National Association of College and University Attorneys
Presents:

The Intersection of ADA and COVID - A Discussion on Evolving Strategies

Webinar

October 4, 2021

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Elizabeth Conklin
Yale University

Jeffrey Nolan
Holland & Knight LLP

Lorena Peñaloza
University of California, Santa Cruz

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Speaker Biographies
Webinar

The Intersection of ADA and COVID - A Discussion on Evolving Strategies

Elizabeth Conklin joined Yale University in the inaugural role of Associate Vice President for Institutional Equity, Access, and Belonging in September 2020. In this role, Elizabeth provides leadership for Yale's institutional equity, access, and belonging strategy and initiatives. This includes overseeing the Office of Institutional Equity and Access, Student Accessibility Services, and the Office of LGBTQ Resources. Elizabeth's work also focuses on ensuring training for university community members on responding to discrimination and harassment and creating a culture of belonging to prevent such behaviors.

Prior to joining Yale, Elizabeth served for nearly nine years as UConn's Associate Vice President for the Office of Institutional Equity, Title IX Coordinator and ADA Coordinator. Before her time in higher education administration, Elizabeth was an associate attorney with a midsize Hartford law firm practicing labor and employment law.

Elizabeth earned her law degree from the University of Oregon School of Law, and she is a *cum laude* graduate of the University of Connecticut, where she earned a Bachelor's Degree with an independent double major in Political Science and Peace Studies.

As a member of the Education Team and Labor, Employment and Benefits Group at Holland & Knight, **Jeff Nolan** works with clients throughout the United States regarding situations that implicate Title IX, the Clery Act, the ADA, and other laws that apply in the higher education context. Jeff conducts compliance assessments, helps clients develop appropriate policies, practices and training programs, and provides training to investigators, hearing panel members, and other professionals. Jeff also advises clients on threat assessment practices, helps clients create appropriate violence prevention policies, and conducts independent investigations of sensitive campus and workplace issues. Jeff also represents clients in federal and state courts and before administrative agencies.

Jeff has presented for NACUA many times on Title IX/Clery Act, threat assessment, ADA, employment law and other issues, and has authored or co-authored three NACUANOTEs on issues related to fair, trauma-informed sexual assault investigations, emotional support animals, and developments in the law related to transgender individuals. In 2018 and 2019, Jeff served on a working group that developed the American Council on Education's comments to the Department of Education regarding the November, 2018 proposed Title IX regulations.

Lorena Peñaloza became Chief Campus Counsel for the University of California, Santa Cruz (UCSC), one of the ten campuses in the University of California system, in March 2017. She provides advice to the campus on a broad range of legal issues, including employment, police, and student safety and conduct issues. She reports jointly to UCSC Chancellor George Blumenthal and UC system Senior Vice President and General Counsel Charles Robinson and serves on their respective leadership teams. Lorena previously worked for the Office of General Counsel for the California State University system, where she first served as a litigator and then as University Counsel for two of the system's twenty-three campuses. Prior to joining CSU, she served as Assistant City Attorney with the City Attorney's Office for the City of Santa Ana, and began her legal career with the Social Security Administration's Office of the General Counsel in Maryland through the Presidential Management Fellowship (formerly known as Presidential Management Internship) program.

Lorena has been a NACUA member since 2008. She has served on several committees, including the 2009 and 2018 Annual Conference Planning Committees. She holds a B.A. from the University of California, Berkeley, and a J.D. from the University of California, Hastings College of the Law.

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A Discussion on Evolving Strategies

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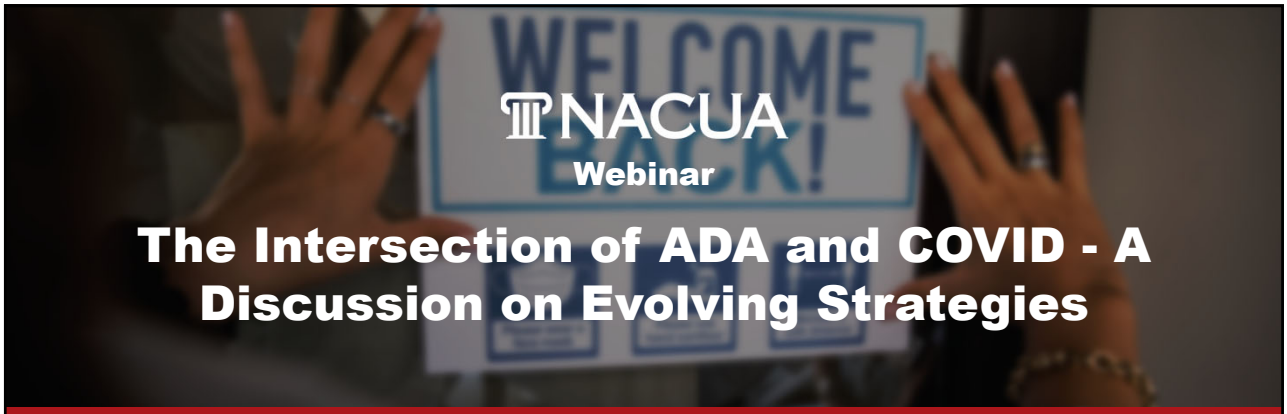

Monday, October 4, 2021

Elizabeth Conklin, Associate Vice President for Institutional Equity, Accessibility, and Belonging, Yale University

Jeffrey J. Nolan, Holland & Knight LLP

Lorena Peñaloza, Chief Campus Counsel, University of California-Santa Cruz

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In Brief Summary: The Legal Framework

- Unchanged, e.g., Section 504 of the Rehabilitation Act of 1973 , ADA
- Section 504 of the Rehabilitation Act
  - "No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."
- Americans with Disabilities Act
  - "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

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In Brief Summary: The Legal Framework

- Office for Civil Rights of the U.S. Dep't of Education ("OCR"):
  - COVID-19 has not changed the legal standard, "whether an institution serves students in a brick and mortar or an online environment."
- Equal Employment Opportunity Commission (EEOC):
  - "EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19."
  - Employers who allowed employees to telework during the height of the pandemic were not necessarily required to offer teleworking as a reasonable accommodation after offices reopened.
- Important to:
  - be flexible and
  - make an *individualized determination*

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Guidance, Enforcement Activity, and Litigation

- Relevant OCR Guidance
  - Resource Collection for Postsecondary Institutions
  - DOE COVID Handbook Vol. III Safe Operation and Addressing COVID-19 Impact
  - See "Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment" (May 13, 2021)
  - https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking
- EEOC COVID-19 Guidance
  - See "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (Updated May 28, 2021)
  - https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- COVID-19-Related Litigation Activity

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Navigating Accommodations Requests in the Learning and Working Environments

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To Begin: Distinguishing between ADA Requests and Non-ADA Requests

- Many overlapping types of requests in the face of Covid
- Important to begin analysis of requests and campus response structures by distinguishing ***what type*** of request is being made
- **Not all requests implicate the ADA**
  - Likely seeing *many* requests not related to employee's own medical condition, but rather that of a household member
    - Unvaccinated children, at-risk family and/or household members
    - Religious or other beliefs

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Distinguishing between ADA Requests and Non-ADA Requests

- Clear processes and structures for different kinds of requests: helpful to entire campus community and staff facilitating processes
- Office(s) responsible for the interactive ADA process facilitation may not be best positioned to facilitate other types of accommodation request processes
  - If they are doing so, provide clear and consistent information about what process they are following
- Support from public health experts on campus will likely be important to the individuals in the ADA accommodations office(s) – some requests are raising novel and challenging questions
- Remember: Individualized, case-by-case analysis is critical (even where there are general blanket rules generally in the non-ADA context)

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The Interactive Process

- Engagement in good faith by both parties
- Analyze the essential functions of a job or the fundamental nature of a program/service
  - Does the position exist to perform that function
  - Does the function require a degree of expertise or skill
  - What's the objective of the course/program
- Determine and understand the functional limitations of the individual with a disability
- Explore potential accommodations

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Doe v. Univ. of Ky. (E.D. Ky. 2021)

- Defendant Univ. of Kentucky offered admission and full scholarship to Plaintiff Jane Doe, in November 2018
- Doe sought accommodations for her dietary restrictions
- Univ. of Kentucky offered numerous accommodations that Doe rejected
- Court concluded that the allegations of failure to accommodate failed:
  - "As the record reflects, UK offered Plaintiff every accommodation that Plaintiff *originally* laid out, . . . without success. . . if Plaintiff rejects a reasonable accommodation, she is no longer a 'qualified individual' as a matter of law."

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Learning Accommodation Requests

- Remote lectures, sections, labs
- Testing
- Housing & dining
- Note taking & recording & video captioning
- Course materials in advance
- Course load reduction
- Meals in class

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Faculty and Staff Accommodation Requests

- Remote office hours
- Information about students
- Remote teaching and work
- Reduction of classroom size
- Supplies
- Classroom location
- Reduced workload
- Remote site accommodation

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Fundamental Alteration & Undue Burden

- Still applicable and in some instances, “an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now”
- What's relevant?
  - Whether current circumstances create "significant difficulty or expense" in acquiring or providing the accommodation
  - some unique pandemic-related issues:
    - More difficult to provide temporary assignments
    - Delivery of items impacted
    - More difficult to reduce non-essential functions of the job
    - Budget and resources of the institution post-pandemic

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Fundamental Alteration & Undue Burden

- Required to provide reasonable modifications to policies, practices, and procedures when such modifications are "necessary to avoid discrimination on the basis of disability, unless [the institution] can demonstrate that making the modification would *fundamentally alter* the nature of the service, program, or activity." *See generally*, Consent Decree, Dudley and the United States v. Miami University, et al., Case No.: 1:14-cv-38 (2016).
- Review and assess the course
  - collaborative process involving pertinent officials
  - considered alternatives
- Individualized assessment
- Follow-up

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Building the Record

- Institutions have wide discretion to make essential function/fundamental alteration decisions
- Institutions' ability to explain and defend those decisions will be enhanced by a process that is:
  - Intentional
  - Deliberative
  - Documented
- Consider analogy to process of building record in support of student affirmative action programs

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Case Scenarios

- A dean makes an accommodation for a faculty member to teach remotely without going through any institutional process (at an institution that is returning to in-person only instruction and has denied nearly all requests to teach remotely)
- A student requests remote instruction at an institution that has returned to all in-person learning
- Multiple teaching assistants refuse to come back to the classroom at an institution that is only offering in-person classes

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Legal Implications of Policy Decisions

- Does the determination that a remote teaching accommodation is not a fundamental alteration of the program impact learning accommodation requests?
- Do our policy decisions around remote learning accommodations enlarge or bridge the equity gap?
- Does a determination that a remote learning accommodation amounts to a fundamental alteration of the program impact student fee class action lawsuits?

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Implications for COVID-19-Related Tuition Refund Litigation?

- Reconciling explanation of unprecedented global pandemic response with essential on-campus work and study requirements
  - Public communications
  - Court filings
- It can be done!

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ADA Issues Related to the Vaccines

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Faculty and Staff Vaccination Issues

- Emergency Use Authorization vs. FDA approval
- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
  - See Q&A K.1 through K.21
- CDC Workplace Vaccination Program
  - https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html

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Faculty and Staff Vaccination Issues

- Classroom controversies and faculty issues
- Staff issues
- Accommodation dialogue
- Undue hardship/direct threat analysis
- ADA Office role
- Pres. Biden Order/OSHA rule
  - Intersection with ADA

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Student Vaccination Issues

- General validity of vaccination mandates
- Recent litigation
- Housing-related issues
- Classroom controversies
- Accommodation dialogue, undue hardship/direct threat analysis
- Exemptions
  - Disability-related
  - Religious
  - Other

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Intersection between Covid and Pregnancy: ADA Considerations

- Not a disability under the ADA or Section 504
  - Resulting impairments may be a qualifying disability
- Interplay of Pregnancy Discrimination Act (PDA) and the ADA – Requires employers to provide reasonable accommodation to pregnant employees with work restrictions, whether they are qualified as disabled (EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues,* 6/25/15)
- Vaccine: "COVID-19 vaccination is recommended for all people 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or might become pregnant in the future." (Center for Disease Control (CDC), *COVID-19 Vaccines While Pregnant or Breastfeeding,* 8/11/21)
  - "CDC strongly recommends COVID-19 vaccination either before or during pregnancy because the benefits of vaccination outweigh known or potential risks." CDC, *Health Advisory*, 9/29/21)

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Lessons Learned and Practical Considerations

- **Process Clarity**
  - Clear and consistently communicated processes and resources
  - Ongoing dialogue between campus offices involved in accommodations process
  - Documentation!
- **Importance of Individualized Assessment**
  - Sense of process fairness and "being heard"
  - Unilateral denials likely not to receive deference from courts/agencies - exceptions from general policies *can* be a reasonable accommodation
- **Some things work well in the remote environment!**
  - E.g., student disability services offices may have benefited from remote exam administration – this and other practices that may have worked well and do not constitute an undue burden and/or fundamental alteration may be worth considering for the longer term/in-person environment.

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DISABILITY ACCOMMODATIONS IN THE PRE- AND POST COVID-19 WORKPLACE: WHEN IS A REASONABLE ACCOMMODATION UNREASONABLE AND THE LONG-TERM IMPACT OF COVID-19 ON DISABILITY ACCOMMODATIONS

June 21–25, 2021

Michael C. Sullivan, Sierra Spitzer, Karyn Moore, and Kris Darrough
Paul, Plevin, Sullivan & Connaughton LLP
San Diego, California

I. Introduction

This Annual Conference presentation will discuss some novel, difficult scenarios which are likely to arise in a world after Coronavirus disease 2019 ("COVID-19"). While the usual panoply of disability and/or medical leave issues continue to evolve in a manner similar to pre-pandemic times, there are a variety of new and complicating issues with which colleges and universities, as well as other employers, will be forced to grapple. These issues will raise compliance, risk management, personnel management, and communication issues for campus counsel.

Because disability related issues are varied and complex, listed below are prior NACUA resources on disability issues already available on the NACUA website. These materials provide, in some instances, extensive review of the current state of the law.[1] We further explore a variety of interesting and complex issues likely to arise in the post-pandemic workplace.

[1] Those recent NACUA materials (and presentations) include the following: T. Pachman, S. Smith, N. Maltz Surgarman, & J. Centeno, "ADA and FMLA Theatre: A Theoretical Piece of Vignettes on Sticky ADA and FMLA Issues" (NACUA Annual Conference June 23-26, 2019); O. Jackson, E. Babbitt, & T. Wible, "At the Corner of Happy and Healthy: Where Disability, Accommodations, FMLA and ADA Intersect" (NACUA Annual Conference Materials, June 24-27, 2018); M. H. Munsch & S. Warner, "Thorny Issues Relating to Faculty Disabilities and Their Impact In and Out of the Classroom" (NACUA Annual Conference Materials, June 25-28, 2017); M. Norris & L. Palacios-Baldwin, "Navigating the Complex Intersection of FMLA, ADA and Workers' Compensation Laws" (NACUA Webinar Materials, December 6, 2016); E. Babbitt, A. Schmidt Jones & V. Leonard, "The Bermuda Triangle: How do the Requirements of FMLA, ADA/Section 504, and Workers' Compensation Intersect?" (NACUA Annual Conference Outlines and Case Studies, June 26-29, 2016); J. Nowak, M. Peterson & S. Roberts, "Don't Leave Me Now: Integrated Leave Management under the ADA, FMLA and Workers' Compensation Statutes" (NACUA Annual Conference Outlines and Case Studies, June 19-22, 2013); J. Thelen & R. Palacios-Baldwin, "Navigating Through The Perfect Storm: Managing Risks Under ADA, FMLA, and Worker's Compensation" (NACUA CLE Outline, March 21, 2013); D. VanDeusen, "FMLA and ADA/Workers' Compensation: We Know the Law, So How Do We Apply It?" (NACUA Annual Conference PowerPoint, June 2006); D. VanDeusen, "FMLA Checklists for Employers and Employees (NACUA Annual Conference Outline, June 25-28, 2006); E. Bunting, "Intersection of FMLA, ADA and Workers' Compensation Laws" (NACUA Annual Conference Outline, June 25-28, 2006). See also K. Zayko, "The Americans with Disabilities Act: Employment Case Law and Regulatory Update" (NACUA CLE Outline, March 23-24, 2011); D. VanDeusen, "New Issues in ADA and FMLA; FMLA Redux: The Top Ten Developments in 2011" (NACUA CLE Outline, March 23, 24, 2011). All such materials are available at www.nacua.org.

