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Accommodating Disabilities in the Post-COVID-19 Workplace

Barbara Hoffman*

The COVID-19 pandemic has exposed a latent conflict between the rights of employees with disabilities and their coworkers. The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to employees with disabilities. At times, these accommodations may impact coworkers. But fueled by the polarized response to the pandemic, coworkers, employers, and the Supreme Court have bristled at the idea that workers owe anything to each other under the ADA. Coworkers have asserted religious and personal liberty arguments to refuse vaccinations, masks, and testing for illness. Employers have been reluctant to impose pandemic-related rules that will exacerbate labor shortages. And the Supreme Court has hamstrung the federal government from requiring employees to be vaccinated and elevated religious liberty over other rights.

This Article illuminates conflicts between coworkers over requested accommodations that have emerged during the pandemic. It argues that these conflicts should be resolved by a principle grounded in the text and purpose of the ADA, which this Article terms the “Assist Principle.” That principle holds that the ADA entitles workers with disabilities to receive accommodations from their employers, including their coworkers, because such accommodations are necessary to comply with the ADA's statutory mandate. Under the Assist Principle, disability law should prioritize enabling employees with disabilities to perform their jobs safely over coworkers’ objections and employers’ fear that coworkers would quit rather than participate in the accommodation.

This Article answers how the Assist Principle can resolve two pressing questions in disability law raised by the pandemic: (1) whether a reasonable accommodation for an ADA-covered employee requires non-disabled coworkers to take protective measures that might affect their own personal autonomy or religious beliefs; and (2) how a court should weigh labor shortages as evidence of an employer’s undue hardship defense.

* Clinical Professor of Law, Rutgers Law School. Thank you to Rutgers Law students Chelsea Nkrumah, Lauren Russell, and Anna Maria Giblin for their thorough research; to Prof. Lisa A. Schur and Prof. Douglas Kruse, Co-Directors, Rutgers University Program for Disability Research, for discussion and research assistance; and to Prof. David Noll and Prof. Bernard Bell, Rutgers Law School, for invaluable feedback and editing.
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INTRODUCTION

When the COVID-19 pandemic transformed the American workplace, employees with disabilities were especially hard hit. Because individuals with disabilities\(^1\) were at least three times more likely to die of COVID-19 than were people without disabilities,\(^2\) the pandemic forced many individuals with disabilities to determine whether physically attending work was worth the risk of exposure to a deadly contagion. The pandemic catalyzed opposition to some accommodations that would protect medically vulnerable workers, and thus, threatened to undermine the right of employees with disabilities to receive reasonable accommodations under the Americans with Disabilities Act (ADA).

The COVID-19 pandemic erected three new barriers to claims for reasonable accommodations for workers with disabilities. First, driven by widespread opposition to vaccine and mask rules, many colleagues became adversaries. Despite overwhelming evidence of the public health benefits of universal vaccination and mask wearing, coworkers asserted religious and personal liberty arguments to refuse vaccinations, masks, and COVID-19 testing.

Second, although a spike in unemployment rates quickly receded,\(^3\) labor shortages persisted throughout the economy.\(^4\) Among the millions of Americans\(^5\) who left or threatened to leave the labor market, the most vocal were workers who objected to mandatory vaccines, masks, and testing. As a result, employers were reluctant to require COVID-19 rules that risked worsening labor shortages.

Third, lawsuits brought by individuals, organizations, and states against pandemic safety rules resulted in injunctions that restricted measures to protect employees—especially those with disabilities—from potentially deadly workplaces. With uncharacteristic speed, the Supreme Court struck down federal vaccination requirements for employees of large employers.\(^6\) Lower courts enjoined President Biden’s executive orders to require vaccinations of federal employees\(^7\) and

\(^1\) Approximately one in four adults—61 million people—have a disability. Disability Inclusion, CDC (Sept. 16, 2020) https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html.


\(^5\) See infra notes 539–553 and accompanying text.


contractors. Additionally, a blizzard of new state and local laws curtailed the authority of public health officials, school boards, public employers, and even private employers to regulate public health, leaving some employees with little more than the ADA as their means to secure a safe workplace.

Has the COVID-19 pandemic imperiled the rights of employees with disabilities? This Article addresses how courts should apply the ADA to claims for reasonable accommodations in the post-pandemic workplace. How should courts balance employees with disabilities’ rights to accommodation with the rights of non-disabled coworkers to religious accommodations and personal liberty? Can a reasonable accommodation for an ADA-covered employee require non-disabled coworkers to become vaccinated, wear face masks, test for contagious diseases, or take other actions that affect their personal autonomy? Will labor shortages become a catch-all defense for employers to reject disability accommodations?

Part I describes employees’ rights to reasonable accommodations and employers’ defenses under the ADA, Rehabilitation Act, and Title VII of the Civil Rights Act of 1964. Part II reviews pre-COVID-19 cases by employees with disabilities who sought accommodations—such as fragrance-free workplaces—that impact the personal autonomy of coworkers. Part III discusses litigation that challenged rules requiring vaccinations, masks, and routine testing in the workplace: 1) executive orders governing federal workers and contractors; 2) regulations by the Occupational Safety and Health Administration (OSHA) governing employees of large employers and regulations by the Center for Medicare Services (CMS) governing healthcare workers; 3) state and local vaccination and mask rules; and 4) vaccination and mask rules imposed by private employers.

Part IV analyzes how the rise of personal autonomy demands—fueled by partisan culture wars—along with the Supreme Court’s dogged elevation of religious freedoms over other rights and rejection of OSHA’s vaccine rule—have furnished employers with new arguments to resist certain workplace accommodations needed by employees with disabilities. Part V outlines an approach for reconciling the rights of employees with disabilities and their non-disabled coworkers in the post-pandemic workplace to preserve the critical rights secured by the ADA. To resolve the conflicting rights between employees with disabilities and their non-disabled coworkers, courts should 1) prioritize enabling employees with disabilities to perform their jobs safely over coworkers’ demands for personal and religious liberty; and 2) limit an employer’s defense that providing a requested accommodation would impose an undue hardship because of related labor shortages.

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9 See Amy Goldstein, Anger Over Mask Mandates, other Covid Rules, Spurs States to Curb Power of Public Health Officials, WASH. POST (Dec. 25, 2021, 8:00 AM)
10 See infra notes 13–118 and accompanying text.
I. Employees’ Federal Statutory Rights to Reasonable Accommodations

Employees with disabilities are protected from disability-based discrimination by the Americans with Disabilities Act (ADA)\textsuperscript{11} and the Rehabilitation Act.\textsuperscript{12}

A. Americans with Disabilities Act

The ADA was the first federal law to prohibit discrimination by large private employers against individuals with disabilities.\textsuperscript{13} Title I of the ADA, which prohibits employment discrimination, provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability” with regards to conditions of employment.\textsuperscript{14} To file an employment discrimination claim under the ADA, a plaintiff must first exhaust administrative procedures by filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).\textsuperscript{15} If the EEOC issues a right-to-sue letter, the plaintiff has ninety days to file a complaint in federal court.\textsuperscript{16} The ADA authorized the EEOC to issue regulations explaining how Title I should apply to specific circumstances.\textsuperscript{17}

i. Employees Protected by the ADA

The ADA defines a “qualified individual” with a disability as a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”\textsuperscript{18} The ADA provides three alternative definitions of a disability: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

\textsuperscript{11} See generally The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2018); see also 42 U.S.C. § 12101(1–4) (2018) (the purpose of the ADA is to eliminate “discrimination against individuals with disabilities”).
\textsuperscript{13} The ADA covers employers that have “15 or more employees for each working day in each of 20 or more calendar weeks.” 42 U.S.C. § 12111(5)(A).
\textsuperscript{14} 42 U.S.C. § 12112(a).
\textsuperscript{15} 42 U.S.C. § 12117(a); 29 C.F.R. § 1601.28 (2022). See also Jones v. U.P.S., Inc., 502 F.3d 1176, 1185 (10th Cir. 2007) (quoting Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994)) (“[T]he purposes of exhaustion are: 1) to give notice of the alleged violation to the charged party; and 2) to give the EEOC an opportunity to conciliate the claim.”).
\textsuperscript{16} See Tiberio v. Allergy Asthma Immunology of Rochester, 664 F.3d 35, 37 (2d Cir. 2011); see also Zillyette v. Cap. One Fin. Corp., 179 F.3d 1337, 1339 (11th Cir. 1999).
\textsuperscript{18} 42 U.S.C. § 12111(8).
(B) a record of such an impairment; or (C) being regarded as having such an impairment."\(^{19}\)

In the first generation of Title I claims, plaintiffs found some success with administrative law decisions before the EEOC, but claims that were not resolved administratively seldom progressed to a trial on the merits because courts often rejected plaintiffs’ proof of standing as a person with a disability.\(^{20}\) To reset the balance between employees’ rights to be free from disability-based discrimination and employers’ rights to determine terms and conditions of employment, in 2008, Congress passed the Americans with Disabilities Amendments Act (ADAAA).\(^{21}\) The ADAAA amended the definition of disability to ensure courts construe it “broadly in favor of expansive coverage, to the maximum extent permitted by the law.”\(^{22}\) Thus, the ADAAA shifted a court’s consideration of an employer’s defenses from whether the plaintiff has a disability to whether the plaintiff is qualified to perform the essential functions of the job and whether the employer offered a reasonable accommodation.\(^{23}\)

### ii. COVID-19 as a Disability

The EEOC issued guidance to the regulations, which it revised throughout the COVID-19 pandemic, to reflect medical understanding of the virus. COVID-19 is not automatically a disability. Whether an individual who has tested positive for

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COVID-19 has a disability must be determined on a case-by-case basis.\textsuperscript{24} An individual “who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA.”\textsuperscript{25} Like any other ADA plaintiff, a person with COVID-19 may have an actual disability, have a record of a disability, or be regarded as an individual with a disability.\textsuperscript{26}

Although COVID-19 “is a ‘physical or mental impairment’ under the ADA,”\textsuperscript{27} whether it is a disability for an individual depends, in part, on how long the person suffers from its symptoms and effects. The ADA considers non-permanent conditions—as COVID-19 is for the majority of those who contract it—to be a disability when it “substantially limit[s] a major life activity when active.”\textsuperscript{28} To be a disability, a COVID-19 infection does not have to limit major life activities for “any particular length of time” or “be long-term” to be substantially limiting.\textsuperscript{29}

A person who has or had COVID-19 may also be an individual with a record of a disability.\textsuperscript{30} Even a person who never tested positive for COVID-19, but whom an employer mistakenly believed had COVID-19, may be regarded as an individual with a disability.\textsuperscript{31} Additionally, the COVID-19 pandemic has created a new class of individuals with disabilities—employees with long COVID—who may be entitled to a reasonable accommodation.\textsuperscript{32}

Because whether the plaintiff has a disability is determined on a case-by-case basis, some plaintiffs have successfully proved that a COVID-19 diagnosis is a disability under the ADA, while others have not. To have standing under the ADA,

\begin{itemize}
\item \textsuperscript{24} EEOC, \textit{What You Should Know About COVID-19}, supra note 22; see also Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) (noting that whether the plaintiff has a covered disability is determined “on a case-by-case basis.”).
\item \textsuperscript{25} EEOC, \textit{What You Should Know About COVID-19}, supra note 22.
\item \textsuperscript{26} See \textit{id}.
\item \textsuperscript{27} COVID-19 may affect major bodily functions, such as functions of the immune system, special sense organs (such as for smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions, or the operation of an individual organ. See \textit{id}. In some instances, COVID-19 also may affect other major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with others. \textit{Id}.
\item \textsuperscript{28} \textit{Id}; 42 U.S.C. § 12102(4)(D) (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”).
\item \textsuperscript{29} \textit{Id}.
\item \textsuperscript{30} \textit{Id}.
\item \textsuperscript{31} \textit{Id}.
\item \textsuperscript{32} “The EEOC recognizes that ‘long Covid’ may be a disability under the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act in certain circumstances.” EEOC, \textit{What You Should Know About COVID-19}, supra note 22. Long COVID “may progress like other post-infection fatigue syndromes into Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS), a disabling and uncurable disease.” Kathrine McNamara & Penney Stanch, \textit{Accommodating Workers with Disabilities in the Post-Covid World}, 18 J. Of OCCUPATIONAL AND ENV'T HYGIENE 149, 152 (2021).
\end{itemize}
an employee’s impairment must be more than “transitory and minor.” Several courts have denied the employer’s motion to dismiss a claim on the ground that “COVID-19 is not so obviously transitory and minor that [the plaintiff’s] claim must fail as a matter of law.” For example, a home health aide who was fired when she was diagnosed with COVID-19 had standing because her employer regarded her COVID-19 as a substantial lasting impairment.

Accordingly, some courts have declined to hold that COVID-19 is a disability when the plaintiff’s illness was temporary and without long-term impact. Moreover, plaintiffs are unlikely to prove they have standing under the ADA merely because they are exposed to someone who is diagnosed with COVID-19.

iii. Reasonable Accommodations under the ADA

Employers must provide a qualified individual with a disability a reasonable accommodation. To be eligible for a reasonable accommodation, employees must meet either the “actual” or “record of” definitions of disability; individuals who meet only the “regarded as” definition are not entitled to receive reasonable accommodation.

Reasonable accommodations are changes to working conditions “that enable an individual with a disability who is qualified to perform the essential functions of

33 See 42 U.S.C. § 12102(3)(B) (“A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”); see, e.g., Payne v. Woods Servs., Inc., 520 F. Supp. 3d 670, 679 (E.D. Pa. 2021) (dismissing plaintiff’s complaint because he failed to allege how COVID-19 impaired him and because his employer did not regard him as being disabled because it insisted he return to work).


36 See, e.g., Payne v. Woods Servs., Inc., 520 F. Supp. 3d 670, 673 (E.D. Pa. 2021) (employee contracted COVID-19 from clients he cared for in a residential program for individuals with disabilities and was fired for failing to return to work while he quarantined, per his doctor’s orders, when he was diagnosed with COVID-19).

37 See, e.g., Alvarado v. The ValCap Group, No. 3:21-CV-1830-D, 2022 WL 196868, slip op. at *7 (N.D. Tex. signed Jan. 3, 2022) (dismissing complaint because plaintiff failed to prove employer regarded her as having a disability because she was exposed to a coworker with COVID-19); Champion v. Mannington Mills, Inc., 538 F. Supp. 3d 1344, 1348–50 (M.D. Ga. 2021) (dismissing complaint because plaintiff failed to prove that her association with her brother, who was diagnosed with COVID-19, made her a person associated with a person with a disability); Rice v. Guardian Asset Mgmt., Inc., No. 3:21-CV-00693-AKK, 2021 WL 4354183, slip op. at *3 (N.D. Ala. signed Aug. 19, 2021) (dismissing complaint of plaintiff who was exposed to coworker with COVID-19).

38 42 U.S.C. § 12112(b)(5)(a).

39 29 C.F.R. § 1630(e) (2022).
that position.” Reasonable accommodations are not just those that allow an employee to have physical access to the workplace. They include “job restructuring; part-time or modified work schedules; reassignment to a vacant position; . . . and other similar accommodations.” Employees are entitled to a reasonable accommodation, but not necessarily to their preferred accommodation.

The ADA does not prohibit an employer from asking employees if they have been vaccinated. It permits employers to require employees who work on-site “to be fully vaccinated against COVID-19,” as long as employers offer reasonable accommodations pursuant to the ADA and Title VII. Examples of reasonable accommodations for an unvaccinated employee who received a religious or medical exemption include wearing a face mask, working at a social distance from coworkers or non-employees, change in working hours or location, periodic testing for COVID-19, or reassignment. To determine what type of accommodation is reasonable for a particular situation, employers and employees must engage in an interactive process. For example, immunocompromised employees may “need reasonable accommodations because . . . vaccines may not offer them the same measure of protection as other vaccinated individuals.” The EEOC provided a non-inclusive list of reasonable accommodations particularly relevant for some employees whose disability put them at greater risk from COVID-19: “changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per Centers for Disease Control guidance or other accommodations that reduce chances of exposure.”

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41 29 C.F.R. § 1630.2(o)(2) (2022).
43 EEOC, What You Should Know About COVID-19, supra note 22 (“[T]here are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA’s rules about making such inquiries do not apply.”).
44 Id. The U.S. Equal Employment Opportunity Commission provides that, in some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business. Id.
45 Id.
46 An interactive process “should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3) (2022).
47 EEOC, What You Should Know About COVID-19, supra note 22.
48 Id.
One long-coveted accommodation by some employees with disabilities—telework—proved to be reasonable for many jobs during the pandemic. But although telework expands opportunities for some individuals with disabilities, it is not a reasonable accommodation for numerous jobs—because they must be performed on site—or for all employees. For example, employees with visual disabilities and disabilities exacerbated by prolonged computer use may be more effective working at a physical workplace. Similarly, some employees with hearing impairments report fatigue and stress resulting from concentration necessary to compensate for poor audio quality.

Another common request for a COVID-19-related accommodation was reassignment to a location that minimized the risk of exposure to COVID-19. For example, a hospital employee whose mental and physical health disorders would be aggravated by COVID-19 sought reassignment to floors without COVID-19 patients. The court denied the employer’s motion for summary judgment because

See Burbach v. Arconic Corp., No. 2:20-CV-00723-CRE, 2021, WL 4306244, at *6 (W.D. Pa. Sept. 22, 2021) (denying summary judgment to employer because remote work may have been a reasonable accommodation for attorney who had COVID-19); Lin v. CGIT Sys., Inc., No. CV 20-11051-MBB, 2021, WL 4295863, slip op. at *2, *6 (D. Mass. filed Sept. 21, 2021) (denying motion to dismiss because employer failed to engage in an interactive process to determine whether employee—whose high blood pressure rendered him vulnerable to COVID-19—could be accommodated by allowing him to work from home); Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 65, 66 (D. Mass. 2020) (granting temporary injunction to plaintiff to allow him to telework for sixty days because his “health care provider recommended telework as a reasonable accommodation for” his asthma, for which COVID-19 increased risk of serious illness or death); Silver v. City of Alexandria, 470 F. Supp. 3d 616, 624 (W.D. La. 2020) (holding that city council member’s request to attend meetings remotely was reasonable because he would face serious illness or death from COVID-19 due to his cardiac condition and age).

See Kanter, supra note 2, at 11–14, 54 (noting that some employees for whom remote work may be a reasonable accommodation may prefer to work on site because they may not have sufficient home technology or working conditions, or they may wish to avoid social isolation common among individuals with disabilities). See also EEOC, Appendix IV Guidance and Technical Assistance Manuals, ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, 2005 WL 4899269 (Sept. 2015 Supp.), question 34 (“An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.”). See, e.g., Conaway v. Detroit Pub. Sch. Cmty. Dist., No. 21-CV-12253, 2021 WL 5989044, slip op. at *2, *5 (E.D. Mich. signed Dec. 17, 2021) (denying injunction to teacher who sought to teach remotely because, although her asthma placed her at high risk of illness or death due to COVID-19, the school district offered her a reasonable accommodation of teaching two days a week in person and three days a week remotely).


