



# COVID-19 update:

## Addressing the Delta variant & workplace vaccine requirements

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# Today's discussion

- Clinical update & safety guidance
- Vaccines & the workplace: The legal landscape
  - FDA approval and employer impact
  - Employer vaccine survey results
  - Employer options related to vaccinations
  - State and local laws
- Helpful tools & resources
- Q&A from attendees

## FEATURED SPEAKERS



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**Dr. Brian Powers**

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# COVID-19: Clinical update & safety guidance

**Humana**



# COVID-19 status

**TOTAL CASES**  
39,110,086

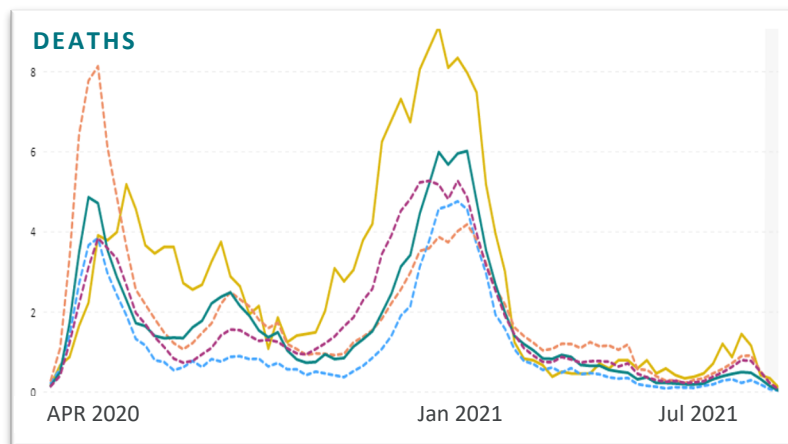
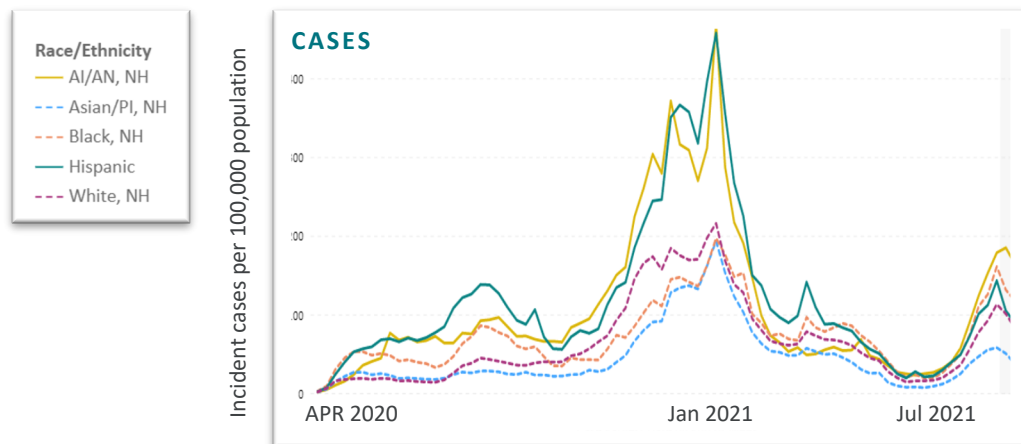
**TOTAL DEATHS**  
637,385

