



Quarantine and Isolation: Selected Legal Issues Relating to Employment

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May 11, 2009

Congressional Research Service

7-5700

www.crs.gov

RL33609

Summary

Recent human cases of infection with a novel influenza A (H1N1) virus have been identified both internationally and in the United States. There has been human to human transmission and the new virus has the potential to become pandemic. The emergence of this virus, in addition to other potential pandemic threats such as the avian influenza A (H5N1) virus, has given rise to issues relating to the use of quarantine and isolation. Questions relating to employment are among the most significant issues since if individuals fear losing their employment or their wages, compliance with public health measures such as isolation or quarantine may suffer. Although the common law doctrine of employment-at-will, which allows an employer to terminate an employee from employment for any reason other than those prohibited by statute, is generally applicable, there is an exception to this doctrine for public policy reasons. This report will examine the employment-at-will doctrine, possible application of the public policy exception in the case of a potential influenza pandemic, the Family and Medical Leave Act (FMLA), and possible application of the nondiscrimination mandates of the Americans with Disabilities Act (ADA).

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Introduction

Recent human cases of infection with a novel influenza A (H1N1) virus have been identified both internationally and in the United States. There has been human to human transmission and the new virus has the potential to become pandemic.¹ The emergence of this virus, in addition to other potential pandemic threats such as the avian influenza A (H5N1) virus, has given rise to issues relating to the use of quarantine and isolation.² Questions relating to employment are among the most significant issues since if individuals fear losing their employment or their wages, compliance with public health measures such as isolation or quarantine may suffer.³ Although the common law doctrine of employment-at-will, which allows an employer to terminate an employee from employment for any reason other than those prohibited by statute, is generally applicable, there is an exception to this doctrine for public policy reasons. This report will examine the employment-at-will doctrine, possible application of the public policy exception in the case of a potential influenza pandemic, the Family and Medical Leave Act (FMLA), and possible application of the nondiscrimination mandates of the Americans with Disabilities Act (ADA).

Background

History suggests that influenza pandemics occur regularly.⁴ Controlling or preventing an influenza pandemic involves the same strategies used for seasonal influenza. These strategies are vaccination, treatment with antiviral medications, and the use of infection control.⁵ A specifically targeted vaccine would not be available immediately since the exact strain of the virus would not be known until the epidemic occurs, and there may be limited supplies of antiviral medications. Therefore, depending on the severity of the pandemic, the use of other infection control measures may be critical. The uses of quarantine and isolation, as well as social distancing and “snow

¹ For information on the latest number of cases, medical information, and U.S. Government actions, see <http://www.cdc.gov/swineflu/> and <http://www.dhs.gov/xprepresp/programs/swine-flu.shtm>. See also CRS Report R40554, *The 2009 Influenza A(H1N1) “Swine Flu” Outbreak: An Overview*, by Sarah A. Lister and C. Stephen Redhead.

² For a detailed discussion of legal authorities relating to quarantine and isolation, see CRS Report RL33201, *Federal and State Quarantine and Isolation Authority*, by Kathleen S. Swendiman and Jennifer K. Elsea. For an overview of the legal issues relating to the 2009 Influenza A(H1N1) see CRS Report R40560, *The 2009 Influenza A(H1N1) Outbreak: Selected Legal Issues*, coordinated by Kathleen S. Swendiman and Nancy Lee Jones.

³ A survey conducted by the Harvard School of Public Health (HSPH) Project on the Public and Biological Security asked employed Americans about the problems they might have if they stayed out of work for various time periods due to an outbreak of pandemic influenza. The survey found, in part, that although most employed people felt they could miss seven to ten days of work without serious financial hardship, 25% of those surveyed said they would face such problems. The survey also indicated that only 19% of employed individuals were aware of any current plans by their employers for dealing with an outbreak of pandemic influenza. These findings were described as “a wake-up call for business, that employees have serious financial concerns and are unclear about the workplace plans and policies for dealing with pandemic flu.” <http://www.hsph.harvard.edu/press/releases/press10262006.html>. The Occupational Safety and Health Administration (OSHA) issued guidance on preparing workplaces for an influenza pandemic that discussed the preparation of a disaster plan and emphasized the importance of addressing leave and pay issues. See http://www.osha.gov/Publications/influenza_pandemic.html.

⁴ Homeland Security Council, *National Strategy for Pandemic Influenza 1-2* (GPO November 2005). For a detailed discussion of pandemic influenza, preparedness, and response, see CRS Report RL33145, *Pandemic Influenza: Domestic Preparedness Efforts*, by Sarah A. Lister.

