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# Top 4 Accommodation Strategies HR Needs to Know Now

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# Reasonable Accommodation 101

## Duty to Accommodate

- The duty to provide reasonable accommodation to a disabled employee to enable him/her to perform the essential functions of his/her is a **fundamental statutory requirement**.
- Onus is on the employee to request in most cases; no special language required and need not be in writing.
- *Reasonable* accommodation does not mean employee's *preferred* accommodation
- The only statutory limitation is if it would cause “undue hardship” to the employer.

# Reasonable Accommodation 101

## Reasonable Accommodation Examples

- Making existing facilities accessible
- Job restructuring
- Part-time or modified work schedules
- Acquiring or modifying equipment
- Changing tests, training materials, or policies
- Reassignment to a vacant position
- Remote work???

# Reasonable Accommodation 101

## The Interactive Process

- An informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.
- The employer may ask the individual relevant questions that will enable it to make an informed decision about the request.
- Depth of conversation depends on the nature of the disability and the accommodation requested.
- Can ask for reasonable documentation to establish that a person has an ADA disability that necessitates a reasonable accommodation, if the need is not obvious.

Can employers mandate that employees receive the COVID-19 vaccine?

YES ... **BUT** ...

# Vaccines

## “But” No. 1: Disabilities

- 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.
- 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.



# Vaccines

## “But” No. 1: Disabilities

- If an employer determines that an individual who cannot be vaccinated because of a disability poses a direct threat, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation that would eliminate or reduce this risk of 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.

# Vaccines

## “But” No. 1: Disabilities

- Excluding an employee from physically entering the workplace does not mean that the employer can automatically terminate the employee.
- The employer must engage in the interactive process to determine if there is a reasonable accommodation that will enable to employee to perform the essential functions of the job—
  - Remote work?
  - Alternate work hours or work site?
  - Unpaid leave of absence?

# Vaccines

## “But” No. 1: Disabilities

- Managers and supervisors must know how to recognize and handle an accommodation request.
- It requires a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship.
- Considerations—
  - Is it necessary to obtain supporting medical documentation?
  - What is the prevalence within the workplace of employees who already have received a COVID-19 vaccination?
- Accommodations are always confidential.
- Retaliation is always unlawful.

# Vaccines

## “But” No. 2: Religion

- Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII.
- “Undue hardship” = anything more than a *de minimus* cost or burden on the employer.

# Vaccines

## “But” No. 2: Religion

- Title VII’s definition of “religion” is broad and protects beliefs, practices, and observances with which an employer may be unfamiliar.
- Employers should presume that an employee’s request for religious accommodation is based on a sincerely held religious belief.
- If, however, an employer has an objective basis to question either the religious nature or the sincerity of a particular belief, practice, or observance, the employer can request additional supporting information.
- Societal / cultural ideas and conspiracy theories ≠ sincerely held religious belief.

# Vaccines

## “But” No. 2: Religion

- Like is the case with disabilities, if an employee cannot get vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible to maintain employment, then it would be lawful for the employer to exclude the employee from the workplace.
- This does not mean the employer may automatically terminate the worker, and should consider accommodations such as a temporary leave of absence.

# Accommodating Long COVID

## What is Long Covid

- Nearly one-third of COVID-19 patients will develop long-haul symptoms that long outlast the actual infection.
- Nearly one-third of all COVID long haulers had asymptomatic COVID cases.
- These long-haul symptoms include fatigue, respiratory problems, "brain fog," body aches and muscle pain, abdominal issues, and loss of smell and taste.
- They can be quite debilitating and last for months or longer.

# Accommodating Long COVID

## Long Covid and the ADA

- Under the ADA, there is no exhaustive list of impairments covered as a disability, and each case is determined based on an individual's specific limitations on major life activities.
- Temporary impairments or impairments of limited are not necessarily excluded from the definition of "disability," and must be evaluated on a case-by-base basis.
- Because COVID long haulers report myriad different symptoms, any one of which may substantially limit one's major life activities, these residual effects may qualify as a disability under the ADA.
- Must engage in the interactive process.
- Justice Department agrees: [https://www.ada.gov/long\\_covid\\_joint\\_guidance.pdf](https://www.ada.gov/long_covid_joint_guidance.pdf)



