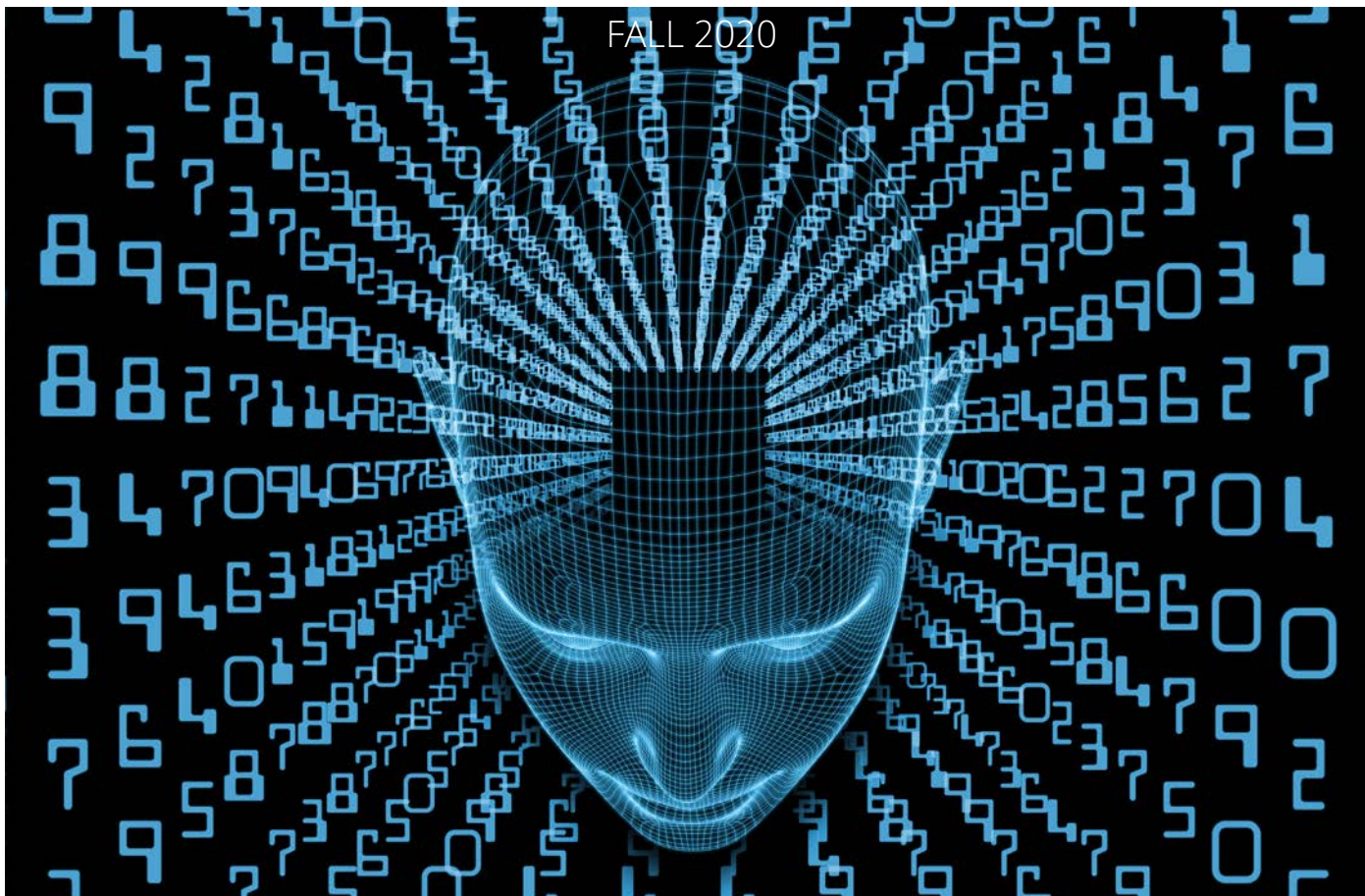


FALL 2020



Covid-19 & Workplace Liability



VINSON & COMPANY

EXPERTS IN COURTROOM PERSUASION &
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Covid-19 & Workplace Liability

ABSTRACT

An unprecedented number of potential lawsuits have emerged targeting employers' actions and responsibilities regarding coronavirus workplace safety measures. A recent Vinson & Company national survey has found that both employers' and employees' behaviors matter in attributing responsibility to employers concerning the coronavirus. The survey also highlighted the varying levels of confidence in the accuracy of information provided by different sources about the coronavirus. Most importantly for litigation concerns, evaluations of employers' responsibilities pivoted dramatically with the mention of the CDC.

