PLI Current

The Journal of PLI Press

Vol. 6 (2022)

Legal Claims and Emerging Trends through the Pandemic and Beyond

Lisa Lupion

Orrick, Herrington & Sutcliffe LLP[±]

I. Introduction

The COVID-19 pandemic has impacted virtually every aspect of our lives, including the way we work and interact with our colleagues. While some of these changes might be temporary as we wait and hope for the end of the COVID-19 crisis, other aspects of work might forever be altered. Employment litigation and litigation risks have and will continue to evolve along with the way we work. Section II of this paper examines trends in employment discrimination litigation as employers continue to navigate these unchartered waters. Section III of this paper discusses unique legal issues and challenges that arise when employers implement mandatory vaccination

[±] These materials are distributed for informational purposes only and are not intended nor should be construed as legal advice.

policies. In Section II of this paper, we will examine the trends we are seeing and expect to see as employers continue to navigate these unchartered waters. In Section III of this paper, we will examine the unique legal issues and challenges that arise when implementing mandatory vaccination policies.

II. COVID-19 Impact on Employment Discrimination Litigation

COVID-19-related litigation runs the gamut and includes single and multi-plaintiff cases, class actions and representative actions, requests for injunctions, and more. Cases filed to date have included claims premised on safety violations, discrimination, retaliation, and wage and hour violations.

A. Pretext Challenges to COVID-19 Explanations

One trend that has emerged in the context of COVID-19 litigation is challenges to and scrutiny of terminations by employers explained to have been caused by COVID-19 and its impact on business needs.

For example, in *Penaloza v. Kimberly Hotel, Inc.*,[1] Case 1:21-cv-06557, plaintiff Darci Fernandez Penaloza filed a complaint in the United States District Court for the Southern District of New York on behalf of herself and other similarly situated employees claiming that their employer's alleged COVID-19-related layoffs were pretext for age discrimination. Penaloza alleges that she first received a letter in March 2020 saying she'd be laid off from her job. One month later, she received another letter that told her the layoff was "expected to be temporary" and was the result of "unforeseen business circumstances" stemming from the pandemic. Penaloza said she received a third letter in November, informing her that her employment would be terminated in February as a result of decreased hotel occupancy and travel restrictions. Penaloza concedes in her complaint that the COVID-19 pandemic forced The Kimberly Hotel to close its doors for part of 2020 and 2021, but as travel restrictions began to lessen, The Kimberly Hotel was able to reopen for business in March 2021; however, Penaloza and other terminated employees were not called back to work, and new, younger employees, were hired in their place.

[1] Penaloza v. Kimberly Hotel, Inc., 1:21-cv-06557 (S.D.N.Y. Dec. 3, 2021).

Similarly, in *Emerson v. Stern & Eisenberg P.C.*,[2] filed in the U.S. District Court for the Eastern District of Pennsylvania, Emerson challenges her termination due to COVID-19-induced work shortage, claiming that it was pretext for discrimination. Emerson, 63, alleges that her job duties, functions, and responsibilities were relatively unaffected by the pandemic and her work was being done by others at the firm. In support of her claims, she offered evidence that she had requested to work from home to help take care of her and her wife's children. Shortly after her request was granted, Emerson alleged she was laid off. Emerson referenced alleged statements made by her employer concerning this work from home request. She said that implicit age and sexual orientation bias, and not any alleged work shortage, resulted in her termination.

Although there are no decisions on the merits of these claims, these complaints and others like them reinforce the importance of ensuring a clear, consistent, and accurate message of any termination decisions that could be challenged. If the pandemic induces changes to the amount or type of work that a company is doing, it logically follows that it could impact the amount and type of employees needed by the employer. However, employers need to exercise caution and avoid using COVID-19 as a way to sugarcoat a termination decision or as an abbreviated explanation of the termination decision.

When pandemic-related issues result in the need to terminate," employers should think through the following:

- Are there objective business reasons that render this role no longer necessary? For example, because of the pandemic, a company decides to have a fully remote workforce and therefore no longer needs employees whose sole function is to support the office structure.
- Will employees who might otherwise be terminated have an opportunity to be reassigned from the role they occupy to other roles that are now more central to the business? If so, what criteria will be applied to determine who will get those opportunities? If not, why not?
- Are there specific skills that have become more or less important to the business that have resulted in the termination decision?

[2] Emerson v. Stern & Eisenberg P.C., 2:21-cv-03096 (E.D.Pa.).

- If employees are going to be hired to fill roles following layoffs due to COVID-19, what is the criteria being used for those hiring decisions? Are former employees eligible to be rehired into the role?

