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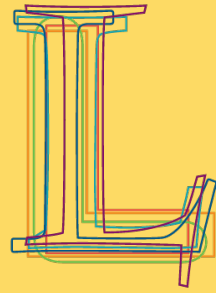
presents

*Convention 2021
Continuing Legal Education Series*

**Reasonable Accommodations in
An Unreasonable World**

May 22, 2021
1:15 pm - 2:15 pm

Presenter: Jacqueline Phipps Polito, Esq.



Reasonable Accommodations in an Unreasonable World: Navigating “Accommodation” Requests in the Middle of a Global Pandemic

May 22, 2021



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Presented by



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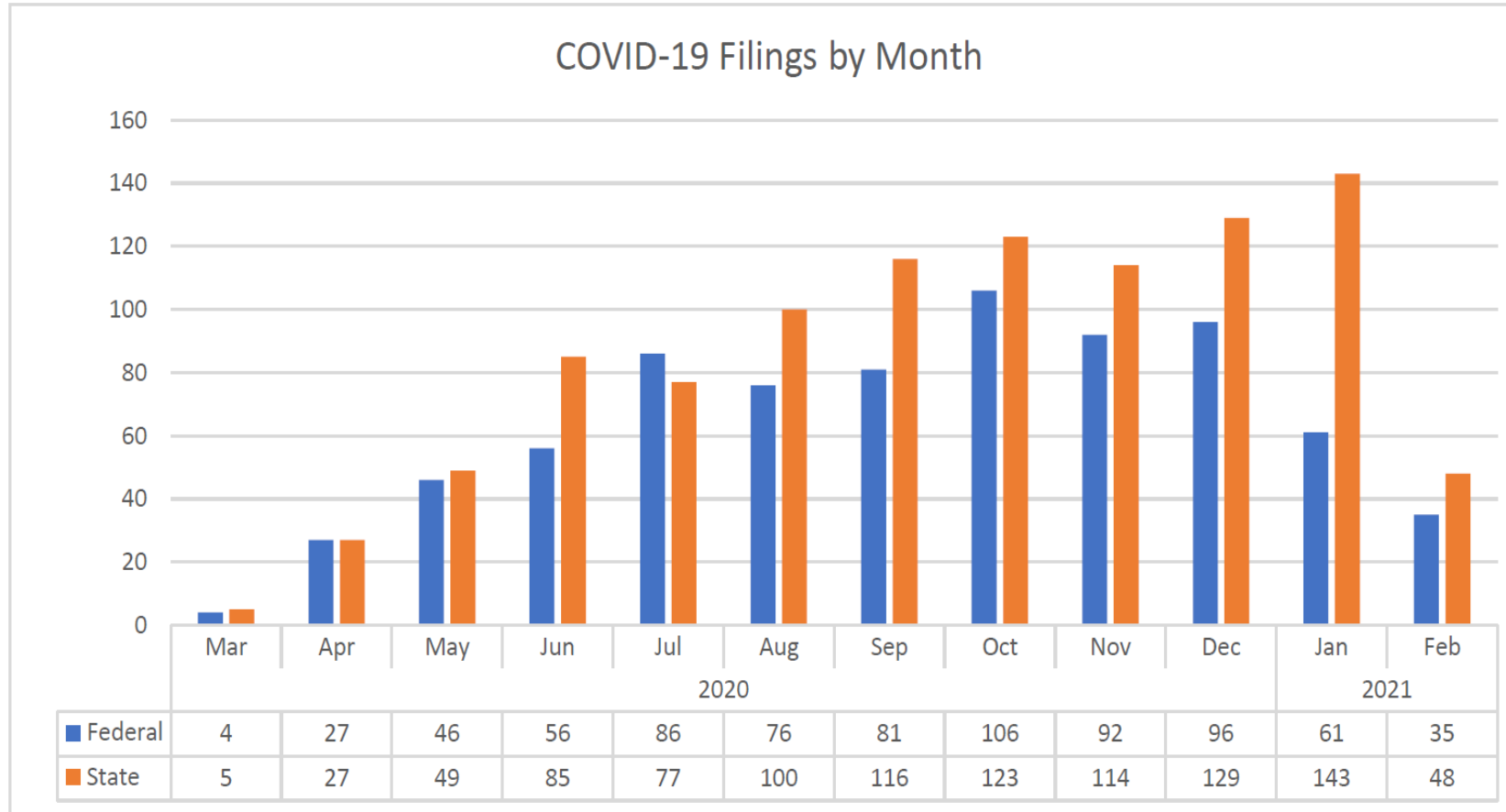
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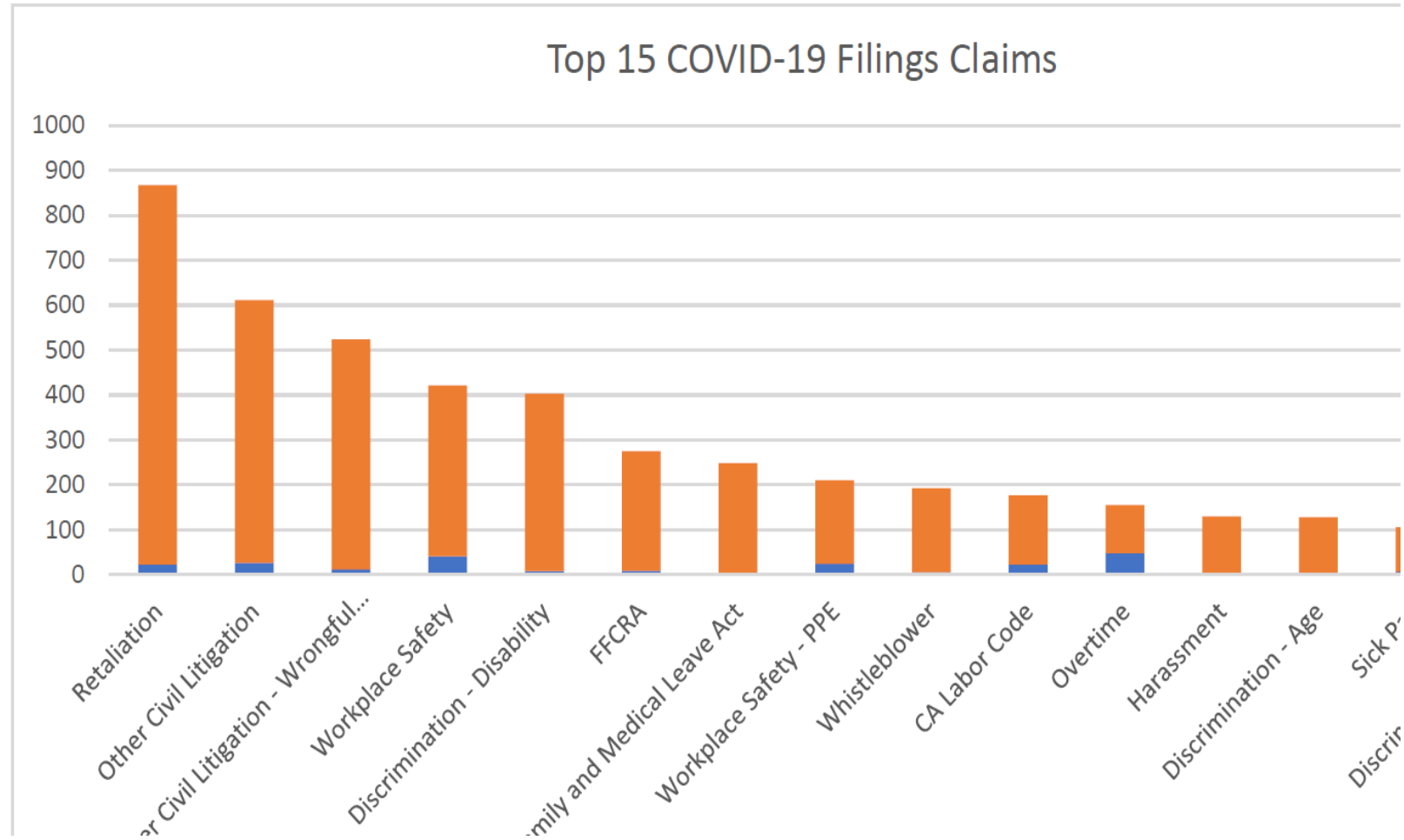
Tracking COVID-19 Labor & Employment Litigation

- Since March 12, 2020, there have been at least 1,832 employment lawsuits (including 147 class actions) filed nationwide due to alleged labor and employment violations related to the coronavirus
- 791 Federal and 1,041 State
- Medical issues (FMLA, ADA, etc.) have been a popular topic
- These are just the lawsuits we can actually track—does not include administrative matters (DOL, EEOC, OSHA and beyond)

COVID-19 By The Numbers



COVID-19 Claim Trends



The Traditional ADA Framework and the COVID-19 Pandemic

The Americans with Disabilities Act (ADA)

