Office of Congressional Workplace Rights

Office of the General Counsel

RETURNING TO THE WORKPLACE: POTENTIAL LEGAL ISSUES
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Introduction

The COVID-19 pandemic has dramatically altered the work experience for us all since March 2020. Every employing office within the legislative branch was forced to adapt rapidly to the new reality, whether by sending employees home to telework full-time, changing employees' shifts and rearranging the physical workspace to allow for social distancing, or making other changes to working conditions to prevent the spread of the virus. New legislation such as the FFCRA and CARES Act temporarily granted employees new rights to help them cope with sudden unexpected childcare needs and other personal obligations.

More than one year later, the pandemic is far from over, but the availability of effective vaccines is providing hope for a return to some semblance of normalcy in the not-too-distant future. As more employees come back to the office, it is worth reviewing certain aspects of the laws applied by the Congressional Accountability Act (CAA) which may be particularly relevant.

Please note that evaluation of the lawfulness of particular employment actions is determined on a case-by-case basis, and the information in this outline does not constitute legal advice. Rather, our goal is to remind employing offices of their obligations under the CAA and get them thinking about how various issues might arise under these laws as employees return to the workplace during the continuing pandemic.

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Resources

We recommend the following resources for more information:

- OCWR regulations: https://www.ocwr.gov/regulations-reports/final-regulations
- OCWR Brown Bag home page: https://www.ocwr.gov/resources-training/resources/general-counsel%E2%80%99s-brown-bag-outlines
- OCWR Ergonomics Outreach Program and other OSH/ADA resources: https://www.ocwr.gov/resources-training/hazard-free-workplaces/oshada-resources-and-fast-facts
- EEOC guidance on COVID-19: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- OSHA guidance on COVID-19: https://www.osha.gov/coronavirus/safework
- Other OSHA COVID-19 resources: https://www.osha.gov/coronavirus
- DOL FLSA Q&A: https://www.dol.gov/agencies/whd/flsa/pandemic
- Other DOL COVID-19 resources: https://www.dol.gov/coronavirus
- The ADA and Face Mask Policies. Southeast ADA Center and Burton Blatt Institute (BBI) at Syracuse University: https://www.adasoutheast.org/ada/publications/legal/ada-and-face-mask-policies.php
- ADA and Accommodation Lessons Learned: COVID-19 Edition. Tracie DeFreitas, M.S., for Job Accommodation Network. https://askjan.org/articles/ADA-and-Accommodation-Lessons-Learned-COVID-19-Edition.cfm
- Partnership on Employment & Accessible Technology (PEAT) Telework and Accessibility Toolkit: https://www.peatworks.org/digital-accessibility-toolkits/telework-and-accessibility/
- Office of Workers' Compensation Programs COVID-19 resources: https://www.dol.gov/agencies/owcp/coronavirus

Occupational Safety and Health Act (OSHAct)

The OSHAct applies to the legislative branch through section 215 of the CAA, 2 U.S.C. § 1341. The OSHAct as applied by the CAA requires that employing offices follow the Occupational Safety and Health Administration (OSHA) standards and provide their employees with workplaces that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees." 29 U.S.C. § 654(a).

OSHA has not issued standards specific to COVID-19, but it has issued guidance on preventing the spread of the virus in the workplace, which is summarized below. The OCWR strongly recommends that all employing offices follow OSHA's guidance, keeping in mind that the guidance may be updated as conditions change and as the understanding of the virus among the scientific and medical communities continues to develop.

OSHA Guidance

The guidance below predates the CDC's May 13, 2021 announcement that fully vaccinated individuals no longer need to wear masks.[1] OSHA has advised that employers may follow CDC guidance, but **we recommend that employing offices proceed with caution**, because (1) the vaccines are not 100% effective, and breakthrough infections are possible, meaning that even vaccinated individuals could potentially become sick and spread the virus at work, and (2) some employees may have health conditions that make them ineligible for the vaccine, or that leave them vulnerable even after obtaining the vaccine, making their return to the workplace riskier if their coworkers are not masked. Additionally, the reality is that not all employees will be honest about their vaccination status, and unvaccinated individuals going maskless in the workplace could increase the risk of the virus spreading to their colleagues.

Therefore, **we recommend that employing offices continue to follow the guidance below, and to implement best practices to the greatest extent practicable until the pandemic has officially ended**. We also suggest that employing offices be flexible with accommodations for vulnerable employees who may be at greater risk if their colleagues are no longer required to wear masks.

Here are the highlights of OSHA's current guidance:

1. Assign a workplace coordinator who will be responsible for COVID-19 issues.

2. Identify where and how workers might be exposed to COVID-19 at work. This involves conducting a hazard assessment to identify potential workplace hazards related to COVID-19.

3. Identify a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls. Examples include but are not limited to: sending infected or potentially infected employees home, installing barriers where distancing cannot be maintained, improving ventilation, using applicable PPE to protect employees from exposure, and performing routine cleaning and disinfection.

4. Consider reasonable accommodations for higher-risk employees through supportive policies and practices.

5. Implement a means of communication by which employees can report to the employer COVID-19 symptoms, possible exposure, and possible COVID-19 hazards at the workplace without retaliation from the employer. Also, communication should be effective and in a language the employee can understand.

6. Educate and train employees on COVID-19 policies and procedures using accessible formats and in a language they can comprehend. Training should include: facts about COVID-19 and how it is spread; the importance of face coverings, social distancing, and

[1] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html

proper hand washing; the employer's COVID-19 prevention program; and documentation of who has been trained.

7. Instruct employees who are infected or potentially infected to stay home and isolate or quarantine.

8. Minimize the negative impact of quarantine and isolation on employees by permitting employees to telework or work in an area isolated from others, if possible. If these options are not possible, allow employees to use paid sick leave, or consider implementing paid leave policies to reduce the risk of transmission.

9. Isolate employees who show symptoms at work. Separate them from other employees and other people on site, send them home, and encourage them to seek medical attention.

10. Perform enhanced cleaning and disinfection, as recommended by the Centers for Disease Control (CDC), after people with suspected or confirmed COVID-19 have been in the facility.

11. Provide guidance on screening and testing. Follow state or local guidance and priorities for screening and viral testing in the workplace. Because individuals may be asymptomatic, health checks should be performed in addition to wearing face coverings and social distancing.

12. Record and report COVID-19 infections and deaths. Employers should also report outbreaks to health departments as required and support their contact tracing efforts.

13. Implement protections from retaliation and provide an anonymous method for employees to voice concerns regarding COVID-19 related hazards.

14. Make a COVID-19 vaccine or vaccination series available at no cost to all eligible employees.

15. Do not distinguish between vaccinated employees and those who are not vaccinated for the purpose of implementing safety measures.

16. Other applicable OSHA Standards: All of OSHA's standards that apply to protecting workers from infection remain in place. These standards include: requirements for PPE (29 CFR 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from blood borne pathogens (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020). There is no OSHA standard specific to COVID-19; however, employers still are required under the General Duty Clause, Section 5(a)(1) of the OSHAct, to provide a safe and healthful workplace that is free from recognized hazards that can cause serious physical harm or death.

See https://www.osha.gov/coronavirus/safework for more details.

Ergonomics

This spring the OCWR launched our Ergonomics Outreach Program, providing resources and support to help employees and employing offices ensure that their workspaces are ergonomically sound. Whether employees are continuing to telework or returning to the office, we invite you to review our resources and take advantage of our support services, which include individualized assessments.

Ergonomically designed office spaces provide many advantages for both employees and employers, including:

- Increasing employee focus, attention, and engagement
- Enhancing productivity and work quality
- Improving employee morale, mood, and energy level
- Reducing employee stress
- Lowering the risk of developing musculoskeletal disorders
- Minimizing business costs associated with employee injuries and absenteeism

The OCWR's ergonomics guidance encompasses a wide range of considerations, including furniture, lighting, equipment, stretches, and more. Visit https://www.ocwr.gov/blog/ocwr-ergonomic-outreach-program for more information.

Americans with Disabilities Act (ADA)

The ADA applies to the legislative branch through sections 201 and 210 of the CAA, 2 U.S.C. §§ 1311 and 1331. Section 201 applies the rights and protections afforded by Title I of the ADA, which concerns employment, while section 210 applies the public access provisions found in Titles II and III.

ADA Title I – Employment

1. COVID & ADA definition of disability
    a. Definition of disability
        i. A physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.
        ii. **Physical or mental impairment** means — 1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or 2) any mental or psychological disorder, such as an intellectual disability,

organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

iii. **Major life activities** include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i).

b. Factors suggesting COVID could constitute a disability

i. "Breathing," as well as other activities that may be affected in someone with COVID, are specifically enumerated in the definition of disability. 29 C.F.R. § 1630.2(i).

ii. "Substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA, and is not meant to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(I).

1. *Ordahl v. Forward Tech. Indus., Inc.,* 301 F. Supp. 2d 1022 (D. Minn. 2004) – Plaintiff with arm amputation and circulatory condition testified that activities including bathing were substantially more difficult than those activities were prior to the amputation, dressing himself takes twice as long as it would an unimpaired person, and that his circulatory condition periodically causes ulcerated sores on his legs that make walking difficult and painful. The employer presented substantial evidence of the degree to which plaintiff managed to overcome and compensate for his impairments, asserting that, as such, he could not be considered disabled under the ADA. The court disagreed, explaining that the ADA does not require that a plaintiff demonstrate total inability to perform daily activities in order to be considered disabled; rather, the central inquiry is whether, when compared to activities of a non-impaired person, plaintiff is substantially restricted in his ability to perform those same activities.

2. *Bragdon v. Abbott*, 524 U.S. 624 (1998) – A limitation can be substantial if it would be "dangerous to the public health" or carry "economic and legal consequences" for the person with an impairment to perform a major life activity. Here, the court found that a plaintiff's HIV substantially limited her ability to reproduce since, though she could technically conceive, doing so would pose substantial risk of HIV transmission to her reproductive partner and child.

