Employee Health Issues in the Wake of COVID-19: How Has the Pandemic Changed the Workplace?

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PREFACE

At this stage in the COVID-19 pandemic, vaccines are widely accessible, the State of Texas and cities have lifted most, if not all, of their COVID-19 restrictions, yet, the Delta variant and stagnation of individuals getting vaccinated has prevented case counts from continuing their solid decline. Cities, as employers, must confront several legal and practical implications as they continue to face issues related to COVID-19. They will also have to decide whether to make any temporary or permanent changes in the workplace and how best to prepare for the future. This paper will highlight some of the crucial employee health issues that employers may continue to face, from accommodations and entitled leave for COVID-19 to mandatory and voluntary vaccine policies and testing considerations.

These issues are evolving in real time and it is worth keeping in mind how much employers have faced over the past year while trying to predict what lies ahead. While employers had very little time and no case law or statutes dealing with such an unprecedented event to rely on, amazingly administrative agencies, such as the EEOC, CDC, DOL and OSHA were able to publish relatively quick and clear guidance on how to deal with COVID-19 in the workplace. It is that guidance that has been key to helping employers keep employees safe by understanding what is lawful and what is unlawful in their response to COVID-19. The information below is based on the administrative guidance and very few cases that are available and meant to assist city employers with everyday questions related to employee health issues. By no means can this paper address every circumstance or question that may arise or predict what the best path forward for each individual employer should be.

Whether the workplace looks any different now or in the future as a result of COVID-19, the pandemic has undoubtedly re-shaped our world.

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- U.S. Equal Employment Opportunity Commission "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

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- "Essential Protections During the COVID-19 Pandemic" https://www.dol.gov/agencies/whd/pandemic

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Abbreviations

The following abbreviations may be used throughout this paper:

i. "**ADA**" - The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et. seq.), including the ADA Amendments Act of 2008 (Public Law 110-325, ADAAA).
ii. "**CDC**" – U.S. Centers for Disease Control and Prevention.
iii. "**COVID-19**" - Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2).
iv. "**DOL**" – U.S. Department of Labor.
v. "**EEOC**" – The U.S. Equal Opportunity Commission.
vi. "**FMLA**" – Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et. seq.).
vii. "**FLSA**" – Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et. seq.).
viii. "**OSHA**" – U.S. Department of Labor Occupational Safety and Health Administration.
ix. "**Title VII**" – Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e)

Preventing and Dealing with COVID-19 in the Workplace

I. Screening employees for COVID-19

Screening employees for COVID-19 can take on various forms and has been evolving since the pandemic arrived last year.

Temperature-taking

The EEOC issued guidance on March 17, 2020, stating that generally, measuring an employee's body temperature is a prohibited medical examination, but because the CDC and state/local health authorities acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature.[1] This guidance from the EEOC, as well as general business safety precautions from the CDC, has not changed since mid-2020. While most employers have discontinued temperature screening for employees, it is unclear whether there will be a reemergence of these practices where there is a sudden return of large numbers of employees to the workplace or where new, more contagious variants of COVID-19 begin to cause breakthrough cases.

The records that an employer keeps related to temperature screening are medical records and must be kept in a confidential medical file. It may be best to indicate whether a temperature was "within range" or "outside the acceptable range" instead of recording the employee's actual temperature.

Asking medical questions

The ADA has restrictions on when and how much medical information an employer may obtain from an applicant or employee, but the EEOC has stated that *during a pandemic*, employers may ask employees if they are experiencing symptoms of the pandemic virus.[2] What may have been a questionnaire to enter the building when most employees were quarantined at or working from home, is likely to become more of an informal medical questioning as the threat of COVID-19 outbreaks dissipate. Employers may want to be cautious with how much information they ask when an employee calls in sick, but it still seems appropriate to ask "have you been exposed to

[1] Question A.3., U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Technical Assistance Questions and Answers - updated June 28, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
[2] Id. at Question A.1.

COVID-19" or "are your symptoms consistent with COVID-19?" With respect to the symptoms that may trigger exclusion from the workplace or testing, employers should still rely on the CDC, public health authorities, or reputable medical sources for guidance on emerging symptoms associated with COVID-19. As far as how long employers can continue to ask those questions and gather medical information is unclear but likely directly correlated to case counts and percentage of employees not vaccinated. Remember that the rationalization for asking medical questions is to determine whether an employee is a direct threat to the health or safety of others.

If employers do continue to screen employees and gather medical information, all that information must be maintained as a confidential medical record in compliance with the ADA.

