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LONG COVID - MEDICAL OVERVIEW & LEGAL UPDATE

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MEDICAL OVERVIEW

- Defining Variant Strains
- State of Michigan Prevalence
- Vaccines
- Understanding Bivalent boosters

MEDICAL OVERVIEW – STRAINS

- Defining Variant Strains
- Variant Being Monitored (VBM)
- Variant of Interest (VOI)
- Variant of High Consequence (VHOC)
- Variant of Concern (VOC)

MEDICAL OVERVIEW – VBM STRAINS

Variant Being Monitored (VBM)

- Significant and sustained reduction in its national and regional proportions over time.
- Evidence suggesting that variant does not currently pose a significant risk to public health in the United States.
- Alpha, Beta, Gamma, Delta, Epsilon, Eta, Iota, Kappa, 1.617.3m Mu, Zeta

MEDICAL OVERVIEW – VOI STRAINS

Variant of Interest (VOI)

- Specific genetic markers that are predicted to affect transmission, diagnostics, therapeutics, or immune escape.
- Evidence that it is the cause of an increased proportion of cases or unique outbreak clusters.
- Limited prevalence or expansion in the US or in other countries.
- Currently, no SARS-CoV-2 variants are designated

MEDICAL OVERVIEW – VHOC STRAINS

Variant of High Consequence (VHOC)

- clear evidence that prevention measures or medical countermeasures (MCMs) have significantly reduced effectiveness relative to previously circulating variants.
- Demonstrated failure of diagnostic test targets
- More severe clinical disease and increased hospitalizations
- Currently, no SARS-CoV-2 variants are designated

MEDICAL OVERVIEW – VOC STRAINS

Variant of Consequence (VOC)

- Evidence of impact on diagnostics, treatments, or vaccines
- Evidence of increased transmissibility
- Evidence of increased disease severity
- Current VOC Strains:
 - Omicron (B.1.1.529, BA.1, BA.1.1, BA.2, BA.3, BA.4 and BA.5 lineages)

MEDICAL OVERVIEW - PREVALENCE

Total COVID-19 Confirmed and Probable

- 2,886,176

Total COVID-19 Deaths in Confirmed and Probable

- 39,250

Average Daily COVID-19 Confirmed and Probable

- 1,738

Weekly COVID-19 Deaths in Confirmed and Probable

- 158

MEDICAL OVERVIEW - VACCINE

Previous boosters are called “monovalent” because they were designed to protect against the original virus that causes COVID-19.

The updated (bivalent) boosters are called “bivalent” because they protect against both the original virus that causes COVID-19 and the Omicron variant BA.4 and BA.5.

MEDICAL OVERVIEW - BIVALENT

CDC recommends that people ages 5 years and older receive one updated (bivalent) booster if it has been at least 2 months since their last COVID-19 vaccine dose, whether that was:

- Their final primary series dose, or
- An original (monovalent) booster

People who have gotten more than one original (monovalent) booster are also recommended to get an updated (bivalent) booster.

MEDICAL OVERVIEW – VAX ACCESS

Children and Teens ages 6 months to 17 years

- Pfizer-BioNTech
- Moderna
- Novavax

Adults ages 18 years and older

- Pfizer-BioNTech
- Moderna
- Novavax

THE PANDEMIC EFFECTS

The COVID-19 pandemic has impacted all of us! It has changed the way we:

- **Work**
- **Vote**
- **Learn**
- **Shop**

The pandemic has also **raised complex legal questions.**

PANDEMIC OPPORTUNITIES

Phenomenal increase integrating technology into the workplace

- Making work just a little more accessible for all!
 - Zoom (closed caption)
 - Portable work stations
- Raising the acceptance of remote work as a reasonable accommodation.
- Increased access to Health Care through Tele-health, telemedicine.

LEGAL QUESTIONS

Questions raised by the pandemic:

- Whether COVID 19 is a disability?
- Whether Employers and Universities can mandate vaccines?
- Whether Businesses need to accommodate people who cannot wear masks?

The pandemic has also shined a light on:

- the importance of effectively communicating government information; and
- ensuring non-discriminatory policies in the healthcare systems.

CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC)

The CDC issued guidance confirming that people with certain medical conditions have an increased risk of severe complications should they contract COVID-19.

