Oklahoma Law Review

Volume 74 | Number 1

Symposium: Privacy in a Pandemic: How Employers, Insurers, and Government Actors Collect and Use Your Data

2021

Employees with Intellectual Disabilities During the Covid-19 Pandemic: New Directions for Disability Anti-Discrimination Law?

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EMPLOYEES WITH INTELLECTUAL DISABILITIES DURING THE COVID-19 PANDEMIC: NEW DIRECTIONS FOR DISABILITY ANTI-DISCRIMINATION LAW?

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I. Introduction

COVID-19 has been devastating for many employees. Job losses are extensive, especially in lower wage positions and positions that do not require college degrees.[1] Hardest hit employment sectors include hospitality, travel and transportation, personal service, and manufacturing.[2]

Risks and challenges of employment have also been altered for the worse. Jobs requiring on-site performance carry high risks of exposure when COVID-19 transmission is widespread.[3] Jobs without sick leave, including nearly all part-time positions, present individuals with difficult choices between coming to work sick or staying home and losing income or potentially their jobs. The Families First Coronavirus Response Act required some employers to provide employees with paid sick leave, including part-time employees on a proportional basis.[4] This requirement

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1. Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

2. Kenneth Terrell, *8 Occupations Hit Hardest by the Pandemic in 2020*, AARP (Jan. 11, 2021), https://www.aarp.org/work/job-search/info-2020/job-losses-during-covid.html.

3. *See, e.g.*, OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3993, WORKER EXPOSURE RISK TO COVID-19 (2020), https://www.osha.gov/Publications/OSHA3993.pdf.

4. *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave (last visited Feb. 15, 2021) (explaining that, based upon the qualifying reason for leave, a part-time employee is eligible for hours of leave in proportion to the employee's average hours of work over a certain time period).

expired at the end of December 2020, and was not extended by Congress.[5] Employees dependent on public transit to get to work faced reduced services and risks of exposure from using the services that remain; public transit may remain changed even if the severity of the pandemic wanes.[6]

Employees with intellectual disabilities may be disproportionally impacted by these risks and challenges. Many are part-time workers or even volunteers without any formal leave arrangements. Jobs such as greeting or shelf re-stocking require on-site presence. Concerns about social distancing may make accommodations involving additional personnel, such as job coaches, no longer practical.

This Article addresses employment risks and challenges presented by the COVID-19 pandemic for people with intellectual disabilities, in particular people with Down syndrome. Part II presents the risks and challenges of employment for people with Down during the COVID-19 pandemic. Part III lays out aspects of Title I of the Americans with Disabilities Act of 1990 (ADA)[7] that are most relevant to these challenges. Part IV explores whether the ADA may be helpful in taking on these risks and challenges. It argues that limits long apparent in Title I of the ADA as it applies to people with intellectual disabilities[8] may be exacerbated by the COVID-19 pandemic. Part V concludes by suggesting several ways these limits might be addressed.

II. COVID-19 and the Risks and Challenges of Employment for People with Down

People with Down syndrome face multiple risks and challenges from COVID-19. They are at a significantly elevated risk of mortality or morbidity should they become ill with COVID-19. They also face significant challenges to continuing to work during the pandemic.

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5. *Essential Protections During the COVID-19 Pandemic*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/pandemic (last visited Feb. 15, 2021) (noting, however, that tax credits were extended for employers who do provide such leave).

6. *See* Kaley Overstreet, *Bus or Bust? The Future of Public Transit in Life After COVID-19*, ARCHDAILY (Dec. 4, 2020), https://www.archdaily.com/952441/bus-or-bust-the-future-of-public-transit-in-life-after-covid-19.

7. 42 U.S.C. §§ 12111–12117.

8. *See, e.g.*, Leslie Pickering Francis, *Employment and Intellectual Disability*, 8 J. GENDER, RACE & JUST. 299 (2004) (discussing "anti-discriminationism, welfarism, and assumptions about the structure of employment as explanations of why current ADA jurisprudence has left people with intellectual impairments largely unprotected").

People with Down syndrome who become ill with COVID-19 have been severely affected at levels much higher than those experienced by others in the general population. A study of eight million adults in the U.K. calculated that people with Down had a "4-fold increased risk for COVID-19–related hospitalization and a 10-fold increased risk for COVID-19–related death."[9]

Medical conditions associated with Down include heart conditions, immune dysfunction, diabetes, obesity, pulmonary hypertension, and sleep apnea,[10] all conditions increasing risks from COVID-19 infection.[11] Although the explanation for these disparities is not fully understood, features of immune system function in Down may increase the likelihood of infection severity.[12] In December 2020, the U.S. Centers for Disease Control and Prevention added Down to the list of conditions for which the evidence supports a high risk of severe illness from COVID-19.[13]

In the face of these differential risks, medical experts recommend that patients with Down syndrome avoid all non-essential activities.[14] The advice of advocates for people with Down syndrome is simple: stay home![15] Advocates have also pushed forcefully for non-discriminatory

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9. Ashley Kieran Clift, Carol A.C. Coupland, Ruth H. Keogh, Harry Hemingway & Julia Hippisley-Cox, *COVID-19 Mortality Risk in Down Syndrome: Results from a Cohort Study of 8 Million Adults*, ANNALS INTERNAL MED. (Oct. 21, 2020), https://www.acpjournals.org/doi/10.7326/M20-4986.

10. *Q&A on COVID-19 and Down Syndrome*, GLOB. DOWN SYNDROME FOUND. (July 30, 2020), https://www.globaldownsyndrome.org/wp-content/uploads/2020/07/07-30-EXPANDED-ENG-QA-FINAL.pdf.

11. *See, e.g.*, Usha S. Krishnan, Sankaran S. Krishnan, Shipra Jain, Mara B. Chavolla-Calderon, Matthew Lewis, Wendy K. Chung & Erika B. Rosenzweig, *SARS-CoV-2 Infection in Patients with Down Syndrome, Congenital Heart Disease, and Pulmonary Hypertension: Is Down Syndrome a Risk Factor?*, 225 J. PEDIATRICS 246, 246 (2020) (reporting that patients with a combination of Down syndrome, congenital heart disease, sleep apnea, and pulmonary hypertension are "at high risk during respiratory viral illnesses").

12. Meredith Wadman, *People with Down Syndrome Face High Risk from Coronavirus*, 370 SCI. 1384, 1384 (2020).

13. *Medical Conditions*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (May 13, 2021).

14. *Coronavirus (COVID-19) Information for Patients with Down Syndrome*, CIN. CHILDREN'S, https://www.cincinnatichildrens.org/patients/coronavirus-information/condition-specific/down-syndrome (last visited Feb. 15, 2021) ("You and your loved one should stay home except for essential activities such as getting food, medications and healthcare visits.").

