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Avoiding Employment Pitfalls in the Post-COVID Workplace

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FSA COMPLIANCE SERVICES

COVID-19
CORONA VIRUS

COVID VACCINE MANDATES

**COVID-19 Vaccines:
Current Status**

- On August 23, 2021, the FDA announced full approval for the Pfizer/BioNTech vaccine.
 - First COVID-19 vaccine to be subject to full review by FDA and puts it on par with other marketed vaccines.
- The FDA has approved two other COVID-19 vaccines Emergency Use Authorization.
 - Moderna and Johnson & Johnson/Janssen
- The Mayo Clinic currently estimates that 63.4% of the U.S. population is fully vaccinated, 54.2% have at least one dose.

BIONTECH

Pfizer

moderna

janssen
PHARMACEUTICAL COMPANIES OF
Johnson & Johnson

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Vaccine vs. Vaccination

• Will Americans voluntarily get vaccinated?

- An August 6, 2021, poll by Gallup estimates that 1 in 5 Americans – or 18% – “would not agree to be vaccinated and are unlikely to change mind.”**
- A September 2021 poll by NPR/PBS NewsHour/Marist “found 19% of U.S. adults now say they do not intend to be vaccinated.”***
- While willingness to get a COVID-19 vaccine has increased over time, a significant portion of the U.S. population remains either unwilling or cautious about immunizations.



• <https://news.gallup.com/poll/253081/one-five-americans-remain-vaccine-resistant.aspx>

***<https://www.npr.org/2021/09/05/105170072/the-share-of-u-s-adults-willing-to-get-vaccinated-ticks-up-a-new-poll-finds>

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Federal Regulations Heading Our Way

• On September 9, 2021, the Biden Administration Announced that OSHA is developing a rule that will:

- require all employers with 100 or more employees to ensure their workforce is fully vaccinated **or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.** OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.
- require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination. This requirement will be implemented through the ETS.

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Federal Regulations Heading Our Way

• CMS also is developing an Interim Final Rule with Comment Period that **will be issued in October.**

- The emergency regulations will require vaccinations for nursing homes, hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, **as a condition for participating in the Medicare and Medicaid programs.**
- In the email announcing the expansion of this requirement beyond nursing homes, U.S. Department of Health and Human Services Secretary Xavier Becerra stated, “There is no question that staff, across any health care setting, who remain unvaccinated pose **both direct and indirect threats to patient safety and population health.**”

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Federal Government Contractors

- On September 9, 2021, President Biden also signed an Executive Order requiring employees of contractors that do business with the federal government to be vaccinated.



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Mandate Laws

- Rapidly evolving area at the federal, state and local level.
- Several jurisdictions have health care employee vaccine mandates for private employers, including:
 - Maryland
 - New Jersey
 - New York
 - Oregon
 - Philadelphia

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Lessons Learned in the Flu Vaccine Trenches

- Employers putting in place a COVID-19 vaccine protocol need look no further than to caselaw and guidance developed over the past several years following the decision by many healthcare providers who put in place mandatory flu vaccine protocols for their employees (with exemptions available for religion and disability).



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Lessons Learned in the Flu Vaccine Trenches

- ✓ Create an exemption policy and process.
- ✓ Identify who will decide exemption requests.
- ✓ Educate the decisionmakers as to what process to use.
- ✓ Roll out the process to employees.
- ✓ Make decisions and convey them to employees.



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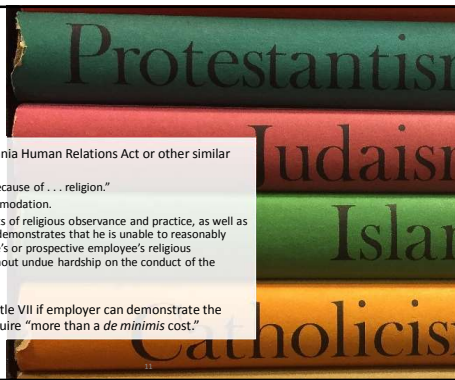


Religious Exemption

- Title VII (and the Pennsylvania Human Relations Act or other similar state law):
 - Prohibits discrimination "because of . . . religion."
 - Requires reasonable accommodation.
 - Religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."
- "Undue hardship" under Title VII if employer can demonstrate the accommodation would require "more than a *de minimis* cost."

