

COVID-19 AND THE ADA

Labor & Employment Law Section
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Points From New Cases

- Following ADAAA rules for definition of disability continues to be a problem
 - Regarded as—Very different from before
 - Actual—Use the rules; include evidence
- “Qualified” brings in essential job functions and (maybe) reasonable accommodations
- Essential functions:
 - Fact-intensive
 - Not same as qualification standards
 - Not same as legitimate non-discrim. reason

Points From New Cases (cont'd)

- Reasonable Accommodations
 - Leave
 - Indefinite leave generally not required
 - Forced leave may not be OK
 - Telework—fact-intensive; big now
- Sovereign immunity
- Difference between ADA and GINA



Some Thoughts On the Application of the ADA & Similar Laws to the Pandemic

Employer Coverage

- ADA—private employers with 15 or more employees, non-federal governmental employees, unions, employment agencies
- Sec. 501—federal-sector employees
- Sec. 503—contractors or subs with contracts worth > \$10,000
- Sec. 504—recipients of federal financial assistance
- Texas law—similar to the ADA

Issues Addressed by (three) EEOC Guidance Documents

- Permissible screening
- Requiring/administering testing
- Mask/hygiene policies
- Confidentiality
- Accommodations
- Excluding employees

<https://www.eeoc.gov/coronavirus>

Employer Actions—OK Screening

- Taking temp or asking about symptoms
- Asking why employee was absent
- Asking about known exposure
- Requiring quarantining if employee has COVID, symptoms, or exposure
- Requiring infection-control practices
- Requiring use of PPE (accommodations?)
- Encouraging getting available vaccine

Employer Actions—OK Screening

- Require medical input certifying fitness for duty on return to work
- Taking temp and screening for symptoms of applicants, if make conditional job offer, and done for all entering same job type
- Delay start date of applicant w/ symptoms
- Withdraw offer if applicant has COVID-19 or symptoms, and must start immediately

Employer Actions— *Improper Screening*

- Asking asymptomatic employees if they have medical conditions that would make them especially vulnerable
- Compelling employees to take vaccine if they have a medical condition that prevents doing so safely
- Sharing medical info beyond those with a need to know

COVID-19 Case Law?

- Kinds of Reported Cases So Far
- One Reported Opinion To Date Under Federal Discrimination Laws
- Discrimination Cases *Are* Being Filed

Kinds of ADA Cases Expected

- Refusing reasonable accommodation for one with risk-factor disability
- Firing or excluding because of accommodation requests, or because of the need for accommodations
- Firing or excluding because employee has COVID-19 risk factor
- Firing because of “exposing others”

Accommodations—Why Needed

- Employee risk-factor disability
- Employee's mental disability
- To make standard accommodations (e.g., teleworking) more accessible
- *Not required* because of risk factors of family/household member
- *Not required* because of generalized fear (even if reasonable)

Accommodations—Examples

- Teleworking
- Leave
- Workplace safety

Types of Accommodations

- Telework
 - Especially common now
 - Reasonable in many (but not all) cases
 - Make sure tech is accessible to worker
- Leave
 - May be easy bc. of virus's short duration
 - Can be unpaid unless contract or company policy provide paid leave
 - Longer leave to avoid exposure?

Types of Accommodations (cont'd)

- Masks, face shields, gloves
- Physical barriers, separate offices
- Distancing, staggered schedules, isolation
- Disinfecting
- Hygiene policies
- Other ideas

Resources: CDC, WHO, OSHA

Peeples v. Clinical Support Options, Inc.,
2020 WL 5542719 (D. Mass. 9-19-20)

- Preliminary injunction granted to allow plaintiff to continue to telework
- Plaintiff has risk-factor disability, asthma, and was ass't mgr. at mental-health clinic
- Plaintiff tried to return to work but safety protocols were spotty at best, and social-distancing was difficult
- Employer arguably threatened termination if plaintiff continued working remotely

Is COVID-19 a Disability?

- Accommodation claims—must prove “actual” or “record of”
- All other cases—“regarded as”
- Serious cases should be easier
- Outwardly milder cases:
 - Regarded as—COVID-19 likely an “impairment” and not “minor”?
 - Actual—which MLAs subt. limited?
- Fear of future infection—likely not

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