COVID-19 and the ADA

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COVID-19 & the ADA

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• This slide will be repeated at the end.
Outline of Today’s Webinar

- Definition of Disability
- Employment (Title I)
- Access to Government Services (Title II)
  - Education
  - Effective Communication
  - Voting Rights
  - Civil Legal System
- Access to Healthcare (Titles II, III)
- Access to Private Businesses (Title III)
- Questions

Definition of Disability

Silver v. City of Alexandria
470 F.Supp.3d 616 (W.D. La. 2020)
- Case brought by 98-year-old man with “significant, inoperable, aortic valve disease, and systolic heart failure” with a pacemaker sued for telephone access to city council meeting (Title II, Section 504)
- City argued: Plaintiff’s disabilities are only COVID-related – situational so he is not entitled to accommodations
- Court: “We find easily that he has a qualifying disability.”
- Must consider totality of health circumstances in conjunction with social circumstances

Fraihat v. U.S. IMM. & Customs Enforc., 445 F. Supp. 3d 709 (C.D. Cal. 2020) (finding plaintiffs likely to have disabilities because their health conditions put them at a “severe risk of illness or death if exposed to COVID-19.”)
Long COVID as a Disability

**Guidance from DOJ/HHS (July 2021)**
- Applies to Titles II/III, Rehabilitation Act, Affordable Care Act
- Long COVID can be a disability (not always)
- Long COVID is a physiological impairment affecting one or more body symptoms
  - Ex: Lingering emotional illness and other mental health conditions
- Long COVID can substantially limit one or more major life activities
  - Ex: “Brain fog” can substantially limit brain function, concentration and/or thinking

COVID-19 as a Disability

Few cases have analyzed the issue; offer little guidance as they were dismissed due to insufficient facts about severity of COVID infection

**Champion v. Mannington Mills, Inc.**
- Plaintiff’s brother had COVID-19; plaintiff was fired and sued for association discrimination
- Court: Found for employer (granted motion to dismiss)
  - Plaintiff raised only general statements about COVID-19, saying some people with COVID-19 develop acute respiratory symptoms and that it can limit major life activities
  - Court left door open to cases with more information about impact
Remote Work as a Reasonable Accommodation

**Peeples v. Clinical Support Options, Inc.**

- Beginning of pandemic, assistant manager with moderate asthma requested telework; approved; able to do all essential functions
- Few months later, employer asked all managers to return in person and denied manager’s request to continue teleworking
- Manager “reluctantly” returned but lacked PPE, mask and so fearful they ate/drank in car
- Learned that managers with children permitted to telework – asked to telework again, denied
- Filed complaint and motion for preliminary injunction
- Court: Granted preliminary injunction
  - Likelihood of success on merits

Telework (Continued)

- Asthma rises to the level of a disability during pandemic
- Can perform essential job functions, per supervisor
- Telework was reasonable, again citing support from supervisor; other managers were on-site to address issues if necessary
- Unlikely that employer could show undue hardship
- Irreparable harm: Demonstrated in these unusual circumstances
- **Order:** Plaintiff may telework as a reasonable accommodation for 60 days or until further order of the court. Parties are encouraged to discuss a mutually acceptable resolution.
- **December 2020:** Case settled

Reassignment as a Reasonable Accommodation

**Madrigal v. Performance Transportation, LLC**
2021 WL 2826704 (N.D. Cal. July 7, 2021)

- Plaintiff with diabetes drove and delivered food to customers
- Feb 2020: Extended medical leave due to high risk of COVID
- Aug 2020: Tried to return – asked for position with minimal contact with other people for 6-12 months due to his risk for COVID as well as other options
- No accommodations offered; fired
- **Court:** Denied motion to dismiss; case moves forward
  - Diabetes = underlying disability; well-accepted that diabetes increases the risk of serious illness or death from COVID-19
  - Denied accommodation request without offering any other options, including reassignment to warehouse position
Disability-Related Questions

Per the EEOC, employers can ask these questions because they are not disability-related inquiries:
- Are you vaccinated?
- Provide proof of vaccination?

