

ROUGHLY EDITED COPY  
AFRICAN AMERICAN CONFERENCES ON DISABILITIES  
NAVIGATING REASONABLE ACCOMMODATIONS AND WORKPLACE  
DISCRIMINATION IN THE TIME OF COVID 19  
FEBRUARY 4, 2021

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>> NICHOLAS BLUM: Hello, everyone. My name is Nick Blum. I work at Northern Arizona University. I want to welcome everybody today. I'm going to spend a minute or two going over some housekeeping, and then I'm going to turn it over to Natalie who is going to introduce our speakers today.

I've posted some information in the chat that I'm going to explain verbally as well.

So there are closed captioning able through Zoom. To activate the closed captioning, there's a button at the bottom of your Zoom screen.

Live transcript, or closed captioning, you can click on that. There's also an external caption link that I placed in the chat. If you want to see the captions externally, or if something happens to the captions in the Zoom meeting, you can use that.

You may have to clear the gear button at the bottom of your screen to turn captions on. Or you may not. It depends on your user settings.

There are two ASL interpreters in this meeting. They are co-hosts, so they should be at the top of the participant list. ASL Audrey and ASL Jeremy. One way to assure it's permanent as the meeting goes on is to use the "pin" function. You right click and pin their videos on their name.

We're showing slides today. You may find that when the slides go up and down, you may have to repin the videos.

The ASL interpreters are going to do their best to spotlight themselves.

One place to check settings is if you move your mouse to the top of the corner, you will see the "view" button. We find that side-by-side mode is a good way, if you're not able to see the ASL interpreter, but there are different ways to see the interpreters in Zoom.

Also, when slides are being shown in Zoom, our stream only shows one video. So to make sure the ASL interpreters are present on Facebook, we're going to ask the presenters to turn off their videos while the slides are being shown, and then they will turn their videos on during later in the presentation.

I'm going to post some community guidelines in the chat that, hopefully, we can all follow.

The presenters are looking forward to a discussion and questions in the chat, and we'll be monitoring it. The chat is your primary form of interaction during the session.

And then the last thing I will mention is that if you have audio issues during this call, I recommend moving your mouse to the bottom left-hand corner where there is a mute button and an "up" arrow. If you click that, you will find audio settings. A lot of problems can be solved by looking at your audio settings.

One of the nuances on Zoom is things in the chat don't show up if you join the meeting late. So you may find us repeating and pasting information in the chat for people showing up late.



I think that's it for me today. You're welcome to message hosts, myself or Jeff, John, or Natalie in the chat. We'll do our best to help with technical questions here.

We're very excited about today's sessions.

Natalie?

>> NATALIE LUNA ROSE: Thanks, Nick.

Good morning, everybody. My name is Natalie Luna Rose. I'm the outreach and communications manager for Arizona Center for Disability Law.

You are joining us for our third session, the last session of the week. This conference is normally just one day, but because of the pandemic, we have decided to put it online, and it will be going through the whole month. So if you have not had a chance to look at our other sessions, I will put the link in the chat, and you can browse at your pleasure.

But this morning, we are excited to be hosting once again. And I want to thank our sponsors, of course, Arizona Center for Disability Law, our co-hosts, Arizona Center for African American Resources, Valley Toyota Dealers, our DD network partners, including Arizona Developmental Disabilities Planning Council, IHD, and Sonoran UCEDD. Thank you, John, Nick, and Jeff, for their help this morning.

The Arizona Commission for the Deaf and Hard of Hearing who are providing interpreters and CART today. Diverse Ability Incorporated, Arizona Statewide Independent Living Council, Mark's the Spot barber shop, and Unique Multicultural Connections.

(Reading sponsor list)

>> NATALIE LUNA ROSE: Our co-founders, Renaldo Fowler, who is our senior staff advocate here at ACDL, and David Carey, now with SILC. They started this amazing conference 10 years ago, and it has just grown; and we've seen, especially with the pandemic, the need for information.

So we're really excited to be hosting this and having all of you here today. Thank you, also, for joining us on Facebook.

So I will introduce our speakers today.

Today's session is: Navigating Reasonable Accommodations and Workplace Discrimination in the Time of COVID.

ACDL, Arizona Center for Disability Law, has not seen our workload go down. If anything, it's gone up. This is one of the issues that we are keeping busy with, among others.

So, without further ado, I'm going to introduce Meaghan Kramer. She's our staff attorney here at ACDL. Mark Sorokin is an attorney with the U.S. Equal Employment Opportunity Commission.

And Trisha Kirtley Wells, is an attorney with Kirtley Wells Law Office.

Meaghan, I will hand it off to you.



>> MEAGHAN KRAMER: Thank you, Natalie. And thank you to our generous sponsors.

I wanted to start with just a few quick announcements and sort of an outline of how this presentation will go today.

Trisha and Mark and I are lawyers, but even we don't like to be lectured at about the law. So we are going to, before we move into each topic, give a brief overview of the law using a PowerPoint presentation, and then we're going to go into a conversation about some of the issues that we're seeing come up in the workplace since COVID has begun and more generally about reasonable accommodations and discrimination in the workplace.

I also wanted to add that I know we have some attorneys attending today. For attorneys who are interested in getting CLE credit, for when it's applicable in your jurisdiction, we're going to have a CLE code that we'll announce and show on the screen about halfway through and, again at the end of the presentation, just one code. In order to get credit for CLE, you will need to email that to the email address that we'll read out and include on the screen. So pay attention to that if you are an attorney and want to get credit.

And before I really kick off, I will just tell you a little bit about my practice and then ask Trisha and Mark to briefly introduce themselves.

I am a staff attorney at the Arizona Center For Disability Law, and one of the areas of law I practice in is employment work. So we primarily will represent employees in employment law disputes, and my work before this time, I did some employee representation, but I was in private practice and had some experience representing employers before I saw the light and became an attorney at ACDL.