II. Disability Accommodations And The Interactive Process – The Basics

The Americans With Disabilities Act of 1990 ("ADA") prohibits discrimination against qualified individuals on the basis of their disabilities. 42 U.S.C. § 12112(a) (as amended by S-3406, effective January 1, 2009). Specifically, the ADA requires institutions to make "reasonable accommodations" to the "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" unless the accommodation would impose an "undue hardship." *Id.* at § 12112(b)(5)(A). An undue hardship is defined as "an action requiring significant difficulty or expense, when considered in light of [specified] factors" on the operation of the institution. *Id.* at § 12111(10)(A). A reasonable accommodation under the ADA is defined to include: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification 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)(i) and (ii); *see also* Accommodating a Disability Under the ADA Checklist, Practical Law Checklist 0-616-6857.

The Rehabilitation Act of 1973 ("the Rehabilitation Act") also prohibits discrimination on the basis of disability, but its protections are limited to employers who fall within one of three categories: (1) federal employers, (2) employers with federal contracts or subcontracts, and (3) employers who receive financial assistance from the federal government. 29 U.S.C. §§ 791; 793; 794. Section 504 of the Rehabilitation Act covers all employers who receive federal financial assistance. *Id.* at § 794; *see also Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984). In 1988, Congress amended the Rehabilitation Act to clarify that the obligations imposed by the Rehabilitation Act cover entire organizations (versus specific programs and activities) that receive federal financial assistance. 29 U.S.C. § 794(b).

Employers who fail to make a reasonable accommodation to the known limitations of an otherwise qualified employee may be subject to a claim of failure to accommodate under the ADA or the Rehabilitation Act. *See* 42 U.S.C. § 12112(b)(5)(A). An employee has the burden of demonstrating: "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999).

Under the Rehabilitation Act, an employee must prove that: (1) they are disabled; (2) they are "otherwise qualified" [with or without reasonable accommodations] for the benefit sought or for participation in the program; (3) they were excluded from participation in, denied the benefit of, or subject to discrimination "solely by reason of … [their] disability;" and (4) the program or activity receives federal financial assistance." *Bowers v. Nat'l Collegiate Athletic Ass'n,* 9 F.Supp.2d 460, 490 (D. N.J. 1998). Notably, liability under the Rehabilitation Act requires an employer to have discriminated against an employee solely because of the employee's disability. *Id.*

The ADA requires institutions to engage in a good faith "interactive process" with their employees. *See Ahmed v. Regents of Univ. of Cal*., No. 17CV0709-MMA (NLS), 2018 WL 747796, at *5 (S.D. Cal. Feb. 7, 2018) (*citing Timmons v. United Parcel Serv., Inc.*, 310 Fed.Appx. 973, 975 (9th Cir. 2009)). The interactive process requires communication and good faith exploration of possible accommodations between employers and individual employees with a goal of determining a reasonable accommodation. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001); *see also Barnett v. U.S. Air*, 228 F.3d 1105, 1114 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391 (2002). Either a disabled employee or an employer may initiate the interactive process. *See Humphrey*, 239 F.3d at 1137. The employee may start the process by requesting an accommodation, while the employer may start the interactive process by recognizing the need for an accommodation. *Barnett*, 228 F.3d at 1112. Thus, institutions are responsible for undertaking an interactive process where they have notice, either formal or informal, that such a process might be necessary.

Finally, it is unlawful to retaliate against employees for exercising their statutory rights. *See* 42 U.S.C. § 12203 (ADA § 503); 29 C.F.R. § 1630.12. Retaliation occurs where there is a causal connection between an employee's protected activity and an employer taking an adverse employment action against that employee. *Id.*

III. FMLA Leave – The Basics

The Family and Medical Leave Act of 1993 ("FMLA") (29 U.S.C. §§ 2601-2654) provides job protection to covered employees of qualified employers for the care of a child (including birth, adoption and foster care), care of a spouse, child, or parent with a serious health condition, a personal serious health condition, and a qualifying exigency arising out of the military service of a spouse, child, or parent, or care of a military member with a serious injury or illness. 29 U.S.C. § 2612(a). The FMLA applies to employees that have worked for a covered employer for at least 12 months and have worked 1,250 hours before the first day of requested leave. The FMLA applies to private employers with fifty or more employees for 20 or more calendar workweeks in the current or preceding calendar year. *Id.* at § 2611(4)(A)(i) and 29 C.F.R. § 825.104. Notably, the FMLA does not cover employees employed in any country other than the United States, or any territory or possession of the United States. 29 C.F.R. § 825.102 and 825.105(b); *see also Cousins v. Hastings Mfg. Co., Ltd. Liab. Co.*, No. 1:11-CV-1196BE, 2012 WL 6690398, at *4 (W.D. Mich. Dec. 21, 2012) (granting defendant's motion for summary judgment where plaintiff worked in China and was denied FMLA by employer based in Michigan "because Cousins worked outside of the United States, he was not an eligible employee for purposes of the FMLA").

State employers, which include many colleges and universities, are considered public agencies and are covered by the FMLA regardless of the number of employees; however, "employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g. State) employ 50 employees at the worksite or within 75 miles." 29 C.F.R. § 825.108. Moreover, public universities should keep in mind that some suits brought under the FMLA (and/or the ADA) may be barred under sovereign immunity. For example, in *Sullivan v. Texas A&M University System*, No. 20-20248 (5th Cir. 2021), the Fifth Circuit affirmed the district court's dismissal of a former employee's claims against Texas A&M University ("Texas A&M") as barred by sovereign immunity. The fired Texas A&M employee

alleged he was terminated for his severe heart condition (atrial fibrillation). However, the court held that Texas A&M is an agency of the State of Texas, so a suit against the former is a suit against the latter. Furthermore, the court found that neither of the two exceptions to sovereign immunity applied in these circumstances: Texas A&M had not waived its immunity nor had Congress abrogated it. Per the opinion, the U.S. Supreme Court has held Congress overstepped its bounds when it made states susceptible to ADA suits and certain FMLA suits. Thus, the court found that the plaintiff would have had to sue under the FMLA's family-care provision (not the self-care provision) to beat sovereign immunity.

Similar to the ADA, employers may not retaliate against employees for exercising their rights under the FMLA. The Department of Labor has explained that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions." 29 C.F.R. § 825.220(c).

IV. The Impact Of COVID-19 On Disability Accommodations

A. Work At Home As An Accommodation

Working from home was thrust upon employees and employers alike at the onset of the COVID-19 pandemic. While this was a definite shift in the dominant paradigm, working from home has long been a possible accommodation under the ADA.

On February 3, 2003, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a "Telework Fact Sheet" under the ADA. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation. This guidance document addresses considerations the EEOC believes employers should make when evaluating employee requests to work from home. For cases where an employee or their immediate family member(s) contract COVID-19, there is no significant impact on the above guidance. Similarly, COVID-19 does not really impact employees who were deemed "essential" and who have worked in-person throughout the pandemic.

The EEOC has since issued guidance last updated on May 28, 2021, entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited May 29, 2021).[2] This guidance clarifies that an employee without a disability is not entitled under the ADA to work from home ("WFH") as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. *Id.* at D.13. The EEOC notes employers are free to allow employees to WFH, but cautions employers not to engage in disparate treatment of employees if it does so. *Id.*

[2] The EEOC added a note to this guidance that they are considering revisions. Employers are well advised to regularly check back for updates to ensure they are relying on the latest guidance.

Moreover, the EEOC says allowing WFH during the pandemic does not automatically mean WFH must be provided to employees as a reasonable accommodation. WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, *supra*, at D.15 (last visited May 29, 2021). Per the EEOC, any time an employee requests an accommodation, the employer is entitled to understand the disability-related limitation that necessitates the accommodation. *Id.* If the employer can effectively address the need with another form of reasonable accommodation at the workplace, the employer can choose that alternative to WFH. *Id.* Also, to the extent an employer is permitting WFH 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 WFH as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. *Id.* Per the EEOC:

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

Id. at D.15.

Given the above, employers should continue to think carefully about the essential job functions of each position and valid reasons why WFH may be an undue burden. For example, the ADA does not require an employer to allow disabled workers to WFH where their productivity would be reduced. *Vande Zande v. Wis. Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995). This will be an especially strong argument for any employer who can show an employee's productivity dropped when they WFH during the pandemic.

Similarly, employers should consider whether technology used during the pandemic (*e.g.*, Zoom) allows certain job functions to be met remotely.[3] For example, in *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565 (7th Cir. 2019), as amended, reh'g en banc denied (Aug. 9, 2019), an employee with multiple sclerosis successfully worked from home for years.

[3] In some states, employers may be required to reimburse workers for any expenses that constitute a necessary part of performing their job. For example, the California Labor Code requires employers to cover "all necessary expenditures or losses" that workers incur while doing their jobs. Cal. Lab. Code § 2802. When employees WFH, those costs may include the purchase of a desk, computer equipment and chair, as well as reimbursement for utilities, such as electricity, Internet or broadband, and phone service. *See also* June Bell, *Do Your Work-from-Home Policies Comply with California Law?*, SHRM (Sept. 4, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/do-your-work-from-home-policies-comply-with-california-law.aspx.

The essential functions of the job changed after a merger and the new duties required face-to-face meetings on short notice. The court found the company properly rescinded all remote arrangements for both disabled and non-disabled employees and affirmed summary judgment. However, post-COVID, this case might not be decided the same way. Given the ease and prevalence of Zoom and other video conferencing technology, a court might easily find that face-to-face meetings on short notice can instead be handled via video calls.

Despite all of the potential changes brought by COVID-19, employers can still request medical records supporting an employee's requested accommodation. For example, in *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805 (6th Cir. 2020), an employee with an injured shoulder asked to be able to work from home three days a week. *Id.* However, the court found that there was insufficient medical evidence establishing this need, stating: "An employer may request medical records supporting the employee's requested accommodation. *Id.* Thus Ascena had every right to ask [plaintiff] for medical documentation linking his injured shoulder and his work-from-home request." *Id.* The court further opined that "[t]he ADA is not a weapon that employees can wield to pressure employers into granting unnecessary accommodations or reconfiguring their business operations." *Id.* Summary judgment was affirmed since there was no demonstration by the employee that the shoulder injury mandated working from home. *ID.*

B. Sufficiency Of Medical Documentation – Focus On Abilities And Limitations, Not Solutions

It is not uncommon for employees to request a specific accommodation without explaining the nature of the limitation giving rise to the accommodation request. These requests may be verbal or written, and may even consist of a doctor's note specifying a particular accommodation. Employers would be ill-advised to grant the requests without receiving information about limitations that necessitate the particular accommodation.

As explained below, employees are not entitled to the accommodation of their choice; they are entitled to a *reasonable* accommodation. This same principle applies in the context of coronavirus-related accommodation requests. Indeed, some accommodations may have the effect of increasing the risk of COVID-19 transmission amongst employees. Thus, it becomes critical for employers to understand the employee's particular limitation before granting an accommodation request.

1. Employee's Preferred Accommodation

An employee's request for an accommodation requires the employer to engage in a good faith interactive process to identify a *reasonable* accommodation. The ADA does not, however, entitle employees to their *preferred* accommodation. *Keyhani v. Tr. of Univ. of Pa.*, 812 Fed.Appx. 88, 91-92 (3d Cir. 2020).

Further, disabled employees' preferred accommodation requests are not binding on the employer. *See Kitchen v. BASF*, 952 F.3d 247, 254 (5th Cir. 2020) ["the ADA does not provide a right to an employee's preferred accommodation but only to a

reasonable accommodation."]. While the EEOC advises that "the preference of the individual with a disability should be given primary consideration," it also recognizes that employers have the ultimate discretion to choose between effective accommodations. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE, REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002).

Accommodation requests that identify a preferred accommodation without explaining the employees' limitations standing in the way of them performing the essential functions of their job is a request focused on *solutions*. The problem with this solution-based approach is that it skips over the important process of identifying the ADA disability and the functional limitations imposed by the disability.

It may very well be the case that the requested accommodation is the one ultimately adopted. However, employers should handle accommodation requests with care by investigating possible accommodations and proposing alternatives that are feasible. Employers may do so by having a conversation with the employee or by requesting medical documentation concerning the following:

- the activity or activities that the impairment limits;
- the extent to which the impairment limits the employee's ability to perform the activity or activities; and
- why the requested reasonable accommodation is needed.

2. Addressing Employees' Preferred Accommodations During COVID-19

COVID-19 has brought on a wave of solution-based accommodation requests. Employees may be requesting accommodations to allow them to work effectively from their home. On the other hand, employees in the workplace may be requesting COVID-19-related accommodations to allow them to work safely in the workplace. For example, employees may be requesting exemptions from the requirement to wear PPE.

Regardless of where the employee is working (from home or in the workplace) or what accommodation they request, it is important for employers to understand the limitations that form the basis of the employee's accommodation request. To be sure, diagnosis is not synonymous with limitation, and employers should not be requiring their employees to reveal their diagnosis. But because an employee's limitations, the job requirements, and the employer's workplace facilities are all unique, the only way to arrive at a mutually agreeable "reasonable accommodation" is for employers and employees to work together to consider the work-related modifications or adjustments that address the employee's functional limitations.

Importantly, the COVID-19 public health crisis has brought about unique challenges in the context of medical documentation for accommodation requests. For example, healthcare providers across the nation have been extremely busy, and it may be unrealistic for employers to receive medical documentation in a timely manner. Employers should consider alternatives to requesting documentation, which may

include having a discussion with the employee or relying on other sources of information such as health insurance records or a prescription. Additionally, the EEOC recommends that employers consider providing the accommodation on a temporary basis. WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, *supra*, at D.1 and D.7 (last visited May 29, 2021). In doing so, the employer should clearly explain why the accommodation is being provided on a temporary basis.

Finally, decisions made during the pandemic can have post-pandemic consequences. If an employer grants an accommodation request during the pandemic without a clear understanding of the employee's limitations, the employer will be hard-pressed in answering why they cannot grant post-pandemic requests for the same or similar accommodation. Employers across the nation are assessing what their workplace will look like in a post-COVID era. Sufficient documentation of the accommodation process is one way in which employers can build in flexibility to develop their post-pandemic workplace in accordance with their needs.

C. Mental Health Considerations

The COVID-19 pandemic has taken a toll on both the body and the mind. Although the physical aspect of COVID-19 has generally been the focus of discussion, the mental aspect of COVID-19 is equally significant and cannot be overlooked. Since the beginning of the pandemic, there has been an added element of stress and anxiety in our daily lives, whether this has been related to fear of contracting COVID-19 and/or spreading it to others, worry over losing a job or the ability to support a family, or just the general fear surrounding all the unknowns and uncertainty that the pandemic has created. And, for many with preexisting mental health conditions, the pandemic has only compounded the issue.

However, mental health has been a major issue in this country long before COVID-19. According to 2019 statistics from the National Alliance on Mental Illness, 1 in 5 U.S. adults experience mental illness each year. Add a global pandemic to the mix and these numbers have shot upward. According to a recent study conducted jointly by the National Center for Health Statistics ("NCHS") and the Census Bureau, from June 2019 to December 2020, the number of Americans reporting symptoms of anxiety, depression, or both, roughly quadrupled. The study also showed that the rate of anxiety and/or depression was higher for women than men.

