



## Navigating COVID-19 and Post-Pandemic Employment Law Considerations: Current Status of COVID-19 in the Workplace

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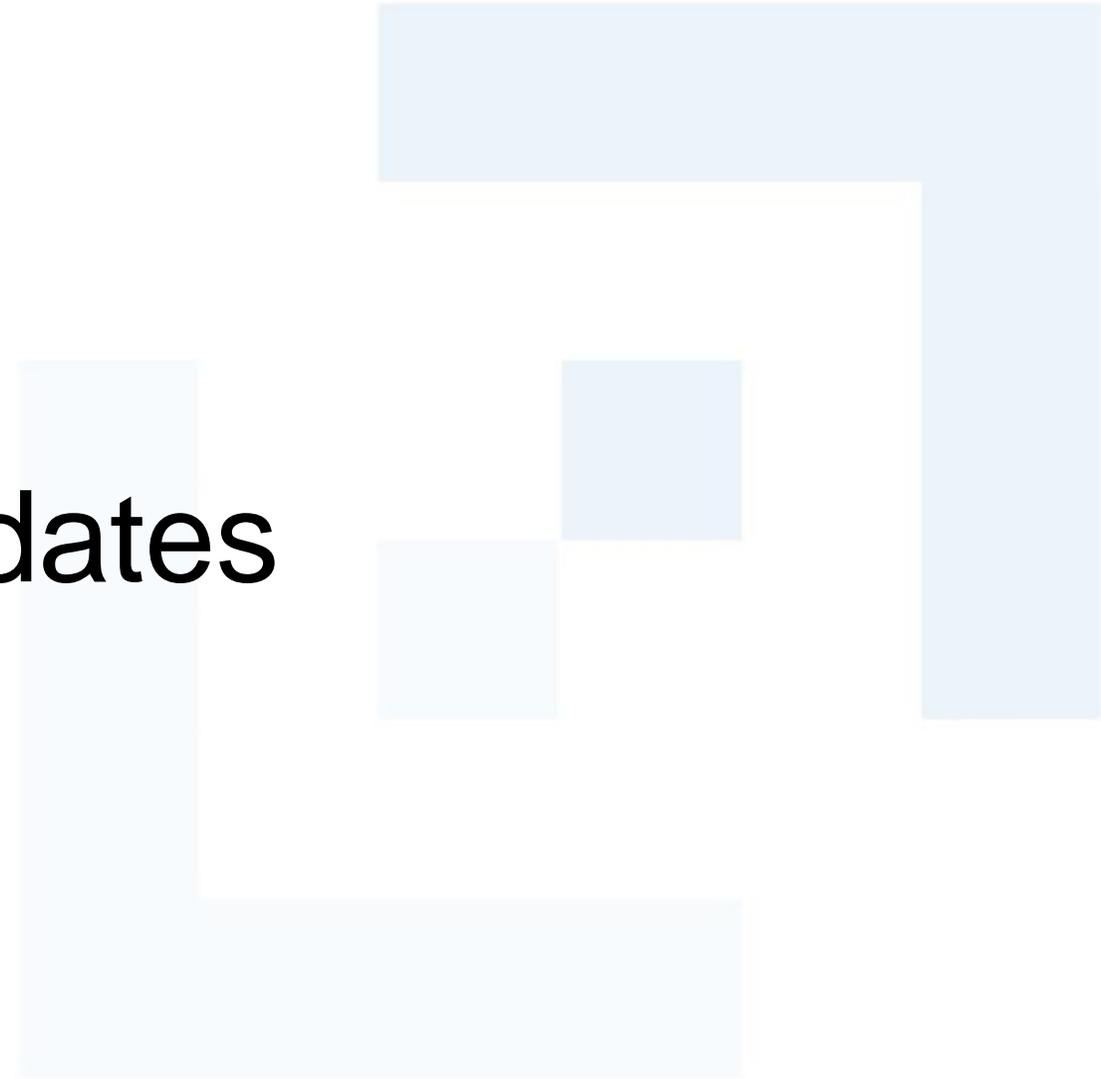
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# Outline

- Workplace Safety
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    - Employer Federal Mandates: Where are we now?
    - OSHA ETS
    - CMS Mandate
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# Employer Federal Mandates



# OSHA Emergency Technical Standard

- Large (100+ employees) employer standard
- Mandatory vaccination or vaccinate or test policy
- Supreme Court stayed January 13, 2022, noting that the OSH Act empowers the agency to “set *workplace* safety standards, not broad public health measures.” *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 21A244, 2022 WL 120952 (U.S. Jan. 13, 2022).

