

Nursing & Assisted Living Facility Professional

NOW IN OUR 10TH YEAR!

"NEWS AND VIEWS YOU CAN REALLY USE"

November 2020
ISSUE 11, VOLUME 10

SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

THE ADELMAN ADVANTAGE by Rebecca Adelman

To Vax or Not to Vax, That is the Question?



Adelman Law Firm expresses its gratitude to each and every one of you, your family and friends and colleagues during these extraordinary times. As we enter this holiday season may we all keep in our hearts the most noble,

beautiful feeling that sets human beings apart: Hope. We are looking forward to 2021 with a sense of hopefulness and look forward to being of service in the year ahead and beyond.

I am also grateful for John Woods, a one of our exceptional Adelman Law Firm attorneys, for his contribution to this month's Adelman Advantage. John also produces the firm's podcast, "Deny Everything", and we will be delivering Episode 4 in short order. John offers us insights into employer issues as they relate to the COVID vaccination and some of the legal areas to consider.

With apologies to Shakespeare, I paraphrase his famous and eponymous protagonist Hamlet for a more modern but no less dire dilemma: can employers if they wanted require their employees to receive a COVID vaccination? Nay, should employers do so? That is the question!

In what is widely agreed to be record

time by historical standards, the medical-research community has produced two apparently effective vaccines against the COVID-19 virus, with more on the way. With many businesses, especially larger ones, on work-from-home status out of concern for both the health of their employees and customers and also the potential liability risks to themselves, employers now see that the only way to return to normal and get back to work is through a nationwide vaccination program as the answer.

The hue of the answer, as all legal ones are, is tempered by state law and you should consult with an attorney for your specific considerations. Federal law however gives good guidelines for our analysis. Bottom line up front: yes, you can probably encourage your employees to be vaccinated and you may even likely be able to require it (aye: there's the rub, though!).

First, we can analogize the flu vaccine to a prospective COVID vaccine. Remember, no COVID vaccine has yet been FDA-approved, even for emergency use as of November 18, 2020. In the absence, we look to CDC, OSHA, ADA, and EEOC guidance.

Every employer has a duty under the Occupational Safety and Health Act ("OSHA") to keep the workplace free of recognized hazards, while also respecting individual rights

Continued on page 2

of employees. Even the Italians understood the value of quarantining (meaning “forty [days]” or the time ships were kept off Venetian shores). While COVID’s status as a “recognized hazard” is probably uncontested at this point, there is no court decision or regulatory guidance clearly declaring it.

The American with Disabilities Act (“ADA”) prohibits discrimination against individual medical conditions and requires employers to provide individuals with health conditions a “reasonable accommodation.” Perhaps most relevant, the ADA circumscribes an employer’s ability to conduct medical exams. An employer can only do so when the exam is for job-specific purposes and consistent with business necessity; there is a significant risk of substantial harm; and the employer’s concern is based upon reliable and objective information.

The Equal Employment Opportunities Commission (“EEOC”) updated their Pandemic Preparedness in the Workplace and the Americans with Disabilities Act memorandum in March 2020. It was initially issued in 2009. The EEOC, in formal response to a question about whether an employer can require a flu vaccination stated that employers covered under the ADA should “consider simply encouraging employees” rather than requiring them.

So what should employers do who want to reopen their business with vaccinated employees? First, the business should have a clear policy related to vaccinations generally, both seasonal influenza and COVID. Second, that policy should clearly describe the rationale, which should be based on objective facts tied directly to an employee’s job duties and job description. Third, the policy should be consistently applied and allow for reasonable, individualized accommodations. Remember, ADA covered businesses should be prepared to provide exemptions for vaccinations to individuals

with covered disabilities, extenuating medical circumstances, and sincerely held religious beliefs, or otherwise according to state law. All documentation related to a request for reasonable accommodations should be carefully documented.

The slings and arrows of our outrageous post-COVID world will undoubtedly provide employers and employees alike much consternation. Employers, especially those in the health care industry, can take steps now to set the stage for mitigated risks and a safer environment for everyone.

Please reach out with questions about policies or protocols and other legal issues related to this important topic for employers and employees.

We are here to bring you peace of mind so let me hear from you and STAY SAFE.



Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, a Women’s Business Enterprise National Council (WBENC) certified Women Business Enterprise (WBE) established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm’s practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca’s insurance defense practice includes representation of insurance companies and

long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at rebecca@adelmanfirm.com and visit www.adelmanfirm.com.



John Woods, a Memphis native, is an attorney at Adelman Law Firm. After graduating from Christian Brothers High School, he attended the University of Mississippi and went on to study at the University of Memphis Cecil C. Humphrey's School of Law. John spent two and a half years practicing high-volume civil litigation, specializing in the contentious field of family law. He also handled appellate matters, labor and employment, contract litigation and plaintiff's personal injury and medical malpractice cases.

John spent several years as a radio correspondent and editor for a national radio program that reached nearly ten million listeners. He also served as an infantry officer in the Tennessee Army National Guard. When he is not at work, he enjoys CrossFit and being with his wife, whom he met in law school, and their dog, Penney.

DID YOU KNOW?



A BANANA IS A BERRY (AND A STRAWBERRY ISN'T)

Talk about berry confusing! This is because a “berry” is technically a fruit with three distinct layers—a thick outer one; a middle one containing most of the edible fruit; and an inner one that contains the seeds. The fruit also must come from a flower with only one ovary. By this classification, grapes are berries as well, but strawberries aren't.