Accordingly, employers may find they are increasingly faced with employee mental health issues related to and arising out of COVID-19, some of which may trigger an employee's right to reasonable accommodations. Thus, it is important for employers to understand their obligations with respect to employee mental health conditions and to develop effective practices for addressing them.

1. Which Mental Health Conditions Are Considered A Disability Under The ADA?

There is not a set list of mental health conditions under the ADA that qualify as a disability, however, there are some mental health conditions mentioned in the ADA regulations as well as in the EEOC guidance that will generally be found to qualify as a disability including, major depression, post-traumatic stress disorder ("PTSD"), bipolar disorder, schizophrenia, obsessive compulsive disorder ("OCD"), panic disorders and personality disorders. 29 C.F.R. § 1630.2(j)(3)(iii); EEOC: Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights: Question 3; EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, 1997 WL 34622315, at *2 (Mar. 25, 1997).

Generally speaking, however, whether a mental health condition meets the definition of a disability under the ADA requires a close examination of the specific facts and circumstances of each individual case and a determination of whether, and to what extent, the impairment limits a major life activity.[4]

Accordingly, when evaluating whether an employee's fear or phobia related to COVID-19 rises to the level of a disability, the employer will need to engage with the employee to determine the source of the issue and level of impairment.

This analysis will be easier in some situations than others. For example, if an employee expresses concern or anxiety about returning to the workplace and increased exposure to others because he or she is at a higher risk of severe illness from COVID-19 due to a preexisting medical condition, it will be easier to identify a disability/qualifying medical condition and an appropriate reasonable accommodation. There will also likely be a doctor's note that confirms this condition.

On the other hand, if an employee expresses concern about returning to the workplace and increased exposure to others because the employee has been keeping largely isolated for the last year and is not comfortable outside of the home environment, the answer is not as clear. For some people, this may simply be a generalized fear that can be assuaged by assuring them that sufficient health and safety precautions are being taken in the workplace. Others may have a true phobia or condition (i.e. OCD, panic disorder, agoraphobia, etc.) that has such a high level of fear or anxiety associated with it that it does in fact significantly inhibit their ability to function and engage in normal activities.[5] In this case, even though the condition

[4] Major life activities generally 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, working and operation of major bodily functions. 29 C.F.R § 1630.2(i)(1).

[5] According to the Mayo Clinic, the major difference between a fear and a phobia is persistence. A specific phobia is "an intense, persistent fear of a specific object or situation that's out of proportion to the actual risk." Someone with a specific phobia will generally go to great lengths to avoid encountering the object or situation even if that

may not be as obvious and may not have been formally diagnosed by a doctor, the impairment could still be considered a disability requiring accommodation if it substantially limits one or more of the employee's major life activities.[6]

2. What Are Employers' Accommodation Obligations?

If an employee's mental health condition meets the definition of a disability, the duty to engage in the interactive process is triggered, and the employee may be entitled to a reasonable accommodation, unless the accommodation poses an undue hardship on the employer. 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).[7]

Once a disability-based need for accommodation has been identified, there must be an initial analysis as to whether the employee is able to perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). As discussed above, it is not considered reasonable for an employer to have to eliminate an essential function of a job as an accommodation, so a critical part of this analysis is determining whether the aspect(s) of the job affected by the employee's mental impairment is an essential one. For example, in *Hill v. Walker*, 737 F.3d 1209 (8th Cir. 2013), an employee with an anxiety disorder requested to be removed from a stressful case. However, because the employee was a family service worker, the court concluded that handling stressful cases was an essential function of the job and therefore removal from the case was not a reasonable accommodation. *Id.* at 1217.

It is also allowable and appropriate for the employer to request documentation supporting the need for the accommodation(s) related to a mental health disability, particularly if the disability or need for accommodation is not obvious. However, as noted above, some mental health disabilities, especially those that surfaced for the first time during the pandemic, may not have been formally diagnosed or evaluated by a mental health professional and many employees may not have any documentation. If this is the case, employers can either request that the employee abide by the formal process and obtain supporting medical documentation that identifies their restrictions and need for specific accommodations, and/or engage directly with the employee about the specifics of his/her perceived limitations and discuss options for accommodating them. In either event, it is important that the

means isolating themselves or giving up something that they love. Thus, a phobia can affect someone in all aspects of life and may substantially limit their ability to engage in major life activities, including work.

[6] Under the ADAAA, various "rules of construction" are used in determining if an individual is substantially limited in performing a major life activity. These rules of construction generally provide that the term "substantially limits" should be interpreted broadly and in favor of finding coverage under the ADA. 29 C.F.R. § 1630.3(j)(1)(i).

[7] Generally, it is up to the employee to inform the employer of a need for accommodation for a mental health disability. However, there are limited circumstances that call for an employer to initiate the accommodations process without a request from the employee including if the employer knows the employee has a disability, knows or has reason to know the employee's workplace problems are due to a disability, or knows or has reason to know that the disability itself prevents the employee from requesting an accommodation. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Question 40.

process be well-documented in writing, including clear identification of all restrictions/limitations and accommodation options discussed.

3. What Are Some Common Mental Health Accommodations?

Because mental health conditions are often based on more nuanced or difficult to define reasons or triggers, providing reasonable accommodations for them may call for some creativity. The EEOC guidance provides some general suggestions for possible accommodations for mental health conditions as follows:

- Altered break and work schedules;
- Quiet office space or devices that create a quiet work environment;
- Changes in supervisory methods;
- Specific shift assignments;
- Permission to work from home;
- Changes to workplace policies, procedures, or practices;
- Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery;
- Physical changes to the workplace or equipment;
- Reassignment to a vacant position.

U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2016-11, DEPRESSION, PTSD, & OTHER MENTAL HEALTH CONDITIONS IN THE WORKPLACE: YOUR LEGAL RIGHTS at Q.3 (Dec. 12, 2016), https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights#:~:text=If%20you%20have%20depression%2C%20post,can%20help%20you%20perform%20and(last visited June 2, 2021); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1997-2, ENFORCEMENT GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES (Mar. 25, 1997), 1997 WL 34622315, at *11-14.

D. COVID-19 and the "Regarded-As" Issue

The ADA protects individuals who have a disability, had a disability, or are "regarded as" having a disability. *See* 42 U.S.C. § 12102(1). The "regarded as" claims are premised on the idea that "being perceived as disabled "may prove just as disabling" to a person as another type of physical or mental impairment. *Eshelman v. Patrick Indus., Inc.*, 961 F.3d 242, 245-46 (3rd Cir. 2020). While employers are not required to provide an accommodation under the regarded-as prong, they may be subjected to alternate theories of liability. 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.2(o)(4).

COVID-19 brings up two issues: First, employees may bring claims alleging that their employer violated the ADA by disciplining or terminating the employee because their employer perceived the employee as having COVID-19. Second, employers' attempts to reduce COVID-19 exposure to high-risk employees may leave employers vulnerable to ADA-related claims.

1. The ADA's "Regarded As" And "Perceived As" Claims

Under the ADA, an employee is "regarded as disabled" if the employer mistakenly believes that the employee's actual, nonlimiting impairment substantially limits one or more major life activities. *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999). However, the ADA's protection does not extend to impairments that are "transitory and minor." 42 U.S.C. § 12102(3)(B). An impairment is transitory if it has "an actual or expected duration of six months or less." *Id.* The term "minor" is not defined in either the statute or regulations. However, the EEOC's interpretive guidance does note that, without this exception, "the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu," and that the exception applies to "minor ailments that last only a short period of time" 42 U.S.C. app. § 1630. Because the "transitory and minor" exception is based on an objective standard, the employer's subjective belief is irrelevant. 29 C.F.R. § 1630.15(f).

2. "Regarded As" Having COVID-19 Or Long-Term COVID-19 Side Effects

One issue raised by COVID-19 in the context of "regarded as" cases is the potential for workers to claim they were "regarded as" having COVID-19 or the long-term side effects of COVID-19.

It remains to be determined whether COVID-19 would fall under the "transitory and minor" exception under the ADA's definition of "regarded as" cases. The EEOC has not taken a position on whether COVID-19 itself could be an underlying disability under the ADA. However, COVID-19 has been a disease of uncertainty, and there has been wide variance on the symptoms experienced by individuals. To further complicate the matter, research has shown that COVID-19 "can result in prolonged illness, even among young adults without underlying chronic medical conditions." Mark W. Tenforde, et al, *Symptom Duration and Risk Factors for Delayed Return to Usual Health Among Outpatients with COVID-19 in a Multistate Health Care Systems Network — United States, March–June 2020*, CTR. FOR DISEASE CONTROL AND PREVENTION (July 24, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6930e1.htm. The long-term effects of COVID-19 have been referred to as "Long COVID."

Importantly, the ADA states that the transitory and minor exception applies to those impairments that are both transitory *and* minor. 42 U.S.C. § 12102(3)(B). A recent case in the Third Circuit held that the condition must be both transitory *and* minor for the exception to apply. *Eshleman v. Patrick Indus.*, 961 F.3d 242, 245-46 (3d Cir. 2020) ["an impairment that is transitory because it lasts less than six months but is objectively non-minor must also fall outside the "transitory and minor" exception."].

Based on the foregoing, it is unclear whether an individual who has or had COVID-19 would be considered a disabled individual under the ADA, or whether employees can bring claims under the "regarded as" prong. Although some individuals only experience minor COVID-19 symptoms for a short period of time,

others experience severe illness, long-term effects, or both. To the extent courts interprets the ADA's transitory and minor exception to require satisfaction of both conditions, employers may have an uphill battle in applying the exception.

To the extent COVID-19 is considered a disability, employers face the threat of claims by employees who were not diagnosed with COVID-19, but nonetheless were perceived as having COVID-19. One can imagine a situation where an employee is approved to take time off from work, but they do not share the reason for their time off. If employers discipline or terminate the employee under the perception that the employee has or had COVID-19, the employer may be subject to a "regarded as" claim. A similar situation may exist where employers bring back a limited group of employees after layoffs and furloughs. The employees who were not rehired may allege it was based on a perception that they had COVID-19.

Even if COVID-19 itself is not considered a disability, it is possible that Long COVID will independently qualify as a disability. If Long COVID is considered an ADA-disability, workers who were diagnosed with COVID-19, but who do not have Long COVID, may potentially bring a claim against their employer alleging that they were disciplined because employers perceived them to have Long COVID. Importantly, many employees report their COVID-19 diagnosis to their employers; in other words, employers often have knowledge that their employees contracted COVID-19. Employers may later discipline these employees for performance problems, including productivity concerns. Employees may claim that their discipline and termination was a result of their employer's perception that the employee had Long COVID.

While employers cannot eliminate the risk of employees filing these types of claims, one mitigation strategy is to prepare thorough documentation of the decisional process. Additionally, employers should seek to keep an open line of communication with employees so that workers struggling with Long COVID can seek the necessary accommodations.

3. Those At Higher Risk For Severe Illness From COVID-19

COVID-19 raises a related concern that certain individuals may be perceived as being at a higher risk for experiencing severe illness from COVID-19. According to guidance issued by the U.S. Centers for Disease Control and Prevention ("CDC"), some people are at a higher risk to get severe illness from COVID-19. CTR. FOR DISEASE CONTROL AND PREVENTION, *Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last updated May 13, 2021). The individuals at higher risk include adults over the age of 65, pregnant women, and persons with certain medical conditions such as cancer, asthma, neurological conditions, immunocompromised persons, overweight and obese persons, etc.[8]

[8] "Severe illness" includes hospitalization, being placed in intensive care, requiring use of a ventilator to help the individual breathe, and death. *Id.*

If an employer excludes these high risk individuals from the workplace, the employer would be acting on a perception that a person has the potential to become ill and disabled *in the future*. The Eleventh Circuit recently found that ADA-protection does not extend to such situations. In *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019), an employee was fired after she traveled to Ghana because her employer was concerned that she was at a heightened risk of developing Ebola. The Eleventh Circuit held that the employee was not "regarded as" having a disability because the ADA protects those who experience discrimination "because of a current, past, or perceived disability—not a potential future disability." *Id.* at 1316.

Nonetheless, employers should avoid differential treatment of employees who are in the high-risk category because excluding these employees could make employers vulnerable to claims for discrimination on the basis of age, pregnancy, or other characteristics that formed the basis for the employer's exclusion of the employees.[9]

While employers may not unilaterally decide to exclude high-risk employees from the workplace or postpone their start date, the EEOC has advised that employers are free to provide flexibility to workers age 65 and older. However, if an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

It remains to be seen how COVID-19 will impact the legal landscape of the ADA's "regarded as" cases. Employers can better minimize the legal risk associate with these claims by exercising in a thoughtful decision-making process and carefully documenting the process.

E. Vaccines

As access to the COVID-19 vaccine is steadily increasing, vaccinations are moving to the forefront of the COVID-19 related matters, and employees and employers alike are facing a host of new challenges, including how to determine employee vaccination status, whether to implement mandatory or permissive vaccination policies and the parameters for same, how to accommodate objections to vaccination, balancing a workforce that has a mix of vaccinated and unvaccinated workers and how to incentivize vaccination—all the while remaining within the allowable confines of the ADA and other applicable laws.

1. Under The ADA, Is It Permissible For Employers To Inquire As To An Employee's Vaccination Status Or Request Proof Of Vaccination?

The short answer is yes. While typically under the ADA, employers have very limited ability to conduct disability-related inquiries or medical examinations of their

[9] The EEOC's May 28, 2021 update to its guidance reminds employers that a reasonable accommodation does not become unnecessary simply because employees become fully vaccinated for COVID-19. WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, *supra*, at K.11 (last visited May 28, 2021). The EEOC gave the example of some immunocompromised individuals, who may still need reasonable accommodations because vaccines do not afford employees the same measure of protection as other vaccinated individuals. *Id.* Regardless of an employee's vaccination status, employers should process accommodation requests in accordance with applicable ADA standards by engaging in the interactive process to determine if there is a disability-related need for reasonable accommodation. *Id.*

employees, the EEOC has taken the position that employers may ask employees whether or not they have been vaccinated, without running afoul of the ADA. WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, *supra*, at K.8 (last visited May 28, 2021). Similarly, an employer may request to see proof of vaccination without it being considered a disability-related inquiry under the ADA.[10]

However, if employers go beyond these basic inquiries, such as asking why an employee has not been vaccinated, they must tread carefully, as this type of question is more likely to elicit information regarding an employee's medical status/disability related information. Accordingly, once the inquiry goes further than a simple "yes" or "no" question, the employer generally must have a reason for asking that is "job-related and consistent with business necessity."[11]

2. May Employers Make Vaccination Mandatory And What Are Employers' Accommodation Obligations?

According to the EEOC guidance, employers may require that employees be vaccinated in order to physically enter the workplace, subject to the reasonable accommodations provisions of the ADA and Title VII.[12] However, employers who decide to implement a mandatory vaccination policy must be prepared to respond to various employee objections, some of which give rise to accommodation obligations under the ADA.

For example, if an employee objects to vaccination based on a disability or sincerely held religious belief,[13] employers are required under the ADA to engage in an interactive process to determine whether there is *reasonable* accommodation (i.e. no undue hardship on the employer) that would allow the employee to perform the essential functions of his/her position without the vaccination. As part of this

[10] Employers requesting confirmation or proof of vaccination should make sure to limit the scope of their inquiry to just verification of the vaccine only and not elicit any other disability-related information. All such information must be treated as confidential medical information and stored separately from the employee's personnel file.

[11] A disability-related inquiry or medical examination of an employee is considered "job-related and consistent with business necessity" when an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or an employee will pose a "direct threat" due to a medical condition. 42 U.S.C. § 12112(d); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA, General Principles at B (July 26, 2000), https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees.