Per the EEOC, employers:
- Can ask if employees are experiencing symptoms of COVID-19 (ex: fever, chills, cough)
- Cannot ask employees unrelated medical questions
- Cannot only ask these questions of people with disabilities

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

Disability-Related Exams

Per the EEOC, employers:
- Can take employees’ temperature
- Can administer COVID-19 test (per EEOC, permitted due to the CDC’s stated precautions to determine if someone would pose a direct threat)
- Cannot only perform these tests on people with disabilities
- Cannot require antibody testing (per EEOC, not job-related and consistent with business necessity)

** ADA requires employers keep all medical information confidential **

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

Vaccine Mandates at Work

Per the EEOC:
- The ADA “does not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of … the ADA and other EEO considerations…”
- If an employee is unable to receive the COVID-19 vaccine for a disability-related reason, the employer is required to engage in an interactive process to identify whether there is a reasonable and effective workplace accommodation.
- May also need to consider state/local laws re: accommodation

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
Vaccine Mandates at Work

To date, no case decisions under the ADA. Cases brought under other laws have upheld vaccine mandates.

**Bridges v. Houston Methodist Hospital**  
- Hospital required vaccine for employees – suspended employees who refused vaccination
- Workers sued because vaccine is “experimental and dangerous” (not an ADA claim)
- **Court:** Dismissed case – hospital’s decision consistent with public policy
- **Appeal:** Employees filed appeal to 5th Circuit

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EEOC Files First ADA Lawsuit Related to COVID-19

**EEOC v. ISS Facility Services**  
21-CV-3708 (N.D. Ga.) (filed Sept. 7, 2021)
- Employee worked as a health and safety manager
- All employees worked from home four days a week from March 2020 to June 2020
- In June 2020, workplace reopened
- Employee asked to work remotely two days per week and take frequent breaks while working on site due to her pulmonary condition that causes her to have difficulty breathing and places her at greater risk of contracting COVID
- Employer allowed other employees in her position to work from home but denied her request and she was fired

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Title II  
Education  
Effective Communication  
Voting Rights  
Criminal Legal System
## Service Animals in School

**Brenner v. Shreveport Sch. of Progressive Education**  
No. 20-cv-01203 (W.D. La. Oct. 23, 2020)
- Student with Type I diabetes had a service dog to assist with detecting changes in their sugar levels  
- Service animal not permitted into school due to a concern that the dog could be infected with COVID-19 and spread it to students  
- **Court:** Granted preliminary injunction  
  - Ordered school to permit service animal  
- **Status:** Case settled

## Admissions Tests

**Kawika Smith v. Regents of the University of Calif.,**  
RG1904622 (Cal. Dist. August 31, 2020)  
Public Counsel Press Release
- Some UC schools have “test-optional” policy (ACT and SAT) – not required but can be used as a “plus factor” in admissions  
- In addition to challenges by students of color, multilingual learners, students with disabilities say lack of meaningful access as COVID-19 pandemic has virtually eliminated ability to obtain accommodations or locate accessible test locations  
- Suit brought under California law that incorporates ADA  
- **Court:** Found for plaintiffs and ordered UC schools not to use SAT and ACT for admission purposes during pendency of case  
  - **Settlement** (May 14, 2021): Test-free policy until at least 2025

## Vaccine Mandates at School

To date, no case decisions under the ADA. Cases brought under other laws have upheld mandates.

**Klaassen v. Trustees of Indiana University**  
7 F.4th 592 (7th Cir. Aug. 2, 2021)
- University required students to be vaccinated or to apply for a medical or religious exemption (which requires them to wear masks, obtain tests, and social distance)  
- Students challenged policy (case not brought under the ADA)  
- **District court:** Denied motion for preliminary injunction  
  - While not under the ADA, court acknowledges that the University has a medical exemption  
- **7th Circuit:** Denied injunction pending appeal
Several states have enacted bans on school districts requiring students to wear masks at schools

ADA lawsuits filed challenging bans:
- Texas: E.T. et al. v. Abbott et al., 21-cv-00717 (W.D. Tex.)