II. COVID-19 Testing

In the situation where an employee calls in sick and the symptoms align with those of COVID-19, an employer may choose to administer a COVID-19 test or require that the employee provide proof of a negative COVID-19 test before entering the workplace (*See the section below regarding quarantine). The ADA allows mandatory medical testing when it that testing is "job related and consistent with business necessity." The EEOC has advised that "an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others"[3] on the condition that such testing is accurate and reliable.

If an employer chooses to administer COVID-19 tests, testing should be conducted in a nondiscriminatory manner and paid for by the employer, including compensating employees for time spent on mandatory testing. If an employer chooses to require that an employee present a negative test result before returning to work, the employer may consider granting the employee paid leave to get tested or allowing the employee to work from home until the test results are received.

[3] Id. at Question A.6.

III. COVID-19 as a serious health condition under the FMLA

Eligible employees may be entitled for up to twelve weeks of job-protected leave under the FMLA because of a serious health condition that makes the employee unable to perform the functions of the employee's job.[4] The FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[5] Although the FMLA itself does not define qualifying illnesses, the FMLA regulations state: [o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal diseases, etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.[6] If we compare the typical COVID-19 case to the flu, then it will not likely trigger FMLA protection. If on the other hand, an employee is incapacitated for more than three full consecutive days and either: (1) consults with a doctor two or more times within 30 days, or (2) consults with a doctor once and receives a regimen of continuing treatment (i.e., prescription medication), then the employee is likely to qualify for FMLA protection.

Payne v. Woods Servs., Inc., No. CV 20-4651, 2021 WL 603725 (E.D. Pa. Feb. 16, 2021).

Plaintiff Anthony Payne brought this case against his employer after having been fired for refusing to return to work. At the time, Payne was under instructions to remain in quarantine after testing positive for COVID-19. Defendants filed a Motion to Dismiss, seeking dismissal of Payne's Complaint in its entirety. Six patients at the Langhorne facility, all of whom Payne had worked with directly, tested positive for COVID-19. Payne discussed this exposure with his doctor who advised him to get tested and quarantine for fourteen days. Payne notified his employer of his doctor's advice. On April 6, 2020, Payne was tested for COVID-19 at work, and the following day a nurse notified him that he had tested positive. The nurse directed Payne to quarantine for fourteen days. Six days later, on April 13, 2020, Defendant told Payne he had been cleared and should return to work. Payne responded that he could not return to work because he had not completed his quarantine. Defendant responded that if he did not return, his absence would be considered a

[4] 29 CFR § 825.112(a)(4).
[5] 29 CFR § 825.113
[6] 29 C.F.R. § 825.113(d).

"call-out," and Payne again reiterated the advice of the nurse and referenced guidance from the CDC. The following day, Payne did not return to work and was fired. The court held that Payne's FMLA claims could not be dismissed but that his ADA claims would be dismissed because there was no proof of discrimination based on disability. The court held that Payne did have a valid FMLA claim since he showed evidence that he was fired against doctor's orders.

IV. Could underlying health conditions that make an employee more susceptible to COVID-19 also trigger leave under the FMLA?

While normally FMLA leave requires that an individual be suffering an illness, injury, impairment, be incapacitated for three or more days, or be seeking continuing treatment, cases on this question suggest that even prophylactic medical certifications may qualify for FMLA. This means that an employee may be entitled to leave under the FMLA if their medical provider certifies that leave is needed because the employee's underlying serious health condition may be exacerbated by COVID-19 or cause serious complications if the employee contracts COVID-19.

An important note is that an employee is not entitled to FMLA leave simply to avoid getting COVID-19 or because of fear of COVID-19.

Santiago v. Dep't of Transp., 50 F. Supp. 3d 136 (D. Conn. 2014).

In this FMLA case, a Material Storage Supervisor II at Connecticut Department of Transportation (DOT), a position that required considerable overtime during the snowy winter months, who suffered cluster headaches. After trying various treatments with little success, the employee's doctor determined that the "excessive work schedule" (more than 8 hours a day) was the main factor that triggered the headaches. The employee requested FMLA leave for overtime shifts as a prophylactic measure, even when he was not suffering from the headaches. DOT denied leave and the employee resigned. The employee brought action against DOT and various DOT employees, alleging they interfered with his FMLA rights and retaliated against him for exercising his rights. The employee moved for summary judgment on his interference claim, and defendants moved for summary judgment on all counts. The Court held that the employee was not precluded from taking

FMLA leave due to the prophylactic and indefinite nature of his request; DOT Commissioner could not be held personally liable for FMLA interference; a fact issue precluded summary judgment on FMLA interference claim; and a fact issue precluded summary judgment on FMLA retaliation claim. The Court stated "Absences . . . qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report . . . because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level." 29 CFR 825.115(f).

