

Return to Work:
COVID-19's
Continuing
Workplace
Challenges &
Vaccine Mandates

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COVID-19's Continuing Workplace Challenges

TODAY'S AGENDA

1. Planning and Coordination of Bringing Employees Back to the Workplace
2. Managing Requests for Continued Remote Work Arrangements
3. Managing Requests for Accommodations, Including Exceptions to Mask and Vaccination Mandates
4. Insights from the EEOC's Recent Public Hearing on Workplace Civil Rights Implications of COVID-19
5. Q&A

Planning and Coordination of Bringing Employees Back to the Workplace

- Workplace Safety Issues – Many employers were advised early in the pandemic to take certain actions to assess workplace hazards and concerns related to COVID-19.
- In bringing employees back to the workplace, whether it's after extended furloughs or prolonged remote/virtual work, a similar process should be employed to prepare the office environment for employees again:
 - Employers should consider performing a new workplace hazard assessment in light of new EEOC, CDC, and OSHA guidances. Information we have about COVID now is different than what we had in March/April 2020.
 - Additionally, employers should consider appointing a workplace coordinator (or panel) for developing and monitoring workplace safety policies as employees return to work. Coordinator should be attuned to ongoing updates from OSHA and CDC, as well as have authority to implement new policies as necessary.
 - Consider a vaccine plan/program (mandatory v. recommended), including tracking which employees are vaccinated and which ones are not. (ADA implications discussed later). Ensure no retaliation for those who raise COVID-related concerns.
 - As before, continue monitoring, recording, and acting on COVID infections. Don't lose focus!
- Other Logistical Issues – Consider necessity of staggered shifts, creation of zones for vaccinated/non-vaccinated employees, maintaining mask requirements in the workplace (particularly if business involves regular contact with general public), and potential psychological impact of employees returning to work.

Factors to Consider When Determining Whether an Employee's Condition Presents a "Direct Threat" to the Workplace

- According to the EEOC, a "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
- If an individual with a disability poses a "direct threat" to the workplace, despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
 - When assessing whether an employee poses a direct threat in the workplace, the employer must base its assessment on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities.
- Based on CDC guidance and other public health authorities, the Coronavirus pandemic meets the "direct threat" standard.
- An employer **may** exclude those who test positive for COVID (or exhibit symptoms associated with COVID) from the workplace because their presence would pose a direct threat to health or safety.
- Furthermore, despite the ADA's prohibition of discrimination against employees who may be *perceived* to have a disability, the ADA nonetheless allows an employer to bar an employee from the workplace if he/she refuses to answer questions about whether he/she has COVID, symptoms associated with COVID, or has been tested for COVID, or otherwise refuses to have his/her temperature taken.

Managing Requests for Continued Remote Work Arrangements

- Approximately 3% of 1,000 HR professionals within the U.S. said that their salaried employees were working remotely at beginning of 2020. By April 2020, that number rose to 64%. (The COVID-19 Business Index from SHRM and Oxford Economics).
- For better or worse, the pandemic has altered many traditional assumptions about the workplace.
 - Likely no truer than for assumptions about the viability of remote/virtual work arrangements.
- Ability to monitor productivity and/or accurately track hours worked remain significant counter-arguments against permitting continued remote work arrangements “after” COVID.
- Some employers simply prefer or value the benefits of a traditional office environment/culture.
- Important issues to evaluate when presented with a request for continued remote work arrangement:
 - Is the request need-based as a consequence of a disability? (Consider mental health issues as possible disability)
 - Is the request based upon fears about contraction of COVID? (As with concerns at the outset of the pandemic, mere generalized fears about contracting COVID is often insufficient to require such an accommodation).
 - Do assessments of remote work productivity during the pandemic justify greater flexibility on part of employers for granting requests for remote work arrangements? (Impact of that data on ADA accommodation requests?)