- Remember, traditional ADA principles still apply
 - No discrimination against qualified applicants or employees with disabilities
 - Affirmative obligation to accommodate (and the required interactive process)
 - Confidentiality
 - Limited scope of medical inquiries



Classic ADA Principles at the Forefront of the Pandemic

- The expanded definition of “disability” under the law is what employers will be held to
- There is a very low notice threshold for employees to alert employers to their need for accommodation (no magic words required)
- A qualified employee still has to be able to perform essential job functions, with or without accommodation
- The standards of reasonableness and undue hardship still apply - and it’s okay if what you did in 2020 is not workable forever



More Classic ADA Principles During the Pandemic

- The need for accommodation must be medically necessary—not just a preference or what might be best
- It's okay to ask for supporting medical documentation for most accommodations
- But you still may need to consider an abridged interactive process to facilitate volume during the pandemic—even still now in 2021
 - Grant temporary accommodations while you await documentation?
 - Restricted time frames on things you cannot approve long-term?
 - Flexibility as guidance from CDC and federal, state and local officials changes?

Application to Essential Workers



- We've heard a lot about CISA/essential workers...
- CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA, or any other equal employment opportunity law
- So, employers receiving requests for reasonable accommodation from employees falling in these categories of jobs must accept and process the requests as they would for any other employee

The ADA and the Limited Scope of Medical Exams and Disability-Related Inquiries

- The general rule is that an employer may make disability-related inquiries and require medical examinations only if they are **job-related and consistent with business necessity**
 - Per the EEOC, this means that an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform the essential job functions will be impaired by a medical condition; or that the employee may pose a "direct threat" due to a medical condition



So When Can You Ask for Medical Documentation?



- Someone indicates a need for leave or another workplace accommodation
- You observe that an individual is having difficulty meeting the expectations of the job and you have reason to believe that the issues are medical in nature
- You have reason to believe someone poses a “direct threat” —but tread carefully

Questions Employers Can Always Ask – A Reminder



1. How the disability creates a limitation
2. How the requested accommodation will effectively address the limitation
3. Whether another form of accommodation could effectively address the issue and
4. How a proposed accommodation will enable the employee to continue performing the essential functions of his position (that is, the fundamental job duties)

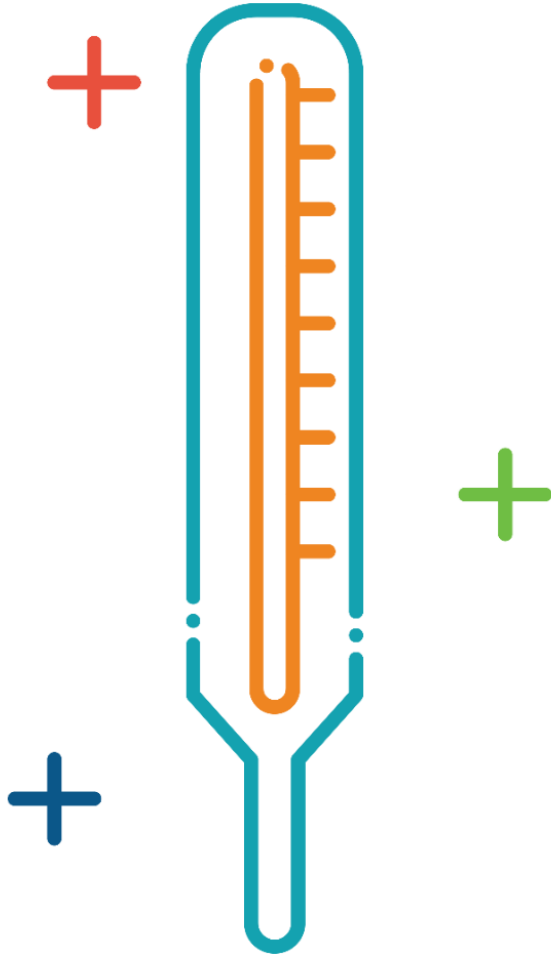
“Accommodating” COVID: How Does the ADA Impact Responses to the Virus?

First, We Can Ask People About their Health Symptoms...

- EEOC states employers can ask if employees are experiencing symptoms of a pandemic virus (an expansion of what they allowed prior to COVID)
- For COVID-19, these have included a variety of symptoms, such as fever, chills, cough, shortness of breath, or sore throat
- Must maintain all information about employee illness as a confidential medical record in compliance with the ADA



Next, We Can Take Employee Temperatures...



