



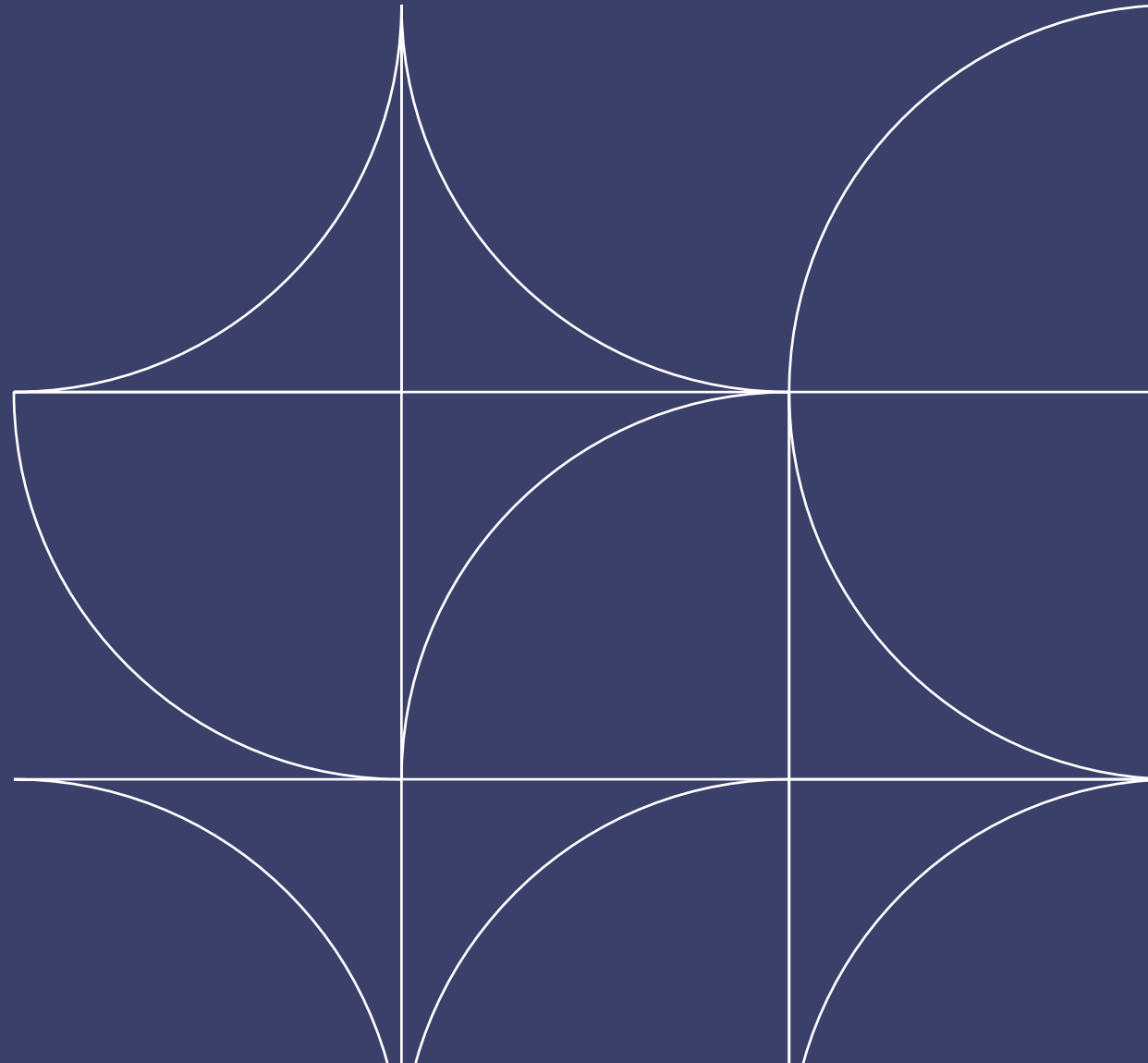
# Hot Issues on Retail Employee Safety In the Face of COVID-19

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Erin Borg - PetSmart

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**Seyfarth Shaw LLP**

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# Speakers

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# Agenda

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**01**

EEOC guidance on vaccinations and practical realities for retailers

**02**

Where retail employees stand in each state's vaccination plan

**03**

Presentation of anonymized survey results and discussion of tips and traps for employers requiring vaccinations (and those encouraging, but not requiring vaccinations)