3. *Alston v. Park Pleasant, Inc.,* 679 F. App'x 169 (3d Cir. 2017) – Plaintiff with cancer who failed to allege any substantial limitation of a major life activity or bodily function did not make out a prima facie case of being disabled. The Court agreed that cancer can – and generally will – be a qualifying disability under the ADA. Nevertheless, the determination of whether an impairment substantially limits a major life activity requires an

individualized assessment, and courts have required some evidence of the plaintiff's substantial limitation – even when the limitation seems self-evident in context.

iii. Duration is not necessarily a factor if the limitation is sufficiently severe – The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. 29 C.F.R. §1630.2 (j)(1)(6). Duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. 29 C.F.R. app. § 1630.2(j)(1)(ix). Although "[i]mpairments that last only for a short period of time are typically not covered," they may be covered "if sufficiently severe." *See id*.

1. *Veldran v. Dejoy,* 839 F. App'x 577 (2d Cir. 2020) – Temporary knee sprain sustained by federal employee, a mail carrier for the Postal Service, was too brief in duration and too limited in severity to constitute a "disability" within the meaning of the Rehabilitation Act, where employee's limitations lasted for only four days and he was cleared to return to work without any physical limitations on the fourth day.

2. *Summers v. Altarum Inst., Corp*., 740 F.3d 325 (4th Cir. 2014) – Plaintiff employee sustained significant leg injuries in a fall, requiring multiple surgeries, hospitalization, bed rest, pain medication, and physical therapy. After his employment was terminated six weeks after his fall, he filed complaints alleging Altarum wrongfully discharged him on account of his disability and failed to provide a reasonable accommodation. The Court found that while the ADAAA imposes a six-month requirement with respect to "regarded-as" disabilities, it imposes no such durational requirement for "actual" disabilities, thus suggesting that no such requirement was intended. The Court applied EEOC regulations and the ADAAA to find that a jury could find that Summers was a person with a disability based on the facts.

c. "Record of disability" prong

i. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. § 1630.2(k)(1).

ii. An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider. 29 C.F.R. § 1630.2(k)(3).

iii. *Savidge v. Postmaster Gen. of the U.S.,* 558 F. App'x 222 (3d Cir. 2014) – Postal employee's records were insufficient to support employee's record of disability claim under Rehabilitation Act; his medical records indicate he could ambulate and climb stairs, albeit with a limp and at a slow pace, and could work in a light-duty job. Assuming the employer saw those records, they were insufficient to show actual disability under the RA. Therefore, they were also insufficient to support a record-of-disability claim.

iv. *Spence v. Donahoe,* 515 F. App'x 561 (6th Cir. 2013) – Postal employee with herniated disc was not disabled under "record of impairment" prong of definition of disability; his impairment was not of sufficient duration or severity to be considered substantial. Although the "record of impairment" prong encompasses plaintiffs who have recovered from their injuries, and therefore contemplates injuries that are not permanent, it nevertheless requires that a plaintiff at one point had (or was classified as having) an impairment that substantially limited a major life activity.

v. *Adams v. Rice,* 531 F.3d 936 (D.C. Cir. 2008) – The court rejected the employer's argument that an employer cannot be held liable for discrimination based on a record of a disability unless it knows not only about the employee's alleged history of impairment, but also *how* that impairment substantially limited a major life activity. Here, the record showed (1) the employer (the State Department) knew plaintiff had a record of an impairment (breast cancer), (2) the impairment did, in fact, substantially limit a major life activity, and (3) employer denied plaintiff employment because of her cancer history.

d. "Regarded as" prong

i. An individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment. 29 C.F.R. § 1630.2(l)(1).

ii. Transitory & minor defense – It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor." 29 C.F.R. § 1630.15(f).

iii. Examples from advocates of recent issues that could be the basis for a "regarded as" claim: employers who refused to allow an employee to take

time off because the individual had been exposed to the virus, because the employer mistakenly believed that the individual had COVID-19, or because the employer mistakenly believed that a person with a past infection was still contagious.

iv. Possible exposure to a communicable disease does not constitute a disability, so "regarded as" claims on this basis fail.

1. *Parker v. Cenlar FSB,* No. CV 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021) – After learning that a professor at the business school where he was a student tested positive for COVID-19, Plaintiff shared this news with his supervisor via email. Plaintiff was terminated a week later. When he sued alleging discrimination, he argued that the employer regarded him as having a disability because it believed that he may have been exposed to COVID-19. The claim failed because the court found that, notwithstanding whether COVID-19 is a disability under the ADA, possible exposure to COVID-19 is not a physical or mental impairment that substantially limits one or more major life activities.

2. *EEOC v. STME, LLC,* 938 F.3d 1305 (11th Cir. 2019) – EEOC alleged that the employer discharged the employee because he believed that because she planned to take a trip to Ghana, she had the potential to become infected with Ebola and bring that infection back home and to the workplace; EEOC did not allege that the employer perceived that the employee had an existing impairment at the time it terminated her employment. The District Court ruled, and the Eleventh Circuit affirmed, that EEOC did not state plausible claim for disability discrimination under the "regarded as disabled" prong of the ADA, absent an allegation that the employer believed, albeit mistakenly, that employee was presently infected. The Court declined to expand the "regarded as disabled" definition in the ADA to cover cases, such as this one, in which an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct.

e. Can "fear of COVID" constitute an ADA disability?

i. A frequent refrain advocates have heard from employers is that "fear of COVID-19" is not a disability. Regardless of the truth of that statement, employers often applied the concept inappropriately. If an individual has no disability or impairment at all, and seeks an accommodation because they have a fear of getting the virus, the ADA may not apply. But an individual who seeks to avoid the virus because of a recognized risk-factor disability is not arguing that "fear of COVID-19" is a disability.

ii. EEOC advises: "Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the

disruption to daily life that has accompanied the COVID-19 pandemic." EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Dec. 16, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

2. COVID & ADA medical exams and disability-related inquiries

   a. **Medical exams and disability-related inquiries generally** – Except as specifically permitted, it is unlawful for a covered entity to require a medical exam of an employee or applicant or make inquiries as to whether an employee or applicant is an individual with a disability or as to the nature or severity of such disability. 29 C.F.R. § 1630.13.

      i. Permissible examinations and inquiries of employees include:

         1. Medical examinations and/or inquiries that are job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c).

         2. Voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

      ii. *Denman v. Davey Tree Expert Co*., 266 F. App'x 377 (6th Cir. 2007) – Employer's requests for medical information and independent medical examination were job-related and consistent with business necessity. Plaintiff was terminated by the employer for failing to show up for work for two weeks, was rehired, and then was absent for another two-week period. When he returned to work, he was placed on unpaid leave until he could provide a physician's statement regarding his bipolar disorder and his ability to safely perform his duties as a foreman. The court found the employer's request was necessary to determine if plaintiff had the ability to perform the essential functions of the job. The court found attendance to be an essential function of the job, and that it was reasonable for the employer to believe that plaintiff's bipolar disorder could affect his essential job function of showing up to work.

      iii. *Lee v. City of Columbus*, 636 F.3d 245 (6th Cir. 2011) – The court distinguished "general inquiries" such as that existing in the City's sick leave policy (requiring returning employees to submit a copy of their physician's note, stating the "nature of the illness" and whether the employee is capable of returning to regular duty, "to your immediate supervisor") from those inquiries which specifically inquire into the nature and severity of an individual's disability. The Court reasoned that if it were to strike down any general inquiry simply "because it may tend to reveal a disability," this "would be overbroad and eliminate many legitimate inquiries not intended to identify disabilities." The Court thus distinguished questions about

medications, illnesses, mental conditions, or past impairments from an employer's request for a medical return-to-work form.

iv. *Fisher v. Basehor-Linwood Unified Sch. Dist. No. 458*, 460 F. Supp. 3d 1167 (D. Kan. 2020), *aff'd,* No. 20-3115, 2021 WL 982587 (10th Cir. Mar. 16, 2021) – During a principal's meeting with a teacher who had post-traumatic stress disorder, the principal's general question about how the teacher's psychiatrist appointment had gone was job-related and consistent with business necessity, and thus was not an improper disability-related inquiry under the ADA. The principal never required the teacher to provide any information about her health or putative disability, the teacher's job required her to teach and supervise students, and the teacher had experienced a panic attack in the classroom, had sent principal a text message referencing suicide and depression, and had met with the assistant principal about an incident in which a student sustained a head injury in her classroom.

b. **Concerns when employer administers vaccines** – Per EEOC guidance, administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) is not a "medical examination" for purposes of the ADA. The employer is not seeking information about an individual's impairments or current health status. However, vaccination prescreening questions may implicate the ADA's provision on disability-related inquiries likely to elicit information about a disability, and thus be permissible only if (1) "job-related and consistent with business necessity" (employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions, and therefore does not receive a vaccination, will pose a direct threat to the health or safety of her- or himself or others) or (b) voluntary (employee chooses whether to receive vaccine and whether to answer prescreening questions).

c. **Concerns when employer requests proof that employee was vaccinated** – EEOC guidance states that this is not likely to elicit information about a disability (there are many reasons why an employee may not be vaccinated, which may or may not be disability-related), and therefore is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability. EEOC advises that if an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

d. **Employer can require its employees to be vaccinated, but may need to provide a reasonable accommodation to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability** – If an employer determines that an individual who cannot be vaccinated 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 would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. See the Accommodations section below for more information.

i. *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) – The Eighth Circuit rejected a claim that sensitivities to chemicals or allergies sufficed to trigger an accommodation obligation on an employer's vaccine mandate. Plaintiff did not provide evidence that these conditions substantially or materially limited her ability to perform major life activities. The record instead revealed garden-variety allergies to various items that moderately impact her daily living – not enough for a reasonable fact-finder to conclude she is disabled.

ii. *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35 (3d Cir. 2018) – The Third Circuit reversed a lower court's dismissal of an accommodation claim citing severe anxiety and eosinophilic esophagitis as disabling conditions necessitating exemption from compulsory vaccination. In her pleading, plaintiff identified her specific impairments and further alleged that those impairments limited certain life activities such as sleeping, eating, and engaging in social interaction. This was sufficient to permit a plausible inference that she was a qualified person with a disability within the meaning of the ADA.

e. **Screening** – Applying the "job related and consistent with business necessity" standard, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

i. An employer may ask **all employees who will be physically entering the workplace** to answer screening questions (if they have COVID-19 or symptoms associated with COVID-19; if they have been tested for COVID-19) or to have their temperature taken or undergo other testing.

ii. If an employer wishes to ask **only a particular employee** to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease.

iii. For those employees who are teleworking and are not physically interacting with coworkers or others, an employer is generally not permitted to inquire about their COVID symptoms. Since such employees could not pose a direct threat even if they had COVID, inquiring about their symptoms would not be job-related and consistent with business necessity.

iv. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. 29 C.F.R. § 1630.14(c)(2).

f. **Requiring PPE and other infection control practices** – An employer may have such requirements. Where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or

gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

g. **Employer may be able to offer incentives for employees to become vaccinated**

i. Such incentives could be considered an "employee health program" that must comply with the ADA's regulations on such programs, including that they be voluntary. *See* 29 C.F.R. § 1630.14(d).

ii. *EEOC v. Orion Energy Sys., Inc.,* 208 F. Supp. 3d 989 (E.D. Wis. 2016) – Employer gave its employees who elected to receive health insurance from Orion the choice to either participate in a wellness program or pay the full health insurance premium amount. The court held that the employer did not violate the ADA because the employer's offer to pay the health premium in exchange for employee's participation in the program was merely a strong incentive, rather than a compulsion. Even if the choice to participate in the wellness program or pay the full insurance premium may have been a difficult choice to make, it was still voluntary. The employer conducted voluntary medical examinations as part of its employee health program. The court cited *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) in finding that a "hard choice is not the same as no choice."