15. *Id.*; *see, e.g.*, Brian Chicoine, *Returning to School or Work in Fall 2020*, ADVOC. MED. GRP. (July 23, 2020), https://adscresources.advocatehealth.com/returning-to-school-or-work-in-fall-2020/?fbclid=IwAR0q3nHMQlrX24O31knUsfCGhqQKuA3H9S7lwBy14L96

access to COVID-19 treatment for people with Down as well as for priority access to vaccination along with others in high-risk groups. Therefore, while the pandemic rages, it may be ill-advised for people with Down to continue to work in many jobs.

Even before COVID-19, the employment situation of people with Down was comparatively poor. Employment data for people with disabilities are typically aggregated for all disabilities, so data limited to Down syndrome are limited. According to a national survey regarding people with Down conducted in 2015, 56.6% were employed with pay but only 3% of these were employed full time.[16] Many others (25.8%) were volunteers performing services a few hours per week.[17] Nearly a third (30.2%) were unemployed.[18] Paid employment sectors for people with Down included food service (19%), office or clerical work (19%), cleaning or custodial work (14%), and grocery stores (12%).[19] All of these industries require on-site activities.

People with Down may have characteristics that increase the challenges of jobs and require additional personal supports, including job coaching. These characteristics include problems with communication skills, problems with short-term memory, problems in dealing with changes in routine, and problems with executive functioning. Together with their increased medical risks, these are all characteristics that pose particular difficulties for employment of people with Down during the COVID-19 pandemic.

III. ADA Title I, Employment Discrimination, and Intellectual Disabilities

Title I of the Americans with Disabilities Act prohibits employers[20] from discriminating against otherwise qualified individuals on the basis of

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chEgSwvrhHMm6tY (advising caregivers to consider the "rate of infection in [their] area," the "health status of the individual [with Down syndrome]," how well "the individual follow[s] safety and hygiene recommendations," the health of the other people "with whom the individual with Down syndrome lives," the importance of the activity to which they are returning, and what alternatives to in-person activities might be available or developed).

16. Libby Kumin & Lisa Schoenbrodt, *Employment in Adults with Down Syndrome in the United States: Results from a National Survey*, 29 J. APPLIED RSCH. INTELL. DISABILITIES 330, 334 (2016).

17. *Id.*

18. *Id.*

19. *Id.* at 335.

20. "Employer" is defined as an industry member having fifteen or more employees on workdays in at least twenty calendar weeks in the preceding year. 42 U.S.C. § 12111(5)(A).

disabilities.[21] "Qualified individuals" are those "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[22] In determining what are essential job functions, "[c]onsideration shall be given to the employer's judgment"; written job descriptions prepared before advertising or interviewing for a position are evidence of these functions.[23] In addition to the accessibility of facilities, reasonable accommodations include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[24]

For people with Down or other similar intellectual disabilities, these definitions of discrimination present several challenges. One challenge is whether they are "qualified" for positions in question. A second challenge is how essential job functions are described, including whether aspects of the job must be performed independently or may be performed as part of a team or with coaching or other help. A third challenge is what counts as reasonable accommodations. As described below,[25] prior case law involving people with Down or other intellectual disabilities illustrates the severity of these challenges.

Even if people with intellectual disabilities can successfully establish that they can perform essential job functions with accommodations, they may be met with employer defenses to their claims of discrimination. One defense is that an accommodation which would otherwise prove successful would be an "undue hardship" for an employer.[26] In support of this defense, employers may cite the expense of the accommodation in light of the overall resources available—resources that may have increasingly been strained by the pandemic.[27] The employer may also cite the impact of the accommodation on how the facility functions.[28] Accommodations that were satisfactory in non-pandemic times might become far more difficult in

21. *Id.* § 12112(a).
22. *Id.* § 12111(8).
23. *Id.*
24. *Id.* § 12111(9)(B).
25. *See infra* Section III.A.
26. 42 U.S.C. § 12111(10)(A).
27. *Id.* § 12111(B)(i)–(iii).
28. *Id.* § 12111(B)(ii).

pandemic circumstances in which social distancing is necessary, to take just one example. A second defense that the employer might call upon is the "direct threat" defense. Under this defense, employers may insist as a qualification that the individual not pose "a direct threat to the health or safety of other[s]" in the workplace.[29] Because this defense has been interpreted to include threats to the individual him or herself,[30] it might be argued that a person with Down should not work on-site because of their own increased risks from COVID-19. If people with intellectual disabilities have difficulties identifying symptoms of infection, wearing masks and other protective equipment, or maintaining distance from others, then they may also be considered direct threats to others.

While no reported cases as yet involve COVID-19, people with Down or other intellectual disabilities, and disability discrimination, surely these cases may emerge. If they do, the prior case law involving employees with Down, as well as employees with other intellectual disabilities, is not encouraging.

A. Job Qualifications

One important difficulty for employees with intellectual disabilities is demonstrating that they are qualified, with or without accommodations, to perform essential job functions. An employee's prima facie case claiming discrimination on the basis of disability[31] must allege that she comes under a prong of the definition of disability, that she is qualified for the job in question, and that she suffered a discrimination—such as an adverse job action or failure to accommodate—on the basis of that disability.[32] The inquiry about whether an individual is qualified may be difficult to separate out from other inquiries, such as those regarding essential job functions or reasonable accommodations, because to be qualified the individual needs to

29. *Id.* § 12113(b).

30. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78 (2002) (noting that the defense "allow[s] an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well").

31. 42 U.S.C. § 12112(a).

32. *See, e.g.*, Conners v. Wilkie, 984 F.3d 1255, 1260 (7th Cir. 2021) (noting that failure to make reasonable accommodations may constitute disability discrimination under the ADA); Brader v. Biogen Inc., 983 F.3d 39, 55 (1st Cir. 2020) (analyzing a discrimination claim based upon "a pattern of adverse employment actions" which "constituted a hostile work environment"); Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 819 (10th Cir. 2020) (holding that a failure-to-accommodate discrimination claim may be made without showing of an adverse employment action).

be able to perform essential job functions with or without reasonable accommodations.

As described above, people with Down have characteristics that may require accommodations in order to perform jobs successfully. These characteristics include communication skills, problems with short-term memory, problems in dealing with changes in routine, and problems with executive functioning. These characteristics may be especially problematic if individuals are expected to function independently on the job or if job responsibilities are changed due to pandemic conditions.