McNamara & Stanch, supra note 32, at 152 (citing Renee Punch, Employment and Adults Who Are Deaf or Hard of Hearing: Current Status and Experiences of Barriers, Accommodations, and Stress in the Workplace, 161 AM. ANNALS OF THE DEAF 384, 386 (2016)).

it failed to reassign her even though positions were available on non-COVID floors.\textsuperscript{54}

In late 2021, the EEOC initiated cases on behalf of employees who sought pandemic-related accommodations. For example, the EEOC sought an injunction and damages for a pharmacy clerk with asthma who resigned after his employer refused to allow him to wear a facemask at work at the beginning of the pandemic.\textsuperscript{55} His employer complained that allowing the employee to wear a mask “might give the appearance to customers that the employee was sick.”\textsuperscript{56}

In \textit{Equal Employment Opportunity Commission v. 151 Coffee, LLC}, the EEOC pursued accommodations for one barista who had multiple sclerosis and another who had a pulmonary valve stenosis.\textsuperscript{57} When the coffee shop reopened after a brief closure due to the pandemic, a manager told the baristas that they could not return to work until they became vaccinated, even though both sought to work with minimal customer contact as a reasonable accommodation.\textsuperscript{58} The coffee shop terminated both baristas.\textsuperscript{59} The EEOC alleged that the coffee shop’s “blanket policy of prohibiting disabled employees from returning to work, with or without an accommodation, until a COVID vaccine was developed, violated the ADA.”\textsuperscript{60}

Similarly, the EEOC filed suit for a manager at a pharmaceutical plant who had chronic obstructive lung disease and hypertension.\textsuperscript{61} For the first few months of the pandemic, the employer allowed some employees to work from home.\textsuperscript{62} But when it discontinued its remote work policy, the manager asked to work from home two days a week because her pulmonary disease placed her at high risk for contracting COVID-19.\textsuperscript{63} The employer rejected her request, even though it allowed other managers to work remotely and subsequently fired her.\textsuperscript{64}

\textsuperscript{54} \textit{Id.} 4; see also, Madrigal \textit{v. Performance Transportation, LLC}, No. 21-CV-00021-VKD, 2021 WL 2826704, slip op. 1, 6 (N.D. Cal. July 7, 2021), \textit{on reconsideration}, No. 21-CV-00021-VKD, 2021 WL 5331442 (N.D. Cal. Nov. 16, 2021) (denying employer’s motion to dismiss because employee with diabetes sought a potentially reasonable accommodation of working with minimal contact with other people for six to twelve months due to his high-risk of severe illness if diagnosed with COVID-19).


\textsuperscript{56} \textit{Id.} at ¶ 14.


\textsuperscript{58} \textit{Id.} at ¶¶ 22, 26–28.

\textsuperscript{59} \textit{Id.} at ¶¶ 29–30.

\textsuperscript{60} \textit{Id.} at ¶ 32.


\textsuperscript{62} \textit{Id.} at ¶ 17.

\textsuperscript{63} \textit{Id. at ¶¶ 18–19.}

\textsuperscript{64} \textit{Id.} at ¶¶ 20–21, 23.
iv. Employers’ Defenses under the ADA

Once an employee proves that they are a qualified individual with a disability, the burden shifts to the employer to prove that “the accommodation would impose an undue hardship on the operation of the business of such covered entity,” or would “pose a direct threat to the health or safety of other individuals in the workplace.”

a. Undue Hardship

i. Statutory Definition of Undue Hardship

An “undue hardship” is an action that imposes a “significant difficulty or expense” on the employer. An employer must prove, on a case-by-case basis, whether it will suffer an undue hardship. The ADA provides courts four factors to determine whether an accommodation would impose an undue hardship on the employer:

(i) the nature and cost of the accommodation . . . ;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity.

Because Congress authorized the EEOC to issue regulations to implement the employment provisions of the ADA, courts defer to these four factors on an individual basis.

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65 42 U.S.C. § 12112(b)(5)(a); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11th Cir. 1997).
66 42 U.S.C. § 12113(b).
71 See US Airways, 535 U.S. at 401 (considering EEOC regulations to determine whether the employer met its burden of proving undue hardship); Johnson v. Bd. of Tr. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561, 564 (9th Cir. 2011) (noting that Congress authorized the EEOC to implement Title I of the ADA).
ii. Case Law Where Employers Claimed Impact of Accommodation on Coworkers Imposed an Undue Hardship

Employers have a strong undue hardship defense when accommodating an employee with a disability would require coworkers: 1) to lose benefits provided by a collective bargaining agreement or seniority system; 2) to perform significant additional job functions; or 3) to work longer hours or otherwise substantially change their jobs. University of Toledo College of Law Professor Nicole B. Porter suggests that many undue hardship cases involve what she terms “special treatment stigma,” which “arises when nondisabled coworkers are resentful of an accommodation needed by an employee with a disability either because it does (or is perceived to) place burdens on other employees or because it is an accommodation that other employees covet.”

Professor Porter characterizes accommodations that affect coworkers’ “hours, shifts, schedules, attendance requirements, and leave of absence policies--basically, when and where work is performed,” as those affecting accommodations of “structural norms” of the workplace.

First, employers are not required to violate a collective bargaining agreement to accommodate an employee with a disability. The Supreme Court has expanded this defense to include a seniority system even if it is not collectively bargained. Even in the absence of a collective bargaining agreement or seniority system, the ADA does not require an employer to fire a non-disabled employee to accommodate a disabled employee.
Second, courts have rejected accommodations that impose a significant burden on coworkers to perform part of the employee with a disability’s job. A commonly-requested accommodation, a leave of absence, may impose an undue hardship if it requires coworkers to perform some of the employee with a disability’s job functions for an extended period.

Third, courts have recognized an undue hardship resulting from accommodations that require non-disabled coworkers to work longer hours or otherwise substantially change their jobs. For example, a flight instructor for Southwest Airlines who had sleep apnea sought to work only afternoon shifts. The Fifth Circuit held that allowing the instructor to work only afternoon shifts would impose an undue burden on Southwest Airlines because, in part, it “would impose inordinate burdens on other SWA employees.” Similarly, an employer may not have to physically move non-disabled employees from their workspaces to accommodate an employee with a disability.

Courts may consider “the number of persons employed at the workplace to deny a requested accommodation that has a significant negative impact on coworkers. To illustrate, RiteAid was granted summary judgment in a case filed by a cashier with osteoporosis who sought to be allowed to sit through part of her shift. In noting that RiteAid had a “lean staffing model,” the court accepted RiteAid’s argument that “having a cashier sit idly for half of her shift would necessarily cause productivity and morale issues.” The court held that an employer need not provide an accommodation that would “result in other employees having to work harder or longer.”

78 See, e.g., E.E.O.C. v. Amego, Inc., 110 F.3d 135, 148 (1st Cir. 1997) (holding that accommodating therapist with psychiatric disability would impose an undue burden because to relieve her of job function of handling her patients’ medication, “it would have been necessary to hire another Behavior Therapist to be paired with her to ensure that she would never be left alone with a client who needed medication”); Hershey v. Praxair, Inc., 969 F. Supp. 429, 435 (S.D. Tex. 1997) (“It is not reasonable to require an employer to have two people doing one person’s job in the name of accommodation.”).

79 See Porter, supra note 73, at 151–52 (noting that providing an indefinite leave of absence likely proves undue hardship but providing a limited leave of absence with a fixed return date may not).

80 See, e.g., Davis v. Columbus Consol. Gov’t, 826 F. App’x 890, 893 (11th Cir. 2020) (bus driver’s “requested nine-week leave of absence would cause ‘significant difficulty or expense,’ given the undisputed evidence regarding the size of the relevant workforce and the number of bus routes, the negative impact of Davis’s absence on the city’s other bus operators, the difficulty of scheduling operators to cover its bus routes while holding open Davis’s position, the cost of overtime pay, and the expected loss of trained and experienced personnel as a result of forced overtime”).

81 Grubb v. Sw. Airlines, 296 F. App’x 383, 386 (5th Cir. 2008).

82 Id. at 388.

83 See, e.g., Henderson v. New York Life, Inc., 991 F. Supp. 527, 541 (N.D. Tex. 1997) (holding that a business was not required to move employees from their offices to accommodate another employee).


86 Id. (“[O]ther Rite Aid employees became frustrated by Strickland’s low productivity.”).

87 Id. (citing Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996) (“Accommodations that result in other employees having to work harder or longer are not required under the ADA.”); see also Pate v. Baker Tanks Gulf S., Inc., 34 F. Supp. 2d 411, 417 (W.D. La.1999) (holding same)).
Accommodating Disabilities

Other employers, however, failed to prove that requiring coworkers to perform additional work proved the employer would suffer an undue hardship. A defendant’s “fear,” without supporting evidence, that accommodating one employee with a disability will have a deleterious effect on other employees is insufficient to prove undue burden.\textsuperscript{88} Employers must provide evidence beyond mere complaints by other employees.\textsuperscript{89}

For example, a hotel casino cashier sought to work only day shifts because medication he took at night for a psychiatric condition made him drowsy.\textsuperscript{90} The trial court denied summary judgment to the employer because it failed to provide sufficient evidence of how accommodating the cashier would cause an undue hardship on other employees who had seniority and may have complained that the plaintiff was assigned to their day shifts. The court cautioned that “[a]lthough employee disapproval does not per se rise to the threshold of undue hardship, if such protest reaches ‘chaotic personnel problems,’ the accommodation will result in undue hardship.”\textsuperscript{91}

Similarly, a police dispatcher who had asthma and chronic fatique sought to be exempt from a rotating shift schedule so she could work days instead of nights.\textsuperscript{92} The court rejected the police department’s argument that allowing the dispatcher to work only day shifts “would cause an undue hardship because the other dispatchers would have to work a less desirable shift,”\textsuperscript{93} noting that “employee grumbling” was insufficient evidence of undue hardship.\textsuperscript{94}

Likewise, the Second Circuit reversed summary judgment for a medical practice that failed to accommodate an anesthesiologist whose back disability limited when he could work.\textsuperscript{95} The trial court held that allowing the anesthesiologist to be relieved from working nights and weekends was not a reasonable accommodation because, in part, it would create an undue hardship on the group’s other physicians by requiring them to work more nights and weekends.\textsuperscript{96} The Second Circuit reversed, finding that the defendant failed to provide specific evidence of how the burden on other physicians “was so disproportionately heavy as to absolve the Group from its reasonable accommodation obligations under the ADA.”\textsuperscript{97}

\begin{itemize}
  \item \textsuperscript{89} See, e.g., Talley v. Fam. Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1108 (6th Cir. 2008) (reversing summary judgment for defendant, holding that a store cashier who had osteoarthritis raised an ADA claim that she was entitled to an accommodation of sitting on a stool during her shift, even though “other employees had complained about unfair treatment”).
  \item \textsuperscript{91} Id. at 169.
  \item \textsuperscript{92} Holt v. Olmsted Twp. Bd. of Trustees, 43 F. Supp. 2d 812, 823 (N.D. Ohio 1998).
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id. at 824.
  \item \textsuperscript{95} Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 116–17 (2d Cir. 2004).
  \item \textsuperscript{96} Id. at 116.
  \item \textsuperscript{97} Id. at 122.
\end{itemize}
b. Direct Threat

An employer may also deny an accommodation if it proves that accommodating the employee would pose a “direct threat.” The EEOC regulations define "direct threat" as "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." Whether an employee poses a direct threat is evaluated on a case-by-case basis, considering “the views of health care professionals,” to determine whether the employee can safely perform the essential functions of the job.

Although most direct threat cases involve a plaintiff who risked injuring themselves or a coworker, the direct threat defense has been considered in cases involving a plaintiff who was potentially contagious. This line of cases began with School Board of Nassau County v. Arline, one of the first disability-rights cases considered by the Supreme Court. A Florida elementary school fired a teacher who had periodic relapses of tuberculosis for fear she would expose her students and other staff to the disease. Noting the importance of an individualized assessment,

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98 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r) (2022); Hutton v. Elf Atochem N. Am., 274 F.3d 884, 892–93 (9th Cir. 2001) ("Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat."); see also Frank Griffin, COVID-19 and the Americans with Disabilities Act: Balancing Fear, Safety, and Risk as America Goes Back to Work, 51 SETON HALL L. REV. 383, 422–29 (2020).

99 29 C.F.R. § 1630.2(r) (2022).

100 See id.; Bragdon v. Abbott, 524 U.S. 624, 650 (1998) (noting that the views of public health agencies “such as the U.S. Public Health Service, CDC, and the National Institutes of Health are of special weight and authority”); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999) (reversed summary judgment for employer because medical expert testified that the risk plaintiff—who had episodic periods of fainting—would faint and drop heavy items on herself or others “was ‘possible’ but ‘very unlikely’”).

101 The regulations provide:

This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;
(3) The likelihood that the potential harm will occur; and
(4) The imminence of the potential harm.

29 C.F.R. § 1630.2(r) (2022).

102 See, e.g., Emerson v. N. States Power Co., 256 F.3d 506, 514 (7th Cir. 2001) (finding that providing frequent breaks to an electric utility consultant—who handled safety-sensitive calls concerning gas leaks and downed power lines—and who suffered from panic attacks, posed a direct threat because emergency calls may not be answered immediately); Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 894 (9th Cir. 2001) (holding that diabetic worker in a chemical plant who had seizures posed a direct threat because, even though the chance of his having an accident was small, the nature of potential harm—a catastrophic event should chlorine liquid escape—was significant); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (holding that line cook who had seizures posed a risk of harm to himself and others because he worked with a gas grill, fryer, and sharp knives).


104 Id. at 281 (finding that Arline was a “handicapped individual”).
the Court held that “the fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases.”\(^{105}\) Accordingly, an employee who has a contagious disease does not automatically pose a direct threat to the workplace.\(^{106}\) The employer must provide objective medical evidence that the employee’s contagious condition—because of the specific nature of their job—posed a direct threat to others.\(^{107}\) A “theoretical risk” of transmission of a contagious disease is insufficient to support the direct threat defense.\(^{108}\) Thus, employees who had a contagious condition survived pre-trial motions when they offered objective medical evidence that their contagious conditions could be safely accommodated for their jobs.\(^{109}\)

Given that the presence of an employee with COVID-19 at a workplace could risk infecting coworkers, the EEOC issued guidance to explain how the direct threat defense should be considered during the pandemic.\(^{110}\) It required employees to consider “the most current medical knowledge about COVID-19” and the individual

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\(^{105}\) *Id.* at 285.

\(^{106}\) 29 C.F.R. § 1630.2(r) (2022) (requiring an individualized assessment to determine direct threat).

\(^{107}\) See, e.g., Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1281 (11th Cir. 2001) (affirming summary judgment for dental office because dental assistant who had HIV “poses a significant risk of HIV transmission to his patients”); Est. of Mauro v. Borgess Med. Ctr., 137 F.3d 398, 403-04, 407 (6th Cir. 1998) (affirming summary judgment for employer of surgical technician who had HIV and performed invasive procedures because he posed a direct threat to the health and safety of others as determined by the Centers for Disease Control standards); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1266 (4th Cir. 1995) (affirmed summary judgment for medical center because, based on Centers for Disease Control standards, physician who had HIV posed “a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation”).


\(^{109}\) See, e.g., Buhrman v. Aureus Med. Grp., 519 F. Supp. 3d 923, 928, 936 (D. Colo. 2021) (denying summary judgment to medical group that fired a registered nurse who had HIV because, in part, medical evidence showed his viral load was zero); Holiday v. City of Chattanooga, 206 F.3d 637, 646–47 (6th Cir. 2000) (reversing summary judgment for police department that failed to hire applicant with HIV because he successfully worked as an officer before and had ample medical evidence he could do so safely); Rollf v. Interim Pers., Inc., No. 2:99CV44 ERW, 1999 WL 1095768, at *5 (E.D. Mo. Nov. 4, 1999) (denying defendant’s motion to dismiss because it fired a forklift operator whom it assumed—“on the basis of mythology, rather medical evidence”—would pose a direct threat to co-workers because he was diagnosed with Hepatitis C, a contagious blood borne disease); Doe v. D.C., 796 F. Supp. 555, 563, 566, 569, 571 (holding that fire department violated the Rehabilitation Act when it withdrew its offer of employment based on the applicant’s HIV status, where the department doctor’s opinion that HIV status impeded the applicant’s ability to perform as a firefighter was contradicted by objective medical evidence that his HIV did not pose a direct threat to others).

work environment.\textsuperscript{111}

\section*{B. Rehabilitation Act of 1973}

The Rehabilitation Act of 1973 was the first federal law to prohibit disability-based employment discrimination and to require employers to reasonably accommodate a qualified employee with a disability.\textsuperscript{112} Unlike the ADA, the Rehabilitation Act applies only to federal agencies, federal contractors, and employers that receive federal funds.\textsuperscript{113} Courts read the ADA consistently with the Rehabilitation Act.\textsuperscript{114} Like the ADA, the Rehabilitation Act permits employers to deny a reasonable accommodation only if they can prove that the accommodation would impose an undue financial or administrative hardship on the operations of the business\textsuperscript{115} or the employee seeking an accommodation would pose a direct threat.\textsuperscript{116} The Rehabilitation Act requires courts to assess an “undue hardship”\textsuperscript{117} and “direct threat”\textsuperscript{118} by same factors they do under the ADA.

\section*{C. Title VII of the Civil Rights Act of 1964}

\subsection*{1. Title VII Prohibition Against Religious-Based Employment Discrimination}

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate an employee’s sincerely held religious beliefs and practices.\textsuperscript{119} Like

\begin{itemize}
\item The Equal Employment Opportunity Commission provides:
\begin{itemize}
\item “[T]he assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.”\textsuperscript{120}
\end{itemize}
\end{itemize}

\textsuperscript{111} The Equal Employment Opportunity Commission provides:

\textsuperscript{112} See 29 U.S.C. § 794.

\textsuperscript{113} 29 U.S.C. §§ 793–794.

\textsuperscript{114} See Laura F. Rothstein, \textit{Reflections on Disability Discrimination Policy–25 Years}, 22 U. ARK. LITTLE ROCK L. REV. 147, 154 (2000) (noting that the ADA incorporates “judicial interpretation from the Rehabilitation Act, a statute that had been in place for 17 years”); \textit{see also} McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 131 (4th Cir. 1994) (“The federal policies behind the ADA and the Rehabilitation Act are similar, since both statutes were enacted, at least in part, to help disabled persons find and maintain employment.”); Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993) (noting that the ADA and Rehabilitation Act define “disability” similarly).

\textsuperscript{115} 29 C.F.R. § 1630.2(p) (2022); Barth v. Gelb, 2 F.3d 1180, 1184 (D.C. Cir. 1993).

\textsuperscript{116} 29 C.F.R. § 1630.2(r) (2022).

\textsuperscript{117} 29 C.F.R. § 1630.2(p) (2022).

\textsuperscript{118} 29 C.F.R. § 1630.2(r) (2022).

the ADA, it applies to both private and public employers with more than fifteen employees. The EEOC, which was created by the Civil Rights Act of 1964, enforces both Title VII and the ADA.

A covered employer violates Title VII if it fails “to reasonably accommodate the religious practices of an employee or prospective employee unless the employer demonstrates that accommodation would result in undue hardship on the conduct of the business.” The sincerity of an employee’s stated religious beliefs is seldom disputed because “the employee’s sincerity in holding a religious belief is largely a matter of individual credibility.” Under Title VII, a reasonable accommodation of an employee’s religious beliefs is one that “eliminates the conflict between employment requirements and religious practices.” Like under the ADA, whether an accommodation imposes undue hardship under Title VII is determined on a case-by-case basis.

An employer can deny a religious accommodation under Title VII if it imposes “more than a de minimis cost.” The Title VII “more than a de minimis cost” undue hardship standard is lower than the “significant difficulty or expense” standard under the ADA. Thus, employees are less likely to obtain a religious accommodation when an employer offers evidence of “more than a de minimis cost.”