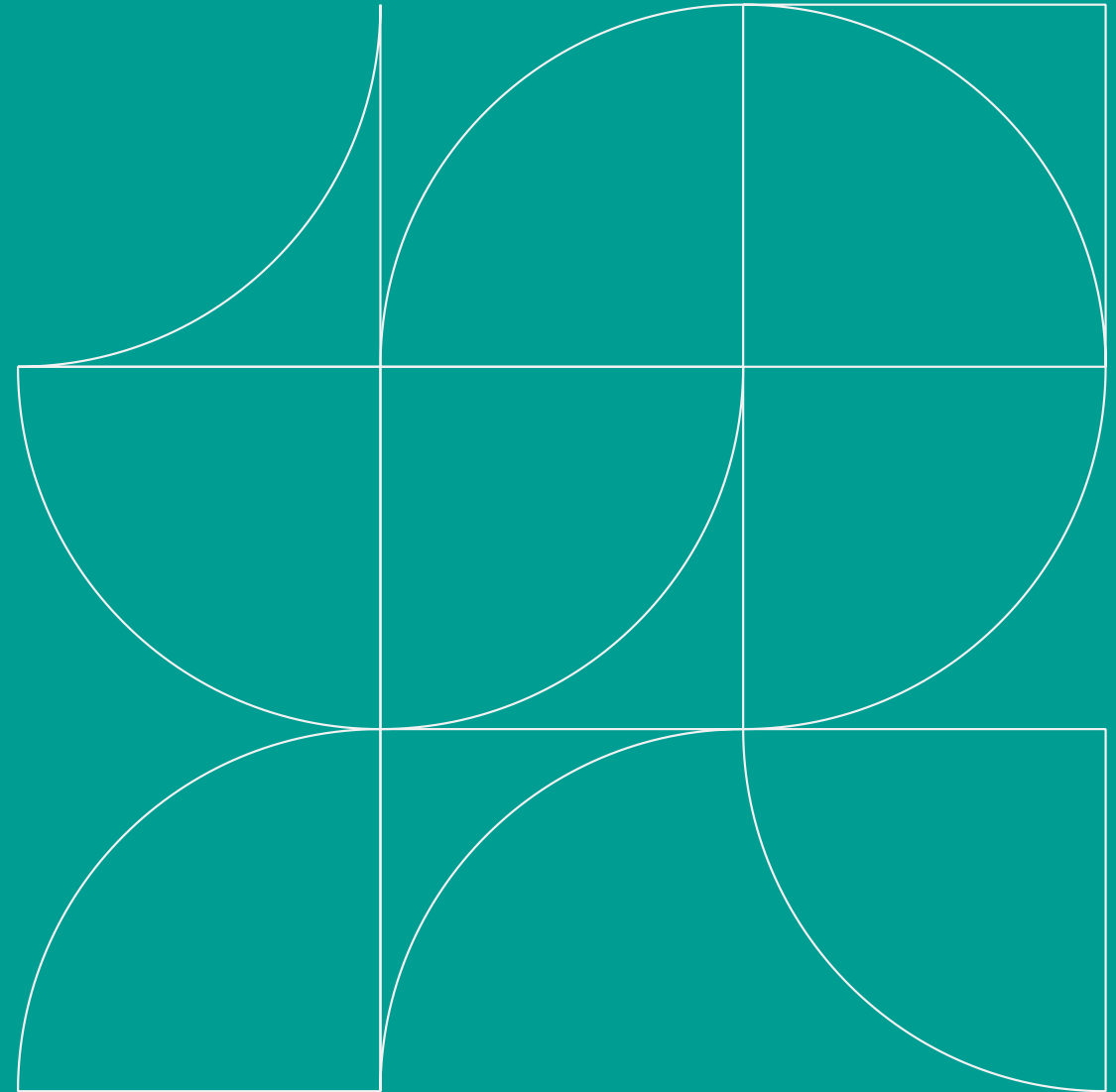
**04**

Update on COVID-19 Litigation in The Retail Industry

**05**

Q&A

# **EEOC guidance on vaccinations and practical realities for retailers**



# Mandatory Vaccines and the ADA

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- EEOC Update to Technical Assistance Guide – December 16, 2020
- ADA Analysis:
  - Vaccines are not medical examinations.
  - Inquiring if someone has been vaccinated or not is not a disability-related inquiry.
- Employers can require employees to be vaccinated IF:
  - The employees receive the vaccine from a pharmacy or health care provider that is not under a contract with the employer to administer the vaccine (and ask medical pre-screening questions)
  - Request for accommodation for religious and disability-related objections are made consistent with applicable law
- Employers are always free to encourage voluntary vaccination.



# Mandatory Vaccines and the ADA

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- If employer wants to administer the vaccine or contract with a pharmacy or health care provider to administer the vaccine (and therefore ask medical pre-screening questions), THEN:
  - it must show that the questions are job-related and consistent with business necessity AND
  - this necessitates showing that the employer has a reasonable belief that an individual who refuses to answer such questions, and therefore not get the vaccine, would present a direct threat to themselves or others if they do not get vaccinated.
- Responses to pre-screening questions must be kept confidential, as required by the ADA.
- Employers may ask if employees have been vaccinated.
  - but if the employees say they have not, no questions about why they have not may be asked unless the above standard for job-related and consistent with business necessity is met

## ADA and Title VII

# Handling Accommodation Requests

- If an employer intends to deny an accommodation request, the employer must show that the unvaccinated individual would present a direct threat due to a “significant risk of substantial harm to the health and safety of the individual or others that cannot be reduced by reasonable accommodation.”
- Determination involves individualized assessment of:
  - (1) duration of risk
  - (2) nature and severity of potential risk
  - (3) likelihood potential harm will occur
  - (4) imminence of potential harm
- Direct threat = conclusion that individual will expose others to virus at worksite
- Even if direct threat is found, cannot exclude employee from workplace unless there is no reasonable accommodation (absent undue hardship) that would eliminate or reduce direct threat

## ADA and Title VII

# Handling Accommodation Requests

- Undue hardship (ADA: significant difficulty or expense)(Title VII: de minimis cost or burden)
  - consider prevalence of employees in workplace who have received COVID vaccine
  - consider amount of contact person requesting accommodation would have with those whose vaccination status is unknown
- This does not mean termination; must evaluate right to leave or work remotely
- Employers need to have an accommodation process for those with disability-related or religious objections to getting a vaccine.
  - Potential Accommodations:
    - masks, testing, social distancing, working remotely, transfer to a non-public facing role
    - may be scenarios where accommodation is not possible considering job duties and workplaces
  - Documentation
    - documentation from medical provider on medical necessity to be excused from vaccine
    - documentation from employee/clergy related to objection to vaccine



# Potential Legal Basis for Objections to Vaccine

- OSHA – Whistleblower claim

Employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.

