

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2021

COVID-19 Employer Liability Still Unknown

Heather R. Falks

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

COVID-19 Employer Liability Still Unknown

Heather R. Falks

The COVID-19 pandemic has spurred a new era of personal injury litigation. Across the United States, lawsuits for wrongful death, negligence, and retaliation are being filed against businesses for their failure to protect employees and the public from the known dangers of COVID-19.¹ Tyson Foods was sued for wrongful death by the widow of a Tyson employee who contracted COVID-19 five days after administering temperature checks for Tyson employees at a meatpacking plant. He died from COVID-19 two weeks later.² A Trader Joe's employee filed a complaint with the National Labor Relations Board claiming he was terminated in retaliation for requesting greater COVID-19 protections from his employer.³ New York sued Amazon for disregarding health standards in Amazon warehouses.⁴ Colorado congressman Doug Lamborn was sued by a former employee who claims the congressman failed to implement any safety standards and as a result contributed to the spread of COVID-19 to his staff.⁵ Most recently, following the death of four courthouse workers, the Superior Court of Los Angeles was fined more than \$25,000.00 for COVID-19 safety violations.⁶

In addition to personal injury liability, employers and places of public accommodation also face liability under the Americans with Disability Act (ADA). The ADA requires that reasonable accommodations be provided to permit those with disabilities to engage in employment and other public services; there-

fore, businesses including the courts must provide reasonable accommodations to both the public and employees permitting them to continue to engage in employment and services regardless of their at-risk status.⁷ Title I of the ADA requires employers to provide reasonable accommodations to employees with disabilities and prohibits discrimination on the basis of disability.⁸ Title I of the ADA also regulates medical examination and inquiries. Title II of the ADA regulates public services provided by state and local government agencies.⁹ Under Title II, state and local government cannot deny services to a disabled person or deny participation in programs or activities that are available to people without disabilities. Titles I and II require that courts continue to protect court employees and the public from exposure to COVID-19 to ensure safe and equal access to the justice system.¹⁰

AMERICANS WITH DISABILITIES ACT COVID-19 AS A DISABILITY

A person with COVID-19 or the long-term effects of COVID-19 may be considered disabled under the ADA. Requests for accommodation from employees who are at-risk due to underlying conditions, or employees who have COVID-19 or those who are suffering long-term side effects from COVID-19, should be processed by engaging in the interactive process.¹¹ The interac-

Footnotes

1. Fatima Hussein & Jaclyn Diaz, *Covid Wrongful Death Suits Test Employer Liability to Families*, BLOOMBERG L. (June 25, 2020) <https://news.bloomberglaw.com/safety/covid-wrongful-death-suits-test-employer-liability-to-families>; Tom Spiggle, *The Coronavirus is Causing More Employment Lawsuits*, FORBES (Sept. 22, 2020) <https://www.forbes.com/sites/tomspiggle/2020/09/22/the-coronavirus-is-causing-more-employment-lawsuits?sh=2e29885134c7>; *Employers Face Increase in COVID-19 Wrongful Death Law Suits*, FISHER PHILLIPS (Aug. 7, 2020) <https://www.fisherphillips.com/news-insights/employers-face-increase-in-covid-19-wrongful-death-lawsuits.html>.
2. Sam Wood, *COVID-19 Death of Original Philly Cheesesteak Supervisor Triggers a Lawsuit Against Meatpacking Giant*, PHILADELPHIA INQUIRER (Jan. 15, 2021) <https://www.inquirer.com/business/philly-original-cheesesteak-fatal-covid-tyson-foods-law-suit-20210115.html>.
3. Ellie Hall, *A Trader Joe's Employee Says he was Fired for Asking for Better COVID-19 Protections*, BUZZFEED NEWS (Feb. 28, 2021) <https://www.buzzfeednews.com/article/elliethall/trader-joes-fired-masks-coronavirus-safety>.
4. Jaclyn Diaz, *New York Sues Amazon Over COVID-19 Workplace Safety*, NPR (Feb. 17, 2021) <https://www.npr.org/2021/02/17/968568042/new-york-sues-amazon-for-covid-19-workplace-safety-failures>.
5. Rachael Bade, *Eye-Popping Lawsuit Portrays GOP Lawmaker's Office as a COVID-19 Petri Dish*, POLITICO (May 13, 2021) <https://www.politico.com/news/2021/05/13/lawsuit-gop-lawmaker-office-covid-488274>.
6. Debra Cassens Weiss, *Los Angeles Superior Court Fined over \$25K for COVID-19 Safety Violations After Courthouse Worker Deaths*, AM. BAR ASS'N (July 8, 2021) <https://www.abajournal.com/news/article/los-angeles-courts-fined-25k-for-covid-19-safety-violations-after-courthouse-worker-deaths>.
7. *Coronavirus Disease 2019 (COVID-19): Accommodation and Compliance*, JAN, <https://askjan.org/topics/COVID-19.cfm> (last visited Aug. 10, 2021).
8. Information and Technology Assistance on the Americans with Disabilities Act: Employment (Title I), ADA.gov, https://www.ada.gov/ada_title_1.htm (last visited Aug. 10, 2021).
9. Information and Technology Assistance on the Americans with Disabilities Act: State and Local Governments (Title II), ADA.gov, https://www.ada.gov/ada_title_ii.htm (last visited Aug. 10, 2021).
10. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated May 28, 2021).
11. *Id.*; *Engaging in the Interactive Process During the COVID-19 Pandemic*, JAN, <https://askjan.org/articles/Engaging-in-the-Interactive-Process-During-the-COVID-19-Pandemic.cfm> (last visited Aug. 10, 2021); Tracy DeFreitas, *The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19*, JAN, <https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm> (last visited Aug. 10, 2021).