⁵ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan 107* (GPO May 2006).

days,” have been discussed in the Homeland Security Council’s Pandemic Influenza Implementation Plan⁶ as ways to attempt to limit the spread of influenza.⁷

Quarantine is defined as the “separation of individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection.”⁸ Isolation is defined as the “separation of infected individuals from those who are not infected.”⁹ Social distancing is defined as “infection control strategies that reduce the duration and/or intimacy of social contacts and thereby limit the transmission of influenza.”¹⁰ Social distancing can include the use of face masks, teleconferencing, or school closures. “Snow days,” a type of social distancing, are the recommendation or mandate by authorities that individuals and families limit social contacts by remaining within their households.¹¹

The Centers for Disease Control and Prevention (CDC) issued interim planning guidance for communities to mitigate the impact of pandemic influenza.¹² This guidance introduced a Pandemic Severity Index, which ranks the severity of a pandemic like the categories given to hurricanes and links the severity to specific community interventions. The community interventions include isolation and voluntary quarantine, school dismissals, and the use of social distancing measures to reduce contact. The social distancing measures include the cancellation of large public gatherings and the alteration of workplace environments and schedules to decrease social density.¹³ The guidance noted the importance of workplace leave policies that would “align incentives and facilitate adherence with the nonpharmaceutical interventions (NPIs)...”¹⁴ Strategies to minimize the impact of workplace absenteeism were discussed in some detail and included the use of staggered shifts and telework. Unemployment insurance was mentioned as potentially available, as was disaster unemployment assistance. The guidance also observed that the FMLA may offer some job security protections.¹⁵

The National Governors Association Center for Best Practices (NGA Center) conducted nine regional pandemic preparedness workshops during 2007 and 2008 to “examine state pandemic preparedness, particularly in non-health-related areas such as continuity of government, maintenance of essential services, and coordination with the private sector.” A report analyzing the information gained during these workshops identified areas in which new or improved

⁶ *Id.* at 72-73, 107-109.

⁷ Although the precise efficacy of these measures is not known, a study by the Institute of Medicine indicated that there is a role for community-wide interventions such as isolation or voluntary quarantine. Institute of Medicine, “Modeling Community Containment for Pandemic Influenza: A Letter Report,” Dec. 11, 2006.

⁸ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan 209* (GPO May 2006).

⁹ *Id.* at 207.

¹⁰ *Id.* at 209.

¹¹ *Id.*

¹² Centers for Disease Control and Prevention (CDC), *Interim Pre-pandemic Planning Guidance: Community Strategy of Pandemic Influenza Mitigation in the United States—Early, Targeted, Layered Use of Nonpharmaceutical Interventions* (February 2007), <http://www.pandemicflu.gov/plan/community/mitigation.html>. The American Public Health Association has also issued recommendations with regard to comprehensive national planning for an influenza pandemic. See American Public Health Association, *APHA’s Prescription for Pandemic Flu* (February 2007) <http://www.apha.org/NR/rdonlyres/D5017DB9-F400-4399-A656-939C4C8DF259/0/FLUpolicycomplete.pdf>.

¹³ See CDC, *supra* note 12 at 19.

¹⁴ *Id.*

¹⁵ *Id.* at 51-52.

policies and procedures are necessary to improve pandemic preparedness. One of these areas was workforce policies. The NGA Center concluded

Every sector examined in this report will be affected by the availability of workers during a pandemic. In general, states and the private sector should develop and test policies affecting the willingness and ability of personnel to perform their duties, whether in traditional or alternative settings. Potential strategies and or guidance addressing telecommuting, alternative schedules, or modified operating hours for retail establishments and Internet or distance-learning programs for school children would be particularly useful. During a pandemic, almost everyone will be susceptible to the illness. A central disease control strategy will be keeping sick people away from others to minimize the spread of infection. Employers should examine their human resource policies and, if needed, create new policies that would allow sick workers to stay at home during a pandemic. When possible, states and private sector employers should collaboratively develop policies that effectively balance the need of some workers to care for sick (or healthy) family members for extended periods of time with the requirements government and private sector continuity of operations plans.¹⁶

Wrongful Discharge in Violation of Public Policy

The employment-at-will doctrine governs the employment relationship between an employer and employee for most workers in the private sector. An employee who does not work pursuant to an employment contract, including a collective bargaining agreement that may permit termination only for cause or may identify a procedure for dismissals, may be terminated for any reason at any time.

Although the employment-at-will doctrine provides the default rule for most employees, it has been eroded to some degree by the recognition of certain wrongful discharge claims brought against employers. In general, these wrongful discharge claims assert tort theories against the employer. A cause of action for wrongful discharge in violation of public policy is one such claim. If isolation or a quarantine were used to attempt to limit the spread of a pandemic influenza virus and an employee was terminated because of absence from the workplace, a claim for wrongful discharge in violation of public policy might arise.