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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

- In 2012, the Hospital began requiring employee flu vaccinations.
- Employees seeking exemption needed to fill out a form.
- A Psychiatric Crisis Intake Worker since 1994 submitted requests for exemption in 2012 and 2013 outlining his "sincerely held beliefs" regarding the harmfulness of vaccines.
- The Hospital approved the exemption requests in both years.



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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

- In 2014, after evaluating his request and detailed essay setting out his religious beliefs, the Hospital denied Employee's request, citing changes in its standards for exemption.
- The Hospital requested a letter from a clergyperson supporting Employee's requested exemption which he was not able to provide because he did not belong to any religious organization.
- He was subsequently terminated and filed suit alleging religious discrimination and failure to accommodate his religion (as well as wrongful termination in violation of public policy).



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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

- The Hospital's Motion to Dismiss was granted by the District Court and the employee appealed to the Court of Appeals for the Third Circuit (Pa., NJ).
- The Court of Appeals examined whether the employee's beliefs as set out in his Complaint and the exemption form and essay he submitted to the Hospital were because of his religion under Title VII.



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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

- The Third Circuit set out a 3-part test to determine whether the alleged beliefs are religious and therefore protected by Title VII:
 1. A religion addresses **fundamental and ultimate questions** having to do with deep and imponderable matters.
 2. A religion is **comprehensive** in nature; it consists of a belief system as opposed to an isolated teaching.
 3. A religion often can be recognized by the presence of certain **formal and external signs**.



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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

1. His beliefs did not address fundamental and ultimate questions having to do with deep and imponderable matters:
 - “Generally he simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid the vaccine.”
2. His beliefs were not comprehensive in nature:
 - He applies one general moral commandment “one should not harm their [sic] own body” which is an “isolated moral teaching” and “not a comprehensive system of beliefs about fundamental or ultimate matters.”
3. There were no formal or external signs:
 - His views were not manifested in signs such as “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions.”

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Third Circuit Flu Vaccination Case – 877 F.3d 487 (3d Cir. 2017)

- Certain anti-vaccination beliefs are not religious.
- However, if anti-vaccination beliefs are a part of a broader religious faith, they are protected.
 - Example given - Christian Scientists who “regularly qualify for exemptions from vaccination requirements.”
- Religious beliefs can be demonstrated in various ways.



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EEOC Guidance

- “In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”
- “The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”

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EEOC Guidance

- Supreme Court cases involving conscientious objection under § 6(j) of the Universal Military Training and Service Act. Individuals were imprisoned because of failure to serve in the military.
 - That Act exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.
 - Religious training and belief: defined as **"an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code"** (emphasis added).
 - Narrow question before the Court was "[d]oes the term 'Supreme Being' as used in § 6(j) mean the orthodox G-d or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent.'"



EEOC Guidance

- The Supreme Court held that "within [the] phrase" "a conviction based upon religious training and belief" "would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." (emphasis added)
- The test might be stated in these words:
 - "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the G-d of those admittedly qualified for the exemption comes within the statutory definition."
 - This holding embraced a broader, non-theistic formulation of "religious training and belief"**



EEOC Guidance

- The EEOC Compliance Manual states that "beliefs are not protected merely because they are strongly held. Rather, religion typically concerns 'ultimate ideas' about 'life, purpose, and death.' Social, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII." Compliance Manual at 12-1, A, 1.
- EEOC Informal Discussion Letter dated March 5, 2012:
 - "It is unlikely that 'religious' beliefs would be held to incorporate secular philosophical opposition to vaccination."** www.eeoc.gov/eeoc/foia/letters/religious_accommodation.html
 - "Facts relevant to undue hardship . . . would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation."** (emphasis added).



COVID-19 Vaccinations: EEO Overview

- **K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? (5/28/21)**
 - The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below. These principles apply if an employee gets the vaccine in the community or from the employer.
 - In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

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COVID-19 Vaccinations: EEO Overview

- **K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? (in relevant part) (12/16/20, updated 5/28/21)**
 - The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p).
 - Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration.
 - Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship.
 - Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

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COVID-19 Vaccinations: EEO Overview

- **K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (in relevant part) (12/16/20, updated 5/28/21)**
 - Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship.
 - Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer.
 - This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability.
 - Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.
 - Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.

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What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws

If an employer requires vaccinations, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?