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120 42 U.S.C. § 2000e(b).
124 29 C.F.R. § 1605.2(b) (2022).
125 EEOC, What You Should Know About COVID-19, supra note 22. (“The employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.”). When an individual seeks a religious exemption, their belief need not be recognized by an organized religion, but it cannot be founded on political or social ideas, a distinction that must somehow be determined by employers. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2021-3, RELIGIOUS DISCRIMINATION § 12(I)(A)(1) (2021).
127 For example, paying overtime to another employee to accommodate a plaintiff who wants time off for religious observance may be an undue hardship under some circumstances, but not under others. Compare Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 68–69, 84 (1977) (overtime pay an undue hardship), with Redmond v. GAF Corp., 574 F.2d 897, 904 (7th Cir. 1978) (no undue hardship because plaintiff would have been paid premium wages for hours at issue).
128 29 C.F.R. § 1605.2(e) (2022) (factors consider “the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation”); see also Hardison, 432 U.S. at 83–84 (holding that Title VII did not require TWA to violate the seniority provisions of a collective bargaining agreement to accommodate plaintiff’s request to not work on Saturdays).
130 United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 890 (3d Cir. 1990) (“Hardison strongly suggests that the undue hardship test is not a difficult threshold to pass.”). See, e.g., Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000) (finding that the proposed accommodation was “more than a de minimis expense because [it] unduly burden[ed] his co-workers, with respect to compensation and ‘time-off concerns’”); see also, Huma T. Yunus, Note, Employment Law: Congress Giveth and the Supreme Court
Two scholars characterized the difference in reasonable accommodation standards under the ADA and Title VII in more stark terms: “Under Title VII, as currently understood, the employer defines the job as it wishes; the law merely insists that workers and applicants for those jobs be treated without regard to race or sex. The ADA goes beyond and asks employers to restructure the jobs themselves.”

ii. Accommodating Employees’ Religious Beliefs During the COVID-19 Pandemic

To resolve how the COVID-19 pandemic affected an employer’s proof of undue hardship in accommodating an employee’s sincerely held religious beliefs, the EEOC advises courts to consider evidence such as “the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.” In determining the cost of accommodation, the EEOC permits employees to consider direct monetary costs and the impact on the employer’s business, “including, in this instance, the risk of the spread of COVID-19 to other employees or to the public.”

Courts have been hesitant to overturn an employer’s rejection of an employee’s claim that they were entitled to a religious exemption from a vaccine mandate. For example, one court declined to reverse a medical center’s denial of exemption requests from six employees who opposed vaccines for allegedly religious reasons, including an electrician who—despite being previously vaccinated—asserted that vaccines “interfere with our bodies [sic] own immune systems that God created,” and a manager who rejected any product required by her employer that could not be “entirely . . . removable from [her] body.”

The court accepted the hospital’s direct threat defense to refuse to accommodate the employees and deferred to “the hospital’s judgment in matters of patient safety,” which was “unvaccinated employees—who are more likely to

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Taketh Away: Title VII’s Prohibition of Religious Discrimination in the Workplace, 57 OKLA. L. REV. 657, 657-58 (2004) (suggesting employees were less likely to succeed on a religious discrimination claim after Hardison’s interpretation of undue hardship).

131 Stewart J. Schwab & Steven L. Willborn, Reasonable Accommodation of Workplace Disabilities, 44 WM. & MARY L. REV. 1197, 1202, 1203 (2003) (noting that both statutes require facially neutral employment practices that are based on facts, not myths).

132 EEOC, What You Should Know About COVID-19, supra note 22.

133 Id.

134 See infra notes 135–54 and accompanying text.

become infected—pose a direct threat to patients and others.” The court also accepted the hospital’s undue burden defense to refuse to accommodate the employees, deferring to expert opinion that “allowing any employee to decide instead just to mask, engage in periodic testing, and socially distance was not adequate to meet [its] urgent health and safety priorities and protect its vulnerable patient population.” In deferring to the EEOC COVID-19 Guidance, the court dismissed the employees’ arguments that they had not been diagnosed with COVID-19, because the hospital would endure an undue hardship if it had to grant the same religious exemptions to other unvaccinated staff. The trial court relied on the First Circuit’s conclusion in a similar case that hospitals need not exempt employees from COVID-19 vaccination “because doing so would cause them to suffer undue hardship.”

II. PRE-COVID-19 CASES REGARDING ACCOMMODATIONS THAT IMPACT THE PERSONAL AUTONOMY OF COWORKERS

A. Employees Who Sought Exemption from Vaccinations

In pre-COVID-19 cases, some employees sought exemptions from employer-required vaccinations as a religious accommodation under Title VII. In 2009, when the H1N1 virus killed more than 12,000 Americans, the New York State Department of Health required healthcare workers to receive a flu vaccine. A hospital employee claimed his employer discriminated against him by not providing him a religious exemption because, as a Jehovah’s Witness, he opposed a vaccine that he believed contained blood. In granting the hospital’s motion to dismiss, the court rejected the employee’s Title VII claim because, although he “held a bona fide

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137 Id. at 434.
138 Id. at 437 (“In determining undue hardship, it is appropriate to consider aggregate effects when multiple employees are granted the same accommodation. Therefore, defendant’s undue hardship is not just accommodating one unvaccinated employee with a higher risk of spreading COVID-19, but potentially hundreds.”).
139 Id. at 435 (citing Does v. Mills, 16 F.4th 20, 35–36 (1st Cir. 2021)).
142 Id.
religious belief conflicting with an employment requirement,” the hospital did not take any adverse employment action against him for his failure to take the vaccine.

Another hospital employee, who met with patients and family members when they arrived in the emergency department of Children’s Hospital Boston, objected to a mandatory influenza vaccine because some contained pork products, which she avoided as a follower of the Nation of Islam. Although Children’s Hospital Boston provided medical exceptions, but not general religious exemptions, it “did accommodate individual requests based on religious concerns to receive a pork-free (gelatin-free) vaccine,” but the plaintiff declined it.

In granting summary judgment to Children’s Hospital Boston, the court considered, among other things, “the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation.” It noted that the EEOC advised that “an employer that grants a religious accommodation excusing a health care worker from a mandatory vaccination may impose additional infection control practices on the worker, ‘such as wearing a mask.’”

The court held that Children’s Hospital Boston reasonably accommodated the plaintiff by offering a pork-free vaccine and potential reassignment to a position that did not involve patient contact. Additionally, it held that allowing the plaintiff to remain unvaccinated would impose an undue hardship on the hospital’s duty to protect the health of its patients and staff because medical evidence “demonstrates that the single most effective way to prevent the transmission of influenza is vaccination.”

In a similar case, a psychiatric crisis intake worker at a Pennsylvania hospital challenged the hospital’s influenza vaccine requirement, which permitted medical and religious exemptions. The hospital rejected his request, concluding it was based on personal beliefs, not on sincerely-held religious beliefs. In affirming

143 Id. at *4 (recognizing that to state a claim under Title VII, the plaintiff “must show that (1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement.” (citations omitted)).
144 Id. at *3.
146 Id.
147 Id. at *3.
149 Id.
150 Id. at *7.
151 Id. at *9–*10 (“[A]ccommodating Robinson’s desire to be vaccine-free in her role would have been an undue hardship because it would have imposed more than a de minimis cost”).
153 Id. at 489, 492.
the district court’s dismissal of the plaintiff’s complaint, the Third Circuit acknowledged that anti-vaccination beliefs can “be part of a broader religious faith,” but the plaintiff failed to provide any evidence that his objection to vaccines was protected by Title VII.154

B. Employees Who Sought Smoke-Free and Fragrance-Free Workplaces

Long before the COVID-19 pandemic, some employees with disabilities sought accommodations—such as smoke-free or fragrance-free workplaces—that affected the personal autonomy of their coworkers. Before smoke-free workplaces became commonplace, several courts considered whether an employer must provide a non-smoking work environment under the ADA for an employee with a disabling sensitivity to smoke.155 The provision of a smoke-free environment can be a reasonable accommodation for an employee.156 For example, Union Pacific Railroad was denied summary judgment because it failed to show how providing a smoke-free locomotive cab to an engineer who had asthma would impose an undue hardship.157

In contrast, plaintiffs have had difficulty proving that providing a fragrance-free environment can be a reasonable accommodation because of its impact on coworkers. The Sixth Circuit twice ruled that a fragrance-free environment “is not objectively reasonable” as an accommodation for a disability.158 In one case, an air traffic controller developed multiple chemical sensitivity to fragrances and chemicals used as the base for perfumes and colognes.159 She sought “a fragrance-free work environment, an air purification device, proper ventilation, and prior notice when chemicals are to be used or sprayed in the facility” as a reasonable accommodation.160 The Sixth Circuit affirmed judgment on the pleadings for the defendant, quoting the trial court’s conclusion that a fragrance-free policy would impose an undue burden on the employer because it would obligate her employer to 1) “prohibit plaintiff’s coworkers and those who occasionally come into the office of

154 Id. at 493; see also, Brown v. Children’s Hosp. of Phila., 794 F. App’x 226, 227 (3d Cir. 2020) (affirming dismissal of complaint by hospital employee who opposed mandatory flu vaccination because she failed to allege “that her opposition to the flu vaccine was religious”).


156 See, e.g., Thorner-Green v. New York City Dep’t of Corr., 207 F. Supp. 2d 11, 15 (E.D.N.Y. 2002) (holding that plaintiff was not able to perform the essential functions of her job even with the reasonable accommodation of a smoke-free environment); Harmer v. Va. Elec. & Power Co., 831 F. Supp. 1300, 1302, 1304, 1306 (E.D. Va. 1993) (finding that once his employer restricted smoking to limited areas, employee with a pulmonary disability could safely perform his job and needed no other accommodation).


159 Montenez-Denman, 2000 WL 263279, at *1.

160 Id. at *2.
their right to wear ‘scents,’”—which the court characterized as a “burdensome and unseemly task”—and 2) “identify and rid plaintiff's workplace of many other common, scent producing agents such as cleaning supplies.” 161

In a subsequent case, the Sixth Circuit affirmed the dismissal of a postal worker’s complaint that she was entitled to a fragrance-free workplace to accommodate her migraines that were induced by exposure to fragrances. 162 Typical of a pre-ADA Amendments Act (pre-ADAAA) case, the trial court was skeptical that plaintiff’s migraines were a disability. 163 Nonetheless, the court addressed her request for a fragrance-free workplace, concluding that her requested accommodation was “not objectively reasonable under the circumstances.” 164 The court accepted the defendant’s evidence of “the difficulty associated with enforcing a total ban on fragrances,” which “would be compounded by the number of” transitional and temporary employees at her workplace “where it may be appropriate for them to wear fragrances.” 165 Though the court declined to explain why wearing fragrances “may be appropriate,” and thus why it was relevant to determine whether a proposed accommodation was reasonable, it cautioned that a “mandatory policy also limits the choices of the non-disabled population.” 166

Similarly, a social services employee with asthma sought to “work in an environment ‘free of perfume.’” 167 The plaintiff rejected her employer’s offer to allow her to use an inhaler, take breaks outside for fresh air, and ask individuals to not wear a particular perfume. 168 In granting summary judgment for the employer, the court concluded that even if the plaintiff had a disability, a fragrance-free workplace policy was not a reasonable accommodation. 169 It held that a broad fragrance-free policy would impose an undue burden because it would require other employees “to alter all of their personal habits to ensure that all products of daily-living, i.e., deodorant, lotions, hair products, etc., used in their private homes before coming into the workplace, are fragrant-free.” 170

Relatively, in a pre-ADAAA case, an insurance claims examiner who worked in an open cubicle sought to move to an enclosed workspace or work from home to accommodate her allergies, asthma, and immune disorder. 171 Although the court, as was typical in pre-ADAAA cases, held that the plaintiff did not have a disability as

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161 Id.
162 McDonald v. Potter, 285 F. App’x 260, 261 (6th Cir. 2008).
164 Id. at *41.
165 Id. at *43.
166 Id.
168 Id. at *4.
169 Id. at *13, *19.
170 Id. at *14.
defined by the ADA, it also held that the employer did not have to provide her an enclosed office because doing so would “adversely impact other employees” by requiring them to vacate their offices.

II. Litigation Challenging Mask and Vaccine Rules During the COVID-19 Pandemic

A. Litigation Challenging Federal Mask and Vaccine Rules

On the first day of his Administration, President Joseph Biden signed an executive order to establish the Safer Federal Workforce Task Force (“Task Force”) to advise federal agencies on regulatory ways to address the COVID-19 pandemic. To increase the lagging rate of vaccinations, the Biden Administration issued four rules requiring employees to receive COVID-19 vaccinations:

1. Executive Order 14042, covering federal contractors.
2. Executive Order 14043, covering federal employees.
3. Occupational Safety and Health Administration (OSHA) Emergency Testing Standards (ETS), covering employees of companies with 100+ employees.

i. Executive Order 14042: Federal Contractors

Two federal trial courts issued a temporary restraining order enjoining the enforcement of Executive Order 14042, which required federal contractors to be

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172 Id. at 539.
173 Id. at 541.
175 By December 28, 2022, although COVID-19 vaccinations had been available for more than a year, only 69% of the United States population had completed the primary vaccination series and only 15.1% had received the bivalent booster that became available in September 2022. COVID-19 Vaccinations in the United States, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-fully-percent-total (last visited Jan. 5, 2023).
176 See infra notes 180–91 and accompanying text.
177 See infra notes 192–200 and accompanying text.
178 See infra notes 201–55 and accompanying text.
179 See infra notes 256–91 and accompanying text.
vaccinated unless they are “legally entitled to an accommodation.” One court held that federal contractors had standing because they alleged a specific injury—a Hobson’s choice of adding “the vaccine mandate to your current federal contracts” or losing “out on future federal contracts.” The court ruled that Executive Order 14042 exceeded President Biden’s authority pursuant to the Federal Property and Administrative Services Act on the grounds that vaccine mandates are “an area traditionally reserved to the States.”

One week later, another court enjoined Executive Order 14042, finding that it “will continue to require extensive and costly administrative work by employers and will force at least some individuals to choose between getting medical treatment that they do not want or losing their job.” Judge R. Stan Baker accepted the contractors’ claim that “they likely will not have sufficient employees to perform the job if they enter into a contract that requires all of the covered employees to be vaccinated.” He issued a nationwide stay of Executive Order 14042 by reasoning that the Association of Builders and Contractors alleged a national harm because its members “were awarded 57% of federal contracts exceeding $25 million during fiscal years 2009–2020.” The district court distinguished the Eleventh Circuit’s opinion upholding COVID-19 vaccinations mandates for staff of healthcare providers that receive Medicare and Medicaid funding, which was issued the day before Judge Baker’s opinion, on the grounds that the Eleventh Circuit addressed healthcare regulations, not workplace safety regulations.

ii. Executive Order 14043: Federal Employees

Just weeks after the Supreme Court struck down an emergency federal rule to require vaccinations by large private employers, Judge Jeffrey Vincent

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184 Id. at 727.
185 Id. at 730 (citing BST Holdings, LLC v. Occupational Safety & Health Admin., 17 F.4d 604, 617 (5th Cir. 2021)).
188 Georgia v. Biden, 574 F. Supp. 3d at 1350.
189 Id. at 1356.
190 See infra notes 256–91 discussion and accompanying text.
191 See infra notes 242–55 discussion and accompanying text.
Brown \(^{193}\) issued a nationwide injunction of Executive Order 14043, which required federal employees to be vaccinated for COVID-19. \(^{194}\) Executive Order 14043 permitted federal employees to apply for religious and medical exemptions. \(^{195}\) Citing the Fifth Circuit’s rejection of vaccination rules, Judge Brown held that “the Hobson’s choice employees face between ‘their job(s) and their jab(s)’ amounts to irreparable harm.” \(^{196}\) And then relying on the Supreme Court’s conclusion that requiring employees to be vaccinated is not a regulation of “workplace conduct,” \(^{197}\) Judge Brown declared that the president “cannot require civilian federal employees to submit to the vaccine as a condition of employment.” \(^{198}\) Like many other Trump-appointed judges, \(^{199}\) Judge Brown held that the balance of the equities favored “the liberty of individuals to make intensely personal decisions according to their own convictions” over the public interest in halting a deadly pandemic. \(^{200}\)

**iii. OSHA Regulations to Require Vaccines by Employees of Large Employers**

**a. OSHA Regulations**

To address the widespread disparity between vaccination and mask rules, \(^{201}\) the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) on November 5, 2021, to require employees of covered employers to undergo COVID-19 vaccination or take weekly COVID-19 tests and wear a mask. \(^{202}\) The ETS instructed employers with 100 or more employees to "establish, implement, and enforce a written mandatory vaccination policy" to ensure that employees are “fully vaccinated.” \(^{203}\) The standard required regular


\(^{195}\) *Id.* at 830.

\(^{196}\) *Id.* at 832 (quoting BST Holdings, LLC v. Occupational Safety and Health Admin., 17 F.4th 604, 618 (5th Cir. 2021)).

\(^{197}\) *Id.* at 834.


\(^{199}\) See infra note 447–74 discussion and accompanying text. See also Barbara Hoffman, *Disabling Disability Rights*, 15 Ne. U.L. Rev. (forthcoming 2023) (manuscript 21–24) (on file with the author) (discussing how federal judges appointed by President Trump have prioritized religious liberties over disability rights).


\(^{201}\) The ETS was issued “to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID–19 in the workplace, and to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers’ authority to require vaccination, face covering, or testing, regardless of the number of employees.” 29 C.F.R. § 1910.501(a) (2022).


COVID-19 testing and masks for employees who qualify for medical or religious exemptions or reasonable accommodations pursuant to the ADA or Title VII. Employees who work alone, in telework, or exclusively outside were exempted from the regulations because they are at minimum risk of spreading COVID-19. OSHA explained why the workplace was ground zero for containing COVID-19:

When employees report to their workplace, they may regularly come into contact with co-workers, the public, delivery people, patients, and any other people who enter the workplace. Workplace factors that exacerbate the risk of transmission of SARS-CoV-2 include working in indoor settings, working in poorly-ventilated areas, and spending hours in close proximity with others. Full-time employees typically spend 8 hours or more at work each shift, more time than they spend anywhere else but where they live.

b. Litigation of OSHA Regulations

1. Initial Cases

Immediately, the ETS was challenged by “private employers, labor unions, state governments, and individual citizens across the country.” The day after the ETS was issued, the Fifth Circuit stayed the ETS pending emergency review. And just one week later, the Fifth Circuit stayed OSHA from enforcing it.

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204 Employees who are not fully vaccinated could comply with OSHA regulations by testing at least once every seven days. OSHA ETS, 86 Fed. Reg. at 61,44761447.
206 OSHA ETS, 86 Fed. Reg. at 61,419.
209 BST Hldgs, LLC. v. OSHA, No. 21-60845, 2021 WL 5166656, at *2 (5th Cir. Nov. 6, 2021) (per curiam).
210 BST Hldgs, LLC. v. OSHA, 17 F.4th 604, 609 (5th Cir. Nov. 12, 2021).
In an opinion by Judge Kurt Englehardt, the Fifth Circuit held that the ETS—which it renamed the “Mandate”—was both overinclusive (characterizing it as a “one-size-fits-all sledgehammer”) and underinclusive (because it did not apply to employers with ninety-eight or fewer workers). But not content to rely on this reasoning, the Fifth Circuit strayed into the partisan debate over vaccination rules. It incredibly concluded that another reason the ETS exceeded OSHA’s statutory authority was that the COVID-19 pandemic was not a “grave danger” to employees because OSHA failed to find that COVID-19 was present “in all covered workplaces.” Yet, as of November 12, 2021, the date of the Fifth Circuit’s opinion, more than 766,000 Americans had died of COVID-19.

