and providing accommodation and leave requests under the Fair Labor Standards Act (FLSA) and corresponding state wage and hour laws.[23]

Although hospitality employers should have always ensured that their employees were properly compensated for all hours worked, including overtime, there are some new twists on old rules. A new wage and hour quagmire has emerged in the wake of the pandemic: Do employees get paid for time spent in complying and executing safety protocol? Employees likely spend significant time conducting temperature checks, answering daily questionnaires about their symptoms, putting on personal protective equipment, such as, among others, face shields and masks. Employers who intend to require the use of protective gear or conduct temperature monitoring of employees should be prepared to address key legal issues that may arise, including federal and state wage and hour requirements for screening time. Although federal COVID-19 guidance provided by the EEOC allows employers to measure employees' body temperatures without fear of violating disability law,[24] that

guidance does not address wage and hour compliance. Likewise, guidance from OSHA and the CDC does not consider wage and hour implications. While FLSA does not require employers to account for trivial amounts of time, employers can easily avoid a wage lawsuit by simply paying workers for engaging in safety protocol measures.[25] Not only is it legally sound to do so, but paying employees for the time they spend ensuring they are healthy enough to work is the right thing to do. In light of these changes, employers should adopt appropriate recordkeeping and timekeeping mechanisms to track compliance when necessary.

Employers should also ensure that they are cautious in their approach to granting leave requests. In the months following the height of the pandemic, covered employers may have encountered or still encounter allegations that they failed to comply with obligations under the Family and Medical Leave Act,[26] Families First Coronavirus Response Act,[27] and state– or local-equivalent laws by denying the requested leave, requesting unnecessary documentation or retaliating against an employee for taking such a leave.

Employers should be proactive in providing employees protected paid leave in compliance with all relevant laws. In addition, when taking potentially adverse personnel actions against employees who requested or took protected leave, employers should ensure that these actions cannot be construed as discriminatory or retaliatory.

Employers should also ensure compliance with the ADA. As COVID-19 rages on during the winter season, common colds and flu heighten the anxieties surrounding the new virus, and some workers may be reluctant to return, particularly employees with preexisting conditions who may be in danger if they return to work and are exposed to COVID-19. Employers who unfairly deny a request for a reasonable accommodation that allows them to do their job safely for the sake of productivity are asking for disability lawsuits. Employers should follow required protocols set forth by EEOC guidance with respect to COVID-19 vulnerable employees. However, COVID-19 alone may not be considered a disability under the ADA, due to the illness being transitory. Consequently, people 65 years and older and women who are pregnant who are at higher risk for developing complications from coronavirus will not qualify to receive accommodations under the ADA solely on the basis of age or ordinary pregnancy. Therefore, it is imperative that employers consult their lawyers regarding their ADA compliance in the context of the COVID-19 pandemic.

Employers must keep in mind that the discrimination laws discussed above permit employees to challenge actions that have a disparate impact on workers of a certain national origin, age, or other protected class, even if the employer did not discriminate intentionally. When conducting temperature checks and other basic protocol, employers must ensure that all employees are subject to the same requirements. For example, EEOC guidance confirms that employers are authorized to administer COVID-19 tests and implement other safety measures before allowing employees to enter the workplace but warns against singling out employees belonging to protected groups, most notably Asian Americans and the elderly.[28] The same tips discussed above in relation to disparate impact claims apply in EEOC cases as well.

While it is true that the hospitality sector is synonymous with socializing and antithetical to social distancing, the industry has also always been known for its resilience and ability to adapt—to new trends, new clientele, and new technologies. Navigating the unchartered territories of the coronavirus pandemic may be daunting, but hospitality businesses should tap into their remarkable ability to change with the times. As John Wooden, the tenacious

and beloved basketball coach of UCLA, once said: "If we fail to adapt, we fail to move forward." ■

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[1] Gavin Koh, *Recommendation re Projecting the transmission dynamics of SARS-CoV-2 through the post-pandemic period* (Post-publication peer review of the biomedical literature), Faculty Opinions (2020), faculty opinions.com/prime/7337740958.
[2] Travel Industry Employment Through September 2020, Report Produced for: U.S. Travel Association (Oct. 6, 2020), *available at* https://www.ustravel.org/sites/default/files/media_root/Employment%20Report.pdf.
[3] 29 U.S.C. §621.
[4] 42 U.S.C. §12101.
[5] 29 U.S.C. §621, 29 C.F.R. §1625.2.
[6] 42 U.S.C. §12112(a), (b).
[7] 42 U.S.C. §12101.
[8] 42 U.S.C. §12112(b)(5)(A).
[9] Gov't Code §12940(a).
[10] Centers for Disease Control and Prevention, COVID-19 Guidance for Older Adults, *available at* https://www.cdc.gov/aging/covid19-guidance.html (last visited Nov 4, 2020).
[11] U.S. Equal Employment Opportunities Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Nov. 30, 2020) [hereinafter E.E.O.C., What You Should Know About COVID-19].
[12] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).
[13] 29 U.S.C. §623 (a)(2).
[14] Smith v. City of Jackson, 544 U.S. 228 (2005).
[15] *Id.* at 239.
[16] U.S. Dep't Labor: Office of the Inspector Gen. - Office of Audit, Report to the Occupational Safety and Health Administration: COVID-19: Osha Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic (Aug. 14, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/viewpdf .php?r=19-20-010-10-105&y=2020.
[17] *Id.*
[18] Phillip Bauknight, *Viewpoint: COVID-19 OSHA Whistleblower Claims on the Rise as Virus Rages on*, Claims Journal, Oct. 15, 2020, *available at* https://www.claimsjournal.com/news/national/2020/10/15/299952.htm.
[19] "Each employer shall furnish to each of his employees 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." 29 U.S.C. §654 (OSHA §5(a)).
[20] Employees can bring such actions under Title VII of the Civil Rights Act of 1964 and California's Labor Code Section 1102.5.
[21] Lab. Code §1102.5(h); Gov't Code §12940(h).
[22] Clark v. Calson Mgmt., LLC, et al., No. BCV-20-101901 (Cal. Super. Ct. (Kern County) 2020).
[23] 29 U.S.C. §206.
[24] U.S. Equal Employment Opportunity Comm'n, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, *available at* https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (last viewed Nov. 19, 2020).
[25] 29 U.S.C. §206.
[26] 29 U.S.C. §203.
[27] Families First Coronavirus Response Act, Pub. L. 116-127, 134 Stat. 178 (2020).
[28] E.E.O.C., What You Should Know About COVID-19, *supra* note 11.