Managing Requests for Disability Accommodations, Including Exceptions to Mask and Vaccination Mandates

- Starting Point/Refresher: The Americans with Disabilities Act, which protects applicants and employees from disability discrimination, is relevant to the current Coronavirus pandemic in at least three significant ways:
 1. The ADA regulates employers' disability-related inquiries and medical examinations for **all** applicants and employees. Notably, per the EEOC, a request for confirmation of vaccination is **not** a disability-related inquiry.
 2. The ADA prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons **unless** they pose a "direct threat."
 3. The ADA requires reasonable accommodations for **individuals with disabilities** (absent undue hardship) during the Coronavirus pandemic. (Note: The ADA does *not* require employers to accommodate employees who have high-risk family members)
- The Interactive Process: The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
 - Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or the employee poses a direct threat due to a medical condition.
 - During a pandemic, employers **may** ask employees if they are experiencing symptoms of the Coronavirus.
- As a reminder, the EEOC defines a "reasonable accommodation" as "a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment."

Navigating the Interactive Process for Accommodation Requests in the Current Environment of COVID

- Since the ADA generally requires employers to provide reasonable accommodations for applicants and employees with disabilities, how does that duty change during a pandemic, if at all?
- Must an employer accommodate an employee with a disability during the Coronavirus pandemic simply because their condition places them at greater risk from COVID-19?
 - Yes, provided the accommodation is reasonable and does not result in an “undue hardship.”
 - If the requested accommodation imposes an “undue hardship,” the employer does not have to provide it but, remember, the employer must still engage the employee in the “interactive process” to see whether other accommodations can be made that do not impose such a hardship, such as telework or other position.
- Must an employer permit an employee infected with COVID to stay at work with an accommodation?
 - No. Current CDC guidelines state that employers should send home employees who exhibit symptoms or test positive for COVID, then employee should follow CDC guidelines for isolation, etc. (How about infected family members?)
- So, given the current climate, what accommodations are “reasonable”?
 - For jobs that can be done remotely, telecommuting.
 - For jobs that *must* be performed at the workplace, the EEOC suggests first considering low-cost options that can be easily implemented or involve materials on-hand (e.g., designating one-way aisles, spacing out workspaces, using existing barriers to ensure a minimum proximity between employees/customers, and limiting interactions between employees where feasible).
- For the interactive process, flexibility is key. Temporary modifications to job responsibilities, temporary transfers, and temporary modifications to work schedule to allow less exposure to others in the workplace could all be considered viable options under the circumstances.

Vaccination Mandates & Exemptions

- So, first question: Can employers require their employees to get vaccinated for COVID-19 before returning to the workplace? (Second Question: Should they require it?).
 - Answer: Yep. Mandatory and/or recommended vaccination programs are permitted.
 - Subject to the usual exceptions under federal/state anti-discrimination law, there is no current basis for *prohibiting* employers from instituting a mandatory vaccine policy (but some state legis).
 - HOWEVER, before you enact a mandatory vaccination policy for employees, you should be aware that there are laws that would be implicated by such policies and would impose requirements accordingly.
 - In particular, the ADA, Title VII, and the Pregnancy Discrimination Act.
 - ADA: Employers can *only* conduct “medical examinations” or ask “disability-related” questions where the questions are “job-related” *and* consistent with “business necessity.” So, is asking an employee whether she/he is vaccinated against COVID a “medical examination”?
 - EEOC has advised that an employer’s inquiry concerning whether an employee has been vaccinated is not a “medical examination” within the meaning of the ADA.
 - As a result, mandatory vaccination policies will not run afoul of the ADA, unless...on-site vaccination program with **pre-screening questions**. But remember, “job-related” & “business necessity”. (Genetic Information Non-Discrimination Act (“GINA”) protection can also be triggered by pre-screening questions).