Many people with Down syndrome have limited communication skills. They may have difficulties in developing language or in making their speech intelligible.[33] Their abilities to understand what is being said—receptive language skills—are typically better than their expressive abilities.[34] The result may be that people with Down have a harder time asking questions, voicing concerns, or even articulating what they do understand about a job. For example, Robert Cotton, a person with Down, was an employee of a firm providing cleaning services to medical facilities.[35] Although he had functioned on the job at a hospital successfully for fifteen years, his troubles began when the hospital outsourced supervision of its cleaning to a management firm.[36] Cotton's supervisor informed the management firm that Cotton needed extra help in understanding anything he was being told, but the new management communicated with him by written notes and eventually reassigned him because of inadequacies in his job performance.[37]

People with Down may also be frustrated by their inability to communicate and thus communicate inappropriately. For example, Sean Reeves, an employee with Down, was terminated for violating employer anti-harassment policies after cursing within earshot of customers.[38] His cursing, however, was in response to situations that had distressed him and

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33. *E.g.*, Joanne E. Roberts, Johanna Price & Cheryl Malkin, *Language and Communication Development in Down Syndrome*, 13 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RSCH. REVS. 26, 27–30 (2007).

34. *E.g.*, Gary E. Martin, Jessica Klusek, Bruno Estigarribia & Joanne E. Roberts, *Language Characteristics of Individuals with Down Syndrome*, 29 TOPICS LANGUAGE DISORDERS 112, 114 (2009).

35. Cotton v. Hosp. Housekeeping Sys., Ltd., No. 04CV447FWO, 2005 WL 2654354, at *2 (M.D. Ala. Oct. 18, 2005).

36. *Id.*

37. *Id.*

38. Reeves *ex rel.* Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 700 (7th Cir. 2014).

might have been interpreted as expressions of his own frustration about his inability to communicate his distress.

Short-term memory presents another qualification challenge for people with Down. Verbal memory is particularly likely to be impaired.[39] As a result, people with Down may require frequent reminders or coaching in order to perform jobs successfully. For example, John Healey was an employee with Down who was a "receiving associate" at Sears.[40] Healey could unwrap merchandise but could not follow through on moving what he had unwrapped to the appropriate staging locations without assistance.[41] Consequently, Sears terminated his employment.[42]

Changes in routine and the need for flexibility may be especially difficult for people with Down because of difficulties in memorizing sequences and engaging in abstract thinking.[43] For example, Marlo Spaeth was a part time Wal-Mart employee with Down who worked folding towels, tidying aisles, and helping customers.[44] Her schedule, which had been 12:00-4 p.m., was changed and lengthened to 1-5:30 p.m. as a response to increased customer traffic in the later time slot.[45] Spaeth had trouble adjusting to the shift change because she thought she would miss her bus and get sick because she could not eat dinner on time.[46] She frequently arrived late for the new shift or left it early, and Wal-Mart terminated her for excessive absenteeism.[47] This case illustrates difficulties employees may have when routines are disrupted. It also raises questions about the definition of essential job functions and reasonable accommodations, discussed below.[48]

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39. Christopher Jarrold & Alan D. Baddeley, *Short-Term Memory in Down Syndrome: Applying the Working Memory Model*, 7 DOWN SYNDROME RSCH. & PRAC. 17, 17 (2001).

40. Healy *ex rel.* Healy v. Sears, Roebuck & Co., No. 08-14320, 2009 WL 2168870, at *2 (E.D. Mich. July 21, 2009).

41. *Id.* at *3.

42. *Id.*

43. Ovidio Lopes da Cruz Netto, Silvia Cristina Martini Rodrigues, Marcus Vasconcelos de Castro, Diego Pereira da Silva, Robson Rodrigues da Silva, Richard Ribeiro Brancato de Souza, Adriana A. Ferreira de Souza & Marcia Aparecida Silva Bissaco, *Memorization of Daily Routines by Children with Down Syndrome Assisted by a Playful Virtual Environment*, 10 SCI. REPS. 3144 (2020).

44. EEOC v. Wal-Mart Stores E. LP, 436 F. Supp. 3d 1190, 1193 (E.D. Wis. 2020).

45. *Id.* at 1194.

46. *Id.* at 1196 (discussing that the bus she needed actually did run until 8 p.m. and suggesting that she simply found the shift change not to her liking).

47. *Id.* at 1199.

48. *See infra* Sections III.B–C.

"Executive functioning" refers to the higher-level cognitive skills needed to organize tasks, plan, and exercise self-control.[49] Deficits in memory and abstract thinking pose noteworthy difficulties for people with Down in exercising planning and organizational skills.[50] These skills may be needed to perform tasks independently rather than with others helping the employee to proceed step by step.[51] For example, A.K., a library trainee with Down, was judged not qualified because he needed supervision to stay on task with the work to which he was assigned.[52]

B. Essential Job Functions

To be qualified, employees must be able to perform essential job functions. Employers' judgments regarding which functions are essential bear significant weight.[53] An employer's prior written description of the position is considered evidence of essential functions.[54] An outer limit to the employer's prerogative to set qualification standards is that these standards may not be set in a way that tends to screen out individuals with disabilities, unless they are job-related and consistent with business necessity.[55]

Individuals with Down have experienced adverse job actions based on the employer's delineation of essential job functions. For example, the Ninth Circuit concluded that Jamie Miller, a job trainee with Down, was not a qualified individual because "he cannot perform without a job coach at his elbow and . . . he does not have the basic, rudimentary knowledge required

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49. *E.g.*, *Executive Functions*, UCSF WEILL INST. FOR NEUROSCIENCES, https://memory.ucsf.edu/symptoms/executive-functions (last visited Feb. 15, 2021).

50. *See* Nancy Raitano Lee, Payal Anand, Elizabeth Will, Elizabeth I. Adeyemi, Liv S. Clasen, Jonathan D. Blumenthal, Jay N. Giedd, Lisa A. Daunhauer, Deborah J. Fidler & Jamie O. Edgin, *Everyday Executive Functions in Down Syndrome from Early Childhood to Young Adulthood: Evidence for Both Unique and Shared Characteristics Compared to Youth with Sex Chromosome Trisomy (XXX and XXY)*, 9 FRONTIERS BEHAV. NEUROSCIENCE 264 (2015).

51. *See, e.g.*, Killoran *ex rel.* A.K. v. Westhampton Beach Sch. Dist., No. 18-cv-3389, 2020 U.S. Dist. LEXIS 25505, at *6–7 (E.D.N.Y. Feb. 12, 2020) (refusing to allow an individual with Down to serve as a volunteer camp counselor because he could not independently take care of younger children). *See generally* Francis, *supra* note 8, at 316–19 (demonstrating that courts may decide employees with Down are not qualified based upon conceptualizations of work as requiring independent performance).

52. Miller v. Santa Clara Cnty. Libr., 24 F. App'x 762, 763 (9th Cir. 2001).

53. 42 U.S.C. § 12111(8) ("For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential.").