- NLRA protected concerted activity
- Public policy
- State anti-vaccine mandate laws



# Practical Considerations

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- Availability of vaccine
  - state vaccine distribution plans
- Storage issues for onsite clinics
- Divisive nature of vaccine
- Ability to offer financial incentives

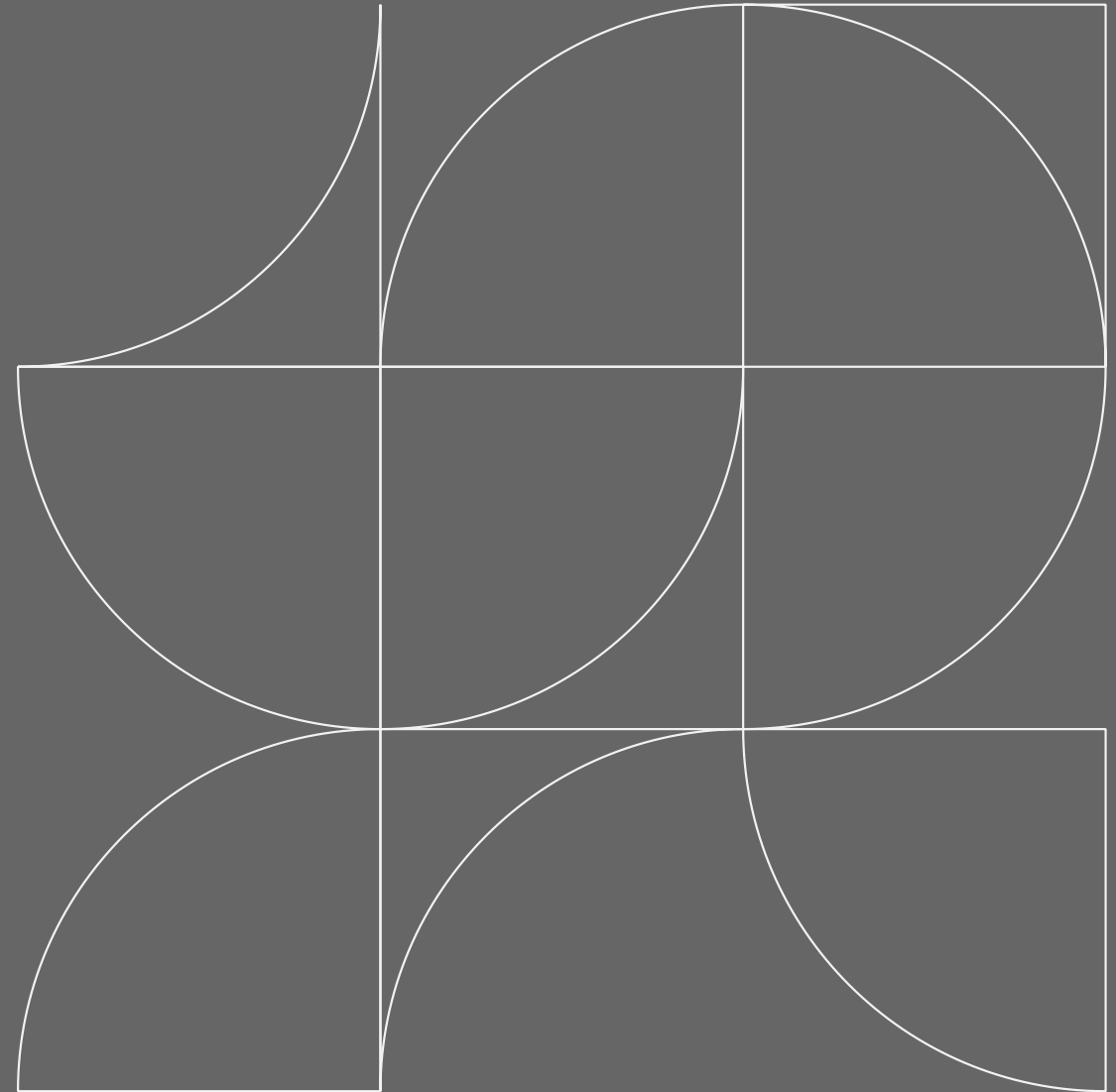


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EEOC's newly proposed regulations concerning wellness plans may curtail employer efforts to offer incentives for employee vaccinations.



## **2. Where retail employees stand in each state's vaccination plan**



# When We Can Expect Retail Employees to Be Vaccinated in Each State

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For most states, retail employees are not explicitly addressed in the governor's executive order and/or CDC guidelines regarding essential workers or the state's vaccination plan, but both must be read together since the state plans often incorporate the governor's executive order and/or CDC definition of "essential workers."