V. COVID-19 as a disability under the ADA

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities.[7] The EEOC has not offered any opinion or guidance as to whether COVID-19 is a disability under the ADA. In fact, during a March 27, 2020 webinar called "Ask the EEOC," the agency declined to answer the question of whether COVID-19 constitutes a disability under the ADA, stating that it is "unclear" whether the virus is or could be a disability given that it is a new virus that medical experts are still learning about.[8] Even a year later, we do not really have a clear answer from the EEOC. The known symptoms and complications of COVID-19 include physical impairments that can be compared to other temporary disabilities, meaning that the non-discrimination and reasonable accommodation protections likely do apply to employees with significant symptoms or complications related to COVID-19.

The EEOC's guidance suggests, and it has been consistently advised, that employers should provide, absent undue hardship, reasonable accommodations for employees who, due to a preexisting disability, are at higher risk of severe health problems from COVID-19. Prior to COVID-19, this type of combined condition plus susceptibility was not conceived in the definition

[7] 42 U.S.C. § 12102(1).
[8] U.S. Equal Employment Opportunity Commission, Transcript of March 27, 2020 Outreach Webinar https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar

of disability under the ADA. This is one of the examples of how COVID-19 guidance very quickly shaped our interpretations of the law.

The COVID-19 combination "risk-factor" definition of disability:

Underlying Health Condition + Susceptibility to Complications from COVID-19 = Disability

Fear of or possible exposure to COVID-19. If an individual has no disability or impairment at all, given the definition above, an employer does not have to grant the employee an accommodation under the ADA for fear of getting the virus. The same is true for possible exposure to COVID-19. If, on the other hand, an individual has fear of COVID-19 because they have a recognized risk-factor disability, as seen in the definition of disability above, then the employee is still entitled to an accommodation for their disability. In that case, the fear is just a means of expressing a need for an accommodation for a recognized disability. Similarly, possible exposure to COVID-19 is not, by itself a disability, but an employer should be careful not to regard the employee as having a disability because a "regarded-as" status triggers the protections of the ADA.

Circumstance	**ADA Implicated?**
Employee fears COVID-19	No
Employee fears COVID-19 because the employee has a risk-factor disability	Yes
Employee is exposed to COVID-19	No
Employee is exposed to COVID-19 and regarded-as having a disability	Yes

Parker v. Cenlar FSB, No. CV 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021).

Jarvis Parker sued Cenlar FSB alleging violations of the Americans with Disabilities Act. Parker worked for Cenlar as a technical project manager. One day, Parker alerted his superior that he had possibly been exposed to COVID 19; in response to this, his supervisor suggested that Parker work remotely. However, Parker had to turn in his laptop to his supervisor so he was not able to complete any work. Seven days later, Cenlar fired Parker, citing lack of work as the sole reason for his termination. Parker alleged that Cenlar violated the ADA when it terminated him based on its perception that he may have been exposed to COVID 19. Parker also argued that Cenlar regarded

him as being disabled based on the possible exposure. The Court held that possible exposure to COVID 19 is not "a physical or mental impairment that substantially limits one or more major life activities", therefore, Parker could not state a proper ADA claim since possible exposure does not fulfil the requirement of a disability.

A COVID-19 positive test result without symptoms

A COVID-19 positive test result, without symptoms, is not a serious health condition under the FMLA or disability a disability under the ADA. Both definitions, provided above, rely on the employee suffering some health condition in order to be entitled to job-protected leave under the FMLA or non-discrimination and a reasonable accommodation under the ADA. The protections of the ADA and the FMLA fall short of providing any protection for employees who test positive for COVID-19. With the expiration of the Families First Coronavirus Relief Act of 2020, no federal or Texas state law protects employees from discrimination or termination for contracting COVID-19 absent a health issue. An employer can also exclude an employee from the workplace (with no requirement that any paid leave or job protection be granted) due to a positive COVID-19 test result because, as the EEOC has stated, they pose a direct threat to the health and safety of other employees.

VI. Continuing reasonable accommodations to employees with underlying health conditions

During the pandemic and over the past year, many employers have made accommodations, such as telework, rearranged office spaces, and temporary job restructuring for employees in response to COVID-19. The EEOC's guidance suggests, and it has been consistently advised, that employers should provide, absent undue hardship, reasonable accommodations for employees who, due to a preexisting disability, are at higher risk of severe health problems from COVID-19. This is a new concept within the interpretation of the ADA.

Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020).

An employee who had moderate asthma brought an action against employer after it refused to permit the employee to continue teleworking during the COVID 19 pandemic, alleging disability discrimination, failure to provide accommodation, and creation of a hostile work environment, in violation of the ADA. The employee moved for preliminary injunction to preclude termination of employment. The Court held the employee would likely prevail that asthma was a disability, that he was able to perform essential functions of his job with reasonable accommodations, that the employer did not reasonably accommodate the employee's asthma, that the employee was likely to suffer irreparable harm in absence of injunction, and that the balance of hardships weighed in favor of granting injunction. The Court granted preliminary injunction to preclude the termination of the employee.

But as the pandemic becomes less of a threat to employees, it is unclear how long employers have to keep accommodating employees solely based on increased risk of COVID-19 and under the combination risk-factor plus susceptibility definition of disability. To be clear, the EEOC stated that an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.[9] An employer does not have to continue providing an accommodation indefinitely as circumstances of COVID-19 change, but the employer should be able to show how the accommodation is no longer reasonable or now presents an undue hardship.[10] Reasonableness may be hard to disprove if an employee can perform all of their essential job functions with the accommodation. Telework is likely to be the most difficult and contentious accommodation that will arise with the return to "normal." Job restructuring, on the other hand, presumes that the essential function of the job were modified during COVID-19, and therefore, an accommodation that removed or modified job functions during the pandemic, will no longer have to be accommodated after the threat of COVID-19 is significantly reduced.

Additionally, an employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," meaning "significant difficulty or expense." When determining

[9] Question D.9.., U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Technical Assistance Questions and Answers - updated June 28, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
[10] Id. at Question D.10.

whether an accommodation would impose an undue hardship, the following factors are consider the following factors[11]:

- The nature and net cost of the accommodation.
- The overall financial resources of the employer.
- The number of employees employed by the employer.
- The number, type, and location of the employer's facilities.
- The employer's operation, including:
    - composition, structure, and functions of the workforce; and
    - geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.

Check out the Job Accommodation Network (JAN) for accommodation strategies related to COVID-19 at https://askjan.org/topics/COVID-19.cfm.

To claim undue hardship, an employer has to show that the accommodation causes more than a minimal cost, both monetary and to the operation as a whole. Extended paid leave or paid time off may be an example of an accommodation that might have been reasonable during COVID-19 but cause an undue hardship after the pandemic if it is a significant cost and/or disrupts the services provided by the employer.

As new and continuing employee accommodations arise during and after the pandemic, it is imperative that employers talk to their employees before making any final decisions. As a reminder, with any accommodation request, employers may:

- ask questions to determine whether the condition is a disability;
- discuss with the employee how the requested accommodation would assist them and enable them to keep working;
- explore alternative accommodations that may effectively meet their needs; and
- request medical documentation, if needed.

[11] *See* 42 U.S.C. § 12111(10)(B); *see also* 29 C.F.R. § 1630.2(p).

Burton v. Maximus Fed., No. 3:20CV955, 2021 WL 1234588 (E.D. Va. Apr. 1, 2021).

Burton sued her former employer alleging discrimination based on disability and race. She asserted claims under the ADA for retaliation, failure to accommodate, and harassment; and under the FMLA for retaliation, interference, and failure to accommodate. Maximus moved to dismiss Burton's complaint. Burton has fibromyalgia, rheumatoid arthritis, and Sjogren's syndrome. Burton claimed that she was harassed because of her medical conditions and that her supervisor told other employees not to sit by Burton and disregarded her concerns of COVID-19. Burton alleged that her employer never offered her accommodations that would have allowed her to cope with her medical conditions. Burton admitted, however, that she never asked for any accommodations. The Court dismissed Burton's claim and held that Burton failed to state a claim regarding her ADA allegations, and Burton failed to allege that she was a qualified individual with a disability. Although she noted her medical conditions, she never alleged that she could "perform the essential functions" of her job "with or without reasonable accommodation." The court also held that viewed in the light most positive to her case, Burton could not show that the "harassment" she claims to have suffered to be "physically threatening or humiliating" and that it did not affect her work in any substantive way.