Brought by parents of public school children with health conditions that increase risk of serious complications from COVID-19 (e.g., asthma, Down Syndrome, cerebral palsy, heart and lung conditions, hypertension, sickle cell anemia, and weakened immune systems)

Court: Granted temporary restraining order (school districts can require universal masking)
- Severe illness or death and loss of educational opportunities are threats of irreparable harm (required for a TRO)
- Likely to succeed on the merits
- School programs are not “readily accessible” because children cannot attend in-person learning without the very real threat to their lives — permitting schools to have universal mask mandates would allow children with disabilities opportunity to participate
- Universal masking could be required as a reasonable modification that would enable disabled students equal access
- Requiring some online learning violates ADA’s integration mandate

Per the Department of Education, Office of Civil Rights
- Question: What if a student cannot wear a mask due to a disability?
- Answer: For this narrow subset of students, the school “must determine based on a student’s individual circumstances whether the student is able to attend school safely if other prevention strategies can be followed, in accordance with CDC guidance” such as consistent masking and PPE of others, avoiding large gatherings, and maintaining sufficient physical distance. If this is not possible, then the Department notes that instruction might need to be provided remotely.

U.S. Department of Education, Office of Civil Rights, Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment
Effective Communication

**Martinez et al v. Cuomo**  
459 F.Supp.3d 517 (S.D.N.Y. 2020)

- During pandemic, Gov. Cuomo gave daily briefings, 30-60 minutes, included “critical” information during time of uncertainty
- Some channels had closed captioning; videos with ASL interpretation were available on the Governor’s website
- Court: Granted injunction to provide “in-frame” ASL interpreter


Voting Rights

**Powell v. Benson**  

- Lawsuit against State for using paper ballot vote-by-mail system
- COVID-19 increased the likelihood plaintiffs and others similarly situated will vote absentee and decreased the likelihood they will have access to assistance to fill out a paper ballot
- Consent Decree: Accessible vote by mail system; deliver ballots so that people with print disabilities can mark ballot electronically; train county and local officials on accessible vote by mail

See also Taliaferro v. North Carolina State Board of Elections, 489 F.Supp.3d 433 (E.D.N.C. 2020) (ordering state to implement accessible absentee voting system, finding plaintiffs’ right to vote privately and independently outweighed purported concerns about ballot security).

Accessible Vote by Mail Cases

- Drenth v. Boockvar, 2020 WL 2745729 (M.D. Pa. May 27, 2020) - TRO granted to ensure accessible vote-by-mail in Pennsylvania
- Gary v. Virginia Dep’t of Elections (E.D. Va. July 27, 2020) - Consent Decree reached resulting in accessible mail-in ballot that people can with disabilities can mark electronically
- Hernandez v. NY State Board of Elections (S.D.N.Y. June 9, 2020) – Agreement reached allowing voters with print disabilities to receive accessible mail-in ballot that can be marked electronically
- Frye v. Gardner (D.N.H. July 7, 2020) – Lawsuit resulted in New Hampshire launching an accessible voting system for people with print disabilities allowing them to request and fill out an absentee ballot privately and independently
Curbside Voting

**People First of Alabama v. Merrill**
- Alabama banned curbside voting
- Voters with disabilities filed a lawsuit against the Alabama Secretary of State under the ADA and constitution
- **District court:** 491 F. Supp. 3d 1076 (N.D. Ala. 2020)
  - Ban violated the ADA by forcing voters with disabilities to risk unnecessary exposure to the virus
  - Ban deprives disabled voters of an equally effective opportunity to participate in the benefit of in-person voting
  - Policy allowing – but not requiring – counties to offer curbside voting was a reasonable accommodation
  - Enjoined the ban, which allowed counties that wanted to offer curbside voting to do so

Curbside Voting (Slide 2)

- **Circuit Court:** People First of Alabama v. Merrill, 2020 WL 6074333 (11th Cir. Oct. 13, 2020)
  - Declined to stay the ban (must allow curbside voting)
- **Supreme Court:** Merrill v. People First of Alabama, 141 S. Ct. 25 (2020)
  - Agreed to stay the ban which, as a practical matter, permitted Alabama to ban curbside voting for the 2020 elections
  - **Dissenting opinion:** State cannot “meaningfully dispute that the plaintiffs have disabilities, that COVID-19 is disproportionately likely to be fatal to these plaintiffs, and that traditional in-person voting will meaningfully increase their risk of exposure.”
    - Benefit at issue here = voting in-person

Corrections (State Law)