tive process allows the employer to determine what accommodations are necessary to allow that employee to continue working. Employers are required to provide reasonable accommodations under the ADA, and reasonable accommodations may include providing a separate workspace, requiring masks, putting up plexiglass, or placing the employee on remote work. The employer should request medical documentation and engage in conversation with the employee to determine the best accommodation.

COVID-19 IS A DIRECT THREAT

The EEOC defines a “direct threat” as anything that poses “a significant risk of harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” The Equal Employment Opportunity Commission (EEOC) has concluded that the COVID-19 pandemic meets the direct threat standard.¹² COVID-19 poses a direct threat to employees and the public.¹³ The courts have a legal responsibility to take all necessary safety measures to protect both court employees and the public. Certain employees and members of the public are more at risk than others due to disabilities and underlying conditions. The ADA prohibits employers and the government from treating individuals differently due to a disability; therefore, disabled, or at-risk employees cannot just be removed from the workplace. The ADA requires that reasonable accommodations be provided to permit those with disabilities to engage in employment and other public services. Therefore, as both a government entity and an employer, the courts must provide reasonable accommodations that will allow for those who are at risk to engage in work and attend court.

REMOTE WORK AS AN ACCOMMODATION

COVID-19 forced many employers to make remote work an option for employees. Employers bought equipment and created processes that would allow employees to work from home during the pandemic, and as a result remote work has now become more widely available. The recent availability of remote work also now makes it a more reasonable accommodation for future disability accommodation requests.

Throughout the pandemic remote work has been used by courts as a way to protect employees and maintain some level of productivity. During the peak of the pandemic many courts were closed or limited to very little activity, which left the courts struggling to find work for their staff on a temporary remote status. As time passed, courts reopened and employees returned to the office. Remote work is often still used to help prevent the spread of COVID when an employee has symptoms or exposure concerns. Much of the work performed by court employees requires them to be in the office or courtroom; it is difficult to maintain a full workload for court employees on an entirely remote basis. Now that employees have been provided the ability to work remotely, some wish to remain on remote. Employees do not get to decide if they remain on remote work; however, if they have a disability and request remote work as an accommodation then the employer needs to process that accommodation request as required under the ADA. Courts do not

have to remove essential job functions to provide an accommodation, and they do not need to provide an employee’s preferred accommodation. If being in the office is an essential function of the job, then remote work is not an appropriate accommodation. The court is required to provide an effective accommodation that meets the needs of the employee and permits the employee to still perform the essential functions of their job.

When an employee requests remote work, the employer must assess the reason for why this request is being made. The employer should ask for an explanation from the employee and ask for supporting medical documentation. If the employee provides documentation of a disability, it then must be determined if remote work is the most reasonable accommodation that can be provided. An accommodation is not reasonable if the employee cannot perform the essential functions of their job even with the accommodation. Most court jobs have essential functions that require the employee to be present in the courtroom to fulfill their full job description. Therefore, if a court employee requests remote work as an accommodation for a documented disability, then court management must assess if the essential functions of the job can be met on a remote basis. If the essential functions cannot be met, then court management should provide alternative accommodations. These alternative accommodations will be very fact specific to the needs of that specific employee. It is important that court management take these requests seriously and engage in this interactive process with the employee to ensure that the requirements of the ADA are being met.