A claim for wrongful discharge in violation of public policy is grounded in the belief that the law should not allow an employee to be dismissed for engaging in an activity that is beneficial to the public welfare. In general, the claims encompass four categories of conduct:

- refusing to commit unlawful acts (e.g., refusing to commit perjury when the government is investigating the employer for wrongdoing);
- exercising a statutory right (e.g., filing a claim for workers' compensation, reporting unfair labor practices);
- fulfilling a public obligation (e.g., serving on jury duty); and
- whistleblowing.¹⁷

¹⁶ National Governors Association Center for Best Practices, *Pandemic Preparedness in the States: An Assessment of Progress and Opportunity*, (September 2008).

¹⁷ See Steven L. Willborn et al., *Employment Law: Cases and Materials* 82 (1993); John F. Buckley and Ronald M. Green, 2006 State by State Guide to Human Resources Law 5-46 (2006).

Although most states appear to recognize a claim for wrongful discharge in violation of public policy, it is possible that a state may allow a claim only under certain circumstances. For example, Texas recognizes such a claim only if an employee is terminated for refusing to perform an illegal act or inquiring into the legality of an instruction from the employer.¹⁸

While the four categories of conduct identified above represent the classic fact patterns for a claim of wrongful discharge in violation of public policy, other actions could be deemed beneficial to the public welfare and result in a wrongful discharge claim if an employee is terminated for engaging in such actions. Some courts have broadly defined what constitutes “public policy.” For example, in *Palmateer v. International Harvester Co.*, the Illinois Supreme Court indicated that

[t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions.¹⁹

Similarly, in *Boyle v. Vista Eyewear, Inc.*, the Missouri Court of Appeals stated that public policy “is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.”²⁰ These broad definitions suggest that an employee’s isolation or quarantine during a pandemic in some states could possibly provide a public policy exception to the at-will rule of employment. It would seem possible for a court to conclude that the isolation or quarantine of individuals during a pandemic serves the public good and that the termination of individuals who are isolated or quarantined violates public policy.²¹

If the government were to direct individuals to isolate or quarantine themselves either because they are infected or because of the risk of infection, it would seem that an even stronger argument for a public policy exception to the at-will rule of employment could be articulated. In such case, the government would appear to be identifying a policy that would benefit the public good. However, even if the government recommended isolation or quarantine rather than mandated such actions, a strong argument for a public policy exception to the at-will rule would still seem possible. In either case, the government would seem to be establishing a policy in furtherance of the public’s best interests.

The Family and Medical Leave Act

The Family and Medical Leave Act²² (“FMLA”) guarantees eligible employees 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

¹⁸ See Buckley and Green at 5-59.

¹⁹ 421 N.E.2d 876, 878 (Ill. 1981).

²⁰ 700 S.W.2d 859, 871 (Mo. Ct. App. 1985).

²¹ But see Mark A. Rothstein and Meghan K. Talbott, *Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation*, 10 J. Health Care L. & Pol’y 239 (2007) (suggesting that a claim for wrongful discharge in violation of public policy may not be successful because “[n]o court has ever held that it violates public policy to discharge an individual because he or she missed work due to quarantine.”)

²² 29 U.S.C. §§ 2601-2654. For additional discussion of the Family and Medical Leave Act, see CRS Report RS22090, *The Family and Medical Leave Act: Background and U.S. Supreme Court Cases*, by Jon O. Shimabukuro.

- because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
- because of the placement of a son or daughter with the employee for adoption or foster care;
- in order to care for a spouse or a son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition; and
- because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.²³

The FMLA defines an “eligible employee” as one who has been employed for at least 12 months by the employer from whom leave is requested, and who has been employed for at least 1,250 hours of service with such employer during the previous 12-month period.²⁴ The FMLA applies only to employers engaged in commerce (or in an industry affecting commerce) that have at least 50 employees who are employed for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.²⁵

If there was a spread of a pandemic influenza virus, the FMLA would seem to provide infected employees and employees who care for certain infected relatives with the opportunity to be absent from the workplace.²⁶ The FMLA defines a “serious health condition” to mean “an illness, injury, impairment, or physical or mental condition” that involves either “inpatient care in a hospital, hospice, or residential medical care facility; or ... continuing treatment by a health care provider.”²⁷ An employee who was affected by a pandemic influenza virus may be found to have a serious health condition. If the FMLA’s eligibility requirements were met, such an employee would likely be granted leave under the statute.²⁸

In addition, because the FMLA grants leave to an employee to care for a spouse, child, or parent with a serious health condition, an employee could be granted leave to care for a relative who was affected by a pandemic influenza virus if the employee met the statute’s eligibility requirements. While on leave, the employee with the serious health condition or the employee caring for a

²³ 29 U.S.C. § 2612(a)(1).