- Courts have easily concluded that individuals with pre-existing impairments that place them at high-risk for COVID-19 are likely people with disabilities during the COVID-19 Pandemic.
 - **Silver v City of Alexandria**
 - **Fraihat v US Immigration & Customs Enforcement**

LEGAL GUIDANCE IN GENERAL

The Americans with Disabilities Act (ADA) is a very comprehensive civil rights law covering a broad range of areas including:

- **Employment (Title I)**
- **Public Entities (Title II)**
- **Places of Public Accommodation (Title III)**

There are several different federal agencies which issue policies and regulations. Today we will discuss:

- The **Equal Employment Opportunity Commission (EEOC)** which issues guidance for Employment under the ADA and the Employment provisions under the Rehabilitation Act;
- The **Department of Justice (DOJ)** issues guidance for Public Entities and Places of Public Accommodation.

COVID-19 AS A DISABILITY

It remains unsettled whether COVID-19 itself is an ADA qualifying disability. There are few cases that have considered this issue; so no meaningful guidance from the Courts.

Late last year, the (EEOC) updated its COVID-19 technical assistance adding a new section to:

- Clarify under what circumstances COVID-19 may be considered a disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

KEY POINTS OF EEOC GUIDANCE

An applicant's or Employee's COVID-19 may cause impairments that are themselves disabilities under the ADA, regardless of whether the initial case of COVID-19 itself constituted an actual disability.

An applicant or Employee whose COVID-19 results in mild symptoms that resolve in a few weeks—with no other consequences—will not have an ADA disability that could make someone eligible to receive a reasonable accommodation.

Applicants or Employees with disabilities are not automatically entitled to reasonable accommodations under the ADA. They are entitled to a reasonable accommodation when their disability requires it, and the accommodation is not an undue hardship for the Employer.

An Employer risks violating the ADA if it relies on myths, fears, or stereotypes about a condition and prevents an Employee's return to work once the Employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.

TITLE I OF THE ADA

The COVID -19 pandemic has completely changed the workforce. Due to concerns about acquiring COVID-19, Employees with disabilities have sought various kinds of **reasonable accommodation** under Title I of the ADA.

ADA - DEFINITION OF DISABILITY

Under the ADA, a person has an ADA-qualifying disability if they fall within one of three prongs.

- They could have “a physical or mental impairment that substantially limits one or more major life activities of such individual.”
- Alternatively, they could qualify as disabled if they have been “perceived” to have an impairment; or
- They have a “record of” having a disability.

NOTE: It is well settled case law that Duration of time is a critical factor.

REASONABLE ACCOMMODATIONS

With the pandemic, Employees with disabilities have demonstrated a record of successful telework and, as a result, Courts are looking more favorably on remote work accommodations.

- **Peeples v Clinical Support Options**
- **Madrigal v Performance Transportation**
- **EEOC v ISS Facility**
 - Plaintiff has an underlying impairment, pulmonary disease, who had requested a reasonable accommodation, that is, to work remotely. The request was denied though other Employees in the same position were granted permission to work remotely. The Plaintiff was later fired. There as been no disposition to this case as of this date.

LONG COVID & WORKFORCE

The American Academy of Physical Medicine and Rehabilitation estimates that long COVID will add as many as 22 million individuals to the U.S. population of disabled people.

- Around 1.6 million full-time workers could be missing from the U.S. labor market because of Long COVID, accounting for some 15% of unfilled jobs.

LONG COVID AS A DISABILITY

Last year, the DOJ/HHS released guidance which focused solely on long COVID. The new EEOC technical assistance focuses more broadly on COVID-19 and does so in the context of Title I of the ADA and section 501 of the Rehabilitation Act, which cover employment.

Guidance from DOJ/HHS (July 2021) applies to Titles II/III, Rehabilitation Act, Affordable Care Act and states:

- Long COVID can be a disability (not always)
- Long COVID is a physiological impairment affecting one or more body symptoms
 - Ex: Lingering emotional illness and other mental health conditions
- Long COVID can substantially limit one or more major life activities
 - Ex: “Brain fog” can substantially limit brain function, concentration and/or thinking

FAMILY MEDICAL LEAVE ACT

Can an Employee who is sick with COVID-19, or who is caring for a family member who is sick with COVID-19, take FMLA leave?

An Employee who works for a covered Employer, is eligible for FMLA, and is sick, or is caring for a family member who is sick, with COVID-19 may be entitled to leave under the **FMLA under certain circumstances.**

An **FMLA-eligible Employee** can take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons, including a serious health condition as defined by the FMLA.