- “Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.”

www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Then it Was Okay to Perform/Require COVID-19 Testing...

- “... because an individual with the virus will pose a direct threat to the health of others... an employer may choose to administer COVID-19 testing to employees before they enter the workplace ...
- ... employers should ensure that the tests are accurate and reliable.”
- But unlike diagnostic testing, **antibody tests** constitute a medical examination per the ADA and, per CDC’s guidelines and EEOC, should not be used to make RTW decisions.



Employers Can Even Screen Applicants for COVID Symptoms as Part of the Post-Offer, Pre-Hire Process

- “An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability”

www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws



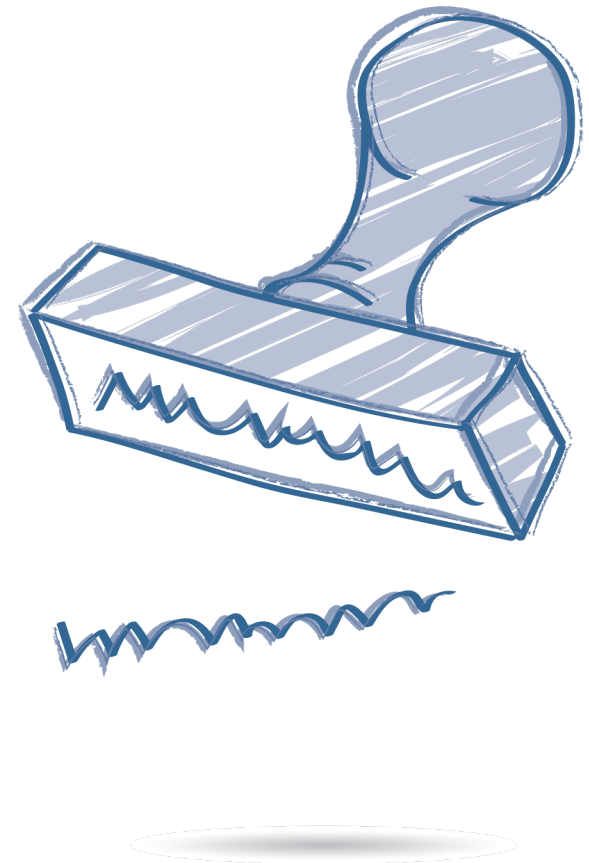
Confidentiality of Medical Information



- The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, under lock and key, and shared only on a need-to-know basis
- Narrow exceptions only

So What COVID Information Must Be Kept Confidential?

- All of it!
- An employee's statement that they have the disease or suspect they have the disease, or the employer's notes or other documentation from questioning an employee about symptoms
- Temperature check results
- Symptom screening results
- COVID-19 testing results



When May an Employer Make a Disclosure?



- An employer may disclose the name of an employee who is diagnosed with COVID-19 to a public health agency
- In other words, not to other employees (even if practical realities make it obvious)
www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- So how do we do contact tracing and inform employees who were potentially exposed?

Common Accommodation Challenges in a COVID-19 World

Can an Employer Require Employees to Go/Stay Home?

YES

- The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace
- The ADA does not interfere with employers following this advice

Can an Employer Require Medical Information Before Allowing Employees to Return to Work?

YES

- The ADA permits employers to make this type of inquiry in order to ensure employees can safely return to work without posing a direct threat to themselves or others
- The trends in what is required:
 - Negative testing - pros and cons
 - The CDC's revised symptoms-based approach
 - A doctor's note

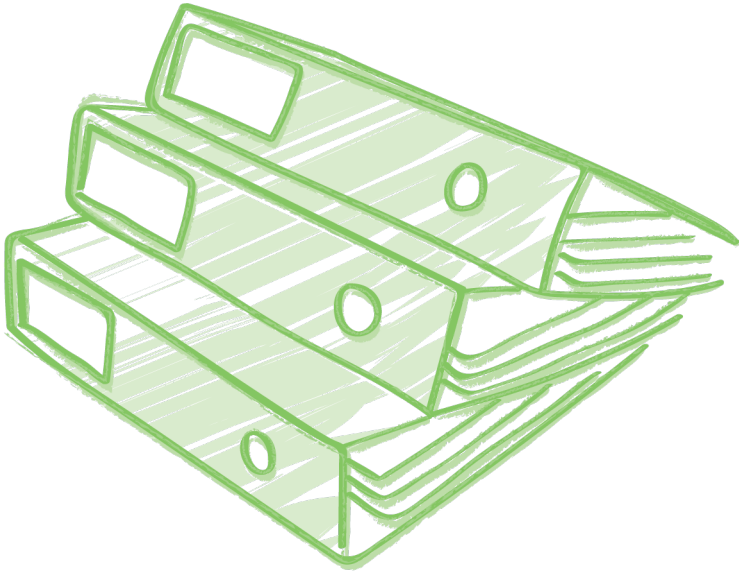
What About Those Pesky Masks...