VII. Continuing reasonable accommodations to employees with family members with underlying health conditions

It is likely that employers will continue to get some requests for accommodations such as continued telework on the basis that the employee has a family member with an underlying health condition and is more susceptible to complications of COVID-19 or who cannot get the COVID-19 vaccine. While employers are usually quick to point out that the ADA prohibits discrimination for the employee's own disability, they should not forget that the ADA also prohibits discrimination based on association. Specifically, the ADA says that disability discrimination may consist of "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or

association."[12] For example, the ADA makes it unlawful to refuse to hire an individual who has a child with a disability based on an assumption that the applicant will be away from work excessively. The ADA does not require a family relationship for an individual to be protected by the association provision.[13] The key is whether the employer is motivated by the individual's relationship or association with a person who has a disability.

Although this provisions seems to open the door, especially during COVID-19, to uncontrolled obligations on employers, the ADA does not require an employer to provide a reasonable accommodation to an employee because of their relationship or association with an individual with a disability. Therefore, an employer cannot discriminate but does not have to provide an accommodation under the association theory. For example, the ADA would not require an employer to modify its leave policy for an employee who needs time off to care for a child with a disability. However, an employer must avoid treating that employee differently than other employees because of their association with a person with a disability.

VIII. Pregnancy

It is still unclear what impact, if any, COVID-19 may have on pregnant females, but as with most circumstances, it is best not to assume that a pregnant employee needs an accommodation or differential treatment unless the employer is told otherwise. Even if the employer has the best of intentions or wants to protect the employee, the law does not permit differential treatment of pregnant employees, especially with regard to adverse employment actions. Employers who have pregnant employees should be aware that three federal employment laws may trigger accommodations for employees based on pregnancy.

First, pregnancy itself is not a disability under the ADA, but pregnancy-related medical conditions may themselves be disabilities under the ADA. If an employee makes a request for reasonable

[12] 42 U.S.C. § 12112(b)(4).
[13] U.S. Equal Employment Opportunity Commission, Questions & Answers: Association Provision of the ADA. https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada

accommodation, related to COVID-19 or otherwise, due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.[14]

Second, Title VII, as amended by the Pregnancy Discrimination Act, specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work.[15] A pregnant employee may be entitled to accommodations, job-restructuring, or leave to the extent provided for other employees who are similar in their ability or inability to work.

Lastly, remember that pregnant employees with medical conditions may be eligible for job-protected leave under the FMLA. Without regard to COVID-19, the same standards for establishing a medical certification for the necessity of leave would apply.

IX. Social Distancing

The term "social distancing" meaning avoiding large gatherings and maintaining distance (at least 6 feet) from others when possible is a term of art that was coined directly from the COVID-19 pandemic. Currently, the CDC still recommends social distancing measures in all indoor settings or where individuals are not vaccinated. Employers have developed strategies that promote social distancing including:

- Allowing flexible worksites (such as telework);
- Allowing flexible work hours (such as staggered shifts);
- Increasing physical space between employees at the worksite;
- Increasing physical space between employees and customers (such as a drive-through and partitions);
- Implementing flexible meeting and travel options (such as postponing non-essential meetings or events); and
- Delivering services remotely (e.g., phone, video, or web).

[14] Question J.2., U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Technical Assistance Questions and Answers - updated June 28, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
[15] Id.

Employers may continue social distancing measures for health and safety reasons even though case counts drop to minimal levels and a majority of employees are vaccinated. Employers may also be required to provide social distancing measures to employees with underlying health conditions as reasonable accommodations under the ADA, as previously discussed. It is too early to tell whether social distancing measures will become part of the design of future office spaces, become a health and safety best practice, be considered a job amenity for applicants, or just become a temporary emergency management solution.

Cleaning and disinfecting

The bottom line is that sick employees are costly to an organization. As a practical matter, excessive cleaning is a small price to pay when compared to the cost of paid leave, overtime for covering duties, or employee turnover.

X. Contact Tracing

Contract tracing is refers to the process of notifying contacts of exposure, addressing questions and concerns, referring for SARS-CoV-2 testing, encouraging self-quarantine, monitoring of symptoms, and assessing the need for additional supportive services during the quarantine period (14 days from last exposure).[16]

Check out the CDC's Contact Tracing Workflow in a non-US setting at https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/contact-tracing-workflow.html

A few caveats: Contact tracing works best when there are small numbers of cases because the process is many steps. For large numbers of cases, an employer may have to decide whether it is worth isolating only exposed cases or whether all employees should or could be sent home to telework. Also, employees who are fully vaccinated and those who have recovered from a previous infection with COVID-19 within the last 3 months, are unlikely to become infected and may not need to be considered contacts for contact tracing activities.