**HIGH COMMUNITY  
TRANSMISSION**  
~314 per 100,000

**TOTAL TESTS  
REPORTED**  
525,230,149

**FULLY  
VACCINATED**  
174,121,529

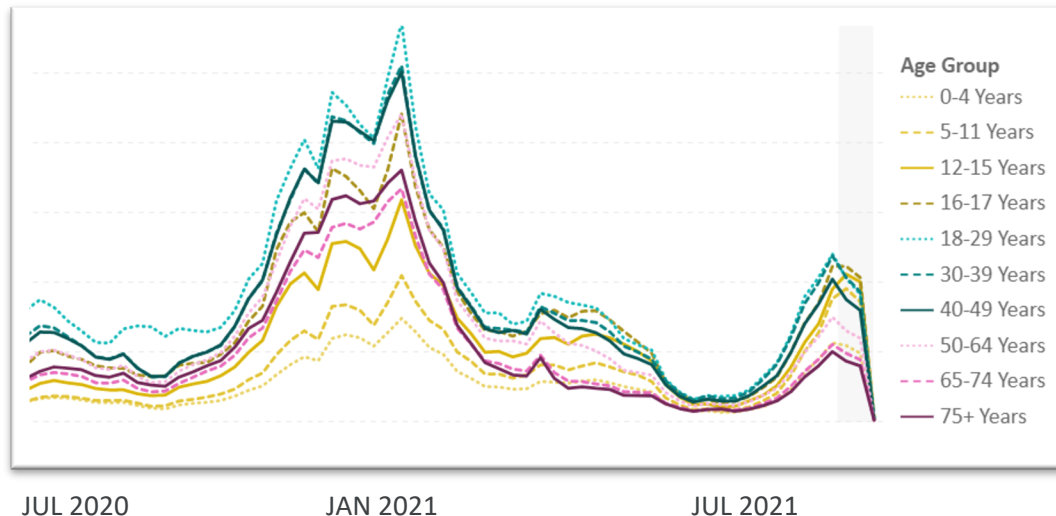
Our most vulnerable populations have been hit hardest:



# The Delta variant has changed everything

- **More contagious:** More than 2x as contagious as previous variants
- **May cause more severe illness:** Some data suggests that this variant is more serious than previous variants in unvaccinated people
- **Unvaccinated people remain the greatest concern**
- **Fully vaccinated people with Delta variant breakthrough infections can spread the virus to others**
- **Younger people are getting it**  
– and getting sicker

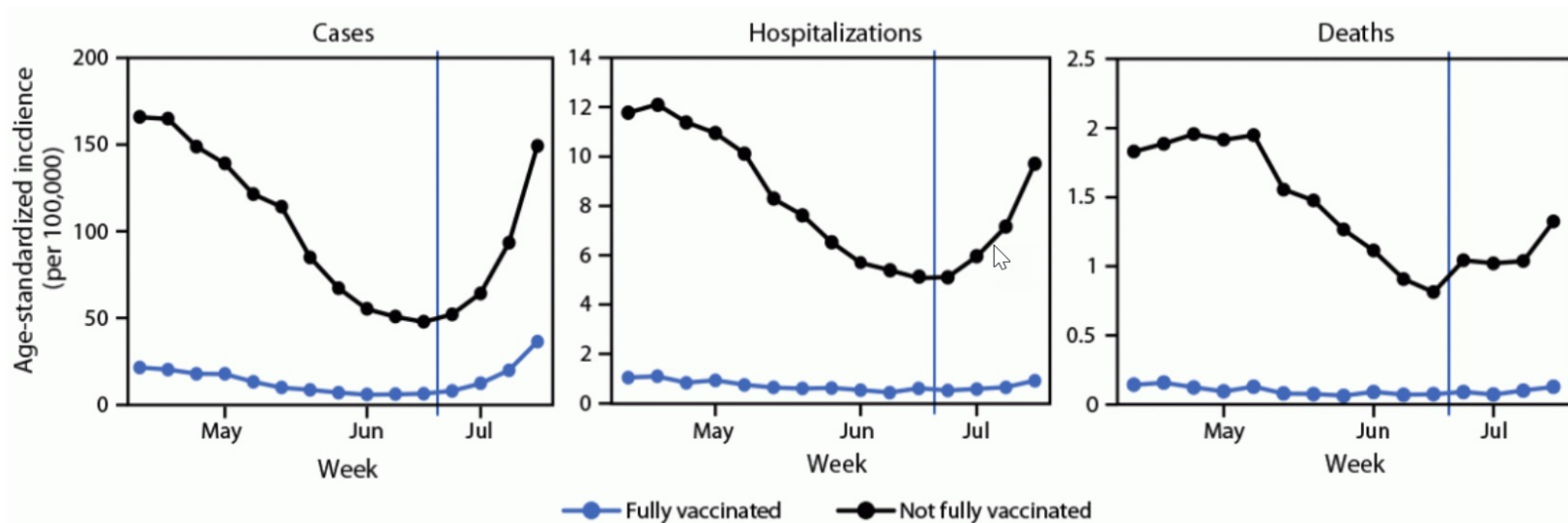
COVID-19 CASES BY AGE GROUP





# How well do the vaccines work?

Weekly trends in age-standardized incidence\* of cases, hospitalizations and deaths by vaccination status (Apr 4 – Jul 17, 2021)