What to Do When Someone Refuses?

- Numerous counties and cities have implemented mask mandates (Charleston, Columbia), but no SC mandate.
- Employer can require.
- Generally speaking, individuals do not have a constitutional right to “free expression” (or to endanger others) in a private business or workplace
- But there are exceptions, including, any person with a ***medical condition or disability*** that prevents wearing a face covering

Can Employers Request Medical Documentation in Support of Someone's Medical Refusal to Wear a Mask?



- Under the ADA, and most similar state and local laws, YES
- But be aware of some state and local face covering laws that may go the other way, or at least be unclear (check your jurisdiction!)
- Largely treat this like any other request for accommodation—engage in the interactive process
- Don't move immediately to separation, even where in-the-workplace accommodations are not feasible – these lawsuits and charges are already being filed

But an “Exemption” by Carrying an Internet Card is Not a Real Thing

FACE MASK EXEMPT CARD

I AM EXEMPT FROM ANY ORDINANCE REQUIRING FACE MASK USAGE IN PUBLIC.

Wearing a face mask poses a mental and/or physical risk to me. Under the Americans with Disability Act (ADA), I am not required to disclose my condition to you.

Department of Justice ADA Violation reporting number: (800) 514-0301





If found in violation of the ADA you could face steep penalties. Organizations and businesses can be fined up to **\$75,000** for your first violation and **\$150,000** for any subsequent violations.

So What Does an Employer Actually Need to Do?

- Follow the interactive process and ask questions
 - Does the individual have a disability by reliable medical documentation?
 - Respiratory disorders, skin conditions, anxiety and panic disorders
 - Is wearing a face covering essential?
 - Are there alternatives?
 - Would eliminating the face covering pose an undue risk to the health and safety of others and/or is it required by state/local order?
 - Leave of absence?

Remember that Day When Remote Work
Became Something We All Just Did...Every Day?

July is the New January (is the new February...): More Companies Delay Return to the Office



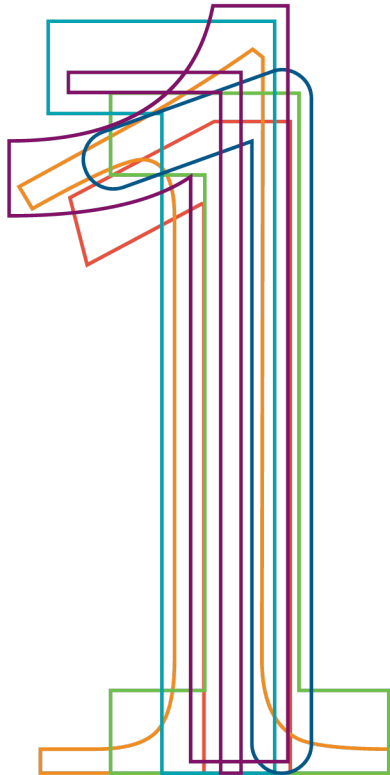
www.nytimes.com/2020/10/13/technology/offices-reopening-delay-coronavirus.html

Working from Home: Don't Forget the Basics

- Can all of the job's essential functions be performed remotely?
- What is the issue and are there other accommodation options?
- Is it reasonable and/or does it pose an undue hardship?
- Have business circumstances changed since the pandemic first started and now (*i.e.*, initial closing versus reopening)?
- If work from home is not your standard model because essential job functions cannot all be performed remotely, be sure to create record of accommodation