Moreover, the Fifth Circuit parroted conservative news attacks on federal attempts to curb the spread of COVID-19 by suggesting “the Mandate makes no serious attempt to explain why OSHA and the President himself were against vaccine mandates before they were for one here.” Additionally, the Fifth Circuit ignored OSHA’s findings of the economic impact of COVID-19 in holding that the ETS “exceeded the federal government’s authority under the Commerce Clause because it regulated noneconomic inactivity.” Finally, the Fifth Circuit also “found ‘irreparable harm’ to the petitioners’ liberty interests of having to choose between their jobs and the vaccine.”

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212 BST Hldgs, LLC., 17 F.4th at 609.
213 Id. at 612.
214 Id. at 611
215 OSHA is authorized to issue emergency temporary standards to address “grave dangers from exposure to substances or agents determined to be toxic or physically harmful.” 29 U.S.C. § 655(c)(1).
216 BST Hldgs, L.L.C., 17 F.4th at 613.
220 BST Hldgs, LLC., 17 F.4th at 618.
2. Consolidated Appellate Case

As challenges to the ETS multiplied, numerous cases were consolidated into the Sixth Circuit. First, the Sixth Circuit denied plaintiffs’ motion for an en banc hearing. Then the Sixth Circuit dissolved the stay issued in BST Holdings, finding the Fifth Circuit failed to address “any of OSHA's factual explanations or its supporting scientific evidence concerning harm.”

The Sixth Circuit correctly noted that the ETS allowed employers “to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces . . . (allowing employers to ‘opt out’ of any vaccination policies)” by choosing instead to “require unvaccinated workers to wear a mask on the job and test for COVID-19 weekly.” It emphasized that the choice lay with the employer to determine whether an employee could telework or work in a physical setting that necessitated COVID-19 precautions.

In rejecting the Fifth Circuit’s “blanket conclusion” that OSHA did not have the statutory authority to mandate vaccinations, the Sixth Circuit held that the COVID-19 pandemic posed exactly the type of “grave danger” to workers that OSHA was authorized to regulate—with religious and medical exceptions—because “voluntary guidance . . . proved inadequate . . . as employees returned to workplaces.” The court concluded OSHA had the authority to issue an emergency order because “the record establishes that COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs.” It spurned the “Fifth Circuit’s conclusion, unadorned by precedent, that OSHA is ‘required to make findings of exposure—or at least the presence of COVID-19—in all covered workplaces.’” The Sixth Circuit dismissed employers’ assertions “that they will need to fire employees, suspend employees, or face employees who quit

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221 Where more than one Circuit reviews the same federal agency order, a “judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received . . . to issue an order consolidating the petitions for review in that court of appeals.” 28 U.S.C. § 2112 (2018).

222 86 Fed. Reg. 61402. 20 F.4th 357, 366


224 In re McP No. 165, 21 F.4th 357, 388 (6th Cir. 2021).

225 Id. at 368.

226 Id. at 367 (internal citations omitted).

227 Id.

228 Id. at 369–71, 379–80 (“[C]ourts have upheld OSHA's authority to regulate hazards that co-exist in the workplace and in society but are at heightened risk in the workplace; see, e.g., Forging Indus. Ass'n v. Sec'y of Labor, 773 F.2d 1436, 1442–43 (4th Cir. 1985) (en banc) (rejecting the argument that 'because hearing loss may be sustained as a result of activities which take place outside the workplace . . . OSHA acted beyond its statutory authority by regulating non-occupational conditions or causes'); see also 29 C.F.R. § 1910.1025 (OSHA regulates workplace exposure to lead)."

229 In re McP No. 165, 21 F.4th at 375

230 Id. at 376 (quoting BST Holdings, L.L.C. v. Occupational Health & Safety Admin., 17 F.4th 604, 613 (5th Cir. 2021)).
over the standard” because the ETS provides “accommodations, variances, or the option to mask-and-test.”

Two Sixth Circuit judges appointed by President Trump issued blistering dissents. In dissenting to the order lifting the Fifth Circuit’s stay of the ETS, Judge Joan Larsen illustrated her position that the ETS was not “necessary” by comparing a deadly pandemic with a hypothetical fire risk in a pizzeria:

One way to protect the workers would be to require all employees to wear oven mitts all the time—when taking phone orders, making deliveries, or pulling a pizza from the flames. That would be effective—no one would be burned—but no one could think such an approach necessary. What OSHA's rule says is that vaccines or tests for nearly the whole American workforce will solve the problem; it does not explain why that solution is necessary.

Although Judge Larsen claims that she does not intend “to trivialize[] OSHA’s task,” her rejection of OSHA’s authority to protect employees from a deadly pandemic does just that. She opines that “it is easy to envision more tailored solutions OSHA could have explored,” such as “a standard aimed at the most vulnerable workers; or an exemption for the least.”

This approach to regulating a highly transmissible virus is akin to pretending a nonsmoking section on an airplane would not be subject to secondhand smoke from the smoking section.

Judge Larsen also reasoned that OSHA’s “claim of emergency rings hollow” because it “waited nearly two years since the beginning of the pandemic and nearly one year since vaccines became available to the public to issue its vaccinate-or-test mandate.” This argument undermines her own assertion that OSHA failed to follow the science; OSHA could reasonably conclude that nearly one year after vaccinations became available, the voluntary vaccination rate remained insufficient to protect employees.

Finally, Judge Larsen asserted that OSHA failed to prove that COVID-19 posed a “grave danger” to employees because it did not specify exactly how many employees would contract COVID-19 at work. But as the majority noted, “OSHA presented substantial evidence both that the workplaces of virtually every industry

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231 Id. at 387–88 (noting that employers’ options to seek a variance from the ETS pursuant to 29 U.S.C. § 655(d) to implement alternative safety measures or to comply by enforcing the temporary mask-and-test component “undercut any claim of irreparable injury”).


233 In re McP No. 165, 21 F.4th at 393 (Larsen, J., dissenting).

234 Id.

235 Id. at 394.

236 Id.

237 Id.

238 Id. at 396–97.
across America present a heightened risk of COVID-19 exposure to employees and that a clear predominance of COVID-19 outbreaks come from workplaces.”

Similarly, in dissenting to the denial of en banc consideration, Judge John K. Bush framed the dispute not as one of statutory authority to protect public health, but simply as one “about power.” Although he acknowledged that OSHA had the authority “to regulate a workplace hazard that affects interstate commerce,” he objected to OSHA’s recognition of “a hazard of life in the United States and throughout the world—COVID-19—as a hazard of the workplace.”

3. Supreme Court Decision

To no one’s surprise, the Supreme Court reversed the Sixth Circuit’s opinion lifting the stay and granted the petitioners’ motion to stay enforcement of the OSHA ETS. In a per curiam opinion, the Court held that the petitioners were likely to prevail on the merits of proving that the Occupational Safety and Health Act did not authorize OSHA to issue the ETS.

The Court critiqued the breadth of the ETS for providing only “narrow exemptions for employees who work remotely ‘100 percent of the time’ or who ‘work exclusively outdoors,’” and characterized “those exemptions are largely illusory” because more than eighty-four million employees are subject to the rule. The Court noted that employers may, but are not required, to exempt unvaccinated employees who choose to undergo weekly testing and wear a face covering. Branding the rule as a “broad public health measure” instead of a “workplace safety” rule, the Court opined that “[a]lthough COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard” because COVID-19 exists everywhere. Taking issue with the scope of the ETS, the Court conceded that OSHA did have the authority to regulate—with targeted precision—situations where “the virus poses a special danger because of the particular features of an employee’s job or workplace,” such as a virus research lab or “particularly crowded or cramped environments.”

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239 Id. at 377–78 n.4 (majority opinion).
241 Id. at 288, 291 (suggesting that because Congress chose not to mandate a federal response to smallpox in the early 1800s or polio in the 1950s, it could not mandate vaccinations for COVID-19 in 2021).
243 Id.
244 Id. at 663–64.
245 Id. at 664.
246 Id. at 665.
247 Id. at 665–66.
In weighing the public equities—the last test to obtain injunctive relief—the Court continued its devaluation of public health by determining that the states, not the federal government, should regulate public health, despite evidence that many Republican-led states failed to do so.

Like the Fifth Circuit, the majority referred to the OSHA regulations as a mandate. But in a compassionate dissent, Justices Breyer, Sotomayor, and Kagan correctly noted that “the Standard does not impose a vaccine mandate; it allows employers to require only masking and testing instead.” They pointed out the obvious—that COVID-19 harms workers “in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk.” This fact underlies the point of statutes such as the ADA because, without statutory protections, employees with disabilities have “little control” and “capacity” to work in an environment free of disability-based discrimination.

See id. at 670, 675 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“[A] court may not issue a stay unless the balance of harms and the public interest support the action”); Trump v. Int’l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam) (slip op., at 10) (“Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms’ and ‘the interests of the public at large.’”).

For example, although the Court fast-tracked its consideration of the OSHA ETS and the CMS Rule, the Court declined four opportunities to stay a Texas law that “imposes a near-categorical ban on abortions,” despite overwhelming evidence of the harm it would pose to women’s health. United States v. Texas, 142 S. Ct. 14, 17 (2021) (Sotomayor, J., concurring in part and dissenting in part); see also In re Whole Woman’s Health, 142 S. Ct. 701, 702 (2022) (Sotomayor, J., dissenting) (“Today, for the fourth time, this Court declines to protect pregnant Texans from egregious violations of their constitutional rights.”).

See Nat’l Fed’n of Indep. Bus., 142 S. Ct. at 670 (Gorsuch, J., concurring); see id. (Breyer, J., dissenting) (citing 86 Fed. Reg. 61,408 (2021)) (“OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months’ time.”). Public health officials have roundly criticized the Court’s decision as limiting the federal government’s ability to protect public health and providing employers cover to discontinue requiring employees to be vaccinated. See Lawrence Gostin, The Supreme Court’s Ruling on Vaccine Mandates Threatens the Federal Government’s Ability to Protect Public Health, FORBES (Jan. 19, 2022), https://www.forbes.com/sites/coronavirusfrontlines/2022/01/19/the-supreme-courts-ruling-on-vaccine-mandates-threatens-the-federal-governments-ability-to-protect-public-health/?sh=2d67b01b5339; see also Katie Moran-McCabe & DeAnna Baumle, Sentinel Surveillance of Emerging Laws Limiting Public Health Emergency Orders, CIT. FOR PUB. HEALTH L. RSC. 5 (May 2022), https://phlr.org/product/sentinel-surveillance-emerging-laws-limiting-public-health-emergency-orders (noting that laws that limit the authority of public health officials to mandate vaccines “could have a significant negative impact on health”); COVID-19 Vaccination and Testing: Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,417 (Nov. 5, 2021), (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928) (“Vaccines remain very effective at reducing the occurrence of COVID-19-related severe illness, disability and death”).

See infra notes 355–58 and accompanying text.

BST Hlds, LLC. v. Occupational Safety & Health Admin., 17 F.4th 604, 609 (5th Cir. 2021).


Id. at 675 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

Id. at 670, 674 (“COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there.”).
iv. CMS Regulations to Require Vaccinations of Healthcare Workers

a. CMS Regulations

Unlike the OSHA ETS, federal regulations governing vaccination among healthcare workers survived the litigation gauntlet. On November 5, 2021, the Secretary of Health and Human Services (HHS) issued an interim rule (hereinafter the “CMS Rule”) that required facilities that provide health care to Medicare and Medicaid beneficiaries to ensure that their staff, unless exempt for medical or religious reasons, are fully vaccinated against COVID-19.256 HHS Secretary Xavier Becerra determined that the CMS Rule was “necessary for the health and safety of individuals to whom care and services are furnished.”257 Secretary Becerra “found that due to the same factors that qualified them for enrollment (age, disability, and/or poverty), patients covered by Medicare or Medicaid are ‘more susceptible’ than the general population ‘to severe illness or death’ if they contract COVID-19.”258 Although CMS considered “that the rule might cause staffing shortages, including in rural areas,”259 it dismissed threats by some employers that resisted vaccination rules because they feared that employees would quit over mandates.260 Instead, CMS argued that vaccination requirements for healthcare workers would alleviate staffing shortages caused by “absenteeism due to COVID-19 related exposures or illness . . . that disrupt patient access” to healthcare.261

b. Litigation of the CMS Rule in Lower Courts

More than two dozen states challenged the CMS Rule in three federal courts. Florida brought its own suit in the Northern District of Florida.262 One group of ten states—Missouri, Alaska, Arkansas, Iowa, Kansas, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming—sued in the Eastern District of Missouri.263 Another group of fourteen states—Louisiana, Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Mississippi, Montana, Ohio, Oklahoma, South


257 Id. at 61,561.


260 See infra notes 267–68 discussion and accompanying text.

261 Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. at 61,559.

262 See Florida v. Dep't of Health & Hum. Servs., 19 F.4th at 1277.

Carolina, Utah, and West Virginia—filed a similar case in the Western District of Louisiana.\textsuperscript{264}

The United States District Court for the Northern District of Florida declined to stay the CMS Rule, holding that Florida failed to prove it would suffer an irreparable injury should the court deny an injunction.\textsuperscript{265} The Eleventh Circuit affirmed, ruling that CMS had statutory authority to pass the Rule for the “health and safety” of Medicare and Medicaid recipients.\textsuperscript{266} In rejecting the anecdotal evidence presented by Florida of the economic harm it feared would result from requiring vaccinations, the Eleventh Circuit defended CMS’s conclusion that the potential risk of temporary staffing shortages, especially in rural hospitals, was outweighed by the urgency to prevent the spread of COVID-19 in healthcare settings: “[i]n issuing the interim rule, the Secretary considered that requiring vaccinations could cause some health care workers to leave their jobs rather than be vaccinated. But after reviewing empirical evidence, the Secretary concluded that this concern was overstated and outweighed by countervailing considerations.”\textsuperscript{267}

Further, the Eleventh Circuit relied on evidence “that when large hospital systems and other health care employers imposed vaccine mandates, workers responded to the mandates by getting vaccinated, not leaving their jobs.”\textsuperscript{268}

But subsequently, two federal courts stayed the implementation of the CMS Rule. First, the United States District Court for the Eastern District of Missouri granted a preliminary injunction to ten states, holding that the COVID-19 pandemic was not the type of “emergency” for which Congress authorized CMS to remedy with an emergency rule.\textsuperscript{269} Judge Matthew Schelp\textsuperscript{270} enjoined CMS from implementing or enforcing the Rule in the ten plaintiff states.\textsuperscript{271} Rejecting medical consensus,\textsuperscript{272} Judge Schelp criticized CMS for “fail[ing] to consider or reject[ing]...
obvious alternatives” to vaccinations, such as weekly COVID-19 testing or the role of “natural immunity.” In contrast to the Northern District of Florida, the Eastern District of Missouri accepted the plaintiffs’ argument that they would suffer irreparable harm because the CMS Rule would exacerbate already existing staffing shortages when employees quit instead of becoming vaccinated.

Finally, dissatisfied with a limited stay, the United States District Court for the Western District of Louisiana extended the injunction nationwide, excluding only the ten states covered by Missouri v. Biden. At the time of the injunction, 2.4 million healthcare workers were unvaccinated. Judge Terry Doughty relied on the Fifth Circuit's decision staying the OSHA ETS to find that requiring employees to “choose between their jobs and the vaccine” violated their liberty. On appeal, the Fifth Circuit declined to stay the trial court’s order as it applied to the fourteen plaintiff states but granted the stay of the order's application to other jurisdictions.

c. Litigation of the CMS Rule in the Supreme Court

The Supreme Court, by a five-to-four vote, granted CMS’s application to stay the preliminary injunctions issued by the federal courts in Louisiana and Missouri. Chief Justice Roberts and Justice Kavanaugh, who believed that OSHA did not have the authority to regulate vaccinations in all industries, joined the majority to rule that HHS had the more limited authority to regulate vaccinations


See id. at 1100 (“Staff reductions due to implementing the mandate, especially in light of the already understaffed healthcare facilities, will cause a cascade of consequences,” resulting in a decrease in the quality of medical care, “compromis[ing] the safety of patients, and plac[ing] even more stress on remaining staff.”).

Louisiana v. Becerra, 571 F. Supp. 3d at 543–44. The trial court’s injunction included Florida, “effectively awarding Florida the relief it sought in the district court and it sought in its motion for injunction pending appeal, even though Florida was not a party to the Louisiana matter and even though the Northern District of Florida denied the State this relief.” Florida v. Dep't of Health & Hum. Servs., 19 F.4th 1271, 1280 (11th Cir. 2021). The Eleventh Circuit criticized the district court for basing what should be seldom-awarded nationwide relief on the claims of a non-party—the Association of Builders and Contractors. Id. at 1282.


Louisiana v. Becerra, 571 F. Supp. 3d at 532 (discussing BST Hlds, LLC, v. Occupational Safety & Health Admin., 17 F.4th 604, 615–17 (5th Cir. 2021)). Judge Doughty expressed skepticism that even Congress would have the authority to require health care employees to be vaccinated. Id. at 537.


of employees in industries that received Medicare and Medicaid funding, as long as employees could seek medical or religious exemptions. 281

In declining to stay enforcement of the CMS Rule, the Court noted that the core mission of HHS “is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients’ health and safety.” 282 To further that mission, CMS “has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds.” 283 It was, therefore, acting within its statutory authority to conclude “that a vaccine mandate is ‘necessary to promote and protect patient health and safety’ in the face of the ongoing pandemic.” 284 One significant difference between the OSHA and CMS cases is that all employers tasked with carrying out the CMS vaccination requirements receive federal funding, 285 whereas the class of employers tasked with carrying out the OSHA vaccination requirements was determined by their size, not by their source of funding. 286

Justices Alito, Thomas, Gorsuch, 287 and Barrett dissented. Justice Alito downplayed the urgency of combatting a deadly pandemic. He faulted CMS for failing to seek public comment before issuing the rule because, somehow, evidence that hundreds of thousands of Americans died between January 1, 2021—when vaccines became available—and November 5, 2021—when CMS issued the Rule 288—was not “something specific that illustrates a particular harm that will be

281 See id. at 650.

282 Id.

283 Id.

284 Id. at 652 (quoting Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,613 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491, 494)). HHS regulations require facilities that participate in Medicare and Medicaid to have effective “infection prevention and control program[s]” to “help prevent the development and transmission of communicable disease and infections.” 42 C.F.R. § 483.80.

285 See Biden v. Missouri, 142 S. Ct. at 652 (“[H]ealthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting.”).


287 Justice Gorsuch was criticized for being the only Justice at oral arguments who refused to wear a mask. Justice Sotomayor, who sits next to Justice Gorsuch and whose diabetes places her at high risk of serious illness or death should she be diagnosed with COVID-19, chose to attend the oral argument remotely from her chambers. See David Leonhardt, Maskless and Inaccurate, N.Y. Times (Jan. 14, 2022), https://www.nytimes.com/2022/01/14/briefing/supreme-court-covid-mask-mandate.html.

caused by the delay required for notice and comment.”

Justice Alito criticized CMS for “its own repeated delays” to fail to require vaccines as soon as they became available in early 2021. But as Justice Breyer wrote, CMS took only two months to prepare the seventy-three-page rule and concluded “that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths.”

The Court’s decision to strike down the OSHA ETS but uphold the CMS Rule was consistent with its restriction of federal authority in areas it asserts are better left to state and local governments.