INTRODUCTION

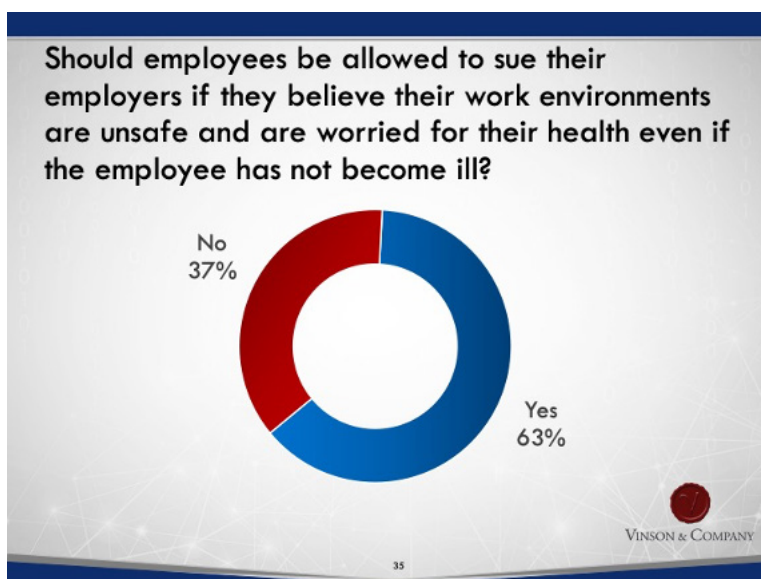
The coronavirus pandemic has created a setting for litigation on many fronts. Employee personal injury lawsuits, alleging unsafe work environments, are already a burgeoning litigation area. Additionally, hospitals and health care facilities face a similar litigation faction from employees who were, or are, at the forefront of coronavirus exposures and claim unsafe workplaces. To the extent these lawsuits develop and become matters for a jury to decide, it will be important to understand what the potential outcomes might be and what prevailing juror attitudes influence those outcomes. In the recent Vinson & Company internet survey¹ discussed below, four key issues related to such litigation were addressed.

1. Do potential jurors feel that employers should be held accountable if the employee fears that the workplace is unsafe due to coronavirus, but has not become ill?
2. Do potential jurors feel that employers should be held accountable for an employee's Covid-19 illness if the employee or the employee's family believes that exposure occurred in the workplace?
3. What relationship, if any, do opinions held by potential jurors about the government and the CDC have on attitudes about coronavirus litigation?
4. What employer and employee factors aggravate or mitigate an employer's perceived responsibility in light of the virus?

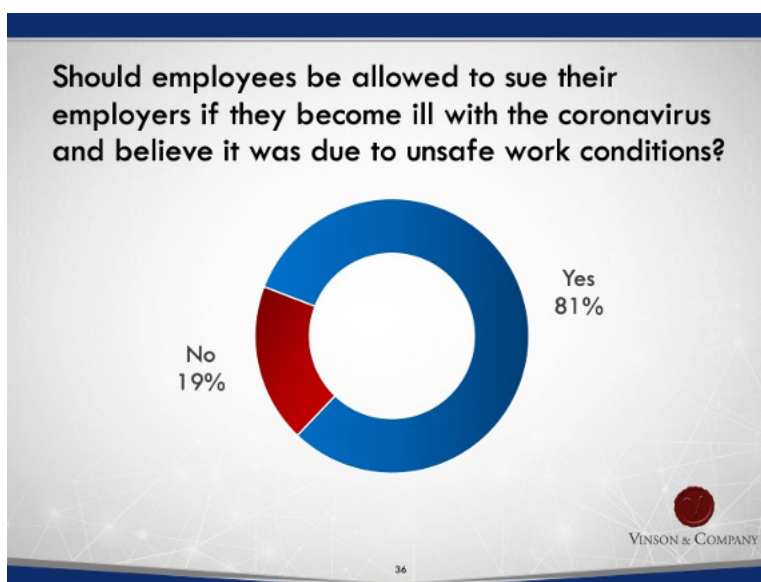
WHAT SURVEY RESPONDENTS TOLD US

There was a distinct willingness to hold employers potentially accountable through the legal system, whether the employee had become ill or not. Fully 63% felt employees should be allowed to sue their employers if they believe their work environment is unsafe and are worried for their health, even if the employees had not become ill from the coronavirus.

¹ The survey of 155 respondents was conducted August 14 – August 18, 2020 via the internet. The national survey consisted of 80 questions which took an average of 14 minutes to complete. Respondents lived in 34 US States with 60% residing in CA, FL, NY, PA, IL & TX. Respondents were volunteer members of Vinson & Company's survey database. They were told after a few initial questions, that "The survey involves attitudes and opinions about the coronavirus (Covid-19) in the US."

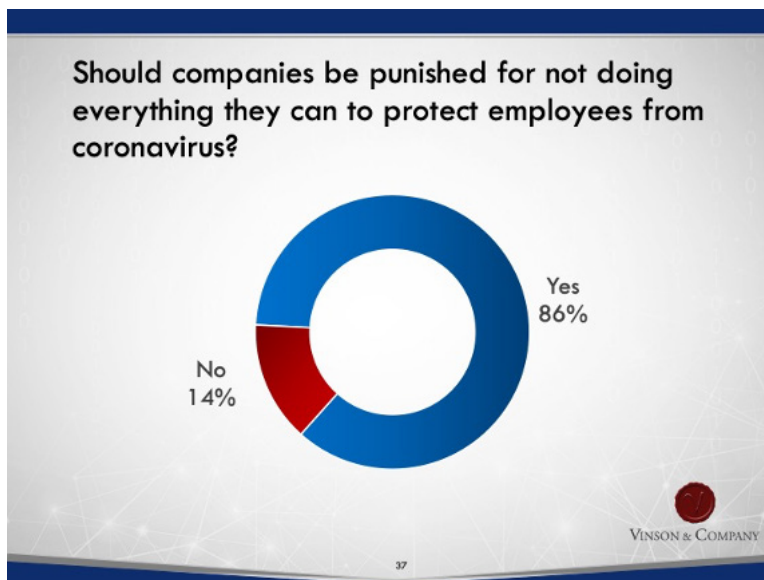


A significantly higher number of respondents supported a lawsuit against an employer if the employee had actually become ill; 81% felt employees should be allowed to sue their employers if they become ill with Covid-19 and believed it was due to unsafe work conditions.



