

EMPLOYEE REALITIES OF WORKING DURING COVID-19

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Remote work was common during the first year of the COVID-19 pandemic, but the federal government, state governments, and many companies are requiring all employees to return to in-person work with a vaccination requirement or suffer weekly testing and masking requirements. Such requirements are legal, generally speaking. What happens, though, when employees don't want to be vaccinated?

II. What Are An Employee's Rights To An Exception To Their Company's Return-To-Work Mandate?

In sum, it will depend on the basis.

Stay-at-Home Argument #1: I have a documented physical health condition

Scenario: Your medical adviser says that you should not be vaccinated, and/or that your condition makes in-person work risky regardless of your vaccination status.

Viability of this stay-at-home argument: Good.

If it's available to you, this is likely the strongest argument you can make, especially if your doctor advises you against being in the workplace for health reasons. The Americans with Disabilities Act (ADA) requires employers to grant reasonable accommodations to employees who have a physical or mental disability, as defined in the statute — and if you've already been working from home, it's hard for employers to argue that you can't continue.

When you make an ADA request to your employer, you will need support from a healthcare provider. You must be ready to open up your health records. HIPAA, the medical privacy law, does not apply in these circumstances. Your employer is entitled to determine whether your condition requires ADA consideration, and whether — even if you truly can't be vaccinated — you may still be able to return to work with extra precautions.

Worth noting:

- If your employer requires vaccination and you can't take one specific vaccine for medical reasons, you may still be required to take a different vaccine.
- If working from home would make it difficult to continue doing your job, would endanger others in the workplace, or would be unduly costly for your employer, your accommodation may be refused.

- The ADA doesn't cover employees of the federal government, who are protected instead by the Rehabilitation Act of 1973. The two laws are not identical, but for this purpose they're largely the same.

Stay-at-Home Argument #2: I have a documented mental health condition

Scenario: Your medical adviser says that returning to in-person work would severely impact your mental health.

Viability of this stay-at-home argument: Good.

As noted above, the ADA applies to mental health conditions; the general standard is whether your condition substantially limits one or more major life activities. For federal employees, the Rehab Act is largely the same.

Disclosing a mental health issue to your company is tough, but you are protected against discrimination and retaliation under the ADA or the Rehab Act. If a doctor says that your condition will be exacerbated by a return to in-person work, your employer should be open to accommodating you.

Again, your medical records are fair game. Expect some back-and-forth about the exact nature and duration of your exemption from in-person work — and possibly some skepticism or alternative suggestions.

Still, with proper documentation you should be taken seriously.

Stay-at-Home Argument #3: I'm pregnant

Scenario: Even if you were vaccinated before or during your pregnancy — a step that is urged by the Centers for Disease Control — you believe that in-person work would be unsafe for you and your unborn child due to the remaining risk of infection.

Viability of this stay-at-home argument: Good.

By itself pregnancy is not a disability under the ADA, but in *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015), the Supreme Court held that employers can't refuse pregnant workers an accommodation that they offer to others who have similar limitations due to a medical condition. According to the CDC, being pregnant raises a person's risk of severe illness from COVID-19 infection, so it's likely that a pregnant employee should be treated analogously to an immune-compromised employee. In addition, COVID infection increases the risk of preterm birth.

Definitely have a discussion with your doctor, who may bolster your argument with a medical opinion. Your company still might suggest returning to work with extra precautions — particularly if that's required of comparable workers. A well-informed employer will likely err on the side of caution, however, as long as you can perform your job effectively from home.

This particular stay-at-home argument is viable only for the duration of a pregnancy, obviously.

Stay-at-Home Argument #4: I object to vaccination for religious reasons

Scenario: Your sincere religious beliefs disallow vaccination, and you believe that in-person work would be unsafe.

Viability of stay-at-home argument: Decent, but employer still may require in-person work with unpleasant conditions.

In general, employers will allow workers to refuse vaccination for sincere religious reasons — but pre-COVID law suggests that they might be required to work in-person regardless.

In *Horvath v. City of Leander*, 946 F.3d 787, 800-03 (5th Cir. 2020), for instance, the U.S. Court of Appeals for the Fifth Circuit in early 2020 ruled that a firefighter could be excused from a mandatory TDAP vaccine on religious grounds — but that he also could be required to choose between undesirable options that included wearing a respirator while on duty, keeping a temperature log, and being tested regularly.

How this plays out in COVID times is uncertain, but remember that remote work isn't the only possible accommodation for unvaccinated employees: Your preferred solution may not be the same as your employer's.

Stay-at-Home Argument #5: My workplace is not safe

Scenario: Even though you're vaccinated, you still fear COVID-19. You think your employer isn't taking enough precautions to prevent breakthrough infections. You object to sharing space with unvaccinated co-workers.

Viability of stay-at-home argument: Temporary at best.

You have a right to a safe workplace, and it's perfectly reasonable to hold your employer to its legal obligations. It's unlawful for your company to punish anyone for raising valid safety concerns — for asking about details of masking and cleaning protocols, for instance.