- The ADA allows an employer to have a [qualification standard](#) that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."
 - However, if a safety-based qualification standard, such as a vaccination requirement, 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 due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." [29 C.F.R. 1630.2\(r\)](#).
- **Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.**

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What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws

- A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.
 - If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk, so the unvaccinated employee does not pose a direct threat.
- If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.
 - Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.
 - For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely.

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Key Takeaways

- Employees do not need to belong to an organized religion to be exempt from vaccination.
- Employers can ask employees to explain their religious beliefs in order to assess whether to approve a religious exemption.
- Employers cannot require a clergy letter in order to consider an exemption request.
- Both theistic and non-theistic beliefs can qualify as religious.
- Have a religious exemption form in place for employees to complete.

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If the beliefs qualify as religious, then what?

- Consider reasonable accommodation.
 - Let the science and the dictates of the particular workplace and the particular employee situation guide you.
 - Is a mask a reasonable accommodation?
 - Is remote work a reasonable accommodation?
 - Is a transfer into an open position where the employee does not work in close proximity to others a reasonable accommodation?
 - Is a leave of absence a reasonable accommodation?



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Key Takeaways Contd.

- An employee must provide notice to the employer about his or her disability and the request for accommodation.
- Once on notice, both parties must engage in an interactive process regarding the employee's request for accommodation.
- An employer must reasonably accommodate a qualified individual's disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.
- The ADA allows an employer to have a qualification standard that includes a requirement that an employee not pose a direct threat to the health or safety of the individual or others in the workplace.
- If an employer determines that an individual poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace unless there is no way to provide a reasonable accommodation, absent undue hardship, that will eliminate or reduce the risk.



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Other Considerations

- Staffing challenges if the vaccine is mandated.
- Staffing issues if the vaccine is not mandated.
- Collective Bargaining Agreements.
- Pandemic-related financial challenges.
- Employee morale.
- The obligation to maintain a safe workplace.



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COVID LEAVE ISSUES



HEALTHCARE EMPLOYEES EXPOSED TO COVID-19

Leave for Healthcare Workers

- **OSHA ETS** governs medical removal for employees in portions of workplace that render **healthcare services**:
 - Nursing care
 - Assisted living (depending on care services provided)
 - Personal care (depending on care services provided)
- When is removal required?
 1. Employee is COVID-19 positive (confirmed positive test OR diagnosed by healthcare provider with COVID-19)
 2. Employee has been told by licensed healthcare provider that that are suspected to have COVID-19
 3. Employee is experiencing recent loss of taste and/or smell with no other explanation
 4. Employee is experiencing both fever ($\geq 100.4^{\circ}\text{F}$) and new unexplained cough
 5. Employee was in close contact with a COVID-19 positive person in the workplace at a time when the employee was not wearing PPE (unless the employee is fully-vaccinated and not experiencing any symptoms)



Period of Leave

1. Employee is COVID-19 positive (confirmed positive test OR diagnosed by healthcare provider with COVID-19)
2. Employee has been told by licensed healthcare provider that that are suspected to have COVID-19
3. Employee is experiencing recent loss of taste and/or smell with no other explanation
4. Employee is experiencing both fever ($\geq 100.4^{\circ}\text{F}$) and new unexplained cough
5. Employee was in close contact with a COVID-19 positive person in the workplace at a time when the employee was not wearing PPE (unless the employee is fully-vaccinated and not experiencing any symptoms)



- **Guidance from licensed healthcare provider; OR**
- **CDC Interim Guidance on Ending Isolation and Precautions for Adults with COVID-19 and Return to Work Criteria for Healthcare Personnel Interim Guidance**
- **Guidance from licensed healthcare provider; OR**
- **CDC Home Isolation and Return to Work Healthcare Guidance; OR**
- **Employer provides PCR test at no cost to employee:**
 - Negative result, employee may return to work
 - Positive result, follow return to work criteria for positive test result
- **Keep the employee removed for 14 days; OR**
- **Keep the employee removed and provide a COVID-19 test at least 5 days after the exposure, at no cost to the employee**
 - Negative result, employee may return to work after 7 days following exposure
 - Positive result, follow return to work criteria for positive test result
- **Not required to remove employee if asymptomatic and either fully-vaccinated or had COVID-19 within past 3 months**

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CDC Return to Work Guidance

Symptom-based Strategy

Mild/Moderate illness, NOT severely immunocompromised

- At least 10 days have passed since symptoms first appeared AND
- At least 24 hours have passed since last fever without the use of fever-reducing medications AND
- Symptoms have improved