HIGH EXPECTATIONS AND REPERCUSSIONS FOR COMPANIES

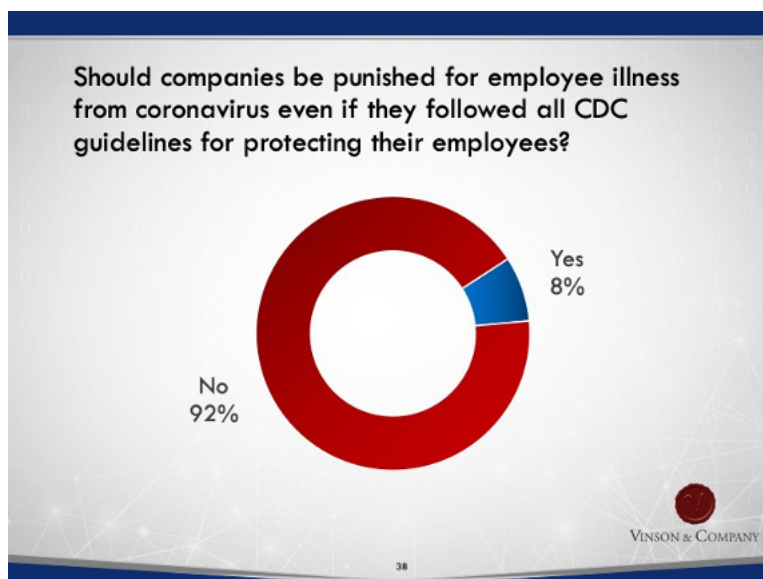
Eighty-six percent (86%) felt that companies should be punished for not doing everything they can to protect employees from coronavirus.



In the absence of any mention of the CDC and its health guidelines, most respondents placed a liability burden on the employer. Introduction of the employer's compliance with the CDC, however, changed everything.

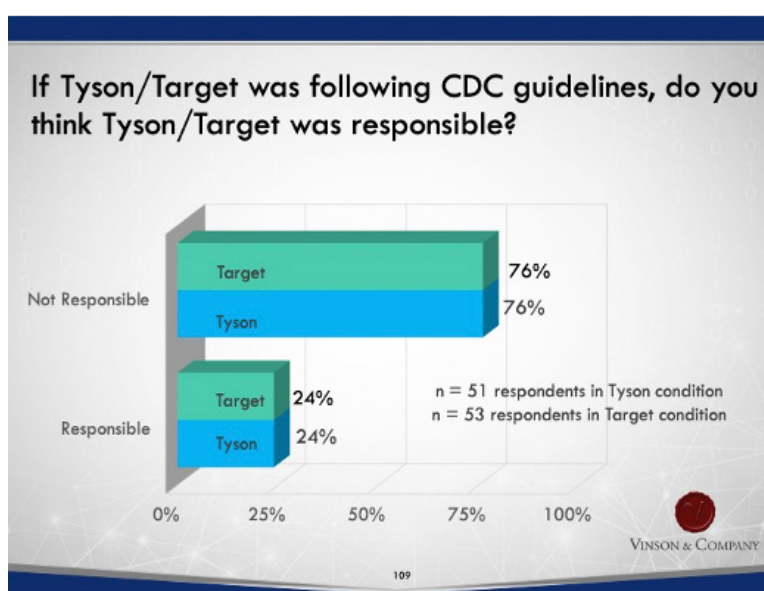
ENTER THE CDC

With mention that a company followed CDC guidelines, only 8% felt that a company should be punished for employee illness from coronavirus if the company followed all CDC guidelines for protecting its employees. For most, evidently, following CDC guidelines was the same as "doing everything they can."

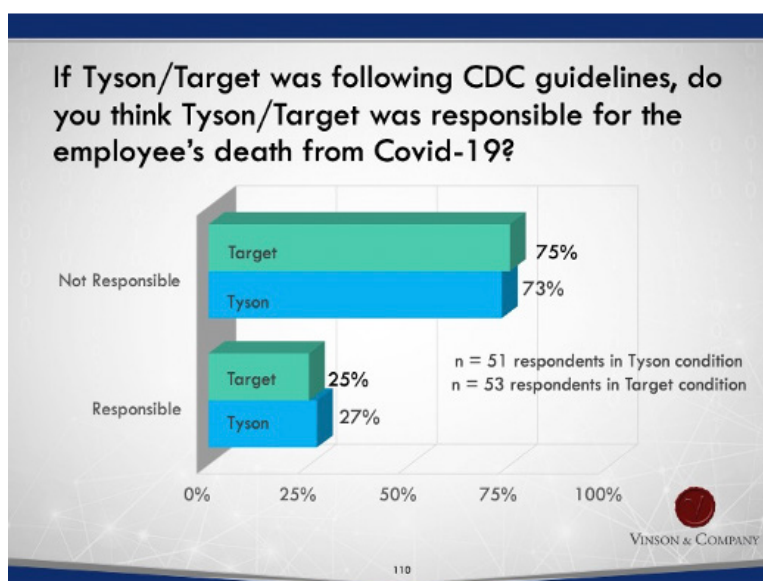


Responses to hypothetical situations confirm the robust sway that any mention of the CDC had on liability evaluations. In a final series of questions, some respondents were asked their opinions about an employee who claimed he contracted Covid-19 while working at Tyson Foods. Others were asked the same question but instead about an employee who claimed he contracted Covid-19 while working at Target. The responses were similar regardless of which of the two companies was indicated and regardless of whether the employee recovered or died from the virus. Fully three-quarters felt the company should not be held responsible.

