

4 Discrimination Questions Employers Have About COVID-19

By **Vin Gurrieri**

Law360 (January 21, 2022, 6:01 PM EST) -- Employers navigating the COVID-19 pandemic's third year may have gained more clarity about the virus' interplay with anti-discrimination laws since the public health crisis began, but the disease's ability to mutate means businesses must stay on their toes.



Among other things, the growing prevalence of COVID-19 vaccine boosters has created questions for employers. (ROBYN BECK/AFP via Getty Images)

With infection rates recently exploding amid the spread of the omicron variant and the U.S. Supreme Court **recently curtailing** federal regulators' **efforts to encourage widespread vaccination** among private sector workers, businesses have seen their operating plans get murkier. That virtually ensures tricky questions about how COVID-19 impacts employers' anti-discrimination obligations will remain on the table for the foreseeable future.

"I think it's a great time to do a refresh [since] ... so much has changed and yet so little has changed in the world of COVID it feels," said Lindsay Ditlow, a management-side partner at McDermott Will & Emery LLP.

Here, experts zero in on four discrimination law questions tied to COVID-19 that employers should have on their radar.

How Will Courts Weigh COVID-19 as a Disability?

One of the major questions that **initially arose** for employers in the pandemic's early days was whether COVID-19 itself or medical conditions that stem from a person's bout with the virus are protected under the Americans with Disabilities Act.

The U.S. Equal Employment Opportunity Commission **in late December** tackled that issue, releasing guidance that explained how the ADA and the Rehabilitation Act cover — or don't cover — COVID-19.

The commission noted, however, that any determination about whether a particular worker with COVID-19 or related symptoms has a disability covered under those laws is dependent on individual circumstances.

That position and the case-by-case approach that the agency advised employers to take leaves the door open for disputes over whether particular individuals are shielded by the ADA that may ultimately land before courts.

While the EEOC's guidance on the topic is more robust in terms of offering legal clarity to employers than it might be in other situations, Taylor White, a shareholder at Winstead PC who represents employers, said the agency's position "is flexible on purpose."

For a worker to meet the ADA's definition of a disability, the EEOC said in part that they must show that they have an "actual" disability, which means that they possess a physical or mental impairment that "substantially limits a major life activity," including major bodily functions or activities such as concentrating. Otherwise, a worker can show they have a "history or record of" an actual disability, or they are "regarded as" a person with a disability by their employer.

The commission clarified that workers must meet either the "actual" or "record of" prongs to become eligible for reasonable accommodations such as telework or special equipment, and that employers have the right to ask for medical documentation backing any COVID-19-related accommodation requests under the ADA.

"The EEOC wanted [its guidance] to be flexible; they didn't want to limit the types of claims that employees can bring [that are] out there to protect employees' rights," White said. "But at the same time, I think the EEOC recognizes that these are all serious issues that employers are struggling with. So I think the EEOC is at least trying to draw the right balance, and I think that courts will have the opportunity to step in and define limits that then [can give] employers ... clarity even further."

Will 'Long COVID-19' Also Be a Fulcrum of Litigation?

Besides the issue of whether COVID-19 is a disability, an increasing number of employers will soon have to make calls specifically about whether long-term symptoms and medical conditions that arise from coronavirus infections are shielded under the ADA, attorneys say.

The U.S. Centers for Disease Control and Prevention defines "long COVID-19" or "long-haul COVID-19" as "new, returning or ongoing health problems" that people experience at least four weeks after first being infected with the coronavirus.

Those "post-COVID-19 conditions," which can last at least for months even in people who had only mild cases of COVID-19, may include fatigue, brain fog, regular headaches, heart palpitations, mood swings and lightheadedness. For people who had severe cases of COVID-19, long-term symptoms may include autoimmune conditions that can damage healthy organs.

While the EEOC hasn't specifically used the term "long COVID-19" in its guidance so far, it has said people who experience "ongoing but intermittent" things such as headaches, brain fog or similar symptoms stemming from COVID-19 may have a disability protected by the ADA.

On the flip side of the coin, the commission has said in guidance that people who experience things such as fevers, headaches or gastrointestinal discomfort "which resolve within several weeks" without any further effects of COVID-19 being manifested don't have the sort of impairments that qualify as an actual disability under the ADA.

McDermott's Ditlow said accommodation requests are increasingly coming in from workers seeking to telework based either on reasons related to long COVID-19 or vaccination issues, highlighting the commission's direction that employers evaluate situations on a case-by-case basis.

"How we've been advising clients is that the U.S. Department of Health and Human Services lists examples of common symptoms of long COVID, which include tiredness, fatigue, difficulty breathing, concentrating, headaches," Ditlow said. She added that most employers are erring on the side of caution by providing accommodations if people show through their medical providers that they have conditions that could fit into agencies' definition of the syndrome.

James Paretto, a shareholder at employer-side firm Littler Mendelson PC, said that though the EEOC has done well in attempting to draw lines around how and when COVID-19 itself or long COVID-19

can qualify as disabilities, the changing nature of the disease and the different ways emerging variants manifest themselves may mean courts will have to weigh in on what exactly the ADA protects.