Developing clear, articulate business plans around these issues will help mitigate against legal challenges to termination decisions. Once those plans are determined, thinking through how these business rationales are communicated to impacted employees will help guard against a claim of pretext.

B. Harassment in The Virtual Workplace

Another COVID-19 induced legal risk that is not likely to go away is the potential for harassment in the virtual world. As the lines between work and home are further blurred, if not completely eliminated, it is important to revisit policies and training materials to ensure that employees are reminded of the reach of employer's anti-harassment policies and expectations.

Remote work also potentially exposes employees to new forms of harassment, bullying, or an uncomfortable work environment, or creates the appearance of differential treatment, including, for example:

- Inappropriate remarks about an employee's appearance on Zoom or commenting about only certain employees' decision to be "off camera."
- An employee commenting about the appearance of an employee's family members in a manner that could be insensitive or inappropriate.
- Commenting about the appearance of only female employees' children in Zoom meetings while ignoring the appearance of male colleagues' children (or vice versa).
- Allowing colleagues to see artwork or decoration in the home that others find offensive or unprofessional.
- Using unprofessional virtual backgrounds.
- Requiring some, but not all, employees on the team to show up for check-in meetings, while trusting that other team members are doing their job without the need for such check-ins.

While not all of these examples are necessarily actionable forms of harassment or discrimination, these behaviors will make for an uncomfortable work environment and lower morale for employees.

C. Best Practices for Avoiding Litigation with Remote Employees

When managing a remote or partially remote workforce, consistency is key. Employers should develop policies and train managers to support remote employees. Suggested best practices include:

- Develop clear guidelines as to who will be permitted to work remotely and with what frequency. If managers will have discretion to approve remote work requests, ensure they have clear and objective criteria that they can apply to all members of their teams. Managers should also be trained to identify a request for a reasonable accommodation that would be protected by law as compared to a personal preference for remote work.

- Set clear expectations for hours of work for all remote workers. If an employee will need flexibility during the workday (to handle family obligations, for example), those should be clearly communicated, and guidelines should be agreed upon between the employee and the manager.

- Ensure that wage and hour policies, including recording hours and vacation or other paid time off, are updated to reflect a virtual environment. Employees should be trained to track time consistent with these policies when they are remote just as when they are in the physical office.

- Determine whether remote work will be permitted in all locations or whether employees will need to live in specific locations where the company is already doing business. Allowing employees to work in countries and states where the employer had no prior presence can have tax and registration obligations that employers should understand before allowing employees to work in those locations. Employers should develop policies and procedures for handling and evaluating requests to work remotely from what would be a new state or country for that employer.

- Identify which business duties and functions must be done in person, if any, and communicate those to employees.

- Determine what technology and at-home set-ups will maximize productivity and efficiency for remote work. Ensure that equipment is being paid for by employers as required by applicable state or local laws.

Employers were largely thrown into remote work by the pandemic in March 2020. Now employers should embrace the opportunity to develop the policies, procedures,

and practices that allow for more efficient and effective virtual offices and minimize inconsistencies that might give rise to potential discrimination claims.

D. Addressing Workplace Stress and Ascertaining Emotional Distress Claims Caused by Alleged Wrongdoing

Concerns for one's own health and the health of family and friends, quarantines and isolation, and long hours of remote work have taken a toll on employees. The CDC issued resources specifically addressing the concerns of stress and mental health in the wake of the public health crisis.[3] Employers can look for ways to help employees manage their stress by encouraging employees to take paid time off or use vacation hours that they accrued but did not use during the pandemic. Employers' health insurance carriers or Employee Assistance Programs may also provide individual counseling for employees dealing with heightened stress during the pandemic. Acknowledging these issues can provide helpful support to employees struggling during this difficult time.

When it comes to litigation, though, employers face a different challenge—how to evaluate whether claimed emotional distress is due to alleged discrimination or harassment rather than distress caused by the circumstances of remote work or the pandemic. Courts explain that to obtain emotional distress damages, "a plaintiff must establish actual injury and the award must be supported by competent evidence in

[3] CTRS. for Disease Control & Prevention, *Support for Employees*, https://www.cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html (last updated Dec. 2, 2021).

addition to a plaintiff's subjective testimony."[4] As claims arising out of COVID-19 circumstances continue to be litigated, more questions will arise about causation and how to distinguish between emotional distress that might have been caused by an alleged act of discrimination, harassment, or retaliation as opposed to emotional distress that the employee might be suffering because of the pandemic.

III. Mandatory Vaccination Policies and Risks of Legal Claims

With COVID-19 risks continuing, many employers have implemented or are looking to create mandatory vaccination policies as a key step to helping business return to some version of normal.