Asymptomatic, NOT severely immunocompromised

- At least 10 days have passed since date of first positive viral diagnostic test

Severe to Critical Illness OR severely immunocompromised

- At least 10 days and up to 20 days have passed since symptoms first appeared AND
- At least 24 hours have passed since last fever without the use of fever-reducing medications AND
- Symptoms have improved

Test-based Strategy

Employee was SYMPTOMATIC

- Resolution of fever without the use of fever-reducing medications AND
- Improvement of symptoms
- Results are negative from at least 2 consecutive respiratory specimens collected more than 24 hours apart

Employee was ASYMPTOMATIC

- Results are negative from at least 2 consecutive respiratory specimens collected more than 24 hours apart

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<https://www.cdc.gov/coronavirus/2019-nCoV/when-to-return-to-work.html> (Sept. 13, 2021)

Removal Pay Benefits

< 10 Employees on date ETS became effective



No medical removal pay

11-499 Employees



Employer must pay a removed employee's regular pay, up to \$1,400/week, for first two weeks; beginning in third week, employer must pay 2/3 of regular pay to up \$200/day; must continue benefits (e.g. health insurance)

500 or more Employees



Employer must pay a removed employee's regular pay, up to \$1,400/week during entire removal period; must continue benefits (e.g. health insurance)

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Removal Pay Benefits

- Employee entitlement to removal pay does not depend on where the employee was infected
- Removal pay based employee's regular pay rate and work schedule
- Employer not required to provide OT pay, even if employee regularly worked OT hours in recent weeks
 - Employee scheduled to work 50 hours next week notifies employer that employee has tested positive – 40 hours removal pay
 - Employee scheduled to work 25 hours next week notifies employer that employee has tested positive – 25 hours removal pay
 - Employee scheduled to work 40 hours is removed after working second 8-hour shift for the week – 24 hours removal pay

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Removal Pay Benefits

- What about pooled **employees** that are scheduled on *per diem* basis – pay for time they were scheduled
 - Employee was called in for Saturday and Sunday, is in close contact with patient on Saturday with no PPE and removed mid-shift – 1.5 days removal pay (remainder of Saturday, all of Sunday)
 - Employee was called in for coverage Monday through Friday and is removed at the conclusion of Tuesday's shift – 3 days removal pay
- Employer may reduce removal pay by amount employee receives from other sources
 - Paid sick leave, publicly funded compensation program.
 - Can require use of accrued PTO before removal pay kicks in.
- No retaliation– employee must be restored to prior position

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Recommendations

- Removal is not required if employee can work remotely or in isolation
 - Evaluate whether there are other needs that the employee can fill
 - Are there telehealth services that employee can provide to residents in lower-care level settings?
 - Are there non-medical tasks that employees can perform to assist other departments (administrative, records, training)?
- Issue FMLA documentation to removed employees
 - Notice of Eligibility and Certification of Employee's Serious Health Condition
 - How will you issue these forms if employee contracts severe to critical COVID and is hospitalized?

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Recommendations

- Have policy in place concerning medical removal under ETS
 - Policy should inform employees that medical removal is mandatory and identify circumstances in which employee will be removed
 - Outline Removal Pay benefits and limitations - no overtime even if scheduled or normally worked
 - Are employees required to use PTO before removal pay applies?
 - How will removal pay be handled for payroll purposes?
 - Require disclosure of other benefits received (unemployment, workers' compensation, disability benefits), and reduction of removal benefits





Leave for Non-Healthcare Workers

- Quarantine/Isolation for non-healthcare employees is governed by:
 - Return to work guidance from licensed healthcare provider
 - State and local requirements
 - CDC Interim Guidance on Ending Isolation and Precautions for Adults with COVID-19
- Issue FMLA documentation to employees out due to COVID exposure
 - Up to 12 weeks of unpaid, job protected leave
 - Employer may require substitution of paid leave
- Pay status while on leave:
 - Voluntary FFCRA extension sunsets on September 30
 - Use of existing PTO, vacation, sick (may be required under FMLA policy)
 - Disability coverage for long-term/severe situations
 - Unpaid