“ . . . if a court employee requests remote work as an accommodation for a documented disability, then court management must assess if the essential functions of the job can be met on a remote basis.”

VACCINES: EDUCATE v. MANDATE

COVID-19 vaccines are now available. Even with vaccines the court must still provide accommodations to employees and the public to protect them from COVID-19. The availability of vaccines has created new areas of concern and impacted workplace policy surrounding whether to mandate the vaccine, accommodations and concerns about documentation, and confidentiality.

COVID-19 vaccines have been approved for administration under the Emergency Use Statute. The Emergency Use Statute, 21 U.S.C. 360bbb-3(e)(1)(ii)(III), requires that each person be informed of the option to accept or refuse administration of the vaccine along with being told of the alternatives and risks and benefits. Each person who gets vaccinated must acknowledge that they have a choice to either take the vaccine or not. Due to the limited authorization of the vaccine, most employers have opted not to mandate vaccination. The Department of Labor (DOL) issued an opinion stating that the Emergency Use Authorization requirements do not prevent private or public employers from

12. EEOC, *supra* note 10.

13. *Id.*

**“Personal
antivaccination
views typically
will not be
enough to
establish a
sincerely held
religious
belief.”**

mandating the vaccines.¹⁴ Many employees have strong feelings about the COVID-19 vaccine and there has been politicization of the vaccine. As a result, if an employer decides to mandate the vaccine, it is likely that they will receive legal challenges to that mandate, even though it is becoming more widely acceptable.

An employer mandating the vaccine must be willing to terminate an employee for not obtaining it. This

would require employees to choose between being vaccinated and losing their livelihood. Before deciding to put a mandate in place employers should consider the impact on office morale if it becomes necessary to terminate large groups of employees. It is possible that with the recent FDA approval of the Pfizer vaccine, some previously reluctant employees will change their mind and decide to get vaccinated. Surveying staff who have not yet vaccinated may assist the employer in determining which employees are more willing to get vaccinated now that Pfizer has received full FDA approval versus which employees will not vaccinate regardless of FDA approval. Performing such a survey will allow the employer to determine how many employees may have to be removed from the workforce if they refuse to vaccinate even after a mandate is put into place. One other factor to consider is that many states have passed their own anti-vaccination mandate laws, also known as anti-vaccination passport laws, and this has resulted in a rise of local mandate lawsuits being filed by employees. This may limit the employer's ability to obtain proof of vaccination; however, an employer can encourage staff to provide proof of vaccination by providing incentives or by imposing mask and testing mandates for those who refuse to provide proof-of-vaccination status. Other possible incentives could include providing additional leave days or small gift cards (\$15 or less) upon proof of vaccination.

Whatever incentive is offered for obtaining the vaccine, that same incentive must also be offered to employees who are unable to get the vaccine due to a disability or a sincerely held religious belief. If a court decides to offer an incentive, the court must be prepared to evaluate accommodation requests. If an accommodation is granted, then the court must still offer the incentives to those employees even though they are not going to be vaccinated. Failure to provide the incentive to those who receive an accommodation may be considered disability discrimination or religious discrimination.

ACCOMMODATIONS

If an employee can establish that they cannot be vaccinated because they have an underlying health condition that is a covered disability under the Americans with Disabilities Act (ADA), then they should be given an accommodation. Some examples of such conditions are pregnancy, allergies, and autoimmune disorders. Additionally, some employees may be on medications that

prevent them from obtaining the vaccine. If an employee requests an accommodation, request a doctor's note and medical documentation to support the request. Once the supporting documentation is provided, then the accommodation should be granted, and the employee should be given any incentives that are being offered to those employees who obtained the vaccine.

Under Title VII a sincerely held religious belief is a requirement to establishing an entitlement to a religious accommodation.¹⁵ Personal and ethical objections are not sufficient. Personal antivaccination views typically will not be enough to establish a sincerely held religious belief. An employee who is not vaccinated due to a sincerely held religious belief will need to provide an explanation. The employee can be asked how obtaining the vaccine impacts their religious beliefs. These requests are very fact specific and need to be evaluated on a case-by-case basis.