[16] Centers for Disease Control and Prevention, Operational Considerations for Adapting a Contact Tracing Program to Respond to the COVID-19 Pandemic in non-US Settings. https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/operational-considerations-contact-tracing.html

Contact Tracing Process

Employers are allowed to mandate that employees report if they have tested positive or been exposed to COVID-19 immediately. This is where employers start the contact tracing process. Upon notice of a positive case or exposure, a designated individual, usually with a role in Human Resources, will work to quickly inform the employee who has tested positive and any other exposed employees to quarantine or isolate and let them know when they can return to work.

The contract tracer should ask the employee if they had close contact with any other employees, meaning having been within 6 feet of the individual for a total of 15 minutes or more, sneezing or coughing in the vicinity, or direct physical contact. If the employee who tests positive has had close contact with any other employees, and those other employees are not fully vaccinated or have had COVID-19 themselves in the past 3 months, then those additional employees will need to quarantine as well.

Contact tracing does not need to happen if the employee is exposed to, but has not tested positive for, COVID-19. In that case, only the exposed employee would need to quarantine.

XI. Return to Work Protocols for COVID-19

Employers should have a procedure for how to deal with employees returning to work after exposure to COVID-19 or testing positive for COVID-19. The CDC and public health guidance recommends ending isolation and precautions for adults using either a symptom-based strategy or time-based strategy depending on the circumstances.[17]

Available data indicate that adults with mild to moderate COVID-19 remain infectious no longer than 10 days after symptom onset. Some adults with severe illness or severely immunocompromised patients may need to isolate beyond recommended time periods for normal adults.

[17] Centers for Disease Control and Prevention, ending isolation. https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html (updated March 16, 2021).

Return-to-work process for individuals with symptoms that have laboratory-confirmed COVID-19 or suspected of having COVID-19 for a symptom based strategy.

- An individual may end isolation:
  - At least 10 days have passed since symptoms first appeared; and
  - At least 24 hours have passed since recovery (having no fever without the use of fever-reducing medications); and
  - Other symptoms have improved (loss of taste and smell excluded).

Return-to-work process for individuals without symptoms that have laboratory-confirmed COVID-19 or suspected of having COVID-19 for a time-based strategy.

- An individual may end isolation:
  - At least 10 days have passed since the date of their first positive COVID-19 diagnostic test.
    - If the person develops symptoms after their positive test, they should use the symptom-based or test-based strategy.

Return-to-work process for individuals who were exposed to COVID-19 without wearing the appropriate personal protective equipment (PPE).

- CDC recommends a 14-day quarantine after exposure. If the individual does not develop any symptoms during the 14 days, they can return to work.

These rules and guidelines may change as more individuals get vaccinated.

XII. Paid Quarantine Leave

The short answer is that employers in Texas do not have to provide paid leave related to COVID-19 exposure unless the employer is a political subdivisions that employ fire fighters, peace officers, detention officers or emergency medical technicians.

During the Texas regular legislative session in 2021, HB 2073 amended Chapter 180, Local Government Code by adding Section 180.008 to require a political subdivision to develop and implement a paid quarantine leave policy for fire fighters, peace officers, detention officers, and

emergency medical technicians who are employed by, appointed by, or elected for the political subdivision and ordered to quarantine or isolate due to a possible or known exposure to a communicable disease while on duty.[18]

Though there is a requirement that a policy be made, it is up to the discretion of the political subdivision to develop and adopt a policy that it deems appropriate. Section 180.008 does not only apply to quarantine for COVID-19, but rather applies to exposure to a "communicable disease." Neither it nor Chapter 81 of the Texas Health & Safety Code outlines what constitutes a communicable disease although the Department of State Health Services does maintain a list for communicable diseases related to reporting requirements for schools. The list contains the flu, the common cold, and other more serious diseases. A policy does have to require that the leave be ordered by the employee's supervisor or the political subdivision's health authority. Leave ordered by other medical professionals is not included, although most supervisors would wisely take the advice of a medical professional. The policy must provide for reimbursement of reasonable lodging, medical, and transportation costs related to the quarantine. A year ago this may have been a greater impact, but it could be difficult for local governments to budget for such expenses. At the least, it would be wise to require proof and an approval process.

XIII. Workers Compensation and COVID-19

An employee is generally eligible for workers compensation if the employee can show that they sustained an injury or illness in the course and scope of employment. Given the nature of the long incubation period, unpredictable infection rate, and varying symptoms, it has been relatively difficult to prove that an employee who suffered from COVID-19 actually contracted it while at work.

