Accommodating Towards Endemic: Foundational & Emerging Employment Law Issues As A Pandemic Fades

Presented By

Kroger Gardis & Regas, LLP

ACEC Indiana
Principals & Owners Summit
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Recapping “The Rules” of Remote Work

Ops and Morale: You can largely do whatever you decide is best for your business – just pay your taxes and treat people decently

1) Assess tax and employee wage/benefit implications if employee working outside Indiana
2) Set performance and duties-based eligibility criteria based on business needs and experience
3) Develop written policy/agreements to ensure common expectations, consistent application
   • Schedules, responsiveness/accessibility, timekeeping
   • Productivity
   • Cost of equipment, utilities, supplies, etc. (esp. for non-exempt)
4) Ensure safety/security of things and information
5) Take full advantage of trial periods, maintain “at-will” status

Employment: Pay at least all required wages, grant required leave, maintain safety, and don’t unlawfully discriminate.

1) FLSA: pay non-exempt EEs at least min. wage and overtime for all hours worked; pay exempt EEs on a proper salary basis
2) FMLA (50 EEs or more): job protected unpaid leave in qualifying circumstances
3) OSHA/Workers Comp: ensure remote office safe for people
4) EEO Laws: treat everyone “the same” regardless of race, age, gender, etc.
WHAT ABOUT REASONABLE ACCOMMODATIONS?

Basic Terms and Concepts

The Americans with Disabilities Act (and Indiana Civil Rights Act)

1) Prohibit discrimination against a qualified individual with a disability (or any other employee due to their association with a disabled individual)
2) Require employers to maintain all employee medical information securely and confidentially
3) Require reasonable accommodation for a qualified individual with a disability
4) Prohibit retaliation against a qualified individual with a disability for requesting accommodation or other protected activity

*Title VII also requires reasonable accommodation of employees' sincerely held religious beliefs

Basic Terms and Concepts

“Disabled”

1) Law: substantially limited in a major life activity
2) Practice: anything preventing or limiting an employee’s ability to perform essential job functions

Some conditions aren’t “serious enough” to be a legal disability. But let HR/lawyers worry about that later. Engage in the “interactive process” regardless.

Basic Terms and Concepts

“Reasonable Accommodation”

1) Law: no fixed definition
   • Shouldn’t present “direct threat” to safety
   • Shouldn’t impose “undue burden”
2) Practice: nearly anything that helps an individual (specific) employee perform essential job functions
Recapping “The Rules”

Do whatever you want, just treat everyone the same … unless an employee qualifies for mandatory different treatment, in which case do whatever you can to help them … as long as it’s not “too” dangerous or “too” difficult

\_(ツ)_/\n
Workplace Accommodations

**NOT** “Reasonable” Accommodations

1) Changing/removing essential functions
2) Creating a new job
3) Changing a full-time job to part-time
4) “Indefinite” leave
5) Moving/bumping another employee
6) Changing supervisors
7) Waiving/rescinding discipline

Workplace Accommodations

**POSSIBLE** Accommodations

1) Changing facilities/physical layout
2) Job restructuring or modification
3) Modified schedule
4) Adaptive mobility equipment
5) Modified discipline/conduct rules (prospective)
6) Preference for open alternative position (if minimum qualifications met)

Talking Things Through

How Exactly Do We Figure Out What We Have To Do?

• “Interactive process” - explore and confirm what employee can/can’t do
  - Highly individualized, “flexible” back-and-forth
  - No magic language or specific process required to initiate
Talking Things Through

How Exactly Do We Figure Out What We Have To Do?