We have prepared a chart of where retail employees fall within each state's vaccination plan, but here is a sample of some states and when we expect vaccinations to be available for retail employees:

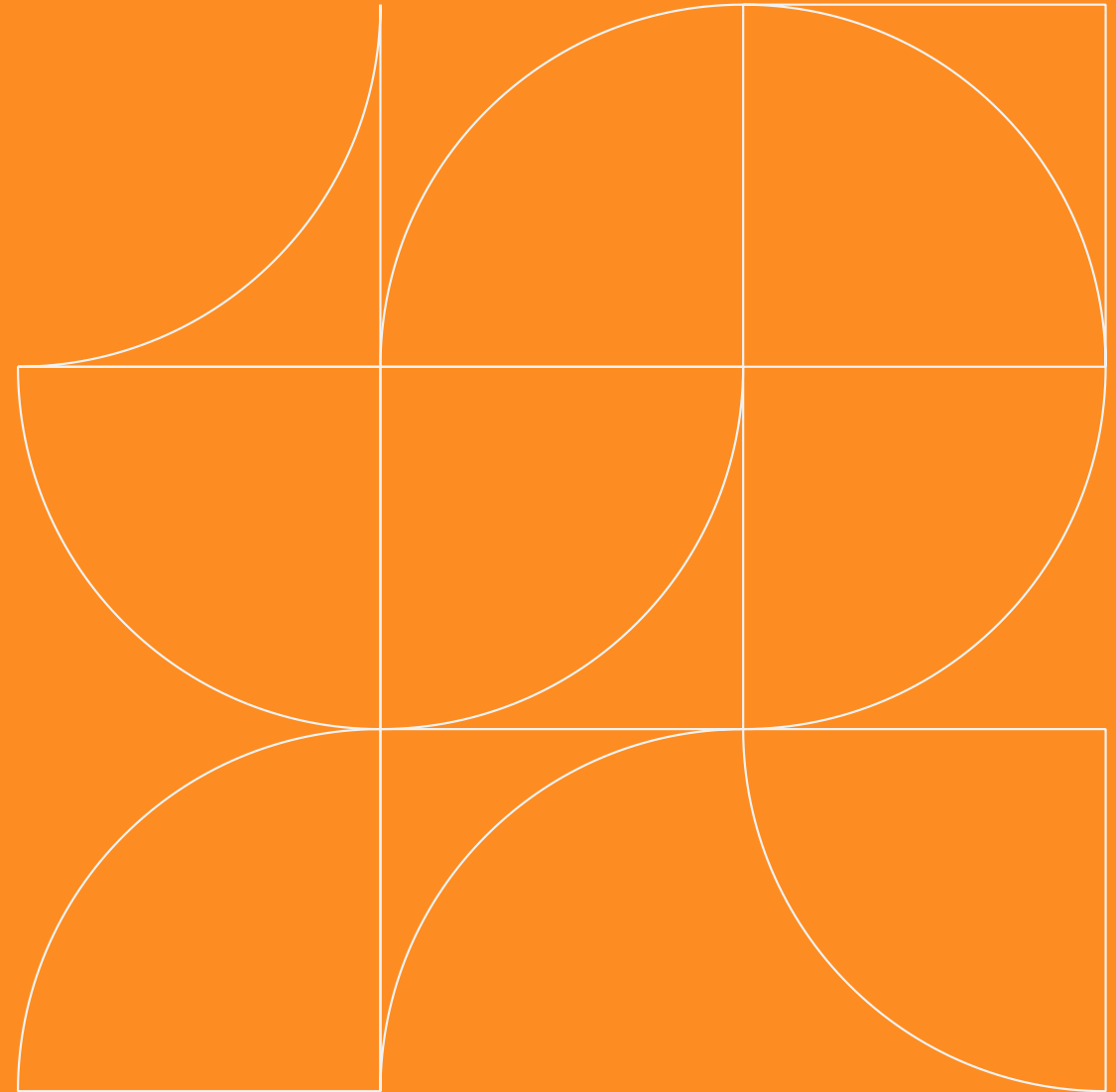
<b>CA</b>	If you have essential services like pharmacies and groceries, retail employees will probably fall within phase 1B, whereas if you do not sell food or drugs, retail workers may not be eligible until later phases that have not been announced.
<b>NY</b>	If you have essential services like pharmacies and groceries, retail employees will probably fall within phase 1B, whereas if you do not sell food or drugs, retail workers may not be eligible until Phase 2.