3. Accommodation issues

a. Accommodations generally

i. Unless it would be an undue burden, it is discriminatory to not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee or to deny employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need to make reasonable accommodation. 42 U.S.C. § 12112.

ii. **Qualified individual** means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

iii. **Essential functions** means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. 29 C.F.R. § 1630.2(n). The regulations provide guidance for determining essential functions and where evidence of essential functions may be found.

iv. **Reasonable accommodation** means modifications or adjustments to a job application process, work environment, manner or circumstances under which

a position is customarily performed that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires or that enable an individual with a disability who is qualified to perform the essential functions of that position. Reasonable accommodations may also enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. 29 C.F.R. § 1630.2(o)(1).

Reasonable accommodation may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o)(2).

v. **Interactive process** – To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3). In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the individual with a disability that it may not be necessary to engage in much analysis. However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation, and it may be necessary for the employer to initiate a more defined problem-solving process to identify the appropriate reasonable accommodation.

b. Presence in the workplace as an "essential function"

i. *McMillan v. City of New York*, 711 F. 3d 120 (2d Cir. 2013) – McMillan worked for the City's Human Resources Administration. He suffered from schizophrenia and took medications that made him "drowsy" and "sluggish" in the mornings. For ten years McMillan exhibited tardy arrivals to work, which were explicitly or tacitly approved. When his employer refused to approve further tardy arrivals, McMillan requested a later start and end time. The employer refused to grant McMillan a flexible schedule. The court held that "[p]hysical presence at or by a specific time is not, as a matter of law, an essential function of all employment." A "penetrating factual analysis" is required to determine whether a rigid on-site schedule is an essential function of the job. Because McMillan had arrived to work late for the past 10 years while still performing his essential work functions, McMillan's request was a plausible accommodation. The employer failed to rebut with a showing of undue hardship or alternative accommodations.

ii. *EEOC v. Ford Motor Co*., 782 F.3d 753 (6th Cir. 2015) – Plaintiff employee, a resale buyer, suffered from irritable bowel syndrome, which gave her uncontrollable diarrhea and fecal incontinence, sometimes so bad that "it" could "start[] pouring out of [her]" at work. As such, Plaintiff exhibited high absenteeism. Plaintiff requested telework four days a week. Ford declined and instead offered to move her closer to the restroom or look for jobs better suited for telecommuting. Under the ADA, the essential job function inquiry does not require employers to lower their standards by altering a job's essential functions. Accordingly, the court held that regular and predictable on-site job attendance is an essential function of a resale-buyer job as well as most jobs. An employer may refuse telework requests when the job requires "face-to-face interactions and coordination of work with other employees" and customers.

The court in *Ford Motor Company* reasoned that there may be a genuine fact issue if "technology has advanced" enough for employees to perform essential job functions at home. An employer's determination of "essential" is not dispositive. Because *Ford Motor Company* does not require "blind deference" to employers' determinations of "essential" job functions, it leaves open the possibility that technological changes could make telework a reasonable accommodation even for jobs that require "face-to-face" interactions.

iii. Has COVID telework changed the analysis of presence in the workplace as an essential function?

1. EEOC has stated that an employer is not necessarily required to grant reasonable accommodation requests for continued telework: "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."

2. EEOC guidance does not address head-on the issue of whether/under what circumstances "presence in the workplace" can be considered an essential function, instead saying: "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**."

3. However, in the case of a disabled employee who showed a disability-related need for a telework accommodation but was denied by employer prior to COVID because of concerns that the employee would not be able to perform the essential functions remotely, EEOC suggests such a

request, if renewed post-COVID-telework, might now need to be granted: "temporary telework experience could be relevant to considering the renewed request … the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."

4. *Peeples v. Clinical Support Options, Inc.,* 487 F. Supp. 3d 56 (D. Mass. 2020) – In one of the few pandemic-related ADA employment cases with a reported opinion, the court granted a preliminary injunction to allow the plaintiff – an assistant manager for a mental-health provider – to continue to telework. The plaintiff had a risk-factor disability (asthma), and had tried to return when the office reopened, but found the safety protocols spotty at best, and social distancing was difficult. The lawsuit was filed after the employer was perceived to threaten termination if the plaintiff continued working remotely. The court found that the plaintiff was likely to be able to show they are able to perform the essential functions of their job remotely, where other managers were working on-site to enforce agency rules and to be available for an in-person response to a client, and plaintiff's direct supervisor stated that plaintiff could perform all their essential duties from home.

iv. An employer still has the ability to deny a request to telework as a reasonable accommodation if it can show another accommodation would be effective. In the case of COVID, other effective accommodations to permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting might include: alternate schedules to minimize interactions, alternate locations or assignment to minimize exposure risk, temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment.

1. *Morris v. Jackson*, 994 F. Supp. 2d 38 (D.D.C. 2013) – Plaintiff, an employee at the EPA, suffered from a disability she described as a "yeast sensitivity" that caused her to have allergic reactions after being exposed to small concentrations of yeast or other molds in the office. After reporting her allergies to her employer, her supervisor allowed her to work from home while the office tested the air quality. The tests revealed that the plaintiff's workspace air was superior to outside air and that it contained no fungal or airborne microbial amplification. The plaintiff's telecommuting was subsequently revoked, and she was ordered to report to the office. The Plaintiff sued for failure to accommodate her disability via permanent telecommuting. The court held that the employer pursued sufficiently reasonable accommodations by purchasing air purifiers, air filters, and testing the air in various worksites to find one that works for

the plaintiff. The employer only needs to provide an employee with a reasonable accommodation, not exactly what the employee desires.

2. *McNair v. District of Columbia*, 11 F. Supp. 3d 10 (D.D.C. 2014) – Plaintiff, a hearing examiner with the Department of Consumer and Regulatory Affairs, suffered from systemic lupus and degenerative disc disease and asked the employer for the option to telecommute 40 to 60 percent of the time. Hearing examiners were expected to conduct on-site administrative hearings on rent-adjustment petitions filed by landlords and tenants. The court found that the Plaintiff's work necessitated physical presence at the workplace, precluding telecommuting as a reasonable accommodation. However, the employer failed to show that it acted in good faith to find another reasonable accommodation.

3. *Buie v. Berrien*, 85 F. Supp. 3d 161 (D.D.C. 2015) – Plaintiff, a newly hired Program Analyst, suffered from lung disease and chronic asthma, which made her highly sensitive to air quality issues. Plaintiff requested three possible accommodations: (1) a private office equipped with an air purifier; (2) the option to work remotely from home; or (3) a transfer to a vacant position in a different city. The employer denied the telework request. The court denied the employer's motion for summary judgement because it failed to offer the plaintiff another accommodation that would be effective.

4. Affirmative defenses

   a. Undue hardship

      i. It is unlawful for an employing office not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the employing office can demonstrate that the accommodation would impose an undue hardship. An undue hardship means **significant difficulty or expense** incurred by an employing office, when considered in light of these factors:

         1. The nature and net cost of the accommodation needed;

         2. The overall financial resources of the covered entity and the facilities involved, the number of employees, and the number, type and location of facilities;

         3. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

4. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

   29 C.F.R. § 1630.2(p).

ii. Circumstances of the pandemic may be relevant to whether a requested accommodation can be denied because it poses an undue hardship. In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

   1. **Significant difficulty** – EEOC guidance suggests that "it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions."

   2. **Significant expense** – Per EEOC guidance, "The sudden loss of some or all of an employer's income stream because of the pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic."

   3. Per EEOC guidance, "The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. … Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available… [and] should also consult applicable Occupational Safety and Health Administration standards and guidance."

   4. Documentation of undue hardship: Employing offices should keep in mind that they bear the burden of proving that an accommodation would result in undue hardship. With respect to leave as an accommodation, it is incumbent on employing offices to document the effect of an employee's absence on the employing office's operations and the employee's coworkers, as well as other relevant factors.

5. Cases

    a. *Menefee v. Action Resources*, No. 2:18-cv-01205-CLM, 2020 WL 7343992 (N.D. Ala. Dec. 14, 2020) – Employer argued that employee's absence from work, as a driver settlement coordinator, during her brain surgery and recovery created an extreme hardship for her fellow employees, who had to perform plaintiff's job duties along with their own. The court found that a reasonable jury could go either way when asked if giving a plaintiff time off to recovery from brain surgery would have created an undue hardship for the employer.

    b. *Morrissey v. General Mills, Inc*., 37 F. App'x 842 (8th Cir. 2002) – Employee, an inventory accountant for General Mills Inc., was diagnosed with a progressive condition that attacks the lungs, causing difficulty breathing. Employee requested the option to telecommute, but General Mills denied it. The court held that telecommuting is not a reasonable accommodation under the ADA because it would require General Mills to suffer undue financial and logistical hardships. General Mills would have to hire a courier to deliver hundreds of invoices to the employee's home each week. The use of a courier would create certain risks of disclosing confidential and proprietary information.

    c. *Sivio v. Village Care Max*, 436 F. Supp. 3d 778 (S.D.N.Y. 2020) – Plaintiff was a Care Manager for the elderly who made home visits to clients who had pets. After experiencing acute asthma attacks due to the pets, she asked to be reassigned to homes that did not have pets. The employer denied plaintiff's request, claiming that one of the essential functions of the Care Manager role is to make home visits. The court held that the employer failed to explain what hardship would have been imposed to determine the pet ownership of members for the purposes of allowing plaintiff to avoid those homes.

b. Direct threat

    i. Employees who pose a "direct threat" are those whose disabilities create "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." The regulations require an individualized assessment based on reasonable medical judgment. Factors to consider include 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. 29 C.F.R. § 1630.2(r).