A. EEOC's Vaccination Guidance

The EEOC issued guidance to help employers think about vaccination requirements.[5] Some key issues that the EEOC opined on in its guidance include:

- **Requiring proof of vaccination:** The EEOC informs employers that they can request proof that employees received a COVID-19 vaccine. The FAQs

[4] Levitant v. City of N.Y. Human Res. Admin., 914 F. Supp. 2d 281 (E.D.N.Y. 2012) (noting that plaintiff failed to provide detail regarding the causation, duration, severity, or consequences of [alleged] conditions, the frequency with which he sought medical treatment, or any medications that he was prescribed), aff'd, 558 Fed. Appx. 26 (2d Cir. 2014) (unpublished) (internal citations and quotations omitted); *see also* Patrolmen's Benvolent Ass'n of City of New York v. City of New York, 310 F.3d 43, 55 (2d Cir. 2002) ("Rather, the plaintiff's testimony of emotional injury must be substantiated by other evidence that such an injury occurred, such as the testimony of witnesses to the plaintiff's distress, *see* Miner, 999 F.2d at 663, or the objective circumstances of the violation itself. *See id.*; Walz v. Town of Smithtown, 46 F.3d 162, 170 (2d Cir.1995). Evidence that a plaintiff has sought medical treatment for the emotional injury, while helpful, see, e.g., Carrero v. New York City Hous. Auth., 890 F.2d 569, 581 (2d Cir.1989), is not required. *Miner*, 999 F.2d at 663.").

[5] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated Dec. 14, 2021).

recommend that employers counsel employees to not provide any additional medical information along with this proof.

- **Responding to disability accommodation requests:** The EEOC outlines a multi-step process for how employers can think about the interplay between requiring a vaccine and accommodating a disability:
    - First, the EEOC begins with the premise that the ADA allows employers to impose a standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."[6] However, if this standard (such as a vaccination requirement) would screen out an individual with a disability, "the employer must show that an unvaccinated employee would pose a direct threat due to a 'significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.'"[7]
    - Second, to determine if a direct threat exists, employers should conduct a case-by-case assessment of (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; and (iv) the imminence of the potential harm.[8]
    - Third, if an employer concludes that an employee who is unable to get a vaccine would pose a direct threat at work, then the employer must determine what, if any, reasonable accommodation can be provided to reduce that direct threat.
    - Finally, if there is no reasonable accommodation that can reduce the direct threat, the employer is permitted to exclude the individual from the workplace but cannot automatically terminate employment. The employer must still consider what other accommodation can be provided to allow the employee to continue performing their job even if they are excluded from the workplace based upon the direct threat analysis.

[6] *Id.*

[7] *Id.*

[8] *Id.*

- **Responding to religious accommodation requests:** Employers must provide an employee with an accommodation for a sincerely held religious belief, practice, or observance, including those that might be unfamiliar to the employer. The EEOC cautioned that employers should generally "assume" that the request for a religious accommodation is based on a sincerely held religious belief unless the employer has an "objective basis" for questioning the religious nature or the sincerity of the belief.[9] The EEOC's vaccination guidance does not provide any illustrative examples of what it would consider such an "objective basis." Because employers often have less experience with analyzing and handling religious accommodation requests as compared to disability accommodation requests, a more fulsome explanation of the legal theories around this issue is discussed below.

B. Evaluating Religious Accommodation Requests

The EEOC regulations codified at 29 C.F.R. 1605.1, explain that

> [i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the [EEOC] will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

The EEOC's Religious Discrimination guidance is also instructive on this issue.[10] The EEOC guidance states that the Commission and courts "are not and should not be in the business of deciding whether a person holds religious belief for the 'proper' reasons. We thus restrict our inquiry to whether or not the religious believe system is sincerely held; we do not review the motives or reasons for holding the belief in the

[9] *Id.*

[10] EEOC Guidance, EEOC-CVG-2021-3, *Section 12: Religious Discrimination* (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

first place."[11] This guidance further explains that "evidence tending to show that an employee acted in a manner inconsistent with this professed religious belief" would be relevant to determining the sincerity of the belief.[12] Examples that might undermine credibility include, "whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons."[13] But the EEOC cautions that "individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held."[14]

The EEOC instructs its investigators that if the employer disputes the sincerity of the religious belief, the investigator can consider oral statements, an affidavit, or other documents from the employee challenging the practices, who is referred to as the Charging Party (CP). The Charging Party describes his or her beliefs and practices, including information about when he or she embraced the belief, observance, or practice; when, where, and how the CP has adhered to the belief, observance, or practice; and/or oral statements, affidavits, or other documents from potential witnesses identified by the CP or the employer as having knowledge of whether or not the CP adheres to the belief, observance, or practice at issue (e.g., the CP's religious leader, fellow adherents, family, friends, neighbors, managers, or coworkers).[15]

Courts have also weighed in on the issue of evaluating a sincerely held religious belief. In *Philbrook v. Ansonia Bd of Educ.*,[16] which was affirmed and remanded on other grounds,[17] the Second Circuit found

---

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481–82 (2d Cir. 1985).

