



***Emerging workplace disputes from covid 19:
Looking into the future
A discussion with Arbitrators***

Hosted by the NAA Employment Arbitration Committee
(May 17 update)



Welcome to our NAA virtual series of continuing education, hosted today by the NAA Employment Arbitration Committee

Tom Gibbons
Committee Chair



This webinar will explore the emerging nature of workplace disputes and litigation anticipated from COVID 19.

The adjudication of most workplace disputes lag the actual incident by around one year.

Tom Gibbons
Committee Chair



Speakers and Introductions-Tom Gibbons

Will Hartsfield, NAA

Rick Bales, NAA

Moderator/speaker, Richard Fincher, NAA

Speakers will share their comments in conversational mode

Share your written questions in chat. Hold oral questions until the end.

Final Q@A at end for ten minutes



Discussion goals-Tom Gibbons

With the unfolding vaccine, what disputes are coming, and what workplace issues are still with us?

We will focus on return-to-work issues:

- *OSHA and COVID safety issues, including masks*
- *Employer rights*
- *ADA discrimination*
- *Title VII Religious discrimination*
- *A few COVID-related arbitration awards, including social media*

Many of our questions do not have clear answers yet. The speakers can stay after one hour.



Workplace assumptions into the future

- Remote work is here to stay, and poses many disputes (FLSA, workers compensation, monitoring)
- A few infected employees are long haulers and require special consideration (FMLA, medical documentation)
- Occupational-specific issues will continue (teachers, nurses)
- Evolving impact on gig workers
- Evolving issues on privacy of medical records
- Evolving issues on work share and flexible work



Anticipated COVID 19 OSHA disputes in the workplace-Richard Fincher, NAA





OSHA Duty of Safety

Under the Occupational Safety and Health Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.

Workers who are vaccinated must continue to follow protective measures

Can an employer claim a duty under OSHA to require employee vaccination, absent a public mandate? Probably not, e.g., OSHA does not specifically require employees to take flu vaccines or Hepatitis B vaccine. Current COVID vaccine only has emergency approval



COVID and an OSHA compliant workplace

1. Employee may refuse, in good faith, dangerous work
2. Work must expose employee to hazardous work conditions with an objective "real threat" of serious injury under the circumstances
3. No reasonable alternative but to avoid workplace
4. Unsafe condition cannot be timely eliminated



Possible COVID Safety Violations

- No COVID PPE available
- Inadequate COVID PPE available
- Not following CDC safety precautions with distancing
- Not requiring double masking
- Vaccinated employees not following ongoing CDC safety precautions



COVID and OSHA Retaliation

1. Employer took the adverse action because employee refused to work due to COVID
2. Employer took adverse action because employee raised reasonable concern
3. And the adverse employment action would deter reasonable employee from refusing to work—disciplined, fired, or lost pay



Anticipated covid 19 disputes in the workplace

Is there a right of an employer to require vaccination as a condition of employment?

Generally yes, but note state law (federal law may preempt state law)



Anticipated covid 19 disputes in the workplace

Is there a right of an employer to require non-vaccinated employees to be regularly tested as a condition of employment?

Generally yes, but note state law (federal law may preempt state law)



Anticipated covid 19 disputes in the workplace

Is there a right of an employer to require wearing of masks as a condition of employment?

Generally yes, but note state law (federal law may preempt state law)



Anticipated covid 19 disputes in the workplace

Is there a right of an employee to insist on wearing a mask as a condition of employment?

Generally yes, but note state law (federal law may preempt state law)



Vaccinations in the workplace-Richard Fincher, NAA





Basic concept: there is no current legal requirement for an individual to be vaccinated, ever...

There is currently no legal requirement for a person to receive a COVID-19 vaccine

But there is talk of “vaccination passports” as a condition for international travel



EEOC has issued guidance on the interplay of workplace bias laws and covid 19 vaccinations

Summary: employers can require vaccines as long as the employer a) allows a third-party medical contractor, and b) follows accommodations under ADA and Title 7.

Administration of the covid vaccine is not a medical procedure

But pre-screening questions might violate ADA



Anticipated Issues with COVID 19 and Americans with Disabilities Act (ADA)- Will Hartsfield, NAA



COVID and Disabilities

1. Impairment substantially limits a major life activity, e.g., Diabetes
2. Without regard to mitigating measures
3. Temporary, nonchronic impairments of short duration may not be disability, e.g., influenza
4. Individuals with “long haul” COVID likely have disability
5. Per EEOC, unclear if COVID is disability
6. Per Management, COVID is not disability
7. Medication side effects may be disability



COVID and Reasonable Accommodation Discrimination

1. Have a disability, e.g., Diabetes, Anxiety Disorder, etc.
2. Needed accommodation due to COVID
3. Requested accommodation, e.g., work from home
4. Proposed accommodation allowed employee to perform job and is feasible
5. Reasonable accommodations include reassignment, work from home, protective gear, and infection control



ADA COVID Discrimination

Employees must show they:

1. have a disability (or regarded as, e.g., COVID infection)
2. were qualified for the job; and
3. were subject to an adverse employment decision on account of the disability, e.g., refused reasonable accommodation



ADA COVID Direct Threat Defense Elements

Per EEOC, COVID infection is a direct threat

1. Duration of risk
2. Nature and severity of potential harm, e.g., substantial
3. Likelihood potential harm will occur, e.g., significant
4. Imminence of the potential harm
5. Reasonable accommodation cannot reduce to acceptable level