DOCUMENTATION & CONFIDENTIALITY

Employers are permitted to gather information from employees concerning their vaccination status. The EEOC has determined that COVID-19 is considered a direct threat under the ADA's standards and this permits employers to conduct more extensive medical inquiries because allowing COVID-19 into the workplace poses a direct threat to others.¹⁶ Courts are permitted to gather documentation related to the vaccination status of court employees. Gathering this vaccination information will help guide the court in making employment policies. Gathering vaccination information will also aid the court in protecting those employees who are not vaccinated. Employers only need a copy of the employee's vaccination card. Some states have passed laws prohibiting "vaccination passports." However, in those states the employer can still provide an incentive that encourages employees to provide documentation of their vaccination. For example, only employees who provide proof of vaccination are permitted to remove their mask in the workplace.

All documentation related to vaccination or accommodation requests must be kept in a file marked as confidential medical information. This file should have restricted access and be separate from the employee's employment file. Do not disclose to other employees who has been vaccinated versus who has not. This information is considered confidential medical information. Only one designated employee should be handling this confidential medical information. Staff should not be gossiping about who is or is not vaccinated and who may or may not have received an accommodation. Employees should not be treated differently based upon their vaccination status. Requiring unvaccinated employees to wear masks is not discrimination and does not identify their vaccination status. Vaccinated individuals still choose to wear masks, so the mere act of wearing a mask does not single out an employee based upon their vaccination status. Requiring the unvaccinated to wear masks is a necessary safety measure and is not discriminatory. The court should not allow coworkers to engage in shaming one another about vaccination status. Employees are likely to have varying opinions about vaccination and each employee will likely have a different rationale

14. See <https://www.justice.gov/sites/default/files/opinions/attachments/2021/07/26/2021-07-06-mand-vax.pdf>.

15. What You Should Know: Workplace Accommodation, EEOC,

<https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation> (last visited Aug. 10, 2021).

16. EEOC, *supra* note 10.

for their stance on vaccination. It is important for the court to encourage civility and for court leadership to model appropriate behavior. Do not put employees in a position where they feel they must disclose their vaccination status publicly. Court management only needs to know the vaccination status of employees to assist in policy development.

According to the CDC, if a fully vaccinated person is exposed to COVID-19 but has no symptoms, then that individual does not need to quarantine or be restricted from work.¹⁷ Based upon the CDC guidance, vaccinated court employees who are exposed to COVID-19 do not need to quarantine but unvaccinated staff would still need to quarantine to prevent spread. This demonstrates why it is important for the court to know which employees are vaccinated versus which employees are not because the court will need to require non-vaccinated employees who are exposed to quarantine.

INDIANA UNIVERSITY MANDATE

Indiana University, a state university, has mandated vaccination for all students and faculty for the 2021 fall semester.¹⁸ Eight students filed a lawsuit and requested a preliminary injunction to stop the mandate. The United States District Court for the Northern District of Indiana denied the students' request for a preliminary injunction. The students have appealed the District Court's decision to the 7th Circuit Court of Appeals.

The court stated the following concerning authority to regulate matters of public health:

Under our country's federalist system, state and federal governments share regulatory authority over public health matters. States traditionally exercise most authority under their inherent police power—and reasonably so when public health may flux and evolve by locale. States thus have the power, within constitutional limits, to pass laws that “provide for the public health, safety, and morals.”¹⁹

The court went on to reason that action taken by a state actor to protect public health should not be interfered with by the courts unless it violates fundamental rights.²⁰ The *Zucht* and *Jacobson* cases settled that the state has the power to require vaccination.²¹ States have historically adopted vaccination mandates, requiring students obtain vaccinations to attend school.²² When the government enacts law, in the interest of public health, that infringes on nonfundamental rights the appropriate review

standard is rational basis.²³ Strict scrutiny analysis is only appropriate for infringements of fundamental rights. The right to refuse a vaccine, due to an interest in bodily autonomy, is not a fundamental right.²⁴ The court reasoned that this interest of the state to protect public health does not permit the state to unjustly expand its powers indefinitely; “the government must continually update its practices in light of the most recent medical and scientific developments.”²⁵