A Tyson/Target employee is suing Tyson/Target saying he contracted Covid-19 from an unsafe workplace there. He was hospitalized for two weeks but has since recovered. The company says that it had been following CDC guidelines and cannot be held responsible. If Tyson/Target was following CDC guidelines, do you think Tyson/Target was responsible?



Another employee at Tyson/Target died of Covid-19. His family is now suing Tyson/Target claiming that the employee contracted the virus from an unsafe workplace there. The company says that it had been following CDC guidelines and cannot be held responsible. If Tyson/Target was following CDC guidelines, do you think Tyson/Target was responsible?



Respondents' evaluations of whether the company was responsible did not always comport with whether the respondents felt the workplace was safe or not. Responding to the above hypothetical, about an employee who died of Covid-19 after working at Tyson Foods, the frequencies were as follows:

11%	Unsafe and Tyson is responsible
08%	Unsafe but Tyson is not responsible
16%	Safe but Tyson is responsible
65%	Safe and Tyson is not responsible

In other words, 16% of those who felt the work environment was "safe" nevertheless wanted to hold Tyson responsible for the employee's death. Just as enigmatic, 8% who felt the work environment was "unsafe" nevertheless felt that Tyson was not responsible to the family for the employee's death.

WHY DID THE INCLUSION OF THE CDC MAKE A DIFFERENCE?

The CDC is an agency that has regularly delivered public health messages regarding safety issues involving the coronavirus and Covid-19. These messages, however, have evolved over time and therefore have not always been the same message. As new information was gathered by the CDC, it altered and updated its recommendations to the public. The fact that information changed and evolved over time did not seem to diminish the trust placed in the messages coming from the agency. While respondents overwhelmingly trusted their personal physicians and health care professionals, a large percentage also indicated trust in the CDC's information about the virus.

TRUST IN THE ACCURACY OF INFORMATION ABOUT THE CORONAVIRUS²

Responding to a series of questions about a number of entities and persons, respondents were asked whether or not they trusted the accuracy of information about the coronavirus obtained from each. The CDC and health care professionals obtained the highest percentage of respondents indicating they trusted the information, but very few trusted information received from other entities. Listed below are the percentages of respondents who indicated they trusted the accuracy of these four health professionals:

87% trust their doctor
84% trust health care professionals
71% trust Dr. Fauci / Only 14% do not trust Dr. Fauci
65% trust the CDC / Only 12% do not trust the CDC

TRUST IN OTHER GOVERNMENT ENTITIES AND INDIVIDUALS WAS VERY LOW

Information has also been disseminated to the public from other government entities and media sources. None of these sources was trusted to the same degree as the CDC. Trust in the federal government's messages, along with President Trump's, were very low at 7% and 10% respectively.

36% trust their county or local government
28% trust their state government
13% trust Vice President Pence
10% trust President Trump
7% trust the federal government

TRUST IN MEDIA WAS VERY LOW AS WELL

Trust in the media was low as well. Print news sources received the highest percentage of respondents indicating trust in the accuracy of information about the coronavirus, with 20% trusting print news reporting on the virus. Internet News and social media information about the coronavirus, were trusted by only a very small percentage of respondents.

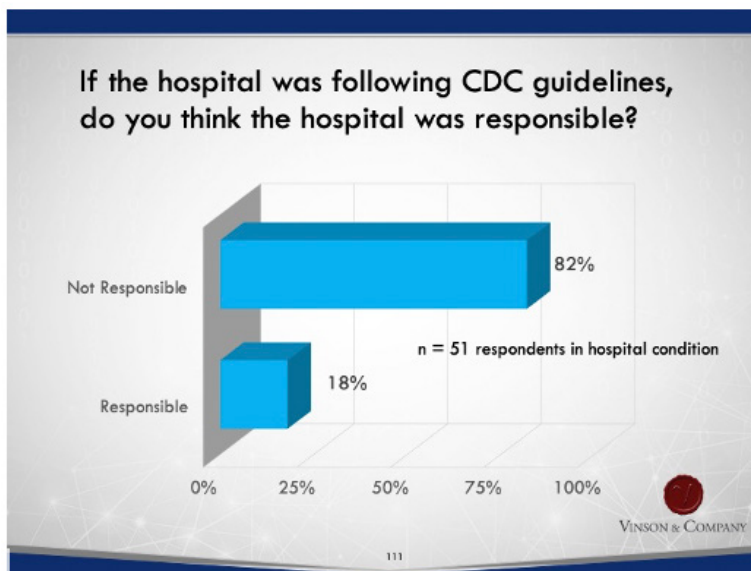
20% trust print News
14% trust the TV News
8% trust internet News
4% trust social media

DO HOSPITALS FARE DIFFERENTLY FROM COMPANIES?

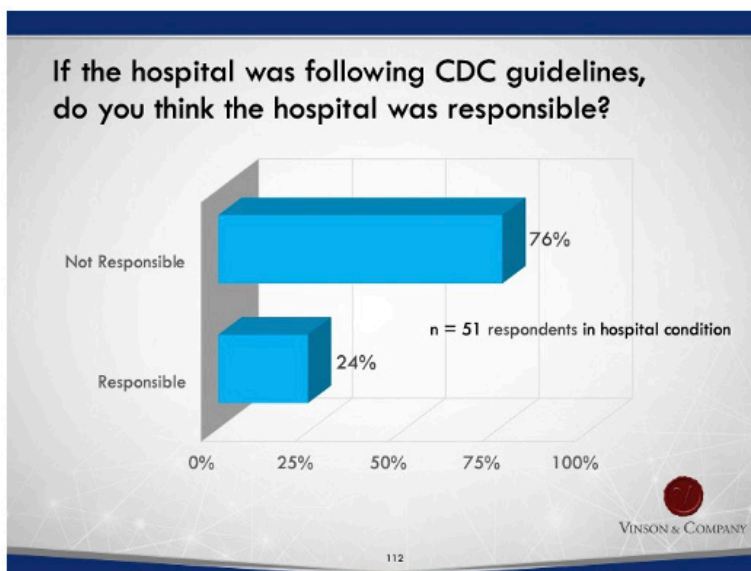
The highest percentage of respondents trusted health care professionals and personal physicians to provide accurate information about the coronavirus, but would a hospital be held to a different standard of care for its employees than would a company? To determine this, a different hypothetical was posed to another portion of the sample, which involved a hospital employee and the hospital where he worked.