I will also ask Trisha and Mark -- Trisha, why don't you go first -- to just tell folks a little bit about your background.

>> TRISHA KIRTLEY: Hi. My name is Trisha Kirtley. I'm in private practice. Probably 98, 99% of what I do is employment representing employees. Prior to starting my own practice 20 years ago, I worked for the federal EEOC for approximately five years as a trial attorney, and then prior to that, I worked in private practice at a large defense law firm.

Okay.

>> MEAGHAN KRAMER: And, Mark?

>> MARK SOROKIN: Yes. I'm an attorney with the EEOC for the past 10 years, and I did some trial work with the Phoenix off of the EEOC for about three and a half years. And that's the time at which the Office of Federal Operation which is in the headquarters, primarily dealing with the administrative process that applied.

>> MEAGHAN KRAMER: So we're very lucky to have Trisha and Mark with us because they



do have that experience at the EEOC.

I'm going to turn my video off now and ask that Mark and Trisha do the same. I will be starting with our slide presentation.

The Americans with Disabilities Act is the primary law that we're going to be discussing here today. We just celebrated 30 years of the Americans with Disabilities Act last year, and it was signed into law on July 26th, 1990. And, today, we're going to be dealing with Title I, which is the employment section of that law.

Title II, of course, is public entities and public transportation.

Title III - Public Accommodations and Commercial Facilities.

This is the signing day on the front lawn of the White House.

Is an employer, a covered employer, subject to the ADA?

Employers are covered under the ADA if they are private employers with 15 or more employees, state and local governments, employment agencies, staffing firms, and Labor Unions.

But there are other laws that may apply. I know we have a national audience today. The you're in Arizona, the Arizona Civil Rights Act also applies to prohibit employers with 15 or more employees from discriminating against Arizonans with disabilities. If you're in another state, there are state and local laws that may apply to you.

And the Rehabilitation Act of 1973 also applies to federal agencies, employers that receive federal financial assistance and some employers that are owned by Indian tribes.

So who is protected under the ADA? An individual with a disability is a person who either has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

And we can sort of get into different examples of these as we get into conversation, but, essentially, if you have a disability or someone thinks you do, this law applies to you, if you work for a covered employer.

And "major life activities" is quite a broad definition. It includes caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

And the ADA has also been expanded to include major body functions, which includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

And that's all just to say that it covers a lot. Employers, since the ADA was amended most recently, don't often take the position that the employee who is bringing a claim does not have a disability because this definition has become so broad, that is no longer a great defense anymore.



And before we get into our conversation about COVID-19, we've all been living in this world now for about a year, and COVID-19 intersects with the ADA in a variety of ways. There's testing, COVID-19 testing, in the workplace; antibody testing in some workplaces; symptom screening, sharing COVID medical information with either co-employers, employees, public health agencies; and reasonable accommodations, which we'll discuss, and vaccine requirements.

And I will stop my share.

If Trisha and Mark can turn their videos on, we can just get into some of the main issues that are coming up. I will just read -- we did get a question. Can the slides be emailed to the registered participants afterwards? That is something we're going to make available to everyone. I know the information is dense. So we'll make the slides available to everyone. It may be after the conference in March.

We're also recording today, so you all will be able to rewatch, if there's something that you missed.

So, Mark and Trisha, let's just start with what kinds of information can employers these days request from employees who call in sick, for example, during the COVID pandemic?

>> MARK SOROKIN: I'll go first.

First, we have to start from the baseline. The ADA puts restrictions on what kind of medical (indiscernible) if we have a simple situation where an employee is sick for a day, then the employer can't ask them more than that.

The EEOC has put out some guidelines saying that if the employer asks everybody who is actually coming into the office or facility, they ask everybody if they have these symptoms of COVID, that's okay. They can do that because that's an issue of whether the person poses a direct threat to the health of the employee or other employees. So that would be okay, I think.

>> MEAGHAN KRAMER: Yes.

Trisha, do you have anything to add?

>> TRISHA KIRTLEY: Just additionally that the questions have to be job-related, that they're asking employees, as well as consistent with a business necessity. So as long as it fits within those parameters, they're permitted to ask those questions of everyone, not to single out a particular individual.

>> MEAGHAN KRAMER: Right. And one example of this may be if you are telecommuting and need to call in sick and you have not been into the office, you may not have exposed anyone. So there may be no business necessity for your employer to ask whether you're COVID positive. It's only relevant to them to the extent that it may affect the workplace, other employees, customers, that sort of thing.



>> TRISHA KIRTLEY: And, additionally, if they're going to ask those certain questions of an employee, they need to have an objective basis for asking that question, an objective, reasonable basis for putting that question out there to begin with.

>> MEAGHAN KRAMER: Yes.

Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?

This is assuming the employee has a job that requires them to come into a job site.

>> TRISHA KIRTLEY: Absolutely. The CDC has said that COVID is a community health problem. They can require them to stay home if their COVID virus is active because that may pose a threat to their safety and/or the safety of other employees.

>> MEAGHAN KRAMER: What about when employees return to work? These are the issues employees are going to start seeing more often. They're going to be returning to work as the pandemic, in theory, starts to wind down. Does the ADA allow employers to ask employees, if they've been sick, for a doctor's note signifying their fitness for duty?

Go ahead, Mark.

Well, I was going to say that I think it does, and the answers we're discussing now are from the EEOC guidance, but, you know, each case by case -- every case is different. And something we know to be true right now is doctors are busy. If your employer is telling you may have had COVID-like symptoms and you need a doctor's note signifying you're in good health before you return to the workplace, you may be able to get a tele-appointment with a doctor rather than get in with your actual doctor and use that tele note to certify your fitness for work.