B. Litigation Challenging State and Local Mask and Vaccine Rules

i. A Short History of State and Local Vaccine Mandates

More than a century before COVID-19, litigants challenged state and local vaccination rules. Shortly after a smallpox epidemic raged through Europe in the 1870s, the United States experienced a spike in smallpox cases and deaths. In response, Massachusetts passed a law that enabled “the board of health of a city or town” to “require and enforce” smallpox vaccinations. Thereafter, in response to “increasing” and “prevalent” cases of smallpox, the City of Cambridge required that “all inhabitants of the city” be vaccinated but some residents resisted.

conditions that are listed as the cause of death, or delays in reporting”); Becky Sullivan, New Study Estimates that More than 900,000 People Died from COVID-19 in U.S., NPR (May 6, 2021, 12:58 PM), https://www.npr.org/sections/coronavirus-live-updates/2021/05/06/994287048/new-study-estimates-more-than-900-000-people-have-died-of-covid-19-in-u-s. See infra note 417 discussion for a reminder that these statistics represent human lives.

Biden v. Missouri, 142 S. Ct. at 660 (Alito, J., dissenting) (quoting United States v. Brewer, 766 F.3d 884, 890 (8th Cir. 2014)).

Id. at 660.

Id. at 654 (majority opinion) (citing Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,584–86 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts 416, 418, 441, 460, 482, 483, 484, 485, 486, 491, 494)).


Smallpox cases more than tripled from 21,064 in 1900 to 72,946 in 1902. Aaron O'Neill, Number of Smallpox Cases Recorded in the United States from 1900 to 1952, STATISTA (Jun. 21, 2022), https://www.statista.com/statistics/1102664/smallpox-cases-in-the-united-states/.


The law exempted only children who had physician-signed certificates asserting that they were not fit for vaccination. Id. at 12–13.
Accordingly, Massachusetts prosecuted Henning Jacobson for refusing to be vaccinated. A Swedish immigrant who led a Cambridge church, Jacobson claimed that mandatory vaccination was an unconstitutional “assault upon his person” that denied him the right “to care for his own body and health in such way as to him seems best.” Jacobson was convicted and sentenced to jail until he paid a five-dollar fine.

The United States Supreme Court upheld Jacobson’s conviction. The Court held that an individual’s rights must, at times, yield to the common good of an organized society—here, the State’s interest “to safeguard the public health.” It recognized that a “[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.” In holding that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members,” the Court rejected an individual’s right to resist vaccinations that would subordiate the health and safety of the general public to “the notions of a single individual.”

ii. Litigation Challenging State and Local Vaccine Mandates

With Jacobson v. Massachusetts intact, courts throughout the country upheld state and local vaccination rules during the COVID-19 pandemic. In contrast to its expedited review of federal rules requiring COVID-19 vaccinations, the Supreme Court refused to intervene in cases brought by state healthcare workers who sought to enjoin COVID-19 vaccination mandates that did not provide for religious exemptions.
a. Cases Upholding State Mandates

1. State Vaccine Mandates for Health Care Workers

Prior to issuance of the CMS Rule, fifteen states required health care workers to be vaccinated as a condition of employment.\textsuperscript{308} For example, the Maine Department of Health and Human Services, in August 2021, amended existing vaccination rules to require healthcare workers to be vaccinated against COVID-19; the rule allowed for medical, but not religious, exemptions.\textsuperscript{309} On appeal, the First Circuit affirmed the denial of an injunction, noting that “health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often require close contact between providers and patients (who often are medically vulnerable).”\textsuperscript{310} In holding that the Maine rule was narrowly tailored to fight the pandemic,\textsuperscript{311} the court found that Maine hospitals would suffer undue hardship if they had to exempt employees who resisted vaccination.\textsuperscript{312} The First Circuit affirmed, holding that the rule was neither underinclusive nor overinclusive.\textsuperscript{313}

Similarly, the New York State Department of Health issued a regulation on August 26, 2021 that required COVID-19 vaccination of healthcare workers employed at hospitals and nursing homes; the rule provided for medical, but not religious, exemptions.\textsuperscript{314} Seventeen New York State medical professionals sought to enjoin the regulation on the grounds that it violated their sincere religious beliefs.\textsuperscript{315} The United States District Court for the Eastern District of New York denied the plaintiffs’ motion for a preliminary injunction,\textsuperscript{316} but the United States District Court for the Northern District of New York granted the plaintiffs’ motion.\textsuperscript{317}


\textsuperscript{310} Does, 16 F.4th at 27.

\textsuperscript{311} See id. at 33.

\textsuperscript{312} See id. at 36.

\textsuperscript{313} Id. at 33.

\textsuperscript{314} We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272, 274 (2d Cir.) (per curiam), opinion clarified, 17 F.4th 368 (2d Cir. 2021).

\textsuperscript{315} Id. at 276.

\textsuperscript{316} Id. at 272.

The Second Circuit affirmed in part and reversed in part.\textsuperscript{318} The Second Circuit held that the regulation did not violate the plaintiffs’ right to bodily autonomy under the Fourteenth Amendment because it permitted healthcare providers “to accommodate—not exempt—employees with religious objections, by employing them in a manner that removes them from the Rule’s definition of ‘personnel.’”\textsuperscript{319} Acknowledging that employees have a right under Title VII to be free from religious discrimination, the Second Circuit noted that “Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated.”\textsuperscript{320}

Foreshadowing its decision upholding the CMS Rule, the Supreme Court rejected the plaintiffs’ application for injunctive relief in the Maine and New York cases.\textsuperscript{321} But in both cases, Justice Gorsuch and Justice Alito dissented, asserting that the rules failed the strict scrutiny requirement to be “narrowly tailored to serve a compelling state interest”\textsuperscript{322} because they prohibited “exemptions for religious reasons while permitting exemptions for medical reasons.”\textsuperscript{323}

Other state vaccination orders also withstood legal challenge. Illinois Governor J.B. Pritzker signed an emergency order on September 3, 2021, requiring healthcare workers to be vaccinated.\textsuperscript{324} The order permitted exemptions for medical and religious reasons but required weekly testing for unvaccinated employees.\textsuperscript{325} Six firefighters sought to enjoin the order.\textsuperscript{326} The district court surveyed “the long history of informed consent and the established right to bodily autonomy and privacy” and concluded that the State’s right to protect public health outweighed the firefighters’ rights to bodily autonomy.\textsuperscript{327} The court also held that the order did not impair the firefighters’ “occupational liberty” because unvaccinated employees could continue to work as long as they complied with weekly testing.\textsuperscript{328}

Similarly, the New Mexico Department of Health issued an emergency order requiring hospital workers and individuals who sought entry into the State Fair to

\textsuperscript{318} We The Patriots USA, 17 F.4th at 296 (affirming Eastern District’s denial of preliminary injunction and reversing Northern District’s grant of preliminary injunction).

\textsuperscript{319} We The Patriots USA, 17 F.4th at 370.

\textsuperscript{320} Id. at 292.

\textsuperscript{321} A v. Hochul, 142 S. Ct. 552, 555 (2021); Does v. Mills, 142 S. Ct. 17, 17 (2021).

\textsuperscript{322} A., 142 S. Ct. at 555 (Gorsuch, J., dissenting); \textit{see Does}, 142 S. Ct. at 21 (Gorsuch, J., dissenting).

\textsuperscript{323} A., 142 S. Ct. at 556–57 (Gorsuch, J., dissenting) (“Maybe the most telling evidence that New York’s policy isn’t narrowly tailored lies in how unique it is. It seems that nearly every other State has found that it can satisfy its COVID–19 public health goals without coercing religious objectors to accept a vaccine.”); \textit{see Does}, 142 S. Ct. at 21 (“Maine has not shown that its rule represents the least restrictive means available to achieve it… Many other States have made do with a religious exemption in comparable vaccine mandates.”).

\textsuperscript{324} Halgren v. City of Naperville, 577 F. Supp. 3d 700, 715 (N.D. Ill. 2021).

\textsuperscript{325} Id.

\textsuperscript{326} \textit{See id.} at 717.

\textsuperscript{327} \textit{See id.} at 733, 746.

\textsuperscript{328} Id. at 751.
be vaccinated.\textsuperscript{329} The health order exempted individuals with a medical condition that would be worsened by immunization and those entitled “to a disability-related reasonable accommodation or a sincerely held religious belief accommodation.”\textsuperscript{330} In refusing to enjoin the order, the trial court noted that “federal courts have consistently held that vaccine mandates do not implicate a fundamental right and that rational basis review therefore applies in determining the constitutionality of such mandates.”\textsuperscript{331} It held that the balance of equities tipped in New Mexico’s favor to prevent the spread of disease.\textsuperscript{332}

2. State University Vaccination Rules

Rutgers University was the first of major universities to require students to be vaccinated before returning to campus in August 2021.\textsuperscript{333} Like many courts, the United States District Court for the District of New Jersey relied on \textit{Jacobson v. Massachusetts} to deny an injunction to students who opposed the vaccination policy.\textsuperscript{334}

Likewise, eight students challenged Indiana University’s requirement that all students, faculty, and staff be fully vaccinated for numerous diseases, including

\begin{itemize}
  \item \textsuperscript{329} Valdez v. Grisham, 559 F. Supp. 3d 1161, 1168 (D.N.M. 2021).
  \item \textsuperscript{331} \textit{Id.} at 1175–76. The court held:
    
    In the context of the current pandemic, courts have applied \textit{Jacobson} to find that mandatory vaccine policies at state universities – all of which, like the vaccine policy at issue here, provide for medical, disability, and religious belief exemptions – meet the rational basis test. \textit{See Klaassen I}, 549 F.Supp.3d at 873 (noting that, in light of the fact that the “vaccination campaign has markedly curbed the pandemic,” “Indiana University insisting on vaccinations for its campus communities,” thereby “stemming illness, hospitalizations, or deaths at the university level[,] hardly proves irrational”); \textit{Harris}, 2021 WL 3848012, at *6 (holding that university's decision to mandate vaccines was based “upon both medical and scientific evidence and research and guidance, and thus is at least rationally related to” the “legitimate interests” of curbing the spread of COVID-19 and “returning students safely to campus”); \textit{America’s Frontline Doctors v. Wilcox}, No. 21-EDCV-1243, 2021 U.S. Dist. LEXIS 144477 (C.D. Cal. July 30, 2021) (holding that “there is clearly a rational basis for Defendants to institute the Policy requiring vaccination” to further the goal of facilitating the “protection of the health and safety of the University community,” where the policy was “the product of consultation with UC infections disease experts and ongoing review of evidence from medical studies concerning the dangerousness of COVID-19 and emerging variants of concern, as well as the safety and effectiveness of the vaccines”).
    
    \textit{Id.} at 1175–76 (alteration in original).
  \item \textsuperscript{332} \textit{Id.} at 1182.
  \item \textsuperscript{334} \textit{See Child.'s Health Def.}, 2021 WL 4398743, at *5, *8.
\end{itemize}
COVID-19, prior to returning to campus for the fall 2021 semester. Relying on Jacobson, the trial court held that the university’s vaccine rule was rationally related to the university’s interest in protecting public health. In an opinion by Judge Frank Easterbrook, the Seventh Circuit affirmed, asserting that “this case is easier than Jacobson for the University, for two reasons.” First, unlike the Indiana University rule—which provided for medical and religious exemptions—the Cambridge smallpox ordinance offered no exemptions. Second, unlike the city-wide Cambridge rule, the Indiana University rule is limited to just faculty and staff of the University, who are free to work and matriculate elsewhere.

3. State Mask Rules

In addition to upholding the authority of state and local governments to mandate vaccinations, several courts also upheld the authority of state and local governments to mandate wearing face masks in public settings. For example, Connecticut Governor Ned Lamont issued an executive order in August 2020 requiring masks in all public places. A federal court denied an injunction to an attorney who alleged that she had “a mental health disability in the form of phobia and associated panic disorder” that interfered with her ability to wear a mask. The court concluded that the masking order was a reasonable safety precaution and “given the nature of this pandemic, the balance of the equities and the public interest favor denying a preliminary injunction.” Likewise, the Court of Appeals of Nevada declined to enjoin a state rule that required mask wearing in public.

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335 Klaassen v. Trs. of Ind. Univ., 549 F. Supp. 3d 836, 843 (N.D. Ind.), aff’d, 7 F.4th 592 (7th Cir. 2021); SCOTUSblog article: Amy Howe, Barrett Leaves Indiana University’s Vaccine Mandate in Place, SCOTUSBLOG (Aug. 12, 2021, 9:40 PM), https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/ (Justice Barrett denying emergency application for writ of injunction).

336 See Klaassen, 549 F. Supp. 3d at 871–72.

337 Klaassen, 7 F.4th at 593.

338 Id. (“Indeed, six of the eight plaintiffs have claimed the religious exception, and a seventh is eligible for it. These plaintiffs just need to wear masks and be tested, requirements that are not constitutionally problematic.”).

339 See id.


341 Id.

342 Id. at *11–*12.

b. Cases Upholding Local Mandates

Local mask requirements, especially those requiring students to wear masks, also withstood court challenges throughout the country. A law student in Broward County, Florida, challenged a county mask rule that required him to wear a mask on campus, claiming wearing a mask violated his religious beliefs. Holding that the county rule “quite easily” survived rational basis review, the court dismissed his complaint. The court recognized that requiring someone to wear a face mask in public was a relatively insignificant intrusion on personal autonomy because “masks can plausibly be characterized as egregious or ‘arbitrary or conscience shocking in a constitutional sense.”

Similarly, many courts upheld public schools’ rights to require students and staff to wear masks, finding that requiring someone to wear a mask does not impact a fundamental right and is rationally related to protecting school children and staff from COVID-19. For example, one court refused to stay a Pennsylvania school district’s rule requiring masks at school and on buses. In dismissing the plaintiffs’ complaint that masks prevented students from freely associating with one another, the court elucidated:

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344 See e.g., Shelton v. City of Springfield, 497 F. Supp. 3d 408 409–10 (W.D. Mo. 2020) (requiring people who were standing in line to enter a place of public accommodation to wear a mask unless they satisfied a medical exemption); see also United States v. Crittenden, No. 20–CR–7, 2020 WL 4917733, at *9 (M.D. Ga. Aug. 21, 2020) (concluding federal courtroom mask requirement did not violate fundamental rights); Stewart v. Just., 502 F. Supp. 3d 1057, 1061 (S.D.W. Va. 2020) (enforcing county rule requiring "an adequate face covering when in confined, indoor spaces where other individuals may be present, regardless of one’s perceived ability to social distance from other individuals"); Forbes v. Cty. of San Diego, No. 20–CV–00998, 2021 WL 843175, at *1 (S.D. Cal. Mar. 4, 2021) (upholding county rule requiring face masks in public places).


346 Id. at *17, *23.

347 See id. at *17 (citing McCants v. City of Mobile, 752 F. App’x 744, 749 (11th Cir. 2018) and Case v. Ivey, No. 2:20–CV–777–WKW, 2021 WL 2210589, at *22 (M.D. Ala. June 1, 2021) (dismissing substantive due process challenge to mask mandate)).

348 Although most challenges to vaccinations and masks in schools were filed by parents seeking accommodations for their children who had disabilities or by parents who refused to vaccinate or mask their children, every school case implicated Title I because they affected the rights of school employees. See infra note 349.


351 Id. at *9–10.
No one except perhaps a bank robber likes to wear a mask—and even then with reluctance, but as a concession to professional attire. But the Constitution does not shield us from all things we dislike. . . . The Constitution does not guarantee students a right to attend school without wearing a mask and being required to do so neither inflicts irreparable harm nor in any way violates students’ right to freely associate and assemble with others.352

Courts also permitted enforcement of mask mandates in private schools. For example, parents of private school students sought a temporary restraining order to enjoin Michigan’s mandate that required all students over the age of five to wear a mask in school.353 The Sixth Circuit affirmed the lower court’s denial of a temporary restraining order and rejected plaintiffs’ free exercise of religion and equal protection claims because the mandate orders “are neutral and of general applicability and satisfy rational-basis review.”354

iii. State Laws Prohibiting Vaccine and Mask Mandates

Throughout the pandemic, as COVID-19 rates cyclically soared and plummeted, states issued, revised, and rescinded rules requiring vaccinations and mask wearing in public. Since Jacobson v. Massachusetts, most state and local laws governing vaccinations for contagious diseases required vaccinations to protect the public health. But the hyper-partisan atmosphere of the COVID-19 pandemic catalyzed states governed by Republicans to demand an extraordinary reversal of a state’s traditional role as a guardian of public health.355 By mid-January 2022,

352 Id. at *1.
354 Id. at 460–61.
twenty states, all with Republican governors, had limited vaccine\textsuperscript{356} and mask\textsuperscript{357} mandates in schools and other public places—eleven through executive orders and nine through state statutes.\textsuperscript{358}

\begin{itemize}
\item Alabama Governor Kay Ivey issued an executive order—“to ensure that the State of Alabama never forces anyone to take an unwanted COVID-19 vaccine”—that prohibited local governmental entities, schools, and businesses from requiring proof of vaccination as a condition for admission or to receive goods and services. \textit{Exec. Order No. 724, OFF. OF THE GOVERNOR OF ALA.} (Oct. 25, 2021), https://governor.alabama.gov/newsroom/category/executive-orders/.
\item Florida Governor Ron DeSantis signed bills that prohibited vaccine passports by public employers. \textit{Fla. STAT. ANN.} § 112.0441 (2021).
\item Idaho Governor Brad Little signed an order banning all executive entities from requiring people to show proof of vaccination to receive services or to enter buildings. \textit{Exec. Order No. 2021-04, DEPT’S STATE OF IDAHO} (Apr. 7, 2021), https://gov.idaho.gov/wp-content/uploads/2021/04/EO-2021-04.pdf (“Whereas, it is contrary to my core values as an Idahoan and conservative to have the State of Idaho mandate the COVID-19 vaccine or issue COVID-19 vaccine passports[].”).
\item Tennessee Governor Bill Lee signed a law “to safeguard the constitutional rights and liberty interests of persons during the COVID-19 pandemic” by prohibiting a governmental entity, school, or local education agency from requiring vaccines.” TENN. CODE ANN. §§ 14-1-103, 14-2-101 (2021).
\end{itemize}

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\end{itemize}
• Utah Governor Spencer Cox signed a law blocking governmental entities, colleges, and universities from issuing vaccine mandates. **UTAH CODE ANN. § 26-68-102 (2021).**
• Wyoming Governor Mark Gordon signed a law prohibiting any public entity from enforcing vaccine mandates. **WYO. STAT. ANN. § 9-14-103 (2021).**

For example:
• Arkansas Governor Asa Hutchinson stated that he regretted signing a bill that banned state and local mask mandates. Fischels, *supra* note 355.
• Florida Governor Ron DeSantis signed an order prohibiting state agencies from mandating COVID-19 vaccine mandates. Fischels, *supra* note 355.
• Georgia Governor Brian Kemp signed an order that prohibited local governments from mandating COVID-19 vaccine mandates. Fischels, *supra* note 355.
• Iowa Governor Kim Reynolds signed a bill that prohibited schools and local governments from issuing a mask mandate. **IOWA CODE § 280.31 (2021).** The Southern District for Iowa issued a temporary restraining order to prevent the law from limiting masks in schools. *Arc of Iowa v. Reynolds*, 559 F. Supp. 3d 861, 866 (S.D. Iowa 2021) (enjoining state law that banned local school districts from implementing universal mask policies on school property as violating the ADA and Rehabilitation Act because mask mandates are a reasonable accommodation to enable children with disabilities to attend school safely).
• Montana Governor Greg Gianforte signed a bill prohibiting local public entities from being required to enforce a mask mandate on May 10, 2021. **MONT. CODE ANN. § 2-9-906 (2021).**
• Texas Governor Greg Abbott signed an order prohibiting state and local governments and public schools from issuing mask mandates. *Exec. Order GA 36, supra* note 356.
• On his first day in office, Virginia Governor Glenn Youngkin signed an order permitting parents to determine whether their children would wear a mask at school, which claimed that masks provided “inconsistent health benefits” and “inflicted notable harm.” *Exec. Order Number Two (2022) and Order of Public Health Emergency One, COMMONWEALTH OF VA. OFF. OF THE GOVERNOR (Jan. 15, 2022),*
Individuals with disabilities successfully challenged many of these rules. Several courts recognized that the ADA and the Individuals with Disabilities Education Act required mask policies that protected students with disabilities from enhanced risk of serious illness or death from COVID-19.\footnote{State Government Policies About Vaccine Requirements, BALLOTpedia, https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports) (Dec. 14, 2022).}