\* Rates are standardized by age, according to the enumerated 2000 U.S. Census age distribution. Blue vertical lines indicate when the B.1.617.2 (Delta) variant reached a threshold of >50%, using weighted estimates for 13 jurisdictions combined.

# FDA authorizations and approvals

## Pfizer-BioNTech COVID-19 Vaccine

★ **FDA approved** for adults 18 and older  
Authorized for emergency use for adolescents  
12-15 years-old

## Moderna COVID-19 Vaccine

Authorized for emergency use for  
adults 18 and older

## Janssen COVID-19 Vaccine (Johnson & Johnson)

Authorized for emergency use  
for adults 18 and older

## Full FDA approval process includes:

- **Clinical trials:** The labs that conduct the trials are independent from the vaccine companies and the government, so the information they convey to the FDA for its approval process is not biased.
- **Risks and benefits:** Before approval can happen, the clinical trials and other data used by the agency must demonstrate that the benefits of a vaccine are greater than its risks for those who will be vaccinated.
- **Continual monitoring:** The FDA continues to examine data for adverse effects among the people receiving the vaccine.
- **Manufacturing guidelines:** The FDA also sets strict guidelines for vaccine manufacturers and requires that they test the vaccine doses in batches (lots) to ensure the quality and effectiveness of the vaccines remain consistent and reliable.

# Layered prevention strategy

Transmission is at an all-time high; and risk of severe disease has increased with the Delta variant.

To keep our communities healthy, it's going to take us all using all the public health practices that have been shown to slow the spread.

## We must use all the prevention strategies available to us:



Get the vaccine



Mask indoors in public places

Everyone, including fully vaccinated people, should wear masks in public indoor places in areas of substantial or high transmission