# OSHA Initial Response

## EMERGENCY TEMPORARY STANDARD

### COVID-19 Vaccination and Testing ETS



#### Statement from Secretary of Labor Marty Walsh on Supreme Court ruling on OSHA emergency temporary standard on vaccination, testing

(January 13, 2022)

**WASHINGTON** – U.S. Secretary of Labor Marty Walsh issued the following statement on the Supreme Court ruling on the department's Occupational Safety and Health Administration's emergency temporary standard on vaccination and testing:

"I am disappointed in the court's decision, which is a major setback to the health and safety of workers across the country. OSHA stands by the Vaccination and Testing Emergency Temporary Standard as the best way to protect the nation's workforce from a deadly virus that is infecting more than 750,000 Americans each day and has taken the lives of nearly a million Americans.

"OSHA promulgated the ETS under clear authority established by Congress to protect workers facing grave danger in the workplace, and COVID is without doubt such a danger. The emergency temporary standard is based on science and data that show the effectiveness of vaccines against the spread of coronavirus and the grave danger faced by unvaccinated workers. The commonsense standards established in the ETS remain critical, especially during the current surge, where unvaccinated people are 15-20 times more likely to die from COVID-19 than vaccinated people. **OSHA will be evaluating all options to ensure workers are protected from this deadly virus.**

"We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation.

"Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause."

# OSHA Withdrawal of ETS as Temporary Standard

- “Although OSHA is withdrawing the vaccination and testing ETS as an enforceable emergency temporary standard, the agency is not withdrawing the ETS as a proposed rule.”
- Effective January 26
- Focus will be initially on a healthcare standard

# What now?

- “Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.”
- In addition to health care, industry standards may be presented for crowded or cramped workplaces

# CMS Vaccination Mandate

- Mandates vaccines except for remote workers
- Requires employers to consider medical and religious exemptions
- Upheld because “healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting.” *Biden v. Missouri*, No. 21A240 and 21A241, slip op. at 6.

# CMS Mandate: What does it Mean?

- If you are a CMS covered employer, the deadlines for compliance vary depending on what state you are in.

**January 27**

California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin

**February 14**

Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, Wyoming

# Who does CMS Mandate apply to?

- Vaccination requirement is applicable to all staff, regardless of clinical responsibility or patient contact
  - Includes students, trainees, volunteers, independent contractors, and others who enter the facility for hospital purposes (such as physicians with staff privileges)
  - Does not apply to full time telehealth workers or fully remote employees
  - Does not apply to infrequent, ad hoc, non-health care service providers

Source: <https://www.jointcommission.org/standards/standard-faqs/hospital-and-hospital-clinics/leadership-ld/000002376/>

# Exemptions and accommodations

- In accordance with federal law
  - States may have certain requirements
- Medical exemptions require specific documentation that CMS surveyors will review for completeness, including:
  - Which vaccines are contraindicated
  - Recognized clinical reasons for contraindications
  - Statement by practitioner recommending exemption based on recognized clinical reasons for contraindications

# Other

- Fully vaccinated means two weeks post primary series (no booster required as of now)
- Policy and procedure requirements
  - Tracking and documenting vaccine status and booster status
  - Exemption request process
  - Tracking and documenting exemptions granted
  - Process to ensure additional precautions for non-vaccinated status
  - Process to ensure tracking and documenting needed any required delays in vaccination

# Federal Contractor Mandate

- Currently stayed nationwide
- Many federal contracts have clauses included
- Subcontracts may have clauses already agreed to between private parties
- Outcome of litigation and timing of rulings are uncertain

# Employer Policies

- Inquiries
- Mandate
- Vaccinate or Test
- Incentives

# Vaccination Status Inquiries

- HIPAA does not apply in employment setting (common misconception)
- DHS says the HIPAA privacy rule does not apply when an individual is asked about their vaccination status by an employer
- But vaccination status and records are “confidential medical information” under ADA
  - Limit sharing of information to those employees with a “need to know”
  - Discourage employees from asking their co-workers
  - Be careful when clients and contracting parties ask for this information

# Vaccines: Framework for Analysis

- OSHA General Duty Clause
  - Employer obligation to maintain health and safety in the workplace (note OSHA statement regarding enforcement)
- EEOC states vaccines are not a “medical examination” under ADA
  - However, EEOC notes that *screening questions* are likely to elicit medical information and/or disability related information.
  - Vaccine status is confidential medical information under ADA.

# Vaccine Incentives

- If the COVID-19 vaccine is obtained in the community, then employer may lawfully (under EEO law) provide monetary or gift card incentives to employees
- Consider employee benefit concerns
  - Are gift cards taxable income?