[17] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

> that it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in both the free exercise context, *see, e.g., United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944); Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir.1984); L. Tribe, American Constitutional Law § 14–11, at 859–61 (1979), and the Title VII context. We see no reason for not regarding the standard for sincerity under Title VII as *482 that used in free exercise cases. *See Redmond*, 574 F.2d at 901 n. 12; *cf. Lewis v. Califano*, 616 F.2d 73, 77–81 (3d Cir.1980) (using free exercise standards for determining whether religious belief is a "justifiable cause" for declining surgery under the Social Security regulations). This court has recently held that a sincerity analysis is necessary in order to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick*, 745 F.2d at 157. In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir.1981) (citations omitted), we outlined several factors that indicate insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief ... or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The Barber court also stated that "the religion's size and history" is relevant to the sincerity determination. Id. The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the factfinder's own idea of what a religion should resemble." L. Tribe, supra, at 861.

A helpful summary of the Second Circuit law on this issue is found in *Waltzer v. Triumph Apparel Corp*.[18] The court explained:

> Any inquiry into a plaintiff's religious belief is restricted to an examination of whether the belief is sincerely held. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481–82 (2d Cir.1985), aff'd and remanded, 479 U.S. 60 (1986). The Second Circuit has explained: "the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Mindful of this profound limitation, our competence properly extends to determining whether the beliefs professed by a claimant are sincerely held and whether they are, in his own scheme of things, religious." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir.1984) (citation omitted). The test for sincerity "seeks to determine an adherent's good faith in the expression of his religious belief ... [as] a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." Id. While Title VII forbids religious discrimination, it does

[18] Waltzer v. Triumph Apparel Corp., 2010 WL 565428 (S.D.N.Y. Feb. 18, 2010).

> not require an employer "to accommodate what amounts to a purely personal preference." *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F .3d 49, 56 (1st Cir.2002) (citation omitted).

Of course, the COVID-19 vaccine is not the first vaccine available to individuals that is used to protect against infectious airborne disease. The court in *Chenzira v. Cincinnati Children's Hosp. Medical Center* addressed an employee's refusal to get the flu vaccine on the grounds that she is a vegan and does not ingest any animal or animal by-products.[19] The publicly available records suggest that this case settled after the court refused to grant the defendant's motion to dismiss. In ruling on the motion to dismiss, the court reasoned that it was "plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views." The court continued to explain that its conclusion "is further bolstered by Plaintiff's citation to essays and Biblical excerpts. Although the Code makes it clear that it is not necessary that a religious group espouse a belief before it can qualify as religious, 29 C.F.R. 1605.1, the fact here that Plaintiff is not alone in articulating her view lends credence to her position."[20]

In the event that the employer concludes that an employee has a sincerely held religious belief that prevents them from getting the COVID-19 vaccine, the employer must then consider whether there is an available reasonable accommodation that does not create an undue hardship for the employer.[21] The undue hardship analysis in the context of religious accommodations is different from that analysis in the context of a disability. Under Title VII, an undue hardship is one that has "more than minimal cost or burden on the employer."[22] The EEOC's Religious Discrimination guidance is again instructive. It explains that employers can consider both the financial cost of the accommodation as well as "the burden on the conduct of the employer's business."[23]

---

[19] Chenzira v. Cincinnati Children's Hosp. Med. Ctr., No. 1:11-CV-00917, 2012 WL 6721098 (S.D. Ohio Dec. 27. 2012).

[20] *Id.*

[21] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated Dec. 14, 2021).

[22] *Id.*

[23] *Id.*

The EEOC states that "courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered."[24]

IV. Conclusion

The workplace may never look the same as it did before COVID-19, and even as the pandemic subsides, employers will continue to face new claims resulting from the public health crisis.

Lisa Lupion is a Partner at Orrick. She regularly litigates a broad range of employment issues in court, administrative agencies, and arbitration. Lisa also helps companies at all stages of development avoid litigation, or prevent a single-plaintiff matter from escalating to a class action. She has successfully handled a number of high-stakes arbitrations and internal investigations. In addition, she offers counseling on discrimination, harassment, equal pay, wage and hour issues, disability accommodations, termination and compensation. Lisa was a speaker at PLI's Psychological Issues in the Workplace 2021 program.

[24] EEOC Guidance, EEOC-CVG-2021-3, *Section 12: Religious Discrimination* (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.