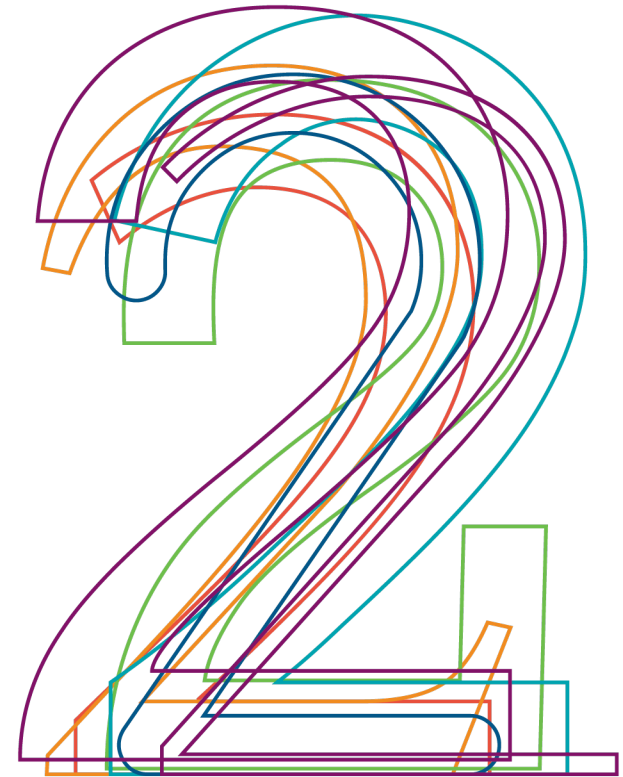
Return to Work: The Employee Who Will Not Return



- Step 1: find out the reason
 - High risk personal health conditions (FMLA, ADA)
 - High risk family member (FMLA—*maybe*)
 - Safety concerns (consider OSHA protections)
 - Generalized fears of COVID-19 (consider employee and public relations issues)
 - Something else?

Return to Work: Accommodating Employees Who Are High Risk

- Step 2: engage in the interactive process
- Examples of accommodation that may be reasonable and effective:
 - Partial remote work
 - Enhanced protective gear or other safety measures
 - Decreased contact with co-workers or modifying work space/schedule
 - Temporarily eliminating “marginal” job functions
 - Time off under the ADA/FMLA



Caution: Advanced Employee Age is Not a Disability

- The CDC's evolving guidance about risk factors associated with age and COVID-19 (individual's specific circumstances, older adults, and those with underlying medical conditions)
- The Age Discrimination in Employment Act (ADEA) prohibits employers from simply excluding individuals from the workplace based on age (regardless of intent) - EEOC has recently reinforced this
- The ADEA does not include an accommodation obligation - but talk to your employees - there could be health issues or advice from a medical provider that needs to be evaluated under the FMLA/ADA framework

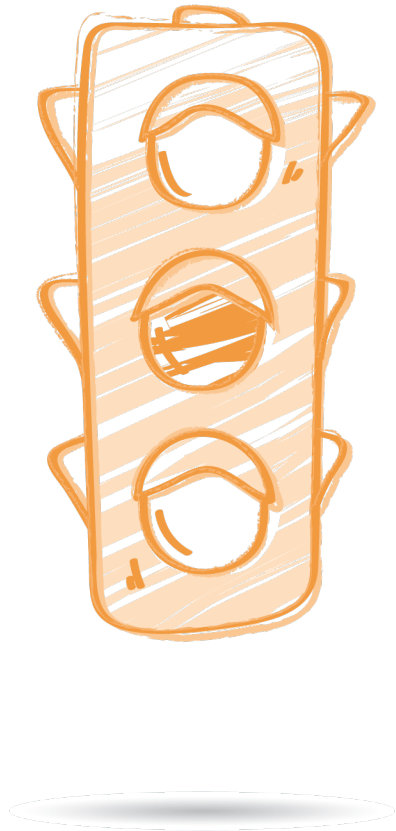


The Reality of Employees Facing New or Exacerbated Mental Health Issues Due to COVID19

- Dramatic uptick in requests for leave, continued remote work and other workplace accommodations
- Make sure you aren't dismissing this as "generalized fears of COVID" —talk to the employee
- Proceed through the interactive process



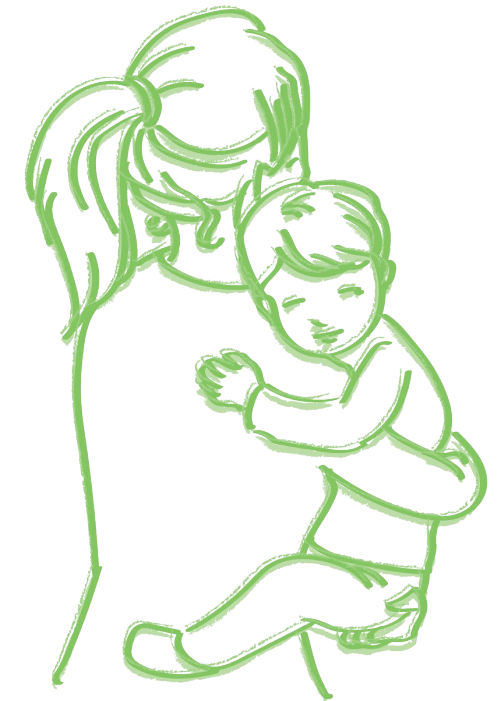
Employees with Higher-Risk Family or Household Members



