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Quarantine and Isolation: Selected Legal Issues Relating to Employment

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Nancy Lee Jones and Jon O. Shimabukuro
Legislative Attorneys
American Law Division

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Summary

The emergence and rapid spread of a new avian influenza virus (H5N1) and its potential for causing a human influenza pandemic have given rise to issues relating to the use of quarantine and isolation. Questions relating to employment are among the most significant issues, since, if individuals fear losing their employment or their wages, compliance with public health measures such as isolation or quarantine may suffer. Although the common law doctrine of employment-at-will, which allows an employer to terminate an employee from employment for any reason other than those prohibited by statute, is generally applicable, there is an exception to this doctrine for public policy reasons. This report examines the employment-at-will doctrine, possible application of the public policy exception in the case of a potential influenza pandemic, the Family and Medical Leave Act (FMLA), and possible application of the nondiscrimination mandates of the Americans with Disabilities Act (ADA). The report will be updated as developments warrant.

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Introduction

The emergence and rapid spread of a new avian influenza virus (H5N1) and its potential for causing a human influenza pandemic have given rise to issues relating to the use of quarantine and isolation.[1] Questions relating to employment are among the most significant issues since if individuals fear losing their employment or their wages, compliance with public health measures such as isolation or quarantine may suffer. Although the common law doctrine of employment-at-will, which allows an employer to terminate an employee from employment for any reason other than those prohibited by statute, is generally applicable, there is an exception to this doctrine for public policy reasons. This report will examine the employment-at-will doctrine, possible application of the public policy exception in the case of a potential influenza pandemic, the Family and Medical Leave Act (FMLA), and possible application of the nondiscrimination mandates of the Americans with Disabilities Act (ADA).

Background

The increased transmission of the H5NI virus among avian populations has raised concerns about a possible mutation of the virus that might cause a human influenza pandemic.[2] Whether the H5N1 virus will cause a human influenza pandemic is unknown, but history suggests that influenza pandemics occur regularly.[3] Controlling or preventing an influenza pandemic involves the same strategies used for seasonal influenza. These strategies are vaccination, treatment with antiviral medications, and the use of infection control.[4] A specifically targeted vaccine would not be available immediately since the exact strain of the virus would not be known until the epidemic occurs, and there may be limited supplies of antiviral medications. Therefore, the use of other infection control measures may be critical. The uses of quarantine and isolation, as well as social distancing and "snow

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[1] For a detailed discussion of legal authorities relating to quarantine and isolation, see CRS Report RL33201, *Federal and State Quarantine and Isolation Authority,* by Kathleen S. Swendiman and Jennifer K. Elsea.

[2] For a detailed discussion of pandemic influenza, preparedness, and response, see CRS Report RL33145, *Pandemic Influenza: Domestic Preparedness Efforts*, by Sarah A. Lister.

[3] Homeland Security Council, *National Strategy for Pandemic Influenza* 1-2 (GPO November 2005).

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

days," have been discussed in the Homeland Security Council's Pandemic Influenza Implementation Plan[5] as ways to attempt to limit the spread of influenza.

Quarantine is defined as the "separation of individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection."[6] Isolation is defined as the "separation of infected individuals from those who are not infected."[7] Social distancing is defined as "infection control strategies that reduce the duration and/or intimacy of social contacts and thereby limit the transmission of influenza."[8] Social distancing can include the use of face masks, teleconferencing, or school closures. "Snow days," a type of social distancing, are the recommendation or mandate by authorities that individuals and families limit social contacts by remaining within their households.[9]

Wrongful Discharge in Violation of Public Policy

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

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

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

- refusing to commit unlawful acts (e.g., refusing to commit perjury when the government is investigating the employer for wrongdoing);
- exercising a statutory right (e.g., filing a claim for workers' compensation, reporting unfair labor practices);

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[5] *Id.* at 72-73, 107-109.

[6] *Id.* at 209.

[7] *Id.* at 207.

[8] *Id.* at 209.

[9] *Id.*

- fulfilling a public obligation (e.g., serving on jury duty); and
- whistleblowing.[10]

Although most states appear to recognize a claim for wrongful discharge in violation of public policy, it is possible that a state may allow a claim only under certain circumstances. For example, Texas recognizes such a claim only if an employee is terminated for refusing to perform an illegal act or inquiring into the legality of an instruction from the employer.[11]

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

> [t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.[12]

Similarly, in *Boyle v. Vista Eyewear, Inc.*, the Missouri Court of Appeals stated that public policy "is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good."[13] These broad definitions suggest that an employee's isolation or quarantine during a pandemic in some states could possibly provide a public policy exception to the at-will rule of employment. It would seem possible for a court to conclude that the isolation or quarantine of individuals during a pandemic serves the public good and that the termination of individuals who are isolated or quarantined violates public policy.

