

Avoiding Discrimination In The Virtual Workplace

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Today's Presenters



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Topics

1. Vulnerable Workers
2. Remote Work As An Accommodation
3. Family Responsibility Discrimination
4. Retaliation For Taking Protected Leave
5. The New Normal: COVID-19 Based Discrimination



Protecting Vulnerable Workers

A New Protected Class: Vulnerable Workers?

- CDC has identified the following as members of the Vulnerable Population:
 - Employees 65 or Older
 - Employees with Compromised Immune Systems
 - Employees with Serious Chronic Health Conditions
- EEOC <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- California Department of Industrial Relations <https://www.dir.ca.gov/dlse/Essential-and-Non-essential-Workers.htm>
- California Department of Fair Employment and Housing https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

EEOC Guidance

- An employer CANNOT bar an employee from the workplace (or take any other adverse action) solely because of an underlying medical condition that puts him/her at risk if they contract COVID-19.
- Instead, that action can be taken only if the employee's disability poses a "direct threat" to his/her health that cannot be eliminated or reduced by accommodations.
- Direct threat means that the individual has a disability that poses a "significant risk of substantial harm" to the employee's own health or those of others.

Vulnerable Workers: “Regarded As” Claims

- An employee seeking protection under the ADA need only show “an actual or perceived physical or mental impairment,” regardless of whether the impairment actually limits, or the employer perceives the impairment to limit, a major life activity.
- Possible examples:
 - Approving accommodation requests even employee does not have an ADA-covered disability – do you run the risk that you have “regarded” that employee as disabled?
 - Example, vulnerable worker has no symptoms and wants to return to work full-time.
 - Vulnerable worker and younger worker have both recovered from COVID-19 symptoms – but only vulnerable worker is required to provide doctor’s note

Age and COVID-19

- EEOC guidance:
 - An employer may not postpone a start date or withdraw a job offer because the individual being hired is 65 years old, which would place them at higher risk from COVID-19. However, an employer may allow or require telework or discuss with these individuals if they would like to postpone the start date.
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - But, the age protections in the ADEA and FEHA do not have an accommodation requirement, and therefore an employer is not required to grant a request to telework from an employee who is 65 years old or older simply because the CDC says older people are at a high risk of contracting the virus (but the employer may have to accommodate if there is a related disability)

A top-down view of a workspace. On the left, a silver laptop is open on a dark wooden desk. To the right, a person's hands are visible; one hand holds a black marker, pointing at a large whiteboard. The other hand is near a notebook with handwritten notes. The whiteboard is mostly blank. An orange-bordered box is overlaid on the whiteboard, containing the text 'Remote Work as an Accommodation'.

Remote Work as an Accommodation

Remote Work During The Pandemic

- The Good:
 - Most employees feel they are more productive working from home.
 - Most employers have seen an increase in productivity after the initial months of the pandemic
 - Most working parents want the flexibility of working remotely
 - According to a survey conducted by Global Workplace Analytics, 93% of employees would like to keep working remotely at least some of the time
- The Bad:
 - A majority of parents have found it difficult to balance household demands while working from home
 - A majority of managers identify inability to communicate in person as one of their top three challenges.
 - 4 in 5 HR managers think working from home has led to “ePresenteeism” - - be ever present on line.
 - Most employees are working longer while working remotely

Disability and COVID-19:

- Work From Home as a reasonable accommodation:
 - Both state and federal law currently state that working from home arrangements could be a reasonable accommodation in instances where working from a physical location is not an essential job function.
- Pre-COVID-19: employers could argue that physical presence is essential and remote work is not a reasonable accommodation.
- Post-COVID-19: Significant shift of most business operations to remote work during the pandemic.
 - Will this make it easier to request remote work as a reasonable accommodation?

Employee Rights

- **Can Employees Refuse to Come to Work?**
 - If Employee Is not ill and has not been exposed to COVID-19? Generally, no, but:
 - Can refuse if conditions pose “imminent danger” – OSHA, Section 13(a)
 - Can engage in “protected concerted activity for mutual aid and protection” - NLRA, Section 7
 - “sick out” strikes for better conditions during coronavirus outbreak
 - FMLA/CFRA leave?
 - Fear of contracting COVID-19 is not a “serious health condition.”
 - A “serious health” condition may include:
 - A serious illness caused by COVID-19
 - Pre-existing physical conditions exacerbated by COVID-19
 - Anxiety or other legitimate mental health conditions could qualify as a serious health condition

Employer Obligations

- Can employers Require Employees to Stay Home?
 - Yes – if employees exhibit symptoms of COVID-19.
 - CDC, EEOC, DFEH guidance
 - No – if employee is a vulnerable worker, unless poses a “direct threat”
- Remote work as a reasonable accommodation?
 - Disability that places employee at greater risk from COVID-19
 - Preexisting physical or mental disabilities
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

Accommodations: Continued Teleworking

- What about continued telework: can we require employees who have been working from home during COVID-19 to return to our physical office location?
 - Does the reason why an employee has requested telework matter?
- How would you handle a scenario where employee refuses to be subjected to temperature checks or COVID-19 testing?
 - Is there an obligation to accommodate the employee's refusal?