- Under the ADA, an employer is not required to provide reasonable accommodation to an employee due to a family member's disability
- Though some state and local laws deem these individuals to be “vulnerable populations” subject to certain protections
- Consider flexibility where you can during these unusual times—and consider documenting the scope of what you are willing and able to do

Don't Forget those Sneaky, Traditional FMLA Protections

- FMLA leave due to an employee's ***chronic health condition***, if a health care provider deems it unsafe for them to return to work (even if they are not actively ill or displaying symptoms) [29 CFR § 825.115 (c), (f)]
- FMLA leave to ***care for*** a parent, spouse or child with a serious health condition

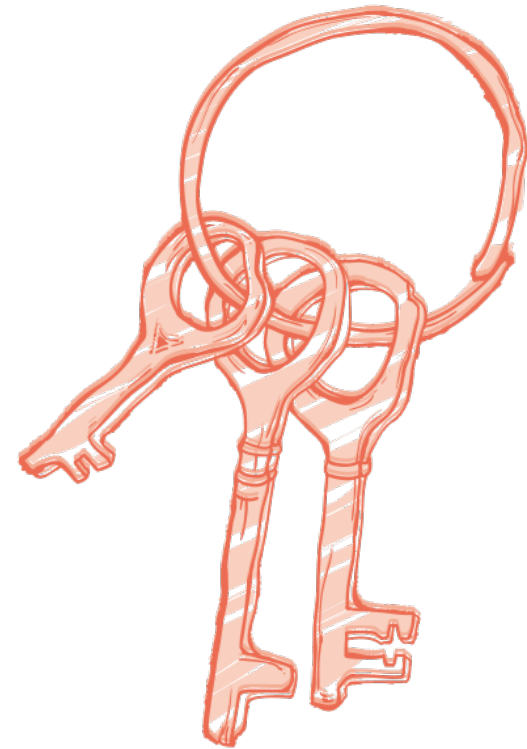


But Won't the COVID Vaccine Fix
All of This?

Setting the Stage

Key Issues:

- The Available COVID-19 Vaccines
- Evolving Priorities for Vaccine Access
 - Federal Recommendations
 - State and Local Distribution Plans
 - Avenues for Employer Involvement
- The Key Question - To Mandate Or To Recommend?



Evolving Priorities for Vaccine Access – CDC Recommendations

Phase 1a :

- Healthcare personnel, and
- Residents of long-term care facilities

Phase 1b :

- “Frontline essential workers” outside healthcare (e.g. first responders, education, food and agriculture, corrections, the U.S. Postal Service, public transit, and grocery stores).
- People aged 75 and older.

Phase 1c :

- People aged 65-74 years of age
- People aged 16-64 with “high risk medical conditions”
- Other “essential” workers

Phase 2 :

- “All other persons ages 16 and older not already recommended for vaccinations in Phases 1a, 1b, or 1c.”

Evolving Priorities for Vaccine Access – State Prioritization Plans

(1) Federal government allocates doses based on state and local population

(2) “...pandemic vaccination planning is a combined state, territorial, tribal and local responsibility that requires close collaboration between public health, external agencies, and community partners

→ Littler Statewide Vaccination Plan Survey:

<https://www.littler.com/publication-press/publication/giving-it-our-best-shot-statewide-vaccination-plans>



The Key Question: To Mandate or to Recommend?

- Decision must be informed by:
 - Logistical issues: supply, distribution and administration challenges
 - Public health policy and ongoing federal transition
 - Community considerations
 - Legal and employee relations considerations affecting each workforce





EEO Issues and EEOC's December 16, 2020 Guidance

Key EEOC Questions Dealing with Employee Vaccinations

Question #1: Does the EEOC encourage mandatory vaccinations?

Question #2: Can an employer mandate that employees be vaccinated against COVID-19?

Question #3: If so, are there any “thresholds” that must be met before imposing a mandatory vaccination requirement for applicants or employees?

Question #4: Even assuming an employer can pass the “threshold,” are there EEO implications if an employee requests to be excused based on a disability (i.e. ADA implications), other medical reasons (e.g. pregnancy) or religious practices/religious beliefs (i.e. Title VII)?