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

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

[11] *See* Buckley and Green at 5-59.

[12] 421 N.E.2d 876, 878 (Ill. 1981).

[13] 700 S.W.2d 859, 871 (Mo. Ct. App. 1985).

The Family and Medical Leave Act

The Family and Medical Leave Act[14] ("FMLA") guarantees eligible employees 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
- because of the placement of a son or daughter with the employee for adoption or foster care;
- in order to care for a spouse or a son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition; and
- because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.[15]

The FMLA defines an "eligible employee" as one who has been employed for at least 12 months by the employer from whom leave is requested, and who has been employed for at least 1,250 hours of service with such employer during the previous 12-month period.[16] The FMLA applies only to employers engaged in commerce (or in an industry affecting commerce) that have at least 50 employees who are employed for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.[17]

If there was a spread of a pandemic influenza virus, the FMLA would seem to provide infected employees and employees who care for certain infected relatives with the opportunity to be absent from the workplace. The FMLA defines a "serious health condition" to mean "an illness, injury, impairment, or physical or mental condition" that involves either "inpatient care in a hospital, hospice, or residential

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[14] 29 U.S.C. §§ 2601-2654. For additional discussion of the Family and Medical Leave Act, see CRS Report RS22090, *The Family and Medical Leave Act: Background and U.S. Supreme Court Cases*, by Jon O. Shimabukuro.

[15] 29 U.S.C. § 2612(a)(1).

[16] 29 U.S.C. § 2611(2). The term "eligible employee" does not include most federal employees. Federal employees are covered generally under the Federal Employees Family Friendly Leave Act ("FEFFLA"). See 5 U.S.C. § 6307(d) (permitting the use of sick leave to care for a family member having an illness or injury, and to make arrangements for or to attend the funeral of a family member). The U.S. Office of Personnel Management has issued a document that contemplates telework, alternative work arrangements, and excused absences during a pandemic. See U.S. Office of Personnel Management, *Human Capital Planning for Pandemic Influenza* (2006), available at [http://www.govexec.com/pdfs/HandbookOPM2ndJuly72006.pdf].

[17] 29 U.S.C. § 2611(4)(I). *See also* 29 U.S.C. §2611(2)(B)(ii). (Employers who employ 50 or more employees within a 75-mile radius of an employee's worksite are subject to the FMLA even if they may have fewer than 50 employees at a single worksite.)

medical care facility; or ... continuing treatment by a health care provider."[18] An employee who was affected by a pandemic influenza virus may be found to have a serious health condition. If the FMLA's eligibility requirements were met, such an employee would likely be granted leave under the statute.[19]

In addition, because the FMLA grants leave to an employee to care for a spouse, child, or parent with a serious health condition, an employee could be granted leave to care for a relative who was affected by a pandemic influenza virus if the employee met the statute's eligibility requirements. While on leave, the employee with the serious health condition or the employee caring for a spouse, child, or parent with a serious health condition could be isolated or quarantined without the fear of termination for at least 12 workweeks.[20]

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

At least five states, recognizing that the lack of statutory protection for employees in a situation where isolation or quarantine may be necessary, have enacted legislation that explicitly prohibits the termination of an employee who is subject to isolation or quarantine. In Iowa, Kansas, Maryland, Minnesota, and New Mexico, an employer is prohibited from terminating an employee who is under an order of isolation or quarantine, or has been directed to enter isolation or quarantine.[21] Under Minnesota law, an employee who has been terminated or otherwise penalized for being in isolation or quarantine may bring a civil action for reinstatement or for the recovery of lost wages or benefits.[22]

Although federal law does not protect from termination employees who may be absent from the workplace because of isolation or quarantine, there are examples of employee protections that are arguably analogous.[23] The FMLA, for example, does

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[18] 29 U.S.C. § 2611(11).

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

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

[21] Iowa Code § 139A.13A; Kan. Stat. Ann. § 65-129d; Md. Code Ann., Health-Gen. § 18-906; Minn. Stat. § 144.4196; N.M. Stat. Ann. § 12-10A-16.

[22] Minn. Stat. § 144.4196.

[23] During the SARS (Severe Acute Respiratory Syndrome) epidemic, Canadian laws and regulations were amended to provide for special employment insurance coverage for health

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grant leave to an eligible employee who has a serious health condition or who provides care to a spouse, child, or parent with a serious health condition. In addition, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") specifically requires the reemployment of an employee who has been absent from a position of employment because of service in the uniformed services.[24] The FMLA and USERRA illustrate Congress's awareness of events that may necessitate an employee's absence from the workplace.