# When We Can Expect Retail Employees to Be Vaccinated in Each State (Cont.)

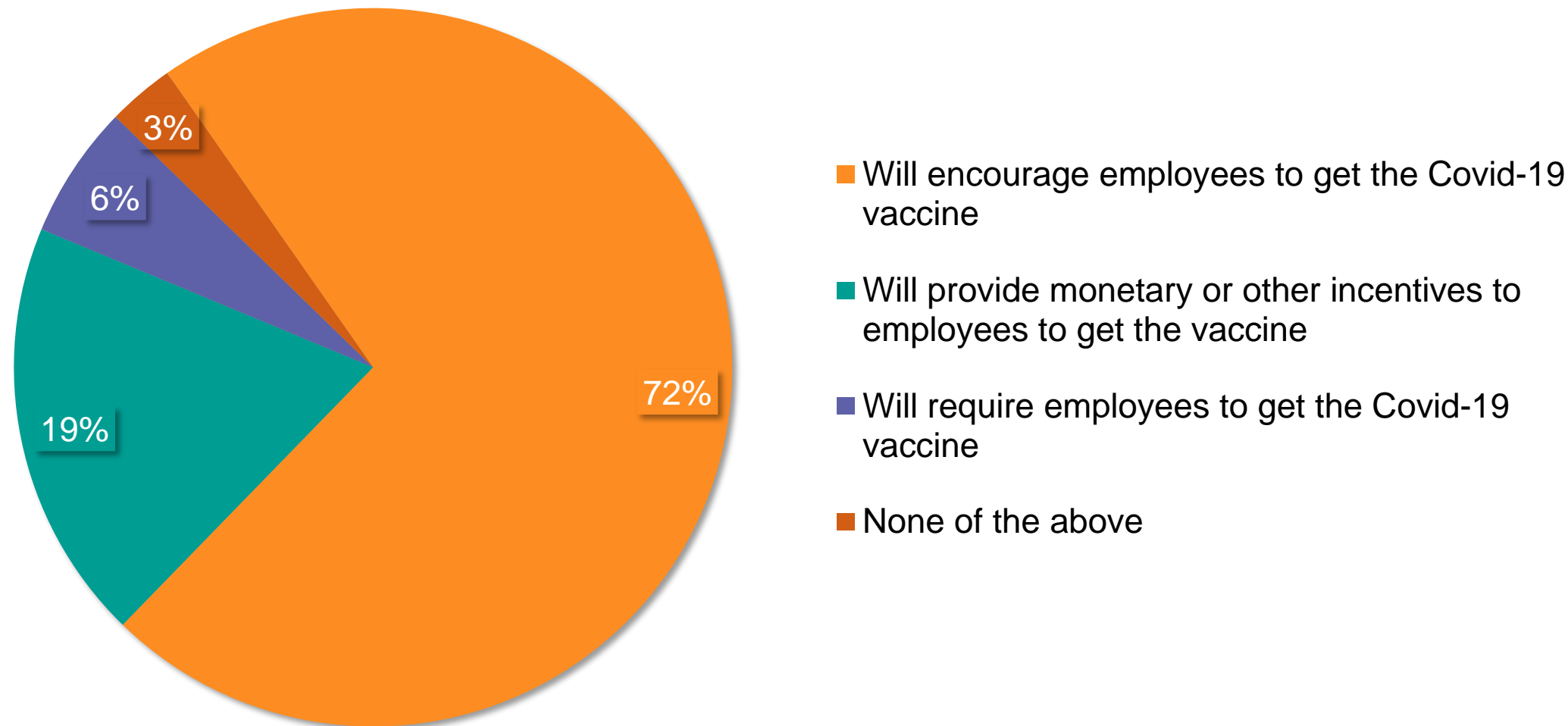
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<b>TX</b>	Retail employees are not included on either of the phases that Texas has announced. Future phases are still under development.
<b>FL</b>	If you have essential services like pharmacies, groceries, and office products, retail employees will probably fall within Phase 2, whereas if you do not sell food, drugs, or office products, retail workers may not be eligible until Phase 3.
<b>MA</b>	Retail employees fall within Phase 2 along with other employees across the food, beverage, agriculture, consumer goods, and foodservice sectors.
<b>IL</b>	If you have essential services like pharmacies and groceries, retail employees will probably fall within Phase 1B, whereas if you do not sell food, drugs, retail workers may not be eligible until Phase 2.

### **3. Presentation of anonymized survey results and discussion of tips and traps for employers requiring vaccinations (and those encouraging, but not requiring)**