² Regarding the guidelines for health safety about the coronavirus, how much do you trust the accuracy of the information you receive from each of the following (Do not trust, neither trust/distrust, Trust): The CDC, Anthony Fauci (Infectious Disease Specialist), President Donald Trump, Vice President Pence, your state government, your county government, your city or local government, the federal government, your doctor, health care professionals, TV News media, internet news media, print news media, social media.

A hospital employee is suing the hospital saying that while he worked at the hospital with Covid-19 patients, he contracted Covid-19 from an unsafe workplace there. He was hospitalized for two weeks but has since recovered. The hospital says that it had been following CDC guidelines and cannot be held responsible. If the hospital was following CDC guidelines, do you think the hospital was responsible?



Another employee at the hospital died of Covid-19. His family is now suing the hospital claiming that the employee contracted the virus from an unsafe workplace while he worked with Covid-19 patients there. The hospital says that it had been following CDC guidelines and cannot be held responsible. If the hospital was following CDC guidelines, do you think the hospital was responsible?



Eighteen-percent (18%) felt the hospital should be responsible for an employee's illness from the coronavirus and 24% felt that the hospital should be responsible for an employee's death from it. The percentage holding the hospital responsible for an employee's illness was significantly less than the percentage holding either of the two companies responsible. The percentage holding the hospital responsible for an employee's death, however, was no different from the percentage holding the companies responsible.

Similar to results for Tyson and Target, respondents' evaluations of whether the hospital was responsible did not always comport with whether the respondents felt the hospital environment was safe or not. Responding to the above hypothetical, where the hospital employee died, the frequencies were as follows:

8%	Unsafe and Hospital is responsible
20%	Unsafe but Hospital is not responsible
16%	Safe but Hospital is responsible
57%	Safe and Hospital is not responsible

In other words, 16% of those who felt the hospital work environment was "safe" nevertheless wanted to hold the hospital responsible for the employee's Covid-19 death. Further, 20% who felt the hospital work environment was "unsafe" nevertheless felt that the hospital was not responsible to the family for the employee's death.

Respondents were more than twice as likely to give the hospital a "pass" when the work environment was deemed unsafe compared to the liability assigned to Tyson and Target. In this time of pandemic, a hospital may be considered a necessarily "unsafe" environment regardless of safety measures in place. Hospitals are also viewed as a last bastion of health care during this health care crisis. Finally, it may be difficult to quantify what would constitute a "safe" hospital environment for a worker caring for Covid-19 patients. For those reasons, it is not surprising that 20% of respondents would categorize the hospital as unsafe but not responsible for an employee's death. Understanding a prospective juror's expectations for and experience with a hospital environment will be important to determine during voir dire for coronavirus litigation.

PUNISHMENT FOR NAMED ENTITIES (TARGET, TYSON, AND HOSPITAL) WAS MORE PROMINENT THAN A DESIRE TO PUNISH A GENERIC "COMPANY"

As was previously reported, only 8% felt a "company should be punished for an employee illness from coronavirus even if they followed CDC guidelines for protecting their employees." However, the percentage changed significantly when specific companies and entities were indicated. Twenty-eight percent (28%) felt that Tyson Foods should be punished as described in the hypothetical situation where Tyson followed CDC guidelines, 21% felt that Target Corporation should be punished, and 28% felt the hospital should be punished. The desire to punish the entities tracked closely with decisions about responsibility.

Should the entity be punished if it followed all CDC guidelines?

Entity	Should be Punished
A "company"	8%
Tyson Foods	28%
Hospital	28%
Target	21%

The difference between the few who would punish a generic "company" versus the over one-fourth who would punish specifically-named entities was significant. All three of the entities referred to in the hypotheticals have been discussed in the media³ revolving around coronavirus safety precautions, but while employee lawsuits have been connected to Tyson and to some hospitals, Target Corporation has had more favorable media articles.

Although respondents expressed reluctance to trust information they received about the coronavirus from media sources, that information nevertheless may have played a role in shaping decisions about the liability of these three entities regardless of the content of the articles. Media exposure will be an important area to explore with potential jurors. While a juror may not recall specific articles or news reports, their media habits will reveal, to some extent, the types of information they have been exposed to.

MOST TAKE THE CORONAVIRUS SERIOUSLY

Only 10% felt that the coronavirus is "just a flu and not too concerning." The overwhelming majority, 80%, perceive it as a "serious threat to public health" and an additional 10% were "not sure." The responses measured in this survey reflect a grim concern about the virus and its effect on the public. Fully 90% felt that "it would be helpful if everyone followed the social distancing restrictions in combating the spread of the coronavirus"; 80% felt it would be "very helpful." Seventy-two percent (72%) said they "almost always" practiced social distancing and 79% said they "typically wear face coverings when outside their households."