        1. EEOC guidance states that an employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to the health or safety of others.

2. EEOC further states: "Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence."

ii. In the case of employees with COVID or risk-factor disabilities returning to the office, if there are not accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions, then an employer must consider whether other accommodations would be effective.

iii. Cases

1. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) – Employer refused to hire Echazabal due to his liver condition, which doctors said would be exacerbated by exposure to toxins at the workplace. Employer argued that under the EEOC's interpretation, 42 U.S.C. §12112(b)(6) creates an affirmative defense allowing an employer to screen out a potential worker whose disability creates risks on the job to his own health or safety. The court held that the EEOC's interpretation is valid and that the threat-to-self defense reasonably falls within the general "job-related and consistent with business necessity" standard.

2. *Siewertsen v. Worthington Steel Co.*, 134 F. Supp. 3d 1091 (N.D. Ohio 2015), *aff'd*, 783 F. App'x 563 (6th Cir. 2019) – Plaintiff Siewertsen was deaf and used American Sign Language and writing as his primary forms of communication. The employer hired Siewertsen to operate forklifts, overhead cranes, and other motorized equipment on a weekly basis. The employer re-assigned Siewertsen due to his "deafness and inability to orally communicate." The defendant argued that the plaintiff's deafness invited undue risk to himself and others in the workplace, thus posing a direct threat of harm. Siewertsen was a certified forklift driver, having driven a forklift for over 10 years for the same employer without an accident. The court, on appeal, found that Siewertsen's deafness did not pose a direct threat to the health or safety of others. Siewertsen's disability did not establish, as a matter of law, a high probability or imminence of harm given his impeccable safety record.

3. *Stragapede v. City of Evanston*, 865 F.3d 861 (7th Cir. 2017) – Plaintiff was a water-services worker whose job involved finding water leaks, testing water pressure, etc. After suffering a traumatic brain injury, his doctor cleared him to return to work. The employer gave Stragapede a three-day work trial, which he passed, and he was reinstated to full-time employment. Later, Stragapede had various mishaps, drove inattentively to work, and tripped on set traps at work. Based on these incidents, Stragapede's doctor opined that he was unable to perform the essential functions of his job. Thereafter, the employer fired Stragapede, claiming a belief that a significant risk of a direct threat existed. The court held that the employer's belief in a direct threat, even if maintained in good faith, is

insufficient under the ADA. The employer must show that a direct threat is based on medical or objective evidence. Driving inattentively and tripping over set traps are not indicative of an actual direct threat to the safety of others.

5. Miscellaneous issues

   a. Employers who offer telework must allow employees with disabilities an equal opportunity to participate in telework. This may require ensuring telework tools are accessible.

   b. Rights under the ADA of employees with substance use disorders – Significant increases in many kinds of drug use have been recorded since March 2020 as people used these substances to cope with stress or emotions related to COVID.

      i. The ADA does not protect an employee or job applicant who is "currently engaging" in the illegal use of drugs. However, it does extend protections to employees who have been rehabilitated or are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs. 42 U.S.C. § 12114.

      ii. As such, employers may need to accommodate an employee's substance use when the employee is recovering from addiction or has a medical condition related to addiction.

      iii. Several Circuits have considered the scope of the "currently engaging" exception and have declined to develop a bright line rule for how long a period of sobriety must be in order for an employee to be considered no longer currently engaging in drug use.

      iv. *Shirley v. Precision Castparts Corp*., 726 F.3d 675 (5th Cir. 2013) – Courts must determine eligibility for safe harbor "on a case-by-case basis," asking whether "the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem." The mere fact that an employee has entered a rehabilitation program does not automatically bring that employee within the safe harbor's protection; the safe harbor applies only to individuals who have been drug-free for a significant period of time. Here, plaintiff's refusal to complete an inpatient treatment program, his insistence that he remain on an opiate pain reliever, and his continued use of Vicodin following detox supported a reasonable belief that continued drug use was still an ongoing problem at the time his employment was terminated.

      v. *Greer v. Cleveland Clinic Health Sys.–East Region*, 503 F. App'x 422 (6th Cir. 2012) – Court found that employee was a "current" drug user within the meaning of the ADA at the time of his termination, despite employee's assertions that he was not abusing drugs when he was fired and that he had participated in an employee assistance program to address his illegal drug use,

where employee admitted that he had relapsed, and that he had used crack cocaine approximately three months before his termination.

vi. *Mauerhan v. Wagner Corp.,* 649 F.3d 1180 (10th Cir. 2011) – Employee who had used illegal drugs, but had completed 30-day inpatient drug rehabilitation program and had been drug-free during that time, did not demonstrate that he qualified for safe harbor for former drug users, as required to be eligible for ADA protection as "qualified individual with a disability," where employee's recovery status at that time was "guarded" and at least 90 days of recovery were necessary to ensure significant improvement in his condition. The Court agreed with plaintiff that thirty days of sobriety is not insufficient *per se* under the ADA, holding that an individual is currently engaging in the illegal use of drugs if "the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem." The factors that should be considered include the severity of the employee's addiction, the relapse rates for whatever drugs were used, the level of responsibility entrusted to the employee, and the employee's past performance record.

ADA Titles II/III – Public Access

1. Screening

   a. The ADA prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered. 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 35.130(b)(8).

   b. However, the ADA does permit covered entities to impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. §§ 35.130 (h), 36.301(b).

   c. Titles II & III contain a direct threat exemption. They do not require a covered entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. § 12182(b)(3); 28 C.F.R. §§ 35.139(a), 36.208(a).

      i. Individualized inquiry necessary: To determine whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain:

the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk. 28 C.F.R. §§ 35.139(b), 36.208(b)

ii. *Tamara v. El Camino Hosp.,* 964 F. Supp. 2d 1077 (N.D. Cal. 2013) – The plaintiff alleged that the defendant, a private hospital, violated the ADA by refusing to allow her service dog to accompany her during a stay in its psychiatric ward. The hospital asserted the "direct threat" defense, but the court held that the hospital failed to demonstrate that the presence of service dogs within a psychiatric ward represented a direct threat to the health or safety of others. The hospital had applied a blanket prohibition instead of conducting an individualized assessment of the patient's service dog, which constituted a violation of the ADA. Further, the hospital's arguments about the potential harm of the dog on the ward were speculative, whereas the plaintiff provided evidence to rebut the hospital's arguments, including evidence regarding the dog's training, the fact that truly dangerous patients were isolated and were unlikely to interact with dog, and the patient's list of possible accommodations for her to care for the dog's hygiene needs.

iii. *Doe v. Deer Mountain Day Camp, Inc.,* 682 F. Supp. 2d 324 (S.D.N.Y. 2010) – The defendant summer camp rejected an applicant who had HIV, and when the camper alleged an ADA violation, the camp asserted a "direct threat" defense, arguing that it determined there was danger the applicant could transmit his condition to other campers. The court held that the camp failed to establish that its threat evaluation was objectively reasonable. A defendant asserting "direct threat" as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others; the individual is not required to prove that he poses no risk. Defendants asserting a "direct threat" defense have the responsibility to present the court with objective, medical evidence, such as reliable medical guidelines, literature, or expert testimony, to establish that their direct threat assessment was reasonable.

d. Bottom line: Employing offices must be very careful about excluding disabled members of the public based on "legitimate safety requirements" or "direct threat."

2. Reasonable modifications to rules, policies, or procedures

a. Generally – Titles II & III of the ADA provide that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, benefits, etc. of a public entity or accommodation. 42 U.S.C. §§ 12132, 12182(a). Employing offices are required to modify their rules, policies, or practices so as to allow equal access to persons with disabilities to participate in or receive the benefits of the services, programs, or activities of the entity unless such a modification would create an undue burden or fundamental alteration. 28 C.F.R. § 35.164; 42 U.S.C. § 12182(b)(2)(A)(iii).

b. Reasonable modifications related to COVID that may be necessary:

    i. Adjustments to attendance/occupancy limits, where permitting a caregiver to accompany a disabled person is necessary for that person to access the services, programs, or activities of an employing office.

    ii. Modifying a policy requiring visitors to wear face masks by allowing a person whose disability prevents them from wearing a mask to wear a scarf, loose face covering, or full face shield instead of a mask; allowing a person to wait in a car for an appointment and enter the building when called or texted; or offering appointments by telephone or video calls.

c. *Pletcher v. Giant Eagle Inc*., No. 2:20-754, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020) – In the first reported case regarding the ADA and face masks, the Court denied a preliminary injunction that would have required Giant Eagle Inc. to change its policy of requiring all customers to wear a face mask or other face covering inside its grocery stores. In this case, 69 plaintiffs filed a class action suit claiming Giant Eagle Groceries were in violation of Title III of the ADA by denying access to customers who claimed they could not wear a face mask due to their disabilities. The Court determined that the store's face mask policy was a correct interpretation of the Pennsylvania Department of Health's order that face masks are to be worn in public spaces and that those who cannot wear a face mask may instead wear a face shield. Giant Eagle noted in their defense that they had in place other modifications to policy and practice consistent with ADA Title III to accommodate customers with disabilities, such as curbside service, home delivery, and personal shoppers.

d. *Long v. Howard Univ*., 439 F. Supp. 2d 68 (D.D.C. 2006) – The determination of whether a modification is reasonable requires a "fact-specific, case-by-case inquiry." What is reasonable in one situation might not be reasonable in another, and a plaintiff must establish a causal link between his disability and the requested modification. In this case, the plaintiff requested a modification of the university's policies regarding time limits to complete his Ph.D. as an accommodation for his pulmonary fibrosis, which limited his ability to walk and breathe. The court held that there was a genuine issue of fact as to whether the plaintiff's request to alter the university's policies was reasonable, in light of the "arguably tenuous relationship between Long's disability and his asserted need for additional time to complete his Ph.D."

e. *Innes v. Bd. of Regents of the Univ. Sys. of Md*., 121 F. Supp. 3d 504 (D. Md. 2015) – Deaf and hard-of-hearing college sports fans brought action against a state university, alleging lack of equal access to events and services in violation of the ADA and the Rehabilitation Act. The university argued that the purchase and installation of captioning boards to accommodate the deaf and hard-of-hearing fans cost $3.75 million plus additional charges at each game for the provision of captioning services, and thus constituted an undue burden. The court held that the university failed to prove the affirmative defense of undue burden, because without any additional information about the applicable budget and/or financial realities, the cost in isolation was insufficient to establish undue burden as a matter of law.

f. *Ruskai v. Pistole*, 775 F.3d 61 (1st Cir. 2014) – Even if plaintiff could show that the TSA's pat-down procedures for passengers with metallic joint replacements denied her meaningful access to government programs or services under the Rehabilitation Act, any proposed modification to those procedures would adversely affect the TSA's efforts to efficiently deploy its resources to maintain airport security and therefore implicate "extraordinary safety concerns," which would constitute a fundamental alteration to its security program. The court therefore found that the TSA did not violate section 504 of the Rehabilitation Act.