²⁴ 29 U.S.C. § 2611(2). The term “eligible employee” does not include most federal employees. Federal employees are covered generally under the Federal Employees Family Friendly Leave Act (“FEFFLA”). See 5 U.S.C. § 6307(d) (permitting the use of sick leave to care for a family member having an illness or injury, and to make arrangements for or to attend the funeral of a family member). The U.S. Office of Personnel Management has issued a document that contemplates telework, alternative work arrangements, and excused absences during a pandemic. See U.S. Office of Personnel Management, *Human Capital Planning for Pandemic Influenza* (2006), http://www.opm.gov/pandemic/opm-pandemic_allissuances.pdf. For additional information on human resources management flexibilities that may be utilized by federal executive branch agencies during emergency situations, see CRS Report RS22264, *Federal Employees: Human Resources Management Flexibilities in Emergency Situations*, by Barbara L. Schwemle.

²⁵ 29 U.S.C. § 2611(4)(I). See also 29 U.S.C. §2611(2)(B)(ii). (Employers who employ 50 or more employees within a 75-mile radius of an employee’s worksite are subject to the FMLA even if they may have fewer than 50 employees at a single worksite.)

²⁶ See CDC, *supra* note 12 (explaining that absenteeism for child minding could last as long as 12 weeks for a severe pandemic).

²⁷ 29 U.S.C. § 2611(11).

²⁸ It is possible that an employee could be affected by a pandemic influenza virus and not develop a serious health condition. In such case, the employee would not be eligible for leave under the Family and Medical Leave Act.

spouse, child, or parent with a serious health condition could be isolated or quarantined without the fear of termination for at least 12 workweeks.²⁹

In contrast, an employee who was not infected by a pandemic influenza virus or who was not responsible for the care of a spouse, child, or parent infected by such a virus would not be protected by the FMLA. If such an employee sought isolation or quarantine to avoid exposure and was absent from the workplace, the FMLA would not prohibit the employer from terminating the employee.

At least seven states, recognizing that the lack of statutory protection for employees in a situation where isolation or quarantine may be necessary, have enacted legislation that explicitly prohibits the termination of an employee who is subject to isolation or quarantine. In Delaware, Iowa, Kansas, Maryland, Minnesota, New Mexico, and Utah, an employer is prohibited from terminating an employee who is under an order of isolation or quarantine, or has been directed to enter isolation or quarantine.³⁰ Under Minnesota law, an employee who has been terminated or otherwise penalized for being in isolation or quarantine may bring a civil action for reinstatement or for the recovery of lost wages or benefits.³¹

Two additional states have enacted legislation that addresses the treatment of employees who are subject to quarantine or isolation. Under New Jersey law, an affected employee must be reinstated following the quarantine or isolation.³² Under Maine law, an employer is required to grant leave to an employee who is subject to quarantine or isolation.³³ The leave granted by the employer may be paid or unpaid.³⁴

Although federal law does not protect from termination employees who may be absent from the workplace because of isolation or quarantine, there are examples of employee protections that are arguably analogous.³⁵ The FMLA, for example, does grant leave to an eligible employee who has

²⁹ Although the Family and Medical Leave Act allows for at least 12 workweeks of leave, it does not guarantee the payment of wages during such leave. Under section 102(d)(2)(B) of the act, 29 U.S.C. § 2612(d)(2)(B), an employer may require the employee to substitute paid vacation or sick leave for the leave granted under the act. If such a substitution is not made, the employee is likely to be granted unpaid leave.

³⁰ Del. Code Ann. tit. 20, § 3136(6)(d); Iowa Code § 139A.13A; Kan. Stat. Ann. § 65-129d; Md. Code Ann., Health-Gen. § 18-906; Minn. Stat. § 144.4196; N.M. Stat. Ann. § 12-10A-16; Utah Code Ann. § 26-6b-3.3.

³¹ Minn. Stat. § 144.4196.

³² N.J. Rev. Stat. § 26:13-16.

³³ Me. Rev. Stat. Ann. tit. 26, § 875.

³⁴ Although the availability of wage or income replacement because of quarantine or isolation is beyond the scope of this report, it should be noted that some commentators have indicated that existing wage or income replacement programs, such as unemployment and workers compensation, would probably not provide compensation for most employees affected by quarantine or isolation. See, e.g., Nan D. Hunter, "Public-Private" Health Law: Multiple Directions in Public Health, 10 J. Health Care L. & Pol'y 89 (2007). Replacement wages, however, were reportedly paid during at least one quarantine. During the 1916 polio epidemic, quarantined families in the village of Glen Cove, New York received replacement wages. See Guenter B. Risse, *Revolt Against Quarantine: Community Responses to the 1916 Polio Epidemic, Oyster Bay, New York*, Transactions & Stud. of the College of Physicians of Philadelphia, Mar. 1992, at 34 ("Garbage cans were distributed free of charge, and quarantined families received replacement wages to compensate for loss of income"). Disaster unemployment assistance pursuant to the Stafford Act may also be a possibility if it is determined that the act is applicable to an influenza pandemic. See CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister; CRS Report RS22022, *Disaster Unemployment Assistance (DUA)*, by Julie M. Whittaker and Alison M. Shelton (discussing the availability of disaster unemployment benefits pursuant to a disaster declaration under the Stafford Act).