FMLA

QUALIFYING SERIOUS HEALTH CONDITIONS

The most common serious health conditions that qualify for FMLA leave include:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate the Employee or the Employee's family member (for example, unable to work or attend school) for more than three consecutive days and that include ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care, such as prescription medication); and,
- chronic conditions that cause occasional periods when the Employee or the Employee's family member is incapacitated, and which require treatment by a health care provider at least twice a year.

DOL FMLA STATEMENT ON COVID-19

Workers who are ill with COVID-19 or have a family member with COVID-19 are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their Employees.

While the requirement that Employers provide paid sick leave and expanded family and medical leave under the **Families First Coronavirus Response Act (FFCRA)** expired on December 31, 2020, tax credits may be available to Employers who voluntarily continue to provide paid sick leave or paid family leave for COVID-19 related reasons.

The **Wage and Hour Division will consider telemedicine** visits to be in-person visits for purposes of **establishing a serious health condition under the FMLA** where certain conditions exist.

STUDENTS IN COLLEGES AND UNIVERSITIES

TITLE II & III OF ADA

The Department of Education issued COVID policies that affect how every college and university operates.

- the long-term effects of COVID, both physical and mental, can **constitute a disability** under **federal antidiscrimination laws** such that someone suffering those effects might be entitled to a **reasonable accommodation at a college or university**.

OTHER LEGAL ISSUES

DISABILITY RELATED QUESTIONS & EXAMS

Disability Related Questions -Employers can only ask disability-related questions and require medical examinations if the requested information is job-related and consistent with business necessity.

Given the issues at play in the pandemic, the EEOC issued earlier guidance allowing for COVID related questions, i.e., if they are experiencing symptoms of COVID-19 (such as fever, chills, cough), take Employees' temperatures, and administer a COVID-19 test.

This has CHANGED with the most recent guidance from EEOC.

EEOC GUIDANCE ON COVID SCREENING

Employers that wish to implement viral screening must meet the “business necessity” standard based on the relevant facts and suggests factors employers may wish to consider in making the “business necessity” assessment!

In considering whether to implement viral screening, the EEOC reminds employers to check the latest CDC guidelines, and any other relevant sources, to determine whether screening testing is appropriate.

FACTORS OF “BUSINESS NECESSITY” ASSESSMENT

- level of community transmission;
- vaccination status of employees;
- accuracy and speed of processing of available COVID-19 viral tests;
- degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations;
- ease of transmissibility of the current variant(s);
- possible severity of illness from the current variant;
- what types of contacts employees may have with others in the workplace or other places they are required to be to perform their work (e.g., working with medically vulnerable individuals); and
- potential impact on operations if an employee enters the workplace with COVID-19.

VACCINE MANDATES

According to the EEOC, if an Employee is unable to receive the COVID-19 vaccine for a disability-related reason, the Employer is required to engage in an interactive process to identify whether there is a reasonable and effective workplace accommodation.

Although to date, there have been no court cases examining Employer vaccine mandates under the ADA, this is an area that is sure to be litigated.

There have been legal challenges to Employer vaccine mandates brought on bases **other than the ADA**; to date, almost all have been unsuccessful. For Example:

Bridges v. Houston Methodist Hospital – Court dismissed (dismissing case brought by Hospital Employees challenging decision to require vaccinations).

MASK MANDATES

TITLE II OF THE ADA (SCHOOLS)

Several states, including Arizona, Florida, Iowa, South Carolina, Tennessee, Texas, and Utah, **enacted bans** on school districts **requiring students to wear masks at schools.**

For example, Florida threatened to withhold funds from any school district that requires students to wear masks.

- Florida's governor, DeSantis, reasoned that universally requiring masks at schools is a limitation on parents' fundamental right to make health and educational decisions for their children.

MASK MANDATES STUDENTS WITH DISABILITIES

Conversely, parents of children with disabilities in Florida and states with similar mask bans, argue that such **bans discriminate against students**. They reason that a ban “**illegally forces parents of children with underlying conditions to choose between their child’s education and their child’s health and safety**” and which **effectively bans children with disabilities from public schools**.

- And at least one court has agreed!

ARC OF IOWA V REYNOLDS

The **Arc of Iowa et al. v. Reynolds et al.**, court explained that the plaintiffs had met their burden of showing that they were **likely to suffer irreparable harm due** to both **the potential of acquiring a severe illness or death**, as well as a **loss of educational opportunity**.