Medical Certification (DFEH Guidance)

Can employers ask employees to provide medical documentation to support a request for reasonable accommodation to work remotely or take leave because they are disabled by COVID-19?

- Generally, when an employee requests a reasonable accommodation in the form of a change in schedule, telework, or leave, employers may request reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation.
- During the current pandemic, it may be impracticable for employees to obtain medical documentation of a COVID-19 related disability from their medical provider. To the extent employers require medical documentation in order to grant reasonable accommodations, **DFEH recommends waiving such requirement until such time as the employee can reasonably obtain documentation.**

EEOC Guidance Updated 9/8/20

- COVID-19 Inquiries

- Employers can ask employees entering the physical workplace - *but not teleworking employees*:
 - If the employee has COVID-19
 - If the employee is experiencing COVID-19 symptoms
 - If the employee has been tested for COVID-19

- Confidentiality

- Medical information must be kept confidential while teleworking
- If an employee teleworks because of COVID-19, managers cannot disclose why

- Reasonable Accommodation

- Teleworking
 - Employee not necessarily entitled to same accommodations as in the workplace
 - Employer is not required to allow teleworking as a reasonable accommodation after physical location re-opens
 - Case-by-case assessment required
- Employers may invite employees to request reasonable accommodations now that will be needed later upon return to work
 - Does not preclude subsequent requests



Family Responsibility Discrimination

What is Family Responsibility Discrimination?

- Family Responsibility Discrimination – or FRD – is a form of discrimination against men and women because of their caregiver roles for family members.
- Examples of FRD:
 - A mother of young children is denied a promotion
 - A father is harassed for working part time to care for his children
 - A baby boomer takes time off to take elderly parent to chemo treatments
- Caregiving responsibilities traditionally have a disproportionate effect on working women.

Legal Protections Against FRD?

- Title VII and FEHA
- FMLA and CFRA
- California Pregnancy Disability Leave (PDL)
- Federal and California Equal Pay Acts
- Americans with Disabilities
- FFCRA and Expended FMLA leave
- EEOC Guidance (May 2007) - <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#male>

Caregiver Bias

- Bias and stereotyping about caregivers
 - Less committed
 - Distracted by personal obligations
 - Not as available as other co-workers
- Distance or Recency Bias
 - Choosing to stay home rather than go into the office and engage in “face time”
- Confirmation Bias
 - Supervisor more likely to remember when a mother takes a day off to care for her sick child than a single mom working from home to wait for the plumber



Caregiver Bias

- Potential FRD claims while employees working from home:
 - Not giving opportunities to employees based on assumption that employee is working from home to take care of the kids
 - Co-workers make negative comments about employees choosing to continue working from home after office reopens
 - Parent of young children not invited to video conference calls to avoid disruption of meeting by children

Best Practices to Avoid FRD Claims

- Train supervisors to identify potential FRD problems, and seek help from human resources when needed.
- Train supervisors to avoid inappropriate comments and actions, and to avoid making personnel decisions based on stereotypes.
- Make sure new supervisors are made aware of flex schedules or arrangements in place for an employee, and of the need to evaluate the impact of new policies on employees with caregiving responsibilities.
- Ensure that employees are evaluated on performance, rather than on a supervisor's assumption about the employee's commitment to their job.
- Consider flexible working arrangements.
- <https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities>

Avoiding Retaliation Claims



Retaliation Basics

- Retaliation: taking an adverse action against an employee because the individual engaged in protected leave
- Protected leave includes:
 - Taking protected leave
 - Requesting protected leave
 - Requesting a reasonable accommodation
- Employee does not need to be entitled to the leave or reasonable accommodation
 - Asking is enough to trigger protection
 - Is it an adverse action to require employees to work remotely?

Leave Options

- If Employee Is Ill, Exposed to COVID-19 or Exhibits Symptoms:
- Options for the employee:
 - Emergency Paid Sick Leave
 - California mandated sick leave; local ordinances; employer sick leave policies
 - FMLA/CFRA if a “serious health condition” exists
 - Note: CFRA will apply to 5 or more employees beginning 1/1/2021
 - Leave as reasonable accommodation if employee has a disability

Leave Options

- If Employee needs to care for family member exposed to COVID-19 or child whose school is closed due to the pandemic:
- Options for the employee:
 - Emergency Paid Sick Leave and Expanded Family Medical Leave
 - California mandated sick leave; local ordinances; employer sick leave policies
 - FMLA/CFRA if a “serious health condition” exists
 - Note: CFRA will apply to 5 or more employees beginning 1/1/2021
 - Leave as reasonable accommodation to care for family member?

Use of Intermittent Emergency Paid Sick Leave and Emergency Family Medical Leave

- Department of Labor Guidance, Federal Register, *29 CFR Sec. 826*
 - Remote Employees
 - Intermittent use of EPSL and EFMLA is permitted *if* employer agrees



The New Normal: COVID-19 Based Discrimination

Discrimination Claims

- Employers may see a rise in lawsuits from “Vulnerable Employees” claiming they were not hired or were terminated because of fears of increased absenteeism or inability to work if they get sick from COVID-19, from parents who need to care for children out of school, or from Asian employees due to xenophobia.