# Anonymized Survey Results\*



\* Data collected from 32 respondents

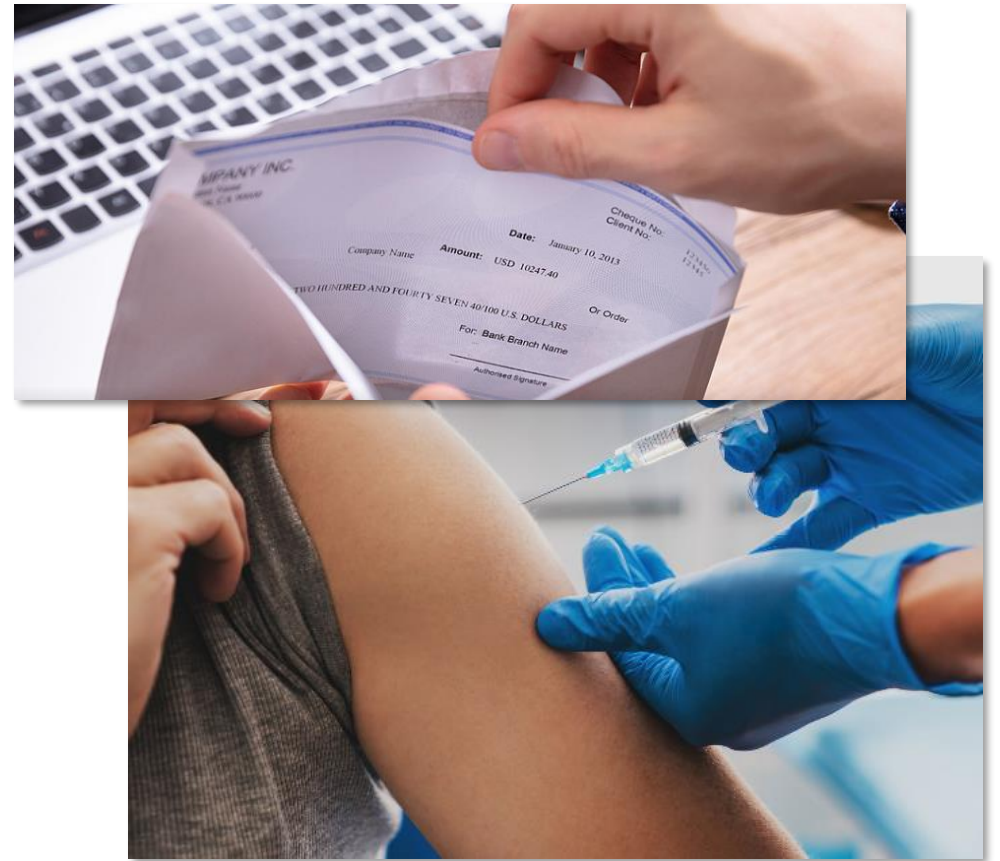


# Employer Incentives for Vaccination

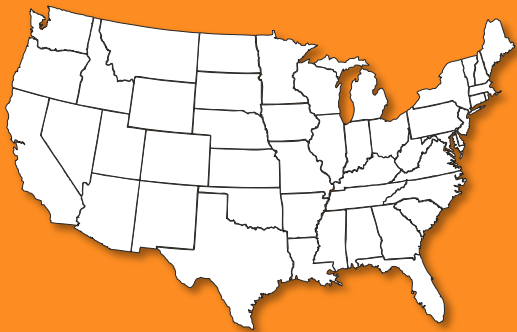
Examples of some of the incentives retailers will offer for employees to get the COVID-19 vaccine:

- **Aldi** – Up to four hours of extra pay; employees will not lose pay for missed hours from work; company will cover any costs related to vaccine administration. The company will also implement on-site vaccination clinics to ensure employees have “easy access to the vaccine.”
- **Dollar General** – Four hours of extra pay
- **Instacart** – \$25 stipend for eligible workers and contractors
- **Lidl** – \$200 of extra pay
- **Trader Joe’s** – Up to 4 hours of extra pay

Note: Above information taken from articles published through *MarketWatch.com* and *npr.org*.