**Campbell et al v. Barnes**
- 30-2020-01141117 (Cal.) (Dec. 11, 2020)
- Challenged continued incarceration of people with disabilities during COVID-19 pandemic
- Without consideration of individuals with disabilities in the jail’s COVID-19 protocols; engaged in disability discrimination
- Lack of social distancing, staff or intake testing, mask requirements all cause disproportionate risk to individuals with disabilities
- **Court:** Plaintiffs shall be released within 48 hours of decision and release enough inmates to reduce population to 50% in congregate living areas

See also: www.acluofnorthcarolina.org/en/cases/nc-naacp-v-cooper-rights-incarcerated-people
Healthcare (Title II and III)

Crisis Standards of Care

Healthcare rationing

- Alabama's emergency plan directed hospitals not to “offer mechanical ventilator support for patients” with intellectual disabilities, “moderate to severe dementia,” and “severe traumatic brain injury.”
  - complaint filed with HHS/OCR
  - Direction removed and Alabama produced a substantially revised crisis standard of care in August 2020
  - HHS/OCR Press Release
- Tennessee crisis standards of care disqualified individuals with certain disabilities from use of a ventilator in times of scarcity
  - Resolution of HHS/OCR complaint

No Visitor Policies

No visitor policies

- Connecticut Hospital
- 73-year old patient with aphasia and severe short-term memory loss, who is mostly non-verbal, was denied in-person access to support persons able to help with her communication and comprehension during care
- Alleged that policies restricting access to support persons deny patients with disabilities access to medical treatment, effective communication, ability to make informed decisions / consent
- Resolution of HHS/OCR complaint

Guidance document from disability rights groups – Evaluation Framework for Hospital Visitor Policies
Title III

Mask Exemptions: Finding for Plaintiff

**Emanuel v. Walt Disney Co.**
- Parent of child with autism sued because store refused to exempt child from masking requirement
- **Court:** Denied store's motion to dismiss (case can move forward)
  - Plaintiff pled that the exemption was reasonable and necessary
  - Request was potentially reasonable because plaintiff's son was not currently infected, she disclosed his disability, the store was relatively empty, other shoppers were wearing masks, and the state's mask mandate had an exemption for medical conditions
  - Noted that for plaintiff's son, masks were “… so unpleasant [for her child] that he would immediately rip the covering off.”

Mask Exemptions: Finding for Business

**Hernandez v. El Pasoans Fighting Hunger**
2021 WL 2763827 (W.D. Tex. July 1, 2021)
- Person with asthma, PTSD with chronic anxiety and panic disorder sued food bank for not allowing him inside without a mask
- **Court:** Granted motion to dismiss
  - Food bank must provide an accommodation that permits equal participation in the goods, services or benefits offered
  - Here, offered effective accommodation of home delivery, just not his ideal accommodation of going inside without the mask.
  - Place of public accommodation is not required to provide a patron with his “ideal or preferred accommodation” – especially if exemption from a mask policy would pose a direct threat to the health or safety of others, citing CDC and NIH guidance.
**Mask Exemptions:**
**Findings for Business**

- Court: If the store conducts an individualized assessment of whether an individual poses a direct threat, based on reasonable judgment grounded in medical knowledge and public health authorities and based on consideration of reasonable modifications, denying that individual from the store’s premises does not constitute discrimination under the ADA.

See also Pletcher v. Giant Eagle, 2020 WL 6263916 (W.D. Pa. Oct. 10, 2020) ("It is neither necessary nor reasonable for Giant Eagle to alter its policy, as the grocery store permits people with disabilities to wear full face shields as an alternative and offers alternatives to in-person shopping such as curbside service, home delivery and personal shoppers.")

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**Accommodating Patrons by Wearing Clear Masks**

Bunn v. Nike
20-cv-7403 (N.D. Cal.)
- Deaf woman in California sued Nike because she was unable to communicate with retail employees wearing masks
- Settlement: Applies to all stores in California – Nike agreed to:
  - Provide retail workers with clear masks
  - Place notices in stores
  - Provide guidance to employees about the availability of clear masks and accommodating deaf and hard of hearing customers

News article about settlement

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Legal Webinar Series
COVID-19 and the ADA
September 23, 2021
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Topic to be announced

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