# Vaccine Incentives

- If the employer (or the employer's agent, such as a health insurer) is providing the vaccine, then incentives must not be so large as to create a "coercive" environment.
- But what does this actually mean?

# Vaccine Incentives

- Employers also cannot offer incentives for employer-administered vaccination of family members.
- Why? Pre-vaccination collection of family medical information
- GINA prohibits incentivized collection of genetic information

# Incentive Issues

- Must the employer provide those who seek accommodations (due to medical, pregnancy or religious accommodation) with an incentive if those who are vaccinated are provided an incentive?

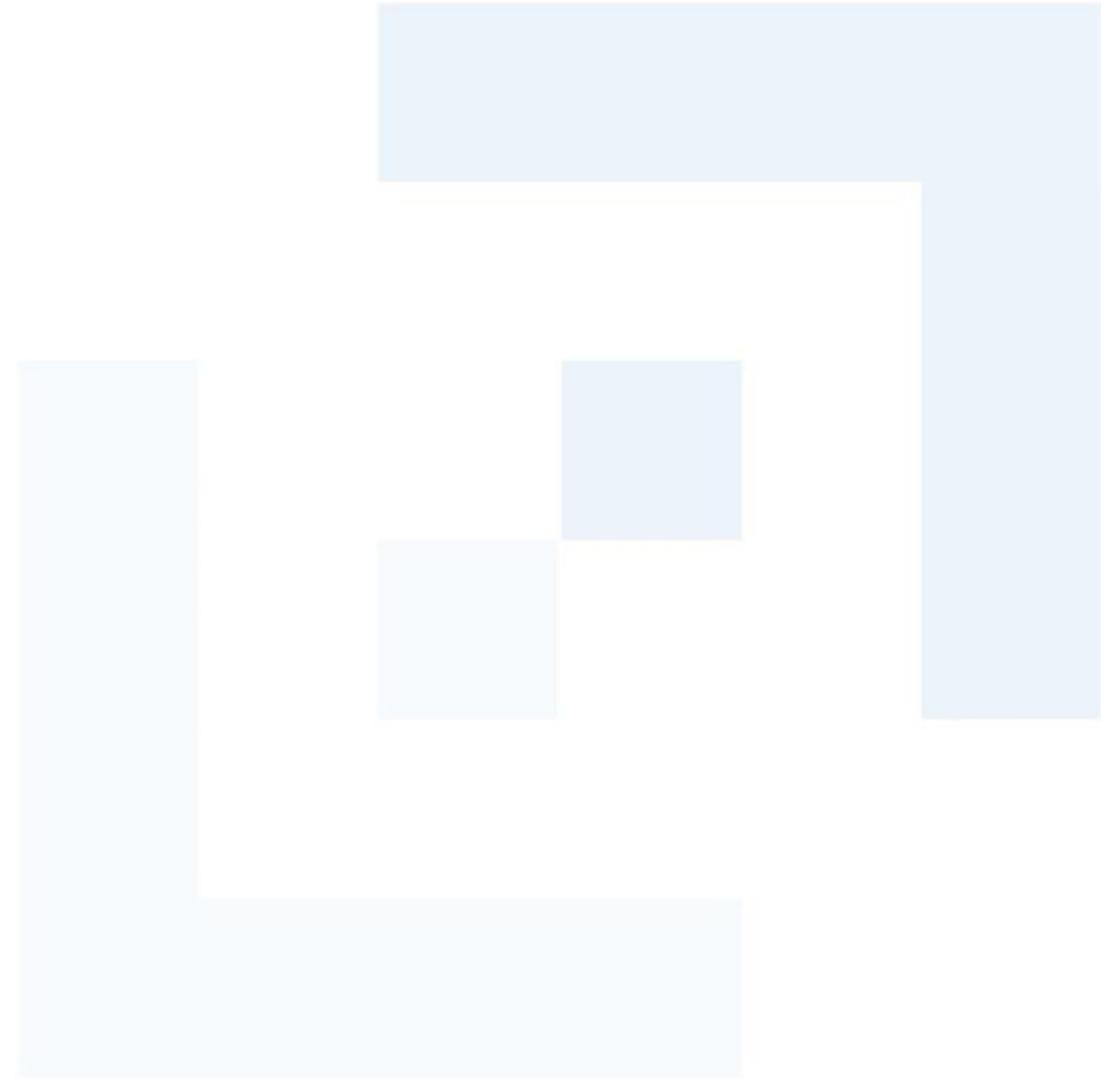
# Alternative to Incentives: Penalties

- Surcharge on monthly health insurance premium
- Paid leave (not charged to PTO) if employee becomes ill from COVID-19 and is vaccinated, but charged to PTO (or leave is unpaid) if employee is unvaccinated
- One-time, ongoing, or progressively larger monetary penalty for not being vaccinated (deducted from pay)
- No accrual of additional PTO if unvaccinated
- No merit increases if unvaccinated
- No promotions if unvaccinated
- Termination of employment