Or, in some situations, the employer's restrictions may be too high. For example, if an employee is told by their employer, You're out sick with COVID. Every 48 hours, if you need to stay home, we need a doctor's note from you saying that you are still sick and unable to come into work. That may be too big of a burden for the employee.

In that case, as an employee, you may just want to try to get a doctor's note that says, you know, I spoke with the doctor -- the doctor says, I met with this patient, and they will be sick until at least this date.

So rules are rules within the workplace, but you don't have to do anything that's too big of a burden, and you should really just engage with your employer to see if you can come up with a way to follow the policies but also just follow the spirit of the policies, which is to keep everyone else in your workplace safe.

>> TRISHA KIRTLEY: And, remember, the ADA focuses on -- I mean, the goal is to deal with discrimination based on a disability. Therefore, a doctor's note is not disability-related. It does not



necessarily evidence a disability. So, therefore, there are individuals who feel, well, that's imposing on my disability. I shouldn't be required to provide a note.

But the cases, they certainly have the right to have information regarding your status, your situation, and your ability to be able to return to work.

>> MARK SOROKIN: And I'm going to add that we also have to keep in mind the ADA also refers to confidential medical information and things in that vein. So taking that is not necessarily in the spirit of the ADA. So when we're talking about COVID, maybe people need to be more flexible and say, Okay. Maybe not a doctor's note but a negative COVID test or something else. Our guidance also talks about a stamp or something that doesn't require a thorough examination.

But I think the key here is really people need to be flexible and understand what is possible and what is recommended, what the EEOC guidelines are and what the CDC guidelines are. They work together.

>> MEAGHAN KRAMER: Excellent.

We got an important question. I will answer this third question in the chat from Sarah.

Can an employer fire you because you can't or won't come into work because you're COVID positive?

I think some of the important things to discuss are, you know, you may be entitled to different types of leave, sick pay, depending on your jurisdiction, FMLA, to care for yourself. And the employer may require you to establish that you have COVID, which is something we discussed earlier, in order to be entitled to those different benefits.

FMLA, for example.

Does anyone else have anything else to add?

>> MARK SOROKIN: Yeah, I do. I think FMLA, I think the first part of that question touches on (indiscernible) OSHA regulates. That's not necessarily something I'm experienced in, but if they're COVID positive, they're therefore contagious. There's more of a safety issue.

>> MEAGHAN KRAMER: Yeah. I do want to get to vaccinations before we get to reasonable accommodation. The program today is ambitious. We're covering a lot of ground, so we may not get to a lot of your questions, but I do want to cover: Can my employer require me to be vaccinated? And if the employer requires vaccinations, when they become available to whatever type of employee works for this employer, how should the response be if the employee indicates that they are unable to receive the vaccine due to a disability or a sincerely held religious belief?

>> MARK SOROKIN: Yeah. So if that happens, we have to analyze it at the time of the request. If it's a disability accommodation, then we have to look at the facts to see if the disability could be (indiscernible) if perhaps they could continue teleworking.



There's a variety of things, including PPE, things that we would have to look at to see whether the employee can do this.

If it's a minimums burden, then under Title VII, the employer may not necessarily have to accommodate. It depends.

>> MEAGHAN KRAMER: Right. And I think we'll get into this as we discuss reasonable accommodations, but one of the key elements in the employer-employee relationship, when it comes to employment discrimination is you really have to analyze every case on a case-by-case basis. Blanket prohibitions, blanket requirements, for example, that everyone be vaccinated, without making room for the consideration that some people may have a disability that would cause a problem when it comes to vaccination, that's the blanket prohibitions or requirements that are going to be unlawful.

The employer is required to look at the employee's request and analyze it under the specific facts and circumstances.

>> TRISHA KIRTLEY: Additionally, it may be as simple as the employee at least presenting a doctor's note that they're not COVID positive. So why are you requiring them to take a vaccination? Why would the employer -- you have to have the objective reasonable basis for actions that are taken, and it has to be consistent with business necessity.

So always go back to that analysis, in terms of what an employee is being asked to do. What is the basis for it? Is it reasonable? Is it consistent with the business? A necessity. Of course an employer has the right to be concerned and should be concerned if people who are positive for COVID are in the workplace and it may spread. Of course. There are so many parameters, as mentioned, and so many things that can be done to, hopefully, alleviate that concern that it doesn't have to be fatal. If you don't get a vaccine, you're fired; you lose your job.

>> MEAGHAN KRAMER: Right. And, as Mark was saying, you can be accommodated if there's a way for you to work remotely or to be separated from everyone else using Plexiglass or PPE. Then the risk is reduced or maybe eliminated, and that necessity does not exist anymore for the employer to require that of you.

>> TRISHA KIRTLEY: And, also, I just want to throw in that if the employee is not exhibiting symptoms, why are you requiring that? Just as a precaution? You can get deeper into that analysis. Just because a person has a vaccine, we don't know the efficacy of that at this point. It's certainly a lot better than not, but it's not a failsafe. So there are other things that can be done.

>> MEAGHAN KRAMER: Yeah. And we're getting now a question or two in the chat about reasonable accommodations, which is can a hot topic now. So I want to move into that section.

So, starting off -- I'm sorry. Let me turn off my camera here.

>> TRISHA KIRTLEY: And I need to turn mine off as well.



>> MEAGHAN KRAMER: Yes, please.

The interactive process -- I'm sorry. I'm going to start back a couple of slides.

So what are reasonable accommodations and undue hardship? The ADA requires employers to provide reasonable accommodations to employees or applicants with disabilities who need them, except when such accommodations would cause the employer an undue hardship. "Undue hardship" means a significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty in providing such an accommodation.

