

EMPLOYERS AND LAWYERS,

WORKING TOGETHER

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Hot Topics in Discrimination and Harassment: Where Future Lawsuits May Arise

Presented By:

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Agenda

- Remote Work and the Pandemic
- Americans with Disabilities Act (ADA) Issues
- Sex Harassment
- Vaccine Mandates
- Religious Accommodation Issues
- Age Discrimination Claims

Remote Work and the Pandemic

- Nine months into the pandemic 41.8% of the workforce remained fully remote
- An estimated 26.7% of the workforce will remain remote by the end of 2021
- By 2025, an estimated 36.2 million Americans will be remote workers, nearly double pre-pandemic numbers

Remote Work and the Pandemic

- Wage and Hour (FLSA and state law)
- Workplace Safety (Workers' Comp and OSHA)
- Trade Secrets and Data Privacy
- Taxation Issues
- Non-Discrimination Issues

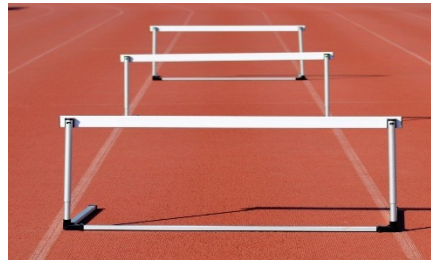
Remote Work and the ADA

- By far, the largest way ADA claims have been impacted by the pandemic are through failure to accommodate claims



Remote Work and the ADA

- The ADA requires that employers provide reasonable accommodations to qualified individuals with disabilities unless doing so would create an undue hardship
- Basic idea = reasonably remove unnecessary obstacles from a person with a disability who can otherwise perform the essential functions of their job



Remote Work and the ADA

- Nothing about the pandemic alters ADA accommodation obligations/analysis:
 - Is the employee a qualified individual with a disability;
 - Have they made a request for accommodation due to that disabling condition;
 - Is the request reasonable; and
 - Are there other reasonable accommodations available that the employer would prefer?

Remote Work and the ADA

- “Long Covid” as a Disability
 - CDC – symptoms lasting weeks/months
 - fatigue, “brain fog,” heart palpitations, joint or muscle pain, dizziness, and depression or anxiety
 - HHS/DOJ - long COVID is a physiological condition that affects one or more body systems and can cause physical or mental impairment
 - See new HHS/DOJ guidance
 - EEOC - agrees long COVID could be a disability
 - Guidance forthcoming

Remote Work and the ADA

BEFORE WE GO FURTHER: Is remaining at the worksite an essential function of the job?

- If not, no conflict – grant accommodation
- If so
 - What do our job postings/ job descriptions say....
 - Have others in the same or similar positions been allowed to work remotely?
 - Has the employee proven, under a health order requirement for all employees to work remotely, that they can perform the essential functions of the job while working remotely?*
- If working on-site is preferred, then is there an on-site accommodation available that allows the employee the ability to perform the essential functions of the job?

Remote Work and the ADA

** KEY QUESTION: Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an accommodation?

No.

Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation.

If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.

Remote Work and the ADA

Q: What if there IS a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace?

A: The employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation **does not have to be granted** if it requires continuing to excuse the employee from performing an essential function.

Remote Work and the ADA

The ADA **never** requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

- The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, **does not mean** that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.
- These are fact-specific determinations.
- The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

Remote Work and the ADA

General Points to Remember About ADA Accommodations:

- An employer need **not** provide the exact accommodation the employee is asking for, only a *reasonable* one
- The amendments to the ADA were meant to broaden the definition of a “qualified individual with a disability,” making it very tough to argue that an individual is not disabled
- Employers **MUST** engage in the interactive process – no blanket denials
- Document everything
- An undue hardship is only met when the accommodation would substantially disrupt operations

Remote Work and the ADA

Undue Hardships Under the ADA – Pandemic’s Impact (Beyond Remote Work):

- Undue hardship considerations that may be relevant to determining whether a requested accommodation poses “significant difficulty” during the pandemic:
 - May be more difficult to conduct needs assessment or acquire certain items
 - Delivery may be impacted
 - May be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temp workers for specialized positions
 - Sudden loss of employer’s income stream
 - Amount of discretionary funds available