• “Interactive process” - explore and confirm what employee can/can’t do
  • Get verification/documentation from medical professionals
  • Ongoing/dynamic responsibility
  • Document each step/conversation

DON’T:

1) Discuss employees’ requests or needs with others’ (except HR or others with a genuine need to know)
2) Make negative comments or act upset about the employee wanting “special treatment,” the cost/disruption of accommodations, etc.
3) Make or act on assumptions about what an employee can or can’t do

Talking Things Through

AVOID SAYING OR DOCUMENTING:

1) Words like “disabled,” “disability,” etc.
   • Instead try: condition, restrictions, limitations
2) Words like “accommodation” and “accommodate”
   • Instead try: help, assist, modify, change, try

The Basic Approach

1) Ask:
   ➢ What is it you can’t do?
   ➢ (If needed) What’s keeping you from doing it?
   ➢ (If appropriate) How long?
   ➢ How can we help? / What are you asking of us?
   ➢ “Anything else?”
2) Listen, take notes, promise nothing except follow-up
3) Consult HR (and legal as needed)
The Basic Approach

4) Gather additional info if needed, e.g.:
   - Doctor’s confirmation/input;
   - Employee’s proposal for anticipated obstacles

5) Circle up, then circle back – confirm internally what you can/can’t do to balance employee’s needs with employer’s needs, then tell the employee*

6) Monitor/assess (employer’s view)

7) Follow-up (employee’s view)

*If employee provides new information/considerations, loop back to #1

Workplace Accommodations

Is Remote Work A Reasonable Accommodation?

DEFINITELY
MAYBE!

Remote Work as an Accommodation

Key Concepts

1) Remote work is a possible reasonable accommodation, if it facilitates the employee’s performance of all essential functions, without imposing an undue hardship.

2) If granted, fine to tell coworkers/others employee is teleworking; not ok to disclose that it’s due to a medical condition.

3) If denied, employer must be able to show employee’s inability to perform essential functions and/or undue burden.

Remote Work as an Accommodation

EEOC’s COVID-19 ADA Guidance

1) Employer not required to continue telework instituted as a response to the pandemic where not required because of a disability.

2) Even if an employee has a disability, employer not required to grant/continue telework if alternative forms of accommodation are available.

3) EEOC has emphasized ADA “never” requires elimination of essential function as an accommodation
Remote Work as an Accommodation
Revisiting Key Concepts in Light of COVID-19

- **Pre-pandemic:** EEOC and courts largely assumed that in-person attendance was an essential function and readily agreed with employer arguments that remote work would impose an undue burden.
- **Now:** no longer. Employer must be able to prove both.

Remote Work as an Accommodation
Potential Employer Considerations

- In-person work treated as essential function historically?
  - Pre- v. during v. post pandemic?
  - Any of that in writing?
- Impact on customer/client service and relationships
- Impact on operations (workflow, service delivery)
- Impact on coworkers (all levels) (supervisors, peers, subordinates)

Remote Work as an Accommodation
Potential Employer Considerations

- Individual need for direct/physical oversight (past performance, discipline, etc.)
- Confidentiality concerns
- Availability of technology, equipment, etc.
- Security of technology, equipment, etc.
- Availability of a safe, suitable workspace
- .........................cost.

*Also: what will "the employee* say about these issues?*

COVID-19 Remote Work Case Study
Peeples v. Clinical Support Options, Inc. - Facts/Chronology