Accommodation Process

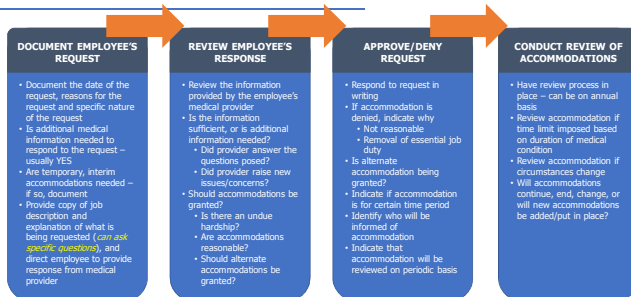
- Have a defined, consistently followed, document-based accommodation process
 - Establishes proof that employer engaged in **interactive process**
 - Ensures consistency and avoids *ad hoc* decision-making
 - Substantiates employee accommodations
- How do accommodation requests arise?
 - Burden on employee to request, but no magic words required
 - Employee requests "accommodation"
 - Employee brings medical condition to employer's attention
 - Employee mentions medical condition/disability in response to performance concerns
 - Employee is unable to return to work after FMLA or planned medical leave
 - Employee wants exemption from policy based on medical condition (mask requirement, mandatory vaccine)
 - Employee requests to work remotely due to medical condition, disability or mental health condition

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Accommodation Process



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COVID Issues – Extended Leave

- Employees who contract severe/critical COVID may be out for extended period
- Healthcare employees
 - Protected by ETS medical removal and anti-retaliation
 - Must hold position – can fill, but employee entitled to position upon return
 - FMLA runs concurrently
- Non-healthcare employees
 - Protected by FMLA and ADA – leave can be reasonable accommodation under ADA
 - Employees eligible for FMLA entitled to 12-weeks job protected leave, may be entitled to additional leave beyond 12-weeks as ADA accommodation
 - Employees not eligible for FMLA may be entitled to leave as ADA accommodation

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COVID Issues – “Long COVID”

- “Long COVID”
 - Employee recovers within weeks, but continues to experience symptoms that last for months
 - Symptoms: tiredness; difficulty thinking/concentrating; shortness of breath; headache; dizziness; pounding heart; chest pain; cough; joint/muscle pain; depression/anxiety; fever; loss of taste/smell
- Per HHS, Long COVID **can** be a disability under the ADA – not always
 - Under ADA, a disability must limit a major life activity
 - Requires individualized assessment
- Use established ADA process to:
 - Obtain information from medical provider concerning nature, extent, duration of condition
 - What accommodations are proposed? How will they enable employee to perform job? Are other accommodations appropriate?

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COVID Issues – Remote Work

- Remote work may be a reasonable accommodation under the ADA, even if employer has no telework program
- Common COVID scenario
 - Employee requested remote work as accommodation pre-COVID and was denied
 - Employee worked from home during some or all of pandemic
 - Employee renews request for remote work based on
- EEOC Guidance
 - Must engage in interactive process at time of renewed request
 - Time spent working remotely is relevant to renewed request for remote work
 - Prior period of remote work could be considered “trial period” – evaluate whether employee satisfactorily performed job duties while working remotely
 - If some duties were temporarily excused due to COVID, not obligated to continue

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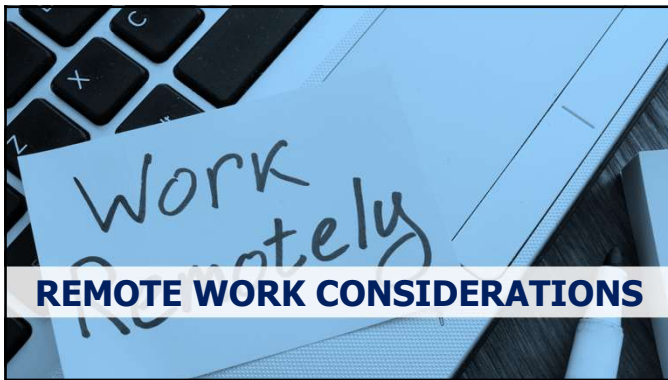
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COVID Issues – Remote Work

- Sept. 7, 2021: EEOC files first pandemic-related remote work suit
- Facts from EEOC Complaint
 - 3/2020: Employee diagnosed with obstructive lung disease and requested to work remotely as ADA accommodation
 - 3/2020: All employees placed on rotating work schedule with 4 days of remote work and 1 day at the facility
 - 6/2020: Employer ordered all employees to return to work
 - 6/2020: Employee renewed request to work from home two days per week
 - 7/2020: Accommodation request denied; other employees in same position permitted to work remotely
 - 9/2020: Employee terminated for "performance issues"; employee had never been notified of any performance concerns





