

## HRAGC LEGAL UPDATE FEDERAL

FEBRUARY 18, 2021

### United States Court of Appeals for the First Circuit

The First Circuit affirmed a jury verdict for a plaintiff who made claims for disability discrimination under the ADA and the Maine Human Rights Act. The plaintiff was awarded \$150,00 in compensatory damages, \$350,000 in punitive damages and attorney's fees. Mr. Burnett is a paraplegic who was working in a call center for a small company handling reservations for a large hotel and resort chain. He struggled to enter the building (a golf clubhouse) through the heavy wooden doors that closed automatically on him as the slope of the entrance caused his wheelchair to roll back toward the closing doors once inside. He requested an accommodation, asking for push-button automatic doors at the public entrance. His supervisor conveyed the request to a manager. The manager inquired of the builder if the doors were ADA compliant and he replied that they were when constructed. No one responded to Mr. Burnett's request. Six weeks later he injured his wrist trying to get through the door, an incident report was filed but no one addressed his request for accommodation. A year later he filed a discrimination claim and the manager discussed it with him, telling Mr. Burnett she was unfamiliar with the ADA but not mentioning the doors, his injury or his requested accommodation. He gave notice terminating his employment the next year after eighteen months of employer inaction concerning the doors. He ultimately filed suit against both the small employer and the related resort chain.

The jury found for the plaintiff against both defendants, finding them an integrated employer and joint employers. Adding the larger company increased the damage caps resulting in a larger verdict. The court affirmed the jury verdict finding the two companies were an integrated employer, enabling the court to treat them as one employer. Key facts included the employment paperwork (hiring, orientation, training, evaluations, payroll and others) that failed to distinguish between the two companies, inconsistency between the documents and overlapping management.

The court found sufficient evidence to support the conclusion there was disability discrimination. Though Mr. Burnett was able to perform his duties, the workplace was not readily accessible to him as the doors were not readily usable to him, and he was entitled to an accommodation that would level the playing field. The court found sufficient evidence of reckless indifference that supported the award of punitive damages. There were three instances where Mr. Burnett's problem with the doors was brought to the employer's attention but no effort was made to address the issue with him. The court rejected the defendants' claims of good faith and their reliance on the policies in the handbook, finding a handbook policy without action is not enough to show good faith, particularly when the employee follows the policy but the employer does not.

The case is *Burnett v. Ocean Properties, Ltd. and AmeriPort, LLC* (Nos. 19-2086 & 19-2087) (February 2, 2021).

## NEW HAMPSHIRE

### New Hampshire Legislature

Bills are now starting to work through committees. Several have been passed by the Senate including:

- SB 69. This bill requires employers to provide a sufficient space and break time for nursing mothers to express milk. The bill passed 24-0.

- SB 61. This bill, named the Right to Work bill, prohibits a collective bargaining agreement from requiring an employee join or contribute to a labor union. The bill passed 13-11.

## Best Practices for Addressing Vaccination Issues

**Mandating Vaccination.** While employers are permitted to require employees be vaccinated they should carefully analyze whether they want to mandate vaccination or strongly encourage it. A mandate may implicate the ADA, Title VII, GINA and others. If an employee voices a religious objection or is unable to be vaccinated on account of a disability, an accommodation excusing the employee from the vaccine requirement may be in order. A mandate may also lead to morale problems or present difficult decisions about those who do not comply.

**Offering incentives.** Employers considering incentives, such as time off, cash payments or gifts, should review whether such a program is discriminatory. The incentives could run afoul of ADA restrictions and screening questions that elicit medical information may trigger the ADA. Consider how to handle those who have a religious objection to the vaccine or who are unable to be vaccinated due to a disability: should those employees nevertheless receive the incentive? Attempting to screen those employees for why they are not vaccinated may lead to impermissible medical inquiries. If incentives are provided, the value may have to be included in the regular rate of pay for overtime calculations.

**Handling the unvaccinated.** Employers should carefully address employees who are eligible for vaccination but who decline. If someone refuses to be vaccinated, that person could be prevented from coming to work and could be terminated. But if the person is not vaccinated due to a religious objection or medical condition, the employer should take steps to explore whether and how to accommodate that person, such as restructuring the work area or work schedules or allowing for remote work. The traditional accommodation rules apply (is it a hardship or is there no viable accommodation) and only after exhausting all options should an unvaccinated employee be terminated. Employers should avoid asking questions that elicit medical information that should not be requested and consider the employer may not want to know the reason someone has not received the vaccine.

**Continue to follow safe workplace recommendations and guidelines.** The best practice to maintain a safe workplace for all employees and visitors – even as vaccination becomes more widespread – is to continue to follow the federal and state guidelines, including mask wearing, physical distancing, signage, cleanliness, remote work, travel restrictions and others. OSHA issued an updated guidance on January 29, 2021 recommending that employers continue to employ safety measures for both vaccinated and unvaccinated employees. The CDC also recommends continued adherence to these safety measures. Everyone remains at some risk at this time. Those who have been vaccinated are protected, but questions remain about whether they may still transmit the virus. And the science is uncertain about whether the vaccine is completely effective against variants and the length of the protection. Some employees may not be vaccinated and remain at risk. At present it is unknown how long those who have been infected and recovered are immune and when they could be re-infected. Thus, it continues to be essential to follow the pre-vaccination protocols to maintain a safe workplace.

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