- 3/2/20 - Asthmatic Plaintiff hired as assistant manager in Community Resilience After Trauma team
- 3/10/20 - Massachusetts Governor declares state of emergency
- 3/18/20 – Plaintiff tells supervisor needs remote work per doctor’s recommendation, asthma makes her vulnerable to COVID
- 1+ month – Plaintiff performs job duties remotely just fine
- 5/14/20 – Plaintiff’s supervisor’s boss (Director) says all managers must return to the office by 5/18/20
<table>
<thead>
<tr>
<th>COVID-19 Remote Work Case Study</th>
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<tbody>
<tr>
<td><strong>Peeples v. Clinical Support Options, Inc. - Facts/Chronology</strong></td>
</tr>
<tr>
<td>• Plaintiff provides doctor’s note saying needs to work from home for 4 weeks; employer grants.</td>
</tr>
<tr>
<td>• 6/19/20 – Plaintiff requests to continue teleworking.</td>
</tr>
<tr>
<td>▪ Director denies because “they” are “not approving work from home for managers” because managers are needed in the building and supporting operations.</td>
</tr>
<tr>
<td>▪ Director confirms duties in office will remain unchanged from what Plaintiff did remotely.</td>
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<td>• 7/6/20 – Plaintiff “reluctantly” returns. Requested PPE, masks, hand sanitizer and wipes but none provided.</td>
</tr>
<tr>
<td>▪ Air purifier installed; moved Plaintiff to private space w/ less foot traffic</td>
</tr>
<tr>
<td>▪ Four KN95 masks provided on 7/7</td>
</tr>
<tr>
<td>• Plaintiff can’t interact w/ children productively wearing a mask, eats lunch in car to isolate and becomes dehydrated.</td>
</tr>
<tr>
<td>• 7/27/20 – Plaintiff renews request to telework w/ letter from allergist plus letter from supervisor saying she could perform effectively from home.</td>
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<td>• 8/10/20 – Plaintiff submits resignation effective 9/5/20 stating she will rescind if permitted to telework.</td>
</tr>
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<td>• 8/21/20 – Plaintiff files a charge of discrimination.</td>
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<tr>
<td>• 8/27/20 – Director announces on group call with all managers that those with children could request remote work up to 2 days/week.</td>
</tr>
<tr>
<td>• 8/27/20 – Supervisor submits letter to Director detailing Plaintiff’s value as an employee.</td>
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<tr>
<td>• 9/1/20 – Director denies telework request “because CSO was not permitting managers to work remotely.”</td>
</tr>
<tr>
<td>▪ Plaintiff says will resume telework on 9/8</td>
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</tbody>
</table>
|   ▪ CSO’s counsel tells Plaintiff they will “enforce…applicable policies” if she tries to telework.

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WHAT HAPPENS NEXT?

COVID-19 Remote Work Case Study
Peeples v. Clinical Support Options, Inc. - Litigation

• 9/3/20 – Plaintiff files complaint alleging disability discrimination, failure to accommodate, and hostile work environment
• 9/16/20 – Court finds:
  ▪ Majority of CSO’s “accommodations” were general workplace safety measures, not tailored to Plaintiff’s needs
  ▪ CSO submitted no evidence of individualized assessment
  ▪ Other managers could likely handle on site needs for in-person client interactions, policy enforcement, etc.
  ▪ Plaintiff’s Supervisor’s assessment indicates no undue hardship

COVID-19 Remote Work Case Study
Peeples v. Clinical Support Options, Inc. - Facts/Chronology

• Court enters preliminary injunction against employer:
  ▪ Plaintiff entitled to telework for 60 days or until further court order
  ▪ Employer can use that time to seek further medical documentation about Plaintiff’s disability
  ▪ Parties “strongly encouraged to discuss a mutually acceptable resolution of their dispute.”

COVID-19 Remote Work Case Study
Peeples v. Clinical Support Options, Inc. - Facts/Chronology

<table>
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<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
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<tbody>
<tr>
<td>12/15/2020</td>
<td>Electronic Clerk’s Notes for proceedings held before Magistrate Judge Katherine A. Robertson: Status Conference held on 12/15/2020.</td>
</tr>
<tr>
<td></td>
<td>Attorneys Present: Clarina Daniels, Douglas W. Moliterno, MaryAnn Murphy &amp; MaryAnn M. Murphy re: status of the case. The parties reported the matter as settled. A sixty (60) day settlement order of dismissal shall issue. (Certified); Kevin Keeler at <a href="mailto:kmob929@gmail.com">kmob929@gmail.com</a>, (Rivera, Melissa) (Entered: 12/15/2020)</td>
</tr>
<tr>
<td>01/04/2021</td>
<td>STIPULATION OFDismissal of Daniel Peeples, Janice Peeples (Rivera, Melissa) (Entered: 01/04/2021)</td>
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Accommodating With Leave

If Can’t Accommodate On The Job, How Much Leave?