[12] However, employers need to be aware of any applicable state laws. Notably, Montana became the first state to pass a law prohibiting the use of vaccination status in employment decisions. Roger G. Trim and Raul Chacon, Jr., *Montana Enacts New Law Making Vaccination Status a Protected Class and Limiting Inquiries Into Immunization Status*, THE NATIONAL LAW REVIEW, https://www.natlawreview.com/article/montana-enacts-new-law-making-vaccination-status-protected-class-and-limiting (last visited May 17, 2021). This may become a trend and surface in other states as well.

[13] Employees who choose not to be vaccinated due to pregnancy may be entitled under Title VII to job modifications and accommodations that would allow them to continue working.

process, employers will need to do a "direct threat" analysis[14] specific to their workplace to determine if and in what ways an unvaccinated employee will pose a threat of exposure to others and if there are reasonable accommodations available that can mitigate or eliminate the threat. Termination of the employee should be treated as the option of last resort and only done after all other options for addressing the direct threat of an unvaccinated employee have been thoroughly exhausted.

In evaluating whether an unvaccinated employee poses a direct threat in the workplace, consideration should be given to the type of work environment, the employee's position and level of interaction with others and the present status/level of community spread. Specifically, the EEOC suggests that the assessment of direct threat take into account whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

Thus, as employers move toward reopening and returning employees to the workplace, reasonable accommodations for unvaccinated employees may include options such as requiring these employees to wear a mask, maintain social distance from others, work a staggered shift, have limited contact with others or be relocated to a different workspace. Additionally, to the extent they continue to be reasonable and do not pose undue hardship to the employer, continued telework, temporary leave or reassignment also remain potential options.

In terms of assessing whether an accommodation poses an undue hardship, the determination depends in part on the reason for the request. Specifically, if an employee's reason for not being vaccinated is based on a disability or medical condition, the ADA governs, and the employer must demonstrate that the requested accommodation would cause "***significant*** difficulty or expense." This is a high threshold to meet and heavily favors a finding of a duty to provide some form of accommodation. On the other hand, if the reason for the accommodation request is based on a religious practice or belief Title VII governs,[15] and the employer need only show a particular case poses a "more than de minimis" cost or burden. However, even with the less stringent showing required under Title VII, employers

[14] A "direct threat" is "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." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. 29 C.F.R. § 1630.2(r). To determine whether an employee poses a "direct threat," an employer must make an individualized assessment of the employee's present ability to perform the essential functions of the job. Employers should consider the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

[15] Employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. That said, an employer is allowed to request supporting information if there is an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.

are nonetheless advised to make every effort to grant accommodation requests whenever reasonably possible.

3. What If An Employee's Objection To Vaccination Is Not Based On A Disability Or Religious Belief?

Employees may also object to being vaccinated for a reason that is not legally protected (or at least not obviously so), in which case, the employer generally has no duty to accommodate. However, employers should proceed with caution in these circumstances as well, as there are some potential, albeit less obvious, legal risks associated with excluding or terminating such employees.

For example, suppose an employee refuses to get vaccinated because he does not believe the available vaccines have been sufficiently vetted for safety due to the fact that they have only been granted Emergency Use Authorization ("EUA") rather than full FDA approval. Assuming this employee does not have a medical condition or disability as an underlying basis for his safety concern, he would not initially appear to be protected under the law.

However, as demonstrated in a case recently filed in federal district court in New Mexico, this exact scenario may give rise to a retaliation and potential wrongful termination claim. In *Legaretta v. Fernando Macias, et al.*, No. 21-cv-179 MV/GBW, (D.N.M. Mar. 4, 2021), the plaintiff, an employee of the Dona Ana Detention Center, asserted that his employer threatened his employment status and retaliated against him for exercising his federal right to refuse the EUA vaccine. Legaretta's suit is based on Section 564 of the Federal Food, Drug, and Cosmetic Act ("FDCA"), which includes a requirement regarding emergency use of FDA-regulated products, including vaccines, that recipients be informed, to the extent practicable, that they have "the option to accept or refuse administration of the [EUA] product [and] of the consequences, if any, of refusing administration of the product." Section 564(E)(1)(A)(ii)(III) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3. Specifically, Legaretta asserts that by his employer requiring him to be vaccinated, he is being deprived of his federal right to refuse administration of the EUA vaccine. While arguably Legaretta does in fact have a choice as to whether or not to be vaccinated, his refusal to do so will cost him his job, which may, in turn, give rise to an actionable claim. As this is a novel issue, the viability of Legaretta's arguments remain to be seen; however, in any event, this case is unlikely to be the last of its kind.

In addition to potential retaliation claims, there is also the possibility of discrimination claims arising out of an employee's seemingly "non-protected" objection to getting vaccinated. Specifically, while vaccination status is not currently considered a protected characteristic under federal anti-discrimination law, there are a number of states with proposed legislation that would allow any unvaccinated employee, regardless of protected status, to bring a discrimination claim against an employer who treated them differently. Currently, there is proposed legislation in Iowa that would allow unvaccinated employees to sue their employer if subjected to discrimination in compensation or the terms or conditions of employment due to

unwillingness to receive a vaccine. Similarly, Kentucky has a proposed law that would explicitly prevent an employer from limiting or segregating an employee who declined vaccination in a way that would deprive the employee of "employment opportunities." Rhode Island, Pennsylvania, and Texas also have similar proposed legislation. As such, there looks to be some potential legal risks associated with treating vaccinated and unvaccinated employees differently coming down the pipeline in many states.

4. What Are Ways For Employers To Lawfully Encourage Vaccination?

Because of the risks and potential conflicts associated with mandating vaccination, many employers may prefer to instead encourage or incentivize their employees to get vaccinated, rather than require it.

In the EEOC's most recently issued guidance, it provided several suggestions for allowable ways to lawfully encourage vaccination. The primary recommendations being to educate employees about the various COVID-19 vaccines, raise awareness about the benefits of vaccination, provide employees with information about available locations/resources related to vaccination and to address common questions and concerns. The EEOC also clarified that, under certain circumstances, it is permissible for employers to offer vaccine-related incentives (which includes both rewards and penalties) to employees.

With respect to incentives, the EEOC delineated between offering incentives to those employees who receive a vaccine through a third party unaffiliated with the employer (i.e. the community, employee's healthcare provider) and those employees who voluntarily receive a vaccine administered directly by the employer or its agent.

As to the former, the EEOC guidance provides that employers may offer incentives to employees who voluntarily provide documentation or other confirmation of a vaccination received via a third party not affiliated with the employer. Similarly, the guidance states that incentives may also be offered to employees who show proof that a family member has been vaccinated by a third party unaffiliated with the employer.

Vaccines administered directly through the employer, on the other hand, are subject to different rules. In particular, the EEOC guidance states that, while incentives may still be offered to employees under these circumstances, they must not be "so substantial as to be coercive" in nature. Further, the guidance provides that employers may *not* offer incentives to employees in exchange for a family member's receipt of a vaccination directly from the employer or its agent because this would require the vaccinator to ask the family member pre-vaccination medical screening questions, which would include medical questions about the family member, which, in turn, would result in the employer's receipt of *employee's* genetic information in the form of family medical history and therefore violate Title II of the Genetic Information Nondiscrimination Act ("GINA"). However, this does not mean that employers are not permitted to offer an employee's family member the opportunity to

be vaccinated – there just cannot be incentives tied to it and steps to ensure compliance with GINA must be taken.

Potential incentives might include covering any vaccination-related costs, special rewards or events, small prizes, gift cards, etc. However, generally speaking, incentives should be kept fairly modest to prevent claims that an individual who is unable to receive the vaccine due to a protected reason is treated less favorably. Alternatively, employers can try to head off any such potential discrimination claims by offering a reasonable accommodation that makes the incentive equally available to all employees.

V. Conclusion

In conclusion, while we have not yet seen many cases dealing with the COVID-19 related issues, such cases are bound to arise in the near future. It will be prudent for schools and other employers to immediately begin considering and developing strategies to deal with these issues if and when they arise.

COVID-19 In-Person or Virtual Requests for Accommodations: What You Need to Know

Presented by the
National Association of College and University Attorneys (NACUA)

Paige O. Barnett, Assistant General Counsel, The University of Texas System

Jeffrey J. Nolan, Senior Counsel, Holland & Knight

Tuesday, August 25, 2020

NACUA National Association of College and University Attorneys

Presenters

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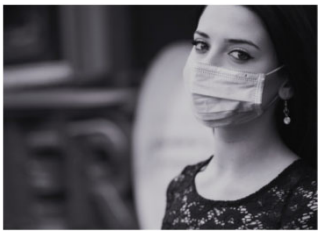
Today's Program

- Employee Accommodations
- Student Accommodations
  - Academic Accommodations
  - Housing Accommodations



Employee Accommodation Requests: Topics for Today

1. Accommodation Obligation Basics
2. COVID-19-Related Agency Guidance
3. Determining Disability Status
4. Interactive Process
5. Undue Hardship
6. Practice Pointers
7. Summary

These days, it feels like we spend our time blocking and tackling.

All images from Pixabay.

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Today we'll talk about processes that help us look down field.

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1. Review the ADA Employment Accommodation Basics

Americans with Disabilities Act and most states' laws **prohibit** employment discrimination against individuals with disabilities and **require** employers to provide to qualified employees reasonable accommodations that will allow them to perform the essential functions of their jobs.

A **reasonable accommodation** is any change in the work environment or the way a job is customarily done that enables an employee with a disability to perform the essential job functions.

In the **interactive process**, the institution and employees work together to assess whether an employee's disability can be reasonably accommodated. It is an informal practice in which the institution and employee determine the limitations created by the disability and how best to respond to the need for accommodation.

Accommodation Basics (cont'd)

- No **magic words** are required to request an accommodation.
- Notice can be **verbal or written**.
- Request **triggers** the interactive process.
- Medical inquiries must be limited in scope:
  - **job-related** and consistent with **business necessity**
- **Confidentiality** must be maintained.

2. Refer to COVID-19-Related Agency Guidance

- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, updated 6/17/20
- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, updated 3/21/20
- JAN Accommodation and Compliance: Coronavirus Disease 2019

3. Start with determining disability status

Fear of Contracting Coronavirus	Age	COVID-19	CDC-identified underlying conditions increasing risks
No	No	Maybe	Likely

Fear of contracting virus not a disability

- **Generalized fear** is **not enough** to trigger accommodation obligations.
  - Don't dismiss all requests as "generalized fears."
  - Be alert to mental health impairments that may trigger obligations.
- ADA requires **no accommodations for household members**.
- But, institutions should **acknowledge fears and communicate** all safeguards being taken.

What the EEOC says About Age and COVID-19

- Age Discrimination in Employment Act (ADEA):
  - prohibits involuntary exclusion from the workplace of employee based on being 65 or older, even if for benevolent reasons such as protecting employee due to higher risk of severe illness from
- No accommodation requirement under ADEA or ADA

"However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison."

EEOC Source: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section H, updated 6/11/20

CDC: Conditions Increase Risk for Severe Illness

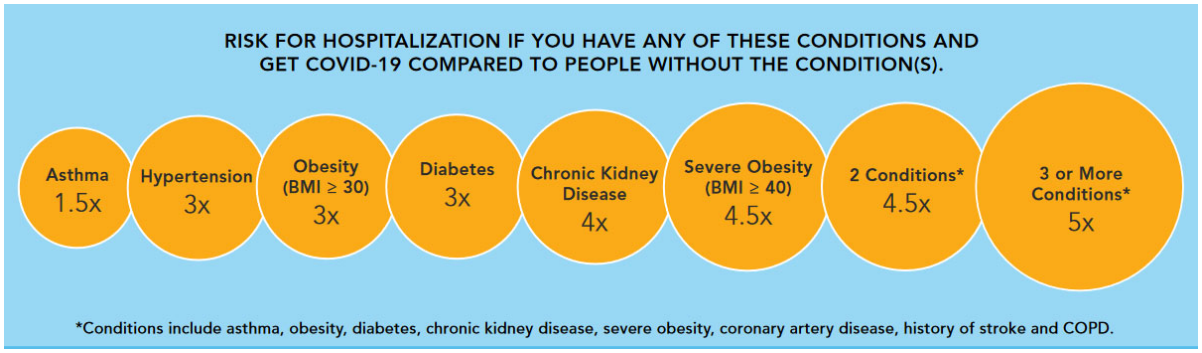
- Cancer
- Chronic kidney disease
- COPD (chronic obstructive pulmonary disease)
- Immunocompromised state (weakened immune system) from solid organ transplant
- Obesity (body mass index [BMI] of 30 or higher)
- Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
- Sickle cell disease
- Type 2 diabetes mellitus

CDC Source: People with Certain Medical Conditions, updated 7/17/20

CDC: Conditions Might Increase Risk for Severe Illness

- Asthma (moderate-to-severe)
- Cerebrovascular disease (affects blood vessels and blood supply to the brain)
- Cystic fibrosis
- Hypertension or high blood pressure
- Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
- Neurologic conditions, such as dementia
- Liver disease
- Pregnancy
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Smoking
- Thalassemia (a type of blood disorder)
- Type 1 diabetes mellitus

CDC Source: People with Certain Medical Conditions, updated 7/17/20



COVID-19 Associated Hospitalization Related to Underlying Medical Conditions, updated 8/10/20

4. Tailor your Interactive Process

Adapt your regular processes

- Tailor forms
- Designate a COVID-19 specialist
- Reconsider participants in initial conversations/meetings
  - Start with employee and disability specialist; bring in manager as needed
- Ensure regular and open communication between HR and Legal

Interactive Process (cont'd)

- Fact-specific
- May ask:
  1. how disability creates a limitation;
  2. how requested accommodation will effectively address limitation;
  3. whether alternative could effectively address issue; and
  4. how proposed accommodation will enable employee to continue performing essential job functions.
- Documentation
  - You may refer to documentation you already have.
  - Be flexible on what you require and accept.

Sample Tailored Interactive Process for Employee in High Risk Category

Refer to documents already on file	E.g., previous ADA request form, FMLA medical certification, provider notes, job description
Engage with employee, then manager	On-campus work? Remote? Hybrid? Other?
If determine that leave is needed:	○Work with leave coordinator ○Ensure protected leave used first, then PTO

Sample Tailored Interactive Process for Employee in High Risk Category (cont'd)

In more challenging scenarios, HR/Disability Coordinator consult Legal

Consider standing meetings between HR and Legal

Keep an eye on consistency

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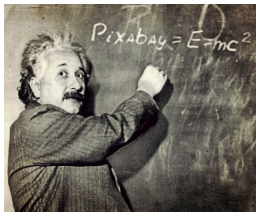
Interactive Process: Example Accommodations

- Mask alternatives for hearing impaired

JAN Job Accommodation Network



- Teleworking
  - Leadership buy-in
  - If provider note states "remote work" but employee is willing to work onsite with additional PPE, consider follow-up provider approval

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Accommodation Options

- Leave: paid & unpaid
- Adjusted shift times
- Face shields
- Enhanced or Modified PPE
- Breaks from wearing face covering
- Private workspace
- Reassignments

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Do we have to grant open-ended requests?

Provider:

Employee needs "indefinite remote work" or "indefinite leave"

Institution:

Really??

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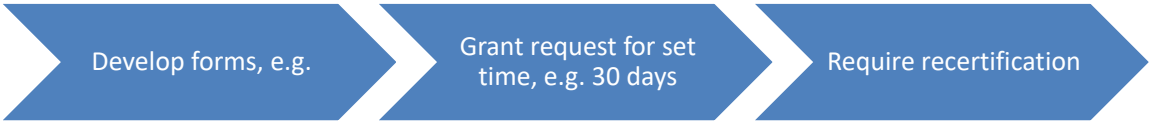
One Approach to Open-ended Request



- Return-to-work status check letter
- Update medical certification form for pandemic purposes, referring to CDC language

Sample Return-to-Work Communication

"During the unprecedented COVID-19 pandemic, University worked quickly to provide temporary workplace accommodations to you and other individuals in an effort to meet both our operational needs, and the individual needs of our employees due to their own medical conditions…. While we were pleased to provide these adjustments due to the unusual circumstances surrounding COVID-19, these changes were only temporary in nature because they did not provide adequate onsite staffing or fulfillment of essential job duties sufficient to sustain our regular operations. "

Sample Return-to-Work Communication (cont'd)

"Your department's expectation is that you and others who have been working remotely will return to the office no later than [date] to resume the job duties you performed prior to the onset of the COVID-19 pandemic.