Remote Work and Sex Harassment

- Refresher: Sexual harassment comes in two basic forms
 - Quid pro quo, where enduring the offensive conduct becomes a condition of continued employment
 - Hostile work environment, where the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

Remote Work and Sex Harassment

■ Some Examples:

- *Garrett v. Serenity Health and Wellness Center, LLC*, Case No. G-4801-CI-0202101791-000 (Ct. Com. Pl. Ohio, April 13, 2021). Plaintiff alleges that, along with touching, sexual requests, and sexual questions, she was also sent numerous kissy face emojis.
- *Cohen v. Retrofete, Inc. et al.*, Case No. Unassigned (Sup. Ct. NY, March 01, 2021). Plaintiff alleges that coworker's misogynistic outbursts occurred in Zoom meetings in front of everyone and that he came back from remote work early in order to take over her job duties.

Remote Work and Sex Harassment

■ More Examples:

- *Pagan v. Liberty Risk Management, Inc., et al.*, Case No. 602847/2021, (Sup. Ct. NY, February 19, 2021). Plaintiff alleges that owner, among a long list of sexual harassment, refused her requests for remote work during the pandemic so he could be alone with her in the office.
- *Delair v. CSU, San Bernadino et al.*, Case No. SC-2021-17042 (Super. Ct. Cal., March 09, 2021). Plaintiff alleges that coworker sent her numerous text messages likening his genitals to his “corona” and inviting her to look. At work, he also engaged in bear hugging her and attempting to touch her to give her COVID-19.

Remote Work and Sex Harassment

- Three primary issues to look out for with regard to COVID-19, remote work, and sex harassment:
 - Increased online, social media, and “after hours” sexual harassment
 - Remote work as a withheld benefit (quid pro quo)
 - Denial of remote work in order to “be alone” in the office with the victim

Remote Work and Sex Harassment

■ Takeaways:

- While a string of emojis or an outburst on Zoom might not be sufficient to find a hostile work environment, when unchecked and coupled with other behavior it can be part of a pervasive environment
- Keep an eye out for one person being singled out to be alone with a manager
- Train everyone to be on alert for digital harassment, how to stand up against it, and how to report it
- Encourage supervisors to let remote workers be off the clock when they are off the clock (and of course – if non-exempt, that’s even more critical for other reasons!)
- Any dress codes for Zoom or in Teams Meetings should be for everyone and should be gender neutral

Vaccine Mandates

■ Federal Level

- **Vaccine Mandates for Federal Contractors - Exec. Order 14042**
- Covered federal contractor employees must be vaccinated against COVID-19 by **December 8, 2021**. (Unlike the Occupational Safety and Health Administration's [OSHA] pending COVID-19 emergency temporary standard [ETS], there is not a testing alternative.) Accommodations may be available for employees with disabilities or sincerely held religious beliefs.
- Recent guidance covers "service contracts and contract-like instruments" valued at more than \$250,000, but does not cover "subcontracts solely for the provision of products." Requirements of the guidance flow down to lower-tier subcontracts.
- The vaccination requirement covers employees "working on or in connection with a covered contract or working at a covered contractor workplace." This includes some remote employees and employees who might not even be working on or in connection with a covered contract.
- The guidance states that covered contractors subject to OSHA's forthcoming COVID-19 ETS or "other workplace safety standards" must still comply with the COVID-19 protocols set forth in the guidance.

Vaccine Mandates

■ Federal Level

- Forthcoming OSHA Emergency Temporary Standard
- Employers with 100+ employees
- Vaccinated *OR* weekly negative test.

State Law Issues

- **Texas – EO No. GA-40:** Executive Order (EO) No. GA-40, prohibiting any entity in Texas from requiring any individual, including an employee, to receive a COVID-19 vaccination if that individual objects to the vaccination “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”
- Conflict between EO No. GA-40 and federal contractor vaccine mandate. Challenges to come.

State Law Issues

- **Arkansas** – Arkansas passed legislation yesterday (to go into effect in 90 days) that creates an objection and testing alternative to mandatory vaccination. See SB 739

<https://www.arkleg.state.ar.us/Bills/Detail?id=SB739&ddBienniumSession=2021/2021R>

- **Montana** - Montana prohibits employers from mandating vaccines with only emergency use authorization and prohibits employment discrimination based on vaccination status.