# Penalty considerations

- Medical, pregnancy and religious accommodations or exemptions from vaccination
- Disparate impact on protected groups of employees
- Potential wage and hour issues if deductions from pay
- HIPAA, ACA, and EEOC wellness program concerns
- Employee relations and morale issues
- Reputational harm for business

# OSHA Enforcement



# OSHA Part 1904 Recordkeeping for OSHA Recordable for COVID-19 Case

- Three key elements for OSHA 300 log:
  - (1) The case is a confirmed case of COVID–19 as defined by the Centers for Disease Control and Prevention (CDC);
  - (2) the case is work-related as defined by 29 CFR part 1904.5; and
  - (3) the case involves one or more of the general recording criteria in set forth in 29 CFR part 1904.7 (*e.g.*, medical treatment beyond first aid, days away from work).

# Reporting of Work-Related Fatalities / Hospitalizations

- Fatalities
  - Within 8 hours of learning about the fatality
- In-Patient Hospitalization
  - Within 24 hours of learning about the “in-patient” hospitalization
  - Was employee just seen in ER, or was employee actually “admitted” to the hospital?
- Similarities and differences with general workplace reporting of fatalities and in-patient hospitalizations?
  - Under 1904.39, employers are only required to report fatalities that occur within 30 days of the work related incident and in-patient hospitalizations that occur within 24 hours of the work-related incident (see 1904.39(b)(6))

# Reporting of Work-Related Fatalities / Hospitalizations

- Three ways to report:
  - Calling the OSHA Area Office that is nearest to the site of the incident (see [www.osha.gov/contactus/bystate](http://www.osha.gov/contactus/bystate));
  - Calling the OSHA toll-free telephone number, 1-800-321-OSHA (1-800-321-6742);  
or
  - Submitting information through OSHA's website at [www.osha.gov](http://www.osha.gov).



# Was the Fatality or In-Patient Hospitalization Work-Related?

- Under 29 CFR 1904.5 Determination of work relatedness
- An employer must consider an injury or illness to be work-related if an event or exposure in the work environment **either caused or contributed** to the resulting condition.
- **If the COVID-19 exposure event likely occurred within the employee's work environment, and the subsequent illness led to either death or in-patient hospitalization**, reporting of this incident would be required.

# Was the Fatality or In-Patient Hospitalization Work-Related?

- Considerations:
  - The type, extent, and duration of contact the employee had at the work environment with other people, particularly the general public;
  - Physical distancing and other controls that impact the likelihood of work-related exposure;
  - The extent and duration of time spent in a shared indoor space with limited ventilation; and
  - Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.
- OSHA's presumptions in certain cases

# Illness and Return to Work: CDC Guidance

- Quarantine

- Applies when an individual has been in close contact with someone who has COVID-19
- Means staying away from others

- Isolation

- Applies when you are sick or when a COVID-19 positive test result is received, even in the absence of symptoms
- Means staying away from others

- Counting

- Day of exposure for quarantine is Day “0.” Day one is first full day after the last contact with the individual with COVID.
- Day of first symptoms or positive test is Day “0” for isolation. Day 1 is the first full day after symptoms developed or the test specimen was collected.

# CDC Guidelines – Unvaccinated Individuals

<b>Positive COVID Test</b>	<ul style="list-style-type: none"><li>• Stay home in isolation for five days</li><li>• If no symptoms appear or symptoms are improving after five days, may leave home but must wear a mask around other people for an additional five days</li></ul>
COVID-19 Exposure	<ul style="list-style-type: none"><li>• Stay home in quarantine for five days</li><li>• Test on fifth day after exposure</li><li>• If negative test, may leave home but must wear a mask around others for an additional five days</li><li>• If a five day quarantine is not feasible, must wear a mask around others for a total of 10 days.</li></ul>

# CDC Guidelines - Vaccinated without Booster

(More than 6 months after Pfizer or Moderna or more than two months after J & J and without a booster)

## Positive COVID Test

- Stay home in isolation for five days
- If no symptoms appear or symptoms are improving after five days, may leave home but must wear a mask around other people for an additional five days

## COVID-19 Exposure

- Stay home in quarantine for five days
- Test on fifth day after exposure
- If negative test, may leave home but must wear a mask around others for an additional five days
- If a five day quarantine is not feasible, must wear a mask around others for a total of 10 days.