³⁵ During the SARS (Severe Acute Respiratory Syndrome) epidemic, Canadian laws and regulations were amended to (continued...)

a serious health condition or who provides care to a spouse, child, or parent with a serious health condition. Moreover, an expansion of the FMLA to allow for at least eight weeks of paid leave because of a serious health condition or to care for a spouse, child, or parent with such a condition has been proposed.³⁶ The availability of paid leave would likely minimize concerns about lost wages during an influenza pandemic.³⁷

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides another example of employee protection.³⁸ USERRA requires the reemployment of an employee who has been absent from a position of employment because of service in the uniformed services. USERRA and the FMLA illustrate Congress's awareness of events that may necessitate an employee's absence from the workplace.

The Americans with Disabilities Act (ADA)

Overview of the ADA Definition and Employment Provisions

Definition of Disability

The Americans with Disabilities Act³⁹ (ADA) has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities. As stated in the act, the ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴⁰

The starting point for an analysis of rights provided by the ADA is whether an individual is an individual with a disability. The term "disability," with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an

(...continued)

provide for special employment insurance coverage for health care workers who were unable to work because of SARS and to provide for unpaid leave if an individual was unable to work due to a SARS-related event, such as being under individual medical investigation. See Institute for Bioethics, Health Policy and Law, *Quarantine and Isolation: Lessons Learned from SARS* at 58-59 (November 2003).

³⁶ See Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007). For additional information on leave benefits available pursuant to federal law, see CRS Report RL34088, *Leave Benefits in the United States*, by Linda Levine.

³⁷ Some states are exploring the availability of paid leave as part of their state disability insurance programs. In 2002, legislation that extends disability insurance benefits to individuals who are unable to perform their work because they are "caring for a seriously ill child, parent, spouse, or domestic partner" was enacted in California. See Cal. Unemp. Ins. Code §§ 3300-3306. Under the so-called Paid Family Leave Insurance Program, an individual who meets the program's requirements is eligible for benefits equal to one-seventh of the individual's weekly benefit amount on any day in which he or she is unable to perform the individual's regular or customary work. Similar legislation has been enacted in New Jersey. See A. 873, 213th Leg., Reg. Sess. (N.J. 2008).

³⁸ 38 U.S.C. §§ 4301-4333.

³⁹ 42 U.S.C. §§12101 *et seq.* For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

⁴⁰ 42 U.S.C. §12101(b)(1).

impairment (as described in paragraph(3)).”⁴¹ The ADA was amended by the ADA Amendments Act of 2008, P.L. 110-325, to expand the interpretation of the definition of disability from that of several Supreme Court decisions.⁴² Although the statutory language is essentially the same as it was in the original ADA, P.L. 110-325 contains new rules of construction regarding the definition of disability, which provide that:

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;
- the term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act;
- an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;
- an impairment that is episodic or in remission is a disability if it would have substantially limited a major life activity when active;
- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.⁴³

The findings of the ADA Amendments Act include statements indicating that the Supreme Court decisions in *Sutton v. United Airlines* and *Toyota Motor Manufacturing v. Williams*, as well as lower court cases, have narrowed and limited the ADA from what was intended by Congress. P.L. 110-325 specifically states that the current EEOC regulations defining the term “substantially limits” as “significantly restricted” are “inconsistent with congressional intent, by expressing too high a standard.” The codified findings in the original ADA are also amended to delete the finding that “43,000,000 Americans have one or more physical or mental disabilities....” This finding was used in *Sutton* to support limiting the reach of the definition of disability.

The ADA Amendments Act states that the purposes of the legislation are to carry out the ADA’s objectives of the elimination of discrimination and the provision of “‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection available under the ADA.” P.L. 110-325 rejected the Supreme Court’s holdings that mitigating measures are to be used in making a determination of whether an impairment substantially limits a major life activity as well as holdings defining the “substantially limits” requirements. The substantially limits requirements of *Toyota* as well as the EEOC regulations defining substantially limits as “significantly restricted” are specifically rejected in the new law.

The EEOC had promulgated regulations and issued other publications on the definition of disability contained in the ADA as originally enacted. The appendix to the regulations stated: “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken

⁴¹ 42 U.S.C. §12102(2) as amended by P.L. 110-325, §4(a).