Vaccine Mandates

- Biggest current area for ADA/Religious Accommodation Issues
- Under Title VII and the ADA, employer may mandate COVID vaccine *subject to* reasonable accommodation under the ADA and Title VII.
- In practice, most employers have been relatively liberally granting these.

Most Common Issues

- **Lots** of Religious Accommodation Requests
 - mRNA nature of vaccine & fetal cells
 - Johnson & Johnson v. Moderna/Pfizer

Religious Accommodation Requests

- Title VII prohibits employers from denying a requested reasonable accommodation of an employee's *sincerely held religious belief or practices* if accommodation will not impose more than a *de minimis* cost or burden on the business
 - “To require [defendant] to bear more than a *de minimis* cost in order to give [plaintiff] Saturdays off is an undue hardship.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 2277, 53 L. Ed. 2d 113 (1977)

The Steps to the Process – Religious Accommodation

- Does the person have a belief that is religious?
 - Is the belief sincerely held?
 - Does the belief conflict with a job requirement?
 - Is there a reasonable accommodation that can be made that would enable the employee to do the job, without creating undue hardship?
- If the answer is “no” to any question → **no accommodation** is legally required.
 - If the answer is “yes” to all questions → an accommodation is required.

What Is Religion, Anyway?

EEOC Position

- The definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar.
- Includes moral or ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views



Step I: Is the Belief Religious?

- Do the employee's beliefs address fundamental and ultimate questions having to do with deep and imponderable matters?
- How comprehensive is the employee's religion? Is it a belief system or comprehensive teaching?
 - Particularly, does it address aspects of life other than vaccines?
- Are there outward signs of religion?
 - E.g., formal services, clergy, holidays?



Step I: Is the Belief Religious?

■ General Questions

- What other beliefs do you hold related to the COVID-19 vaccine? Political beliefs?
- Do you believe it is effective? Harmful? Unsafe?
- What are things you've read about the COVID-19 vaccines that have formed your beliefs?
- Would you say your concerns with receiving the vaccine are more related to the religion you follow, or to other concerns about the vaccine? In what way?
- When did you start to follow this religion?
- Who else follows the religion?
- Does the religion have an "official stance" on vaccines?
- When did it espouse that? Can I find a copy of its official stance?

What Isn't Religious?



Step 2 --“Sincerely Held”



Religious Exemption Attestation for Covid-19 Vaccine

Based upon your religious exemption request, we ask that you complete the below attestation. This will help to validate your understanding of the ubiquity of fetal cell use in the testing and development of common medicines and consumer products and support your claim of a “sincerely held belief”. The following is a list of common medicines that have used fetal cells in their development. This is a commonly used and available, but not all inclusive list of every day medicines that fall into the same category as the Covid-19 vaccine in their use of fetal cell lines:

Tylenol	Ibuprofen	Benadryl	Claritin
Pepto Bismol	Maalox	Sudafed	Zoloft
Aspirin	Simvastatin	Albuterol	Suphedrine
Tums	Ex-Lax	Preparation H	Prilosec OTC
Lipitor	Zocor	Enbrel	Azithromycin
Senokot	Zostavax	MMR Vaccine	Varilrix
Xigris	HIV-1	Acetaminophen	Havrix
Motrin	Tylenol Cold & Flu		

I truthfully acknowledge and affirm that my sincerely held religious belief is consistent and true and I do not use or will use any of the medications listed as examples or any other medication (prescription, vaccine, or over the counter medication) that has used fetal cell lines in their development and/or testing.