Remote Work Policy

- Identify types of remote work arrangements permitted
 - Remote: Employee works 100% from home
 - Remote+: Employee works primary from home and reports to office as needed
 - Hybrid: Employee works some days at home, some days at office
 - Temporary: Employee works remotely due to quarantine/isolation
- Establish eligibility requirements
 - Job duties
 - Performance/productivity
 - Interaction/collaboration with other departments/employees
 - Business needs
 - Disciplinary status



Remote Work Policy

- Employee performance expectations while working remotely
 - Work schedule
 - Accessibility and communication
 - Timekeeping
 - Responsiveness
 - Dress codes while on video conference
- Requirements for remote work location
 - Suitable location that is conducive to work
 - Security and confidentiality concerns (resident and patient information)
 - Safety considerations
 - Right to inspect



Remote Work Policy

- Security and confidentiality requirements
 - Access to company property and information
 - Access to and security of company equipment and devices
 - Access to remote work area
- Equipment and supplies
 - Maintenance of equipment
 - Limited to business use only
- Expense reimbursement
 - Normal business expenses
 - Expenses for use of personal mobile phone/home internet
 - Some states require: California, Illinois, Iowa, Massachusetts, Montana, New York, D.C.



Remote Work Policy

- Trial period
- Non-compete issues
 - Does home location place employee in violation of non-compete with prior employer?
- Remote work is not substitute for child/dependent care*
- Ability to terminate remote/hybrid work arrangement
 - Business need
 - Performance/productivity
- Requirement to sign Remote Work Agreement



Wage and Hour Compliance

- Timekeeping Requirements
 - Employer must have system for tracking time worked for hourly employees
 - Computer time clock system or timesheets
 - Should include certification that time is true and accurate
- Employee Work Schedule
 - Must be documented
 - Understanding FLSA "continuous workday"
- Overtime
 - Required to be paid for work beyond 40 hours
 - Address in Policy and Agreement

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Discrimination Compliance

- Remote work arrangements are subject to anti-discrimination obligations under federal and state law
 - CANNOT discriminate in making remote work available to employees on basis of race, color, national origin, gender/sex, age, disability, religion, and any other characteristic protected by law
 - Discrimination claims can arise if remote work arrangement denied on basis of protected characteristic, or individual is subject to more stringent work requirements
 - Reasons for excluding employees must be based on objective, job-related criteria
 - Position is not suitable for telework
 - Employee's poor work performance has been documented and addressed with employee

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Workers' Compensation

- PA Workers' Compensation Act applies to "work-related" injuries incurred in remote work situations
- Examples of at home injuries determined to be work-related:
 - Jones (PA): Employee was rehab coordinator who worked out of her home and also went to client homes and escorted clients to appointments. Employee returned home after serving client, and slipped and fell while walking up the steps to her home.
 - Verizon (PA): Employee who worked from home was drinking glass of juice upstairs when she received a call from her supervisor. Employee began descending steps to home office, fell and hit her head.
- Employer Considerations
 - Remote Work Agreement should document work hours, break times, and location
 - Remote Work Policy and Agreement should provide opportunity for safety inspection of work location
 - Employees should be required by policy to immediately report any injuries

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Cybersecurity

- Considerations:
 - Resident medical information (HIPAA)
 - Resident financial information
 - Confidential business and proprietary information
- What measures are sufficient for remote work arrangements?
 - Password protections on WIFI and devices
 - Virus protection on devices
 - Logging out at conclusion of work
 - Must use company-owned equipment
 - VPN, remote access software, etc.
 - Restrict use of company-equipment to employee for business only
 - Documented technology policy with no expectation of privacy in company devices/systems

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Confidentiality

- Document in Remote Work Policy and Agreement
 - Employer property taken home remains property of employer
 - Employer property taken home must be kept in designated work area
 - Employees must maintain confidentiality of all employer information to the same extent they would if working at employer's site
 - Designated procedure for disposal of hard copy materials
 - Materials developed at home are company property
- Employer confidentiality considerations may warrant having employees sign separate Confidentiality Agreement
- Employer intellectual property considerations may warrant having employees sign separate Intellectual Property Agreement

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Questions



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