1) EEOC - “Brief”
2) Seventh Circuit - “Intermittent” or “short,” meaning “a couple of days or . . . weeks.” Not months.
3) Other Circuits - whatever:
   • Isn’t indefinite
   • Doesn’t pose an undue hardship
   • Helps the employee to perform essential duties

Accommodating After Leave

What happens when medical leave runs out?

• Must consider if employee can return to work and perform essential functions of their job.
• If not, must consider if employee can return to work and perform essential functions in any open available position.
• If employee can’t perform all essential functions of some job, employment ends.

A Note on Medical Leave & Insured Benefits

Remember/distinguish...

1) Benefits are about money
   • Wage replacement, medical expenses
   • Governed by plan terms
2) Leave is about attendance
   • Protected/excused
   • Typically unpaid
   • Governed by law and policies

COVID-19 Vaccine Mandates

Federal Mandate Scoreboard (as of 1/31/22)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Status</th>
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<tbody>
<tr>
<td>OSHA (100+ Employees)</td>
<td>Enjoined by SCOTUS*</td>
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<tr>
<td>CMS (most healthcare employers)</td>
<td>SCOTUS lifted injunction</td>
</tr>
<tr>
<td>Federal Contractors</td>
<td>Enjoined by federal district court</td>
</tr>
<tr>
<td>Federal Employees</td>
<td>Enjoined by federal district court</td>
</tr>
<tr>
<td>DHHS/OHS (Head Start Programs)</td>
<td>Enjoined in 24 states by federal district court</td>
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*OSHA has said it will look at ETS standards in analyzing general duty clause!
COVID-19 Vaccine Mandates

**EEOC on Employer Vaccine Mandates and “Direct Threat”**

- See EEOC’s “What You Should Know About Covid-19…”
- Cannot require employees with disability- or religious-based objections to be vaccinated unless the unvaccinated individual would pose a “direct threat” to health or safety of the employee or others in the workplace
- “Direct threat” = significant risk of substantial harm that cannot be eliminated/educed by reasonable accommodation

**EEOC Breaks Direct Threat Analysis into Two Steps**

1) Determine if there is a direct threat, by individualized assessment of:
   - Employee’s ability to safely perform essential functions
     a) Duration of the risk
     b) Nature and severity of the potential harm
     c) Likelihood that the potential harm will occur
     d) Imminence of the potential harm
   - Reasonable medical judgment + most current knowledge
     a) Current level of community spread
     b) CDC Guidance
     c) Employee’s medical provider

2) Assess if a reasonable accommodation would reduce/eliminate the threat
   - Requiring a mask
   - Periodic testing
   - Staggered/changed shifts
   - Changing the work environment (e.g., improving ventilation systems or limiting contact with others)
   - Telework if feasible
   - Reassignment (EEOC’s “last resort”)
   - Leave (the “real last resort”)

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Looking Forward/Other Issues

OSHA’s other/general rules still very much in play!

- COVID-19 is a recordable if work-related.
- Reportable if in-patient hospitalization or fatality
- Adverse reactions to vaccines not (at least through May 2022)

OSHA Focusing on Employer’s Process for Determining if a COVID-19 Case is “Work Related”

- What does employee know/say about how contracted?
- What other info does employer have available?
  - Several cases among those who work closely together?
  - Contracted shortly after lengthy, close exposure to known case?
  - Job duties incl. frequent, close exposure to general public in area of ongoing community transmission?
  - Does employee closely, frequently associate w/ known case outside work during likely infectious period?

State-level Reminders

- Employees outside Indiana? Check state/local laws!

- What do your customers want/demand?
- Watch Indiana HB 1001!

Reducing Exposure By Avoiding Upset Employees – the Good Old Fashioned Art of Communication

- More Noise
- Feedback
- Still More Noise
- Decoding
- Receiver’s Context
- Encoding
- Channel/Medium
- Message
- Sender’s Context

*Links aren’t endorsements