The court further held that the **plaintiffs were likely to succeed on the merits of their case**. If school districts were not permitted to require masking, then school programs would not be **“readily accessible”** as students with disabilities cannot attend in-person learning without the very real threat to their lives, whereas permitting schools to have universal mask mandates would allow children with disabilities opportunity to participate.

The court also explained that **universal masking could be required as a reasonable modification to policy** that would provide disabled students with **equal access**.

Finally, the court noted that **requiring students with disabilities to receive education online would violate the ADA’s integration mandate**.

MASK MANDATE

TITLE III OF ADA

Access to Private Businesses - Whether private businesses can require patrons to wear a mask and what, if any, reasonable accommodations must be provided to people who cannot, has been a much-talked-about topic since the start of the pandemic.

- **Emanuel v. Walt Disney Co.**
- **Pletcher v. Giant Eagle**
- **Hernandez v. El Pasoans Fighting Hunger**
- **Giles v. Sprouts Farmers Market Inc.**

Individuals who are deaf and hard of hearing rely on lip reading to communicate effectively, which becomes difficult to impossible when people are wearing masks.

- **Bunn v. Nike**

LEFT WITH A HODGEPODGE GUIDANCE

No consistent precedent on Vaccine and Mask mandates:

In January of 2022, Supreme Court issued two opinions on COVID regulations impacting federal employers and contractors across the country.

- In the first, the Court stayed OSHA's "vaccine or test" mandate for employers with 100 or more employees, finding that OSHA had overstepped its authority in promulgating the rule.
- In the second, the Court allowed a rule implemented by the Centers for Medicare and Medicaid Services ("CMS"), requiring healthcare facilities to ensure vaccination of their entire workforces, with no testing alternative.

A New York judge in Nassau County struck down the state's masking requirement for public spaces late 2021.

EFFECTIVE COMMUNICATION

One of the cornerstones of Title II (and Title III) of the ADA is the requirement to provide the auxiliary aids and services necessary to ensure effective communication for people with disabilities.

Ensuring effective communication to government information is always important but became even more crucial during the COVID-19 pandemic.

- *Martinez et al v. Cuomo*
- *Yelapi v. DeSantis*
- *National Association of the Deaf v. Trump*

ACCESS TO HEALTHCARE

Title II and III of the ADA apply to healthcare providers and seek to ensure that people with disabilities have **equal access to health care services.**

- Examples of discrimination and lack of equal access for individuals with disabilities within the healthcare system comes from a
 - **review of the crisis standards of care**, which have been developed by states to direct healthcare professionals **how to ration healthcare in times of shortages.**

HEALTHCARE STANDARDS OF CARE

Many states' **crisis standards of care** expressly discriminate against people with disabilities.

For example, at the beginning of the pandemic, **Tennessee's crisis standards of care** disqualified certain populations from care services or equipment, such as ventilators.

The **guidance** discriminated against individuals with advanced **neuromuscular, cancer, dementia, traumatic brain cancer**, as well as people who **require assistance with activities of daily living or already require chronic ventilator support**.

- The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services received a complaint regarding Tennessee's crisis standards of care and responded by providing technical assistance to the state.

STANDARDS OF CARE CONT'D.

After OCR's intervention, **Tennessee's** new standards only permitted doctors to consider the patient's imminent mortality.

- **AND Categorical exclusions**, such as **specific diagnoses**, as well as disability and age **were removed from the criteria** and removed from the state's primary instrument that assessed likelihood of short-term survival.

Similarly, **Alabama's** emergency plan directed hospitals **not to “offer mechanical ventilator support for patients” with intellectual disabilities, “moderate to severe dementia,” and “severe traumatic brain injury.”**

- Through an OCR early resolution process, this **direction was removed** from the state's emergency plan in April 2020. The state then produced a substantially revised crisis standard of care in August 2020.

VISITOR POLICIES

To prevent the spread of COVID-19, many hospitals and health care facilities modified their **visitor policies** preventing entrance by anyone other than the patient.

- Strict no-visitor policies can prevent patients with disabilities from access to family members or other supporters who help the patient communicate to medical staff.

The ramifications of such restrictions are alarming, such as denying the person with a disability the ability to make informed decisions and provide consent.