Question #5: Even in the absence of a mandatory vaccination requirement, are there potential EEO implications based on any employer vaccination program?

EEOC View on COVID-19 Vaccinations – Are there Any Prerequisites that Must Be Met Before Requiring Vaccinations – The “Threshold Question”

Point #1: EEOC is **not** a medical examination. **Impact**:

- Employer ***does not*** have to demonstrate vaccination is job related and consistent with business necessity
- Employer can mandate vaccination
- Employer can request “proof of vaccination” (*Note: ADA risks if ask “why” individual did not receive vaccination*)
- **Caveat**: *This only eliminates the “threshold question” of requiring the vaccine, but does not eliminate the potential exceptions and ground rules based on EEO grounds, regardless of whether the vaccine is “recommended” or “mandatory”*

EEOC View on COVID-19 Vaccinations – “Recommended” Vaccinations

Point #2: “If a vaccination is offered to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary.”

“If an employee chooses not to answer these questions, the employer may decline to administer the vaccine, but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.”

Caveat: The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.” (Query: Do you have to keep fact that employee did not take vaccination confidential?)

Caveat: Care must be taken regarding potential disparate treatment /hostile work environment claims.

EEOC View on Mandatory Vaccinations and Impact of ADA

Point #3- Mandatory Vaccinations are permissible, but care must be taken based on excluding an employee from the workforce who indicates that he/she cannot receive a COVID-19 vaccination due to a disability (and/or pregnancy under PDA).

“The ADA allows an employer to have a qualification standard that includes ‘a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.’ However, if a safety based qualification, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, ***the employer must show that an unvaccinated employee would pose a direct threat due to a ‘significant risk of substantial harm to the health or safety of the individual or others that could not be eliminated or reduced by reasonable accommodation.’***”

Step #1: Per the EEOC, this requires an ***individualized assessment*** whether a direct threat exists:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.

EEOC Views on Mandatory Vaccinations – Obligation of Reasonable Accommodation and Interactive Process under ADA

Step #2: “If an employer determines that an individual who cannot be vaccinated due to disability poses a **direct threat** at the worksite, the employer **cannot exclude** the employee from the workplace- or take any other action- **unless there is no way to provide a reasonable accommodation** (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.”

Step #3: Employer needs to determine if any other rights apply.... “For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely...or if not, [the employee] may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies.”

Step #4: “If an employee cannot get vaccinated for COVID-19 because of a disability....and there is no reasonable accommodation possible, **then it would be lawful for the employer to *exclude* the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.**”

EEOC Views on Mandatory Vaccinations and Religious Accommodations

Point #4: If an employee indicates that he/she is unable to receive a vaccination because of a sincerely held religious belief or practice, care also must be taken in excluding an employee from the workforce.

- “EEOC guidance explains that because the definition of religion is broad and protects religious beliefs, practices and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.”
- If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or sincerity of a particular belief, practice or observance, the employer would be justified in requesting additional supporting information
- Practice Pointer: Although there is a lower burden to establish “undue hardship” dealing with religious accommodation, employers should consider the same approach to reasonable accommodation through the interactive process. The EEOC used identical language grouping religious accommodation with ADA issues in stating, “If an employee cannot get vaccinated for COVID-19 because of a ...sincerely held religious belief, practice or observance, and there is no reasonable accommodation possible, **then it would be lawful for the employer to *exclude* the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.**”
- *Note: Littler has reviewed/monitored EEOC litigation involving employee vaccinations, pre-COVID, and most of the litigation focused on the failure to accommodate based on religious beliefs, practices and observances.*



Employee Relations Issues

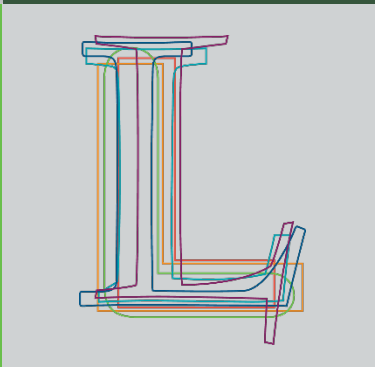
A Successful Vaccination Program Requires Engagement

- Recognize that COVID-19 vaccines are authorized but experimental
- Assume there will be hesitation, and focus on broad, fact-based messaging
 - Link in with public campaigns as they develop
- Be conscious of appearing to “lead from the back”
- Consider how peer engagement can play a role
- Evaluate how to remove or simplify possible barriers to getting the vaccine





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Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