Indiana University argued that the students were not being forced to vaccinate against their will because they could always choose to go to college elsewhere.²⁶ The “unconstitutional conditions doctrine” forbids the government from denying a benefit to a person because they exercise a constitutional right.²⁷ The liberty at issue here is the student's Fourteenth Amendment right to refuse a vaccine.²⁸ It has been suggested that individuals have a constitutional right to refuse unwanted medical treatment.²⁹ The *Cruzan* and *Glucksberg* cases both involved an individual's choice to refuse treatment with no ramifications to the health of someone else.³⁰ “Vaccines address a collective enemy, not just an individual one.”³¹ Vaccines address a public health concern and the decision surrounding whether to vaccinate or not has an impact on society as a whole and not just the individual. Every individual has a choice but that choice is “subject to the state's reasonable measures designed to pursue legitimate ends of disease control or eradication.”³² The University has an obligation to protect students and faculty. As a result, the students have a difficult choice to make but they do have a choice.

The students also argue that the vaccine mandate violates their free exercise of religion. The court reasoned that when evaluating free exercise claims, “[n]eutral and generally applicable regulations need only be supported by a rational basis.”³³ The University's vaccine mandate is a neutral rule of general applicability as it applies to all students regardless of religion. The court opined that stopping the spread of COVID-19 remains a compelling state interest, and the University has an interest in protecting the health of students and faculty.³⁴ The court provided case citations to numerous jurisdictions to support the finding

“Indiana University argued that the students were not being forced to vaccinate against their will because they could always choose to go to college elsewhere.”

17. Interim Public Health Recommendations for Fully Vaccinated People, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (last updated July 28, 2021).

18. *Klaassen v. Trs. of Indiana University*, 1:21-CV-238-DRL-SLC, 2021 WL 3073926, at *5 (N.D. Ind. 2021).

19. *Id.* at *17 (citing *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991); *Washington v. Glucksberg*, 521 U.S. 702, 729–31 (1997); *Zucht v. King*, 260 U.S. 174, 176–77 (1922), *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24–25 (1905)).

20. *Id.* at *17–22 (citing *Jacobson*, 197 U.S. at 31, 38).

21. *Id.* at *24 (citing *Zucht*, 260 U.S. at 176–177).

22. *Id.* at *19.

23. *Id.* at *21.

24. *Id.* (citing *Sweeney v. Pence*, 767 F.3d 654, 668 (7th Cir. 2014)).

25. *Id.* at *22.

26. *Id.*

27. *Id.* at *23 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 545 (1983)).

28. *Id.*

29. *Id.* (citing *Cruzan v. Dir., Missouri Dept. of Health* 497 U.S. 261, 279 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

30. *Id.*

31. *Id.* at *24.

32. *Id.*

33. *Id.* at *25 (citing *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017)).

34. *Id.* at *26.

“The court is not entitled to make medical inquiries of jurors; however, the court can ask about vaccination status if a potential juror asks to be excused due to COVID concerns.”

that there is no right to not wear a mask and there is no right to not be tested for the virus.³⁵

The court denied the students’ motion for preliminary injunction because the students did not establish a likelihood of success on the merits, and the public’s interest did not favor a preliminary injunction. The court quoted John Stuart Mill, *On Liberty* 9 (1985), “the only purpose for

which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”³⁶ This opinion evaluates the individual rights of a few versus the collective interest in public health and safety for everyone and provides legal support for the continued effort to enact policies with the goal of protecting the public from COVID-19.

JURY CONSIDERATIONS

The vaccination status of jurors should not be considered when conducting voir dire. Inquiries of jurors concerning their vaccination status is likely to get into a greater discussion about underlying disabilities and medical conditions. These discussions should not occur in a public forum. The court is not entitled to make medical inquiries of jurors; however, the court can ask about vaccination status if a potential juror asks to be excused due to COVID concerns. The court is permitted to ask about vaccination in this circumstance because if the juror is vaccinated it may eliminate their COVID concerns. The court is not permitted to engage in a discussion of the specific reasons why a juror may or may not be vaccinated because this will open the door for medical inquiry. Diversity concerns is another reason why courts are discouraged from considering vaccination status for jurors. Attempting to limit jury pools to only vaccinated individuals will result in a less diverse jury.

CONTINUE SAFETY STANDARDS

Vaccinated individuals can still be infected with COVID-19. The vaccine reduces symptoms and severity of the infection but it does not prevent infection. Vaccinated individuals can be

asymptomatic carriers of COVID-19; therefore, courts should continue to maintain safety standards. Courts should shape their COVID-19 policies based upon CDC guidance and local conditions.³⁷ The DOL issued guidance on mitigating and preventing the spread of COVID in the workplace, and this guidance provides guidance to employers on how they can best protect both the vaccinated and unvaccinated in the workplace and these recommendations include keeping safety measures such as mandatory masking in place during times of high community spread.³⁸ Courts should be hesitant to eliminate all COVID-19 safety protocols.