54. *Id.*

55. *Id.* § 12112(b)(3), (6); 29 C.F.R. §§ 1630.7, 1630.10(a) (2020).

for library work."[56] In a case discussed above, John Healey was terminated by Sears because he was unable to perform all of the "essential functions" of a Receiving Associate; he could only unwrap merchandise and take out the trash, but could not successfully move the merchandise to its assigned place in the store without assistance.[57]

Decisions to the like effect have involved people with intellectual disabilities and functional capacities similar to many people with Down. For example, Bobbie Bost, a "moderately mentally retarded" woman, was terminated by Dollar General because she could not operate a cash register, a function the employer contended was essential to her clerk position.[58] The court concluded that, although the employer had specifically hired Bost for a position that did not require operating the cash register, questions of fact remained about whether Bost was indeed performing the job functions that were essential or whether her job coach was performing those functions for her.[59] To take another example, Joseph Phillips, also "mildly mentally retarded," had worked for years at a plant manufacturing adhesives, where his position of "Entry Level/Utility" involved primarily "stacking buckets on pallets and helping to clean the warehouse floor."[60] The employer needed to lay off one employee for cost reasons and chose Phillips for the layoff because his tasks could be reassigned.[61] The court concluded that the employer did not discriminate against Phillips based on his disability. Rather, the employer had chosen Phillips as the employee to let go because he was the worker with the most limited skills whose tasks could be reassigned.[62]

C. Reasonable Accommodations

Under the ADA, it is also discriminatory for employers to fail to provide reasonable accommodations for employees who can perform essential job functions with accommodations.[63] The disability must be known to the

56. *Miller*, 24 F. App'x at 765.

57. Healy *ex rel.* Healy v. Sears, Roebuck & Co., No. 08-14320, 2009 WL 2168870 at *5–6 (E.D. Mich. July 21, 2009).

58. EEOC v. Dollar Gen. Corp., 252 F. Supp. 2d 277, 280–81, 286 n.3 (M.D.N.C. 2003).

59. *Id.* at 292–93.

60. Phillips v. DAP, Inc., 10 F. Supp. 2d 1334, 1335 (N.D. Ga. 1998).

61. *Id.*

62. *Id.* at 1336.

63. 42 U.S.C. § 12112(b)(5).

employer, however, for there to be liability on the part of the employer.[64] What constitutes an adequate request for accommodations may raise contested questions of fact, and courts reach different conclusions about the fact situations that suffice to constitute a request for accommodations.[65] Nonetheless, the law is clear that without some notice, the employer is under no obligation to take the lead in suggesting an accommodation.[66] On the other hand, employers may not require employees to accept accommodations.[67] Once the employer knows that the employee has a disability for which accommodations might be relevant, the employer is obligated to enter into an interactive process with the employee to determine what reasonable accommodations might be possible to enable the

64. *Id.* The statutory language is "not making reasonable accommodations to the known physical or mental limitations." *Id.*; *see, e.g.*, Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996) (stating that an employee's duty to inform the employer of a disability prior to ADA liability is "a duty dictated by common sense lest a disabled employee keep his disability a secret and sue later for failure to accommodate"); *see also The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited Feb. 15, 2021) ("An employer's obligation to provide reasonable accommodation applies only to known physical or mental limitations. However, this does not mean that an applicant or employee must always inform you of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer 'knows' of the disability even if the applicant never mentions it.").

65. *Compare* Waggel v. George Washington Univ., 957 F.3d 1364, 1372 (D.C. Cir. 2020) (finding that an employee's mere request for medical leave coupled with the employer's knowledge of the employee's disability was insufficient to constitute request for accommodation), *with* Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694 (7th Cir. 1998) ("A request as straightforward as asking for continued employment is a sufficient request for accommodation.").

66. Aubrey v. Koppes, 975 F.3d 995, 1006 (10th Cir. 2020) ("An employer cannot be liable for failing to accommodate a disability if it is unaware of the need for an accommodation."); Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1261 n.14 (11th Cir. 2007) (acknowledging but declining to resolve the question of whether an accommodation proposed by a terminated employee during litigation was sufficient to trigger ABA liability, absent any pre-litigation request for accommodation).

67. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [hereinafter EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION] ("An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.").

employee to function successfully.[68] This interactive process is required even if the employer believes that the initial accommodation requested by the employee is not reasonable.[69]

Whether accommodation requests are reasonable also presents complex questions of fact. Some accommodation requests are for adjustments of job responsibilities; their reasonableness depends on their impact on essential job responsibilities. For example, Warren Adams, a hospital employee with intellectual disabilities whose primary job duties involved keeping the kitchen clean and taking out the garbage, sought to be relieved of responsibilities for delivering meal trays to patients.[70] His concern was that because he could not read well, he might deliver meals to the wrong patients, causing them harm.[71] The court concluded that he had presented an issue of fact over whether the accommodation he requested was reasonable.[72] Whether the accommodation was reasonable, in the court's analysis, depended on whether delivering the trays was a marginal or an essential job function.[73] Accommodations that remove an essential function are "facially unreasonable," according to the court.[74]

Other frequent accommodation requests are for changes in job scheduling. The reasonableness of these requests will depend on the burdens they impose on other employees and the extent to which they would disrupt productivity or other employer functions. For example, Marlo Spaeth, the part-time Walmart employee with Down whose case was described above, presented a question of fact whether her request to stay on an earlier schedule was reasonable. The court concluded that her request to stay on the earlier schedule could have been reasonable in light of the

68. *E.g.*, Winkfield v. Chi. Transit Auth., 435 F. Supp. 3d 904, 910 (N.D. Ill. 2020); EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 805 (7th Cir. 2005). *See generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, QUESTIONS & ANSWERS ABOUT PERSONS WITH INTELLECTUAL DISABILITIES IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2004), 2004 WL 2368526.

69. *See* EEOC v. Wal-Mart Stores E. LP, 436 F. Supp. 3d 1190, 1203–04 (E.D. Wis. 2020).

70. Adams v. Crestwood Med. Ctr., No. 5:18-cv-01443-HNJ, 2020 WL 7049856, at *6 (N.D. Ala. Dec. 1, 2020).

71. *See id.* at *5.

72. *Id.* at *27.

73. *Id.*

74. *Id.* at *28; *see also* EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 67 ("An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a 'qualified' individual with a disability within the meaning of the ADA.").

possibility that other employees would have been happy to take more extended shifts.[75]

One type of accommodation of particular relevance to the circumstances of the pandemic is telecommuting. While remote work may be possible for some positions, it is not a reasonable accommodation if essential job functions require on-site presence.[76] Food service workers or in-store cashiers are examples of such jobs. Other jobs may require direct supervision for their essential functions to be performed successfully; telecommuting would not be a reasonable accommodation for these positions.[77]

For some claims of disability discrimination, accommodation rights are not available. The ADA Amendments Act specifically excludes claims of discrimination based on the "regarded as" prong of the definition of disability[78] from the accommodation right.[79] One justification for this exclusion was that people who are only "regarded as" disabled are not in fact disabled and should not need accommodations.[80] Less clear is whether the accommodation right is available for people claiming ADA protections based on their past record of disability[81] or their association with someone

75. EEOC v. Wal-Mart Stores E. LP, 436 F. Supp. 3d 1190, 1202 (E.D. Wis. 2020).

76. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation.

77. EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 67 ("Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home.").

78. 42 U.S.C. § 12102(1)(C), (3) ("The term 'disability' means . . . being *regarded as* having such an impairment." (emphasis added)).

79. *Id.* § 12201(h).

80. *See Roundtable Discussion: Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing on Examining the Americans With Disabilities Act (Public Law 101-336), Focusing on Ways to Determine the Proper Scope of Its Coverage Before the Comm. on Health, Educ., Lab., and Pensions*, 110th Cong. 8 (2008) (statement of Chai Feldblum, Professor, Georgetown University Law Center) (asserting that Congress initially introduced the "regarded as" language to refer to "those who are not limited by an actual impairment but are instead limited by 'society's accumulated myths and fears about disability and disease'"); *see id.* at 29 (statement of Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation) (criticizing courts' overbroad application of the "regarded as" language).

81. *See* 42 U.S.C. § 12102(1)–(3).

who is a person with a disability, such as a child or a spouse.[82] With respect to claims based on a record of a disability, the EEOC regulations provide that employees may be entitled to accommodations "needed and related to the past disability," such as leave to attend follow up appointments with a health care provider.[83] By contrast, the ADA has long been interpreted not to extend the accommodation right to cases of associational discrimination.[84] This interpretation stems from the statutory definition of discrimination which includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[85] This interpretation reads the dependent clause "who is an applicant or employee" to preclude accommodation claims by employees because of the needs of others, such as flexible work hours to attend to a disabled child. The reasoning behind this limitation of the association right is that it is not the person him or herself whose disability necessitates the accommodation for success on the job. This interpretation is not, however, accepted by all courts. At least one jurisdiction—California—has interpreted parallel language in its state statute prohibiting disability discrimination in employment to include the actual disability of a child as a disability of the employee to which the accommodation right applies.[86]

D. Undue Hardship

An accommodation is not reasonable if it would be an undue hardship for the employer.[87] An undue hardship means a "significant difficulty or expense"[88] when considered in light of factors such as cost, "overall financial resources of the facility" involved in the accommodation, overall

82. *See, e.g.*, Den Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997) (recognizing congressional debate over application of the "association discrimination" provision of the ADA).

83. 29 C.F.R. § 1630.2(k)(3) (2020); *see also* EEOC v. Mfrs. & Traders Tr. Co., 429 F. Supp. 3d 89, 106–07 (D. Md. 2019).

84. *See, e.g.*, *Den Hartog*, 129 F.3d at 1083–85.

85. 42 U.S.C. § 12112(b)(5)(A).

86. Castro-Ramirez v. Dependable Highway Express, 207 Cal. Rptr. 3d 120, 127, 131–32 (Cal. Ct. App. 2016); *see also* Castro v. Classy, Inc., No. 19-CV-02246-H-BGS, 2020 WL 996948, at *3 (S.D. Cal. Mar. 2, 2020) (stating that plaintiff had sufficiently alleged a failure to accommodate claim based on her son's disability).

87. *See* 42 U.S.C. § 12112(b)(5)(A).

88. *Id.* § 12111(10)(A).

financial resources and size of business of the employer as a whole, and the type of operation of the employer.[89]

Undue hardship is a defense on which the employer bears the burden of persuasion.[90] The employer's hardship claims must be supported by "an individualized assessment of current circumstances" rather than generalizations or fears.[91] However, certain types of accommodation requests are highly likely to fail if the employer claims they are unreasonable because of the hardship they impose. Requests that the employer create a new or part-time position,[92] reassign burdensome responsibilities to other employees,[93] or change schedules in a way that would disrupt operations[94] fall into this category. Requests for indefinite leave without a fixed return date are also highly likely to be found unreasonable.[95]

E. Direct Threat Defense

Employers may also assert the defense that the employee presents a "direct threat."[96] For example, an employee with intellectual disabilities who may become aggressive in response to difficulties in meeting production quotas could pose a direct threat in the workplace.[97] In asserting the direct threat defense, employers may not rely on general claims or stereotypes; a successful direct threat defense requires objectively

89. *Id.* § 12111(10)(B).

90. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002).

91. EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 67.

92. *E.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174 (10th Cir. 1999) ("It is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job.").

93. Gardea v. JBS USA, LLC, 915 F.3d 537, 542 (8th Cir. 2019) ("[A]ssistance from other mechanics is not a reasonable accommodation.").

94. EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 67. Work-time differences that do not disrupt productivity may be reasonable, however. *See, e.g.*, Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1260 (11th Cir. 2007).

95. *E.g.*, Carpenter v. York Area United Fire & Rescue, No. 18-CV-2155, 2020 WL 1904460, at *6 (M.D. Pa. Apr. 17, 2020) ("[L]eave cannot be indefinite or open-ended; there must be some expectation that the employee could perform his essential job functions in the 'near future' following the requested leave.").

96. 42 U.S.C. § 12111(3) ("The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.").

97. *E.g.*, Denoewer v. Union Cnty. Indus., No. 2:17-CV-660, 2020 WL 1244194, at *5, *14 (S.D. Ohio Mar. 16, 2020).

reasonable individualized assessments of the nature of the threat.[98] The possibility of contagion may be a direct threat, but only if the employer can meet this standard of an individualized assessment.[99]

Employers need not rely on the direct threat defense if the employee's misconduct would warrant the adverse action at issue.[100] Thus, an employee who curses others because of frustration in meeting work expectations may be terminated for violating workplace civility policies even if an accommodation might have relieved the frustration and prevented the outburst.[101]

Although the statutory definition only refers to "threats to others," the Supreme Court has extended the defense to include significant risks to the health or safety of employees themselves.[102] Individuals whose medical conditions may be exacerbated by on-the-job exposures come within this extension.[103] So might individuals who could be harmed because performing their job is risky for them in a way it is not for others.[104]

IV. COVID-19 and the ADA

The COVID-19 pandemic poses significant new challenges with respect to disability discrimination in the workplace. Job qualifications and delineations of essential job functions may change, as may contentions that proposed accommodations are not reasonable. The undue hardship and direct threat defenses may also be easier for employers to invoke under pandemic conditions.

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98. *E.g.*, Jarvis v. Potter, 500 F.3d 1113, 1122–23 (10th Cir. 2007); Lowe v. Ala. Power Co., 244 F.3d 1305, 1308 (11th Cir. 2001); Nall v. BNSF Ry. Co., 917 F.3d 335, 342 (5th Cir. 2019).