Vaccination Mandates & Medical Exemptions

- Exceptions to Mandatory Vaccination Policy Under the ADA:
 - An employer can require COVID-19 vaccination as a “safety-based job qualification,” assuming the employer shows that unvaccinated employees pose a “direct threat” to the health and safety of the employee or others. Likely easy to do.
 - However, employers must still permit exemptions from such a policy for employees with disabilities that prevent them from being vaccinated.
 - If applicable, employers must engage in the “interactive process” to determine whether accommodation options, such as remote work, are alternatives to termination or whether the inability to be vaccinated creates a sufficiently “direct threat” to exclude the employee from the workplace. Fact-dependent analysis.
 - Certainly, based upon the pandemic’s history and changes to business models, every employer should be apt to consider teleworking as a reasonable accommodation (make sure to comply with state and federal law concerning paid or unpaid leave protection too).
- Exceptions to Mandatory Vaccination Under Title VII:
 - Religious accommodation – “Sincerely held” and “actually religious” analysis. Lower standard than ADA for employer’s “undue hardship” exception for making an accommodation (*i.e.*, only requires a “more than a de minimus cost” burden to except).
- Exceptions to Mandatory Vaccination Policy Under Pregnancy Discrimination Act:
 - Same accommodations analysis as for disabilities, but...

Vaccination Mandates: Religious Exemptions and Recent Litigation

- Religious Exemption Requests:
 - Just last week, the HR Policy Association sent a letter to the EEOC, which reaffirmed support for the Biden Administration's efforts to combat the COVID-19 pandemic but also requested guidance concerning the thousands of accommodation requests their members are receiving concerning vaccine mandates, including what may constitute a "reasonable" accommodation in the current environment and templates for the interactive process expected by the EEOC.
 - On Monday, the EEOC issued its updated guidance on these issues:
 - Workers **must** inform employers if they intend to seek a religious exemption but do not have to utter "magic words" such as "religious accommodation" to trigger an employer's obligations. ("Religious beliefs" broadly defined) Employers should develop procedure for requests and communicate clearly to employees.
 - Employers should **assume** religious beliefs are sincerely held but may seek confirmation/facts in a limited fashion. I.e., can ask employees to explain. (BUT, Title VII does not protect social, political, or economic views, or personal preferences).
 - Essentially boils down to whether the employer has good reason to know that the exemption is not sought for religious reasons, keeping in mind that individuals' beliefs may change over time and may be different than in the past.

Employment Vaccination Mandates: Recent Litigation

- Recent Federal Litigation:
 - Several cases have been brought in US District Courts in various districts around the country.
 - These cases have been brought against several different kinds of employers and on various grounds, but for purposes of discussion today the most important distinction is private versus public employer.
 - This distinction triggers whether the employee's claim must be evaluated under a constitutional right analysis or not. Private employers are typically not susceptible to claims brought under a 14th Amendment analysis, for example.
 - *Ryan Klaassen, et al. v. Trustees of Indiana University* (N.D. Ind. 2021), appealed to U.S. Seventh Circuit Court of Appeals – request for injunction denied on Aug. 2, 2021.
 - *Christy Beckerich, et al. v. St. Elizabeth Medical Center, et al.* (E.D. Ky. 2021).
 - Defendant was private hospital and District Court Judge held no grounds for an injunction against vaccine mandate because no constitutional rights implicated and no violation of ADA or Title VII, as employer permitted medical and religious exemptions.
 - Decision based on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld constitutionality of criminal statute penalizing those who did not comply with state-wide vaccine mandate during smallpox pandemic (no exemptions offered).

Question Two – Mandatory Vaccination Programs: Should You?