I also truthfully affirm that I will abide by the vaccine accommodation requirements and understand that failure to abide by the accommodation requirements will subject me to disciplinary action up to and including termination of employment for failure to adhere to the



EEOC – Insider Info

- Drastic increase in these types of potential charges
- Some investigators reported that these were now approaching two thirds of their intakes
- Most reported that the cases were coming mainly from health care providers

EEOC – Insider Info

- All of the investigators interviewed expressed cynical attitudes toward the new charges –
 - They asked “carefully” whether the individual had taken other vaccines, how often they consulted God about decisions, or what other toxins they might not have a problem with putting in their “temples”
 - They inquired into how their religious belief could be just about this vaccine
 - Some directly asked whether this was about a religious belief or a political, philosophical, or moral belief
 - They inquired how they came to their “religious” belief and even asked about how they got their materials and/or citations

EEOC – Insider Info

- Investigators interviewed agreed that the cost of testing as an accommodation, if sufficiently high enough, could easily qualify as an undue burden
- Two Themes Kept Coming Up As Guaranteed Cause –
 1. Employers with blanket denial or unpaid leave policies; and
 2. Employers who deny accommodations to remote workers

EEOC – Insider Info

The EEOC is by and large handling this influx of cases by creating a suspension hold on the cases –

- The investigators all complained to me that there was no current guidance on how to handle these cases
- Headquarters is waiting on court decisions to develop the agency's approach – in particular, they mentioned and were aware of *A. v. Hochul*, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021)
- In the meantime, cases filed are being put on hold and many investigators are suggesting Complainants wait to file

EEOC – Insider Info

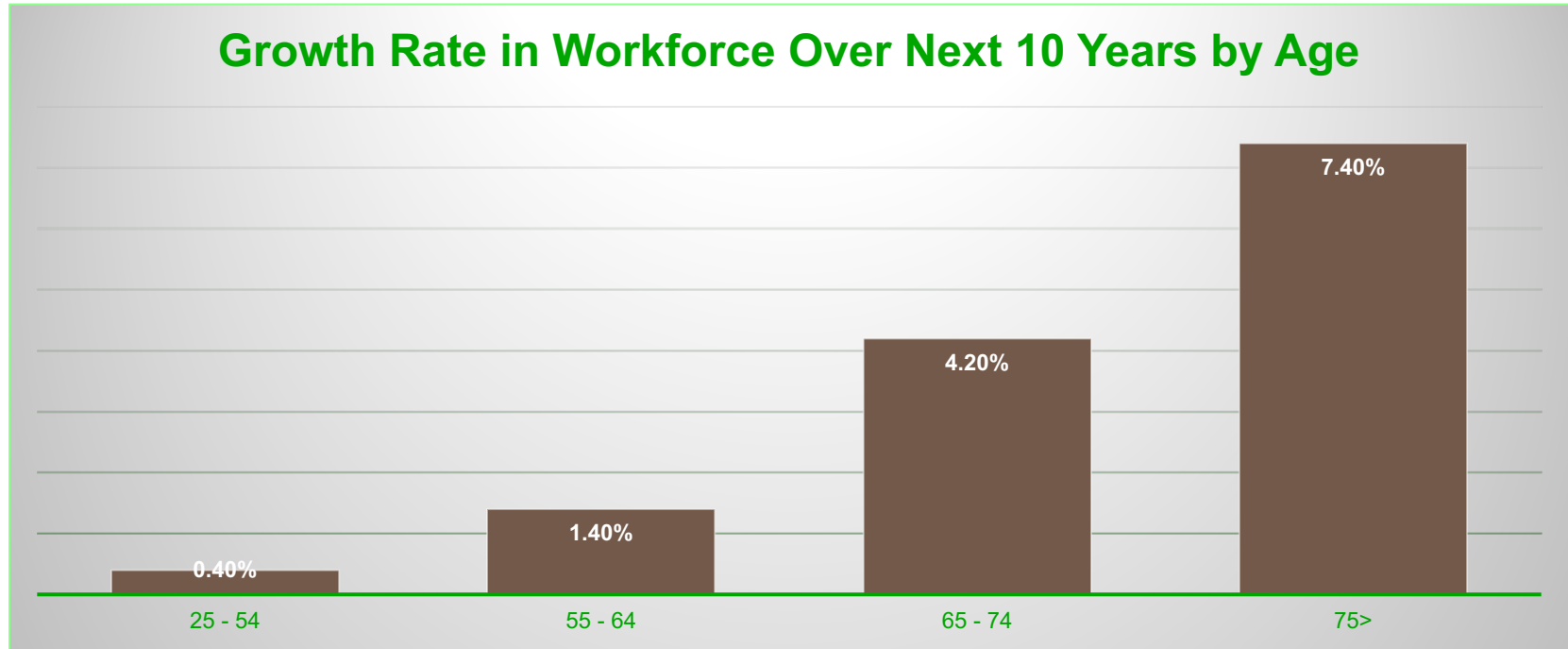
- Keep an eye on the New York case
- Be prepared (and prepare clients) for the coming deluge of cases currently on hold
- Undue hardship is still the gold standard defense and additional iterations may become relevant
- Have an interactive process and document it – do not get caught holding the ball
- Avoid the look of a blanket policy
- Investigators appear to be more sympathetic to sincerity and religiosity inquiries – they are asking the same questions
- None of this is certain and the guidance could change everything...