Coronavirus is a serious threat to public health	80%
"Very helpful/helpful" if everyone practiced social distancing	80%/10%
I typically wear face coverings when outside household	79%
I almost always practice social distancing	72%

Jurors may have a difficult time accepting that some employers named in lawsuits have not approached the coronavirus and safety measures with the same seriousness that they themselves have.

³ The Associated Press, "California Hospital Workers Sue over Virus Safety Concerns," AP NEWS (The Associated Press, August 20, 2020), <https://apnews.com/51995d987261d105f84b46e30eb506c6>.

The Associated Press, "Tyson Foods Sued for Coronavirus Outbreaks by Families of 3 Dead Workers," FORTUNE (Fortune Media, June 26, 2020), <https://fortune.com/2020/06/26/tyson-foods-coronavirus-lawsuit/>. Katie Kaplan, "Target Confirms Multiple Cases of COVID-19-Positive Employees," WCTV (WCTV, July 7, 2020), <https://www.wctv.tv/2020/07/08/target-confirms-multiple-cases-of-covid-19-positive-employees/>.

PERSONALLY AFFECTED BY CORONAVIRUS

Fully 36% said they believed that they are “more at risk than others” of contracting the coronavirus while 67% said they have a family member or close friend who is at a heightened risk. Surprisingly, 6.5% of the sample indicated they have had a family member or close friend who has died from Covid-19. This 6.5% represents 10 respondents out of 155: six were African American and the remaining four were Caucasians over the age of 60—two demographic groups that are at the highest risk for contracting and dying from this virus.⁴

While the demographic make-up of those who knew someone who has died from the virus is consistent with the national data, the percentage of 6.5% is much higher than the currently confirmed mortality rate in the US.⁵ It is unclear how respondents determined the exact cause of death; isolating and reporting deaths from Covid-19 apart from pneumonia and other forms of influenza is difficult for hospitals and for the CDC as well, but from a purely psychological perspective, the percentage claiming that experience reveals the extent of concerns about Covid-19 in the current sample. The belief that a relative or close friend died of Covid-19 is important in itself, whether it reflects the medical reality as verified on a death certificate or not.

Fatality rates as reported by the CDC on August 21, 2020 indicated that the combined deaths for week 33, from pneumonia, influenza or Covid-19, was 7.8% based on death certificates.⁶ This CDC statistic, which combines flu, pneumonia and Covid-19, is somewhat more in line with the respondents’ reporting.

EMPLOYER RESPONSIBILITY V EMPLOYEE CHOICE

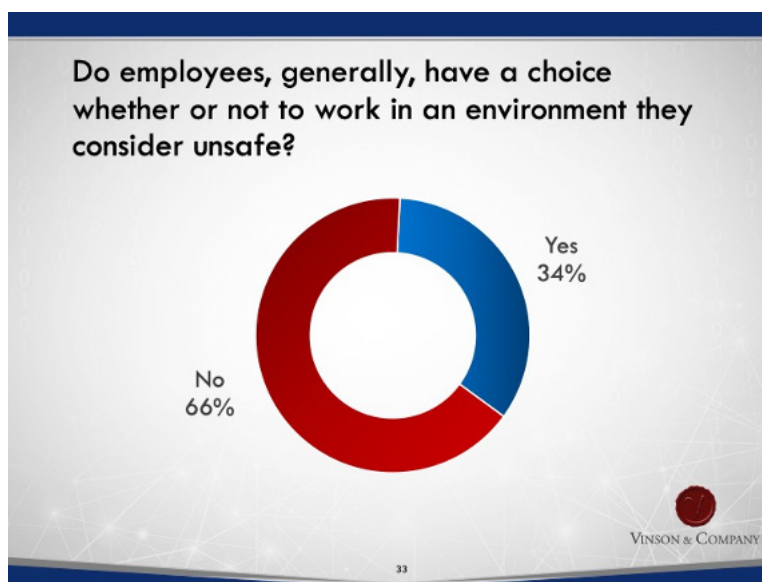
Shedding light on why, when there was no mention of CDC guidelines, a large percentage wanted to hold the company responsible for an employee’s illness, is the concept of choice or more specifically lack of choice.

While 34% of respondents felt that employees have a choice to go to work or refuse to go into what they believe to be an unsafe environment, the majority, 66%, felt an employee has no choice. For those 66% the reasons they provided boiled down to one: Work is a necessity and if employees refuse to follow their employers’ requests, they could lose their job. Unlike other potentially risky behaviors such as smoking, vaping or drinking liquor, whether or not to work for most respondents is much less a choice and most often a necessity as outlined by those respondents.

⁴ This small group who had someone close who died of Covid-19, was also significantly more concerned than others that the coronavirus might negatively affect the health of family members or close friends in the future. The group was not, however, significantly more or less likely to feel that employees should be allowed to sue employers regarding an illness, with one qualifier: 100% of this small group believed that an employee who did not follow CDC guidelines at work (social distance, wear a face mask) should not be able to sue their employer.

⁵ Because respondents were told early in the survey that many of the questions concerned the coronavirus in the US, it would be reasonable to assume the respondents with a personal experience with Covid-19 may have had more of an interest in completing the survey, thus accounting for the higher percentage who knew someone who had died from the virus. When evaluating the drop-out rates for the survey, however, there were only three persons who did not complete the survey after starting, making it unlikely that the survey somehow attracted those with a greater interest and lost those without that interest.

⁶ COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity, August 21, 2020.