An "undue hardship" refers not only to financial difficulty but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

>> TRISHA KIRTLEY: One thing that lawyers forget or don't recognize, the word is "undue hardship." So the fact that it's a hardship doesn't mean that they have to do it. Okay? That they can avoid it. Well, it's a hardship. It has to be "undue." As Meaghan said, significant difficulty. Not that it's difficult. A significant expense. When you're talking about the resources of the employer, we're looking at the employer as a whole. So if we're talking about a major corporation, we're not looking at its Arizona office. We look at the resources as a whole.

So this is not an easy thing to demonstrate. Just saying, oh, it's going to be difficult. It's going to be hard.

>> MEAGHAN KRAMER: That's right.

So we'll get into -- there are three main categories of reasonable accommodations.

First, modifications to a job application process that enable a qualified applicant with a disability to be considered for the position he or she is applying for.

The second is modifications to the work environment or to the way the position is customarily performed that enable an employee or applicant with a disability to perform the essential functions of that position.

This second category is the one we see most often.

And, third, modifications that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

This covers a wide variety of things, but it's not the day-to-day environment. For example, if your employer is going to have an employment picnic on a weekend and everyone is invited but it's not accessible, that would be a benefit and privilege of employment.

Next, we'll get into the interactive process. The interactive process allows employees and employers to communicate in good faith and to find a reasonable accommodation that both allows the employee to perform the essential functions of his or her job and does not cause the employer an



undue hardship.

So the employers' duty to initiate the interactive process gets triggered as soon as the employee asks for a reasonable accommodation. And the way the law actually works is employees don't need to know magic words. They don't need to know the words "reasonable accommodation." They really just need to be able to convey to their employer that with this reasonable change in the way that I perform my job, assistance, reassignment, whatever it is, I could perform the essential functions of my job.

And as soon as the employer hears anything that resembles that -- and it doesn't have to be the reasonable accommodations person at the office. It's anyone at the employer who is in that position of responsibility. It triggers their duty, as an employer, to participate in this process.

And, in most situations, both the employee or the applicant and the employer have vital information to share to identify an effective accommodation that will work in the workplace.

That's why they have to talk to each other. Employees, for example, have information about their disability, their abilities and limitations, how they have adapted and modified tasks to overcome those limitations. The employer doesn't know that information generally. Employers tend to have access to more information about the job, the job duties. They can analyze the essential functions of that job and the possible range of alternative positions or ways they can accommodate an employee in that position.

And so in this process, they're sharing that information and, hopefully, coming to an agreement of how that employee can be accommodated.

The EEOC has identified four steps that are critical to the interactive process. These are things that the employer needs to do. Analyze that particular job and determine its purpose and essential functions.

Now, this doesn't mean -- Mark and Trisha and I have talked about this -- that the employer just reads the job description. Because, as many of you know, job descriptions can become outdated very quickly or may never be accurate. So the employer just actually has to think: What is this employee required to be able to do?

Next, the employer has to consult with the individual with the disability to ascertain the job-related limitations imposed by the individual's disability and how can those limitations be overcome with a reasonable accommodation.

In consultation with the individual, identify the potential accommodations and assess the effectiveness each would have in enabling the individual to perform those essential functions of that position.

And then, finally, the employer is required to at least consider the preference of the individual to



be accommodated. This is if there are multiple options for accommodation. Of so I will end our share here and turn my camera back on.

>> TRISHA KIRTLEY: Meaghan, before we go further, someone asked the question: They provide advice to a large agency or organization, and they need to know what factors to consider with respect to whether or not it's an undue hardship.

And the things they should look at are: What is the accommodation, the nature and cost of the accommodation? So that's one thing. It's going to cost us \$500 to make this accommodation. And then look at the resources of the agency. Now, if it's a large agency, the presumption is that it has a large budget. Or if it's a company like Walmart, a major organization, a \$500 accommodation is not going to pose an undue hardship for that organization.

If it's a small mom-and-pop organization, considering their resources, perhaps it would.

So you look at the nature of the accommodation, the resources of the facility as a whole, and make the determination. That includes the number of people that are employed at this particular facility -- or organization, I should say, overall, and the effect of the expense. What is the effect of the expense going to be on the organization?

Also, undue hardship could enter into the area of disruption of the business. Is it going to cause a major disruption in the organization?

So those are things that you look at. And there's plenty of case law out there that discusses these various factors to help you with the analysis.

>> MEAGHAN KRAMER: Do you have anything to add on that, Mark?

>> MARK SOROKIN: I mean I think Trisha covered pretty much all of it. I was just thinking to a case regarding this issue a couple of years ago. The case was out of Maryland, and a deaf woman was a nursing student. She was a nursing student at John Hopkins and was taking our clinicals at John Hopkins Hospital. She wanted an interpreter to take her classes. They offered to her -- she asked for an interpreter to perform the duties of a nurse. They said no. They claimed it was an undue burden.

The case went to summary judgment. The judge found in her favor because they know that if anybody knows John Hopkins in Maryland, it's the second-largest employer in the state of Maryland. They have buildings and buildings.

There was an addition that mentioned current 2% of their operating budget. So they didn't consider everything. You have a big corporation, big entity. It's not likely to be able to claim an undue burden as a mom-and-pop shop.

>> MEAGHAN KRAMER: That's right. And some of the guidance that the EEOC discusses, COVID has affected the bottom line of a lot of industries, and that's something that would be



considered in the undue hardship analysis.

So, for example, if you're working for a restaurant chain that normally does really well or maybe just a mom-and-pop restaurant that normally does really well and would, in ordinary times, have no problem paying for an expensive accommodation, but their business has been completely devastated by the pandemic, that all gets brought in this analysis, and that may create an undue hardship now in the time that you're currently asking for an accommodation that may not have existed before the pandemic.

>> TRISHA KIRTLEY: Additionally, when you're analyzing undue hardship, I mentioned that does it cause a significant disruption in the business. However, the fact that employees may be upset because you're providing an accommodation for an employee, whether it's for COVID or any other -- or a disability, the fact that you're providing that and employees get upset is not the type of disruption that the ADA contemplates.