Title VII of the Civil Rights Act of 1964

Title VII applies to the legislative branch through section 201 of the CAA, 2 U.S.C. § 1311. Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin. Several issues involving these protected classes may be particularly relevant as employees return to the office.

Religious Discrimination and Accommodation

1. Religious objections to vaccination – Employers might have to accommodate some employees whose sincerely-held religious beliefs would prohibit them from becoming vaccinated.

    a. Reciprocal duty of reasonable accommodation and cooperation – Title VII permits certain employees to object to vaccinations on the basis of their sincerely-held religious beliefs, which may pose challenges for some employers. Generally, employers must offer employees a reasonable accommodation in such situations, although employers are not required to incur undue hardships to accommodate religious beliefs, and are not required to provide the exact accommodation requested by an employee. Once the employer has reasonably accommodated the employee's religious needs, the inquiry is over. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). An employer's offer of a reasonable accommodation triggers an accompanying duty for the employee to cooperate in achieving a suitable accommodation. *Id.* at 69.

        i. *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) – The court held that the city and fire department did not violate Title VII because they offered the plaintiff firefighter several reasonable alternatives to receiving a TDAP vaccine. The plaintiff, a devout Christian Baptist, was offered two reasonable accommodations: (1) the opportunity to transfer to a code enforcement position, which offered the same salary and benefits as his current position and did not require vaccination; or (2) the opportunity to remain in his current position if plaintiff agreed to wear personal protective equipment, including a respirator, at all times while on duty, and submit to testing for possible diseases. The plaintiff rejected both alternatives. The court held that the employer did not violate Title VII because its accommodations were

reasonable and respectful of the plaintiff's right to exercise his religion while maintaining his current job.

ii. *Robinson v. Children's Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255 (D. Mass. Apr. 5, 2016) – Plaintiff Robinson, an administrative associate, refused to get the influenza vaccine, claiming that her Muslim faith precluded the use of a vaccine with pork byproduct. The employer offered a pork-free influenza vaccine or work reassignment to a non-patient-area position so she would remain employed. Robinson rejected all of the employer's proposed accommodations. The court held that the hospital's pork-free vaccine and work reassignment options were reasonable accommodations and met the employer's burden under Title VII.

b. Religious beliefs under Title VII – Not all beliefs fall under the broad sweep of "religion" in 42 U.S.C. §2000e-2(a)(1). Title VII does not require an employer to accommodate "purely personal preference[s]." *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997).

i. *Africa v. Commonwealth of Pennsylvania*, 622 F.2d 1025 (3d Cir. 1981) – The court identified three factors to determine whether a belief is "religious" in nature: (1) a religion addresses fundamental questions having to do with deep and imponderable matters; (2) a religion is comprehensive in nature and consists of a belief-system as opposed to an isolated teaching; and (3) a religion often can be recognized by the presence of certain formal and external signs.

ii. *Fallon v. Mercy Catholic Med. Ctr. of Se. Penn.*, 200 F. Supp 3d 553 (E.D. Pa. 2016), *aff'd,* 877 F.3d 487 (3d Cir. 2017) – Fallon was terminated by his employer because he refused to obtain a flu vaccine. The District Court dismissed Fallon's case because his beliefs, while sincere and strongly held, were not religious in nature and, therefore, not protected by Title VII. On appeal, the Third Circuit relied on the *Africa* factors to determine whether Fallon's beliefs were religious under Title VII. First, Fallon believed that the flu vaccine may do more harm than good, which meant that he was worried about possible health effects and not about fundamental questions of imponderable matters. Second, Fallon concluded that the flu vaccine was morally wrong based on a single maxim – "[d]o not harm your own body" – which is an isolated moral teaching rather than a comprehensive system of beliefs. Finally, Fallon's views did not have formal and external signs like ceremonial functions. As such, the court held that Title VII does not protect Fallon's beliefs. The court cautioned that anti-vaccination beliefs that are part of a broader religious faith may still be protected under Title VII.

iii. *Brown v. Children's Hosp. of Philadelphia*, 794 F. App'x 226 (3d Cir. 2020) – Employer required employees to receive an annual flu vaccine starting in 2012. Plaintiff Brown complied until 2017, when she decided she could no longer go against her beliefs. Brown argued that her "African Holistic Health" lifestyle had immunized her against diseases for 10 years and that she should

not be forced to obtain the vaccine. Brown further contended that her scrupulously washed hands made the vaccine unnecessary. The employer subsequently fired Brown. While Brown may have held a "sincere opposition to vaccination," she failed to show that the opposition is a religious belief. The court relied on *Fallon* and *Africa* in assessing whether beliefs are religious.

2. Discrimination and hostile work environment – Employers may not discriminate against employees based on their religious beliefs, or allow the creation of a hostile work environment on that basis. Managers and coworkers may be upset about an employee's refusal to obtain the vaccine, but where that refusal is based on a sincerely-held religious belief, they must be careful not to take any adverse actions or harass the employee, as such treatment could violate Title VII's prohibition against discrimination on the basis of religion.

Sex Discrimination

As employers allow – or require – more employees to return to the physical workplace, they should consider potential pitfalls with regard to Title VII's prohibition against discrimination on the basis of sex.

- Employing offices may have flexible policies for employees who are responsible for caregiving, especially parents of young children who are still learning virtually or have limited daycare options during the ongoing pandemic. Employers must be careful to treat male and female employees equally when it comes to making these determinations. Men with caregiving responsibilities should be treated the same as their female counterparts with similar such responsibilities.

- Keep in mind that discrimination on the basis of pregnancy is a form of sex discrimination under Title VII. Although employers may be concerned about potential harm to the mother or fetus, they cannot force pregnant employees to work from home if others are allowed to return, or give them involuntary reassignments in an effort to protect them, or otherwise treat them in a way that may be perceived as less favorable.

Race/National Origin Discrimination

Even now, more than a year after the pandemic began, we are still witnessing an increase in discrimination against and harassment of individuals of Asian descent. Employers should be vigilant about prohibiting such conduct in the workplace.

Labor-Management Relations

The Federal Service Labor-Management Relations Statute (FSLMRS or "Statute") applies to the legislative branch through section 220 of the CAA, 2 U.S.C. § 1351. The Statute typically prohibits employing offices from unilaterally making changes to terms and conditions of employment of bargaining unit employees without bargaining, although certain management rights are exempted from this requirement.

Agencies may want to issue a variety of policies relating to the return to the workplace due to the recent reduction of the rate of infection and concern for hospitalization. These policies may include:

- Face Mask Policy
- Temperature Check
- Health Screen Questionnaire or affirmation
- Vaccination policy – mandatory or voluntary
- Social Distancing
- Continued expansion of telework
- Infection Prevention and Control in the Workplace

Potential issues with respect to implementing such policies under the CAA's implementation of the FSLMRS may include:

- Whether any applicable collective bargaining agreement (CBA) already authorizes any subject matter addressed by the policy.
- Whether the policy changes a condition of employment.
- Whether the subject matter of the policy is a management right.

Statute and Regulations

The provisions of the FSLMRS adopted by the CAA require a federal agency to negotiate in good faith with the chosen representative of employees covered by the Statute. 5 U.S.C. § 7114(a)(4); *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644 (1990). "The scope of the negotiating obligation is set forth in § 7102, which confers upon covered employees the right, through their chosen representative, 'to engage in collective bargaining with respect to conditions of employment.'" *Fort Stewart Sch.*, 495 U.S. at 644 (quoting 5 U.S.C. § 7102(2)). "It is well established that before changing conditions of employment, an agency must provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain." *U.S. Dep't of Homeland Sec. U.S. Citizenship & Immigration Servs.*, 69 F.L.R.A. 512, 515 (2016).

The Statute, 5 U.S.C. § 7103(a)(14), defines "conditions of employment" as follows:

> …personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute.

The OCWR Board promulgated regulations ("Office of Compliance Regs.") under § 1351(d) defining "conditions of employment". *See* 142 Cong. Rec. 16983–17001 (1996) (publishing the Office of Compliance Regs.); H.R. Res. 504, 104th Cong. (1996) (approving the Office of Compliance Regs.); S. Res. 304, 104th Cong. (1996) (same). The regulations tracked the FSLMRS language in 5 U.S.C. § 7103(a)(14), defining "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters ... [t]o the extent such matters are specifically provided for by Federal statute." Office of Compliance Regs. § 2421.3(m).

In *AFGE, AFL-CIO, Local 1929 v. FLRA*, 961 F.3d 452, 457-459 (D.C. Cir. 2020), the Court clarified that

> If the relevant inquiry under § 7103(a)(14) is whether an agency's action constitutes a change in "personnel policies, practices, and matters ... affecting working conditions," it would seem that a memo that affects working conditions is, by definition, a condition of employment over which the agency must bargain. The only way this would not be accurate is if the memo is not a *personnel policy, practice or matter*.
>
> … Clearly, "conditions of employment" and "working conditions" are related, but they are not the same thing. For example, "working conditions" would be an employee's work starting and stopping times, or whether the employee has the ability to take home a government owned vehicle (GOV): "conditions of employment" would be the "rules, regulations, or otherwise" that define the hours of work for the bargaining unit, or determine whether or what employees have the right to take that GOV home.