The law provides for an exception to the proof requirement by a rebuttable presumption. Subchapter B of Chapter 607 of the Texas Government Code provides that certain diseases contracted by firefighters, peace officers, or emergency medical technicians are presumed to have been contracted while on duty for worker's compensation purposes. During the 2021 Texas regular legislative session, Subchapter B was amended to add "custodial officer" and "detention officer"

[18] Full text of H.B. 2073 (87R), https://capitol.texas.gov/tlodocs/87R/billtext/html/HB02073F.htm

to the list of eligible employees for the presumptions and add COVID-19 to the list of diseases for which the presumption may apply.

The new COVID-19 presumption applies only when the employee:

- is employed during a gubernatorially-declared disaster and contracts the disease during that time;
- is employed on a full-time basis and diagnosed with COVID-19 using a test authorized or approved by the U.S. Food and Drug Administration;
- had been on duty within 15 days before being diagnosed;
- if deceased, had been diagnosed using a U.S. Food and Drug Administration-approved test or by another means, including by a physician; and
- if deceased, had been on duty within 15 days before the diagnosis, began to show symptoms, or was hospitalized for such symptoms.

The bill expires September 1, 2023, but has some retroactive effect. For example, an employee may file a new claim up until December 14, 2021, for contracting COVID-19 between March 13, 2020, and June 14, 2021. Also, an employee whose claim was denied during that timeframe is entitled to request reprocessing of the claim under the new presumption as long as the request is filed no later than June 14, 2022.

XIV. Mandatory COVID-19 vaccine policies

The EEOC issued guidance stating that federal laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to certain exceptions and accommodations.[19]

But that guidance does not directly address the question of whether employers may mandate vaccines authorized only for emergency use (not full approval) under the U.S. Food and Drug

[19] Question K.1.., U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Technical Assistance Questions and Answers - updated June 28, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Administration (FDA), such as the COVID-19 vaccines.[20] In addition, government employers have to interpret the Governor's Executive Order GA-35 which suspends Section 81.082(f)(1) of the Texas Health and Safety Code (a health authority has control over the administration of communicable disease control measures) to the extent necessary to ensure that no governmental entity can compel *any individual* to receive a COVID-19 vaccine administered under emergency use authorization.[21] Whether the Order includes a governmental entity as an employer and prohibits mandating government employees get the vaccine is ripe for interpretation.

Bridges v. Houston Methodist Hospital, et.al., Civil Action H-21-1774, U.S. Southern District of Texas, Order on Dismissal (Filed 06/12/21).

On April 1, 2021, Houston Methodist Hospital announced a policy requiring employees be vaccinated against COVID-19 by June 7, 2021, starting with the leadership and then inoculating the remaining workers, all at its expense. Bridges and 116 other employees sued to block the vaccine requirement and the terminations. The employees argued that Methodist was unlawfully forcing its employees to be injected with one of the currently available vaccines or be fired. The hospital moved to dismiss the case. On June 12, 2021, the Court held Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker. To succeed on a wrongful termination claim, the Plaintiffs must show that they were required to commit an illegal act — one carrying criminal penalties, they refused to engage in the illegality, they were discharged, and the only reason for the discharge was the refusal to commit an unlawful act. Plaintiffs did not specify what illegal act they had refused to perform, but in the press-release style of the complaint, Bridges stated that she refused to be a "human guinea pig." Receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties. Plaintiffs refused to accept inoculation that, in the hospital's judgment, will make it safer for its workers and the patients in its care. The Court held that Plaintiff's claims failed and that the hospital's requirement of the vaccination is consistent with public policy.

[20] Id. at Section K. ("It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach. Individuals seeking more information about the legal implications of EUA or the FDA approach to vaccines can visit the FDA's EUA page.")

[21] 2021 Texas Executive Order No. GA-35 relating to COVID-19 vaccines and the protection of Texans' private health information.

Some employers are adopting a more cautious legal approach to requiring vaccines by encouraging employees to get vaccinated on a voluntary basis.

Vaccine Passports

While the EEOC's guidance allows employers to obtain proof of vaccination (a "Vaccine Passport"), GA-35 prohibits political subdivisions from enforcing any rule that requires a vaccine passport to enter any place, presumably including the workplace.[22]

XV. Exceptions and accommodations to mandatory vaccine policies

There are three major exceptions that employers should keep in mind when establishing mandatory vaccine policies. Those are disability accommodations under the ADA, religious exceptions, and pregnancy protections under Title VII.

Reasonable accommodations for these exceptions may involve logistical measures, such as socially distanced workspaces to reduce potential COVID-19 exposure or instituting temporary job restructuring or rescheduling. Employers may also implement reasonable accommodations by exempting these employees from the mandatory requirement.