99. *E.g.*, Doe v. An Or. Resort, No. 98-6200-HO, 2001 WL 880165, at *6 (D. Or. May 10, 2001) (explaining that a defendant may challenge the employee's qualifications if they "pose a direct threat to the health or safety of other[s]," including a "contagious disease" that is a "subsequent risk to others").

100. *E.g.*, Felix v. Wis. Dep't of Transp., 104 F. Supp. 3d 945, 953 (E.D. Wis. 2015).

101. *See* Reeves *ex rel.* Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 700 (7th Cir. 2014).

102. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 (2002).

103. *Id.* at 76, 84–87 (considering the exacerbation of an employee's Hepatitis C by on-the-job exposures to refinery toxins).

104. *E.g.*, Darnell v. Thermafiber, Inc., 417 F.3d 657, 661–63 (7th Cir. 2005) (considering a manufacturing employee with uncontrolled diabetes); Fortkamp v. City of Celina, 159 F. Supp. 3d 813, 825–26 (N.D. Ohio 2016) (considering a lineman with a prior back injury).

Although there has been much discussion about these challenges, it is too early in the pandemic for any reported decisions by courts. The EEOC has, however, issued a number of documents about the impact of the pandemic and disability discrimination in employment. This Part uses two primary documents from the EEOC to illustrate the likely challenges for employees with Down to be successful in claiming protections under the ADA.

In March 2020, the EEOC reissued a technical guidance document ("EEOC Guidance") about pandemic preparedness that was originally created for pandemic influenza and updated to cover aspects of COVID-19.[105] That document was based on knowledge of COVID-19 during the first several months of the pandemic and cautioned that employers should continue to follow evolving advice from public health authorities.[106] The second document is a set of questions and answers about COVID-19 and employment discrimination law ("EEOC Q & A").[107] These documents were supplemented by a webinar held in March 2020 ("EEOC Webinar") answering questions submitted in advance.[108] These materials have not gone through the notice and comment rule-making process and hence may not be legally binding on the EEOC.[109]

A. Changes in Essential Job Functions and Employee Qualifications

To claim ADA protections, employees must be qualified to perform essential job functions.[110] But COVID-19 has brought many changes to workplaces that have altered job functions. Job functions once performed on-site may be transferred to remote performance in the case of shutdowns,

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105. U.S. EQUAL EMP. OPPORTUNITY COMM'N., EEOC-NVTA-2009-3, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2020), https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act [hereinafter EEOC, PANDEMIC PREPAREDNESS IN THE WORKPLACE].

106. *Id.*

107. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 16, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [hereinafter *What You Should Know About COVID-19 and the ADA*].

108. *Transcript of March 27, 2020 Outreach Webinar*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 27, 2020), https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar.

109. The role of guidance documents is controversial. Some see these documents as helpful information to the public about how the agency will act; others are concerned that these documents circumvent the formal rule-making process. Administrative Conference Recommendation 2014-3: Guidance in the Rulemaking Process, 79 Fed. Reg. 35,992 (June 25, 2014).

110. 42 U.S.C. §§ 12112(a), 12111(8).

individual isolation, or quarantine. On-site, employees may be distanced from one another or separated by shields to reduce the risk of disease transmission. Employees may no longer be able to work together closely and perform tasks as teams; instead, they may need to work separately and independently. Personal protective equipment or barriers may be critical to reducing pandemic spread but may also make communication among employees more difficult. Employer needs may shift even from week to week as pandemic restrictions rise and fall. With these shifting needs, some job functions may be eliminated altogether for a period of time—there is no need to greet customers or wash dishes when a restaurant is closed.

New functions may become necessary and existing functions may be performed in different ways. Restaurants shifting to take-out and delivery may require food delivery workers who can provide their own transportation, for example. Employees also may be expected to take on additional responsibilities for fellow workers who are ill or in required quarantine, and to be cross-trained to be able to assume these responsibilities. Part-time employees may be especially vulnerable to resulting layoffs.[111]

The EEOC Guidance, Q & A, and Webinar contain no direct discussion of changes in essential job functions and hence whether employees may continue to be qualified to perform them. Instead, essential functions are discussed from the perspective of accommodations: it is not a reasonable accommodation for an employee to be relieved of an essential job function.[112] The example given by the EEOC is telework, which may have been denied as a reasonable accommodation before the pandemic on the judgment that on-site performance was an essential function. During the pandemic, however, telework might become a reasonable accommodation. Indeed, experience with telework may cast doubt on some employers' prior judgments about the need for employees to be present on-site. The EEOC cautions employers that remote job performance during the pandemic could be relevant to whether responsibilities can be performed successfully offsite in the future.[113]

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111. For example, Rudy Gobert, the Utah Jazz basketball player whose COVID-19 infection spurred cancellation of the NBA season, donated funds to support part-time workers at the arena where the Jazz play to offset their layoffs. *Rudy Gobert Donates $500,000 to Part-Time Employees, COVID-19-Related Services in U.S., France*, NBA (Mar. 14, 2020, 3:30 PM), https://www.nba.com/news/rudy-gobert-donates-500k-covid-19-related-services.

112. EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 67.

113. *What You Should Know About COVID-19 and the ADA*, *supra* note 107.

This backwards way of addressing essential functions does not help in determining whether an employer's decision to redefine a job, temporarily or permanently, is discriminatory, however. The EEOC materials do not question the settled assumption that it is the employer's prerogative to set job expectations and employee qualifications, as long as they are job related and consistent with business necessity.[114] At most, the employer is required to state responsibilities clearly[115] and otherwise avoid discrimination.

The reality is that people with Down syndrome may have difficulty in meeting pandemic demands for job performance. New functions may require additional training. Shifting between tasks or exercising independent judgment may strain capacities for executive functioning in people with Down. People with Down may also feel disturbed by or be unable to fully understand infection control practices or personal protective equipment. Whether reasonable accommodations are available to enable people with Down to perform these altered job functions will be the critical turning point in determining whether they are qualified for the jobs they have been performing or might seek.

An additional factor diminishing the job opportunities for people with Down in the pandemic may be the reconstruction or elimination of jobs such as greeters or shelf stockers when customers' shopping patterns change. In 2019, Walmart had already announced the elimination of greeter positions in favor of expanded "customer host" roles that included additional responsibilities such as lifting goods or checking receipts to prevent shoplifting.[116] This announcement resulted in expressions of concern about its impact on people with disabilities,[117] and Walmart has since redesigned its program to shift responsibilities, adjust hours, and respond to increased customer demand during the pandemic.[118] Walmart's

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114. *See* 42 U.S.C. § 12112(b)(6).

115. *See id.* § 12111(8) ("For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.").