The Statute, 5 U.S.C. § 7106, specifically excludes certain "management rights" from an agency's duty to bargain. Management rights include the right to determine "the mission" and "internal security practices of the agency." It also includes the right to assign employees, assign work to employees, direct employees, and to determine the personnel by which agency operations should be conducted, and "to take whatever actions may be necessary to carry out the agency mission during emergencies." At the election of the agency, the parties may negotiate "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work." 5 U.S.C. § 7106(b)(1).

Nevertheless,

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating…
>
> > (2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Although the term does not appear in the statute, the process of negotiating over the procedures and arrangements is commonly referred to as "impact and implementation" bargaining.

Mandatory Vaccinations

Cases relating to mandatory vaccination policies span more than one-hundred years. *See*, *e.g.*, *Jacobson v. Massachusetts,* 197 U.S. 11, 25-26 (1905) ("We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is … hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.").

In *AFGE Local 1345*, 64 F.L.R.A. 949 (2010), the Army implemented a policy requiring all civilian health care providers who have direct contact with patients to be immunized annually against influenza (flu) as a condition of employment. The policy provided medical and religious exemptions to immunization. The Army claimed that this policy "will help to reduce potential outbreaks of influenza that could adversely affect military preparedness and medical care." In response, the Union offered a bargaining proposal that would allow employees to refrain from being immunized for personal reasons.

The Army rejected the proposal, claiming that it interfered with its management right to determine its internal security practices. Under § 7106(a)(1), the right to determine internal security practices includes an agency's right to determine the policies and practices that are necessary to safeguard its personnel, physical property, or operations against internal and external risks. Internal security practices may also include safeguarding the public. *See NTEU*, 59 F.L.R.A. 978 (2004).

The Authority found that the Army established the requisite link between its internal security objectives and its mandatory vaccination policy: to prevent the occurrence and spread of influenza among its staff and those with whom its staff comes in contact. The Army determined that by vaccinating all health care personnel who have direct patient contact, it will reduce the frequency with which those individuals contract influenza. This in turn will reduce employee absences and the risk of transmission of the virus to patients, including military personnel.

The Authority next evaluated whether the proposal was an "appropriate arrangement." A proposal that affects management rights under §7106(a) of the Statute is nevertheless negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management rights. *NAGE, Local R14-87*,

21 F.L.R.A. 24, 31 (1986). The Authority determines whether a proposal excessively interferes with the exercise of a management right by weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right. *NTEU*, 59 F.L.R.A. at 981. The Authority weighed the Union's argument -- that employees should have dominion over their bodies and medical procedures – against the exceptions already part of the Army's policy. The Authority also considered case law acknowledging employee's "personal convictions are important to them" but finding that management was not required to "accommodate all employees' personal beliefs." *NAGE, Fed. Union of Scientists & Eng'rs, Local R1-144*, 42 F.L.R.A. 730, 737 (1991). The Authority thus held that the proposal excessively interfered with management's right to determine its internal security, and was thus not an appropriate arrangement. Ultimately, the Authority found the proposal non-negotiable.

Masks

Arguably, implementing a new policy requiring the wearing of masks could fall under management's right to determine its internal security and necessitate notice to the union and the right to bargain appropriate arrangements. Alternatively, implementing a new policy requiring the wearing of masks could fall under management's right to determine the means and methods and as such is a permissive topic of bargaining.

Presently, there is no federal sector case law that discusses the negotiability of requiring a mask during the COVID-19 pandemic. *Army Human Resource Command*, No. 20 FSIP 084, 2020 WL 7658150 (Dec. 20, 2020) provides little guidance, but it is the only FLRA case that even tangentially discusses the negotiability of requiring a mask due to the COVID-19 pandemic. The proposal in question was "Each party is responsible for providing their own computer, internet access, printer/photocopier and fax machine. If required, all parties will wear face mask, either cloth, N95, or surgical." The Agency argued that the CBA was already expired such that an agency wide regulation prohibiting the free use of Federal agency facilities and equipment for unions supported this language. The FSIP discussion focuses entirely on whether the CBA was already expired.

In contrast, there are multiple cases discussing the negotiation of a uniform policy which, theoretically, could require the wearing of a mask.

1. Federal Service Impasses Panel (FSIP) – *U.S. Dep't of Health & Hum. Servs.,* No. 20 FSIP 038, 2020 WL 5844298 (Sept. 28, 2020). The parties were negotiating a successor collective bargaining agreement. The agency proposed to (1) eliminate the previous article regarding attire and appearance, and (2) insert into the article "Safety and Health" a provision providing management the right to determine the appropriate apparel and to provide employees such apparel at its discretion. The agency asserted it needed flexibility to respond to hazardous work situations and changing external standards such as OSHA updates to personal protective equipment regulations. The union asserted that the agency's changes would inhibit employee understanding regarding the appropriate clothing and grooming standards permitted. The union's proposals identified the attire and grooming standards for employees required to wear specific clothing to perform their job. The Panel imposed modifying language: "The Agency will provide the employees within each division policy and guidance on the appropriate attire and appearance

requirements. Should the Agency determine it needs to make changes that are more than *de minimis*, it will comply with its statutory bargaining obligations."

2. Negotiability Appeal – *Ass'n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, 70 F.L.R.A. 968, (2018) – The petition for review involved a union proposal regarding clothing and apparel that would allow military technicians to wear, at the technician's discretion, organizational or military attire while performing civilian duties in the technician's work areas. Under existing Authority precedent, uniforms that dual (military and civilian) status technicians wear while performing civilian duties are part of the agency's "methods[] and means of performing work," per § 7106(b)(1). Thus, the agency may elect to bargain over uniforms but is not required to do so. When an agency elects to bargain over a method and means of performing work, it may withdraw from bargaining at any time prior to reaching agreement. But, if the parties execute an agreement on such matters, then, under § 7114(c) of the Statute, the head of the agency "shall approve [that] agreement" *unless* it is inconsistent with applicable law, rule, or regulation. The parties disagreed as to whether the agency elected to withdraw from bargaining before or after reaching agreement. Authority determined that because parties did not execute an agreement, the Agency was entitled to withdraw from bargaining over § 7106(b)(1) matters. *Id*. at 969.

3. Unfair Labor Practice (ULP) – In *U.S. Dep't of Justice, Kennedy Center FCI*, 29 F.L.R.A. 147 (1987), the agency notified the union that it planned to change the uniform regulations already in place by designating winter and summer seasons for clothing, requiring that neckties be worn during the winter season or when long-sleeved shirts are worn, requiring that blazers and neckties be worn at certain posts, and prohibiting the wearing of the uniform in public except while on duty, official business, or to and from work. In response, the union submitted proposals, both substantive and appropriate arrangements. The agency rejected the substantive proposals, revised the proposed draft with the "appropriate" proposals, and reiterated a willingness to bargain over the impact and implementation of the draft. The union filed an unfair labor practice alleging that the agency refused to negotiate concerning the substance of a policy which changed already existing uniform regulations; refused to bargain with the union over proposals it submitted; and by unilaterally implementing the policy.

   The Authority adopted the administrative law judge's decision. The judge reviewed Authority case law which recognized that where the mission of an agency involves contact with the public, an agency may implement a uniform policy, pursuant to section 7106(b)(1), and thereby choose the "means" which will accomplish this aspect of its work. *Id.* at 1486-7. The judge distinguished a series of cases where the Authority permitted substantive bargaining when the proposals did not interfere with the stated purpose for the agency's uniform policy. Relying on these cases, the judge found a direct relationship between the agency's new uniform requirements and its need to obtain the cooperation of inmates and the public. *Id.* at 1487-8. Thus, the judge found the agency's decision-making regarding uniform clothing constitutes a method and means of performing work. *Id.* at 1488. Since the agency could elect <u>not</u> to bargain, the judge did not find an unfair labor practice.

Social Distancing

Many employers have made changes to their office spaces to enable employees to maintain social distancing. An important question related to such changes is whether they are *de minimis*.

1. *NTEU, Chapter 26*, 66 F.L.R.A. 650, 652-53 (2012) – The Authority found an arbitral award not contrary to law. The Arbitrator found that the relocation of a non-bargaining unit employee to vacant space in an appeals office where bargaining unit employees are located had only a de miminis impact on bargaining unit employees as (1) no bargaining unit employee was asked to move or was displaced; (2) there was no change in the layout, furnishings or lease; and (3) nothing was taken away from the bargaining unit.

2. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M*, 64 F.L.R.A. 166 (2009) – An employee was ordered to move into a smaller office as well as to move out of an office space that he used to do training sessions and store training equipment. Because of the move, the employee was unable to effectively communicate training information to other employees since the computer, telephone, and fax machine at his new office did not work for two weeks after the move. Also, the employee was not able to do face-to-face training because of the loss of training space, and he became strained for storage in his office because of the space the training materials took up. The order to relocate had a negative effect on the employee's ability to perform his training duties, so the change in conditions of employment was more than de minimis.

3. *Pension Benefit Guar. Corp.*, 59 F.L.R.A. 48 (2003) – The Agency ordered employees to be reassigned and relocated. The effects were greater than de minimis because it was reasonably foreseeable that the reassignment would cause one of the employees to travel less, make overtime less available, and result in the employee having to give up her laptop. Also, it was reasonably foreseeable that the employees would lose access to a window and have smaller office spaces because of the relocation.

4. *U.S. Dep't of the Treasury, IRS*, 56 F.L.R.A. 906 (2000) – The Agency moved nine bargaining unit employees from the ninth to the third floor. The change was more than de minimis because of the problems that happened during the move. Some computers did not work, employees were denied security access to get computer files, and one employee was originally denied storage cabinets to replace the storage cabinets she lost in the move.

Changes to Tour of Duty

1. *Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 F.L.R.A. 471 (1992) – The Agency changed the days of the week the employees were required to report for duty. If an agency changes the days on which an employee is required to report to work as part of the employee's regularly established weekly tour of duty, that change has more than a de minimis effect because it will disrupt responsibilities and commitments that the employee has made based on the previously scheduled days off.