Age Discrimination and COVID-19

- Federal, state, and local laws ban employment discrimination because of age (usually 40 years of age and above)
 - These laws have become more important as time goes on since the growth rates for older workers keeps increasing

Age Discrimination and COVID-19

Growth Rate in Workforce Over Next 10 Years by Age

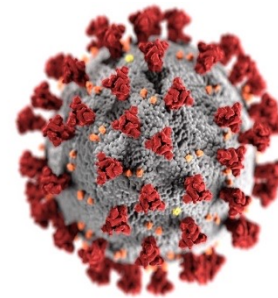


Age Discrimination and COVID-19

- In age claims, a plaintiff must show “that age was the “reason” that the employer decided to act.”

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)

- But inadvertently, the pandemic set up what appears to be just such a possibility for age discrimination cases



Age Discrimination and COVID-19

- *Shiohama v. Sensorex Corporation, et al.*, Case No. 30-2021-01193696 (Super. Ct. Cal., April 2, 2021). Plaintiff alleges that Defendant eliminated her job due to COVID-19 as a pretext for discrimination due to her age, 67, when she asked for the ability to work from home due to her age, COVID-19 symptoms, and high risk for severe illness. She was excluded from training on remote work and then terminated due to a false slowdown.



Age Discrimination and COVID-19

- The above cases follow a very similar fact pattern:
 - Plaintiff is well over 40, usually over 60
 - They are laid off (sometimes not rehired), sometimes after the need for remote work
 - Younger individuals are retained (sometimes rehired) to do the same or part of the same duties that are allegedly no longer needed
 - They all share COVID-19 and its effects as a possible reason other than age for the employers' actions

BUT...

Age Discrimination and COVID-19

- Underneath this possible reason is the following:
Older adults are more likely to get severely ill from COVID-19. More than 80% of COVID-19 deaths occur in people over age 65, and more than 95% of COVID-19 deaths occur in people older than 45.
- We have heard this CDC guidance since the start of the pandemic and it continues to be true even now.

Age Discrimination and COVID-19

- But is using it as a reason to eliminate older workers discriminatory?



Age Discrimination and COVID-19

- According to the EEOC – Yes
 - The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.
 - EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Technical Assistance Questions and Answers, H.1 (last updated December 16, 2020)



Age Discrimination and COVID-19

Takeaways:

- Conduct layoffs and job eliminations for business reasons divorced from age considerations
- Employers need not, but can if they want, offer flexible remote work options to older workers who are at risk according to the CDC
- But do not swing too far toward benevolence – wait to be asked, do not exclude an older worker “for their own good”

Pandemic's Impact on Discrimination and Harassment Claims

- Has the pandemic created new COVID-related causes of action?
 - Harassment and other claims based on the virtual and remote work environments (think about the electronic discovery ...)
 - Disability claims based on return-to-work policies
 - Claims based on layoffs and recalls (why me? or why not me?)
 - Add-on COVID-related “whistleblower” claims

Pandemic's Impact on Discrimination and Harassment Claims

- How has the pandemic impacted the litigation of these claims?
 - Number of lawsuits being filed
 - How courts are handling existing litigation
 - Ramifications for future litigation
 - Is “virtual litigation” here to stay?
 - Effect on settlement timing and amounts
 - Related changes to settlement strategy

Practical Tips for Avoiding Litigation

- Create and enforce policy and protocols for virtual and remote work environments
- Documentation, documentation, and documentation of decisions
- Have clear criteria for deciding who to layoff and recall
- Create protocols for accommodation requests from employees returning to the office
- Follow your COVID Prevention Plan

THANK YOU!

Thank You!!

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