# CDC Guidelines – Recently Vaccinated and Boosted Individuals

<b>Positive COVID Test</b>	<ul style="list-style-type: none"><li>• <b>Stay home in isolation for five days</b></li><li>• <b>If no symptoms appear or symptoms are improving after five days, may leave home but must wear a mask around other people for an additional five days</b></li></ul>
COVID-19 Exposure	<ul style="list-style-type: none"><li>• Wear a mask around others for ten days</li><li>• Test on fifth day after exposure</li><li>• No quarantine or isolation period required</li></ul>

# Accommodations and Time Off



# Employees at Higher Risk for Severe COVID-19

- Certain medical conditions might place individuals at higher risk, per CDC
- Under ADA, cannot automatically exclude at-risk employee from workplace
- Does the employee's disability pose a "direct threat" to the employee's health?
- If so, can that threat be eliminated or reduced by a reasonable accommodation?

# Employees at Higher Risk for Severe COVID-19

- Direct threat analysis requires
  - Individualized assessment based on...
  - Reasonable medical judgment about the employee's disability using...
  - Most current medical knowledge and/or best available objective evidence

# Employees at Higher Risk for Severe COVID-19

- Direct Threat Factors:
  - Duration of the risk
  - Nature and severity of potential harm
  - Likelihood that potential harm will occur
  - Imminence of the potential harm
- Considerations might include:
  - Prevalence of COVID in geographic area
  - Current state of the employee's health
  - Employee's job duties

# Employees at Higher Risk for Severe COVID-19

- If “direct threat” exists, engage in interactive process to determine whether a reasonable accommodation exists.
- EEOC suggested accommodations:
  - Telework
  - Leave (and don’t forget possible FMLA implications)
  - Reassignment
- “An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a **significant risk of substantial harm to themselves** that cannot be reduced or eliminated by reasonable accommodation.”

# Refusing to Return Due to Fear of COVID

- DOL: Leave taken solely to avoid exposure is not FMLA-protected.
- But must also consider ADA implications.
- Could the fear or anxiety relate to or rise to level of a disability?
- If the employee identifies a medical condition and/or requests an accommodation, begin the interactive process...

# Refusing to Return Due to Fear of COVID

- Require documentation from provider supporting:
  - (1) Existence of a medical condition substantially limiting a major life activity; and
  - (2) Need for reasonable accommodation
- And remember: You do not have to grant an employee's preferred accommodation if another reasonable accommodation will work.
- OK to ask medical provider whether alternative accommodations would be effective in meeting the disability-related needs of the employee.

# “Long COVID” as a disability

- “Long COVID” = Where individuals experience new, returning, or ongoing health problems four or more weeks after being infected with COVID-19.
- EEOC: Determining whether COVID is a disability requires an individualized assessment.
  - Asymptomatic = Not a disability
  - Mild cold or flu-like symptoms resolving within weeks = Not a disability
  - But if COVID causes physical or mental impairment substantially limiting a major life activity, then could be a disability.

# “Long COVID” as a disability

- “Major Life Activity”: Includes both bodily functions (like respiratory, circulation) and actions (like breathing, eating, concentrating).
- “Substantially Limits”:
  - Construed broadly; “should not demand extensive analysis”
  - Need not be long term. EEOC Example: temporary lifting restriction lasting several months
  - Take mitigating measures into account
    - Medication
    - Medical devices
  - Episodic flare-ups = Can still be a disability

# “Long COVID” as a disability: EEOC Examples

- Ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating.
- Shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months.
- Intestinal pain, vomiting, and nausea that linger for many months even intermittently, that the employee’s doctor attributes to COVID-19.

# When COVID is not a disability: EEOC Examples

- Congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort that resolves within several weeks, with no further symptoms or effects.
- Asymptomatic COVID-19 infection, even if subject to isolation/quarantine.

# Other ADA Protections

- ADA protects those who have a “record of” a disability. EEOC notes that a person who has or had COVID-19 might be in this category.
- ADA protects those who are “regarded as” having a disability. EEOC notes that a person who has or has had COVID might be in this category.

# Telecommuting as a “reasonable accommodation”

- Many employees have been permitted to work from home since onset of pandemic in March 2020.
- How long do employers have to continue offering telecommuting as an accommodation?

# Telecommuting as a “reasonable accommodation”

- Real Life Example: *Peeples v. Clinical Support Options* (D. Mass. Sept. 2020)
- Plaintiff with asthma worked as an assistant manager of community trauma support program.
- Doctor advised plaintiff in mid-March 2020 to telework to avoid exposure.
- “Plaintiff performed all the essential duties of their position along with other job-related tasks while teleworking.”
- Two months later, all managers directed to return to the office.
- Based on doctor’s note, Plaintiff permitted to continue teleworking another month.

