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Employment Issues Post COVID-19

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EMPLOYMENT ISSUES POST-COVID-19

I. INTRODUCTION

As vaccines continue to be administered and employers begin to reopen in-person operations, questions regarding more permanent remote work arrangements and the extent to which employers may *require* employees to return to work become less theoretical and more practical. This paper explores the legal issues surrounding employer COVID-19 screening protocols, vaccine mandates, on-the-job accommodations, work from home policies, and protection of business information with a remote workforce.

II. COVID-19 AND WORK

A. The ADA, GINA, and Title VII

1. The ADA

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination by covered employers against qualified individuals on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Disability. The current ADA’s definition of “disability” is sweepingly broad (following the amendment of the ADA in 2008 in response to court decisions limiting the scope of the term under the ADA’s original statutory language). *See* 42 U.S.C. § 12102. It includes (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment. *Id.* at § 12102(1). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function. *Id.* at § 12102(2). Major body functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive function. *Id.*

By statute, courts are required to construe the ADA’s “disability” definition in favor of “broad coverage of individuals ... to the maximum extent permitted by the terms of this chapter.” *Id.* at § 12102(4)(A). Moreover, whether a condition substantially limits a major life activity must be judged in the absence of any mitigating measures (like medication), technology, or accommodations and during the period of the condition’s activity (if the condition is intermittent and thus sometimes in remission). *Id.* at § 12102(4)(D), (E).

With respect to the “regarded as” prong of the definition of disability, it should be noted that an individual meets the definition if the individual proves he or she was subject to an action otherwise prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment actually limits or is even perceived to limit a major life activity, provided the impairment in quest is not transitory (one lasting fewer than six months) or minor. 42 U.S.C. § 12102(3).

Disparate Treatment. Like other civil rights statutes, the ADA of course prohibits intentional discrimination against an individual because of his or her disability. *Id.* at § 12112(b)(1). Going a step further than other civil rights statutes, the ADA also prohibits discrimination against an individual based on the known disability of an individual with whom the qualified individual is known to have a relationship or association. *Id.* at § 12112(b)(4).

Disparate Impact. In addition, the ADA prohibits the use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disability unless the standard, test, or other selected criteria is shown to be job-related for the position in question and is consistent with business necessity, again without reference to any subjective intent to discriminate. *Id.* at § 12112(b)(6); *see also id.* at § 12112(b)(3)(A) (defining “discrimination” to include “utilizing standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability” without making any reference to business necessity), 12113(a) (“It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.”); *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003) (citing 42 U.S.C. § 12112(b)(3) and (b)(6)) (holding the ADA supports disparate impact claims without proof of a subjective intent to discriminate).

Direct Threat. At the same time, the ADA allows “qualification standards” requiring that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b). A “direct threat” means “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” *Id.* at § 12111(3). The determination that an individual poses a “direct threat” must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. 29 C.F.R. § 1630.2(r). In addition, this assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and the best available objective evidence. *Id.* In determining whether an individual would pose a direct threat, the factors to be considered include:

- (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.

Id.

Reasonable Accommodation. To be clear, the obligation to “reasonably accommodate” a qualified individual with a disability extends beyond the direct threat analysis. Indeed, the ADA requires covered employers to make a reasonable accommodation of the known physical or mental limitations imposed on any otherwise qualified individual with a disability, whether that person is an employee or an applicant, unless such accommodation would impose an undue hardship on the operation of the business of the covered entity. 42 U.S.C. § 12112(b)(5)(A). Among other things,

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