116. Associated Press, *Walmart Cuts Greeters and Adds a Job That's Harder for Workers with Disabilities*, L.A. TIMES (Feb. 27, 2019, 3:20 PM), https://www.latimes.com/business/la-fi-walmart-greeters-disabilities-20190227-story.html.

117. Associated Press, *Greeter Job Going Away, but Disabled Employees Are Not, Walmart Says*, NBC NEWS (Mar. 2, 2019, 9:14 AM), https://www.nbcnews.com/business/business-news/greeter-job-going-away-disabled-employees-are-not-walmart-says-n978431.

118. *See* Michael Sainato, *Walmart Cuts Workers' Hours but Increases Workload as Sales Rise Amid Pandemic*, GUARDIAN (Sept. 24, 2020, 5:00 PM), https://www.theguardian.com/business/2020/sep/24/walmart-workers-hours-pay-great-workplace.

program, which aims to create a more nimble workforce, features jobs with expanded responsibilities, fewer leadership roles, and more cross-training so that employees can readily cover for one another.[119] The ultimate impact of these changes on people with intellectual disabilities remains to be seen, but a likely hypothesis is that cross-training requirements alone will be disadvantageous for these workers.

B. Re-evaluation of Reasonable Accommodations and the Undue Hardship Defense

COVID-19 appears to be shifting the landscape of accommodation requests. The most obvious shift is the desire of many employees to work from home to reduce infection risks for themselves or their high-risk loved ones.[120] The EEOC Guidance document on the influenza pandemic, updated for COVID-19, states that high-risk employees "may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic."[121] Telework, however, is only practical for some jobs. Moreover, discussions of the reasonableness of telework strongly suggest that as the pandemic situation shifts, the reasonableness analysis may shift as well.[122]

Workers who must be on-site may request accommodations, such as one-way aisles or barriers between employees and customers, to reduce the possibility of exposure.[123] Increased stresses of the pandemic may be the impetus for accommodation requests, particularly by employees whose disabilities make stress difficult to manage.[124] Other accommodation requests may come with changes in job responsibilities as employees request help in, or relief from, functions made difficult by their disabilities. As described above, accommodations that involve relief from essential job

119. Jon Springer, *Walmart Details Sweeping Restructure of Its Supercenter Workforce*, WINSIGHT GROCERY BUS. (Sept. 18, 2020), https://www.winsightgrocerybusiness.com/|retailers/walmart-details-sweeping-restructure-its-supercenter-workforce.

120. *See* Tracie DeFreitas, *The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19*, JOB ACCOMMODATION NETWORK (Jan. 3, 2020), https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm.

121. EEOC, PANDEMIC PREPAREDNESS IN THE WORKPLACE, *supra* note 105.

122. *What You Should Know About COVID-19 and the ADA*, *supra* note 107.

123. *Id.*

124. *Id.*

functions are unreasonable;[125] employees who cannot perform essential functions are not qualified for the jobs in question.

The EEOC documents are clear that accommodations during the pandemic may be met with the defense that they are an undue hardship. Accommodations that were not a hardship before the pandemic may become far more burdensome during the pandemic.[126] For example, it may be more disruptive to allow employees to have time off if they are needed to cover for others who are out sick or quarantined.[127] If employers' revenue is decreased during the pandemic, or expenses are increased by, for example, the need to purchase protective equipment, the sheer costs of an accommodation may be unreasonable.[128]

Because of their increased risks from COVID-19, employees with Down may request accommodations to reduce their risk of exposure. In fact, without such accommodations there is a possibility that employers might consider Down employees' continuing to work on-site a direct threat,[129] as discussed below.[130] Yet at least some of these accommodations might not be feasible or might increase workplace risks in a way that would create an undue hardship. For example, the EEOC makes clear that employers may implement recommended infection control practices during a pandemic.[131] These practices may include wearing personal protective equipment.[132] Without personal protective equipment, employees might themselves be at greater risk or place others at greater risk of infection transmission. But an employee with Down might not understand how to wear protective equipment properly or might need special training or job coaching assistance to accomplish needed protection. If the employee must be reminded frequently about how to wear the equipment, this might distract from other employees' ability to perform their jobs or might require the presence of an additional person on-site. More people on-site could make social distancing more difficult and, on this basis, might be an undue hardship as well. Even when employees with Down are able to pay for their job coaching, the mere presence of the coach as an additional person in the workspace may be a hardship when, absent the pandemic, it would not be.

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125. *Id.*
126. *Id.*
127. *See id.*
128. *See id.*
129. *Id.*
130. *See* discussion *infra* Section IV.C.
131. EEOC, PANDEMIC PREPAREDNESS IN THE WORKPLACE, *supra* note 105.
132. *Id.*

The threshold difficulty for employees about whether they have rights to accommodations at all also may have important consequences for people with Down. As discussed above, the dominant view excludes claims for accommodations based on associational discrimination.[133] The EEOC pandemic documents reiterate this exclusion.[134] The exclusion rules out accommodation requests both by people who wish to avoid exposing their family members with Down and those who may need additional time off as caregivers for people with Down who can no longer attend school or day programs.

Caregivers for individuals with Down will also be unable to claim accommodation rights to help people with Down contend with their own work challenges. For example, a parent of a working adult child with Down could not seek accommodations for the time needed to help their child learn new job responsibilities or how to use protective equipment. Excluding these claims of associational discrimination from the accommodation right ignores the fact that many people have been unwilling to take on-the-job risks of COVID-19 infection that might in turn infect their loved ones at serious risk from the disease.

In Chicago, for example, many schoolteachers reportedly took unpaid leave when they were denied accommodations or leave because of concerns about infecting someone in their household vulnerable to COVID-19.[135] Other school districts have also limited accommodation rights claims based on association to vacation leave, short term leave without pay, or other personal leave.[136] Commentators have pointed out that this may be unwise employment policy, as an employer who has granted similar accommodation rights to other employees in the past might still be

133. *See supra* notes 82, 84–86 and accompanying text.

134. *What You Should Know About COVID-19 and the ADA*, *supra* note 107; *Transcript of March 27, 2020 Outreach Webinar*, *supra* note 108.

135. Elyssa Cherney, *CPS Denies COVID-19 Accommodations to Hundreds of Teachers and Staff Who Are Due to Return to Schools Monday*, CHI. TRIBUNE (Dec. 29, 2020, 3:53 PM), https://www.chicagotribune.com/coronavirus/ct-covid-19-illinois-chicago-public-school-teachers-20201229-mncckgdyvfcl3atk7jfk3vwama-story.html. The district reportedly intended to provide weekly testing for employees with at-risk household members and exemptions for employees who serve as primary caregivers for individuals with high-risk medical conditions.