Wash hands regularly

**6 ft**



Keep at least six feet of distance from others in public spaces





**Emily Litzinger**

Partner, Fisher Phillips LLP

# Vaccines & the workplace: The legal landscape



# FDA approval and employer impact



## Current status

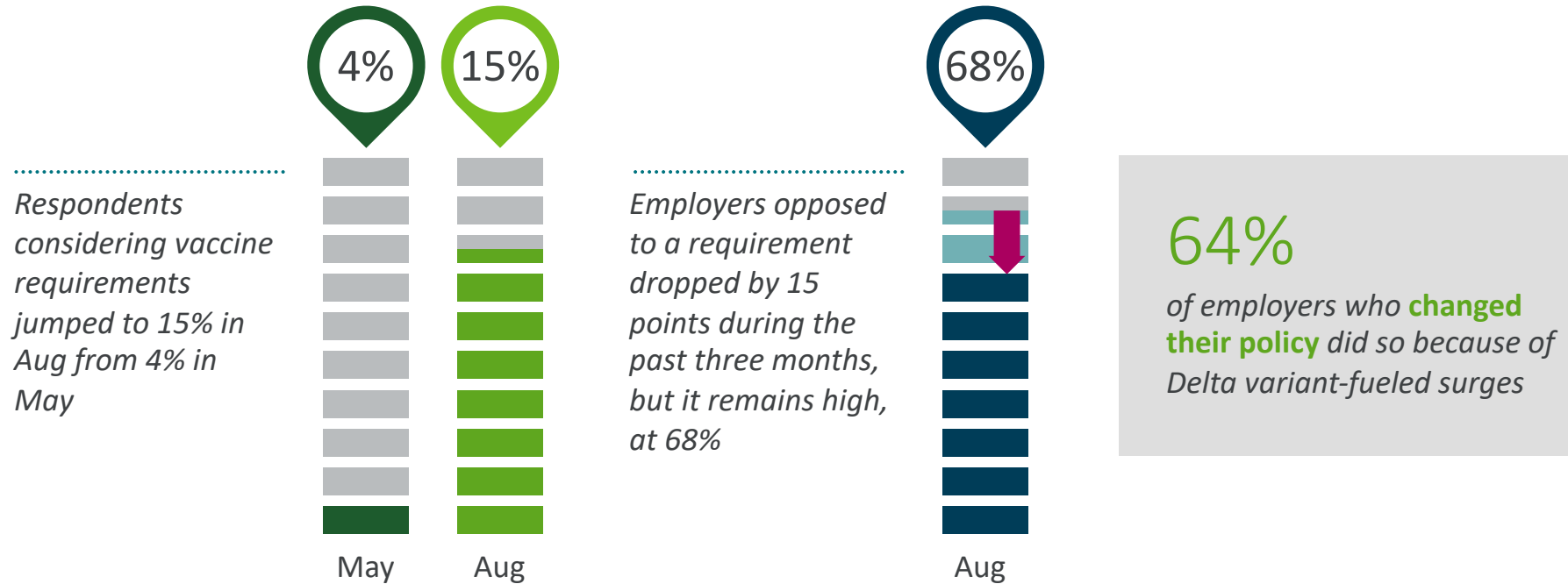
- **Pfizer fully approved** in U.S. as of August 23, 2021
- Moderna and J&J approved under Emergency Use Authorization (EUA)
- Moderna expected to receive full approval soon




## Workplaces requiring vaccination

- **Before full approval, multiple courts upheld employer vaccine requirements**
- **Now, private employers with 100 or more employees, and other workplaces, must either require vaccination or weekly testing**
- Houston Methodist case (July 6, 2021): **EUA status did not prohibit public or private entities from imposing vaccination requirements**
- EEOC and OSHA guidance: **reasonable accommodations for disability-related and religious objections**

# FP Flash Survey reveals Delta is driving a dramatic jump in employers requiring COVID-19 vaccine



# FP Flash Survey: Industries likely to implement requirement before President Biden's September 9 announcement

	Most likely to require	Generally in line with overall average	Least likely to require
	<ul style="list-style-type: none"><li>• Healthcare: 42%</li><li>• Hospitality: 29%</li><li>• Education: 24%</li><li>• Nonprofit or civic organizations: 22%</li></ul>	<ul style="list-style-type: none"><li>• Professional and technical services: 14%</li><li>• Technology: 14%</li><li>• Retail: 13%</li><li>• Construction: 11%</li></ul>	<ul style="list-style-type: none"><li>• Automotive: 9%</li><li>• Manufacturing: 8%</li><li>• Staffing, PEO, and employment services: 7%</li><li>• Finance and insurance: 5%</li></ul>

# President Biden's September 9 announcement



## GOAL: VACCINATE THE UNVACCINATED

### How are employers impacted?

- Private employers with 100 or more employees must require vaccinations or weekly testing if workers refuse to get vaccinated
- Medicare and Medicaid Health Care Settings to require vaccination

### WHAT NEXT?

- CMS will issue action for Medicaid/Medicare settings
- OSHA will be issuing ETS “in the coming weeks” – based on September 10 conference:
  - PTO for vaccination and related recovery;
  - Medical and religious accommodations;
  - 100 employee threshold is by employer, but joint employer application unclear;
  - Remote employees are not covered if there are never any in-person interactions with co-workers;
  - There will be verification requirements for vaccination status and test results.