According to the CDC, individuals with COVID-19 who have symptoms may discontinue isolation ten days after symptom onset AND after at least 24 hours have passed since resolution of fever without the use of medication, AND all other symptoms have improved.³⁹ The CDC also states the following concerning exposure cases: the CDC recommends 14 days of quarantine after exposure based on the time it takes to develop illness if infected.⁴⁰ Thus, it is possible that a person known to be infected could leave isolation earlier than a person who is quarantined because of the possibility they are infected.⁴¹

The CDC recommends that any fully vaccinated individual who has symptoms of COVID-19 isolate themselves from others, following the above guidance for individuals with symptoms.⁴² Therefore, any employee, juror, or litigant experiencing symptoms of COVID, whether vaccinated or not, should isolate following the CDC guidance above. The requirement to isolate for at least ten days for individuals with symptoms further reinforces the need to continue with safety protocols such as masking, social distancing, and remote work options to maintain productivity by lessening the occurrence of symptoms.

COURT BEST PRACTICES

MASKS Although many states have lifted their mask mandates, courts can still mandate masks in their courtrooms. Each court will have to assess their local conditions and decide whether to mandate masks in their courtrooms. Courts should consider the vaccination status of their staff and the local conditions. If the court still has some unvaccinated staff then those individuals are at a greater risk for contracting COVID and having a more severe reaction. Therefore, it is in the court’s interest to protect those staff members from being infected, and masks are the best way to do that. Since vaccinated individuals can still be asymptomatic

35. *Id.* at *38 (citing *Kelly v. ImagineIF Libr. Entity*, 2021 U.S. Dist. LEXIS 111958, 8 (D. Mont. June 15, 2021); *Whitfield v. Cuyahoga Cnty. Pub. Libr. Found.*, 2021 U.S. Dist. LEXIS 92944, 4 (N.D. Ohio May 17, 2021); *Denis v. Ige*, 2021 U.S. Dist. LEXIS 91037, 14 (D. Haw. May 12, 2021); *W.S. by Sonderman v. Ragsdale*, 2021 U.S. Dist. LEXIS 98185, 5 (N.D. Ga. May 12, 2021); *Forbes v. City of San Diego*, 2021 U.S. Dist. LEXIS 41687, 11 (S.D. Cal. Mar. 4, 2021); *Stewart v. Justice*, 2021 U.S. Dist. LEXIS 24664, 20 (S.D. W. Va. Feb. 9, 2021); *Oakes v. Collier Cnty.*, 2021 U.S. Dist. LEXIS 15174, 4 (M.D. Fla. Jan. 27, 2021); *Shelton v. City of Springfield*, 497 F. Supp.3d 408, 414 (W.D. Miss. 2020); *Ryan v. Cnty. of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995) (no constitutional right to wear a mask); *United States v. Berglund*, 2021 U.S. Dist. LEXIS 78476, 2 (D. Minn. Apr. 23, 2021) (“Courts have repeatedly found that requiring participants at trial to wear face masks due to the COVID-19 pan-

demic does not violate a criminal defendant’s constitutional rights.”)).
36. *Id.* at *43.
37. COVID-19 Integrated County View, CDC, <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited Aug. 10, 2021) (CDC map showing local conditions).
38. See <https://www.osha.gov/coronavirus/safework>.
39. Ending Home Isolation, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html> (last updated Feb. 18, 2021).
40. *Id.*
41. *Id.*
42. Guidance for Fully Vaccinated People, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (last updated July 28, 2021).

carriers, if some court staff are not vaccinated and masks are not required in the courtroom then non-vaccinated employees may be exposed and then have to quarantine or be sent home due to illness, thereby, limiting the productivity of the court. Local conditions are important to consider as well, specifically, the level of spread in the local community. If community spread is rising, then courts should consider requiring masks and social distancing again to protect staff and to try and prevent the continued rise in cases.