⁴² *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Kirkingburg v. Albertson’s Inc.*, 527 U.S. 555 (1999); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). For a more detailed discussion of P.L. 110-325 see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

⁴³ Low vision devices are not included in the ordinary eyeglasses and contact lens exception.

limbs, sprained joints, concussions, appendicitis, and influenza.”⁴⁴ Similarly, in a question-and-answer publication on the ADA, the Department of Justice and the EEOC observed that “an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered” under the definition of disability.⁴⁵ There was some question about whether this interpretation would apply to pandemic influenza since pandemic influenza may not be a “minor, nonchronic condition of short duration.” Of particular importance concerning whether this interpretation could be distinguished would be the extent to which an individual may have long-lasting residual effects from infection with a pandemic influenza virus.⁴⁶ However, the EEOC and DOJ interpretations of the definition of disability do not take into consideration P.L. 110-325. The EEOC will be promulgating new regulations to reflect the statutory amendments and, although the statute did not address pandemic influenza, the broad reach of the new definition, particularly the requirement that the definition be interpreted broadly, may necessitate a change in the regulatory interpretation.

Employment Discrimination

Title I of the ADA prohibits employment discrimination, and specifically provides that no covered entity shall discriminate against a qualified individual with a disability on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.⁴⁷ The term discrimination is defined in part as “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”⁴⁸ The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.⁴⁹

For an ADA employment-related issue, if the threshold issues of meeting the definition of an individual with a disability and involving an employer employing over 15 individuals are met, the next step is to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Title I defines a “qualified individual with a disability.” Such an individual is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires.”⁵⁰ The EEOC has stated that a function may be essential because (1) the position exists to perform the duty, (2) there are a

⁴⁴ 29 C.F.R. Part 1630, App. §1630.2(j).

⁴⁵ Equal Employment Opportunity Commission and U.S. Department of Justice, Civil Rights Division, “Americans with Disabilities Act: Questions and Answers,” <http://www.usdoj.gov/crt/ada/qandaeng.htm>.

⁴⁶ For a chart listing differences between seasonal influenza and pandemic influenza, see http://www.pandemicflu.gov/season_or_pandemic.html.

⁴⁷ 42 U.S.C. §12112(a).

⁴⁸ 42 U.S.C. §12112(b)(4).

⁴⁹ 42 U.S.C. §12111(5). This parallels the coverage provided in the Civil Rights Act of 1964. The Supreme Court in *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), held that the 15-employee limitation in title VII of the Civil Rights Act, 42 U.S.C. §2000e(b), was not jurisdictional, but rather was related to the substantive adequacy of a claim. Thus, if the defense that the employer employs fewer than 15 employees is not raised in a timely manner, a court is not obligated to dismiss the case. Since the ADA’s 15-employee limitation language parallels that of Title VII, it is likely that a court would interpret the ADA’s requirement in the same manner.

⁵⁰ 42 U.S.C. §12111(8).

limited number of employees available who could perform the function, or (3) the function is highly specialized.⁵¹

It is a defense to a charge of discrimination that an alleged application of a qualification standard has been shown to be job-related and consistent with business necessity.⁵² A qualification standard may include a requirement that an individual not pose a direct threat to the health or safety of other individuals.⁵³

The ADA requires the provision of reasonable accommodation unless the accommodation would pose an undue hardship on the operation of the business.⁵⁴ “Reasonable accommodation” is defined in the ADA as including making existing facilities readily accessible to and usable by individuals with disabilities, and job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, adjustment of examinations or training materials or policies, provision of qualified readers or interpreters, and other similar accommodations.⁵⁵ The Equal Employment Opportunity Commission (EEOC) has interpreted reasonable accommodation as including work at home⁵⁶ and the use of paid or unpaid leave.⁵⁷

“Undue hardship” is defined as “an action requiring significant difficulty or expense.”⁵⁸ Factors to be considered in determining whether an action would create an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.⁵⁹ The EEOC has provided detailed guidance on reasonable accommodation and undue hardship, which, in part, discusses the use of paid or unpaid leave as a form of reasonable accommodation.⁶⁰

The ADA also limits an employer’s ability to make disability-related inquiries or to require medical examinations.⁶¹ Prior to an offer of employment, all disability-related inquiries and medical examinations are prohibited. After a conditional job offer but prior to the commencement of employment, an employer may make disability-related inquiries and conduct medical examinations as long as this is done for all entering employees in the same job category. After an employee begins work, an employer may make disability-related inquiries and conduct

⁵¹ 29 C.F.R. §1630.2(n)(2).

⁵² 42 U.S.C. §12113.

⁵³ 42 U.S.C. §12113(b).

⁵⁴ 42 U.S.C. §12112(b)(5)(A).

⁵⁵ 42 U.S.C. § 12111(9).

⁵⁶ See <http://www.eeoc.gov/facts/telework.html>.

⁵⁷ EEOC, “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>. Since the ADA Amendments Act largely concerned the definition of disability, it is likely that the EEOC’s interpretations of parts of the ADA would not be significantly affected by P.L. 110-325.

⁵⁸ 42 U.S.C. §12111(10).

