

Navigating Disability and Leave Laws in the Workplace:

During a Pandemic and Beyond



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Getting back to “normal”

- **Key work health issues:**
 - OSHA obligations, CDC guidance, vaccine mandates, testing
 - High risk employees, anxiety, accommodations
 - Absences due to illness, parental obligations

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Infectious disease policies

- **Written safety protocols (OSHA, CDC)**
 - Barring sick employees from workplace
 - Daily health checks, office hygiene, visitors
 - COVID-19 testing
 - Vaccine requirements
 - Masking, social distancing (may vary based on vaccination status, level of transmission)

Health inquiries allowed - COVID-19

ADA, GINA, FMLA obligations:

- Limit scope to what necessary
- Keep confidential and private
- Do not discriminate
- Use medically reliable processes
- Stay within parameters of CDC or other official guidance

COVID-19 Vaccine

- EEO laws do not prevent an employer from requiring COVID vaccination under most circumstances
- OSHA began recommending that employers require employees to be vaccinated, as of August 13, 2021

COVID vaccines to be discussed during COVID panel on October 28, 2021

COVID-19 Vaccine

EEOC has stated:

- Nothing prevents an employer from requiring the vaccine
- A vaccination itself is not a medical examination when administered by the employer or a third party.
- If employer administers, then caution: prescreening vaccination questions may elicit information about a disability; questions must be “job-related and consistent with business necessity”

COVID vaccines to be discussed during COVID panel on October 28, 2021

COVID-19 vaccine and testing

President Biden's Plan - Vaccine mandates:

- Federal contractors and subcontractors (deadline for vaccinations, December 8, 2021)
- Employers with 100+ employees (OSHA ETS) (vaccination or testing)
- Certain healthcare facilities with Medicare/Medicaid revenue (vaccination & testing)

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COVID-19 vaccine

- Subject to potential accommodations due to disability (ADA) or for religious reasons (Title VII), unless undue hardship results

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Vaccine accommodations under the ADA

Use traditional ADA analysis

- Is there a covered disability?
- Request medical documentation
 - Employer is entitled to a diagnosis
- Use the interactive process

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What is possible?

- Case-by-case analysis
- Is there a direct threat or undue harm
 - Safety of workplace
- Remote work? Frequent testing? Masking? Social distancing? Leave?
- Consider making only temporary accommodations

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COVID-19 vaccine

- Written policy
- Proof of vaccination?
 - Federal contract rule requires proof
- HR should handle information and keep confidential
 - Not in personnel files

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Getting back to normal . . .

High risk employees, anxiety, others

- Traditional analysis
- Review and reconsider what are *essential functions* vs. *marginal functions* in the COVID-19 and post-COVID-19 era
 - Everyone dispensed with important functions temporarily during COVID remote work period
- Making exceptions during COVID-19 will not necessarily bind an employer down the road, if proper justification is provided, but, these exceptions may open more possibilities

Parents and caregivers

- Attendance may be unpredictable
- Retention strategies
- Most will not be eligible for FMLA leave
 - Does not cover children's school closed or a quarantined symptom-free child

What is a disability?

- COVID? (depends)
- Underlying condition that puts employee at risk (depends)
- Short stature?

Common employer ADA mistakes

- **Failing to:**
 - recognize medical issue is affecting performance or safety
 - recognize that employee has provided enough information *to put employer on notice* that an accommodation is being requested or is needed

Common employer ADA mistakes

- **Failing to:**
 - obtain *actual medical information*
 - engage in the interactive process
 - get HR involved
 - train managers and supervisors to recognize issues and call HR

Reasonable accommodation process

- Employer never has to eliminate or change “essential functions”
- What is an essential function is slippery at times, and requires close analysis
- Document terms and conditions for accommodation and require periodic review and evaluation

Employee leave laws

Federal paid leave

- Congress continues to consider enacting a paid employee leave program, but passage in 2021 unlikely
- Business getting frustrated with patchwork of state and local leave laws

State legislatures

- Continue to expand employee paid sick leave or family leave

Common employer FMLA mistakes

Employers:

- Fail to recognize an employee has provided information triggering employer notice obligations
- Fail to give required FMLA notices, including designation notice
- Fail to closely manage process including certification of health care provider

Common employer FMLA mistakes

Employers:

- Fail to train or rein in managers, so they make comments or express irritation at leave-takers, and then retaliate
- Fail to document and address performance issues until leave is taken

FMLA tips

Use the tools allowed:

- Regularly request fitness to return to work certificates
- Get recertification as allowed for changing circumstances
- Ensure all required documentation is provided by employee and healthcare provider
- Hold employees to employer policies on notification of absences in advance and separate performance issues for noncompliance from FMLA protected absences

Stay Safe and Healthy!



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