# Employer options related to vaccinations **if covered** by forthcoming OSHA ETS or CMS action

- 1 **Require weekly testing**
- 2 **Require vaccines** (subject to ADA / Title VII)

**Start planning now.** You may only have 75 days between ETS and start of enforcement.





# 5-Step action plan for covered employers

1



Adopt procedures for determining employees' vaccination status

2



Determine if you will require the vaccine OR allow weekly testing

3



Develop a plan for handling accommodation requests

4



Have a plan for tracking test results

5



Prepare for OSHA complaints and inspections

# Employer options related to vaccinations **if not covered** by forthcoming OSHA ETS or CMS action

- 1 **Merely “encourage” through an information campaign**
- 2 **Hybrid approach / incentives**
- 3 **Require vaccines** (subject to ADA / Title VII)



# Option 1: Informational campaign

People are flooded with disinformation about COVID-19 vaccines from social media, disreputable (sometimes reputable) news sources and word of mouth – others simply do not have enough information

- ✓ Address specific questions, concerns or misconceptions among vaccination skeptics in your workforce
- ✓ Evaluate whether you can improve vaccination rates by providing targeted informational opportunities for your workers, like:
  - Town hall and/or Q&A sessions with HR or company leaders
  - Education sessions with your employees with respected medical or public health representatives
  - Videos from trusted sources, like the CDC



## Option 2: Hybrid approach / incentives

**Incentives:** EEOC guidance on May 28, 2021 includes description of two options for employers:

1. **If your organization administers the vaccine, you can still offer incentives** – but they cannot be so substantial in value as to be considered coercive
2. **If your employees voluntarily provide documentation confirming their vaccination** and got the shot from a pharmacy, public health department, or other health care provider, you can offer incentives with no definitive limitations (**but watch out for the ADA Wellness Rule and other considerations**)

### Complications with ADA Wellness Rules may arise if:

- Program is not “voluntary”, in view of applicable history, guidance and court decisions
- Incentive offered is too high
- Employees feel coerced to participate, leading to wellness program rules violations when employees are “forced” to disclose protected medical information in order to gain the incentive
- Proposed rule permitted only de minimis incentives
- Biden administration withdrew proposed rule during administrative transition

**Takeaway: Higher incentives equals higher risk**

## Option 2: Hybrid approach / incentives



### EMPLOYER CONSIDERATIONS

#### Accommodation

Employers must consider alternative means for an employee to earn an incentive if unable to be vaccinated due to a medical/disability or religious objection

##### Some potential options:

- Watching a workplace COVID-19 safety video
- Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workplace
- COVID-19 testing

#### Confidentiality

- All documents and information about an employee's vaccination status should be maintained confidentially
- You may not offer incentives to your employees in return for their family members getting vaccinated
- You can still offer an employee's family member the opportunity to be vaccinated by your organization if you take certain steps to ensure compliance with federal privacy laws



#### INCENTIVE IDEAS:

- Cash
- Gift card
- Paid time off
- Raffles
- Vacations
- Fitness equipment

# Option 3: Require vaccination

## EEOC COVID-19 vaccine guidance:

- **Employers can require workers to get COVID-19 vaccine**
  - EUA status did not appear to negate this
  - Consider employee's duties and work setting
- **When may an employee be “excluded from the workplace” for not being vaccinated?**
  - Direct threat – would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation? This is a high standard
  - Qualification standard

## Safety qualification standard

- Not as difficult to meet as “direct threat” standard
  - *Direct threat requires establishing that threat cannot be eliminated by a reasonable accommodation*
- Must be an objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity
- Be prepared to support imposition of that standard on a job



## Option 3: Require vaccination



### EMPLOYER CONSIDERATIONS

### Accommodation

- An employee may be entitled to exemption from “required” vaccines:
  - due to an ADA-covered disability or other medical circumstances
  - based on sincerely-held religious beliefs, practices or observances
- In either case – “interactive process” is critical
- Employer must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries

## Option 3: Require vaccination



### EMPLOYER CONSIDERATIONS

#### Tracking and privacy

- If you do not require the vaccine, should you inquire about and track the vaccine status of your workers to determine whether someone is fully vaccinated?
- Will this raise privacy and disability discrimination concerns?