136. Granite School District in Utah is an example. *See* GEA AdvoCats, *FAQs – Leave and COVID-19*, GRANITE EDUC. ASS'N (June 30, 2020), https://www.gea-ut.org/gea-news/archives/06-2020.

considered discriminating on the basis of disability by failing to grant accommodations for associational discrimination during COVID-19.[137]

C. Medical Examinations, Vaccination, and the Direct Threat Defense

The EEOC materials devote by far the most attention to medical examinations and the possibility that employees may be direct threats to themselves or others. This possibility may arise because employees are actually ill, have been exposed to illness, or are at high risk of serious illness or death from infection.

Reducing the threat of disease spread within a workplace is an important aspect of workplace safety. All the EEOC documents are clear that employers may ask employees coming into the workplace whether they have COVID-19, have symptoms of COVID-19, or have been tested for COVID-19.[138] Employers may also ask whether employees may have had contact with someone who is ill with COVID-19.[139] Employers may even require COVID-19 testing of employees before entering the workplace to determine whether they pose a direct threat to others.[140]

Employers may direct these requirements to particular employees if they have objective reason to believe that the employee might be ill with COVID-19—for example, an employee with a noticeable cough.[141] The EEOC materials do not discuss what an employer may do if an employee is unable to answer any of these questions, as might be the case for an employee with an intellectual disability such as Down. It is possible that employees with Down, therefore, might be subject to increased scrutiny from employers in a manner that could target or discriminate against them. It is also likely that at least some forms of testing for COVID-19 might be disturbing to people with intellectual disabilities who cannot understand what is happening to them.

Vaccination mandates are also given considerable attention by the EEOC materials. The EEOC Guidance states that employees have a right to be exempt from vaccination mandates if they have a disability that prevents

137. Jon Hyman, *Must You Accommodate an Employee with a High-Risk Family Member?*, WORKFORCE.COM (June 23, 2020), https://www.workforce.com/news/must-you-accommodate-an-employee-with-a-high-risk-family-member.

138. *What You Should Know About COVID-19 and the ADA*, *supra* note 107. Any information is, however, subject to the confidentiality requirements of the ADA.

139. *Transcript of March 27, 2020 Outreach Webinar*, *supra* note 108.

140. *What You Should Know About COVID-19 and the ADA*, *supra* note 107.

141. *Transcript of March 27, 2020 Outreach Webinar*, *supra* note 108.

them from being vaccinated.[142] The EEOC treats this right as an accommodation, so vaccination exemptions could be subject to the argument that they are not reasonable or are an undue hardship. The employer might make claims of hardship if an unvaccinated employee could pose risks to others, for example customers, and it is important for the employer to be able to represent to the public that all on-site employees have been vaccinated.

Evidence is incomplete about the efficacy of COVID-19 vaccination in people with Down. People with Down are included in the U.S. CDC recommendations for vaccination prioritization as people with underlying medical conditions that increase their risks of severe COVID illness.[143] Because of differences in their immune systems, some vaccinations may be less effective in people with Down.[144] To date, moreover, there is limited safety data about whether people with compromised immune systems are at any increased risk from the COVID vaccines currently approved for use.[145]

People with Down are, however, at increased risk from COVID-19. As a result, employers are likely to consider whether continuing to work constitutes a direct threat for employees with Down. If immunization is imperfect, or if a person declines the vaccine for safety reasons, employers may worry that employees with Down who are on-site pose risks to customers. Employers may also be concerned that the employees with Down may become infected themselves and seriously ill.

These concerns must be supported by objective evidence and an individualized assessment, along with consideration of whether reasonable accommodations are available.[146] Given the information that is currently available, however, it seems likely that an employer could argue that allowing on-site presence of employees with Down creates a direct threat to themselves, especially if these employees have difficulties managing personal protective equipment such as masks.

142. EEOC, PANDEMIC PREPAREDNESS IN THE WORKPLACE, *supra* note 105.

143. *Medical Conditions*, CDC (May 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

144. Dean Huggard & Eleanor J. Molloy, *Question 1: Do Children with Down Syndrome Benefit from Extra Vaccinations?*, 103 ARCHIVES DISEASE CHILDHOOD 1085 (2018).

145. *Medical Conditions*, CDC (May 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/underlying-conditions.html.

146. *What You Should Know About COVID-19 and the ADA*, *supra* note 107.

V. Employees with Down in a Pandemic: The ADA and Beyond

This Article has identified four particularly critical challenges for employees with Down in the COVID-19 pandemic. These challenges are:

- Many of the kinds of jobs these employees hold are limited-task, part-time, or require on-site presence. It is likely that essential functions of these jobs will change and employees may no longer meet job qualifications, even with accommodations.
- Accommodations that were reasonable before the pandemic may no longer be so if they now present a hardship to employers with increased costs, decreased revenue, or fluctuating workflow.
- The direct threat defense may be invoked if employees with Down have difficulty using protective equipment or are unable to be immunized as successfully as others and, thus, their continued on-site presence risks serious illness for themselves or transmission to others.
- Caregivers who may not claim accommodation rights because of their association with people with Down will face the choice between continuing to work or taking unpaid leave; if they continue to work, their own exposure may increase the risk to people with Down. In addition, caregivers continuing to work will not be available to help people with Down navigate their own job challenges.

These challenges are real. Importantly, they present in direct and concentrated form challenges that are apparent for people with Down outside of pandemic times and that contribute to the low employment rates of people in this population. Two different kinds of strategies may be available to address these challenges.

One strategy would address possible changes in how courts have interpreted the ADA. The doctrine that employees claiming associational discrimination are not entitled to accommodations is the result of court decisions interpreting the language of the ADA. The determination that threats to self are included in the direct threat defense is the result of the Court's much-criticized *Echazabal* decision. Courts could undo these

decisions, or Congress could entertain new amendments to the ADA as it did in 2007 with the ADA Amendments Act.[147]

Another kind of strategy would move beyond the ADA, to reconsideration of many aspects of how work is constituted in the United States. This Article highlights several aspects of particular concern. The United States lacks comprehensive paid family and medical leave either for family members or workers themselves who for medical reasons should avoid exposure to disease. The absence of these protections is particularly apparent for part-time workers. The United States also lacks a comprehensive program for retraining workers or reallocating job responsibilities in light of crises such as the COVID-19 pandemic. Instead, U.S. anti-discrimination law places the costs of addressing these issues largely on employers, with the result that otherwise reasonable accommodations may constitute undue hardships.

The benefits of serious attention to these strategies will reach far beyond people with Down during COVID-19. However, the challenges faced by people with Down in the pandemic shine harsh light on the limitations of U.S. employment discrimination law in its current form.

147. *See generally* Alex H. Glaser, *The Americans with Disabilities Act Amendments Act: Legal Implications and the Effect on Employer-Employee Relationships*, 59 LA. BAR J. 94 (2011) (discussing changes stemming from the ADA Amendments Act).