- Age Discrimination
- Disability Discrimination
- Gender Discrimination
- National Origin Discrimination

1. Elderly individuals.
2. Individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

Discrimination Against COVID-19 Victims

Employers have an obligation to prevent and respond to pandemic-related harassment, including:

- Online harassment by employees who are teleworking;
- Negative comments or differential treatment of employees who have taken pandemic-related leave;
- Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

Eastern Airlines Accused Of Firing Exec Over COVID-19 Leave



By [Danielle Nichole Smith](#)

Law360 (April 16, 2020, 8:26 PM EDT) -- A former director at Eastern Airlines hit the company with a suit in Pennsylvania federal court Thursday, claiming she was fired for trying to take time off under the Families First Coronavirus Response Act, a law Congress recently passed to address the COVID-19 outbreak.

Attached Documents

 [Complaint](#)

Useful Tools & Links

 [Add to Briefcase](#)

National Origin Discrimination

- Surge in bias claims against Asians since COVID-19
- Since its launch on March 19, 2020 to August 5, 2020, STOP AAPI HATE reporting center received 2,583 reports of coronavirus discrimination from Asian Americans across the country.
 - Verbal assaults: 70.6%
 - Shunning: 21.8%
 - Physical Assault: 8.7%
 - Cough/spat on 6.4%
 - Workplace Discrimination: 4.3%
- Another survey reports that more than 30% of Americans have witnessed someone blaming Asians for the pandemic

National Origin Discrimination

- EEOC Chair Janet Dhillon reports that the EEOC has received complaints of mistreatment and harassment against Asian Americans and other people of Asian descent during the COVID-19 outbreak.
- EEOC cautioned employers to reduce harassment risk by explicitly informing employees that fear of COVID-19 cannot be “misdirected against individuals” based on any protected characteristic, including national origin or race.
- DFEH issued updated FAQ’s on July 24, 2020 on COVID-19 reminding employers that it is unlawful **at all times** to discriminate against or treat an employee less favorably than another employee on the basis of race or national origin, which includes geographic places of origin, ethnic groups, and tribal affiliations.

Preference for Recovered Victims: Reverse Immunity Discrimination

- If COVID-19 continues to be a lingering threat to businesses, or returns in seasonal waves, employees who have immunity will be more desirable. Imagine the competitive advantage of an essential business with a workforce that will not get COVID-19, and will not put customers at risk of getting COVID-19. Imagine a world where employers could test employees to determine if they were immune.
- That world may be here soon through inexpensive antibody testing, and raises difficult questions.
 - Can employers test applicants or employees for immunity?
 - Will applicants tout their immunity on resumes?
 - Will the government regulate immunity certificates (as some have proposed) to avoid fraud?
- Current EEOC Guidance: Anti-body testing violates ADA.

Mental/Emotional Disabilities

- Non-physical disabilities traditionally have been challenging for employers to accommodate.
- The following accommodation requests are likely on the horizon:
 - Employees are anxious/nervous about their own health if they return to office environment
 - Employees are fearful of contracting COVID-19 in the office and passing to others at home
 - Employees are concerned that office environment will trigger pre-existing mental disabilities



“Regarded As” For Mental Health Issues

- Beware reliance on myths and stereotypes when deciding whether someone can perform essential functions.
- Delicate balance between gathering evidence on job limitations versus the employee’s privacy rights.
- Flexibility is key.
- EEOC Guidance: *Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights*
https://www.eeoc.gov/eeoc/publications/mental_health.cfm
- EEOC Enforcement Guidance: Americans with Disabilities Act and Psychiatric Disabilities
<https://www.eeoc.gov/policy/docs/psych.html>



Associational Discrimination

- Courts have recognized discrimination claims based upon an “association” with individuals in a protected class. **But**, there is no obligation reasonably accommodation based on the disability or age of the “associated person.”
 - What about employees who may have family members that are vulnerable workers – either because of age or disability? Even if they are not entitled to a reasonable accommodation – is it discrimination if an employer refuses?
 - What about employees who are married to medical workers or other front line employees likely to become infected?
- Examples – (1) employer refuses to allow an employee to work from home who is married to a cancer survivor with weakened immune system; (2) employer fails to recall an employee married to a EMT because the employer is afraid of spreading infection in workplace.

Employees with Family Members At High Risk for COVID-19

Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?

- No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.
- For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.
- Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

Best Practices to Avoid Discrimination Claims

1. Train managers on permissible subjects for job interviews – it will be hard to avoid discussion of COVID-19 and that will lead down a dangerous path.
2. Any and all testing or medical inquiries should be done in accordance with ADA guidelines, be job related and applied consistently. Create a written policy with guidelines and protocols for managers to apply.
3. No good deed goes unpunished – Don't presume an older or disabled person does not want a job or an assignment (like traveling).
4. Be open to reasonable accommodation requests - religion, disability, pregnancy.
5. Wherever possible, base policies on CDC and government recommendations or guidelines, and be ready to change policies if recommendations or situation on the ground changes.

Thank You

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