Disability

Under the ADA, employers may require employees to meet qualification standards that are "job-related and consistent with business necessity," which encompasses COVID-19 vaccinations. But if an employer-mandated vaccination policy "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" that cannot be eliminated or reduced by a reasonable accommodation. If a reasonable accommodation exists, it must be implemented. The "direct threat" analysis revolves around the (1) duration of risk posed by the employee, (2) nature and severity of the potential harm caused by their physical presence at the work site, (3) likelihood of the potential harm, and (4) imminence of the potential harm. If an employee cannot get the mandatory vaccine because of the employee's disability, the employer should engage in the interactive process and determine whether a reasonable accommodation exists. This could include accommodations such as telework or

[22] Id.

socially distanced workspace, or it could just include an exception to the mandatory vaccine policy itself.

Religious Beliefs

Title VII requires employers to reasonably accommodate employees who have a "sincerely held religious belief" or practice that prevents them from being vaccinated, unless the accommodation would cause an "undue hardship" for the employer. According to the EEOC, employers should assume that a sincerely held belief underlies an employee's request for religious accommodation. However, if an objective basis exists for questioning the religious nature or sincerity of the belief or observance, the employer may request additional information from the employee.

Horvath v. City of Leander, 946 F.3d 787 (5th Cir. 2020), as revised (Jan. 13, 2020).

This case addresses with vaccine requirements and what employers may do to make reasonable accommodation for those who do not want to receive vaccines due to medical or religious reasons. Horvath, an ordained minister, did not take vaccines according to his religious tenant. Horvath was employed as a pump driver for the city fire department when the city started to require TDAP vaccinations for all firefighters. Horvath then made a request to be exempt from the requirement due to his religious belief. The City presented Horvath with a choice to avoid getting the vaccine. He could either take a job as a fire code inspector, at the same pay rate

, or he would have to wear a respirator during his shift as a pump driver. Horvath did not accept either accommodation and was fired for insubordination. Horvath sued, claiming that the City violated his 1st amendment free exercise rights. The court held that since Horvath did not accept the very reasonable and generous accommodations, the City was within its rights to terminate his employment. The court found that the City did not base its decision to terminate on the fact that Horvath did not want the vaccine, but rather that he did not choose either accommodation to remain employed.

Pregnancy

Employees who are not vaccinated because of pregnancy (under Title VII) or pregnancy-related conditions (under the ADA) may be entitled to adjustments to keep working, if the employer makes

modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.[23]

XVI. Concerns not connected with employee health issues – discrimination and harassment

It is important for employers to keep in mind that navigating the COVID-19 and post-COVID-19 workplace extends beyond employee health issues. Discrimination and harassment may impact the workplace moving forward in both direct and indirect ways. As employees return to normal operations and employers are able to host more in-person trainings, this is a good time to refresh employees' minds regarding what is discrimination and harassment and ways to prevent it in the workplace.

National origin discrimination

The public saw a rise in Chinese and Asian-American discrimination and harassment as a result of the origins of COVID-19. Associating an individual with the cause of the pandemic or making hostile remarks is a form of harassment that employers must try to prevent or take actions to remedy.

Age discrimination

Many of the initial concerns regarding the number of hospitalization and deaths as a result of COVID-19 focused on older populations. Employers may think that this means that hiring older workers or allowing them in the workplace puts the employer at risk. It is unlawful to treat employees differently solely based on age, and the emergence of COVID-19 does not change that.

Sex discrimination

During the pandemic, women, especially minority women, suffered far greater job loss than men during the same timeframes.[24] The reasons are not clear, but the impact of COVID-19 has

[23] Question K.2.., U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Technical Assistance Questions and Answers - updated June 28, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

[24] See Karageorge, Eleni X."COVID-19 recession is tougher on women." U.S. Bureau of Labor Statistics Monthly Labor Review September 2020 (https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm); see also Ewing, Nelson, Claire. "All of the Jobs Lost in December Were Women's Jobs." National Women's Law Center, January 2021 (https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf).

disproportionately affected women in the workplace. While employers cannot control female employees' personal choices, they can take steps to reduce COVID-19 response measures that have a disparate impact on their female employees.

CONCLUSION

COVID-19 has brought both challenges and opportunities for employers over the past year. Some people say that the workplace will never truly be the same, but it is difficult to tell in what ways the response to COVID-19 will shape the future. Like the phrase "hindsight is always 20/20," it is hopeful to think that the lessons will one day be clear.