For example, students with disabilities sought relief preventing the enforcement of Tennessee Governor Bill Lee’s Executive Order No. 84, which provided parents or guardians of children in Tennessee the right to opt out of wearing masks in schools, even if the school, school system, local health department, or other governmental entity otherwise required that masks be worn.\footnote{See, e.g., ARC of Iowa v. Reynolds, 566 F. Supp. 3d 921, 927 (S.D. Iowa 2021) (enjoining state law that banned local school districts from implementing universal mask policies on school property as violating the ADA and Rehabilitation Act because mask mandates are a reasonable accommodation to enable children with disabilities to attend school safely); see also Disability Rts. S.C., 564 F. Supp. at 424 (enjoining state law that banned local school districts from implementing universal mask policies on school property as violating the ADA and Rehabilitation Act “because it fails to accommodate disabled children and denies them the benefits of public schools’ programs, services, and activities to which they are entitled”); P.M. ex rel. Maras v. Mayfield City Sch. Dist. Bd. of Educ., No. 21 CV 1711, 2021 WL 4148719, at *2–3 (N.D. Ohio Sept. 13, 2021) (upholding school district’s mask mandate as not violating “Fifth and Fourteenth Amendment rights to life, liberty, and property”).}

The district court issued a temporary restraining order that prevented parents from opting out of the mask mandate. In dismissing as “hyperbole” the school district’s “contention that a mask mandate would cause it to endure an undue administrative burden,” the court held that the students stated a claim for violations of the ADA and the Rehabilitation Act.\footnote{G.S. v. Lee, 558 F. Supp. 3d 601, 605 (W.D. Tenn. 2021).} The court rejected Governor Lee’s argument that a mask mandate would harm third parties (non-disabled children and their parents).\footnote{Id. at 613.}

The Sixth Circuit denied a stay pending appeal. Like the trial court, the Sixth Circuit spurned Governor Lee’s argument that mask rules were like a rule requiring an “impractical and virtually impossible” to enforce “fragrance-free work environment.”\footnote{Id. at 611 (noting that at least one plaintiff got COVID-19 after being exposed to an unmasked student with COVID-19).} The Sixth Circuit noted that the federal district courts for all three districts in Tennessee enjoined enforcement of Governor Lee’s order on ADA grounds.\footnote{Id. at 607.}
Unlike most courts, however, the Fifth Circuit remained hostile to mandatory safety rules, including mask requirements. Texas Governor Greg Abbott signed an executive order that banned local school districts from implementing universal mask policies on school property. The trial court enjoined the order as violating the ADA and the Rehabilitation Act because it forced students with disabilities to forego in-person learning altogether or assume “unnecessarily greater health and safety risks than their nondisabled peers.” However, the Fifth Circuit reversed. In an opinion by Judge Cory T. Wilson, the Fifth Circuit stayed the district court’s order granting a permanent injunction pending appeal, holding: (1) that Texas “demonstrated a strong likelihood of success on the merits and the prospect of irreparable injury absent a stay”; (2) that allowing enforcement of the order would “not risk substantial injury to the plaintiffs”; and (3) “that the public interest favors a stay.”

The Fifth Circuit was skeptical that students with disabilities would suffer sufficient injury if masking was not mandated because other safety measures such as “distancing, voluntary masking, class spacing, plexiglass, and vaccinations” would protect them. Even more absurdly, the Fifth Circuit noted that any harm the plaintiffs suffered was “self-inflicted” because Texas did not “bar plaintiffs’ physical access to school.” The Fifth Circuit held that the plaintiffs were unlikely to succeed on the merits of their ADA and Rehabilitation Act claims because “vaccines, voluntary masking, and other possible accommodations” were somehow adequate, and plaintiffs “are not entitled to their preferred accommodation.”

Finally, in weighing the relative potential harms suffered by both parties, the Fifth Circuit discounted the plaintiff’s evidence that they would risk injury or death from exposure to COVID-19 as merely “tenuous and speculative” and held that Texas would suffer the irreparable injury “of denying the public interest in the enforcement of its laws,” a conclusion so broad as to render nearly impossible any litigant’s ability to prove it would suffer more irreparable injury than would Texas.

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369 Id. at 659.
372 Id. at 766.
373 Id. at 771 n.2.
374 Id. at 768.
375 Id. at 770.
376 Id. (citing Veasey v. Abbott, 870 F.3rd 387, 391 (5th Cir. 2017)).
377 See Plaintiffs’ Brief in Opposition to Defendant’s Emergency Motion to Stay Injunction Pending Appeal, E.T., 19 F.4th, at *5 (Defendants’ “only argument for irreparable injury is in a single paragraph, arguing that it is always harmful to enjoin government officials from carrying out validly enacted laws”).
Similarly, a district court refused to stay Florida Governor Ron DeSantis’s executive order banning school districts from imposing mask mandates. The court held that students with disabilities failed to exhaust administrative remedies under the Individuals with Disabilities Education Act and raised many accommodation issues that required individualized assessment. Though, in dicta, the court acknowledged “that as a general matter, immunocompromised individuals would be benefitted by settings in which those surrounding them are wearing masks.”

C. Litigation Challenging Private Employer Mask and Vaccine Rules

Like public entities that passed vaccine and mask rules to protect the public, many private employers imposed vaccine and mask rules to protect their employees and customers. These safeguards had precedent. Before the COVID-19 pandemic, courts considered employees’ opposition to vaccinations in the context of flu vaccines. These cases generally favored the employer’s right to require employees to be vaccinated against contagious diseases.

Logically, the healthcare industry updated health and safety protocols in response to COVID-19. These rules typically survived challenges from employees. For example, employees of Massachusetts General, a private hospital system, who were denied a religious or medical exemption from a COVID-19 vaccination policy, challenged the hospital’s vaccination mandate for all staff. The First Circuit denied an injunction pending appeal, holding that, as a private employer, Massachusetts General could impose employment criteria that impaired First Amendment rights. The Supreme Court declined to issue a stay.

In a similar case, employees of a private Kentucky hospital challenged an employment condition that they be vaccinated against COVID-19; the rule permitted exemptions for those with disabilities and sincerely held religious objections to vaccines. Ruling that the hospital complied with Title VII and the ADA by permitting medical and religious exemptions, the trial court denied the

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379 Id. at 1197.
380 Id. at 1208.
381 See, e.g., Edwards v. Elmhurst Hosp. Ctr., No. 11 CV 4693 RRM LB, 2013 WL 839535, at *1, *3 (E.D.N.Y. Feb. 15, 2013) report and recommendation adopted, No. 11-CV-4693, 2013 WL 828667 (E.D.N.Y. Mar. 6, 2013) (dismissing public hospital employee’s argument that the hospital policy requiring staff to be vaccinated for the H1N1 virus that killed more than 12,000 Americans violated his religious beliefs).
382 See Mary-Lauren Miller, Inoculating Title VII: The “Undue Hardship” Standard and Employer-Mandated Vaccination Policies, 89 FORDHAM L. REV. 2305, 2321 (2021) (reviewing Title VII cases where the employee sought exemption from a vaccination policy).
385 Id. (denying application for injunctive relief, Nov. 29, 2021) (J. Breyer).
employees an injunction.\textsuperscript{387} It also dismissed the employees’ constitutional claims because the employer was a private entity, not a state actor.\textsuperscript{388}

Finally, describing the private hospital policy as “less restrictive than the\textit{ Jacobson} mandate, and being enacted by a private actor,”\textsuperscript{389} the court concluded the policy “appropriately balances the public interests with individual liberties.”\textsuperscript{390} In weighing the balance of equities, the court accepted the necessity of strict health and safety protocols during a pandemic.\textsuperscript{391} Noting that private employers have the right “to set conditions of employment,”\textsuperscript{392} the court explained how vaccine mandates were no different from other employment protocols:

In these cases “easier” than\textit{ Jacobson}, which deal with private, non-state actors, courts have rationalized that each of us trade off our individual liberties every day in exchange for employment. . . . Yet, to work at St. Elizabeth, Plaintiffs agree to wear a certain uniform, to arrive at work at a certain time, to leave work at a certain time, to park their vehicle in a certain spot, to sit at a certain desk and to work on certain tasks. They also agree to receive an influenza vaccine, which Defendants have required of their employees for the past five years. These are all conditions of employment, and “every employment includes limits on the worker’s behavior in exchange for his remuneration.” . . . If an employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment.\textsuperscript{393}

Applying similar reasoning, another court dismissed a complaint by employees of a private Houston hospital who were subject to termination if they did not receive the COVID-19 vaccine.\textsuperscript{394} The court held that the hospital complied with EEOC guidance by considering medical and religious exemptions.\textsuperscript{395} The court spelled out the lead plaintiff’s simple options to choose either a COVID-19 vaccination or another job:\textsuperscript{396} “If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment

\textsuperscript{387} Id. (“[U]nder the ADA and Title VII, private employers such as St. Elizabeth are required to offer medical and religious accommodations to its mandatory vaccination policy.”).

\textsuperscript{388} Id. at 644.

\textsuperscript{389} Id. at 646.

\textsuperscript{390} Id.

\textsuperscript{391} Id. at 645 (“No matter any individual stance on COVID-19, every person, including the parties in this case, can agree that ending the COVID-19 pandemic is in our collective best interest—and in the public’s best interest, as well, for purposes of balancing equities.”).

\textsuperscript{392} Id. at 646.

\textsuperscript{393} Id. at 646–47 (internal citations omitted).


\textsuperscript{395} Id. at 527.

\textsuperscript{396} Id.
includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain."

A private employer may require employees who receive exemptions to test regularly in lieu of vaccination. For example, employees of a private hospital who received a religious-based exemption from COVID-19 vaccination, but who resisted twice-weekly testing, were denied an injunction against the hospital. The United States District Court for the Middle District of Pennsylvania warned that the plaintiffs’ arguments relied on a “toxic combination of motivated reasoning and misinformation—a cocktail that promises to plague this country long after COVID-19 has abated.” Even if plaintiffs could meet their burden of proof under Title VII, the court concluded, the hospital easily proved it would suffer an undue burden.

Like the healthcare industry, the airline industry imposed vaccination requirements for employees, despite ongoing labor shortages. United Airlines (“United”) employees alleged “United violated the ADA by failing to provide reasonable medical accommodations for qualified employees and for retaliating against those who requested medical exemptions.” United permitted either religious or medical reasons—but not both. It granted approximately 80% of the requests for religious exemptions and 63% of the requests for medical exemptions. The court held that the employees failed to prove they would suffer irreparable harm because United exempted them from the vaccine mandate. It reasoned that United did not require them to violate their religious beliefs; employees were simply obligated to choose between getting vaccinated or taking unpaid leave.

Likewise, employees of an aerospace engineering firm were denied an injunction against a vaccination policy that offered medical and religious exemptions. The firm denied the religious exemption request of four employees and the disability claims of two employees, arguing that testing unvaccinated

397 Id. at 528.
399 Id. at 379.
400 Id. at 388 (“[A]fter consideration by their own experts and the advice of the CDC and EEOC, [the hospital] concluded that testing was the best and least invasive way to reduce the risk that unvaccinated individuals pose to patients and staff.”).
402 Sambrano, 27 F. Supp. 3d at 412.
403 Id.
404 Id.
405 Id. at 411; see also Barrington v. United Airlines, Inc., 566 F. Supp. 3d 1102, 1106, 1115 (D. Colo. 2021) (denying injunction to United employee who was granted a religious accommodation from mandatory vaccinate and was placed on a leave of absence without pay).
406 Sambrano, 27 F. Supp. 3d at 410, 415 (characterizing “unpaid leave” as a “trifling pittance”).
workers in lieu of vaccination imposed undue administrative, financial, and safety costs. Two employees with disabilities sought as a reasonable accommodation “mask usage, remote work, and periodic testing” for unvaccinated employees with a disability. The court held that, “even assuming” these accommodations were reasonable, allowing unvaccinated workers on site would impose an undue hardship of significant administrative, financial, and safety costs sufficient to prove both an ADA and Title VII defense. The court ruled that the potential harm of the employees having to look for a new job was minimal compared with the harm the company “may face if it is forced to retain unvaccinated employees.” Finally, the court determined that the firm’s public interest “to promote the safety and welfare of their employees” outweighed personal autonomy claims: “[P]laintiffs’ religious liberty is not threatened, nor is their medical freedom of choice. Rather, the plaintiffs are given the option to remain unvaccinated—an option that they have all chosen—and instead seek employment with a company that does not require vaccination.”

Lastly, a private company is not necessarily liable for failing to grant religious exemptions to vaccine requirements. For example, out-of-state employees of a Texas molecular testing company, which mandated vaccinations for all employees, sued the company for failing to grant religious exemptions. The court denied the plaintiffs’ motion for an injunction to prevent the defendant from firing them after it denied their requests for exemptions. The company, as a private employer, was free to impose employment conditions like a vaccine mandate, which did not irreparably harm the plaintiffs.

IV. EMPLOYEES’ RIGHTS IN THE POST-COVID-19 WORKPLACE TO REASONABLE ACCOMMODATIONS THAT IMPACT THE PERSONAL AUTONOMY OF COWORKERS


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408 Id. at 1261, 1264.
409 Id. at 1264.
410 Id. at 1264–65.
411 Id. at 1269.
412 Id.
414 Id. at *4.
415 Id. at *3 (“While the Court is sympathetic to the difficulty of Plaintiffs’ decision, it remains unconvinced that Plaintiffs’ alleged harms associated with complying with Caris’s vaccination requirement—be they religious or medical in nature—are imminent and non-speculative when Plaintiffs can avoid these purported harms by remaining unvaccinated, even if it means they sustain the reparable harm of losing their employment.”).
often forgotten are the lives behind these daunting statistics. How many would still be alive had their coworkers become vaccinated or worn masks?

The pandemic transformed the American workplace. In less than two years, the unemployment rate seesawed from 3.5% in January 2020 to 13.2% in May 2020 to 3.5% by December 2022. Staffing shortages plagued many industries as millions of Americans left the workforce. The approximately one in four adults—sixty-one million people—who have a disability were employed at significantly lower rates than adults without disabilities.

The COVID-19 pandemic exposed individuals with disabilities to new barriers to—as well as potential opportunities for—employment. Many individuals with disabilities had to determine whether physically attending work was worth the risk of exposure to a deadly contagion for which their disabilities exacerbated the

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418 See infra notes 537-71 discussion and accompanying text.

419 Table 4. Quit Levels and Rates by Industry and Region, Seasonally Adjusted, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/news.release/jolts.t04.htm (last visited Oct. 17, 2022); see infra notes 537-71 discussion and accompanying text (discussing the labor shortage); see, e.g., Christopher Rugaber, Americans Give Bosses Same Message in Record Numbers: I Quit, AP (Nov. 12, 2021), https://apnews.com/article/business-f155e50d450936fbf666bef07185b0b5.


421 In December 2020, the unemployment rate for persons with disabilities was 11.4%, compared with an unemployment rate of 6.1% for persons without disabilities. By December 2021, the unemployment rate for persons with disabilities dropped to 8.0%, compared with an unemployment rate of 3.4% for persons without disabilities. Table A-6. Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/news.release/empstat.t106.htm (Oct. 7, 2022); see also Lisa A. Schur, Mason Ameri & Douglas Kruse, Telework After COVID: A ‘Silver Lining’ for Workers with Disabilities?, 30 J. OF OCCUPATIONAL REHAB. 521, 522 (2020) ("In 2019, less than a third (30.9 percent) of working-age people with disabilities were employed, compared to three-quarters (74.6 percent) of people without disabilities.") (noting that the pandemic may ultimately expand employment opportunities for employees with disabilities whose jobs could be performed remotely); Susanne Bruyere, COVID-19 Employment and Disability Resources, ILR SCHOOL (May 8, 2020), https://www.ilr.cornell.edu/work-and-coronavirus/work-and-jobs/covid-19-employment-and-disability-resources (estimating that 37% of working-age people with disabilities were employed compared with 79% of their nondisabled peers).
risk of severe illness or death.\textsuperscript{424} As millions of Americans shifted their workplace from on site to at home, remote work\textsuperscript{425} proved to be an effective reasonable accommodation for many employees.\textsuperscript{426} But for various jobs, remote work is not a reasonable accommodation.\textsuperscript{427} For employees with disabilities, the pandemic erected new obstacles to obtaining reasonable accommodations to attend work safely.

\textbf{A. The Rise of Personal Autonomy Arguments}

Challenges to vaccination mandates are not novel. Americans resisted vaccinations for smallpox in the early 1900s;\textsuperscript{428} diphtheria, tetanus, and pertussis in the 1980s and 1990s;\textsuperscript{429} measles, mumps, and rubella in the late 1990s;\textsuperscript{430} and the H1N1 virus, known as a swine flu, when sixty million Americans were infected in 2009 and 2010.\textsuperscript{431} But recently, the rates of Americans who have refused vaccinations have soared.\textsuperscript{432} The COVID-19 pandemic became a potent accelerant to the anti-vaccine movement. By late 2021, those opposed to vaccine and mask mandates were “marching in the street in protest, resigning in mass and demonstrating outside

\textsuperscript{424} The Centers for Disease Control and Prevention defines severe illness as “hospitalization, admission to the intensive care unit, intubation or mechanical ventilation, or death.” It identified several dozen underlying medical conditions that increase the risk of severe illness caused by COVID-19. These include pulmonary hypertension and embolism, cancer, cerebral vascular disease, chronic kidney disease, diabetes, cardiac failure, coronary artery disease, obesity, and some mental health disorders. \textit{Science Brief: Evidence Used to Update the List of Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19}, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/underlying-evidence-table.html#anchor_1616780486662 [June 15, 2022].

\textsuperscript{425} See Kanter, supra note 2 (discussing the history of cases that considered whether remote work was a reasonable accommodation for an employee with a disability); Schur et al., supra note 423.

\textsuperscript{426} As courts correctly predicted years ago, the reasonableness of remote work as an accommodation would “no doubt change as communications technology advances.” See, e.g., Vande Zande v. State of Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995); see also Equal Emp. Opportunity Comm’n v. Ford Motor Co., 752 F.3d 634, 642 (6th Cir. 2014).

\textsuperscript{427} See Kanter, supra note 2; Schur et al., supra note 423.

\textsuperscript{428} Jacobson v. Massachusetts, 197 U.S. 11, 13 (1905); see supra notes 295-305 discussion and accompanying text.

\textsuperscript{429} \textit{History of Anti-Vaccination Movements}, COL. OF PHYSICIANS OF PHILA., https://www.historyofvaccines.org/content/articles/history-anti-vaccination-movements#Source%209 (Apr. 20, 2022).

\textsuperscript{430} Id.