NO VISITOR POLICIES – REASONABLE ACCESS TO SUPPORT

People with disabilities and advocacy groups quickly began advocating for **reasonable modifications**.

- Some of these situations were resolved, including in **Connecticut**, where the governor issued an executive order regarding non-visitation policies for short-term hospital stays, outpatient clinics, and outpatient surgical facilities to make sure that people with disabilities were not denied reasonable access to a needed support person.

SSA BENEFITS

In the vast majority of Coronavirus (COVID-19) cases – according to the World Health Organization

- The median time from onset to clinical recovery for **mild** coronavirus cases is **approximately 2 weeks**.
- And, for patients with **severe or critical** COVID-19 the recovery period is **3-6 weeks**.

Since these “typical” cases do not last a year, these ill individuals would not qualify for Social Security Disability.

SSA GUIDANCE – COVID-19 COMPLICATIONS

Patients have been on ventilators for months; patients experiencing “complications” or secondary problems – such as blood clots or acute respiratory failure.

- 1 in 6 people who contract coronavirus will incur serious complications. Some long-term complications of COVID-19 are the result of underlying medical conditions, including diabetes, asthma or heart disease.

If a Coronavirus (COVID-19) patient develops complications that impairs them such that they cannot work for a year or longer, then they would be eligible to collect Social Security Disability (if they have paid enough in taxes into the system).

- Acute Liver Injury, secondary infections such as strep and staph that result in amputation, and acute cardiac injury that lasts after recovery are all secondary complications of coronavirus that potential could leave a COVID-19 patient disabled for a year or more.

FUTURE TRENDS

Another way in which individuals with disabilities might have been excluded from effective communication with the government occurred when the COVID-19 vaccine became available.

- Individuals who are blind or visually impaired and who searched the internet for vaccine appointments could not always book a vaccine, because state websites were often inaccessible to people who use assistive technology, like screen reading software.

There have yet to be any published cases on the this topic, but it is certainly a topic to look out for in cases.

EEOC COVID RELATED CHARGES

Thousands of workers across the country have filed discrimination claims with the U.S. Equal Employment Opportunity Commission (“EEOC”) since the inception of the COVID-19 pandemic.

Since April 2020, the U.S. Equal Employment Opportunity Commission has received roughly **6,225 COVID-related charges of discrimination under federal civil rights laws** and more than **2,700 vaccine-related charges**, most of which were in 2021 when vaccine requirements were introduced.”

The majority of the EEOC charges citing COVID-19 allege violations of the **Americans with Disabilities Act (“ADA”)**.

- These numbers are expected to continue increasing in light of the EEOC’s December 2021 guidance announcing situations in which COVID can be a “disability” for purposes of the ADA.

COVID-19 FEDERAL RESOURCES

FEMA COVID-19 FUNERAL ASSISTANCE

- **Eligibility**
- **Coverage**
- **Requirements**
- **Applications**
- **News of note**
 - 2.6 billion dollars awarded
 - \$6500 average award
 - 92% eligibility rate for applications processed

FEMA FUNERAL ASSISTANCE - ELIGIBILITY

U.S. citizen, non-citizen national, or qualified non-citizen.

The death occurred in the United States, including U.S. territories and the District of Columbia;

The death was attributed to COVID-19; and

You are responsible for the eligible funeral expenses incurred on or after January 20, 2020

FEMA FUNERAL ASSISTANCE - COVERAGE

- **Funeral services**
- **Cremation**
- **Internment**
- **Transfer of remains**
- **Casket or urn**
- **Burial plot**
- **Marker or headstone**
- **Ceremony, clergy, funeral home equipment/staff**

FEMA FUNERAL ASSISTANCE - REQUIREMENTS

You must provide FEMA a copy of an official death certificate that shows the death occurred in the United States, including U.S. territories and the District of Columbia, occurred after January 20, 2020, and was attributed to COVID-19.

You must provide FEMA with a signed funeral home contract, invoice, receipts, or other documentation.

FEMA FUNERAL ASSISTANCE - APPLICATIONS

To apply, call 844-684-6333 toll-free between 9 a.m. to 9 p.m. Eastern Time, Monday-Friday.

After you apply, FEMA will provide you an application number, and you may create an account on [DisasterAssistance.gov](https://www.disasterassistance.gov).

Once FEMA receives all required documents, it takes approximately 45 days to make an eligibility decision.

Funds direct deposited or Department of Treasury
Check via US Mail.

QUESTIONS

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