For example, you know, in the past, some companies, or individuals, would say, I don't want African-Americans working here. All right? That caused a major disruption in the business, but the law is not going to facilitate that type of thinking. We are going to accommodate our individuals who were disabled who require an accommodation, and the fact that it may upset employees, there might be a moral problem because they perceive you treat an employee favorably is not the type of disruption that's going to constitute undue hardship.

>> MEAGHAN KRAMER: Exactly. And I think oftentimes employers have a concern that a slippery slope is going to happen. If I let this one employee telework who needs that accommodation, isn't everybody going to come up with a disability and have to telework? The answer is they have to do that analysis for every employee who asks for an accommodation.

And these blanket bans, that these companies saying this is a company that does not allow telework does not fly. It requires an analysis finish each claim.

What type of things are you seeing people request during the pandemic?

>> TRISHA KIRTLEY: Well, the number one is telework, people requesting to be able to work at home. The problem that may arise is that the employee doesn't have the resources to telework. I have seen that, where the employee, you know, doesn't have a computer. So then the question becomes should the employer provide this equipment to the employee?

I have a friend who works for State Farm. And I believe they had over -- I think she told me seven or 800 people in their Tempe facility. And they moved them all home. And my friend did not have a laptop. She did not have a home computer, but State Farm provided her with one.

And, you know, interestingly enough, when you look at State Farm's resources, they should be able to provide an occasional computer here or there for their employees. So sometimes the bigger



issue is: Do they have the resources to telework?

>> MEAGHAN KRAMER: Uh-huh. And, of course, for a lot of jobs, telework is simply not an option.

>> TRISHA KIRTLEY: That's right.

>> MEAGHAN KRAMER: And in those jobs, what other kinds of accommodations are you seeing people ask for?

There was something in the chat about the clear masks for those that it's helpful to read lips. Do you all have any experience with that during the pandemic?

>> TRISHA KIRTLEY: I have not.

>> MARK SOROKIN: Me either.

>> MEAGHAN KRAMER: That's something that you do the analysis, and it's probably not unreasonable, given the cost of the clear masks, that PPE is negligible for a large employer's budget. So these are types of things that are coming up pretty regularly.

Also, plexiglass is something that the EEOC mentions as a possible accommodation. We're seeing that in stores and restaurants, the plexiglass to keep people sort of separated from each other.

And giving out PPE is another thing that we're seeing a lot of.

What, in your experience, is a best practice for an employee who is asking an accommodation perhaps for the first time? What should they do before they go to their employer with that request? And how should they ask?

>> TRISHA KIRTLEY: Well, as an attorney, I'm going to say put it in writing. That's my recommendation. It does not have to be in writing, but you're better off if it is. And you can approach the employer by saying, I need an accommodation for my disability of this.

You can make that recommendation. Let's talk about it.

That's what I recommend people do. Ask the employer, Can we talk about my need for an accommodation?

Right then, they're triggering the interactive process. And if the employer refuses to discuss it with them, there's a problem. And then the interactive process is a problem-solving process. So the employer and employee, as Meaghan mentioned, can discuss it and come up with the best solution for both sides, for the employer as well as for the employee.

So I recommend you put it in writing and invite a discussion about it.

>> MARK SOROKIN: I definitely agree with that.

Reviewing case files in the EEOC, they make (indiscernible) a record because without that record, it becomes a he-said/she-said. You have to determine who to believe at that point.

I've worked with that. You also have to think about what your disability is because if you're



requesting any accommodation for a disability, it does make a difference whether your disability is obvious or not. You know, for somebody like me, I'm deaf. I wear a cochlear implant. So I need an interpreter. I tend to not need too much documentation. My doctor says, Hey, he's deaf. That's something that's very obvious.

But then you have other disabilities that are not so obvious. So we have to look at your personal situation and figure out if it's objective, the question of if you have a disability. If that's the case, maybe you need the documentation, which would include what the limitations are and how those limitations apply and what you would need in order to perform your job. That would move the process along quickly.

>> MEAGHAN KRAMER: I will just add I agree with everything you're both saying. I'll add that it's helpful, if you're going to need an accommodation, find your employer's policies, if you have an employee handbook. Your employer may have a form that you need to fill out in order to ask for an accommodation. Take a look at that form. If that form requires a doctor, for example, or whatever type of medical health care professional would be an expert in whatever your disability is, to fill it out and identify your restrictions. You will want to take that with you when you make an appointment, and make sure your physician really understands these are the essential functions of my job. You've got to be able to do these things. And that they understand what their role is, which is to identify your restrictions in a way that will help your employer understand what accommodations will help you perform those essential functions of your job.

So, you know, doctors, some of them are really good at this. Others of them, they're not lawyers. So, as an employee, whether you have an advocate or not, you really need to be your own advocate at your doctor's office and make sure that that form gets filled out in a way that will help you achieve the goals that you have.

Yeah, I think that just about covers it.

>> TRISHA KIRTLEY: One other thing I want to add is that I recommend employees, whatever documentation you give to the employer, you keep a copy of it at home.

I have had cases where an employer said, I never received that.

They can't find it. So that's one thing.

And the other thing we want to emphasize is that you can ask -- the employee may ask for a specific accommodation, and that's fine. But if the employer determines and through the interactive process, the employer and employee determine that perhaps there are three or four accommodations that would address whatever the limitation is, then the employee doesn't get to pick. They don't get to choose which accommodation is going to be made. That's the employer's prerogative. They get to choose.



I've had employees that want to do this. They want to do that. But that's not the case.

>> MARK SOROKIN: Absolutely. It's nice to have a specific request in the first place so you can start the interactive process because there may be several potential accommodations, but they may also not know what the potential -- they may not be in the best place to understand the employee's position. So it's good to have that in the request in the first place so everybody has an idea of what the potential accommodation is.