> [Edit to reflect what's going on in a particular department or location—is the department bringing remaining teleworkers back in phases, or is the employee already supposed to be back, or is there a hard date they are expected to return, etc.]

"In the interim, if you believe that your own medical condition prevents you from returning to work onsite as scheduled, please contact [ADA contact] to discuss next steps, including whether continued accommodations or other options might be available to you.

"We thank you for your continued service and commitment to University, and for your hard work during these incredible times."

Accommodation Issues Related to Faculty

- Communicate with faculty leaders, e.g. AVPs, deans
- Institution may have desire for leadership or other faculty presence on campus when students return
  - May encounter (vocal?) pushback
  - Key: work through your processes

Accommodations in Academic Medical Centers or other Clinical Operations

- Essential Critical Infrastructure Workforce
  - ADA still applies
- Flexibility in scheduling non-clinical staff
- Physical barriers
- Leave (paid or unpaid)

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What if….

- Request conflicts with public health guidelines
- Request relates to on-campus screening
- Job description is silent on teleworking
- Department wants to deny requests
- Leave is exhausted, and termination seems likely
  - Ensure you have exhausted all other options

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Accommodations During Continued Remote Work Period

- Extended telework may bring new requests
- Notify employees now how to request accommodations for return-to-campus

5. Use caution when denying request as undue hardship

- Pandemic may justify accommodation denial
  - Significant difficulty
  - Significant expense
    - Loss of revenue stream is relevant.
    - But, consider no-cost or low-cost accommodations.

- But, the pandemic may also blunt traditional undue hardship justifications.
  - If your institution has a hiring freeze, undermines argument that termination is warranted

6. Keep in mind these COVID-19-Specific Accommodation Practice Pointers

- Develop pandemic-specific processes
- Consider temporary accommodations
- Train supervisors
  - On process
  - On written communications
  - On non-retaliation obligations

Practice Pointer: Consider Talking Points for Supervisors

Disciplinary Guidance and Talking Points for Managers Involving the University Directive for Cloth Face Coverings or Masks

Do not make assumptions. Consider there may be valid reasons to not wear a face covering. For example, a lack of awareness or understanding of the reasons behind the directive, forgetfulness, or medical reasons. Ask and listen to the reason the employee is not wearing a face covering so you can approach their concerns from a place of information and empathy. *"Is there a reason you are not wearing a face covering right now?"*

Additional Resources and Tools:

Medical Concerns with Wearing a Cloth Face Covering. If an employee shares that they are not wearing a face covering due to medical reasons, advise them that a face covering is required in interior spaces and whenever they are working near another employee and social distancing cannot be maintained. If they do not put on a face covering, send them home and refer them to the Americans with Disabilities Act (ADA) Accommodation Process. They may request a reasonable accommodation by completing the Employee Accommodation Request form.

Practice Pointer: Communication

The relationships between HR and management and between HR and Legal have never been more important.

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7. Employment Accommodations Summary

Adapt.

Communicate.

Train.

Document.

Be creative and flexible.

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Questions & Answers

Student Accommodation Requests: Topics for Today

- OCR position
- Accommodation procedures
- Documentation challenges
- Online learning issues
- Housing accommodations
- Dietary accommodations

March 16, 2020 OCR Fact Sheet

March 16, 2020 Fact Sheet: "Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students"

- "Whatever decisions are made by the school (such as decisions to temporarily suspend classes), schools must continue to comply with their non-discrimination obligations under federal civil rights laws, including Section 504 and Title II [of the ADA]."

Accommodation Procedures

- Must adapt interactive accommodation dialogue procedures to:
  - Remote learning and hybrid educational environments, and
  - Remote working environments
- Communication challenges must be anticipated and addressed
  - Communications with students
  - Communications with faculty
  - Communications with colleagues

Accommodation Basics

- Traditional questions still apply:
  - Is the requested accommodation reasonable and necessary to provide equal access to educational program or activity, or
  - is it unnecessary, or
  - would providing it constitute a fundamental alteration of the course or program or
  - be an undue burden for the institution?

Documentation Challenges

- Volume of requests may be higher
- Health care providers and related visits may be less available in current environment
  - Delays in obtaining documentation may be more common

Documentation Challenges

- Institutions may need to change teaching modalities quickly
- Disability services offices may therefore have to be more flexible in providing provisional accommodations, pending receipt of documentation
- But: Don't waive documentation requirements altogether!

Online Learning Environment Accommodations

- Digital accessibility requests will increase, possibly substantially
- Audiovisual materials and other technologies used should be accessible, captioned, etc.
  - There is no reason to believe that basic ADA digital accessibility requirements will not be enforced

Online Learning Environment Accommodations

- Providing IT support and accessibility guidelines to faculty in advance of course creation or re-configuration may decrease effort required of disability services professionals after the fact
- Spring 2020 semester presented "emergency" situation for many campuses
  - Practically, Fall 2020 expectations may be higher

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Online Learning Environment Accommodations

- Some students will request:
  - Not to attend classes in person
  - Changes in particular class requirements
- Analysis of whether student is individual with a disability will be as discussed above
- Big question will be:
  - What is a "fundamental alteration" in the requirements of a class given the experiences of the last 6-7 months?

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Student Requests for Entirely Online Program

- Applicable (of course) when institution is generally providing hybrid or in-person programs
- How relate to undue hardship argument when compared to Spring 2020 emergency remote programs?

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Student Requests for Entirely Online Program

July 15-19, 2020 NACUANET Discussion:

- Student requests completely online program based on unspecified COVID-19-related risk factor
  - Is this a request for a reasonable accommodation or could institution assert undue hardship?
- Considerations in response:
  - Nature of "undue hardship" calculus at public vs. private institutions?
  - Does Spring 2020 experience show that it is possible to create entirely online program?

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Student Requests for Entirely Online Program

July 15-19, 2020 NACUANET Discussion:

- Query: Can institutions require in-person participation to extent possible in non-emergency circumstances?
  - Analogy to employment context discussion above: emergency remote work responses do not necessarily dictate irrevocably and forever the essential elements of a job
  - Obligation is to provide a reasonable accommodation, not necessarily the preferred accommodation (i.e., social distancing, PPE, single room may be reasonable accommodation depending on disability and essential requirements of academic program)

Housing Accommodations

- Emotional support animal issues
  - See: January 28, 2020 HUD Guidance: "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act"
    - Available at: https://higherlogicdownload.s3-external-1.amazonaws.com/NACUA/e4e786ec-af81-4751-bbe5-748d3533b5eb_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1598221840&Signature=rPirdrndThTId%2B%2BgJV7%2Foq%2F2HQo%3D
- Increases due to anxiety?
- Complications and opportunities in COVID-19 environment

Housing Accommodations

- Requests for private rooms
- Alternate housing arrangements that can be offered?
- Other housing-related accommodations, including in quarantine locations

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Dining Accommodations

- Dietary accommodation (e.g., allergy-related) requirements will continue to apply
- Coordination challenges will be exacerbated by COVID-19-related “grab & go” and delivery protocols
- Institutions will need to communicate well with students with diet-related disabilities

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Questions & Answers

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EMPLOYEE & STUDENT ACCOMMODATIONS DURING COVID-19

Accommodating Employees and Students after a Year Online: Considerations for Higher Education Institutions in Returning to Campus

April 14 – 16, 2021

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I. Introduction

Requests for disability accommodations that include remote work and education are not new. Higher education institutions (as well as most other American institutions) are now returning from a period of unprecedented remote activity, and that will add the weight of experience to such requests. Relatedly, emerging technology and equipment now allow far greater connectivity from remote locations. This paper explores the implications of this new reality for disability accommodation requests implicating remote work or education as we continue to navigate the COVID-19 pandemic and look forward to a post-pandemic future.

Of course, questions of remote work and learning will not be limited to the disability context. Institutions will emerge from the pandemic better equipped for fully-remote or hybrid (combined in-person and remote) activities. Furthermore, some students and employees will believe they learned and worked better remotely and many will now have ready access to technology and equipment at home allowing for more seamless engagement in remote work and instruction than ever before. Thus, institutions will face mission-driven questions about how to more generally approach remote activity going forward.

This paper, however, deals not so much with what schools may *choose* to do with regard to these general policy questions, but with what they are *required* to do under federal disability laws. In this regard, at least two key themes emerge. First, decisions about student and employee accommodation requests will need to be evaluated on an individualized basis (as always) with a view towards the effectiveness of remote arrangements in achieving legitimate work and instructional objectives, in light of developing technologies and other resources.

Second, the fact that an institution has managed to perform many functions remotely during the height of the pandemic does *not* mean that it must continue to keep functions remote as it reopens, even if employees or students request such an accommodation. Questions such as "who are we as an institution?" and "what does it mean to be 'open'?" will have an integral impact on these decisions, because institutions have the right to preserve and re-establish fundamental

institutional and programmatic character when accommodating student and employee accommodation requests during the return to campus.

As a final note, while this paper approaches this topic primarily in terms of accommodation requests that may be related to COVID-19 (e.g., an employee who wishes to continue working remotely out of concern of being exposed to COVID-19 even as the pandemic subsides), the analysis presented here applies to a broader emerging issue. Employees and students will predictably be requesting remote accommodations for any of a number of reasons unrelated to COVID-19 (e.g., an employee with mobility challenges who can work more easily from home). Decisions on such requests will similarly have to be made in light of the expanded experiences with, and resources for, remote participation in work and learning in higher education.

II. Accommodating Employees in Return to Campus

a. The Legal Landscape

This section provides an overview of federal disability laws relevant to employee requests for reasonable accommodations of their disabilities.

i. Fundamentals of the ADA and Section 504

The Americans with Disabilities Act[1] ("ADA"), in addition to state nondiscrimination laws, prohibits employers, including colleges and universities, from discriminating against qualified individuals[2] in all aspects of employment based on a disability.[3] Section 504 of the Rehabilitation Act of 1973 ("Section 504") provides similar protections at any entity that receives Federal funds,[4] thus covering virtually every American institution of higher education. Given the significant substantive overlap between the ADA and Section 504[5], this paper will primarily speak in terms of ADA obligations with the understanding that Section 504 obligations are generally the same.

The ADA protects three classes of individuals: "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record

* The authors would like to thank Eden Vasquez, an associate in the Education and Employment Teams at Miller Nash Graham & Dunn LLP, for her considerable contribution to the development and drafting of this paper.

[1] 42 U.S.C. §§ 12111-12117 (Title I); 42 U.S.C. §§ 12131-12134 (Title II) (applying to public entities, including public colleges and universities); 42 U.S.C. §§ 12181-12189 (Title III) (applying to public accommodations, including private colleges and universities).

[2] A qualified individual is someone who possesses the knowledge, education, skill, or other job-related requirements to complete the essential functions of the job, with or without a reasonable accommodation. *See* 29 C.F.R. § 1630.2(m).

[3] This paper discusses the federal law landscape with regard to student and employee disability accommodations. In addition to any considerations under federal law, there may be parallel requirements under state and local nondiscrimination rules. Institutions should consider such rules in disability-related decisions as they may provide greater protection to individuals than Federal law.

[4] 29 U.S.C. § 794.

[5] "While some procedural differences do exist between Section 504 and the ADA, courts generally read the two statutes together to grant the same substantive protections." Marie-Thérèse Mansfield, *Academic Accommodations for Learning-Disabled College and University Students: Ten Years After* Guckenberger, 34 J.C.U.L. 203, 206 (2007).

of such an impairment, or (iii) is regarded as having such an impairment."[6] Under the ADA, an employer must provide an employee with a disability a reasonable accommodation unless doing so would create an undue hardship.[7]

An accommodation means a modification or adjustment "to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position."[8] Common examples of a reasonable accommodation include transferring some of the non-essential functions to another position, or changing when and how the essential functions are performed.[9] A reasonable accommodation can be a change in workplace or work that allows an individual with a disability to perform the essential functions of the position. Reasonable accommodations do not require the elimination or relocation of the essential functions of the job, but the employer may do so if it wishes.[10]

In making reasonable accommodations, an employer must engage in an interactive process with the employee, which "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[11]

The ADA, rather than specifying any particular accommodation that must be given to address a certain condition or disability, requires the use of this process to determine if a reasonable accommodation might allow the employee to achieve the essential functions of the employee's position in spite of his or her disability. Employers must engage in the interactive process when an employee requests an accommodation even if the conclusion is ultimately that no reasonable accommodation exists.

While the ADA provides a right to a reasonable accommodation if one exists, it does not provide a right to any specific accommodation requested by the employee. Rather, an employer may choose any reasonable accommodation.[12] An employer does not have to provide an accommodation that would impose an undue hardship—that is, an "an action requiring significant difficulty or expense."[13] Whether an accommodation would impose an undue hardship is determined on a case-by-case basis.[14] This determination considers factors such as

[6] 34 C.F.R. § 104.3(j)(1).
[7] 29 C.F.R. § 1630.2(o). Additionally, an employer need not accommodate an employee who poses a "direct threat". *See generally* 29 C.F.R. § 1630.2(r) (defining "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"); 29 C.F.R. § 1630.2(r)(1)-(4) (a direct threat is determined in consideration of 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). The direct threat exception to an employer's accommodation obligations is beyond the scope of this paper—reasonable accommodations for employees and students when returning to campus.
[8] 29 C.F.R. 1630.2(o)(1)(ii).
[9] 29 C.F.R. 1630.2(o)(2).
[10] *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#leave [hereinafter EEOC Enforcement Guidance].
[11] 29 C.F.R. § 1630.2(o)(3).
[12] EEOC Enforcement Guidance, *supra* note 10.
[13] 42 U.S.C. §12111(10)(A).
[14] 29 C.F.R. § 1630.2(p)(2)

the nature and cost of the accommodation, the overall financial resources of the employer, the size of employer, and impact of the accommodation on work operations, among others.[15]

ii. EEOC Guidance

The U.S. Equal Employment Opportunity Commission ("EEOC") has recently issued guidance for employers about providing reasonable accommodations during COVID-19. The guidance, last updated December 16, 2020, provides suggested practices for employers navigating health and safety concerns and compliance with the ADA and Section 504, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), and the Genetic Information Nondiscrimination Act during COVID-19.[16] The EEOC also cautioned that employers should be mindful that information from public health authorities, such as the Center for Disease Control ("CDC"), is likely to change as the COVID-19 pandemic evolves.