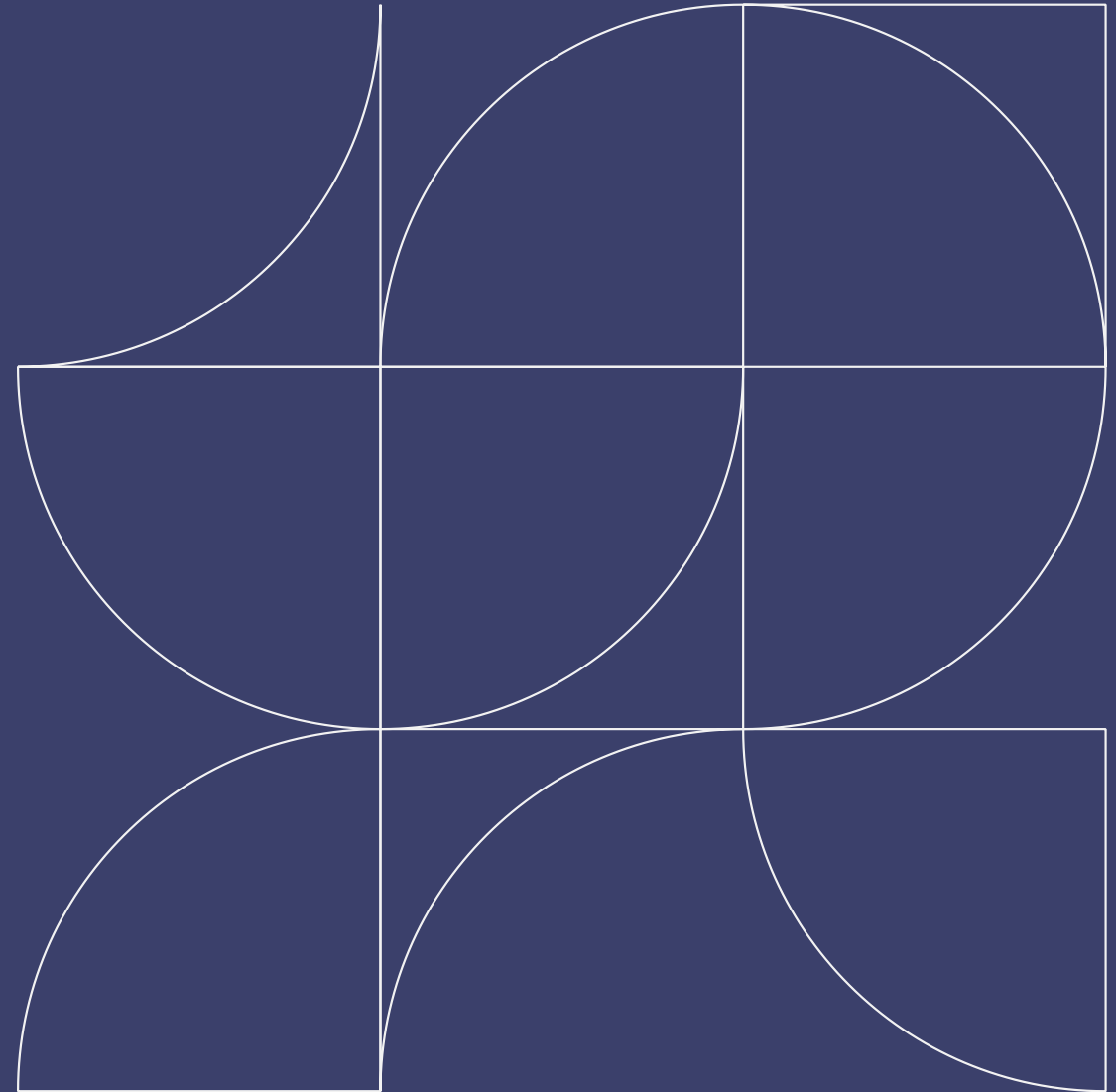


# State Legislative Activity

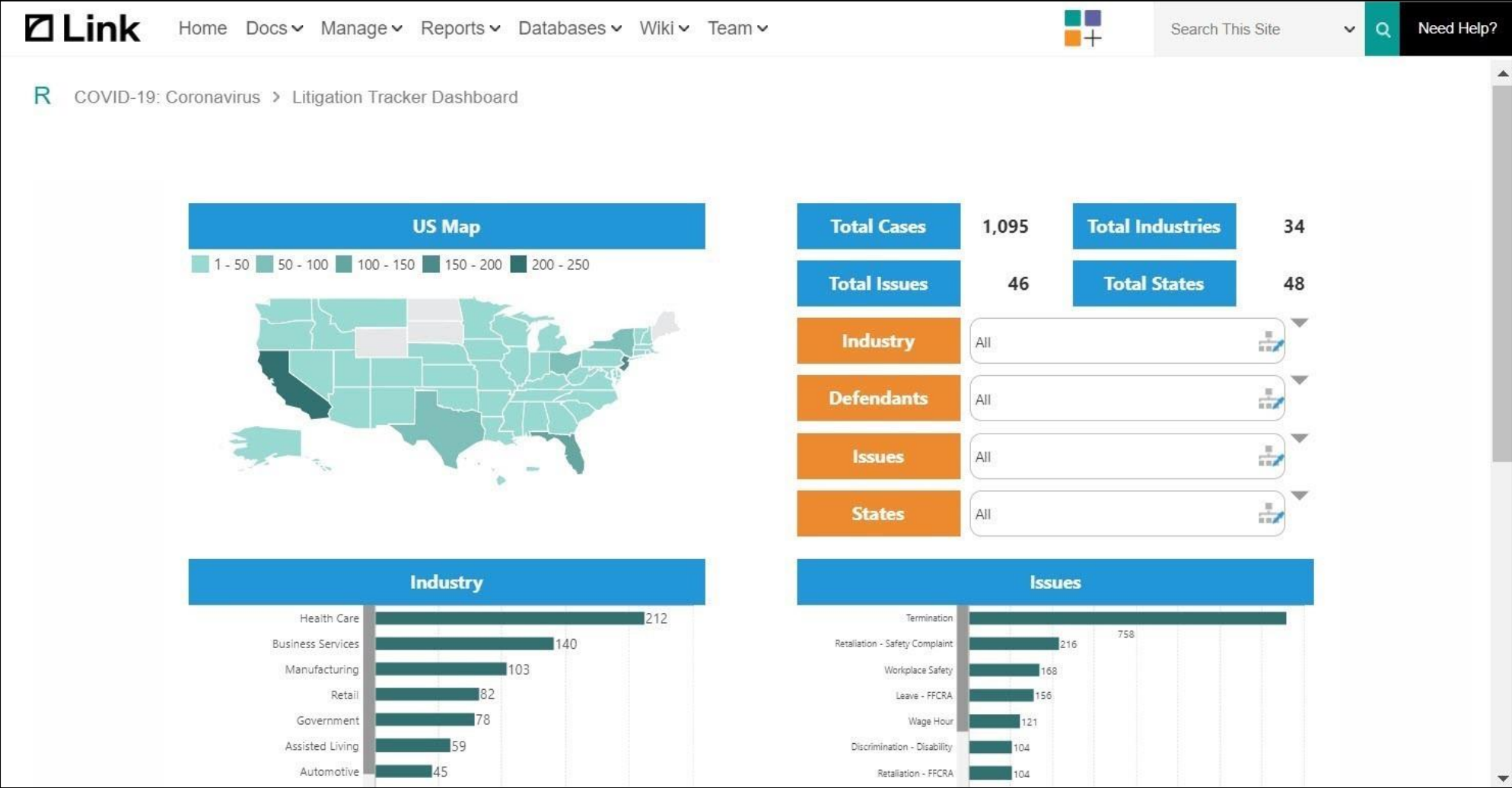


- Bills are being introduced at the state level regarding mandatory vaccines – and some are directed at employers.
- Other are directed at state and local government mandates.
- Sometimes there are conflicting laws within the same state.
- States proposing vaccination status as a protected classification under the state FEP laws.