>> MEAGHAN KRAMER: I will move on to this question, and I will answer it with a yes-or-no answer, and then we can have a discussion about it.

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

And the answer, unfortunately, is no. There are some protections for family members, as it relates to discrimination and harassment, under the ADA, but as it relates to a reasonable accommodation to avoid exposing a family member, unfortunately, that's just not something that the ADA covers at this time. It's imperfect during the pandemic.

I don't know if you guys have anything to add there.

>> TRISHA KIRTLEY: Just that the ADA covers the employee. It covers the employee. So it's limited right there.

>> MEAGHAN KRAMER: Uh-huh. I think a lot of employers, at the start of the pandemic, made major changes to protect their employees. For example, they sent everyone home, regardless of whether or not they needed a reasonable accommodation and had everyone start telecommuting. And, at a certain point, if they haven't done it already, they will require everyone to come back in. And then at that point, I guess my question is: Are employees who would like a reasonable accommodation to telecommute then automatically required, in those circumstances -- automatically allowed to get that reasonable accommodation, since the employer let them work from home during the pandemic?

How would you analyze that?

>> MARK SOROKIN: I think the analysis is still the same. Before the pandemic, the idea of teleworking was flooring to employers. So it would probably be easier to argue that it would be an undue burden. They wouldn't have face-time with other employees. They wouldn't have access to office supplies that, kind of thing. It would result in the employee having not be able to perform some of the essential functions.

And I think the pandemic has essentially acted as a trial period. It allows the employee and employer to really understand whether that person's work can be performed at home, if the essential



function can be performed at home. So that particular argument would be different, but, like everything else, you still have to analyze that the person with a disability is teleworking with accommodations for that disability, and then the undue burden discussion, which is rare, depends.

>> MEAGHAN KRAMER: Before the pandemic, employers used to get request for telecommuting as a reasonable accommodation, and they would just panic. There's no way people are going to be able to accomplish all of the essential functions of their job from home. That just won't happen. There's too many distractions.

And here we are, Mark and Trisha and I are in our homes. We're doing our jobs. A lot of people across the world are doing the same. And I think, for the most part, people are as efficient or more efficient than they were before. There's changes in the workforce now, but there's a body of evidence that supports a lot of different workplaces that employees really can do these jobs efficiently from home, telecommuting. So I think that's evidence that, I think as Mark said, will get used in the analysis later when the question comes up: Will they be able to perform those essential functions from home. Yes, they will.

>> TRISHA KIRTLEY: However, it's still the employer's choice. So if there is a reasonable accommodation that will assess the limitations in the workplace -- so there's the option they can work at home or we can do this for them at the office, the employer makes that choice. And the fact that it worked and the employees were productive with the telework, yeah, it's something to be considered, but it's not dispositive. If there's an alternative, the employer makes that choice.

>> MEAGHAN KRAMER: Do you guys have anything else to add? I want to make sure we have enough time to get into discrimination and harassment.

>> TRISHA KIRTLEY: Well, no.

I saw a question that someone had put in the chat about attendance, but I don't remember the full question, and I don't know if we should address that now, but I do remember that, if anybody has it. It was something about requiring employees to attend.

>> I'm happy to read the question, if it's helpful.

What do you recommend an employer have, by way of data, to show that attendance is an essential function of a job rather than a personal preference?

>> MEAGHAN KRAMER: Well, I will say none of us here are in the business of representing employers, so we're probably not the best people to answer this question, but I'll just say that, in my limited experience representing employees during the pandemic, I haven't seen a good example in an office setting job description of an employer who actually needed the employee to be there in person, for any reason. I think our technology in the office setting really would allow for anything that needs to get done in an office setting, just thanks to technology these days.



I don't know. Mark still works at the EEOC, so I'm not going to ask him to comment on behalf of the EEOC on this, but if you guys have anything else to add, feel free to weigh in.

(Overlapping speakers)

>> MARK SOROKIN: I just go back to the issue of it depends on the facts. Take the facts and see what happens.

>> TRISHA KIRTLEY: Initially, when the ADA was first passed, I've been around that long, we saw a lot of cases -- or I did. When I was there, I had to litigate this issue of attendance a lot because the employers would say, This person has a disability. They're not able to come to work because of the disability. And they're not able to work, therefore I should be able to terminate them, or I don't have to accommodate them.

That's a different issue than what was being asked.

And, Meaghan, I agree with you. If the issue is the employer is saying, I need them to be physically here in the office, perhaps that's correct. And the types of things the employer is going to have to show -- and the courts will give the employer some amount of deference, you know, objective reasons as to why they need to be in the office. I suppose -- but even this is changing. Technology is amazing. If they have to greet customers and work with customers, then you need to be there to work with customers; but I have to tell you several years ago, I went to a bank a while back, and I talked to someone over a monitor. But it may be a hardship for an employer to do that. So they're going to have to show objective reasons, if you're talking about attendance, you're referring to the physical presence in the office, why is that needed. It has to be job-related. Certainly, the one that came to my mind is greeting customers. If it requires them to use, perhaps, a certain type of equipment that can only be found in the office, perhaps that's another reason.

With technology, there's so much that can be done.

Another factor to look at is some jobs, there are five or 10 or 20 people who have the same job. So if you require someone to be in the office to greet customers but you have 20 other people that can do it and you've divided up the essential functions of the job, then that may not be a good argument. If what they have to do in the office isn't an essential job function and cannot be accommodated, then that's when the law will support the employer's position.

But, as Meaghan said, technology has just done so much over the years. And then remember that you have the Job Accommodation Network who is amazing. You can look them up on the Internet. You can call them. And they just have so much material, very extensive material on potential accommodations.

So I will stop there.