When creating a plan for a return to campus, employers can encourage employees to request reasonable accommodations *before* they are expected to return to in-person operations to allow the employer to begin the interactive process.[17] Employers are also permitted to send all employees a notice that includes "all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions."[18] This notice may also state that the employer is willing to consider requests for accommodations or flexibilities on an individualized basis.[19] Importantly, the employer may make certain disability-related inquiries and medical examinations that would normally be prohibited under the ADA, such as asking about COVID-19 symptoms, taking employees' temperatures and requiring employees to show a negative COVID-19 test before coming to campus during the pandemic, because individuals with COVID-19 may pose a direct threat to others on campus.[20] For the same reason, an employer may bar an employee who has COVID-19 symptoms or a COVID-19 diagnosis from coming on campus.[21]

An employee may request a reasonable accommodation because, among other reasons, they suffer from one or more of the underlying medical conditions that the CDC has recognized as placing individuals at a higher risk for severe illness from COVID-19.[22] In response, an

[15] 42 U.S.C. §12111(10)(B); 29 C.F.R. § 1630.2(p)(2).
[16] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 26, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [hereinafter "EEOC COVID-19 Guidance"].
[17] *Id.*16 at G.6.
[18] *Id*.
[19] *Id*..
[20] *Id.* at Section A, Disability-Related Inquiries and Medical Examinations.
[21] *Id.*
[22] *See People with Certain Medical Conditions*¸ Center for Disease Control (updated Feb. 3, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. If the employee does not request an accommodation because of a condition listed by the CDC, but the employer believes the employee needs to be excluded from the workplace because of the employee's safety, then the employer would have to show that the employee poses a direct threat to their own heath, which "cannot be based solely on the condition being on the CDC's list." EEOC COVID-19 Guidance, *supra* note 16, at G.4.

employer could offer "short-term accommodations" to account for the employee's underlying condition that increases their "vulnerability to the novel coronavirus" during the course of the pandemic.[23] The difficulty arises for employers, however, that as the COVID-19 pandemic continues (and evidence suggests that it might not entirely resolve for years to come[24]) accommodations initially offered with the intention of being "short-term" could easily extend for long periods of time. It is difficult to entirely assess at this juncture of the COVID-19 pandemic whether an accommodation will be "short-term" or longer.

The CDC has explained that individuals over the age of 65 are at higher risk of suffering a severe case of COVID-19 and has encouraged employers to provide flexibility to this age demographic.[25] The EEOC, however, has not identified such age-based vulnerability in and of itself as providing a right to an accommodation with regard to the COVID-19 risks, and the ADEA "would prohibit a covered employer from involuntarily excluding an individual from the workplace based on [their] being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19."[26] Although the CDC has encouraged employers to permit employees 65 or older to work from home or similar alternatives, employers should be mindful that there is the possibility that such practice could raise discrimination claims based on age from other employees aged 40 to 64 if they are not eligible for the same benefits.[27]

In contrast to an employees' right to accommodations for their own disability, the needs or vulnerabilities of a family member with respect to COVID-19 (or any other health condition) do not create rights under the ADA. The EEOC states, "[t]he ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom [they are] associated."[28] At the same time, an employer could consider such requests and address those requests from employees under a separate benefit program, if any.

[23] *Peeples v. Clinical Support Options, Inc.*, —F.Supp.3d—, 2020 WL 5542719, *1 (D. Mass. Sept. 16, 2020); EEOC COVID-19 Guidance, supra note 16, at D.7.; *see also Valentine v. Collier*, Slip Copy 2020 WL 3625730, *2 (S.D. Texas July 2, 2020) (Plaintiffs "properly pled that they are at higher risk for serious illness or death if they contract COVID-19 because of their disabilities," and by failing to provide protective measures, defendants failed to accommodate disability); *Silver v. City of Alexandria*, 470 F.Supp.3d 616, 622 (W.D. La. 2020) (the court considered the totality of the circumstances, including the existence of the COVID-19 pandemic when making the determination whether the plaintiff had a qualifying disability in granting preliminary injunction).

[24] LuLu Garcia-Navarro and Christianna Silva, *COVID-19 May Never Go Away – With Or Without a Vaccine*, NPR (Aug. 9, 2020), https://www.npr.org/2020/08/09/900490301/covid-19-may-never-go-away-with-or-without-a-vaccine; *see also* Reid Wilson, *Health officials warn COVID-19 eradication unlikely*, THE HILL (Feb. 8, 2021), https://thehill.com/policy/healthcare/537862-health-officials-warn-covid-19-eradication-unlikely.

[25] EEOC COVID-19 Guidance, *supra* note 16, at H.1.; *Older Adults*, THE CENTER FOR DISEASE CONTROL (updated Dec. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

[26] *Id*.

[27] The ADEA prohibits discrimination on the basis of age against any person aged 40 or over. 29 U.S.C. 631(a). Some state laws have more expansive protections based on age, as well, that would expand the employees that could raise such claims. *See*, *e.g.*, Or. Rev. Stat. 659A.030 (prohibiting age discrimination against individuals age 18 or older); Mont. Code Ann. § 49-2-101(1) (prohibiting age discrimination, but does not specify an age limit); Mich. Comp. Laws Ann. § 37.2103 (specifying no age limit); Minn. Stat. Ann. §363A.03 (protecting any individual over the age of 25).

[28] EEOC COVID-19 Guidance, *supra* note 16, at D.13.; *but see infra* Section (b)(iv). When Leave is a Reasonable Accommodation.

As discussed in more detail below, the EEOC guidance states that an employer that has offered a work-from-home option to slow the spread of COVID-19 does not necessarily have to continue offering this accommodation.[29] Moreover, the EEOC has recognized that there are situations where "an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now."[30] It may be difficult for an employer to acquire items necessary to provide a reasonable accommodation, create temporary positions, or reallocate job duties. Furthermore, whether the requested accommodation poses "significant expense" includes consideration of any reduction in the employer's income stream because of COVID-19, as well as any discretionary funds available.[31] As an alternative to costly accommodations, employers should consider whether available no-cost or low-cost accommodations would be effective (*e.g.,* reducing contact, increasing distance, installing plexiglass, temporarily restricting job duties, or transferring duties to a different position).[32] Employers should also remain cognizant that increased vaccination efforts do not necessarily mean that the need for health and safety measures such as social distancing or face covering requirements will be immediately eliminated.[33]

Although myriad situations may trigger an employee's request for reasonable accommodations, a few anticipated circumstances for institutions considering bringing employees back to campus are discussed below.

b. Special Circumstances

i. Non-teaching Remote Work Requests

An employer does not necessarily have to provide or continue the accommodation of remote work, even after having instituted a "work-from-home" policy during the COVID-19 pandemic to slow the spread of the disease.[34] The determination whether remote work is a reasonable accommodation will depend on the essential functions of the requesting employee's position—and there "are certain jobs in which the essential functions can *only* be performed at

[29] *See* infra Section (b)(1) – Requests for Continued Remote Work.
[30] EEOC COVID-19 Guidance, *supra* note 16 at D.9.
[31] *Id*. at D.11.
[32] *Id*. at D.1.
[33] Notably, the CDC has indicated that social distancing and mask requirements will remain in effect even as vaccinations become more widely available. *Frequently Asked Questions about COVID-19 Vaccination*, THE CENTER FOR DISEASE CONTROL (updated Feb. 25, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html. With regards to the COVID-19 vaccines, which are beyond the scope of this paper, the EEOC guidance also acknowledges that some employers can require employees be vaccinated, subject to objections and requests for reasonable accommodations based on religious beliefs or medical conditions. *See* EEOC COVID-19 Guidance, *supra* note 16, K. Vaccinations. Notably, the CDC has not yet provided guidance or recommendations for non-healthcare employers concerning COVID-19 vaccinations. The EEOC guidance outlines that administration of the vaccine is not a medical examination under the ADA; medical screening questions, however, are considered disability-related inquiries. Additionally, an employer can request proof of receipt of vaccination without implicating the ADA. Whether an employer adopts a voluntary or mandatory vaccination policy in order for employees to return to campus, will require weighing a variety of considerations, including compliance with federal, state, and local law.
[34] EEOC COVID-19 Guidance, *supra* note 16 at D.15.

the worksite."[35] Essential job functions are "the fundamental job duties of the employment position."[36] A job function may be deemed essential for various reasons, including that the position exists to perform a specific function, that there are limited employees who can perform the function, or the function is highly specialized.[37]

When considering teleworking as a possible accommodation, the fact that an employee has been working-from-home would be relevant because the time spent working remotely could serve as a trial period and show that the employee *can* perform the essential functions of the position from home.[38] Several factors may be considered in determining the feasibility of continued work-from-home requests, such as the employer's ability to adequately supervise the employee, the need for personal interaction and coordination with other employees, "whether in person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace."[39]

When an employer believes remote work may be a reasonable accommodation, it should discuss and consider the frequency that the employee may be able to work from home while accomplishing their essential functions; this could be a certain number of days a week or only for a specified period.[40] Alternatively, even if remote work would be a reasonable accommodation and preferred by the employee, an employer can select an alternative accommodation that would also allow the employee to perform their essential functions so long as it is effective. For example, for some disabilities and positions, an employer might offer a modification to the work schedule to reduce time that the employee is in contact with others instead of remote work.[41]

Employees have filed claims under the ADA for failure to accommodate their disabilities based on employers' refusal to provide remote work as an accommodation during COVID-19. Whether those claims will be successful may largely depend on the essential functions of the position, and whether the employee could complete those functions off-campus. In *Kugel v. Princeton University*, the plaintiff, a campus security guard, claimed that he was constructively

[35] EEOC Enforcement Guidance, *supra* note 10 (emphasis added); *see also* E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (rejecting employee's proposal to telecommute to work, because the job was interactive and "[r]egular and predictable on-site attendance was essential" to the employee's position as an automotive resale buyer).
[36] EEOC Enforcement Guidance, *supra* note 10 (citing 29 C.F.R. § 1630.2(n)(1)).
[37] 29 C.F.R. § 1630.2(n)(2).
[38] EEOC COVID-19 Guidance, *supra* note 16, D.16 (a temporary telework experience could be relevant to an employee's renewed request to work from home). In *Peeples v. Clinical Support Options, Inc.*, plaintiff was granted a preliminary injunction because, *inter alia,* defendant failed to show that allowing plaintiff (who suffered from moderate asthma – an underlying condition listed by the CDC) to continue teleworking would create an undue hardship. —F.Supp.3d—, 2020 WL 5542719, *1 (D. Mass. Sept. 16, 2020).
[39] *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 3, 2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation (Prior EEOC guidance notes that "[f]requently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.").
[40] *Id*.
[41] *See generally* EEOC COVID-19 Guidance, *supra* note 16, D.1 ("modifying a work schedule or shift assignments may also 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").

discharged after his request to work from home was denied.[42] Plaintiff suffered from underlying health conditions that put him at higher risk for complications from COVID-19. The plaintiff also alleged that, as a lieutenant, his functions were mainly administrative and managerial, so he could fulfill his obligations without patrolling campus and coming into contact with students and community members.[43] A decision in the case has not been issued as of the writing of this paper.

In determining the essential functions of a position, courts have recognized that this "inquiry is not intended to second guess the employer or to require the employer to lower company standards."[44] Generally, an "employer has the right to establish what a job is and what is required to perform it."[45] At the same time, although a court often defers to the employer's determination of the essential job functions, courts do not give blind deference to an employer's judgment, but may also evaluate the employer's policies and practices.[46]

In some cases, an employee's essential functions may change as a school re-opens. Employers that have temporarily excused essential functions while employees work remotely may restore all of an employee's essential duties when returning to work on-campus. For example, the physical presence of a person with front-desk responsibilities in a financial aid office obviously becomes more important when students return to campus and will be visiting that office in person. Teleworking may no longer be a reasonable accommodation when students and employees return to on-campus work and learning and certain essential functions can no longer be performed remotely.

ii. Remote Instruction Requests

Institutions should anticipate requests from faculty members to continue to engage in remote instruction instead of returning to teach courses on campus. As with other requests to continue working from home, an employer is not required to allow faculty to continue to teach remotely merely because it has previously provided remote instruction to slow the spread of COVID-19.

For accommodation requests involving continued remote instruction, the institution will have to engage in the interactive process and determine whether the employee can complete the essential function of teaching the specific course, and any associated essential functions

[42] *Kugel v. Princeton University*, Complaint, No. MER-L-1098-20 (Mercer County Superior Ct. June 17, 2020) (complaint).
[43] *Id.*
[44] Tate v. Farmlands Indus., Inc., 268 F.3d 989, 993 (10th Cir. 2001); *see also* Forslund v. Nat'l Tech. & Engineering Solutions of Sandia, LLC, —F.Supp.3d—, 2021 WL 423733 (D.N.M. Jan. 29, 2021) (employer determined that employee's essential job functions were required to be "performed in-person and on-site inside restricted-access tech area"); McMillan v. City of New York, 711 F.3d 120, 126 (2nd Cir. 2013) ("a court will give considerable deference to an employer's determination as to what functions are essential, there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions.").
[45] *Id*.
[46] Credeur v. Louisiana Through Office of Attorney General, 860 F.3d 785, 793 (5th Cir. 2017) (court will examine "employer's words alongside its policies and practices" in determining what the essential functions of a job are; finding persuasive, *inter alia,* communications prior to litigation expressing requirement of in-person presence and testimony regarding interactive aspects of job of litigation attorney that precluded remote work as an accommodation.)

regarding instruction, remotely. This inquiry may hinge on the position of the employee requesting the accommodation and the nature of the course that the faculty member is responsible for teaching (with heavy weight to the latter). Institutions can also consider whether technology will adequately allow for the essential functions to be performed, and in some cases, whether the required investment into technology resources to allow for remote instruction would create undue hardship. As discussed above, however, employees' experience with remote work and access to enabling equipment during the time that remote work was *required* during the COVID-19 pandemic will likely have an impact on these assessments.

As an alternative to remote instruction, the institution can provide another accommodation, if it would allow the disabled employee to effectively perform the essential instructional functions. This may include additional safety measures, such as increasing physical distance between instructor and students, reducing classroom density, or installing barriers to limit the possibility of transmission of COVID-19. Claims in this arena may also arise in the context of the interactive process, relating to how the institution engages with faculty members about requests for remote instruction.[47] Institutions will need to be able to show that they have considered telework requests on an individualized basis.

iii. Altered Workspace Requests

In efforts to accommodate a disability, an employee may request an altered workspace to reduce the likelihood of COVID-19 transmission when returning to work on campus. The EEOC has recognized no-cost or low-cost reasonable accommodations to an employee's workspace, such as implementing safety measures that reduce contact, increasing distance between employee workspaces, and installing physical barriers (*e.g.,* plexiglass).[48] An employer may also stagger employee schedules to reduce the number of employees in the workspace throughout the work day and the number of people entering and leaving the workspace during a given period. These policies and practices also align with the Occupational Safety and Health Administration's ("OSHA") guiding principle of controls, including engineering and administrative controls, for returning to work.[49]

iv. Leave as a Reasonable Accommodation

[47] *Grundy v. Univ. of Maryland Sch. of Medicine*, Complaint, No. 1:20cv2010 (D. Md. 2020) (complaint) (voluntarily dismissed by plaintiff, Dec. 10, 2020). A Clinical Assistant Professor at the University of Maryland School of Medicine filed a claim against her employer for failure to accommodate her disability. The plaintiff alleged that she suffered from asthma and eczema, which made her a high risk patient for severe illness should she contract COVID-19. Due to her disability, plaintiff requested that she be allowed to telework during the pandemic as a reasonable accommodation. Plaintiff alleged that her employer failed "to participate in the interactive process in good faith in order to identify a suitable accommodation." The plaintiff further alleged that teleworking was consistent with the employer's policy that individuals at higher risk of COVID-19 complications would not be required to be physically present on campus and could request an accommodation to telework. *Id*.

[48] EEOC COVID-19 Guidance, *supra* note 16, D.1.

[49] *Guidance on Returning to Work*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, https://www.osha.gov/sites/default/files/publications/OSHA4045.pdf (last accessed March 2, 2021). OSHA guidance provides that employers should implement appropriate engineering controls such as physical barriers, or enhanced ventilation, and administrative controls, such as staggering work shifts, limiting workplace capacity, ensuring employees wear appropriate PPE. *See id*.

An institution's obligation to provide disability or disability-related leave to employees is governed by multiple federal laws.[50] (State and local law may entitle employees to paid sick or family leave beyond what is provided under federal law, although this is beyond the scope of this paper.) Failure to provide leave can carry penalties under the ADA and the Family and Medical Leave Act ("FMLA").