# Telecommuting as a “reasonable accommodation”

- *Peeples v. Clinical Support Options* [continued...]
- In mid-June 2020, employer denied request for continued telecommuting.
- Claimed managers must be in the building to support operations.
- But job duties remained the same as what they were performing at home.
- Employer also did not provide other requested mitigation times, including PPE, masks, sanitizer, wipes.
- Allegedly no individualized assessment / interactive process.
- Did the plaintiff win an injunction? Yes.

# Telecommuting as a “reasonable accommodation”

- *Peeples v. Clinical Support Options* [continued...]
- Court said asthma = disability.
- Telecommuting = reasonable accommodation because...
  - Plaintiff worked remotely with success for four months
  - Employer’s blanket statement that all managers needed to be in the office was not enough.
  - Employer offered no evidence of interactive process.
  - Employer’s offer of unpaid leave not a reasonable alternative accommodation because (1) plaintiff did not request it, and (2) “difficult to see how a leave .... would enable [the plaintiff] to perform the essential functions” of the job.

# Refusing Mandatory Vaccination: Pregnancy

- CDC: Pregnancy not a contraindication for vaccination.
- Plus, pregnancy is not a disability under the ADA (although certain pregnancy-related conditions might be).

# Religious Exemptions from Vaccine Mandates

- Title VII requires an employer to consider an exemption requested based on an employee's sincerely held religious beliefs, practices, or observances.
- But EEO laws do not require consideration of exemptions based on political, social, or economic beliefs, or those based on personal preferences.
- Exercise caution when questioning sincerity of employee's belief.

# Religious Exemptions from Vaccine Mandates

- “Religion” encompasses more than just mainstream beliefs.
- Do not assume a belief an exemption request is invalid just because it is based on an unfamiliar religious belief.
- But it is ok to ask an employee to explain the religious nature of their belief.

# Religious Exemptions from Vaccine Mandates

- What if the employer suspects an employee's stated belief is not sincere?
- Suspicion must be based on objective evidence, such as...
  - Employee is acting in a manner inconsistent with the professed belief (but be careful: religious beliefs can change over time)
  - The sought-after "accommodation" is a desirable benefit (e.g., telework)
  - Timing of the request: made shortly after same request was made for non-secular reasons

# Religious Exemptions from Vaccine Mandates

- If religious-based need for exemption seems sincere, then what?
- Determine whether a reasonable accommodation is available.
- An accommodation is not reasonable if it would cause the employer an “undue hardship.”
- Undue hardship = More than a minimal cost.
- Lower threshold than ADA!

# Religious Exemptions from Vaccine Mandates

## Undue Hardship Analysis:

- Not just monetary costs
- Risk of spread to other employees and visitors
- Diminished productivity and efficiency
- Burdens imposed on co-workers
- Number of employees seeking the accommodation

# Religious Exemptions from Vaccine Mandates

Real Life Example: *Barrington v. United Airlines* (D. Colo. Oct. 14, 2021).

- Employee is a Ramp Services Supervisor at Denver airport.
- Claimed her sincerely held Christian beliefs prevented vaccination.
- Airline offered unpaid leave as a reasonable accommodation.
- Indicated she “would be welcomed back to work once COVID-19 testing protocols [were] in place for her location and work area.”
- Employee sought an injunction prohibiting United from placing her on unpaid leave.

# Religious Exemptions from Vaccine Mandates

- *Barrington v. United Airlines* [Continued...]
- Court denied injunction request, ruling the employee was unlikely to win her Title VII discrimination / retaliation claim.
- Employee wanted job reassignment or social distancing/masking as an accommodation from vaccination requirement.
- Airline not required to create a job or reassign her.
- Increased risk to co-workers (including vaccinated ones!) = undue hardship.

# FMLA

## Serious Health Condition

- Requires overnight stay in a hospital or other medical care facility;
- Incapacitates employee or family member for more than 3 consecutive days and includes ongoing medical treatment; or
- Chronic conditions that cause occasional periods of incapacity and that require treatment by health care provider at least twice per year.