>> MEAGHAN KRAMER: Great. I'm going turn off my video.



>> TRISHA KIRTLEY: Okay.

>> MEAGHAN KRAMER: And share my screen for the last time here.

>> TRISHA KIRTLEY: As will I.

>> MEAGHAN KRAMER: So what is discrimination under the ADA?

An employee who works for a covered employer, which we discussed earlier, or an applicant that applies to work for a covered employer, has a claim for employment discrimination under the ADA if he or she was disabled within the meaning of the ADA, which we discussed earlier, was qualified to perform the essential functions of his or her job with or without a reasonable accommodation and was subject to an adverse employment action as a result of his or her disability.

An employee or applicant may have a claim in association with a person with a disability. We spoke earlier about you're not entitled to a reasonable accommodation because of a family member, but you may be entitled -- you may have a discrimination claim because of your association with a member of your family or a person you're associated with a disability and you are then subjected to an adverse employment action as a result.

An adverse employment action includes but is not limited to, terminations, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of unlawful harassment by other employees, supervisors, or vendors, other people in the workplace.

And ding, ding, ding. This is the time for attorneys wanting CLE credit to pay attention.

Please [cgutierrez@azdisabilitylaw.org](mailto:cgutierrez@azdisabilitylaw.org) with your name and the code word, which is harassment. We'll respond with your CLE certificate.

We'll quickly cover harassment under the ADA.

Employees or applicants who experience harassment may have a cognizant claim if they can show the following elements. The employee or applicant was disabled within the meaning of the ADA. He or she was subjected to harassment. The harassment was based on his or her disability or requests for accommodation, and the harassment complained of affected a term, condition, or privilege of employment and that the employment knew or should have known of the harassment and failed to take prompt, remedial action.

Terms, conditions, or privileges of employment, just for context, include, but are not limited to, job application procedures, hiring, firing, promotions, and compensation.

And when we're determining whether unwelcome harassment occurred, courts consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether or not it reasonably interfered with an employee's work performance.

Harassment claims are not limited to harassment by coworkers. They can also include harassment by your supervisor or by third parties at work, which, as we discussed, can include



customers or vendors.

And the employer's knowledge of harassment is an important element when you're establishing a claim for harassment against a coworker or a third party. If you're being harassed by your coworkers or third parties, you should inform your human resources department, in writing, if possible.

If it is your supervisor that is harassing you, you may not need to prove that your employer had notice because your supervisor, him or herself, was the one harassing you.

And, finally, retaliation. An employee is retaliated against under the ADA if she engaged in protected activity, suffered an adverse employment action, and the adverse employment action was the result of the employees having engaged in protected activity. So it had to cause the adverse employment action.

I will stop my share.

We can launch into some questions. I see we're already getting questions in the chat.

What if harassment came from the HR department? That was a question we got.

I think you've got a solid argument there that you don't have to establish that you notified your employer that the harassment is having, that someone in the HR department probably harassing you, the vicarious liability -- I'm sorry. I have to restart my video -- vicarious liability will probably attach there.

Do you all have anything to add?

>> TRISHA KIRTLEY: No.

>> MARK SOROKIN: They should continue to report the harassment to whoever is on their management team. They need to think about who the owner is and keep working at it. I'm sure we'll get into this by the end, but if you feel you're being harassed, report it to the EEOC or a state agency or find an attorney and try to figure out how to keep elevating this.

>> MEAGHAN KRAMER: And that is the first question I'm going to ask.

Since Mark is a current employee of the EEOC and Trisha used to work there, they're more familiar with the EEOC than I am. What should I do if my employer is discriminating against me? What would you advice is the first step to take?

>> MARK SOROKIN: So we have to keep in mind timelines. In some states, you have to file terms with the EEOC or a state agency within 180 days from when the harassment happens.

In other states, including Arizona, it's 300 days. So that's the first thing. If that doesn't happen, you're maxed out. You can't go to court. You can't even (indiscernible) so I always tell people the first thing to do is to file for relief. That will start the process of figuring things out.

>> TRISHA KIRTLEY: You know, it's always preferable -- it's always best for you, the employee, if you can resolve it without having to file a charge, but quite often, you're forced to do so.



First, you may want to try to resolve the issue with the employer, to report it internally, but I would advise you to keep documentation of your efforts.

And don't look at the EEOC as a quick solution.

The process is slow but the process is also required. If you want to file a lawsuit against the employer under the ADA, you're going to have to, as a prerequisite to filing that lawsuit, file a charge with the EEOC. I have people who will walk in and say, I want to file a lawsuit. But if you did not timely file with the EEOC, that lawsuit is not going to proceed. It's going to be thrown out of court because you didn't file timely with the EEOC.

So don't think of it as an immediate solution, but, quite often -- or hopefully, I should say, the employer would perhaps be willing to talk to you about it when they see you went to the federal government. Because no employer want the federal government knocking on the door of their business about how they treat their employees.

The EEOC process is long. Right now, if you file a charge -- or attempt to file a charge, it probably won't get filed until May. I checked with the EEOC on that. They're down because of COVID, because of attrition, because of budget cuts, they're down to nine investigators. In the past, they had 20 to 30. And, even then, it was a slow process because they're investigating -- presumably they are -- all of these charges.

They do offer a mediation program where, if the employee says they're willing to mediate -- and it's a question they ask you at the time the employee files the charge: Are you willing to mediate?

If the employee is willing to mediate, they will ask the employer. If both parties say yes, the EEOC has a mediation department to facilitate the mediation. And, perhaps, it can get resolved that way.

I attempted to find out what their turnaround time is on mediations in Phoenix, with COVID, but I wasn't able to find out. In the past, it still took several months to get to mediation. Again, I would like to emphasize for employees that you may want to try to resolve the issue, keep documentation at home of what you did. The thing I advise employees to do is you send that email -- I love email. Emails are wonderful. They can't deny they received it. You can give them notice that you're having a problem with this. I asked for a disability accommodation, and I haven't heard anything back.