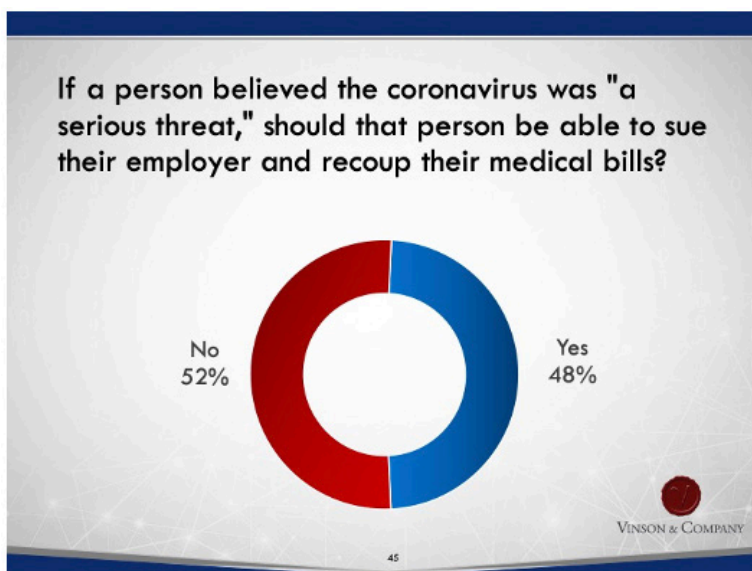
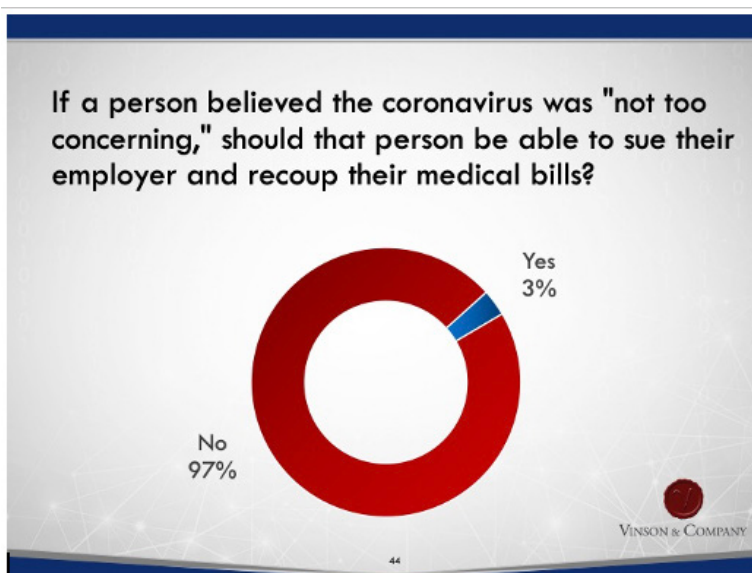


For those who felt that employees generally do not have a choice, 68% felt that employees should be allowed to sue their employers if they believe their work environments are unsafe and are worried about their health, even if the employee has not become ill. For those who felt employees do have a choice, 55% were nevertheless in favor of employees being allowed to sue. Choice to go to work or not appears to be a factor in willingness to sanction lawsuits against employers, but is not the overriding factor since over half of those who felt the employee had a choice, nevertheless felt the employee should still be allowed to sue the employer.

Support for employee litigation against an employer climbs significantly if the employee is described as becoming ill from coronavirus; 81% said that employees who become ill should be allowed to sue. For the small percentage (19%), who disagreed, their reasoning was that the employee could not prove where the exposure happened and should not be allowed to blame the employer. This argument is similar to the impact of proving or failing to prove, product placement in other personal injury litigation and will undoubtedly be an important issue in all litigation surrounding coronavirus in the workplace.

EMPLOYEE FACTORS THAT MITIGATE EMPLOYER RESPONSIBILITY

Employer behaviors were not the only influence on whether the employer was deemed responsible for an employee's illness. Employee behaviors were also a factor. Employees who were described as not taking the coronavirus seriously, not wearing a mask and not social distancing at work were viewed as less deserving of the ability to sue the employer to recoup medical bills than those who were described as viewing the virus as a serious threat, using a mask and socially distancing. Only 3% viewed the former employee as "should be able to sue the employer to recoup their medical bills" versus 48% of the latter.



As discussed previously, most respondents felt an employee does not really have a choice about returning to an unsafe work environment because of the necessity of continuing to work. However, almost all, 88%, felt that an employee should at least talk to their supervisor and request changes before decisions about going back to work. An employee's initiative to reason with an employer was another potential employee behavior that, depending upon whether or not it was engaged, could aggravate or mitigate the validity of a lawsuit involving coronavirus safety.

These findings suggest that the behavior of a plaintiff during the timeframe at issue will be important to document. Regardless of the employees' beliefs and attitudes about the virus beforehand (which may be difficult to verify), what precautions the employee routinely took, both at work and outside the workplace, will be an important fact pattern to identify and one which will impact jurors' decisions about employees' legitimacy to sue and their employers' liability.

RESPONDENTS' EXPERIENCES WITH THEIR OWN EMPLOYERS

Of the total sample of 155, 62% said their employer had made changes to their work environment due to the coronavirus. Almost all, 92%, felt these changes had been for the better and that their employer was trying to do the right thing for their employees in response to the coronavirus. The percentage, whether employed or unemployed, who perceived "most companies" as trying to do the right thing was less, at 73%.⁷

This suggests that direct experience with an employer during the pandemic is generally positive and perceived by a prospective juror as their employer doing the "right thing" for its employees in response to the coronavirus. It will be important to understand the nuances of why a potential juror feels the way they do regarding employers, confirming with the potential juror that employers are different and employees have different experiences. This process will be important for both defense and plaintiff attorneys. Depending upon the attorney's goals, it will assist in removing jurors for cause or for rehabilitating jurors who appear to hold preexisting biases regarding employers' behaviors.