2. *Air Force Accounting & Fin. Ct., Denver, Colo.,* 42 F.L.R.A. 1196 (1991) – The Agency implemented a duty roster that required employees to adjust their arrival times for up to two hours and their departure times for up to two and one-half hours for weeklong periods throughout the year on a rotating basis. Before, under a flextime program, employees could choose their arrival and departure times

Meetings – In-Person vs. Virtual

1. *Dep't of Army, Fort Campbell, Ky.*, No. 2021 FSIP 001, 2020 WL 7658152 (Dec.20, 2020) – A dispute arose in negotiating ground rules for bargaining the parties' successor collective bargaining agreement relating to in-person or virtual bargaining meetings. The parties were in agreement to conduct bargaining sessions face-to-face under normal circumstances. However, due to the COVID-19 Pandemic, some bargaining team members have concerns about meeting in a closed meeting room and/or travel to the location. FSIP determined that "[t]o facilitate continuation of bargaining during the COVID-19 Pandemic, the parties should maximize flexibilities." Although FSIP ordered negotiations to be conducted "face-to-face", it also permitted "bargaining team members may attend negotiation sessions virtually."

2. *Nuclear Regulatory Comm'n*, No. 20 FSIP 0352020, WL 4754818 (July 22, 2020) – A dispute arose in negotiating ground rules for bargaining the parties' successor collective bargaining agreement relating to in-person or virtual bargaining meetings. The FSIP added the following language: "The parties recognize that the health and safety of our staff is of paramount importance. Accordingly, negotiations will occur face-to-face unless either party expresses concerns over the Covid-19 pandemic and requests that negotiations be held via Microsoft Teams / WebEx or similar tool."

Other Issues – Continued Telework, Travel, Changes to Work Duties

1. *U.S. Dep't of Agric.*, No. 20 FSIP 085, 2021 WL 228870 (Jan 17, 2021) – The parties came to impasse while negotiating a telework article for a successor CBA. The Agency proposed a return to pre-COVID-19 telework conditions, for example: an employee must be in the office 4-days a week and may only telework 1-day per week. The Agency argued that during the COVID-19 pandemic, teleworking employees rarely spoke and were less engaged on conference calls. As a result, the Agency argued that the meetings were less of an opportunity for new employees to receive on-the job training from colleagues. The Union proposed that Agency employees be permitted to telework up to four days a week. With respect to probationary employees, the Union proposed that after three months probationary employees become eligible to telework up to half the time as non-probationary employees. The FSIP adopted the Agency's proposal; it is unclear whether the same decision would have been reached a month later by the new FSIP.

2. *U.S. Dep't of Def., Def. Logistics Agency*, 70 F.L.R.A. 932 (2018) – The employee teleworked full-time from her home in Utah. After her husband accepted a job in Nevada, the employee asked the Agency to change her duty station and permit telework full-time from Las Vegas. The Agency denied the employee's request based on its management right under section 7106(a)(1) of the FSLMRS. The Arbitrator concluded that the Agency did not violate the parties' agreement, law, rule, or regulation by denying

the grievant's request *to change her duty station*. But he found that the Agency violated the collective bargaining agreement's telework provision by denying the grievant's request *to telework full-time from Las Vegas*. The Authority overturned the arbitrator's decision vis-à-vis telework. The Authority explained that permitting "telework" from a different state would effectively require the Agency to change the grievant's official duty station and would be contrary to management's right to determine duty stations.

3. *Pension Benefit Guar. Corp.*, 59 F.L.R.A. 48 (2003) – In determining that relocation and reassignment were more than de minimis changes, one of the factors the Agency considered was the impact on the employee's travel time.

4. *AFSCME Council 26,* No. 04-LMR-02, 2004 WL 5658966 (OOC July 23, 2004) – During negotiations, AFSCME proposed that bargaining unit members other than the Grounds Team would not be expected to accrue additional work duties during inclement weather. Under the FSLMRS, a proposal to subject to collective bargaining an employing office's decision to add duties to employees' position descriptions infringes upon management's right to assign work. This is in contrast to the negotiability of proposals for an agency to bargain over the impact and implementation of its decision to assign such additional duties to employees. Because the union's proposal would have served only to restrict the employing office's ability to assign work, without expressing any purpose or intent to address the impact and implementation, the Board found the proposal non-negotiable.

Other Laws

Keep in mind some of the following issues that may arise under several other CAA-applied statutes as more employees return to the workplace:

Fair Labor Standards Act (FLSA)

The FLSA applies to the legislative branch through section 203 of the CAA, 2 U.S.C. § 1313. Several issues could arise under the FLSA in connection with the return to the workplace.

1. Health screenings and wages

    a. Preliminary temperature and COVID-19 screenings – Employing offices that require health screenings, such as temperature or COVID-19 tests, before entering the workspace or starting work may be required to compensate their non-exempt employees for the time spent undergoing health screenings. The FLSA requires employers to pay for all hours worked, including for the time before an employee begins their normal working hours *if* the task performed is *necessary* for the work they do. The Department of Labor's guidance and case law suggest that health screenings may be compensable time under the FLSA because they could necessary in the context of congressional employment. Under 29 C.F.R. 785.43, the "time spent

by an employee in waiting for receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked." Employing offices that require COVID-19 testing during the workday may have to pay for the time spent undergoing such testing. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/flsa/pandemic#6 (last visited May 12, 2021).

b. Postliminary temperature and COVID-19 screenings – Like preliminary temperature checks, employers will likely have to compensate non-exempt employees for time spent undergoing temperature or COVID-19 testing during or after the workday unless the screening is done during a meal break or other off-duty time, as specified 29 C.F.R. Part 785.

c. Requiring COVID-19 testing on off-days or before returning to work – Employing offices that require COVID-19 testing on off days before returning to the jobsite might still be required to compensate the time spent getting a COVID-19 test.

d. The Portal-to-Portal Act of 1947, codified in 29 U.S.C. § 251(a), exempts employers from FLSA liable for claims based on "activities which are preliminary to or post-liminary to" the performance of the principal activities that an employee is employed to perform. 29 U.S.C. § 254(a)(2); *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) (holding activities of meatpackers in sharpening their knives either before or after work are integral and indispensable to the principal activities for which they were employed to perform). *Mitchell* represents an extreme case of the kinds of activities that an employee cannot dispense with if he or she is to perform their principal activities. Consider the following cases that present complex factual scenarios:

    i. *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956) – Workers in a battery plant regularly handled toxic lead materials. Because lead poisoning is contracted by inhalation or ingestion (similar to COVID-19, *see Ways COVID-19 Spreads*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited May 12, 2021)) there was a risk that people outside the plant, such as the workers' families, would be exposed to the lead fumes or dust that attached to the skin and clothing of workers. Thus, employees were compelled to change their clothes and shower at work before leaving. The employers sued for compensation during the time they spent showering and changing clothes. The Supreme Court held that clothes-changing and showering to avert the potential communal exposure of workplace chemicals was an integral and indispensable part of the principal activities for which the employees were hired.

    ii. *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014) – Employer required its hourly workers to undergo security screenings before leaving the warehouse every day. Employees sued, alleging that they were entitled to compensation under the FLSA for the roughly 25 minutes they spent each day waiting to undergo screenings. The Supreme Court held that the time spent waiting to undergo security screenings was not compensable under the FLSA.

The employees were employed to retrieve products from the warehouse shelves and package them for shipment, not to undergo security screenings. The Court clarified that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 517.

iii. *Vaccaro v. Amazon.com., LLC*, No. CV 18-11852, 2021 WL 1022699 (D.N.J. Mar. 17, 2021) – Employees at an Amazon warehouse sued for compensation for time spent undergoing mandatory post-shift-security screenings and pre-shift COVID-19 screenings. Amazon argued that COVID screenings are not compensable because they are not "work." The court defined "work" as an (1) an activity that is controlled or required by the employer; and (2) that such activity serves to primarily benefit the employer. Employees argue that pre-shift COVID-19 screenings benefit Amazon because they keep the virus from spreading, which reduces the risk of absenteeism or facility closure. The Court found that the question of whether COVID-19 screenings by the employer primarily benefitted the employer is a question that depends on all the circumstances of the case. As such, employees were entitled to discovery on the issue.

2. On-call time

a. Non-exempt employees who are on-call may need to be compensated for their time. On-call time may be compensable under FLSA under two circumstances: (1) if an employee is required to remain on the premises or; (2) if the employee finds their time on-call is so restricted that it interferes with their personal pursuits. *See* 29 C.F.R. § 285.17. An employee who is not required to remain on the employer's premises but is merely required to notify their supervisor of where they may be reached is generally not deemed to be working while on call.

b. Factors determining the compensability of on-call time:

i. The terms of the employment agreement, if any; i.e., whether the employer and employee had a prior agreement governing the compensation, or lack thereof, of on-call time.

ii. Physical restrictions placed on an employee while on call; for example, when an employer requires employees to remain in a fixed location while on call, the courts and DOL regulations consider this to be compensable time.

1. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) – Plaintiffs were employed as private firefighters. They remained on-call after 5:00 p.m. at a furnished fire hall until the following morning at 8:00 a.m. During night duty, they were required to stay in the fire hall to respond to alarms. The Court held that the employees' time was compensable because they did not have the "liberty to go away." The employees were "on duty" because they were required "to stand and wait." Remaining idle and in wait during

the nighttime for a potential fire alarm was predominantly for the employer's benefit. *Id.* at 133. The key inquiry regarding the definition of compensable work is "[w]hether time is spent predominantly for the employer's benefit." *Id*.

2. *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000) – Plaintiff, a funeral director, claimed he was expected to remain at home while on call, where he was required to answer work calls during the evenings, which were forwarded to his house. Plaintiff claimed that the on-call duties prevented him from getting enough sleep, drinking alcohol, visiting his children, and boating. The Court held that the time the employee spent on phone calls was primarily for the benefit of the employer and that he was physically restricted to his home, thus requiring compensation.

3. *Wesley v. Experian Info. Solutions, Inc.*, No. 4:18-CV-00005, 2021 WL 765224 (E.D. Tex. Feb. 26, 2021), *appeal docketed*, No. 21-40236 (5th Cir. Mar. 29, 2021) – Plaintiff employee was required to be on-call after-hours both during the workweek and on weekends. He needed his cell phone and company-issued laptop to access the internet while on-call and to ensure a timely response to any arising issues. The on-call policy did not specify the location where plaintiff had to take calls. Plaintiff argued that he could not freely use his time for himself and was confined to his house. The Court held that despite the requirement of on-call work, the plaintiff had great latitude for his personal pursuits. The activities that the plaintiff was prohibited from doing – such as drinking alcohol and being more than fifteen minutes from his cell phone, work computer, and internet – did not place substantial enough restrictions on his life to require compensation. While the court recognized that some of the calls the plaintiff received came in around 2 a.m., the FLSA does not compensate for inconvenience alone.

iii. The maximum period allowed by the employer between the time the employee was called and the time he or she reports back to work

1. *Gilligan v. City of Emporia*, 986 F.2d 410 (10th Cir. 1993) – Court ruled that water department employees who were given 1 hour to respond to a scene did not have to be compensated for the time spent on call.

iv. The percentage of calls expected to be returned by the on-call employee

1. Courts generally do not require compensation under the FLSA when the on-call employees can ignore a certain percentage of calls, thereby retaining a degree of flexibility in their personal schedules.