Print that email out and take it home. That's what I advise people to do.

But if you can't work it out, you have to file with the EEOC or you will be barred from filing a lawsuit.

>> MEAGHAN KRAMER: And I will just add that if you can, if you have a personal email address, that's what I recommend you use before you communicate with your employer. Because if something happens and you're terminated from your job, you will have a record of all the email correspondence that you have had with your employer.



As Trisha mentions, printing those emails, that is also a good answer, but, oftentimes, an employee will be terminated or laid off, and they come into the EEOC with no documents. That doesn't mean that they won't eventually get them during the investigation process, but the employer has really got an upper hand because they've got everything, and sometimes the employees come in, and they have nothing.

So documentation is your friend. Your employer may not like the fact that you're emailing about this stuff, but it's a best practice, and they're used to it. If they've been in business long enough, they know employees are going to send them emails about this type of stuff.

>> TRISHA KIRTLEY: Along that line, what a lot of people do is they will email the employer from the company's computer system, and that's fine, and they will copy their personal email address. That may violate the employer's policy. At the very least, we may end up having an argument about it.

I think, Meaghan, it's great. If they email them from their personal computer, how are they going to complain about that? If you email them at work, print that out and take it home, if you can. And you can also keep a log. I emailed them on the work computer on this date and time. So when they say they didn't receive them -- and if you're in litigation or with the EEOC, you can say, Hey, it should be on their system. These are the dates and times.

>> MEAGHAN KRAMER: And I will just ask Mark to briefly elaborate on the mediation process. From my perspective, as an advocate, the mediation process that the EEOC offers is very valuable, if both parties will agree to participate in it. As Trisha mentions, there can be a wait, but it can be very effective at getting both parties to a reasonable solution and end the dispute so that both parties can move on quickly.

>> MARK SOROKIN: I will preface it that I'm a trial attorney. Trial attorneys look at the mediation process for a specific reason. It's supposed to be confidential. So nothing is said during (indiscernible) is taken back to a trial attorney, which means that the trial attorney can't use -- or the investigator can't use any of that information against the company. I think that's fair because it allows the employee and the employer to candidly talk about what is going on and how they can really fix the problem. I don't know what the current numbers are, but while I was in the Phoenix office, I recall a hearing that if both parties agreed to mediation, then mediation works at least nine out of 10 times. So that will serve a big purpose because, as Trisha mentioned, the EEOC has resources, meaning investigative resources. The case must be investigated and get a determination. That's the reality of that.

>> TRISHA KIRTLEY: Nothing precludes -- it might take you two or three months to get into a mediation with the EEOC, but nothing precludes the lawyer for the employee from picking up the phone and calling the employer and saying, Would you like to mediate? Okay? The parties can do



that. And sometimes they can do it the parties meet together or they hire a mediation. Sometimes the employer may be willing to pay for the mediator.

>> MARK SOROKIN: Yes. Times that may not happen 100% of the time, but the investigation can be (indiscernible) litigation by itself. So it could be 10 years and then you have to go to court after that. I understand that. If the case is mediated, in comparison to the investigation taking several years and then taking several more years on top of that, mediation is quicker.

>> TRISHA KIRTLEY: Meaghan, I saw a question about: Do you have to disclose the disability before the discrimination?

They can't discriminate against you if they don't know about the disability.

>> MEAGHAN KRAMER: That's right. That's an important point. If it's something that's obvious to the employer, there's no need to send an email about that, but, otherwise, it's important that your employer be on notice that you have a disability before you can establish that discrimination has taken place. And, as always, email is our preference, as you advocates.

I know Trisha and Mark and I could talk about this stuff all day or all week, but I understand that we're getting low on time.

Before I hand it to Natalie, Trisha or Mark, do you have any additional comments? I appreciate your perspective and thank you for joining us today.

(Overlapping speakers)

>> MARK SOROKIN: Maybe two final comments. One, you mentioned the employer has to know that the essential element for every discrimination complaint regardless of what the basis is. If the employer doesn't know, there's no way.

The other is I saw a question in the middle about whether a company smaller than 15 employees receive federal funding and are protected by the ADA. They may (indiscernible) the Rehabilitation Act. That person should take a look at the Rehabilitation Act.

>> MEAGHAN KRAMER: Do you have anything to add, Trisha?

>> TRISHA KIRTLEY: No, I don't.

>> MEAGHAN KRAMER: Thank you, both.

And I will turn it back over to Natalie.

>> NATALIE LUNA ROSE: Thank you, Meaghan and Mark and Patricia. We really had a lot of great interaction in the chat. I've received a lot of emails, people asking for slides. I wanted to point out that we have a survey, and I put it in the chat box. If you could fill it out and let us know how you thought about the session and the conference in general, that would be much appreciated.

I will also, again, put my email in. It's [natalie.lunarose@azdisabilitylaw.org](mailto:natalie.lunarose@azdisabilitylaw.org).

For CLE credit, you can contact [cgutierrez@azdisabilitylaw.org](mailto:cgutierrez@azdisabilitylaw.org). I've put it in the chat box a couple



of times. I will put it again. The code is harassment.

That's our last session for the week. We have a session coming up on February 9th, and, again, there's still time to register. We hope to see you then. Please have a good weekend, and we'll see you all soon.

>> TRISHA KIRTLEY: Thank you.

>> NICHOLAS BLUM: Special gratitude to our interpreters and captioners today. They worked really hard. Thank you.

>> NATALIE LUNA ROSE: Yes, thank you.

>> MARK SOROKIN: Thank you, guys.

>> TRISHA KIRTLEY: Thank you.

>> MEAGHAN KRAMER: Thanks again, Mark and Trisha.