# Accommodating Long COVID

## Long Covid and the ADA

- Possible reasonable accommodations for Long COVID –
  - Providing or modifying equipment or devices
  - Job restructuring (but not eliminating essential job functions or lowering production standards)
  - Part-time or modified work schedules (including work-from-home if appropriate)
  - Reassignment to a vacant position (but not creating a new position)
  - Adjusting or modifying examinations, training materials, or policies;
  - Providing readers and interpreters; and
  - Making the workplace readily accessible to and usable by people with disabilities

# Accommodating Long COVID

## Long Covid and the FMLA

- Under the FMLA, eligible employees are entitled to 12 weeks of annual unpaid leave for a qualifying reason, including an employee's own serious health condition.
- The FMLA defines a serious health condition as an impairment, illness, injury, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider.
- The FMLA permits leave to be taken intermittently for chronic, episodic medical conditions.
- It's not difficult to imagine an employee needing intermittent leave while experiencing a flare-up of any of the long-haul symptoms.

# Accommodating Long Covid

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# Remote Work and the ADA

## What Employees are thinking

- 58% of workers say they would “absolutely” look for a new job if they weren’t allowed to continue working remotely in their current position
- 65% of employees want to work remotely full-time post-pandemic
- 33% prefer a hybrid work arrangement.
- *Only 2%* prefer to return to the office full-time

## Why?

- COVID-19 exposure/infection, 49%
- Having less work flexibility, 46%
- Less work-life balance, 43%

# Remote Work and the ADA

## What Employers are thinking

- 83% of employers now say remote work has been successful
- 66% planning to allow employees to work from home full-time through 2021
- 73% intend to offer flexible work arrangements when the pandemic is over
- 21% believe employees should be in person five days per week
- 52% report that average employee productivity has improved
- 70% plan for new investments to assist hybrid work arrangements

Sources: <https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html>; [www.cnn.com/amp/2021/04/29/most-us-companies-will-require-proof-of-covid-vaccination-from-employees-survey.html](http://www.cnn.com/amp/2021/04/29/most-us-companies-will-require-proof-of-covid-vaccination-from-employees-survey.html)

# Remote Work and the ADA

**EEOC v. Ford Motor Co., 782 F.3d 753 (6<sup>th</sup> Cir. 2015)**

Regular on-site attendance as an essential job function.

“A sometimes-forgotten guide ... supports the general rule: common sense. Non-lawyers would readily understand that regular on-site attendance is required for interactive jobs. Perhaps they would view it as ‘the basic, most fundamental’ ‘activity’ of their job.... Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones. That’s the same rule that case law from around the country, the statute’s language, its regulations, and the EEOC’s guidance all point toward. And it’s the controlling one here.”

Therefore, remote work is not a “reasonable accommodation.”

# Remote Work and the ADA

**Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595 (6<sup>th</sup> Cir. 2018)**

“Mosby-Meachem presented sufficient evidence supporting a finding that she could perform all the essential functions of her job remotely for ten weeks. For example, several MLG&W employees as well as outside counsel who worked with Mosby-Meachem testified that they felt she could perform all essential functions during the 10-week period working from home. ...

“The ADA Committee understood its orders as ‘staying firm on the telecommuting mandate from [MLG&W president] Jerry Collins’ that ‘nobody can telecommute ... no matter what the circumstances.’ Given this evidence, the jury could have reasonably concluded that MLG&W did not actually engage in an interactive process.”

# Remote Work and the ADA

## Remote Work as a Reasonable Accommodation

EEOC: Just because an employer grants telework to employees during COVID *does not mean* that the employer automatically must grant telework as a reasonable accommodation after recalling employees to the worksite.

- Each request requires a separate interactive process and analysis; always *fact specific*.
- If the post-reopening request would excuse an employee from performing an essential function, continued remote work can be denied.
- ADA never requires an employer to eliminate an essential function as an accommodation.
- Temporary WFH during a pandemic does not alter a job's essential function(s).



# Remote Work and the ADA

## Remote Work as a Reasonable Accommodation

- **Must** engage in the interactive process with an employee with a disability requesting WFH.
- Telecommuting *can* be an appropriate reasonable accommodation, depending on the facts and circumstances of an employee's job, and whether actual in-person attendance is required, or merely preferred.
- Prior successful implementation of the requested accommodation *may* make it difficult for an employer to argue its lack of reasonableness.
- Are WFH performance issues documented?
- Mandates and inflexibility are ADA red flags. A non-existent or meaningless interactive process is an ADA violation.

Any questions?



# Thank you



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