"I think [the EEOC has] done a decent job on setting out when, particularly long-term COVID, can be a disability," Paretti said. "I do think we'll have to see what courts say. COVID is no longer just one thing."

Are Phony Religious Exemption Requests Getting Any Easier to Suss Out?

One of the thorniest labor relations issues that employers have faced during the pandemic is the extent to which they must accept workers' contentions that their religious beliefs warrant exceptions from workplace safety policies such as mandatory vaccination or on-site masking rules.

The issue is yet another topic that the EEOC has addressed. The agency issued **lengthy guidance in October** saying employers can require workers to be inoculated against COVID-19 to enter a worksite — provided that religious or medical accommodations remain available — and any accommodations shouldn't pose an "undue hardship" on the business.

But as part of that guidance, the commission made clear that employers aren't obligated under Title VII to grant a religious exemption that isn't rooted in religion or based on a sincerely held belief, with the agency specifically noting that the law "does not protect social, political or economic views, or personal preferences."

For employers, determining exactly what qualifies as a sincerely held religious belief remains complicated, even for businesses that have gotten increasingly used to handling such requests over the past two years.

"What I'm seeing is you have a lot of employees who are seeking protection — claiming discrimination, harassment [and] retaliation ... under Title VII, claiming it's a religious choice where ... in reality, it's a political or a personal preference," Winstead's White said.

"I think that's where a lot of the wiggle room is, where you get kind of the religion meets politics meets personal preferences," White added. "I foresee a lot of that is where it's going to be litigated."

Even in instances in which a business doesn't mandate a vaccine or can't do so due to state or local laws that restrict such policies, some workers are still asserting civil rights law when faced with periodic testing or workplace mask requirements.

"A lot of times what you're having are employees who are claiming discrimination that way, saying, 'Well, you know, wearing a mask is going to mark me as unvaccinated and therefore that's discriminatory,'" White said. "And then employers are having to navigate whether a claimed religious belief is sincerely held and whether accommodating it would constitute an undue hardship in the workplace."

Kelly Raney, a Los Angeles-based partner at Greenberg Glusker Fields Claman & Machtinger LLP, noted that employers can lean on judgments from licensed medical professionals when it comes to evaluating disability accommodation requests, but they can't do the same for religious exemptions.

In the latter case, it falls on employers to make a "preliminary judgment call" about whether a stated religious belief is sincerely held or whether it is really a political or personal viewpoint before evaluating whether a potential accommodation is unduly burdensome on the business, Raney said.

"In my experience, employers of all sizes struggle with this process at least the first couple times they must go through it," Raney said. She added that midsize and smaller employers have an especially tough time "even after they've been through it a time or two, because it is more personal for them both to assess the sincerity of their employees' beliefs, and to assess the hardship or danger an accommodation poses to their operations and workforce."

Will Booster Shots Muddy Existing Accommodations?

Most exemptions to vaccination requirements that employers have granted were processed when workers were still due to receive their initial series of vaccine doses. But in recent months, public health officials have increasingly called for people, particularly those in high-risk categories, **to receive boosters** to their initial vaccine series.

For employers, the growing prevalence of vaccine boosters is creating new questions that haven't yet arisen during the pandemic, one of which is whether the obligation for people to get additional doses "starts to compound conflicts" that exist with workers' religious beliefs or disabilities and medical conditions, according to Raney.

Raney noted that the EEOC in its existing guidance has advised that a person's "prior inconsistent conduct" can be taken into account by employers when evaluating the sincerity of requests for religious exemptions to COVID-19 policies.

So far, that has meant employers try to gauge the sincerity of a person's vaccine objections in part by asking workers if they have received other vaccines in their lives and whether they received them as adults when they could make a choice about getting them.

But when booster shots are added to the equation, the calculus for employers may change. As an example, Raney questioned whether workers who have strong religious beliefs that conflict with vaccines but who also opted to get the COVID-19 vaccine anyway would be pushed too far if asked to get more shots.

"Is it fair to count the fact that they were willing to acquiesce once against them? Is it fair to minimize or even discredit their beliefs over someone who refused to get the original vaccine, when arguably the person who, against their beliefs, agreed to get the vaccine was doing what the employer and society asked them to do?" Raney asked. "At this point, the solution to the issue is to look at the whole picture, but it still requires a potentially uncomfortable assessment of an employee's beliefs and actions."

Additionally, booster shots may also create new avenues for workers to request medical exemptions from vaccination requirements, with Raney saying that employers shouldn't be caught off-guard if vaccinated workers submit doctor's notes seeking exemptions from booster shots.

For example, people with medical conditions who were cleared to get the original vaccine may not get a doctor's approval for another round, and those who experienced "unusual or severe" reactions to the initial vaccine may similarly not get a doctor to sign off on a booster, she added.

"Luckily for employers, this is largely up to the individual and their doctor to decide, but employers will subsequently be tasked with determining whether they can provide a new disability accommodation without undue hardship," Raney said.

--Editing by Abbie Sarfo and Roy LeBlanc.