That said, you don't get to set safety standards yourself. The federal Occupational Safety and Health Administration (OSHA) and its local analogs do that. If your employer isn't meeting OSHA guidance, you can point out specific problems and ask your employer to fix them, *perhaps* staying at home until the situation is addressed — but you can't hold your company to an ideal of your own making, and you have no right to stay at home if your workplace already meets OSHA standards. As an example, you can't refuse to work alongside unvaccinated employees unless you have a documented health condition. Indeed, OSHA guidance is often more focused on the safety of the unvaccinated workers in such a mixed environment.

Moreover, most OSHA protections are enforced via an administrative process at the U.S.

Department of Labor. Resolution can take years, while you may have been fired in the meantime. As a practical matter, you must weigh your discomfort against your continued employment. Pursuing legal action is costly and risky.

Stay-at-Home Argument #6: My workplace may be safe, but my commute is not

Scenario: In order to work in-person, you must use public transportation that's crowded and possibly full of unvaccinated people. This freaks you out.

Viability of stay-at-home argument: Poor.

Employers don't control the world outside your workplace; ultimately, the safety of your commute is on you. The only exception would be based on a diagnosed mental or physical condition — in which case you should argue for an accommodation under the ADA or Rehab Act, as noted above. Your employer could argue for a different solution, however, such as a rideshare arrangement.

Stay-at-Home Argument #7: I live with an immune-compromised person (or maybe an unvaccinated child)

Scenario: You're vaccinated but you fear bringing home a breakthrough infection to a vulnerable family member.

Viability of stay-at-home argument: Shaky, but worth making.

Legally this is a poor argument, as the ADA does not require employers to accommodate the condition of a third party, but your company still might accommodate you out of empathy. Talk to your employer and explain your fears. Appeal to their humanity.

Stay-at-Home Argument #8: I moved during the pandemic

Scenario: You moved out-of-state during the remote-work period – perhaps to take care of family members. Now you'd have to upend your life to return to the workplace.

Viability of stay-at-home argument: Poor.

We've consulted with several employees in this situation. They became very comfortable with remote work and didn't understand why their employer would insist that they return. Unfortunately, an employer doesn't need to justify such a requirement.

In fact, even for people who telework full-time, an employer can choose to employ only workers who live in certain states, absent other facts. If you used to work remotely from home in D.C., for instance, but moved to Montana during the pandemic (perhaps without your boss' knowledge or approval), your employer could require you to move back to D.C. *even for remote work*.

At bottom, employers can choose which states' employment laws they want to be subject to.

Many employers don't want the hassle of complying with paperwork in extra states, or being exposed to employee-friendly laws in states such as California.

Unless you received explicit permission to move permanently, you have little leverage here.

Stay-at-Home Argument #9: I don't want to get the vaccine (or to prove that I got it)

Scenario: You're required to return to in-person work, and your employer requires proof of vaccination. You don't believe the vaccine is safe, or you have some other reason for not getting it — or you simply object to providing proof.

Viability of stay-at-home argument: Poor.

Like it or not, the federal government has declared the vaccine to be safe and effective — and the world is facing a health crisis. Unless your objection is based on a documented health condition or a bona fide religious belief, your employer can likely reject a stay-at-home request and require you to get the shot before reporting to the workplace. If you don't comply, you must face the possibility that you'll lose your job as a result.

Instead of firing you for refusing to prove your status, your employer might force you to follow different workplace rules — mandatory masking and/or weekly testing, for instance. Based on current law and guidance, such questioning and treatment doesn't violate either the ADA or HIPAA, although follow-up questions about your reasons should be minimal and consistent with business necessity.

Your vaccination status should be kept confidential from your co-workers, but differential treatment may “out” you as unvaccinated. Alas, this is part of the balance employers must strike between privacy and workplace safety.

Many people believe the entire situation is unfair, but your chances of prevailing in a legal battle are slim.

Stay-at-Home Argument #10: I work better remotely

Scenario: You prefer to work at home, where you believe you're more productive. You can't understand why your employer would choose an option that's obviously worse.

Viability of stay-at-home argument: Poor, but make your case.

To be clear, employers can make in-person work a condition of employment — even at the cost of productivity. If they insist, you're unlikely to win the argument. Still, make your case. Employers are rational creatures, and if your performance improved significantly while working remotely during the pandemic you might be persuasive. Remember that there are other factors, however, including the risk of setting a precedent: you allowed *her* to work from home, so why not me?

Stay-at-Home Argument #11: You allowed someone else to work from home

Scenario: Your employer has allowed other people to continue working from home, and there's no obvious difference between them and you.

Viability of stay-at-home argument: Depends heavily on the facts.

If your employer has allowed work-from-home only for strong legal reasons — such as a health conditions — and those reasons don't apply to you, then it's hard to make this argument. If you notice that another factor is at play, however, you could have a strong case.