\textsuperscript{431} The Centers for Disease Control and Prevention estimated that from April 12, 2009, to April 10, 2010, there were 60.8 million cases, 274,304 hospitalizations, and 12,469 deaths in the United States due to the H1N1 virus. \textit{2009 H1N1 Pandemic (H1N1pdm09 Virus)}, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html (June 11, 2019). See also Gustavo S. Mesch & Kent P. Schwirian, \textit{Confidence in Government and Vaccination Willingness in the USA}, 30 HEALTH PROMOTION INT’L 211, 213-14 (2014), https://doi.org/10.1093/heapro/dau094

\textsuperscript{432} See Michael Eisenstein, \textit{An Injection of Trust}, 507 NATURE S17, S17 (2014) (“CDC data indicate that the percentage of non-medical exemptions essentially doubled between 2006 and 2011.”).
government buildings” with hyperbolic vigilance.\footnote{433} Republican members of the New Jersey Assembly equated requiring proof of vaccination to enter the Statehouse with “tyranny,” declaring that “[l]iberty is dying right here on the floor.”\footnote{434} At a public school board meeting, a Virginia woman threatened to bring loaded guns to her child’s school if the school district required children to wear masks in school.\footnote{435}

Though the majority of Americans supported a federal vaccine mandate in some workplaces, approximately one-third of Americans opposed it.\footnote{436} People who opposed vaccinations included those who invoked “personal or religious freedom to skip vaccinations . . . and right-wing politicians speaking to voters primed by . . . politicization about the virus.”\footnote{437} Distrust of science not only suppressed vaccination rates, and thus increased the spread of COVID-19, but it also impacted how nondisabled coworkers reacted to requests to wear a mask or become vaccinated.\footnote{438}

Opposition to vaccine and mask mandates directly endangered public health and encouraged new laws that added fuel to the fire. Nationwide, local and state legislatures passed laws and regulations that curtailed the authority of public health officials, school boards, public employers, and even private employers to safeguard public health.\footnote{439} These laws placed public health decisions in the hands of partisan elected officials instead of public health experts.\footnote{440} They disproportionately harmed people with disabilities and communities of color, who already faced worse health and equity injury from the pandemic.\footnote{441}

The harm from laws that restrict how employers can protect their employees may endure beyond the COVID-19 pandemic. For example, Montana amended its human rights law to label as discrimination requiring vaccines as a condition for


\footnotesize{\textsuperscript{436} Oliver Knox, \textit{Vaccine Mandates Are Working, Anti-Vaccine Violence is Worrying}, WASH. POST (Oct. 1, 2021, 12:01 PM), https://www.washingtonpost.com/politics/2021/10/01/vaccine-mandates-are-working-anti-vaccine-violence-is-worrying/.}

\footnotesize{\textsuperscript{437} Hughes, supra note 433.}


\footnotesize{\textsuperscript{439} See Goldstein, supra note 9; Moran-McCabe & Baumle, supra note 250.}

\footnotesize{\textsuperscript{440} Goldstein, supra note 9.}

\footnotesize{\textsuperscript{441} Moran-McCabe & Baumle, supra note 250.}
employment. As a consequence, even hospitals in Montana, which had routinely required employees to get vaccines approved by the Centers for Disease Control, could no longer ensure that their healthcare workers were vaccinated for some illnesses.

Although some people opposed COVID-19 vaccinations for religious or disability-based reasons protected by Title VII or the ADA, most cited other reasons to reject the scientific consensus of vaccine efficacy. Compared with vaccinated adults, unvaccinated adults were “younger, more likely to identify as Republicans or be Republican-leaning, and more likely to have lower levels of education and lower incomes.”

442 MONT. CODE ANN. § 49-2-312(1)(b) (2021). Although not mentioning COVID-19 by name, the statute targets COVID-19 vaccinations because it excludes vaccinations that are required by schools. MONT. CODE ANN. § 49-2-312(2).


444 Unvaccinated adults cite a variety of reasons why they have not received a COVID-19 vaccine, with half citing worries about side effects and the newness of the vaccine as major reasons (53% each). Other major reasons include just not wanting to get the vaccine (43%), not trusting the government (38%), and having a medical reason for not getting vaccinated (14%). KFF COVID-19 Vaccine Monitor: June 2021 (June 30, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-june-2021/; KFF COVID-19 Vaccine Monitor: Profile of the Unvaccinated (June 11, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-profile-of-the-unvaccinated/; see also Douglas A. Hicks, Stop Blaming Religion for Vaccine Hesitancy, Commentary, FORTUNE (Dec. 13, 2021), https://fortune.com/2021/12/13/stop-blaming-religion-for-covid-vaccine-hesitancy-mandates-biden-pandemic-health/ (concluding that most religious leaders support vaccination, but that “religious people who object to the vaccine on faith-based grounds are a small minority”).


446 KFF COVID-19 Vaccine Monitor: Profile of the Unvaccinated, supra note 444; see also Cary Funk & John Gramlich, 10 Facts About Americans and Coronavirus Vaccines, PWE RSCH. CTR. (Sept. 20, 2021), https://www.pewresearch.org/fact-tank/2021/09/20/10-facts-about-americans-and-coronavirus-vaccines/ (finding that 86% of respondents who identified as Democrat or Democrat-leaning received one dose of the COVID-19 vaccine by August 2020 compared with 60% of respondents who identified as Republican or Republican-leaning).
The ADA was passed in 1990, and amended in 2008, with widespread, bipartisan support.\textsuperscript{447} Given growing hyper-partisanship in politics and the law, many scholars doubt these laws would pass today.\textsuperscript{448} In his first year of office, Republican Attorney General Jeff Sessions rescinded Department of Justice guidance upon which courts long relied to interpret many sections of the ADA.\textsuperscript{449} Senate Republicans proposed the Health, Economic Assistance, Liability Protections and Schools (HEALS) Act in 2020 to limit—under laws like the ADA—employers’ liability to employees who contract COVID-19 at work.\textsuperscript{450} Just days after West Virginia Governor Jim Justice was unable to deliver his State address because he was ill with COVID-19,\textsuperscript{451} Republican lawmakers proposed a law to prevent school districts from testing asymptomatic people for COVID-19,\textsuperscript{452} as though “what-you-don’t-know-can’t-hurt-you” was an effective public health strategy.

During his four years in office, President Trump appointed 3 Supreme Court justices, 54 Courts of Appeals judges, and 174 District Court judges,\textsuperscript{453} more than any other modern president in just four years. Representing twenty-eight percent of the active federal judges as of January 13, 2021, his appointments were less

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\textsuperscript{447}Laura Rothstein, \textit{Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization}, 12 St. Louis U.J. Health L. & Pol'y 271, 271, 279, 304 (2019) (quoting LENNARD DAVIS, \textit{ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS} 8 (2015)) (“The ADA is an excellent example of a bipartisanship no longer extant but made possible when a Republican president, George H.W. Bush, worked together with a Democratic House and Senate. . . . All these political leaders believed that disability was an issue both parties could agree on.”).

\textsuperscript{448}\textit{Id.} at 272 (explaining that speakers at a 2018 meeting of law faculty at the Association of American Law Schools reached a consensus that the ADA would be unlikely to pass in 2018).


diverse than the judges appointed by the three previous presidents.

As litigation of COVID-19 safety measures wound through the federal courts, a clear pattern emerged: judges appointed by President Trump sided with litigants who argued that their right to personal autonomy and to express religious beliefs outweighed the public interest to curb a deadly pandemic. These jurists enjoined federal regulations requiring vaccinations and masks. Of the cases discussed in Part III that upheld vaccination and mask requirements, only one was issued by a judge appointed by President Trump.

Even prior to the COVID-19 pandemic, some Trump-appointed judges were hesitant to enforce the ADA. For example, Judge Eli Richardson dismissed the ADA claims of a salesperson who sought transfer to a day shift after she experienced Post-Traumatic Stress Disorder (PTSD) resulting from a car accident. Despite evidence that the plaintiff informed her employer of her symptoms, saw a licensed clinic social worker to treat her symptoms, and was prescribed medication for PTSD, Judge Richardson held that she did not have a disability sufficient to state an ADA claim. Yet the ADA was amended in 2008 to prevent exactly this type of decision that defines disability too narrowly.

Tenth Circuit Judge Allison Eid joined a dissenting opinion opposing the grant of a new trial to a county commission employee who alleged she was denied a

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454 Id. Only 16% of judges appointed by President Trump were non-white, compared with 25% for President Clinton, 18% for President George W. Bush, and 36% for President Obama.


456 See Barbara Hoffman, Disabling Disability Rights, 15 Ne. U.L. Rev. (forthcoming 2023), for a discussion of how federal judges appointed by President Trump have ruled in disability-rights cases.


461 Id. at *14.

462 29 C.F.R. § 1630.1(c)(4) (2012) (“The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA” so disability “shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.”); see also Hoffman, supra note 23, at 877–78.

disability-related accommodation. The trial court erroneously instructed the jury that the plaintiff had to prove she suffered an adverse employment action to pursue her claim, so the Tenth Circuit reversed and ordered a new trial. The dissent, however—contrary to the conclusion of most other circuits—read the ADAAA so narrowly that plaintiffs who claim they were denied a reasonable accommodation under the ADA must also prove that they endured an adverse employment action because of their disability. Such a standard would deny many employees with a disability their day in court. Moreover, in a typical conservative rejection of regulatory authority, the dissent also critiqued the majority for deferring to EEOC regulations for guidance.

Especially troubling are the Fifth Circuit’s rulings for individuals who resist public health mandates that protect the rights and safety of individuals with disabilities, including:

- enjoining enforcement of the OSHA ETS requiring large employers to vaccinate their employees because, in part, “it remains unclear that COVID-19 . . . [poses a] grave danger” and compelling employees to “choose between their jobs and the vaccine” violated their liberty;
- declining to stay the trial court’s order enjoining CMS from requiring vaccinations for healthcare workers in fourteen states;
- upholding a Texas executive order that banned local school districts from implementing universal mask policies on school property and rejecting ADA and Rehabilitation Act claims of students with disabilities;
- ruling that Southwest Airlines need not accommodate a flight instructor who had sleep apnea by allowing him to work only

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465 Id. at 788, 804 (“No less than six circuits—the First, Fourth, Fifth, Sixth, Eleventh, and the D.C. Circuit—either state, or strongly suggest, that there is no adverse-employment-action requirement in ADA failure-to-accommodate claims.”).
466 See id. at 827 (McHugh, J., dissenting).
467 Id. at 829–30.
469 See supra discussion and text accompanying notes 368–77.
470 BST Holdings, LLC v. Occupational Safety & Health Admin., U.S. Dep’t of Lab., 17 F.4th 604, 613 (5th Cir. 2021).
afternoon shifts because, in part, doing so “would impose inordinate burdens on other SWA employees.”

Resolving conflict through enforceable orders is a unique and inherent function of the judiciary. That authority is subject to inconsistent application by partisan judges where the rules require case-by-case analysis of individual circumstances, as conflicts between disability rights and other rights demand.

C. The Weaponization of the First Amendment

One right that collides with the right to a disability-based accommodation in public employment is the right to free speech, and the Supreme Court has recently put its weighty thumb on the First Amendment side of the scale.

In an expansive 2018 decision, the Court overturned a forty-one-year-old decision to hold that a union could not impose a fee on non-member employees to cover the union’s cost of collective bargaining because the fee violated the non-members’ First Amendment rights. Justice Kagan, the most centrist of the Court’s liberal justices, dissented, cautioning that the Court was “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” New York Times reporter Linda Greenhouse predicted that Janus v. American Federation of State, County, and Municipal Employees marked an elevation of the First Amendment that would gain momentum as a “deluge” that “could reshape American life in profound ways.”

Two years later, as the COVID-19 pandemic exploded, the Supreme Court upheld the Trump Administration’s broad moral and religious exemptions to the contraceptive mandate of the Patient Protection and Affordable Care Act; this exemption permitted employers to deny their employees comprehensive health insurance coverage, despite the government’s estimate that up to 126,400 people would immediately lose insurance coverage for contraceptives. Justice Ginsburg dissented, asserting that the Court cast “totally aside countervailing rights and

474 Grubb v. Sw. Airlines, 296 F. App’x 383, 388 (5th Cir. 2008).
478 Id. at 2501 (Kagan, J., dissenting). Justice Kagan explained:

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers’ speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public.

Id. at 2491 (Kagan, J., dissenting).
interests in its zeal to secure religious rights to the nth degree.”\textsuperscript{481} She cautioned that although “the Government may ‘accommodate religion beyond free exercise requirements,’ . . . when it does so, it may not benefit religious adherents at the expense of the rights of third parties.”\textsuperscript{482}

Previously, “the Court was historically wary of granting an accommodation or exemption where doing so would cause an injury or impose a cost on others.”\textsuperscript{483} For example, in ruling for Black employees who were discriminated against by a seniority system, the Court signaled that “if relief can be denied simply because other employees are unhappy about the relief received by victims of discrimination, ‘there will be little hope of correcting the wrongs to which the Act is directed.’”\textsuperscript{484}

Some scholars now fear “that all antidiscrimination laws are at risk of being undermined through religious exemptions,”\textsuperscript{485} including the ADA, which does not protect a suspect class.\textsuperscript{486} They predict it is “nearly inevitable that the Court's trajectory on religion will be toward granting more and more extreme religious exemptions—even where they threaten the health and lives of fellow citizens,” as it sides with “religious objectors, largely at the expense of society’s most marginalized populations.”\textsuperscript{487}

\textsuperscript{481} Justice Ginsburg opined that the Court’s decision invalidated the statutory right that targeted discrimination. \textit{Id.} at 2404 (Ginsburg, J., dissenting) (“Despite Congress' endeavor, in the Women's Health Amendment to the ACA, to redress discrimination against women in the provision of healthcare, the exemption the Court today approves would leave many employed women just where they were before insurance issuers were obliged to cover preventive services for them, cost free.”).

\textsuperscript{482} \textit{Id.} at 2408 (Ginsburg, J., dissenting) (internal citations omitted).


\textsuperscript{485} \textit{Reframing the Harm}, supra note 483, at 2196 (citing Marci A. Hamilton, \textit{Religious Entities Flex Their Muscles Through the Roberts Court, Playing Both Sides of the Discrimination Coin}, Justia: Verdict (Aug. 4, 2020), https://verdict.justia.com/2020/08/04/religious-entities-flex-their-muscles-through-the-roberts-court-playing-both-sides-of-the-discrimination-coin/ (“[In Little Sisters] the spotlight was trained on the religious actors while their victims essentially sat in the dark, off to the side, ignored by the justices who were busy constructing a separate world for fellow believers without the bothersome Lockean obligations of a shared society.”); \textit{see also} Leslie Griffin, \textit{Symposium: Religions' Wins Are Losses}, SCOTUSBLOG (Aug. 4, 2020), https://www.scotusblog.com/2020/08/symposium-religions-wins-are-losses/ (“As religion's influence increases at the court, victories for civil rights decrease. The court’s recent cases confirm that some religious exemptions are incompatible with civil rights.”).

\textsuperscript{486} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (holding that individuals with disabilities are neither a suspect class nor quasi-suspect class).

\textsuperscript{487} \textit{Reframing the Harm}, supra note 483, at 2207 (internal citations omitted).
D. The Rights of Employees with Disabilities to Reasonable Accommodations that Impact the Personal Autonomy of Coworkers

Because “[c]ivil rights’ include rights that are potentially at odds with one another,”488 how should courts balance the accommodation rights of employees with disabilities with the rights of non-disabled coworkers? Although both the ADA and Title VII prohibit employment discrimination, as Rutgers Law Professor Carlos Ball explains, the ADA gives to plaintiffs; coworkers who argue for personal liberty and religion claim they are being asked to do the giving.489

By granting the right to reasonable accommodation only to qualified individuals with a disability, the ADA provides preferential treatment to a limited class of employees,490 which can cause non-disabled employees to resent and resist disability-based accommodations. University of Toledo Law Professor Nicole Porter warns that an inherent risk of accommodating employees with disabilities is a “special treatment stigma,” which she defines as “the harm that arises from receiving special treatment in the workplace, especially when coworkers believe that the special treatment is unwarranted or unfair.”491 But this resentment is misguided, as the ADA reasonably balances the rights of all employees without giving employees with disabilities unfair benefits because the “type of preferential treatment required by the ADA . . . is aimed at leveling the playing field rather than at placing the employee with a disability in a position of advantage over nondisabled employees.”492

Courts have seldom tackled how to resolve conflicting requests by one employee who seeks an accommodation pursuant to the ADA and a coworker who seeks an accommodation pursuant to Title VII or a constitutional right, though courts have addressed conflicting requests for disability-based public accommodations by two individuals. For example, Madeleine Entine, a university student who used a service dog to control her panic attacks, lived in a sorority house with another student who had Crohn’s disease that was aggravated by her allergy to dogs.493 Entine sought the accommodation of allowing her service dog to live with

488 Martha Minow, Should Religious Groups Be Exempt from Civil Rights Laws?, 48 B.C. L. REV. 781, 786-87, 848 (2007) (emphasis added) (“The struggles over exemptions from civil rights laws for religious groups reflect historic political battles, inspired but not dictated by ideals and hammered out through shifts in power from popular mobilization and changes of heart.”).
490 See id. (“[T]he failure to provide preferential treatment in the context of reasonable accommodation is itself a form of discrimination.”).
491 Nicole Buonocore Porter, Special Treatment Stigma After the ADA Amendments Act, 43 Pepp. L. Rev. 213, 238 (2016) (noting that although “most common types of accommodations, such as making the building more accessible or providing modifications to work equipment, do not negatively affect other employees,” some employers refuse to accommodate employees with disabilities because they fear “that coworkers will feel that they are being treated unfairly when accommodations are given to employees with disabilities”).
492 Ball, supra note 489, at 960.
her in the sorority house; the other student sought the accommodation of living in a house free from dog dander. The district court recognized the dilemma the university faced to “reconcile the needs of two disabled students whose reasonable accommodations are (allegedly) fundamentally at odds.” But, as the court acknowledged, the resolution of the students’ conflict “merely entail[ed] a straightforward application of ADA regulations.” The court granted a preliminary injunction to Entine because she formally sought a reasonable accommodation from the university with supporting medical evidence. In contrast, the student with Crohn’s disease “did not request an accommodation; rather, she objected to the modification of [the sorority’s] no-animal policy” without providing sufficient medical evidence that Entine’s dog aggravated her Crohn’s disease.

Similarly, in Lockett v. Catalina Channel Express, Inc., a blind passenger sued a ferry company that denied her access to the first-class lounge with her guide dog because the company excluded dogs from the lounge to accommodate a frequent passenger who was allergic to animal dander. After the incident, the ferry company changed its policy to allow service animals in the first class lounge. The Ninth Circuit affirmed summary judgment for the ferry company because it accommodated the plaintiff by allowing her to sit in a different area of the ferry with her service dog. As the Ninth Circuit acknowledged, though, the plaintiff’s accommodation request “created a dilemma for” the ferry company because it “had to decide on the spot whether to potentially expose passengers” in the lounge to dander or to ask the plaintiff to sit in another passenger area. The Ninth Circuit held that in balancing the rights of both passengers, the ferry company reasonably assessed whether one passenger posed a direct threat to another passenger by asking the plaintiff—on the one occasion—to sit in a different area of the ferry.

i. Requiring Coworkers to Wear a Mask or Become Vaccinated as a Reasonable Accommodation

Can a reasonable accommodation for an ADA-covered employee require non-disabled coworkers to become vaccinated, wear face masks, test for contagious

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494 Id.
495 Id.
496 Id.
497 Id. at *2.
498 Id. at *7.
499 Id. at *8, *10.
500 496 F.3d 1061, 1063 (9th Cir. 2007).
501 Id. at 1064.
502 Id. at 1065.
503 Id.
504 Id. at 1066 (cautioning that the ferry company “may well have violated the ADA had it not changed its policy”).
diseases, or take other actions that affect their personal autonomy? How will courts balance the rights of employees who seek disability accommodations with those who seek conflicting religious accommodations? Given the several years it typically takes between bringing a charge to the EEOC and having the merits of a claim heard by a federal court, few courts have yet to adjudicate Title I cases related to the pandemic.\(^5\) \(^5\) Although one court recognized that the unprecedented risk posed by COVID-19 merited a flexible application of the ADA,\(^5\) another, contrary to the EEOC regulations,\(^5\) ruled that the plaintiff failed to prove her asthma was a disability because she was fully vaccinated, despite the dangers posed to her by COVID-19.\(^5\)

a. Masks

During the early stages of the pandemic, some people sought to avoid mask mandates by erroneously claiming that they were exempted by the ADA.\(^5\) In response, the Department of Justice clarified that the ADA did not provide a right to ignore mask mandates.\(^5\) Instead, whether a disability prevented a person from wearing a mask had to be determined on an individualized basis.\(^5\) The same facts that determine whether a person’s disability could exempt them from a mask

\(^5\) See, e.g., Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 63, 66 (D. Mass. 2020) (granting injunction to plaintiff with asthma to telework as a reasonable accommodation during a COVID-19 surge); see also Valentine v. Collier, No. 20-CV-1115, 2020 WL 3625730, at *2 (S.D. Tex. July 2, 2020) (finding plaintiffs successfully pled a failure to accommodate claim where they identified disabilities that subjected them to a heightened risk of death or serious illness if they contracted COVID-19); Silver v. City of Alexandria, 470 F. Supp. 3d 616, 621–22 (W.D. La. 2020) (during the COVID-19 pandemic, whether a plaintiff has a disability should be judged by the totality of the circumstances, including the heightened risks of an impairment caused by the pandemic).

