

Employee Health in the Workplace in the (Almost) “Post-Pandemic” Era


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The new normal . . .

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- COVID is still here . . .
 - Vaccines are not perfect
 - Remote and hybrid schedules may be here to stay
 - Absenteeism persists due to COVID-related issues
 - Ongoing challenges with employee performance
 - New and old challenges managing requests for accommodations and leave

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Impact of COVID on workforce

“Long Social Distancing”

- While many have moved on, COVID fear persists with some individuals
- Believed to have kept 3 million people out of the workforce in first half of 2022, amounting to 2% of workforce
- Reduced nation’s output by \$250 billion during same period

Barrero, Bloom, Davis, *Long Social Distancing*, National Bureau of Economic Research, October 2022, <https://www.nber.org/papers/w30568>

Impact of COVID on workforce

Long Covid

- Impacts almost 16 million working-age adults (aged 18 to 65)
- 2 to 4 million are out of work due to condition
- Annual cost of lost wages is around \$170 billion a year (and potentially as high as \$230 billion)

Brookings Institute, <https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/#footnote-5>

Impact of COVID on workforce

COVID-related absences and disabilities remain a concern for employers

- 34% concerned with COVID-related absences (acute illness, quarantine, isolation)
- 14% concerned with leaves related to long COVID
- 12% concerned with productivity losses related to long COVID

Mercer's 10-minute survey on 3 Big Issues for Health Programs 2022, based on respondents with 500 or more employees, <https://www.mercer.us/our-thinking/healthcare/survey-reveals-covids-continuing-impact-on-us-business.html#contactForm>

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Infectious disease policies - COVID-19

OSHA General Duty Clause

- Perform job hazards assessment relating to COVID-19
- Provide PPE and contact tracing
- OSHA recommends employers follow CDC guidance
- Written policy and safety protocols, to include barring sick employees from workplace
- Consider more expansive state rules (e.g., CA)

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Employer vaccine mandates

Most employers have decided one way or another . . .

- 41% have adopted mandates
- 56% have not

The Littler Annual Employer Survey, May 2022, <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

Many use “soft” mandates

- 45% allow unvaccinated to test and use protocols
- 28% bar unvaccinated from working on site
- 27% terminate employment (no testing) if unvaccinated and no accommodation approved

The Littler Annual Employer Survey, May 2022 , <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

Most employers are tracking vaccination status

- 47% use internal software
- 27% use third party or alternative method
- 27% are not tracking

The Littler Annual Employer Survey, May 2022, <https://www.littler.com/publication-press/publication/littler-employer-survey-report-2022>

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Employer vaccine mandates

- EEO laws do not prevent an employer from requiring COVID vaccinations under most circumstances
- Subject to potential accommodations due to disability (ADA) or for religious reasons (Title VII), unless undue hardship results
- State laws may limit process and cause multi-state employers to consider variations in requirements (e.g., AL, AK, FL, IN, KS, MT, ND, SC, UT, WV . . .)

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Employer vaccine mandates

- Discrimination charges filed in response to employer denials of requests for accommodations are starting to make their way to and through the EEOC and state agencies

EEOC Updated Guidance on COVID-19 testing

- “Business necessity” is required to make medical inquiries or require exams, including COVID-19 testing
- Considerations in determining “business necessity” include:
 - Level of community transmission, vaccination status of employees, accuracy and speed of processing COVID-19 tests, degree of breakthrough infections for employees who are “up to date” on vaccinations, ease of transmissibility of current variant, possible severity of illness from current variant, types of contacts for employees in workplace, potential impact on operations if an employee enters workplace with COVID-19
- COVID testing will meet “business necessity” standard if consistent with CDC guidance

Other ADA vaccine/testing compliance concerns

- Keep confidential and share only with HR or those who “need to know”
 - vaccination status, test results, medical reasons for accommodation requests, etc.
- Keep separate from personnel files or records accessible by management or others
- Use medically reliable processes
- Stay within parameters of CDC or other official guidance

Adults with disabilities

- Second largest minority group in the U.S.
- 42.5 million, or 13% of the civilian population

U.S. Census Data, released September 2022, <https://data.census.gov/cedsci/table?tid=ACSST1Y2021.S1810>

Adults with disabilities

- Historically high levels of employment
 - 5.6 million employed in August 2022
 - 37.6% working or looking for work
- Result of more remote work opportunities and tight labor market

U.S. Census Data, released September 2022, <https://data.census.gov/cedsci/table?tid=ACSST1Y2021.S1810>

Key ADA trends and pitfalls

More conditions are recognized as covered disabilities

- EEOC guidance suggests that COVID-19 and long COVID might be considered
- Be alert for requests based on pre-existing underlying conditions that increase risk from COVID-19

Key ADA trends and pitfalls

More conditions are recognized as covered disabilities (cont.)