COVID and ADA Retaliation

Employee must show:

1. ADA-protected activity, e.g., COVID accommodation
2. Employer knew of that activity
3. Adverse employment action—action that would dissuade a reasonable employee from making claim
4. Causal connection between protected activity and adverse employment action
5. Pretext



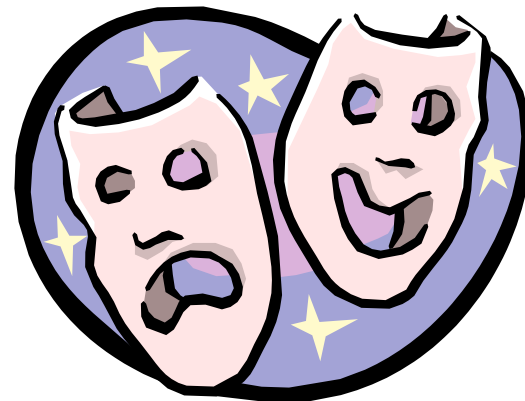
ADA & COVID Vaccinations

1. Employers may screen employees entering workplace for COVID, including exposure and where traveled, but not antigen test
2. Employers may ask if vaccinated
3. Employers may require proof of vaccination
4. Employer may exclude:
 - Employees with symptoms and who refuse to be screened
 - Non-vaccinated employees who pose direct threat not mitigated by reasonable accommodation (or accommodation poses undue hardship)

Source: EEOC Guidance December 16, 2020



Exemption from vaccination due to religious reasons-Richard Fincher, NAA





Title VII of the Civil Rights Act of 1964 prohibits religious discrimination



The law: An employee or applicant may decline being vaccinated due to a good-faith belief of their religion



Employee or applicant must request an accommodation in lieu of vaccination



An employer may request documentation

Communicating that there is a conflict between the job requirements and the employee's sincerely held beliefs and/or **religious** practices, regardless of whether the employee is a member of an organized **religion**



When Title VII protection attaches:

The employer must provide a reasonable accommodation for the sincere religious belief, practice or observance, unless it would pose an undue hardship



Possible accommodation: Reassignment into a position that does not require vaccination (or work remotely)



**Possible accommodations: protective gear
(e.g., masks and gloves)**



Possible accommodations: infection control practices and isolation (e.g., social distancing, plexiglas isolation, hand washing)



What is undue hardship on the employer?

Undue hardship is a fluid, case-by-case contextual examination of factors that measure the burden of accommodation versus the reasonable ability of the employer to make the accommodation.



Does the reasonable accommodation impose an undue hardship on the employer?

Undue Hardship -- Common factors for “balancing test”

- Size and interchangeability of operation, facilities, and workforce
- Nature of operation;
- Financial means;
- Interference with contracts and other employees’ rights;
- Morale problems;
- The magnitude of the safety risk (if applicable); and
- The term “undue” does not mean “any” hardship, the hardship must be significantly difficult



Recent covid-related labor arbitration awards (war stories): Rick Bales, NAA





Workplace covid policies: procedural challenges

- Unpublished “thermometer” case (Samuel Spencer Stone):
 - Er unilaterally implemented policy requiring ees to certify $< 100.4^{\circ}$.
 - No notice; no thermometer.
 - Sent ees home.
 - Held: duty to bargain; improper to discipline ees if they can’t comply.
- “No-moonlighting” case (Augustus Richardson)
 - Er had residential home for mentally & physically disabled adults.
 - Many ees moonlighted at other healthcare facilities.
 - Er temporarily forbade moonlighting during time of \uparrow community transmission.
 - Held: reasonable, but CBA required “meaningful consultation” with Union first.





Workplace covid policies: substantive challenges

- COVID testing by nasal swab for nursing home staff every 2 weeks. Union: invades privacy, like a random drug test. Held (Dana Randall): reasonable. Risk of COVID in nursing home far > risk of drunk nurse.
- New police dep't policy: officers must wear masks w/ effective shields. Officer had PFB & couldn't get seal. Dep't ruled "unfit for duty" and required him to use sick & vacation time until policy was modified. Held (Barry Goldman): reasonable given what Dep't knew of COVID at the time.
- Employee lived in US & worked in Canada. Er policy: anyone crossing border must quarantine 14 days before coming to work. EE's children lived in US & Mom had custody. Held (Norm Jesin): Er should accommodate this ee by re-assigning shift, isolation w/l workplace, requiring PPE, etc.



Workplace covid policies: disciplinary cases

- Hospital forbade on-premises social gatherings; ee threw a pizza party.
- Maintenance worker at nuke plant had COVID symptoms and was told not to come to work. EE came to work anyway and, when asked at gate if he had symptoms, said no.
- Plant shut down because of COVID. Grievant, furloughed, texts co-ee & asks her to move N95 masks to Grievant's work area. Grievant comes in & steals masks; suggests co-ee do same.





Social media case study: oncology nurse placed on disciplinary leave after bragging on tick tok about not wearing a mask while off-duty

Viewers identified the woman as an employee of Salem Health in Oregon and flaunting basic precautions; thousands left messages on the company's Facebook page.



Closing comments: Tom Gibbons



Questions and Adjourn

Thank you on behalf of the
NAA Employment Arbitration Committee