SUMMARY

Litigation regarding the coronavirus' effect on employees in the workplace will require a unique understanding of the issues involved in these cases, as well as an understanding of the employer and employee characteristics that affect decisions about responsibility. This brief survey has illustrated how the desire to hold an employer responsible is greatly influenced by a number of key factors.

Whether an employer is or is not described as following CDC guidelines in the workplace plays a huge role in how potential jurors evaluate the employer's responsibility for an employee's illness or death. When no reference to the CDC was mentioned in a brief description, fully 63% felt that an employee should be allowed to sue the employer even if the employee was not ill from the coronavirus. The percentage increased dramatically to 81% if the employee was described as becoming ill from the virus, and 86% wanted the employer to be punished if they have failed to do "everything" they can to protect its employees from the virus. For the few who felt that an employee should not be allowed to sue, the reasons provided fell into two categories: lack of ability to prove that the employee contracted the illness at the workplace, and an attitude that these types of lawsuits are frivolous and promote more frivolous lawsuits.

When the employer was characterized as having followed all CDC guidelines for protecting the employees, however, only 8% felt the employer should be punished for an employee's illness. The mere mention of the CDC had a huge and immediate impact on the respondents' view of the litigation.

The CDC, Dr. Fauci and health care professionals emerged as those entities most trusted to dispense valid information about the coronavirus' effect on public health. Trust in these entities was much higher than trust in governments, the news media, Vice President Pence or President Trump. This high level of trust placed in the health professionals was reflected in the complete reversal of attitudes toward an employer's responsibility to its employees.

⁷ There was no difference between employed and unemployed respondents; 73% of both employed and unemployed felt "most" companies in the US are trying to do the right thing.

Descriptions of specific entities, Tyson, Target and a hospital, who assert that they have followed CDC guidelines were viewed by the vast majority as “not responsible,” for an employee’s illness or death.

Employee behaviors also impacted attitudes about an employer’s liability to the employee. An employee who was seen as not taking the coronavirus guidelines seriously, one who did not wear a face mask or practice social distancing, was deemed less deserving of holding the employer responsible if the employee became ill. Further, 100% of respondents, who indicated they had a family member or a close friend that died from Covid-19 (n=10), believed an employee who failed to follow CDC guidelines should not be allowed to sue the employer if the employee becomes ill.

Perceptions of choice also played a role in how jurors may view these cases. Respondents who felt that employees have a choice to go to work in a pandemic, were less likely to feel an employee should hold the employer responsible for the employee’s illness, placing an onus on the employee to decide. For those who felt that employees do not have a choice, their reasoning boiled down to the view that work is a necessity, and most do not have the luxury of not working. Respondents did, however, place a responsibility on the employee to at least attempt to discuss alternatives and safety issues with their employer.

Having direct experience with an employer who made changes to the workplace as a result of the coronavirus, also may have an impact on jurors. Most respondents who said their employers had made such changes felt those changes had been “for the better,” thus indicating a willingness to believe, in the absence of other information, employers try to do the right thing for their employees. Most respondents, on the other hand, held a somewhat less than positive view of “other” employers’ responses.

Jurors will not come to a trial without a background, information or personal experience with the coronavirus; it has affected to one degree or another, every person in this country. How the employer and employee are characterized in Covid-19 lawsuits will have a profound effect on jurors and will undoubtedly affect their perceptions of both parties as the trial progresses.

APPENDIX A SAMPLE DEMOGRAPHICS

Gender	50% Male 50% Female
Age	19% less than 36 23% between 36-45 25% between 46-55 11% between 56-60 22% 61+
Ethnicity	51% Caucasian 19% Hispanic 16% African American 10% Asian 2% Native American 2% another Ethnicity
Marital Status	54% Married 25% Single 15% Divorced/Separated 4% Living with Partner 2% Widowed
Education	1% Less than High School 5% High School Graduate 22% Some college/Technical School 14% AA/Technical School degree 29% 4-year College 7% Some Graduate School 22% Graduate degree
Current Work	60% Full-time employment 9% Part-time employment 13% Retired 8% Homemaker 5% Disabled 3% Student 2% Unemployed
Family Income	27% Less than \$40,000 27% \$41,000-\$70,000 22% \$71,000-\$100,000 24% \$100,000+
Political Affiliation	39% Democrat 25% Independent 20% Republican 2% Libertarian 4% Other 10% None
Jury Duty	6% Civil trial(s) only 15% Criminal trial(s) only 7% Both Civil and Criminal trials 72% None

About THE COMPANY



VINSON & COMPANY

PIONEERS IN THE FIELD

Experts in Courtroom Persuasion & Jury Persuasion since 1976

Vinson & Company is a jury research and trial strategy consulting firm that corporations, law firms, and government entities retain when the stakes are high and the consequences of losing are unacceptable. We are experts at identifying and testing effective trial themes, predicting juror behavior, and assisting with visual presentation strategies for the courtroom. We have been retained to assist clients with civil and criminal jury trials in both Federal and State courts throughout the United States, U.S. territories, and in some foreign jurisdictions. With over 35 years of experience, we have been involved in virtually every type of litigation. Our record for helping clients achieve successful results is well recognized by the law firms and corporations with whom we have worked over the years.

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Our jury research programs are based upon sophisticated social science research methodologies and decades of practical courtroom experience. We pioneered the field of jury research and have advanced the field with proprietary tools and unique research designs.

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