# FMLA

- Not only long COVID
- Employee or family member
- FMLA eligibility factors (length of employment, worksite location, number of employees, availability of leave) apply

# FMLA

- Not available because employee wants to stay home to avoid getting COVID
- Not available for every situation in which employee has COVID

# FMLA

- Real Life Example: *Price v. Ajinomoto Foods* (N.D. Miss. Nov. 1, 2021)
- Employee worked on a food processing production line.
- On June 29, 2020, she became ill with COVID symptoms while at work.
- She remained through the end of her shift and tested positive the next day.
- As a result, 8 other employees quarantined; production suspended for 2 days
- On July 1, employee was terminated for violating the employer's rule requiring employees to leave work if they begin to feel ill at any time during a shift.

# FMLA

- *Price v. Ajinomoto Foods* [continued...]
- When she called in sick (but before she was terminated), FMLA was not discussed.
- Same again when she later called providing notice she had COVID.
- Instead, the employee first attempted to request FMLA leave the day after she received notice of her termination.
- Did her FMLA interference and retaliation claims survive summary judgment?

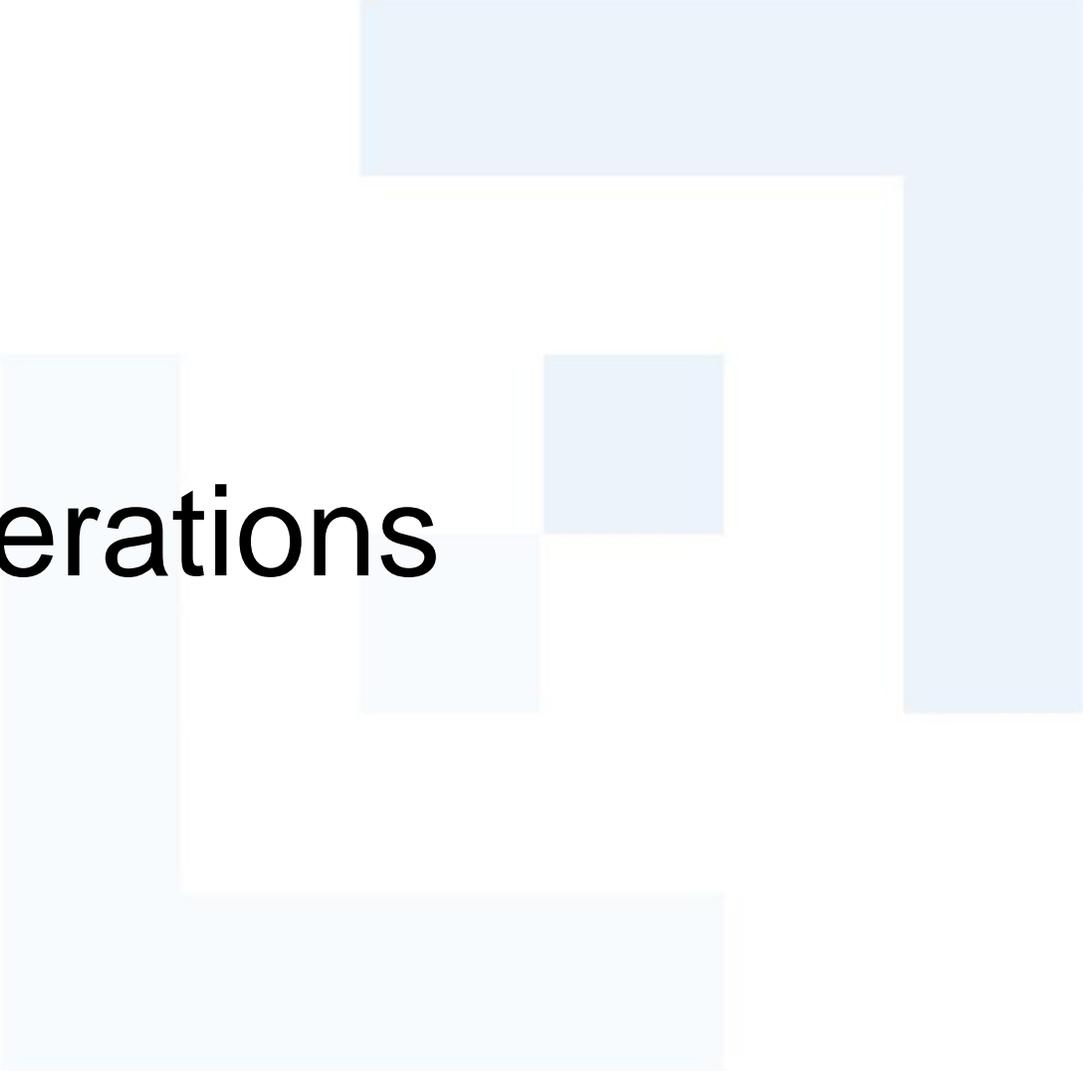
# FMLA

- *Price v. Ajinomoto Foods* [continued...]
- Did her FMLA interference and retaliation claims survive summary judgment?
- No. She was no longer an “eligible employee” when she first requested leave after her termination.
- Her interference claim failed because she was terminated before she sought to exercise FMLA rights.
- Her retaliation claim failed because she did not engage in protected activity (i.e., seek leave) before she was terminated.