- What are we really talking about here?
 - Assurance of safe workplace environment vs. Potential liability/problems for employer
- Pro: According to the U.S. Centers for Disease Control (CDC), “a growing body of evidence suggests that fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others.”
- Con: Even though the EEOC’s guidance states that employers may permissibly require that employees get vaccinated against COVID-19 for onsite work, instituting a mandate carries practical risks:
 - Mandate Discomfort/“Protected Activity” – All three major vaccines remain authorized by the FDA for distribution. Pursuant to the Emergency Use Authorization, recipients had to be informed that they had the option to refuse the vaccine. Question had been whether the public policy behind the EUA makes refusal of mandatory vaccination “protected activity.” Likely no longer an issue.
 - Workplace Liability Claims – Traditionally, “work-related” injuries are analyzed under a state’s workers’ compensation scheme. Adverse reaction to vaccine cases in situations where vaccine is mandated to return might be handled similarly.
 - Employer Obligation to Record – Under mandatory vaccination programs, employers may have a duty to record as workplace safety incidents when adverse reactions to vaccines occur.
 - If an employer requires employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is considered work-related. Furthermore, recent OSHA guidance indicates that these adverse reactions may be recordable. Understand, though, OSHA guidances do not create liability.
- However, these issues likely not implicated if the vaccination program is only “recommended” and truly voluntary. But provides lesser assurance of workplace safety if voluntary.

Workplace Safety Rules: OSHA and the CDC

- Given recent CDC guidance and changes to many state laws concerning mask requirements in places of public accommodation and workplaces, it's possible this issue could become obsolete soon.
 - Due largely to the increasing numbers of vaccinated individuals. But have they stagnated?
- However, OSHA has not yet weighed in on the issue in the same manner as the CDC (natural lag time).
 - Although OSHA is in the process of finalizing a standard regarding COVID-19 safety, that standard has not yet been issued and the timetable for its release is unknown.
- Controversy over OSHA's forthcoming "vaccine-or-test" workplace safety rule for private employers and current rule in place for federal employees/contractors. Some states are resisting and providing more exemptions than OSHA rule.
- The mere increased number of vaccinations is not a panacea, as they are only one part of a comprehensive safety plan for the workplace. Other factors to consider include:
 - What percentage of workers are vaccinated?
 - Is social distancing still feasible/appropriate in the workplace?
 - How much contact do workers have with the general public, given that those individuals' vaccination status is likely unknowable?
- As for exceptions to mask mandates, they largely track similarly to the considerations in play for vaccination mandates (*i.e.*, ADA, Title VII, etc.).

Insights From Recent EEOC Public Hearing on Workplace Civil Rights Implications of COVID-19

- On April 28, 2021, the EEOC held a virtual hearing to explore and discuss the impact of the pandemic on the civil rights of workers.
- Focus was on identifying and examining specific challenges that employers face due to COVID, including:
 - how to maintain a safe work environment,
 - whether to mandate vaccinations, and
 - the growing problem of harassment in the virtual work environment.
- Participants told the Commission that “employers are in urgent need of guidance as they devise their return to workplace strategies.”
- As such, they are looking to EEOC to facilitate this return by issuing comprehensive/clear recommendations to assist employers on these issues.
- Witness testimony from the virtual hearing focused primarily on the disproportionate impact of COVID on the lowest wage jobs, including those currently/previously held by people of color, women (esp. mothers of school-age children), older employees, and those with disabilities.
- Guidances expected to be delivered on accommodations due to COVID, hiring/retention, workplace safety, re-examination of “essential functions” of a job.

How to Safeguard Your Workplace from Pandemic-Related Harassment

- The EEOC has noted an uptick in reports of harassment in the workplace on the basis of national origin and race, particularly for those employees who are or perceived to be Asian.
- Accordingly, the pandemic presents an opportunity for employers to revisit their workplace policies and handbooks, including all EEO anti-harassment policies, to make sure they are up-to-date with federal and state law.
- Employers should also take the opportunity to remind all employees of anti-harassment policies and to encourage that all complaints be reported per the company's policy.
- Particularly as many employees may still be teleworking, employers should be aware that harassment in the workplace may occur through email, phone, or by text.
 - In these circumstances, employers should treat complaints of harassment as it would any similar complaint made in the physical workplace.
- HR managers should ensure that management and supervisors are aware of their responsibilities to report complaints of harassment, promptly investigate all such reports, and resolve potential problems before they escalate.

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QUESTIONS?



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