For instance, if everyone who was exempted from in-person work is white and you, a person of color, were denied an exemption despite being comparable in all other ways, you probably have some leverage.

Your first step should be to inform your company in writing of the discrepancy you see; after that, you should consider making an EEO complaint and/or consulting a lawyer. You are likely protected from retaliation under several laws.

II. What Are An Employee's Rights To Continued Employment If They Secure An Exception To Their Company's Return-To-Work Mandate?

Title I of the ADA protects individuals with disabilities from employment discrimination. An individual with a disability must be qualified to perform the essential functions of the job with or without the reasonable accommodation in order to be protected by the ADA. This means that the individual, in order to be qualified "with or without reasonable accommodation," 42 U.S.C. § 12111(8), must:

- satisfy the job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- be able to safely perform those tasks that are essential to the job.

See Bates v. United Parcel Serv., Inc., 511 F.3d 974, 994 (9th Cir. 2007).

The religious exemption to a vaccination requirement is based on three factors, including whether the accommodation poses an undue hardship on the employer, whether granting the exemption would present a direct threat to health and safety of others, and a judgment of the employee's genuine and sincere religious beliefs. *See Phillips v. City of New York*, 775 F.3d 538, 540 (2d Cir. 2015). Under Title VII, sincerely held religious beliefs must be reasonably accommodated unless doing so causes the employer an undue hardship, and the "sincerity" of a religious belief "is generally presumed or easily established." *Moussazadeh v. Texas Dept. of Crim. Justice*, 703 F.3d 781, 790 (5th Cir. 2012). A person's sincerely held belief need not be shared by anyone else in the world to merit protection, may be inconsistent or even heretical within the person's professed faith, and may seem completely illogical or inconsistent to the government or employer. This is because the government or employer need not determine that a person's belief is "acceptable, logical, consistent, or comprehensible to others in order to merit...

protection.” *Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981). A belief is “religious” under Title VII if it is “religious” in the employee’s “own scheme of things,” *United States v. Seeger*, 380 U.S. 163, 166, 176 (1965), and a belief is “religious” under Title VII even if the belief is merely a non-theistic “moral or ethical beliefs as to what is right and wrong which [is] sincerely held with the strength of traditional religious views.” See *Commission Guidelines*, 29 C.F.R. § 1605.1.

However, securing a religious exemption from being immunized or by getting a disability accommodation may provide an employee with a legal right to not be vaccinated. If being unvaccinated in the workplace precludes the person from being qualified from safely performing their job duties and responsibilities safely, they can still be removed from the workplace legally. For example, medical professionals who work with immunocompromised individuals and who secure an exemption from being vaccinated likely will not be deemed qualified if they have forward-facing positions where they interact with the patients. Likewise, employees who interact with clients or other employees on a regular basis may be deemed unqualified if they cannot perform their job duties and responsibilities in isolation, as federal and state laws require employers to provide a safe workplace for all workers. Providing a safe work environment includes removing potential health risks, such as unvaccinated employees, from the workplace.

III. What Are An Employee’s Rights To Return To Work Without Being Vaccinated And Without Being Subjected To Being Tested Or Having To Wear A Mask?

In sum, there likely aren’t any. In *Jacobson v Massachusetts*, 197 US 11 (1905), state officials passed regulations under state law requiring vaccination in an attempt to fight smallpox. Jacobson refused to comply, was tried, convicted, and ordered to pay a \$5 fine. He appealed, and the Supreme Court rejected the appeal, citing the state’s “police power” declaring “power which the State did not surrender when becoming a member of the Union under the Constitution.” Accordingly, a state can “enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of public health.”

Justice John Marshall Harlan wrote for the Court that “[t]he good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts,” and “upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”

Jacobson had argued that law requiring mandatory vaccination was a violation of due process under the 14th Amendment, particularly the right “to live and work where he will.” Justice Harlan rejected this argument by noting that while the Court had protected such liberty, a citizen:

[M]ay be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one’s body upon his willingness to submit to reasonable regulations established by the constituted

authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger.”

However, Harlan concluded by limiting the ruling as follows, “We are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death.”

IV. What Are An Employee’s Rights If They Return To Work And Test Positive For COVID?

In *Matias v. Terrapin House, Inc.*, No. 5:21-CV-02288, 2021 WL 4206759 (E.D. Pa. Sept. 16, 2021), the plaintiff disclosed her positive test result for COVID-19 and requested 14 days leave under the FFCRA. Instead of providing leave, her employer immediately fired her, and in the termination letter, said it was because she was “not a good fit.”

The court denied the employer’s motion to dismiss, finding that COVID-19 can be a regarded-as disability under the ADA and under Pennsylvania state law. It also rejected the transitory and minor defense. In doing so, it cited recent guidance from the DOJ saying Long COVID could be a disability, took judicial notice of facts about the disease from the CDC website and from the WHO Director-General, and pointed out how much more severe the disease is than the seasonal flu.