⁵⁹ *Id.*

⁶⁰ EEOC, “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>. This guidance also discusses the relationship between the ADA and the Family Medical Leave Act (FMLA).

⁶¹ 42 U.S.C. §12112(d).

medical examinations only if they are job related and consistent with business necessity. Any medical information an employer obtains as a result of these actions must be treated as a confidential medical record.

Application of the ADA

Overview

The first question to be discussed is how the ADA's requirements regarding disability-related inquiries might effect employers who are planning for possible absences due to potential influenza absenteeism. The EEOC has issued guidance regarding how an employer may ask employees about factors, including chronic medical conditions that may put an individual at higher risk from influenza, that may cause them to miss work during a pandemic.⁶² Generally, the EEOC has found that such inquiries are permitted if the employer asks broad questions that are not limited to disability-related inquiries.

Second, would an individual who is isolated, quarantined, or told to use a “snow day” be discriminated against in violation of the ADA if he or she was subject to adverse employment consequences, such as termination of employment? The first step in the analysis of this issue is to examine which of these circumstances—isolation, quarantine, or snow days—is applicable to the individual. Then it must be determined if the person is an individual with a disability. If the individual is determined to be an individual with a disability, the final step is to determine whether the person is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.

Definition of Disability and Isolation

Isolation, as noted previously, separates individuals who are sick from those who are well. Generally, individuals with long-term contagious diseases would be considered individuals with disabilities.⁶³ In *Bragdon v. Abbott*,⁶⁴ the Supreme Court held that HIV infection was a physical impairment that was a substantial limitation on the major life activity of reproduction. It might be argued that an individual who is infected with a pandemic influenza virus and who manifests symptoms would have a substantial limitation on a major life activity such as breathing. Therefore, it could be argued that an individual who is isolated because of this illness would be covered under the ADA.

However, although the ADA Amendments Act of 2008 broadened the definition of disability so that arguments against coverage that could have been made prior to the statutory change are no longer relevant, the enactment of P.L. 110-325 does not mean that there is no ambiguity about coverage. There will still be a requirement for making the determination of whether a disability is covered under the definition. The Statement of Managers to Accompany S. 3406, the bill which became P.L. 110-325, specifically states the following:

⁶² EEOC, “ADA-Compliant Employer Preparedness for the H1N1 Flu Virus,” http://www.eeoc.gov/facts/h1n1_flu.html.

⁶³ For a discussion of the ADA's coverage of contagious disease generally, see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by Nancy Lee Jones.

⁶⁴ 524 U.S. 624 (1998).

By retaining the essential elements of the definition of disability including the key term “substantially limits” we reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability under this prong. That will not change after enactment of the ADA Amendments Act, nor will the necessity of making this determination on an individual basis. What will change is the standard required for making this determination. This bill lowers the standard for determining whether an impairment constitutes a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.⁶⁵

Therefore, since determination of coverage under the ADA is dependent on an individualized determination, the mere fact of having a particular condition does not necessarily make an individual an individual with a disability. If an individual’s symptoms were mild or short-term, the condition might not be considered to be a substantial limitation on a major life activity, as interpreted by the ADA Amendments Act. Therefore, an argument could be made that an individual who is isolated due to infection with a pandemic influenza virus would not be considered to be an individual with a disability. However, this argument is dependent on an individualized determination, and may turn on the severity of the particular infection and whether an individual had any long-lasting residual effects from the infection. In addition, the enactment of P.L. 110-325, with its requirement that the definition of disability be construed broadly,⁶⁶ makes it more likely that a disability will fall within the purview of the ADA.

If an individual who was isolated due to infection with a pandemic influenza virus was determined to be an individual with a disability, the next step in determining whether there would be ADA coverage would be to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Since an individual in isolation would most likely be too ill to work, the major question would concern the use of leave, paid or unpaid, as a reasonable accommodation.⁶⁷

Definition of Disability, Employment Discrimination, and Quarantine

Quarantine separates individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection.⁶⁸ Since the individual who is quarantined is not yet sick and may never become sick, the first prong of the definition of disability, having a physical or mental impairment that substantially limits one or more of the major life activities of such individual, is not applicable. The second prong of the definition, having a record of a disability, would also not be applicable since the individual has not been ill. The third prong protects individuals who are “regarded as” having a disability and would appear to be the most applicable in this situation. P.L. 110-325 amended the ADA definition of “regarded as” providing that an individual meets the requirement of being “regarded as” having a disability “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the

⁶⁵ Statement of Managers to Accompany S. 3406, 153 CONG. REC. S. 8344, 8345 (Sept. 11, 2008).

⁶⁶ 42 U.S.C. §12101(3), as amended by P.L. 110-325, §4.

⁶⁷ The following section regarding quarantine discusses the application of reasonable accommodation requirements in more detail.