“FORTY” IS THE ONLY NUMBER (IN ENGLISH) WHOSE LETTERS ARE IN ALPHABETICAL ORDER



Not the most useful, sure, but it's sure fun to think about!



A “JIFFY” IS A REAL UNIT OF TIME

Ever told someone you'd be back in a

“jiffy”? You were definitely lying. Though the English language has adopted it to mean “a short amount of time,” it actually is a scientific term. In the physics world, a “jiffy” is the time it takes light to travel a centimeter in a vacuum or around 33.4 picoseconds. (A “picosecond,” meanwhile, is a trillionth of a second.)

Do You Suffer with Comparative Suffering?



I must paint a picture, one that I do not want to paint, with colors I've not chosen on a landscape I don't like. Yet, I will do it anyway. We are living and working in extraordinary circumstances. Day-to-day predictability and consistency have

been gone – so far, for months. Our basic assumptions about the world are shattered, and everyday things like hugging and hand holding, going to work, meeting a friend for dinner, kids going to school, and family celebrations are radically modified or missing entirely. From our sense of security, stability with routines and connections, to financial insecurity, the list of losses is long and growing. At work, there may be rising tensions among staff given the constantly changing and oftentimes conflicting information, the high pressure survey process, intense scrutiny from the media, families, and the general public, and now the beginning of lawsuits.

Residents and their families are suffering, and staff are bearing witness to intense, and at times overwhelming grief. But unlike most disasters where the event itself ends and people can settle and hopefully ease into recovery, the conditions with the pandemic create an entirely different experience. The

type of grief that we're living with right now is extraordinary. There is nothing 'normal' about what is happening in our lives, at work or at home.

So, what is comparative suffering and why is understanding this concept critically important? Erica Layne describes comparative suffering as the ranking of problems (suffering) and then comparing them with other peoples' problems, in essence denying a voice to our own struggles. She goes on to explain that denying a voice to our struggles may actually make them heavier and leave us feeling even more overwhelmed, worried, and alone (<https://ericalayne.co/comparative-suffering/>).



Ranking of just about everything is rampant in our society – we score and rank individual performance, team performance (for those of you who are baseball fans, just think of all the crazy statistics for the World Series –

even the announcers acknowledge the bizarre stats!), school districts, nursing homes (all the quality measures), and on and on. The ranking doesn't stop with those areas. In her podcast on comparative suffering, Brene Brown says, "Our pain and hurt are not immune to being assessed and ranked."

<https://brenebrown.com/podcast/brene-on-comparative-suffering-the-50-50-myth-and-settling-the-ball/>. Comparative suffering is the

misguided idea that we don't have the right to feel what we feel, to grieve our losses, or to acknowledge our distress because someone else's suffering is worse than ours. For example:

- How can I be upset when there are so many people who have it worse than me?
- How can I be scared for my children when there are kids with no place to sleep tonight?
- Why should I feel so tired and angry when many people don't have a job right now?
- Who am I to complain when we don't even have COVID in our facility right now?

No matter the individual circumstance, each of us is carrying tremendous burden right now. We are all living in a collective traumatic environment, even if we are each experiencing variations based on our family situation, our social and cultural situation, our financial situation, and our work situation. Given the fact that we are living and working during a pandemic, it must be acknowledged that there is suffering all around us. And while there is nothing normal about these abnormal situations, the simultaneous distress *is* completely normal. "Emotional distress is common and normal in the context of uncertainty and potentially life-threatening situations, such as the COVID-19 pandemic" (COVID-19 Anxiety Workbook, <https://health.uark.edu/coronavirus/caps-covid-19-resources-anxiety-workbook.pdf>).

In our deepest desire to feel relief from the suffering and the sadness, the lure of comparative suffering awaits, that if we tell ourselves that someone else is worse off, or that our situation isn't as horrible as it can be, the emotional distress will go away. Wrong. In Brene Brown's podcast, she says that when we

try to deny emotions, they "double down" and "fester". In other words, they grow. And what makes this more complicated is that shame gets invited to the scene which sounds like, "Not only are other people suffering more than I am, I'm a bad person because I feel so angry [frightened, irritated, etc.] right now." The underlying, and untrue, message is *I'm not worthy of feeling the way I do and there is something wrong with me.*

Here's the stark reality. If I deny myself, essentially shame myself, from feeling the fear (or any other emotions), it does not help anyone who has suffered the death of someone they love from COVID. It does not help anyone who is currently ill with the disease. It does not help the person without a job. It does them no good. It does me no good. Denying my feelings doesn't make someone else's grief and suffering any less, even as much as I desperately want it to.

While maintaining perspective of our situation is important, it is equally important to allow ourselves to feel the grief, the anger, the fear, and any other emotions. At the risk of being perceived as simplistic, as humans we are destined to experience an array of emotions – no need to label or judge them. Emotions simply are. We do need to let them have space and a voice. Emotions come and they go. In this time of suffering (and always), allow yourself to be fully human and grieve when you grieve, be angry when you're angry, and then celebrate the little joys that are hopefully present in each of our days.

Contact Paige at 520-955-3387
or at paige@paigeahead.com
Discover more about her at
www.paigeahead.com