# Retaliation

- Employees who request a reasonable accommodation for a disability or a religious accommodation are protected against retaliation for making the requests.
  - Applies even if they are not entitled to the accommodation.
- Employees who request FMLA leave for COVID-related reasons are protected from employer interference and retaliation, even if the leave is appropriately denied.
- State law may provide additional anti-retaliation protections

# Wages and Pay Considerations



# Is mandatory testing permissible?

- Generally yes, at least under federal law.
- Medical examinations, including testing, lawful if job-related and consistent with medical necessity.
- OSHA “Large Employer” ETS would require mandatory testing for covered unvaccinated workers.
- But what if state or local law ban mandatory testing?

# Who is required to pay for mandatory testing?

- Answer will likely depend on several factors, including...
  - Is testing required for all workers or only unvaccinated workers?
  - If only unvaccinated workers, was it the employee's personal choice not to get vaccinated?
  - OSHA "Large Employer" ETS said employer not required to pay for testing costs, but...
  - ADA: Pre-COVID guidance stated that if an employer required an employee to go to a healthcare professional chosen by the employer, then the employer must pay for all of the costs associated with that visit.
  - State Law: Some states require employers to pay for medical examinations required as a condition of employment generally. There are also some state laws that apply specifically to COVID tests in the workplace.

# Can an employer require that employees use free testing resources?

- Starting Jan. 15, 2022, health insurers and group health plans must cover costs of OTC, at-home COVID-19 tests
  - Test must be FDA-authorized or approved.
  - Up to 8 tests per insured person per month
- But big exception: Reimbursement not required if tests are used for **employment purposes**.
- COVIDtests.gov: Limited to 4 tests per household.
- Community-based testing resources:

<https://www.hhs.gov/coronavirus/community-based-testing-sites/index.html>

# Payment for time taken to vaccinate, test or undergo screenings

- If vaccination or testing is mandatory and completed during regular working hours, then pay is required.
- DOL says “if an employer requires an employee to obtain a COVID-19 vaccine dose, undergo a COVID-19 test, or engage in a COVID-19 related health screening or temperature check during the employee’s normal working hours, the time that the employee spends engaged in the activity is compensable.” employers must pay for time spent “waiting for and receiving medical attention at [the employer’s] direction or on their premises during normal working hours.”

# Time Spent Outside of Normal Working Hours

- Employer-required activities that are required for employee to safely and effectively perform their jobs are “integral and indispensable” to the work.
  - DOL Example: If a health care worker must put on and take off PPE before and after shifts, that time is compensable “because it is necessary to the safe and effective performance of that worker’s job.”
- What if employer requests testing on an employee’s day off?

# Remote Work

- Employers are obligated to pay employees for all hours worked.
- Remote work presents risks of “off the clock” work.
- Still obligated to pay even if hours worked were unauthorized.
- Flexible hours are permissible. Example: Employee takes time off in the middle of the day for parenting obligations because daycare is closed.
- Employer not required to pay during periods when the employee is completely relieved from duty

# Remote Work

- DOL Field Assistance Bulletin 2020-5 (Aug. 2020)
- Employers have an obligation to exercise reasonable diligence in tracking teleworking employees' hours of work.
- One DOL-approved way:
  - (1) Provide reasonable reporting procedures for non-scheduled time;
  - (2) Compensate employees for all reported hours of work, including hours not requested by the employer; and
  - (3) Do not prevent or discourage employees from accurately reporting their hours worked.

# Remote Work

- DOL Field Assistance Bulletin 2020-5 (Aug. 2020) [continued...]
- If an employee fails to report unscheduled hours worked through an established reporting procedure, an employer is generally not required to investigate further to uncover unreported hours.
- “Reasonable diligence” does not require an employer to “undertake impractical efforts” to sort through non-payroll records showing when employees accessed or used their work-issued electronic devices.

# Resources

- ADA and Discrimination: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Job Accommodation Network (ADA Accommodations): <https://askjan.org/topics/COVID-19.cfm>
- Department of Labor
  - FMLA: <https://www.dol.gov/agencies/whd/fmla/pandemic>
  - OSHA: <https://www.osha.gov/coronavirus>
- CDC: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>

# Resources cont'd.

- Spencer Fane Blog: <https://www.spencerfane.com/blogs/worksmarts-workplace-solutions/>