An employer should evaluate an employee's rights to leave under both the ADA and the FMLA.[51] The U.S. Department of Labor guidance on the FMLA and COVID-19 encourages employers to consider flexible leave policies for employees who are experiencing COVID-19 symptoms or have been exposed to symptomatic family members.[52] Although, as noted above, EEOC guidance provides that an employer is not required to provide leave or any other accommodation because of the disability of an employee's family member,[53] under the FMLA an employee may be entitled to leave to care for family members who have COVID-19 or associated complications.[54]

Under the ADA, "qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer's sick leave policies as 'reasonable accommodations.'"[55] An employer does not have to "provide paid leave beyond that which is provided to similarly-situated employees" without disabilities.[56] Leave can be provided for many reasons related to a disability, such as obtaining medical treatment, recuperating from an illness, or temporary adverse conditions in the work environment.[57]

When an employee requests leave as a reasonable accommodation, an employer may have to modify attendance policies to accommodate the employee. As with other accommodation requests, however, an employer can deny leave as an accommodation if it can offer an alternative accommodation that would allow the employee to perform the essential functions of their position. In other words, an employer can provide "a reasonable accommodation that requires an employee remain on the job (*e.g.,* reallocation of marginal functions or temporary transfer) as

[50] The Family Medical Leave Act ("FMLA") applies to public employers and private employers with 50 or more covered employees and requires employers to provide unpaid leave for certain family or medical reasons. The ADA, applicable to employers with 15 or more employees, requires employers to reasonably accommodate employees with disabilities. Title VII of the Civil Rights Act of 1964, with the same applicability as the ADA, requires employer to treat pregnancy-related conditions the same as non-pregnancy related conditions. The Families First Coronavirus Relief Act requires private employers with fewer than 500 employees to provide paid and other protected leave for covered employees.

[51] If an employee's leave is covered by the FMLA, "the employer may have a uniformly-applied policy or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work." EEOC Enforcement Guidance, *supra* note 10.

[52] *COVID-19 and the Family and Medical Leave Act Questions and Answers*, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION (last accessed Mar. 3, 2021), https://www.dol.gov/agencies/whd/fmla/pandemic[hereinafter DOL Guidance].

[53] *See supra* text accompanying note 28.

[54] DOL Guidance, *supra* note 52 Certain absences, however, are not protected under FMLA, including an employee missing work to care for a healthy child while their school remains closed or "leave taken by an employee for the purpose of avoiding exposure to COVID-19." *Id.*

[55] *Id*.

[56] EEOC Enforcement Guidance, *supra* note 10. An employer should allow an employee with a disability to exhaust paid leave before providing unpaid leave. *Id*.

[57] *Id*.

long as it does not interfere with the employee's ability to address [their] medical needs, and "granting additional leave would cause an undue hardship" on the employer.[58] Additionally, employers may not be required to hold a position open for an employee taking leave as an accommodation if the employer would incur undue hardship, but an employer should consider whether the employee is qualified for a vacant position and could be reassigned.[59]

An employer cannot penalize an employee for missing work when taking leave as an accommodation, for "such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation."[60] Indefinite leave, however, is not a reasonable accommodation.[61] In *Myers v. Hose*, the court explained that the ADA does not require an employer to "wait an indefinite period" of time for an employee to correct a disabling condition.[62] The court recognized that the employee had been on leave for a year, and the employer could not be "forced to stand by—or hire temporary help" while the employee endeavored to improve their heath because it would impose a significant burden.[63] With the uncertainty of when the pandemic will "end," granting an employee leave for the duration of the pandemic may appear to be indefinite. When considering whether leave would be a reasonable accommodation, institutions should consider the temporal limits applicable for non-pandemic related leave, such as sabbaticals for faculty. Approaches taken to granting leave may depend largely on institutional policies and operational capacity, such as whether a position could be covered temporarily. In sum, an employee may be entitled to temporary "leave if there is no other effective accommodation and the leave will not cause undue hardship."[64]

III. Accommodating Students in Returning to Campus

[58] *Id*. at 20.
[59] *Id.*
[60] *Id*. This issue has been raised in an as-of-yet undecided case in Michigan, where the plaintiff filed a complaint against her employer for discrimination due to her termination for missing work while awaiting results of her COVID-19 test. *Benavides v. Board of Regents of the University of Michigan*, Complaint, No. 20-000392-CD (Washtenaw County Circuit Ct. April 21, 2020) (transferred to Michigan Court of Claims) (Plaintiffs alleged discrimination under the Michigan Persons with Disabilities Civil Rights Act).
[61] Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003) ("While a leave of absence might be a reasonable accommodation in some cases, [plaintiff] was requesting an indefinite leave of absence."); *see also* Dick v. Dickinson State University, 826 F.3d 1054, 1061 (8th Cir. 2016) (employee was not denied leave for medical appointments and was on leave for over two years after an injury at home. The university, however was not "required to grant additional indefinite leave; that is not a reasonable accommodation."); *see also* Severson v. Heartland Woodcraft, Inc. 872 F.3d 476, 479 (7th Cir. 2017) (citing Byrne v. Avon Prod., Inc., 328 F.3d 379 (7th Cir. 2003) (an employee who needs long-term medical leave cannot work, and therefore is not a "qualified individual" under the ADA). *But see* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) ("Even an extended medical leave, or an extension of existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer. * * * If [the plaintiff]'s medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified.").
[62] Myers v. Hose, 50 F.3d 278, 282-83 (4th Cir. 1995) (County did not have to wait for the employee, a bus driver, to cure his disabilities in order to pass a required examination, when it was uncertain when or if the employee would be able to cure his disabilities and the employee set no temporal limits).
[63] *Id*. at 283.
[64] EEOC Enforcement Guidance, *supra* note 10.

Beyond concerns with employees, including staff and faculty, returning to campus, institutions must also prepare for students returning. Students may similarly request reasonable accommodations due to a disability.

a. The Legal Landscape

Title II and Title III of the ADA[65] and Section 504[66], in addition to state nondiscrimination laws, prohibit higher education institutions from discriminating against students on the basis of a physical or mental disability.[67] The ADA protects students who would be "otherwise qualified" to meet the academic standards of the educational program.[68]

Colleges and universities are not required to make accommodations or modifications to the educational program that "would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden."[69] Courts and the OCR have been "very clear to recognize the rights of institutions to impose uniform academic and technical standards on students with disabilities in clinical programs."[70] Additionally, "courts are likely to defer to the academic decisions of institutions using appropriate technical standards and accommodation procedures."[71] Generally, when students have "already performed poorly on a test or evaluation, institutions are not required to change grades or, generally, permit a 'do-over' of a project or clinical evaluation."[72]

The Department of Education's Section 504 regulations list examples of accommodations that might be considered for a student with a disability.[73] Common accommodations include additional time to complete tests, substitution of courses required for degree completion, granting assignment extensions, audio or visual aids during class, and service animals.[74]

Students with disabilities returning to campus as the COVID-19 pandemic wains may request reasonable accommodations to complete educational requirements, and more broadly partake in campus life, in areas such as student housing, student support resources, and

[65] *Supra,* note 1.
[66] *Supra,* note 4.
[67] 34 C.F.R. § 104.41 (Section 504 applied to higher education institutions receiving federal funding); *see also supra* note 5 and accompanying text, noting close substantive similarity between Section 504 and the ADA.
[68] Laura Rothstein, *Millennials and Disability Law: Revisiting* Southeastern Community College v. Davis, 34 J.C.U.L. 169, 169 (2007)(citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) ("otherwise qualified" individual means "the individual must be able to carry out the essential requirements of the program with or without reasonable accommodation and in spite of the disability")); 42 U.S.C. § 12132. As mentioned above, the ADA also addresses that the individual must not pose a direct threat. Rothstein, *supra* note 68 at 175. Colleges and universities are "not required to permit an individual to participate in or benefit from a service, program, or activity . . . when the individual poses a direct threat to the health or safety of others." OCR, *Resolution Agreement*, Wright State University, OCR Docket Nos. 15-12-2118 and 15-13-2011 (Oct. 20, 2013). This decision should rely on current medical knowledge, objective evidence and consider the nature, duration, and severity of the risk. *Id.*
[69] 42 U.S.C. § 12182(b)(2)(A)(iii).
[70] Ellen Babbitt and Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges, New Strategies*, 42 J.C.U.L. 119, 135 (2016).
[71] *Id*. at 140-41 ("deference to genuine academic determinations remains strong, particularly with regard to clinical or professional programs, institutions need to be prepared to interact in good faith").
[72] *Id*. at 137.
[73] **Error! Bookmark not defined.**34 C.F.R. § 104.44 ("Academic Adjustments").
[74] Rothstein, *supra* note 68 at 184.

experiential programs. For example, they may request continued remote education, restructured exam requirements, increased distancing, or the creation of physical barriers in the classroom.

There is little case law or agency guidance in the area of student accommodations under the ADA in the context of institutions returning to in-person learning. Pre-COVID-19 pandemic voluntary resolution agreements ("VRAs") and Consent Decrees from the Department of Education's Office for Civil Rights ("OCR") provide parameters in implementing reasonable accommodations applicable in the post-COVID-19 context.

Colleges and universities must make reasonable modifications to policies, practices, and procedures when such modifications are "necessary to avoid discrimination on the basis of disability, unless [the institution] can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity."[75] When considering a student's request for accommodation, the institution must conduct an individualized assessment, which requires a case-specific determination of what accommodation can be made to allow the student to continue their participation in the institution's educational programs.[76] Colleges and universities should document requests for accommodations, including the basis of the determination and how, who, and when the determination was made.[77] As discussed below, such documentation will help to support obtaining deference to the decision making of the institution from courts and OCR.[78]

The process to determine whether the requested accommodation would constitute a fundamental alteration of a program or course should be "made collaboratively" by relevant officials who have considered multiple possible alternatives.[79] It is not advisable that any individual faculty member be allowed to unilaterally deny any adjustment or modification. Even when a faculty member believes that the accommodation would fundamentally alter the course or program, the institution should engage in the deliberative process and base any decision on its established procedures.[80]

An institution's denial of a request for reasonable accommodations must be based on "a consideration of the relationship of the disability to the requested accommodation," and the diligent, reasoned, academic judgment of relevant officials who considered alternatives, their

[75] *See generally,* Consent Decree, Dudley and the United States v. Miami University, et al., Case No.: 1:14-cv-38 (2016).
[76] *See Settlement Agreement between the United States of America and Quinnipiac University* (Dec. 29, 2014), https://www.ada.gov/quinnipiac_sa.htm.
[77] OCR, *Resolution Agreement*, Southeast Community College, OCR Docket No. 07142236 (Dec. 12, 2014).
[78] *See infra* text accompanying note 87and note 87.
[79] OCR, *Resolution Agreement*, Wright State University, *OCR Docket Nos. 15-12-2118 and 15-13-2011* (Oct. 20, 2013).
[80] *Id*. At a minimum, this process should include: "(i) a review of all resources available for use in the funding and operation of the program or activity; (ii) a decision made by relevant officials, including faculty members, with knowledge of whether a requested accommodation for a particular class or learning opportunity would fundamentally alter an essential program requirement of that class or opportunity; (iii) a decision issued in writing that includes the reasons for reaching the conclusions when the university denies an accommodation on this ground; and (iv) if a proposed academic adjustment or auxiliary aid would result in an alteration, the university will take any other action that would not result in such an alteration but would ensure that, to the maximum extent possible, individuals with disabilities receive the university's services, programs, and activities." OCR, *Settlement Agreement*, Central Washington University, OCR Reference No. 10162203 (July 14, 2017).

feasibility, cost and effect on the academic program" and came to a rationally justifiable conclusion that the available alternative would result either in lowering academic standards or requiring substantial modification to the [institution]'s academic program, or was not related to the complainant's disability."[81] An institution should not deny a requested academic adjustment or modification based on funding or administrative concerns alone, unless the requested accommodation would result in "an undue financial or administrative burden, considering the [institution]'s resources as a whole (and not just the resources available to the particular course or school)."[82]

When there is a denial of a request for adjustment or modification, the institution should prepare a statement explaining the reasons for the denial and proposing alternative adjustments or modifications, if any are available.[83] Additionally, in the situation of a denial, the written statement should include an explanation of how the requested modification would fundamentally alter the nature of the service, program, or activity, if that is the basis of the denial. Moreover, if any contemplated alternative is also rejected as an accommodation, the statement should include why the alternative would fundamentally alter the nature of the service, program, or activity, "and/or how an academic requirement is essential to the course."[84] An institution must establish a grievance process that can resolve complaints alleging violations of disability rights, including allegations regarding the denial of a requested accommodation or the sufficiency of an accommodation.[85]

A key consideration in accepting or denying a specific requested accommodation is the deference the institution's decision will be given in a review by OCR or a court. Institutions should focus on the interactive process, as discussed above, and document the various factors that were considered in determining whether the requested accommodation would fundamentally alter the nature of the academic program.[86] Generally, courts' review of the substance of genuinely academic decisions will provide "great deference" to academic professional judgment.[87] Therefore, deference is commonly given to the institution's decision unless the

[81] OCR, *Resolution Agreement*, Flints Hills Community College, Docket No. 07132229 (Oct. 30, 2013) (requested ASL accommodations during entrance assessment); Rothstein, *supra* note **Error! Bookmark not defined.** at 185 (citing Wynne v. Tufts University School of Medicine, 932 F.2d 19, 26 (1st Cir. 1991)).
[82] OCR, *Resolution Agreement*, Wright State University, OCR Docket Nos. 15-12-2118 and 15-13-2011 (Oct. 20, 2013).
[83] OCR, *Resolution Agreement*, Southern Connecticut State University, OCR Complaint Nos. 01-16-2045 and 01-16-2140 (May 10, 2017).
[84] *Id.*
[85] 34 C.F.R. § 104.7 (adoption of grievance procedures); OCR, *Resolution Agreement*, Southeast Community College, OCR Docket No. 07142236 (Dec. 12, 2014) (college was required to provide OCR with its appeal process, as well as how students are informed of the process); OCR, *Resolution Agreement*, Flint Hills Community College, OCR Docket No. 07132229 (Oct. 30, 2013) (college was required to review and modify its policies and procedures to ensure that it included "a process for ensuring students denied requested academic adjustments/auxiliary have an opportunity to appeal the determination."); Wright State University, OCR Docket Nos. 15-12-2118 and 15-13-2011 (Oct. 20, 2013) (requiring timely notification to the student "of all specific academic adjustments that have been agreed to and of any denial of requested adjustments and the reason(s) for the denial informing them of the appeal procedure that can be used to challenge the denial of requests.").
[86] *See supra* text accompanying note 77.
[87] Powell v. National Bd. Of Medical Examiners, 364 F.3d 79, 88 (2d Cir. 2004) (The University's decision that the student not be able to continue in the medical program without passing a licensing exam "was something the medical school correctly believed would unreasonably alter the nature of its program."). Generally, courts provide

institution cannot show that the interactive process sufficiently evaluated whether the requested accommodation would impose an undue burden or fundamentally alter the program. Thus, in *Dean v. Univ. at Buffalo Sch. of Med. and Biomedical Sciences*, the court declined to extend the deference ordinarily afforded to the "professional, academic judgments of educational institutions" because the university failed to provide evidence indicating that it had evaluated whether the student's requested accommodation—a modification of an exam deadline—would impose an undue financial and administrative burden or require a fundamental alteration of the academic program.[88]

b. Special Circumstances

i. Remote Learning Requests

Student requests for reasonable accommodations that include the continuation of remote and online courses should not be denied on a generalized assumption that the requested accommodation would fundamentally alter the essential educational program requirements. Rather, this determination should be "an individualized, case-by-case determination for each applicable course" regarding whether remote learning would fundamentally alter an essential requirement of the course or lower academic standards.[89] The determination will depend on the nature of the course and the broader academic program. For example, attending a science lab online could fundamentally alter the nature of the course, especially if all other students in the course are participating in-person; whereas a request to attend a lecture or seminar course remotely could lead to the opposite conclusion. Institutions should anticipate engaging in a case-by-case determination of each request, for each student and possibly for each course for which the student requests accommodations.