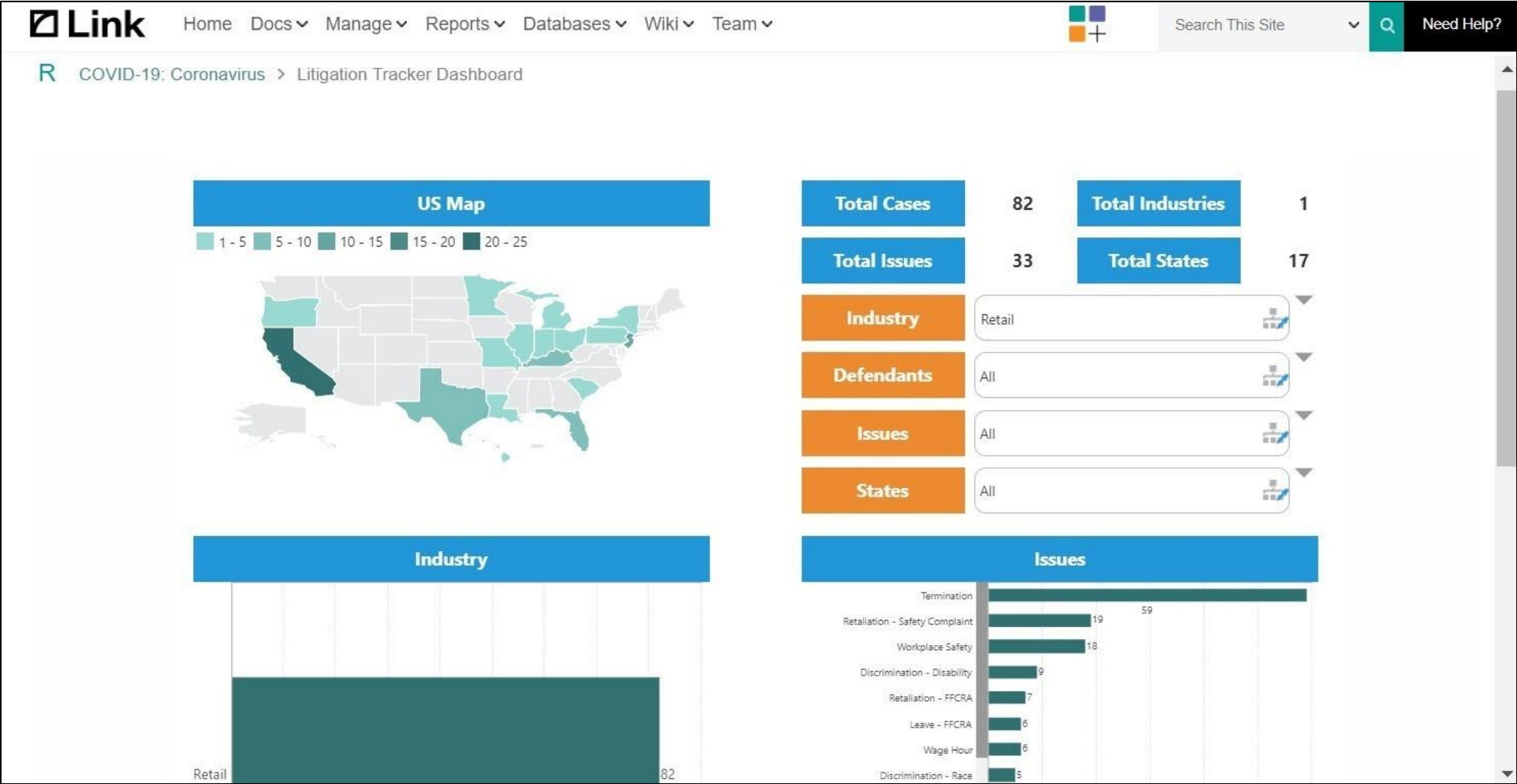
## 4. Update on COVID-19 Litigation



# COVID-19 Litigation – A Birdseye View



# COVID-19 Litigation – Specific to the Retail Industry



# Our Methodology

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- Weekly search of Courthouse News for employment cases filed mentioning COVID-19, coronavirus, or pandemic
- Reviewed by a team of employment litigators and tagged with appropriate industries
- Further tagged with up to three types of issues/claims involved in each case
- Maintained in our firm's collaboration portal, Seyfarth Link

# The Dataset

EDIT	FILING DATE ▾	COURT ▾	SUMMARY	ISSUE 1 ▾	ISSUE 2 ▾	ISSUE 3 ▾	CASE NUMBER ▾	PLAINTIFFS
	2/1/2021	Davidson County	Employment and disability discrimination. Defendants did not provide personal protection equipment for employees working with Covid-19 patients at defendants' rehabilitation center, and thereafter terminated plaintiff's employment when she requested to take her accrued time off to protect her high-risk family members from Covid-19.	Termination	Retaliation - Safety Complaint	Workplace Safety	21C204	Kimberly Jackson
	1/29/2021	Los Angeles Superior Court Central District	Discrimination; wrongful termination. Plaintiff was terminated after taking medical leave due to testing positive for Covid-19.	Termination	Retaliation - FFCRA		CNS Temporary No.E183582724	Derek Kelly
	1/29/2021	Hamilton County Court of Common Pleas	Labor and education. Plaintiffs seek an injunction to prevent defendant from requiring its members to return to in-person instruction on February 1 until the parties' grievance regarding an end to virtual learning is settled via arbitration. The parties had previously agreed to suspend in-person instruction until February 15 - depending on the number of Covid-19 cases in Cincinnati - but defendant unilaterally changed course and is attempting to force a return on February 1, even though the number of new cases is well above the threshold established by the agreement.	Workplace Safety	Working from Home		A2100376	Cincinnati Federation of Teachers Cincinnati Federation of Office Professionals, Local 1520
	1/29/2021	Hamilton County Court of Common Pleas	Employment, disability discrimination and retaliation. Defendant failed to call plaintiff back from furlough during the Covid-19 pandemic after he applied for medical leave related to his diabetes and	RIFs/Furloughs	Retaliation - Disability/Accommodation		A2100378	Scott Alexander

# Some Findings

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- Geographically unsurprising, with California and New Jersey leading the way in number of cases filed
- Also unsurprising, majority of cases involve terminations, but majority of them with some sort of COVID-spin, like retaliation for whistleblowing/reporting safety violations, or failure to accommodate for COVID-related leave
- Comparing “All Industries” to “Retail,” the top three issues are the same (Termination, Retaliation - Safety Complaint, Workplace Safety); then, for Retail, Disability Discrimination vaults ahead of Leave/FFCRA and Wage Hour (which otherwise are the next top issues for All Industries)
- Reach out to your Seyfarth attorney to discuss more!



# Questions?