#### Proof of vaccination

Should employers ask for “proof” of vaccination status? **If allowed, yes:**

- OSHA
- Definition of “proof” may vary depending on the jurisdiction, industry, etc.
- In most jurisdictions, employers may inquire about vaccination status
- EEOC has stated that seeking proof of vaccination is not a medical examination
- Employers should instruct employees not to disclose any additional medical or other information and must maintain any information as confidential

## Option 3: Require vaccination



### EMPLOYER CONSIDERATIONS

#### Decline to disclose vaccination status

- **Remind employee of legitimate business-related reasons** for the inquiry but proceed with caution before disciplining or taking any other adverse action, even if there is required vaccination policy
- Even with a required vaccination policy, **ensure that you have a process in place to address issues of reasonable accommodation** with employees prior to moving to discipline or any adverse action
- **Consider whether reprimanding an employee for declining to disclose their vaccination status could be viewed as a per se required vaccination policy**, which requires an accommodation analysis in the event the employee cannot get the vaccine for disability or religious reasons or if such reprimand is allowable in the particular jurisdiction
- **Employees who refuse to disclose their status should be treated as unvaccinated**

## Next steps: Action plan

- ✓ **Establish a procedure for collecting employees' vaccination status** and a process for safeguarding that information confidentially
- ✓ Once the information is collected, **determine the percentage of employees that are vaccinated**
- ✓ **Evaluate what approach or combined approaches may be most successful** amongst your employee population and the timeline for implementation
- ✓ **Create a clear and detailed written policy** which includes information on how employees can seek an accommodation and how you will handle such requests



# Speaking of state and local laws

## Some states already require healthcare (or other industry) workers to get vaccinated or submit to testing:

Example:

New Jersey has a deadline of September 7 for health care facilities and high congregate settings, including home health agencies, to get vaccinated or submit to weekly testing.

*Keep an eye on proposed legislation in several states that would bar employers from requiring workers to get vaccinated and related challenges to the federal requirements.*

## Vaccine passport bans:

**Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Missouri, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming have some form of a ban on vaccine passports.**

## Many exempt health care workers

Example:

Florida bars companies from requiring proof of vaccination from its customers (not employees) but contains an exception for health care providers as defined by statute. Some are limited to businesses that receive state funding.

## Paid leave laws:

Some states require that employees who have side effects from the vaccines must be paid for taking leave.

Example:

New York includes vaccine recovery under its existing paid sick leave law.

# Occupational Safety and Health Administration



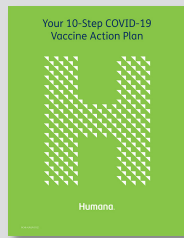
- General Duty clause requires employers to maintain a **workplace free of recognized hazards**
- **Emergency Temporary Standard** for healthcare, effective June 21, 2021
  - Condition application in some settings based on personnel being fully vaccinated and all patients screened
  - Paid leave requirements for illness, quarantine and vaccination
  - Safety, cleaning, disinfection protocols
- **Emergency Temporary Standard for requiring vaccinations if 100+ employees coming soon**



# Resources

## Support resources:

Download these guides with helpful tips brought to you by Humana and Fisher Phillips to help you develop your workplace policies



### 5-Step COVID-19 Vaccine Action Plan

How to address the spread of the Delta variant in your return-to-work strategy



### Q&A: Vaccine labor laws



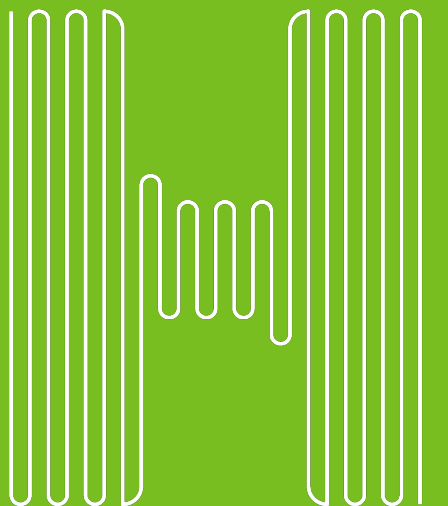
## ONLINE RESOURCES:

- Visit **Humana.com/employersupport** for past webinars and resources
- Visit Fisher Phillips Vaccine Resource Center for employers at **fisherphillips.com/vaccine-resource-center**



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