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## A Rock And A Hard Place? ADA Requests For Exemptions From Public Health Mandates

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This week's spotlight on COVID-19 related workplace litigation serves as a reminder that the Americans with Disabilities Act and similar laws require employers to engage in the interactive process with employees with disabilities before denying an employee's request for an exemption from a public health mandate. This is true even if the employee's requested accommodation appears contrary to federal, state or local public health guidance.

In *Grimmitt v. DeJoy*, the plaintiff, a United States postal worker who worked primarily as a mail carrier, filed a three-count complaint against the USPS alleging that it discriminated against him, failed to accommodate him, and retaliated against him, all in violation of the Rehabilitation Act.

Although this lawsuit was brought under the Rehabilitation Act, its lessons are nevertheless instructive for private employers covered by the ADA and similar state and local laws, because courts and agencies analyze these laws using the same principles.

In this case, the plaintiff alleges that he asked to be exempted from the COVID-19 mandatory mask requirement because wearing the mask triggered his anxiety and caused him to have panic attacks that rendered him unable to work. At the request of the local postmaster, the plaintiff provided a note from his healthcare provider stating that wearing a mask would cause the plaintiff

medical harm. Although the postmaster let the plaintiff work for three days without a mask, the plaintiff alleges that the postmaster then decided that the plaintiff would be charged as absent without leave for any day that he worked without a mask, moved him to work outside on the dock, and prohibited him from going inside to access the water fountain or water facilities.

Assuming these facts to be true (which a court must do when a complaint is first filed), one might ask: What is wrong with the postmaster's response? After all, when the alleged acts occurred in May through July 2020, there was no COVID-19 vaccine and the risk of COVID-19 infection was great. The answer: Perhaps nothing. But that is an issue for the court (or a jury) to decide, and we all know that is a time-consuming and expensive process.

With this case in mind, a few reminders are in order, as we (hopefully) begin to see the end of the pandemic.

If an employee with a disability requests an accommodation because of a medical condition that contraindicates compliance with a COVID-19 mandate (such as wearing a mask or being immunized against COVID-19), the employer runs the risk of violating the ADA if they do not grant the request -- unless the employer can establish that exempting the employee from the requirement would pose a direct threat to the employee or others that cannot be eliminated by a reasonable accommodation or that it would otherwise be unreasonable under the ADA to grant the exemption or that it would result in an undue hardship.

Each of these determinations require an individualized assessment, based on the particular facts and circumstances, which generally means that there are no easy answers.

For example, the EEOC has explained in its COVID-19 Guidance that the direct threat analysis should be based on a reasonable medical judgment that relies on the current medical knowledge about COVID-19. That knowledge might include things such as the level of community spread at the time of the assessment, the type of work environment, the vaccination status of the workers, whether other employees are wearing masks or undergoing screening, and the space available for social distancing.

Even if this assessment results in a determination that granting the exemption would pose a direct threat to the employee or others, the employer must still determine whether there is a reasonable accommodation that reduces or eliminates the direct threat without creating an undue hardship on the employer.

The bottom line is this: In over two decades of litigating these issues, I have yet to argue direct threat or undue hardship when defending an ADA case, because it is the employer's burden to prove and it is a difficult burden to carry. Instead, the focus can be on determining whether there is a reasonable accommodation -- which need not be the one chosen by the employee -- that eliminates the workplace barrier (here, the mask mandate) so that the employee can perform the essential functions of his or her position.

Finally, because each of the public health mandates contemplates exemption requests for those with medical conditions and sincerely held religious beliefs, employers will not be able to rely on the mandate to establish direct threat or undue hardship.

It may well be that the court (or the jury) decides in this case that allowing the employee to work outside was reasonable under the facts and circumstances

in May through July 2020. Stay tuned as this plays out over the next several months.