Courts should continue to require masks of all participants in the courtroom when conducting jury trials. Jury pools will contain a mix of both vaccinated and unvaccinated individuals. Therefore, to protect the unvaccinated who are appearing for jury service, courts should continue to require everyone to wear masks. Additionally, it is not recommended to limit jury service to only those who are vaccinated because of the impact such a decision would possibly have on diversity. Certain communities do not have the same access to vaccines, and some communities are more reluctant to be vaccinated. These individuals would be excluded from jury service if a court tries to limit jury service to vaccinated individuals only. Masks are the best way to keep everyone safe and to prevent a mistrial due to an outbreak.

The court may decide to require only those who are not vaccinated to wear masks. If the court decides to implement such a policy, then signs should be posted informing patrons of the court that if they are not vaccinated they need to wear a mask. It is not recommended that the court take any actions to enforce this requirement. Court staff should not ask to see proof of vaccination. If an unvaccinated visitor of the court decides to disobey the policy and go without a mask then this is a risk they are deciding to take. The court has done its due diligence by having a policy posted that requires unvaccinated individuals to wear a mask. Before making such a policy, the court should consider the vaccination status of court staff. If there are any unvaccinated court staff members, then it may place them at risk to allow court patrons to attend court without a mask. Another option is that if not all court staff is vaccinated, then all court staff may be required to wear masks when interacting with the public. The court's primary priority should be to protect court staff and lessen the spread of COVID in the court.

SOCIAL DISTANCING When used together, masks and social distancing are the best way to limit the spread of COVID-19. Courts are encouraged to consider keeping some social-distancing requirements by limiting the number of people in their courtrooms at one time. Courts should continue to stagger scheduling rather than engaging in cattle-call-type hearings and continue to limit how many people from the public can observe any hearing. Provide virtual hearings as an option and stream hearings online so that the public can view without appearing in person. Jury members should be socially distanced as much as possible as well. Masks and social distancing are most effective at preventing spread when used together.

Vaccinated court employees should not be working in shared workspaces with unvaccinated court employees, especially if masks are not being required while in the shared workspace. Shared workspaces should be limited as much as possible by moving employees into private offices or placing employees on a rotation. Placing vaccinated employees in a shared workspace

with unvaccinated employees puts the unvaccinated employees at risk and increases the likelihood that COVID-19 will spread in the court office, thereby impacting productivity and availability of court staff. Additionally, the ADA still requires that employers protect their staff and the public from known risks such as COVID-19.

“Courts should continue to require masks of all participants in the courtroom when conducting jury trials.”

REMOTE OPTIONS Continuing to offer remote options for both employees and court proceedings will continue to be an important tool in managing COVID-19. Employees with COVID-19, exposure to COVID-19, or symptoms of COVID-19 should still have the option to work remotely if possible. Continuing to allow for remote work during these limited circumstances is important to encourage continued symptom and exposure reporting. Remote work also allows for staff to continue to be productive even if they are placed on quarantine. If employees are required to use their own benefit time when they are exposed to COVID-19 or have symptoms of COVID-19, then they will be less likely to report that they were exposed or are having symptoms. If court staff do not disclose their exposure or symptoms then the likelihood of spread among all court staff increases.

Remote hearings are still the best way to accommodate litigants and attorneys who have been exposed to COVID-19 or have COVID-19 symptoms. Litigants and attorneys should still have the option to request a remote hearing to prevent the spread of COVID-19 in the courtroom. Courts can identify a contact person or email on court orders that litigants can use to request a remote hearing. Every request for a remote hearing does not have to be granted, especially if the court believes that the privilege has been abused by the litigant or attorney; however, providing remote hearings is the best way to protect court staff from being unnecessarily exposed to COVID-19, especially if a portion of the court staff is not vaccinated.

SYMPTOM REPORTING Courts should continue to encourage employees, attorneys, and litigants to report their symptoms. Employees should be reminded to reach out to the Judge or court administrator before coming into work if they have any COVID-19 symptoms. The employee who has symptoms should then be directed on next steps, and the next steps may vary depending on that specific employee's vaccination status. Each court will have to decide the best approach for them based upon CDC guidance and the vaccination status of all court staff. Litigants and attorneys reporting symptoms should be placed on remote hearings to prevent exposing court staff and the public to possible COVID.

FREQUENT SANITIZATION High-touch areas should continue to be sanitized frequently. Providing sanitizer wipes at numerous locations in the courtroom and court offices with signs encouraging staff and the public to wipe areas they touch. Designating a staff member to engage in a scheduled sanitizing cycle of high-traffic areas such as door handles and countertops. There

