Avoiding ADA Compliance Pitfalls in a COVID-19 World

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Sponsored by Cupa-HR
CUPA-HR Webinar

Presenter

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Agenda

• Legal Considerations
  • What are the ADA workplace “Rules of the Road”? ⇨ Reasonable accommodation, undue hardship, and “direct threat” principles
  • How have the rules changed in light of COVID-19?
  • EEOC and other agency guidance
Agenda

• **Practical Considerations**
  o Anticipating ADA return-to-work issues
  o Managing reasonable accommodation requests
  o Addressing novel issues without “reinventing the wheel”
  o Using the RA “Interactive Process” effectively
Agenda

• **Best Practices for Minimizing Risk**
  Executing an effective Communications strategy
    o Communicating with respect and empathy
  Enforcing workplace policies
    o Health and safety-based
    o Flexible work, leave policies, attendance procedures
    o Nondiscrimination rules
Poll Question #1:

How worried are you about an increase in ADA-related claims as employees begin to return to work?

A) Not worried
B) Somewhat worried
C) Extremely worried
Poll Question #1

If you answered “A”, “Not worried”...

• We love your enthusiasm and optimism!
• You’ve probably thought about and anticipated potential return-to-work issues and have a plan to address them
• Still, there may be value in hearing about some of the unique/emerging COVID-19-related ADA issues on the horizon
• You’re in the right place!
Poll Question #1

If you answered “B”, “Somewhat worried”...

• You’ve probably spent a bit of time thinking about (or dealing with) possible ADA issues and scenarios already
• You may be looking for tips and strategies for addressing ADA concerns in a fair and consistent manner
• You’re in the right place!
Poll Question #1

If you answered “C”, “Extremely worried”...

• It may not be as bad as you fear
• There are a number of resources available to help guide your compliance efforts
• You’re in the right place!
Legal Considerations

• The Americans with Disabilities Act (ADA), as amended
  ➢ Nondiscrimination
  ➢ Duty to Accommodate
  ➢ Restrictions on Disability Inquiries and Medical Exams
  ➢ Confidentiality

• Enforced by U.S. Equal Employment Opportunity Commission (EEOC)
Legal Considerations

• How have the rules changed in light of COVID-19?
  Novel and emerging ADA issues
    o Intersection with new health and safety mandates and protocols

Examples include:
  o COVID-19 screening and test administration protocols
  o COVID-19 vaccination mandates
Legal Considerations

• How have the rules changed in light of COVID-19?

  Employer response and actions must account for COVID-related changes
  
  o Reasonable Accommodations
    ▪ Undue hardship considerations
    ▪ “Direct threat” analysis

  o Workplace policy adjustments
    ▪ i.e., revisiting inflexible leave rules and/or WFH policies

  o Other issues, i.e. medical documentation, coordinating logistics
Poll Question #2:

Do your safety protocols include taking employee temperature scans and/or conducting antibody testing?

A) Yes to both
B) Yes to temperature scans only
C) Yes to antibody testing only
D) No to both
E) Undetermined/unsure
Poll Question #3:

Once a vaccine is available, will you require staff to be inoculated?

A) Yes, in all instances
B) No, we will not mandate vaccinations
C) Yes, but only on a case-by-case basis
Legal Considerations

• EEOC COVID-19 Guidance: “What you Should Know about COVID-19 and the ADA, Rehabilitation Act, and other EEO Laws”:


  o Responds to frequently-asked compliance questions
  o Last updated on September 8, 2020
Legal Considerations

• EEOC 2009 Pandemic Guidance: “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act”:


  o Preparedness publication issued in connection with H1N1 outbreak in 2009
  o Updated to address COVID-19 issues
Legal Considerations

⇒ The EEOC’s guidance documents reiterate that employers should also follow COVID related guidelines from public health authorities, such as the Centers for Disease Control and Prevention (CDC)
Legal Considerations

• Be mindful of other compliance risks
  o “Association,” “regarded as” disability discrimination
  o Protected-basis harassment (disability and non-ADA)
  o Retaliation
Practical Considerations

• Anticipating ADA return-to-work issues
  o Handling EEO vs. non-EEO COVID related complaints
    ▪ The “my-coworker-refuses-to-wear-a-mask-and-he’s-making-me-uncomfortable” vs. the “my-coworker-refuses-to-wear-a-mask-and-she’s-placing-my-health-at-risk” complaint
      ▪ Should they be handled differently?

• Managing reasonable accommodation requests
  o What’s your process?
    o Who’s the point person?

• Addressing novel issues without “reinventing the wheel”

• Using the RA “Interactive Process” effectively
Best Practices for Minimizing Risk

• Communicating and enforcing workplace policies
  o COVID-19 health and safety-based rules
  o Flexible work, leave policies, attendance procedures
  o EEO, nondiscrimination, anti-harassment, Code of Conduct

• Proactively monitoring for and preventing discrimination, harassment, and retaliation
Best Practices for Minimizing Risk

• Looking for opportunities to promote employee sense of safety and well-being
  ≫ Constant reinforcement of safety-based message --- “we got you” – and backing it up with action
  ≫ Reminding employees of other available resources
Additional Resources

• CDC Guidance
  o General COVID-19 related information:
  o Businesses and the Workplace:
  o Job Accommodation Network
    askjan.org
  o Updated regularly

• State and/or local agency guidance
  o May speak to issues impacting a particular geographic area
Submit questions to our presenters using the Q&A box
Thank You