⁶⁸ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan 209* (May 2006).

impairment limits or is perceived to limit a major life activity.”⁶⁹ The “regarded as” prong does not apply to transitory and minor impairment. A transitory impairment is defined as an impairment with an actual or expected duration of six months or less.⁷⁰ In addition, the ADA Amendments Act provides that reasonable accommodations do not have to be provided to an individual who is covered under the “regarded as” prong.⁷¹

Assuming that an individual who is quarantined would be covered under the regarded as prong of the definition of disability, the next hurdle regarding ADA coverage is whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Can an individual who is quarantined perform the essential functions of a job? The answer to that question depends in large part on what the job is. If the job is serving food at a restaurant, the answer is clearly no. However, an individual might be able to perform a job on a computer by teleworking. The EEOC has interpreted reasonable accommodation as including work at home⁷² and the use of paid or unpaid leave.⁷³ However, several cases have found that physical attendance at a job is an essential function of a job relying on employer’s arguments concerning the need for supervision and teamwork.⁷⁴ These interpretations regarding reasonable accommodation are unlikely to apply since under the ADA Amendments Act of 2008, an individual covered under the “regarded as” prong does not have to be provided reasonable accommodation.

Definition of Disability and Snow Days

“Snow days,” a type of social distancing, is the recommendation or mandate by authorities that individuals and families limit social contacts by remaining within their households.⁷⁵ Since there would not even be the connection to possible infection that there might be in a quarantine situation, an argument that individuals taking snow days would be individuals with disabilities would be unlikely to be successful. Similarly, it is unlikely that an argument that individuals taking snow days are regarded as having a disability would be successful. However, it is possible to argue that individuals taking snow days may be unimpaired, but are treated as having a mental or physical impairment. If this argument were successful, the next step would be to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. The analysis of these issues would be the same as discussed previously regarding individuals who are quarantined.

⁶⁹ 42 U.S.C. §12101(3), amended by P.L. 110-325, section 4.

⁷⁰ *Id.*

⁷¹ 42 U.S.C. §12201(h), as amended by P.L. 110-325, section 6. Under previous law, the circuits were split on whether there is a duty to accommodate a “regarded as” plaintiff. See e.g., *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005)(duty to accommodate); *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003), cert. denied, 540 U.S. 1049 (2003)(no duty to accommodate).

⁷² See <http://www.eeoc.gov/facts/telework.html>.

⁷³ EEOC, “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>.

⁷⁴ See, e.g., *Maya v. Avaya Communications, Inc.* 357 F.3d 1114 (10th Cir. 2004). For a discussion of this case, see Patrick Rogers, “Challenges in Meeting the Disability Qualification Under the ADA: The Tenth Circuit’s Analysis in *Mason v. Avaya Communications, Inc.*,” 82 *Denv. U.L.Rev.* 539 (2005).

⁷⁵ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan 209* (May 2006).

Summary of ADA Application

The preceding discussion illustrates the complexity of applying the ADA's nondiscrimination mandates to employment issues arising during an influenza pandemic. ADA coverage is to be individually determined so it is not possible to make a definitive determination of coverage. Given the recent amendments to the ADA, it has become more likely that individuals with disabilities would be covered.⁷⁶ However, even if an individual is determined to be an individual with a disability who has been discriminated against, the requirement for reasonable accommodation varies depending on whether the determination of disability is made on the first two prongs of the definition or on the third. If an individual is found to be an individual with a physical or mental impairment that substantially limits one of more major life activities or has a record of such an impairment, reasonable accommodations may be required. In the context of pandemic influenza, this may mean that telework or other accommodations may be available. However, the third prong of the definition of disability, being "regarded as" having a disability, does not require the provision of reasonable accommodation.⁷⁷ As a practical matter, this would mean that the provision of telework for individuals who are quarantined or subject to a "snow day" would not be required under the ADA, even if an individual were to meet the requirements of the third prong of the definition.

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⁷⁶ For a discussion of the reach of the ADA prior to these amendments see Institute for Bioethics, Health Policy and Law, *Quarantine and Isolation: Lessons Learned from SARS*, at 123 (November 2003) (discussing the analogous situation presented by Severe Acute Respiratory Syndrome (SARS)). See also Mark A. Rothstein, and Meghan K. Talbot, "Encouraging Compliance with Quarantine: A Proposal to Provide Job Security and Income Replacement," 97 AM. J. OF PUBLIC HEALTH S49, S50 (April 2007); Nan D. Hunter, "Public-Private Health Law: Multiple Directions in Public Health," 10 J. HEALTH CARE L. & POL'Y 89 (2007). Generally, these articles concluded that the ADA's reach was limited due to the Supreme Court's narrow interpretation of the definition of disability.

⁷⁷ 42 U.S.C. §12201(h), as amended by P.L. 110-325, section 6.