Another factor that may affect the feasibility of continuing remote learning options is accreditor requirements. For example, the American Bar Association, which accredits law schools, lifted a cap on distance learning during the pandemic, but that is likely to be reinstated

deference to the professional judgment of faculty in denying accommodations that would fundamentally alter clinical or professional graduate programs. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1049-50 (9th Cir. 1999) (Court deferred to the medical school's academic decision that the in-person hospital portion of clerkship was vital part of medical education and that allowing the student to be excused would "sacrifice the integrity of its program."); Maczaczyj v. State of New York, 956 F. Supp. 403, 406 and 409 (W.D.N.Y. 1997) (School argued that the program delivered by telephone as a distance learning program would "require a deliberate design and pedagogy distinctly different from that of a program designed for face to face interaction between teacher and students."); Amir v. St. Louis University, 184 F.3d 1017, 1029 (8th Cir. 1999) ("We will not invade a university's province concerning academic matters in the absence of compelling evidence that the academic policy is a pretext for discrimination."); Halpern v. Wake Forest University of Health Sciences, 669 F.3d 454, 463 (4th Cir. 2012) (collecting cases).

[88] Dean v. University at Buffalo School of Medicine and Biomedical Sciences, 804 F.3d 178, 190-91 (2d Cir. 2015) (citing Powell v. National Bd. of Medical Examiners, 364 F.3d 79, 88 (2d Cir. 2004)) (on a motion for summary judgment, plaintiff had shown a prima facie case of discrimination under the ADA and Section 504, and a factual issue existed as to whether the requested accommodation—a modification of the exam deadline—was reasonable). .

[89] OCR, *Resolution Agreement*, Southeast Community College, OCR Docket No. 07142236 (Dec. 12, 2014).

as the pandemic subsides.[90] An accommodation that would violate accreditation standards would almost certainly constitute a fundamental alteration.

Universities should consider whether they can continue to provide students with the flexibility many have experienced over the past year, such as asynchronous or view-from-home options, because some students with disabilities have stated that remote learning has provided them with better access to courses and transformed their education experience.[91] Some such students were previously told that such accommodations could not be provided, "[b]ut when COVID-19 became an emergency for everyone else, campuses figured out simulcasting and video recording in a matter of weeks."[92] Students may advocate for remote options to continue beyond a transitionary period. Institutions should also be mindful of the perception and optics of denying requests for remote learning accommodations if students express concerns regarding safely returning to campus after courses have been offered online for a period of time.

Finally, universities that may have lacked the technology pre-pandemic to support broad remote learning should reconsider the feasibility as new accommodation requests are made. Classrooms and other campus spaces that previously lacked remote functionality may now be well equipped to support both in-person and remote experiences. Complexity mounts, however, in consideration of classes with in-class small group work, conversation or discussion groups, etc. If one or two students are joining a class via technology while all other students are in-person, how will the remote students meaningfully participate in a group with a few others in the physical classroom? For those students who are remote, how will they draw the faculty's attention if they have questions or want to offer a comment to a rapid discussion happening among students in the room?

Institutions would be well-served to also consider if being in person, on campus, is a requirement for all students beyond those students who elect into academic programs that the university specifically offers as "online" or "remote." At some institutions, certain—or perhaps a majority of—academic programs have historically required in-person attendance. Now many of these programs have likely been virtual for over a year. Institutions receiving accommodation requests from students wanting to remotely participate in one of these "on-campus" and in-person programs will need to grapple with a more complex question about what truly is required to be experienced or completed in person, as compared to aspirations to be a "residential" campus or the historic ethos of having most students present in the same space at the same time.

ii. On-Campus Living Requirements

[90] *See* Standard 3.11(e), ABA Standards and Rules of Procedure for the Approval of Law Schools, 2020-21 https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf (no more than 10 credit hours of distance education allowed during the first third of a student's legal education); *Council Moves to Expand Flexibility for Fall Academic Year,* ABA Website (June 1, 2020) https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/council-moves-to-expand-flexibility.

[91] *See* Lilah Burke, *'Proof of Concept,'* INSIDE HIGHER ED (Mar. 5, 2021), https://www.insidehighered.com/news/2021/03/05/will-colleges-maintain-flexibility-disabled-students (reporting on students with disabilities who said they had learned better through remote instruction during the pandemic than they had through in-person instruction previously).

[92] *Id*.

Many universities require students to live on campus for either their first, second or more years. As they reopen, institutions should prepare for requests from students to waive or adjust live-on-campus requirements. Students may request to live off campus or to live alone on campus to accommodate a disability. This may occur because the student is more susceptible to suffering from a severe case of COVID-19 due to an underlying medical condition. Institutions may consider waiving live-on requirements for students who believe their disability prevents them from living safely on campus due to the risk of spread of COVID-19 in communal living situations. A university may not charge a student more for receiving a single room than a typical shared room as a disability accommodation.[93] Moreover, institutions may receive student requests for exemptions from mandatory meal plan minimums associated with living on campus. Students living on campus may not feel comfortable going to dining halls or getting food in a communal setting. These students may request an accommodation, such as having meals dropped off, to avoid exposure to others in the dining hall. In accommodating these students, institutions may prefer to alter or waive these on-campus living requirements for those students who express concerns about living and dining in community settings.

Finally, some students with disabilities who prefer to live on-campus as it is the environment most supportive of the student's condition may request accommodations specific to COVID-19. This analysis will be further complicated if the student's condition is one that, per the CDC, makes them more susceptible to severe COVID-19 infection.

Institutions' live-on requirements exist for valid reasons—many or all of which are core to a university's mission. Students who live on campus for one or more years may perform better academically—staying on track to graduation—become more integrated into campus activities and student organizations, and/or benefit from a broader and more supportive peer group.[94] Institutions with live-on requirements may be challenged with new data from this past year, however, as some students flourished through remote learning in unique first-year experiences without the traditional slate of on-campus activities, events, and peers. Institutions will be well-served to further consider available student success data to determine if living on-campus for one, two or more years is truly most supportive of students' ability to learn.

iii. Student Support Resources

Institutions that have been operating primarily remotely in response to COVID-19 may have already experienced requests from students for increased or additional modalities of access to student support resources. Some student support resources, such as student health services, mental health counseling and recreation, may have historically been offered only to those physically present on the campus. Similar to the discussion above regarding accommodation

[93] *See* OCR, *Resolution Agreement*, State University of New York at Potsdam, No. 02-11-2062 (Aug. 8, 2011) (Complainant alleged that the University charged the student a surcharge for a dorm room after she requested a single room to accommodate her disability. The University charged the student the amount it would have charged a non-disabled student who wanted to live alone for personal reasons. The University agreed to refund the student and change the room rate policy to reflect a "medical single" dorm room.).

[94] Allen Grove, *Why You're Required to Live on Campus Your First Year of College*, THOUGHTCO. (July 18, 2019), https://www.thoughtco.com/college-residency-requirements-787021; Josh Moody, *Living on Campus: A Guide to College Housing*, U.S. NEWS (May 1, 2019), https://www.usnews.com/education/best-colleges/articles/2019-05-01/living-on-campus-a-guide-to-college-housing.

requests for remote learning, institutions should consider new accommodation requests involving access to support resources from students with a focus on how those offerings may have changed over the past year. For example, a request for distance counseling with a mental health provider may not have been possible for an institution previously based on provider licensure restrictions or the unit not being equipped to conduct counseling virtually, but those limits may have been lifted in the past year. In addition, some campus offices that previously had firm policies against lending out certain equipment or materials might have routinely done so to support students during the pandemic. Before denying a requested accommodation based on past restrictions, institutions should confirm what support resources may continue to be offered by new modalities and if past restrictions have eased.

iv. Internship/Lab/Clinical Programs

In general, an institution's obligation to provide reasonable accommodations is the same in the internship, lab, or clinical context as in the classroom. In ensuring access to all students, institutions can consider whether clinical requirements can be met effectively online and/or remote. Hosting certain clinics remotely may not fundamentally alter the program, such as a clinical counseling program where program requirements like meeting with patients may be able to be successfully completed virtually through telehealth. In contrast, other clinical programs or labs may require that students participate in person because the field work might be an integral component of the program.[95] For example, in a dental program that requires completion of a certain number and type of dental procedures. For internships, labs, or clinical programs, an institution may not be required to modify coursework if the institution can show that the in-person, on-campus requirements are essential to the program.

When a requested accommodation is based on the threat posed by COVID-19 but would constitute a fundamental change in the requirements for completion of a clinical program, internship, or lab, an institution may consider whether students could defer the requirement until COVID-19 restrictions have been lifted or the threat of the spread and transmission of the virus has significantly decreased. This may allow for accommodations for students, for example, who have medical conditions that prevent them from receiving the COVID-19 vaccine, but who are enrolled in programs that may require vaccination, such as clinical nursing rotations. In *Wong v. Regents of the University of California*,[96] the University's denial of the requested accommodation, a special eight-week -reading period to prepare for a pediatrics clerkship, was not entitled to deference, because the school had not shown that it had adequately investigated whether it could provide the accommodation without substantially altering its standards. [97] Therefore, institutions may prefer to adopt a more flexible approach in providing experiential

[95] Babbitt and Lee, *supra* note 70 at 138-39 (citing Letter to N. Seattle Cmty. Coll., 10 NDLR 42 (1996) (denying a student's requested accommodation to "substitute additional cooperative work experience for two classroom theory courses, maintaining that her learning disability and her consequent memory problems compromised her ability to pass formal examinations." The OCR agreed "that the institution need not modify coursework requirements that it demonstrated to be essential to the program.").

[96] Wong v. Regents of the University of California, 192 F.3d 807 (9th Cir. 1999) (court would not defer to the medical school's determination that the accommodation was unreasonable, which created a jury question about the reasonableness of the accommodation).

[97] *Id.* at 818-19.

programs online when possible or out of the sequence required in the past, if those modifications would not fundamentally alter the program requirements.

IV. Accommodating Requests re Safety Protocols and Protections

Although widespread administration of vaccinations for COVID-19 has begun, universities will most likely require returning students and employees to continue to observe enhanced hygiene measures for the foreseeable future.[98] For example, employers may require that employees returning to physically work in an office on campus wear face coverings[99] and frequently wash their hands or sanitize.

Accordingly, universities should anticipate requests for accommodations regarding personal protective equipment and additional safety procedures. Employers may also have to accommodate employees and students whose medical conditions make them unable to wear a face covering.[100] An employee may request an accommodation such as "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 wheel chairs."[101]

Institutions should anticipate requests for accommodations in screening procedures that are being generally used before individuals can return to campus. EEOC guidance provides that screening procedures such as asking employees COVID-19 related questions or measuring an

[98] *See Interim Public Health Recommendations for Fully Vaccinated People*, THE CENTER FOR DISEASE CONTROL (last updated Mar. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (Recently updated guidance for fully vaccinated individuals, which includes the ability for fully vaccinated individuals to be indoor with other fully vaccinated individuals without face coverings. CDC cautions that fully vaccinated individuals should continue to wear masks and socially distance in public as well as avoid medium to large person gatherings.).

[99] Recently released CDC research recommends wearing two masks (a cloth mask over a medical procedure mask) or "knotting the ear loops of a medical procedure mask and then tucking in and flattening the extra material close to the face." The CDC notes that each of the modifications "substantially improved source control and reduced wearer exposure" to the virus that causes COVID-19. John T. Brooks, MD et al, *Maximizing Fit for Cloth and Medical Procedure Masks to Improve Performance and Reduce SARS-Co-V-2 Transmission and Exposure, 2021*, THE CENTER FOR DISEASE CONTROL (updated Feb. 19, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7007e1.htm?s_cid=mm7007e1_w. Additionally, the effectiveness of face shields is unknown. As a result, the CDC does not recommend the use of face shields, but is continuing to evaluate its effectiveness. *Your Guide to Masks*, THE CENTER FOR DISEASE CONTROL (updated Feb. 22, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html.

[100] In *Frazier v. Northcentral Technical College*, *Slip Copy* an instructor was fired because she refused to wear a face mask in compliance with the technical college's COVID-19 precautions. The instructor argued that she could not wear a mask due to a sinus issue and a variety of other disorders including lupus, fibromyalgia, and Lyme disease. 2021 WL 118533, *1 (W.D. Wis. Jan. 13, 2021) (case was dismissed for failure to exhaust administrative remedies). *See also* Phil Ray, *Ex-worker sues Vitro over mask wearing*, ALTOONA MIRROR (Oct. 16, 2020), https://www.altoonamirror.com/news/local-news/2020/10/ex-worker-sues-vitro-over-mask-wearing/ (an employee filed a complaint alleging failure to accommodate his disability, chronic obstructive pulmonary disease (COPD), when his employer refused to consider alternatives to the face mask policy. The complainant's alternative proposals included working at his own risk, socially distancing from others, or wearing a face shield that did not obstruct his breathing.).

[101] EEOC COVID-19 Guidance, *supra* note 16, at G.2.

employee's body temperature upon entering the workplace are permitted,[102] but institutions must consider accommodation based on disability.[103]

V. Takeaways and Recommendations

As universities prepare and move forward with returning to campus, they should continue to provide reasonable accommodations and engage in the interactive process to determine how to meet accommodation requests from students and employees. Failure to engage in and document the interactive process can create liability for institutions, even if no reasonable accommodation is ultimately available. Institutions should consider whether experiences with remote operations have expanded the options for reasonable accommodations and, conversely, whether the return to on-campus operations requires a return to functions and standards that existed before the pandemic and that may in some situations be less amenable to remote approaches to work and learning. Furthermore, institutions are within their rights to consider whether requested accommodations are reasonable, asking, for example, if they would allow for the performance of essential functions and preserve fundamental characteristics and academic standards of their educational programs.

Employers should consider the following as they evaluate accommodation requests from employees and students as they return to campus:

- **Review and Document Essential Functions and Fundamental Nature of Programs Post-Pandemic:** In considering requests for reasonable accommodations, institutions should ensure that there is a clear process being followed that includes documentation of the different factors considered. This process should include a consideration of the essential functions of the employee's job, or the fundamental characteristics of an academic program that might be altered by a proposed accommodation for a student. The essential functions of a position and fundamental characteristics of an academic program may have changed since pre-COVID pandemic times so a new evaluation may be in order.

- **Engage in Individualized Assessment of Accommodation Requests:** Accommodations should be considered on an individualized, case-by-case basis rather than based on broad generalizations regarding employment or learning at the university. Unilateral denials of requested accommodations without specific consideration of the position or academic program as it exists now (for example, if the denial would be based on what are now inaccurate notions of technology challenges that would arise from

[102] *See id.* at A.11 (employers are allowed to maintain body temperature information so long as it is kept confidential). Additionally, employers can take screening steps, such as administering COVID-19 tests. *Id.* at A.6. This does not, however, permit administering the COVID-19 antibody test. *Id*. at A.7 ("[A]n antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e. the viral test)"). Moreover, employers can continue to ask employees if they have COVID-19 symptoms or have been tested for COVID-19. And, if the employee has been in contact with anyone who had been diagnosed with COVID-19 or anyone experiencing symptoms associated with coronavirus. *Id*. at A.8 (employers, however, cannot ask employees teleworking these questions, or if they have family members who have COVID-19 or symptoms).

[103] *Id*. at G.7 (An employee entering the worksite may request an alternative method of screening due to a medical condition or religious belief, such a request would proceed "as it would for any other request for accommodation under the ADA or the Rehabilitation Act.").

remote work or classroom participation) will likely not receive deference if reviewed by a court or agency.

- **Re-engage with Employees and Students about Effectiveness After Implementation:** The effectiveness of accommodations the longer employees and students are back on campus may change. Institutions should actively re-engage with employees and students to determine the ongoing effectiveness of the accommodation.