- Gender Dysphoria

Williams v. Kincaid, 4th Cir. August 6, 2022

Key ADA trends and pitfalls

Mental health issues on the rise

- The percentage of adults who received mental health treatment increased between 2019 and 2021 among adults aged 18-44, from 18.5% to 23.2%*
- 30% of ADA EEOC charges in FY 2021 were based on mental health discrimination claims (up from 10% in 2010)
- Anxiety and PTSD are the leading conditions, accounting for nearly 60% of all mental health EEOC charges and 17.6% of all ADA charges in FY 2021

*Centers for Disease Control and Prevention, September 2022,
<https://www.cdc.gov/nchs/products/databriefs/db444.htm#fig1>

Key ADA trends and pitfalls

Employers often fail to obtain medical documentation when considering accommodations

- Permitted under the ADA
- Clarifies the condition and how it impacts work and avoids blurriness when things go wrong or get more complicated
- Employees sometimes overstate the need for accommodations, inadvertently or deliberately

Key ADA trends and pitfalls

Scope of medical documentation needed:

- Diagnosis?
- How condition impacts major life activities?
- How condition impacts ability to perform job duties?
- How long condition will last?
- Recommended accommodations?

Key ADA trends and pitfalls

Employers too often fail to recognize when the interactive process has been triggered

- Triggered when employer is on notice that a physical condition may impact performance
- No magic words
- May be informal or arise in casual conversation with supervisor or co-worker
- HR might not have necessary information

Key ADA trends and pitfalls

Employers too often fail to adequately identify the essential functions of the job

- Employee must be able to perform essential functions to be “qualified”
- Employer never has to eliminate or change “essential functions”
- What is an essential function is slippery at times, and requires close analysis

Key ADA trends and pitfalls

Essential functions (cont.)

- With changing duties during the pandemic, essential functions may have changed or been redefined
- In person attendance may or may not be essential

Key ADA trends and pitfalls

Use “interactive process” in making decisions on reasonable accommodations

- Listen to employee suggestions, but employer gets to choose
- Allowing remote work may open the door to more requests for remote work as an accommodation
- Memorialize accommodations in writing
- Explicitly make them temporary and subject to review as circumstances and needs change
- Keep discussions about performance and medical conditions separate
- Limit discussions of medical conditions between supervisor and employee

Key ADA trends and pitfalls

EEOC enforcement focus on staffing agencies and temporary workers

- Complicated in ADA cases where a reasonable accommodation is necessary
- Decisions about temporary workers often do not follow the same discipline used for regular workers, making them vulnerable to claims
- Beware and do not assume employer is off the hook

Paid leave trends

Growing patchwork of state and local paid leave laws

- Paid family and medical leave - 12 states, DC, and growing number of municipalities
- Paid sick leave - 15 states, DC, PR, and more than 30 municipalities

Paid leave trends

Challenging for multi-state employers

- Notice and posting requirements
- Various rules for accrual and use, definition of family members
- Most state laws prohibit retaliation

Paid leave trends

Multi-state employers (cont.)

- Policy development - one policy that complies with most generous law or different rules for different states/municipalities?
- Business getting frustrated with patchwork of state and local leave laws (US Chamber)
- Congress periodically considers enacting paid employee leave legislation, but . . .

Key FMLA trends and pitfalls

Employers often fail to provide appropriate notices

- 3+ FMLA notices are required:
 - Posting/handbook
 - Notice to specific employee when employer acquires knowledge of need for leave, with Notice of Rights (within 5 business days)
 - Designation Notice after employer receives enough information to determine if leave qualifies (e.g., receipt of medical certification) (within 5 business days)

Key FMLA trends and pitfalls

Employer fails to recognize when the need for leave has arisen

- No magic words
- May be informal, arise in casual conversation
- Employer has an obligation to request more information if needed

Key FMLA trends and pitfalls

Employee's notice of need for leave

- Employee may be required to use the employer's "usual and customary" method to notify of need for leave
- Dispute when informal practice inconsistent with written policy

Roberts v. Gestamp West Virginia, LLC., 4th Circuit, August 15, 2022

Key FMLA trends and pitfalls

Employer takes action that interferes with leave

- US Department of Labor issued guidance on retaliation and interference with FMLA rights

Field Assistance Bulletin No. 2022-02

<https://www.dol.gov/agencies/whd/field-assistance-bulletins>

Key FMLA trends and pitfalls

FMLA interference claims

- Manager who discouraged employee from taking leave will result in jury trial on employee's claim

Zicarelli v. Dart, 45 F. 4th 1079 (7th Cir. 2022)

Key FMLA trends and pitfalls

Liability under the FMLA

- Generally, no liability to employer for a procedural infraction that does not result in harm to the employee
- Fix procedural irregularities as soon as discovered to avoid claims

Practice Pointers

- ✓ Create and follow disciplined practices and procedures for employee requests for accommodations and for leave and centralize handling as much as possible
- ✓ Use all available tools and employer rights under the ADA and FMLA, including requesting medical documentation and certifications, recertifications, return to work certifications, etc.
- ✓ Provide all required notices and stay on top of deadlines, both the employer's and the employee's

Practice Pointers

- ✓ Train managers to:
 - ✓ Spot ADA and employee leave issues (including absenteeism) and get HR involved immediately and often
 - ✓ Avoid medical discussions with employees, while showing compassion
 - ✓ Avoid expressing irritation at leave-takers
 - ✓ Refrain from any form of retaliation
- ✓ Keep discussions about performance and medical conditions separate



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