2. *Jonites v. Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008) – Employees sued for compensation based on their employer's on-call policy that required them to respond within 2 hours to at least 35% of the calls while off duty.

The court held that the policy does not curtail the worker's freedom of action to the level that requires compensation.

v. The frequency of actual calls during on-call periods

vi. The actual uses of the on-call time by the employee

vii. The disciplinary action, if any, taken by the employer against employees who fail to answer calls

c. *Adair v. Charter County of Wayne*, 452 F.3d 482 (6th Cir. 2006) – Security officers at an airport were not entitled to compensation under the FLSA for their time off duty when they were required to carry pagers and remain within 30 minutes from the airport. The court's analysis used the above-listed factors and held that the employees were not entitled to compensation. The employees could refuse to answer pages; the employees could engage in all their regular activities while off duty; the officers were never disciplined for failing to respond to a page; and the officers could remain at home.

d. To limit compensable on-call time under the FLSA, employing offices could consider allowing non-exempt employees to swap assignments, minimize restrictions on freedom of movement, permit other unrestricted activities during on-call periods, and provide employees significant time to respond to calls, emails, and voicemails.

3. Hazard pay – at least one court recently held that exposure to COVID-19 in the course of employees' regular duties did not entitle the employees to hazard pay, and because their FLSA overtime claims were derivative of their hazard pay claims, their FLSA claims failed. *Adams v. United States*, 152 Fed. Cl. 350 (2021), *appeal docketed*, No. 21-1662 (Fed. Cir. Feb. 17, 2021).

Family and Medical Leave Act (FMLA)

The FMLA applies to the legislative branch through section 202 of the CAA, 2 U.S.C. § 1312, and provides rights and protections, including unpaid leave and job protection, to eligible employees who need to take time off from work for specified family and medical reasons.

Although the Families First Coronavirus Response Act (FFCRA) expired at the end of 2020, eliminating child care as a qualifying reason for FMLA leave, the fact that the pandemic is still ongoing means some employees will still get sick with COVID-19, some will have to care for family members who get sick with COVID-19, and some will be forced to deal with their own or family members' lingering health issues even after recovering from the virus. All of these reasons might form the basis for employees using protected leave under the FMLA.

As the pandemic continues, employing offices should continue to be mindful of their obligations under the FMLA, including such issues as:

1. *Staffing* – If an employee meets the FMLA eligibility requirements and they are requesting leave for a qualifying reason as defined by the statute, the employing office must allow the employee to take time off. Manpower considerations have no bearing on whether the employee is entitled to leave. Thus, employing offices may encounter situations where multiple eligible employees qualify to take FMLA leave at the same time, and employers should prepare for how they will continue to operate in the event of mass staffing shortages. This preparation may involve identifying essential or time-sensitive services that the office must continue to provide, planning for service automation where possible, and conducting cross-functional training.

2. *Job Protection* – Employees are generally entitled to return to their same job or an equivalent position when they return from leave. Employing offices must consider this if they choose to hire or contract with additional staff to perform the job responsibilities of employees who are out on leave.

3. *Medical Certification* – The increased demand for medical services during the pandemic may affect employees' ability to obtain completed FMLA medical certifications from their medical providers in a timely manner. Timely medical certification completion may be further complicated where employees test positive for COVID but do not seek medical care. While employers are required to provide employees at least 15 days to return their completed medical certifications, the FMLA does not prohibit employers from extending this due date.

4. *Privacy* – In the event that an employing office conducts contact tracing because of potential or confirmed employee exposure to COVID-19, employing offices must limit access to an employee's FMLA-related information to as few persons as possible, to maintain the employee's privacy and confidentiality.

Finally, employing offices may also have their own policies about employees taking leave for childcare and other reasons not necessarily covered by the FMLA but still impacting employees' lives as the pandemic continues.

Age Discrimination in Employment Act (ADEA)

The ADEA applies through section 201 of the CAA, 2 U.S.C. § 1311. Under the ADEA, adverse employment decisions – even temporary ones that may be viewed as unfavorable – must not disfavor employees aged 40 or over. It is well documented that COVID-19 has disproportionately affected older individuals, and employers may be tempted to treat older workers differently in a well-intentioned effort to protect them from the risk of exposure. However, even if the employing office means well, disparate treatment of older workers – for example, involuntarily reassigning them to lower-risk positions, or requiring them to stay home while younger employees are permitted to return to the workplace – may violate the ADEA.

Genetic Information Nondiscrimination Act (GINA)

GINA applies to the legislative branch by its terms and through CAA section 102(c), 2 U.S.C. § 1302(c).

1. *"Genetic information"* – Although COVID-19 is not a genetic disorder, employers must still take care not to run afoul of GINA, which defines "genetic information" broadly to include, among other things, "the manifestation of a disease or disorder in family members of" the employee. 42 U.S.C. § 2000ff(4)(A). Therefore, it could be a violation of GINA to ask the employee whether any of the employee's family members has tested positive, been diagnosed, or shown symptoms consistent with COVID-19. However, broadly asking employees whether they have had close contact with *anyone* known or suspected to have COVID-19 would not violate GINA, as the inquiry is not specific to family members.

2. There is an exception in 42 U.S.C. § 2000ff-1(b)(3) that allows an employer to request or require genetic information to comply with the medical certification provisions of the FMLA, 29 U.S.C. § 2613. As discussed above with respect to the FMLA, caring for a family member with a serious illness – including COVID-19 specifically – is a qualifying reason for requesting and taking FMLA leave, and employing offices may require that the employee provide supporting documentation of the family member's condition.

3. *Vaccines* – The EEOC in its guidance adopted the position that information about whether an employee has been vaccinated does not qualify as genetic information under GINA: "Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of 'genetic information' as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology[.]" Note, however, that if the employing office is administering the vaccine to its employees, it must be careful about asking questions regarding family medical history as part of a pre-screening process, as this could violate GINA. https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Retaliation

Under section 208 of the CAA, 2 U.S.C. § 1317, "It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter."[2]

Additionally, some of the statutes listed above contain their own anti-retaliation provisions, which might provide alternative avenues of recovery for employees who can demonstrate that they raised good-faith concerns over potential violations of those laws.

Some examples of protected activity that would entitle employees to the protection of section 208 may include:

1. An employee reports a concern, either to the OCWR or internally to their employing office management, that they believe the employing office is not taking adequate safety precautions to protect employees from the spread of COVID-19

2. During an OCWR OSH inspection of the workplace, an employee answers the inspectors' questions regarding the steps the employer has taken to protect against the spread of the virus

3. An employee of Asian descent complains to management that he has been subjected to hostile treatment by a coworker who blames Asian people for creating the pandemic

4. An employee with a qualifying disability making her more vulnerable to the virus files an OCWR claim alleging that the employing office has denied her request for a reasonable accommodation under the ADA

5. An employee properly requests and takes FMLA leave to care for a family member who is seriously ill with COVID-19

6. The head of a labor organization requests information from management regarding the precautions being taken to prevent the spread of the virus in the workplace

It is not uncommon for employees to succeed on retaliation claims even in situations where they fail to prove that the employing office committed the violations that were originally alleged. For example:

1. An employee may request a safety and health inspection, and even if the OCWR ultimately determines that there was no violation of the OSHAct, the employee might still be able to prove unlawful retaliation if they can show that they suffered an adverse employment action or were subjected to a hostile work environment because they requested the inspection.

[2] This section was originally designated as 207 but was recently renumbered as a result of a statutory amendment. The U.S. Code citation remains the same.

2. If an employee believes that they were subjected to a hostile work environment because of their national origin or another protected characteristic, and that complaining about it to management or filing a claim with the OCWR led to even worse harassment or an adverse personnel action, the employee might be able to show retaliation even if they can't prove that the original hostility was unlawful.

Workers' Compensation

Although not covered by the CAA, and not administered by the OCWR, workers' compensation laws apply to legislative branch employees, who are "employees" within the meaning of Federal Employees' Compensation Act (FECA). *See* 5 U.S.C. § 8101(1)(A) (applying to "a civil officer or employee in any branch of the Government of the United States"). Where FECA applies, its remedy is exclusive and bars all other claims for compensation against the Government.

Some workers' compensation issues to consider with respect to the pandemic are summarized below:

Burden of proof – An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that:

(1) the individual is an employee of the United States within the meaning of FECA,

(2) the claim was timely filed within the applicable time limitation of FECA,

(3) an injury was sustained in the performance of duty as alleged, and

(4) any disability or medical condition for which compensation is claimed is causally related to the employment injury.

S.B. & Dep't of Veterans Affairs., Albany Stratton Veterans Admin. Med. Ctr., No. 19-1744, 2020 WL 2476893 (E.C.A.B. Mar. 17, 2020). These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease. *Id.*

Causal relationship – Causal relationship is a medical issue. The medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the causal relationship – if any – between the claimant's diagnosed condition and the established incident or factor of employment.

Presumption of injury: duties that include risk of exposure to COVID-19 – On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021. The new law makes it easier for federal workers diagnosed with COVID-19 to establish coverage under FECA. Section 4016 of the law provides that a federal employee who is diagnosed with COVID-19 and carried out duties that required contact with patients, members of the public, or co-workers, or included a

risk of exposure to the novel coronavirus during a covered period of exposure prior to the diagnosis, is deemed to have an injury that is proximately caused by employment.

Employer-sponsored vaccinations – Some offices within the legislative branch have been authorized to provide COVID-19 vaccinations to their employees through the Office of Attending Physician. Although employees have a choice whether to obtain the vaccine, it is possible that the Department of Labor could deem an injury resulting from the vaccine a compensable injury. *See*, *e.g.*, *DiPippa v. United States*, 687 F.2d 14 (3rd Cir. 1982) (discussing Department of Labor's intent to provide FECA coverage for adverse reactions to inoculations administered by federal employers on federal premises).