\(^5\) See, e.g., Piotrowski v. Signature Collision Centers, LLC, No. 21-CV-02115, 2021 WL 4709721, at *4 (E.D. Pa. Oct. 8, 2021) (“Everyone here is in uncharted territory. Mr. Piotrowski and Signature were in March 2020, when they tried to figure out how to function in a world suddenly overtaken by a virus. And the Court is now, as it tries to sort through language that Congress adopted but which lacks clarity. Mr. Piotrowski can pursue his ADA interference claim . . .”).

\(^5\) See supra notes 24–37 discussion and accompanying text. EEOC COVID-19 Guidance states that “a condition caused or worsened by COVID-19,” such as heart inflammation, stroke, or diabetes, can “be a disability under the ADA[,] . . . In some cases, an individual’s COVID-19 may also worsen the individual’s pre-existing condition that was not previously substantially limiting, making that impairment now substantially limiting.” EEOC, What You Should Know About COVID-19, supra note 22.


\(^5\) The Department of Justice Warns of Inaccurate Flyers and Postings Regarding the Use of Face Masks and the Americans with Disabilities Act, U.S. Dep’t of JUST. (June 30, 2020), https://www.justice.gov/opa/pr/department-justice-warns-inaccurate-flyers-and-postings-regarding-use-face-masks-and (“The ADA does not provide a blanket exemption to people with disabilities from complying with legitimate safety requirements necessary for safe operations.”).

\(^5\) Whether an accommodation is reasonable is determined on a case-by-case basis. 29 C.F.R. § 1630.9 (2021).
mandate are equally relevant to whether a non-disabled coworker could refuse to wear a mask.

Public health guidelines for wearing masks provided only narrow exemptions for the limited number of people who could not wear a mask safely for health reasons.\textsuperscript{512} Experts concluded that “[m]ost people, including those with disabilities, can tolerate and safely wear a mask.”\textsuperscript{513} Exemptions were “not meant to cover people with disabilities for whom wearing a mask might only be difficult.”\textsuperscript{514} For example, the Centers for Disease Control and Prevention limited its “narrow subset of persons with disabilities” from its requirement to wear masks on public transportation to a person whose disability rendered them “unable to remove a mask without assistance if breathing becomes obstructed.”\textsuperscript{515} Although someone with “a severe sensory . . . or . . . mental health disability who would pose an imminent threat of harm to themselves or others if required to wear a mask” may be exempt from wearing a mask on public transportation, individuals “who experience discomfort or anxiety while wearing a mask without imminent threat of harm” would not be.\textsuperscript{516}

States permitted similarly limited exceptions to mask mandates. For example, California exempted individuals with a rare “medical condition for whom wearing a mask could obstruct breathing or who are . . . otherwise unable to remove a mask without assistance.”\textsuperscript{517} Thus, in most circumstances, requiring a coworker to wear a mask is such a minor intrusion that it does not impose an undue hardship as defined by the ADA.

\textbf{b. Vaccinations and Routine Testing}

As discussed in Part III, private employers, states, and, in some circumstances, the federal government, may require vaccinations for contagious diseases as a condition of employment.\textsuperscript{518} Alternatively, employers can require employees who are exempt for medical or religious reasons to test regularly.\textsuperscript{519} Thus, an employer may require employees to be vaccinated or test regularly as a

\begin{footnotes}
\item[512] For example, the Centers for Disease Control and Prevention regulations that required masks on public transportation deferred to the EEOC’s “narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability.” Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025, 8027–28 n.9.
\item[514] Id. (emphasis added).
\item[515] Id. (noting that “people with asthma, or other similar conditions, can generally wear a mask safely”).
\item[516] Id.
\item[518] See supra, notes 256–354 discussion and accompanying text.
\item[519] See supra, notes 45, 325–28, 398 discussion and accompanying text.
\end{footnotes}
reasonable accommodation of a coworker with a disability, as long as medical and religious exemptions are considered pursuant to the ADA and Title VII.520

ii. Employers’ Undue Hardship Defense in the Post-)COVID-19 Workplace

Historically, the undue hardship defense seldom determined the outcome of a Title I claim.521 Unlike the *de minimis* standard to prove an undue hardship under Title VII,522 the ADA requires employers to demonstrate an accommodation would impose “significant difficulty or expense”523 to prove undue hardship. Typically, employers allege that the proposed accommodation would impose a financial or administrative burden.524 But rarely does a defendant prove that it would suffer an undue hardship because of the financial cost of providing the requested accommodation.525 The COVID-19 pandemic furnished employers with a new argument to prove undue hardship: that severe labor shortages, exacerbated by actions that would cause employees to quit, would impose “significant difficulty or expense.”526

a. Employers Embrace Labor Shortages to Resist Pandemic Rules

In challenging the OSHA ETS that directed large employers to require employees to be vaccinated against COVID-19, plaintiff businesses argued that the ETS would impose on them “billions in non-recoverable compliance costs.”527 Citing scant anecdotal evidence, they argued that some employees would quit their jobs if they were required to wear a mask in lieu of vaccination, and if even small numbers of employees quit, business losses would be magnified by an already tight labor market.528

In enjoining the ETS, the Supreme Court ignored the ample evidence provided by OSHA of how vaccination and masking requirements actually affected

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520 See supra, notes 124–27, 331 discussion and accompanying text.
521 See Porter, supra note 73, at 133.
524 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2).
525 See Porter, supra note 73, at 139–44.
the workplace.\textsuperscript{529} OSHA conducted an in-depth economic analysis of the impact of the regulations,\textsuperscript{530} weighing the number of employees who may quit with the number of employees who cannot work because of exposure to COVID-19.\textsuperscript{531} “Thus, OSHA conclude[d] that the ETS may, on net, help ameliorate absenteeism by reducing illnesses, but in any event will not increase absenteeism.”\textsuperscript{532} Conceding that a vaccine mandate would cause some employees to quit, OSHA noted that other employees would more likely attend a workplace if they knew their coworkers were vaccinated.”\textsuperscript{533} Relying on labor studies instead of general polls,\textsuperscript{534} OSHA concluded that the ETS would not “add significant new costs to covered employers or threaten the economic feasibility of any industry during a six month period.”\textsuperscript{535} Moreover, OSHA considered employers’ possible costs of providing a reasonable accommodation pursuant to the ADA and concluded that these costs would not impact the economic feasibility of the ETS.\textsuperscript{536}

Nonetheless, as the American economy adjusted to the pandemic, many industries experienced labor shortages, “the consequence of labor supplied being less than labor demanded at currently offered compensation levels.”\textsuperscript{537} With approximately 7.4 million unemployed workers for 11 million job openings,\textsuperscript{538} many

\textsuperscript{529} COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,448 (Nov. 5, 2021) (“More than 60 percent of surveyed employers requiring vaccinations for some or all employees. These survey results further support OSHA’s determination that the vaccination policy requirement is feasible.”).

\textsuperscript{530} See id. at 61,459.

\textsuperscript{531} See id. at 61,473–74.

\textsuperscript{532} Id. at 61,474.

\textsuperscript{533} Id. OSHA cited an Arizona State University study of employee resignations due to COVID-19 workplace policies, which found that 42% reported “lack of workplace safety policies,” 17% reported that “existing workplace policies were not stringent enough,” and only 39% reported “overly restrictive workplace policies,” suggesting that many employees will welcome vaccine mandates. Id. (citing Nathaniel L. Wade & Mara G. Aspinall, How Work Has Changed: The Lasting Impact of COVID-19 on the Workplace, ASU COLL. OF HEALTH SOLS. 9 (Sept. 2021)), https://issuu.com/asuhealthsolutions/docs/asu_workplace_commons_sept2021_singles?fr=sNjBiNDE5NTg1NJ[M].

\textsuperscript{534} Id. at 61,475 (illustrating the unreliability of general polls, OSHA noted that, although approximately one-half of employees who are polled reported they would consider leaving a job if it mandated vaccines, only one to three percent of employees actually quit).

\textsuperscript{535} Id.

\textsuperscript{536} Id. at 61,484–85.


workplaces became understaffed. The labor force participation rate dropped significantly at the beginning of the pandemic (from a high of 67.3% in February 2020 to a low of 60.2% in April 2020) as many industries closed, but by December 2022, it had rebounded to 62.3%. Labor rates were affected by whether employees remained in a known job rather than risked looking for a new one, decided to become vaccinated despite claiming that they would not, opted to test regularly, or received a medical or religious exemption.

Employees left the workforce during the COVID-19 pandemic for a variety of reasons, including fear of being exposed to COVID-19 at work, closed schools and daycare centers, and increased early retirement. One poll found near one-half of those surveyed would “consider quitting if their employers weren’t flexible about remote work.” Other employees quit one job to take another job with higher pay.

The most vocal employees who either left or threatened to leave the labor market were those who objected to COVID-19 vaccine mandates. A Kaiser Family Foundation study found that thirty-seven percent of unvaccinated workers—who represented five percent of the adults surveyed—claimed they would “leave their job if their employer required” them to get a vaccine or get tested weekly. But in reality, a far smaller number of employees actually quit when they faced vaccination or termination, likely because “while it is easy and cost-free to tell a

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540 The labor force participation rate is the percentage of the population that is in the labor force. Labor Force Participation Rate, FRED, https://fred.stlouisfed.org/series/CIVPART (Jan. 6, 2023).

541 Id.


544 Renna & Coate, supra note 537; Mitchell, supra note 4 (noting that pandemic-related border closures, childcare shortages, and health concerns contributed to labor shortage).

545 Renna & Coate, supra note 537.


pollster you’ll quit your job, actually doing so when it means losing a paycheck you and your family may depend upon is another matter.”549 For example:

- In August 2021, Tyson Foods mandated that all its 120,000 employees get the COVID-19 vaccine.550 Despite threats from many employees that they would quit, more than 96% ultimately became vaccinated.551 Of the 4,000 workers who were granted religious or medical exemptions, some were transferred to a position that allowed them to socially distance, and others were furloughed.552
- At Indiana University Health, only 125 workers out of 35,800 quit.553
- At North Carolina-based Novant Health, 99.5% of 35,000 employees complied with the company’s vaccine mandate.554
- United Airlines, the first American carrier to require its employees to get vaccinated, experienced a compliance rate of more than 99%.555

Police officers throughout the country initially resisted vaccine mandates, even though COVID-19 was the leading cause of police officer deaths in 2020 and 2021 in the United States.556 Although sixty-five percent of San Diego police officers said they would consider quitting over vaccine requirements,557 by December 2021, sixty-five percent reported they had been vaccinated, with most of the rest requesting a medical or religious exemption.558 Similarly, despite warnings from unions representing the New York City Police Department that 10,000 officers would be “pulled from [the] streets” for refusing to be vaccinated, by the November

549 Jack J. Barry, Ann Christiano, & Annie Neiman, Half of Unvaccinated Workers Say They’d Rather Quit than Get a Shot, but Real World Dates Suggest Few Are Following Through, THE CONVERSATION (Sept. 27, 2021), https://theconversation.com/half-of-unvaccinated-workers-say-theyd-rather-quit-than-get-a-shot-but-real-world-data-suggest-few-are-following-through-168447 (Although “[s]urveys have shown that as many as half of unvaccinated workers insist they would leave their jobs if forced to get the shot[,]” in reality “few people actually quit.”).
551 Id.
552 Id.
553 Barry et al., supra note 549.
554 Knox, supra note 436.
555 Id.
1, 2021 deadline, only thirty-four out of 35,000 officers had been placed on unpaid leave. 

The pandemic’s impact on the unemployment rate varied from industry to industry. Labor shortages were most acute in accommodations, food services, arts, entertainment, and recreation. But no industry was harder hit than the health care industry, as many health care providers struggled to keep up with patient demands. After years of caring for COVID-19 patients, burnout and job dissatisfaction caused some “nurses to take early retirements, move to higher-paid traveling nursing positions, [or] switch careers.” Some health care workers became sick themselves, but a relatively small number of employees quit or were fired over vaccine mandates. The transportation industry, especially airlines and trucking, also experienced staff shortages.

Economists disagree over whether these labor shortages are significant and whether they will persist. When and how labor shortages ease—and in which industries—depends on many factors, including the availability of childcare, nurses, and paid leave. Industries that had to cancel large events were hardest hit. Health care providers struggled to keep up with demand, in part because of historically low wages, but also because some health care workers became sick themselves, but a relatively small number of employees quit or were fired over vaccine mandates.


See Knox, supra note 436.


See Mitchell, supra note 4; Shierholz, supra note 561; Data Portends Acute Labor Shortages for Some US Corporate Sectors, supra note 561.
whether schools are in-person or remote, wage growth, and COVID-19 spikes. Some industries continued to experience labor shortages for years. The National Council on Compensation Insurance correctly predicted in 2022 that, although labor shortages may improve, “[l]abor force participation is unlikely to climb all the way back to pre-pandemic levels by year-end, in part” because employees will continue to retire early.

b. Labor Shortages as Evidence of Undue Hardship

How will labor shortages affect how courts balance the rights of employers and employees in Title I litigation? Evidence of undue hardship under the ADA includes the employers’ “overall financial resources” and number of employees, the impact of the accommodation on the employers’ operation, and the “functions of the workforce.” Thus, a court may consider evidence of whether a labor shortage in the employer’s industry would be so exacerbated by a proposed accommodation that it would impose a “significant difficulty or expense” on the employer. But because evidence of hardship must be considered on a case-by-case basis, courts should be wary of employers who seek to use labor shortages as a catch-all defense.

The pandemic has revealed that polling of employees and anecdotal evidence grossly overestimate the percentage of employees who would actually quit a job over objections to actions that affect their personal autonomy, such as becoming vaccinated or wearing a mask. To prove an accommodation would cause “a significant difficulty or expense,” an employer must provide specific evidence that

568 See Leonhardt, supra note 539; Shares of Gross Domestic Income: Compensation of Employees, Paid: Wage and Salary Accruals: Disbursements: To Persons, FED. RSRV. Bank OF St. Louis, https://fred.stlouisfed.org/series/W270RE1A156NBEA (Oct. 12, 2022); Some economists argued that the labor shortage could be alleviated in many industries by wage increases because wages in 2021 were low. Renna & Coate, supra note 537.

569 Data Portends Acute Labor Shortages for Some US Corporate Sectors, supra note 561; Shierholz & Bivens, supra note 561 (noting that employment recovery after 2020 varied by industry).


571 Renna & Coate, supra note 537; see also Labor Force Participation Rate, FRED, supra note 540 and accompanying text.


573 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p)(1).

574 US Airways, Inc. v. Barnett, 535 U.S. 391, 396–97, 402 (2002); see, e.g., Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (affirming summary judgment for employer of clerical worker who sought to telework because her job involved “team work under supervision rather than solitary unsupervised work”).

the accommodation the employee with a disability seeks would actually cause other employees to quit in numbers that would result in an undue hardship to its operation.

V. THE ASSIST PRINCIPLE

This article proposes the Assist Principle— that the determination of a reasonable employment accommodation should not render the right to a disability-based accommodation subordinate to other employee rights. Although employers—not coworkers—have the statutory duty to provide accommodations to employees with disabilities, many workplace accommodations necessitate some involvement by nondisabled employees. Accommodations such as “job restructuring . . . or modified work schedules” often require coworkers to perform different job functions or work at different times. Because the ADA applies only to employers with at least fifteen employees, it requires accommodations in settings where teamwork is common. It is those collaborative workplaces where accommodations are most likely to require participation by coworkers.

In many industries, employees work together like players on a basketball team. Each person performs a task towards a common, often coordinated, goal. In basketball, a player who passes the ball to a teammate who then scores a basket is credited with an “assist,” a coveted statistic. An assist enables a teammate to score points, thus, benefiting the team. Analogously, the purpose of the ADA is to enable a worker with a disability to perform essential job functions. A coworker’s participation in the accommodation, like an assist, not only enables the employee with a disability to perform their job, but it benefits the entire workplace, too.

The pandemic has illuminated the challenges faced by employees with disabilities that are exacerbated by a prevalent contagion. To provide a safe workplace to such an employee, the coworker may need to be vaccinated, wear a face mask, test for a contagious disease, or take other actions that affect their personal autonomy.

Before the pandemic, employees in many industries were required to follow safety protocols that impact personal autonomy, such as wearing goggles, construction helmets, surgical masks, hair nets, gloves, and sterile gowns. Some

576 29 C.F.R. § 1630.2(o)(2).
579 COVID-19 causes a higher risk of serious illness or death for people with disabilities such as cancer; chronic kidney, liver, and lung disease; dementia; diabetes; Down syndrome; cardiac disease; HIV; immunocompromised state; mental health conditions; obesity resulting from a physiological condition; sickle cell disease; cerebrovascular disease; and tuberculosis. People with Certain Medical Conditions, CDC FOR DISEASE CONTROL & PREVENTION (Dec. 6, 2022), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.
industries required routine testing for exposure to dangerous substances.\textsuperscript{580} Requiring a nondisabled coworker to assist an employee with a disability by taking similar safety measures is no different from these routine acts. Even requiring a nondisabled coworker to be vaccinated—as long as all employees are subject to the same vaccination standards—is no different. The polarized response of some individuals to the COVID-19 pandemic to resist these simple public health measures does not justify an employer's denial of the accommodation. The ADA obligates an employer to provide a reasonable accommodation tailored to the employee with a disability regardless of a coworker's objection. Disability law can take a page from basketball rulebooks to protect the rights of employees with disabilities in the post-COVID-19 workplace. Under the Assist Principle, disability law should prioritize enabling employees with disabilities to perform their jobs safely over coworkers' objections and employers' fear that coworkers would quit rather than participate in the accommodation.

CONCLUSION

Like a coastal nor'easter, the COVID-19 pandemic and conservative jurists' rejection of public health mandates threaten to erode the foundation on which the ADA stands. Opposition to vaccinations, masks, and other safety measures in the wake of the pandemic will likely increase coworker resistance to participating in accommodations, which some employers may use as an excuse to deny reasonable accommodations. Employers and courts must resolve conflicts between employees with disabilities and coworkers to prioritize assisting employees with disabilities to safely perform their jobs. With such assists that elevate “enableism” over individualism, Title I of the ADA can emerge from the pandemic intact.

\textsuperscript{580} See, e.g., 29 C.F.R. § 1910.1450(d).