The Americans with Disabilities Act (ADA)

Overview of the ADA Definition and Employment Provisions

Definition of Disability. The Americans with Disabilities Act[25] (ADA) has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities. As stated in the act, the ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[26]

The starting point for an analysis of rights provided by the ADA is whether an individual is an individual with a disability. The term "disability," with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[27] The EEOC has defined "substantially limits" as meaning "(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can

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

[24] 38 U.S.C. §§ 4301-4333.

[25] 42 U.S.C. §§12101 *et seq.* For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

[26] 42 U.S.C. §12101(b)(1).

[27] 42 U.S.C. § 12102(2). For a detailed discussion of the ADA's definition of disability, see CRS Report RL33304, *The Americans with Disabilities Act (ADA): The Definition of Disability*, by Nancy Lee Jones.

perform that same major life activity."[28] In order to determine if an individual is substantially limited in a major life activity, the EEOC found that the following factors should be considered: "the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."[29] In a question-and-answer publication on the ADA, the Department of Justice and the EEOC observed that

> [t]he first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.[30]

The definition of disability has been the subject of numerous cases brought under the ADA, including major Supreme Court decisions.[31]

Employment Discrimination. Title I of the ADA prohibits employment discrimination, and specifically provides that no covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[32] The term discrimination is defined in part as "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[33] The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.[34]

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[28] 29 C.F.R. §1630.2(j)(1).

[29] 29 C.F.R. §1630.2(j)(2).

[30] Equal Employment Opportunity Commission and U.S. Department of Justice, Civil Rights Division, "Americans with Disabilities Act: Questions and Answers," [http://www.usdoj.gov/crt/ada/qandaeng.htm]. See, also, 29 C.F.R. Part 1630, App. §1630.2(j), which states: "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza."

[31] See, e.g., *Sutton v. United Airlines*, 527 U.S. 471 (1999), where the Court held that the determination of whether an individual is an individual with a disability should be made with reference to measures that might mitigate the individual's impairment, such as medications or eyeglasses.

[32] 42 U.S.C. §12112(a).

[33] 42 U.S.C. §12112(b)(4).

[34] 42 U.S.C. §12111(5). This parallels the coverage provided in the Civil Rights Act of 1964. The Supreme Court in *Arbaugh v. Y. & H. Corp.*, 546 U.S.__, 126 S.Ct. 1235, 163 (continued...)

For an ADA employment-related issue, if the threshold issues of meeting the definition of an individual with a disability and involving an employer employing over 15 individuals are met, the next step is to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Title I defines a "qualified individual with a disability." Such an individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[35] The EEOC has stated that a function may be essential because (1) the position exists to perform the duty, (2) there are a limited number of employees available who could perform the function, or (3) the function is highly specialized.[36]

The ADA requires the provision of reasonable accommodation unless the accommodation would pose an undue hardship on the operation of the business.[37] "Reasonable accommodation" is defined in the ADA as including making existing facilities readily accessible to and usable by individuals with disabilities, and job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices, adjustment of examinations or training materials or policies, provision of qualified readers or interpreters, and other similar accommodations.[38] The Equal Employment Opportunity Commission (EEOC) has interpreted reasonable accommodation as including work at home[39] and the use of paid or unpaid leave.[40]

"Undue hardship" is defined as "an action requiring significant difficulty or expense."[41] Factors to be considered in determining whether an action would create an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.[42] The EEOC has provided detailed guidance on reasonable accommodation and undue hardship,

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[34] (...continued)
L.Ed.2d 1097 (2006), held that the 15-employee limitation in title VII of the Civil Rights Act, 42 U.S.C. §2000e(b), was not jurisdictional, but rather was related to the substantive adequacy of a claim. Thus, if the defense that the employer employs fewer than 15 employees is not raised in a timely manner, a court is not obligated to dismiss the case. Since the ADA's 15-employee limitation language parallels that of Title VII, it is likely that a court would interpret the ADA's requirement in the same manner.

[35] 42 U.S.C. §1211(8).

[36] 29 C.F.R. §1630.2(n)(2).

[37] 42 U.S.C. §12112(b)(5)(A).

[38] 42 U.S.C. § 12111(9).

[39] See [http://www.eeoc.gov/facts/telework.html].

[40] EEOC, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," [http://www.eeoc.gov/policy/docs/accommodation.html].

[41] 42 U.S.C. §12111(10).

[42] *Id.*

which, in part, discusses the use of paid or unpaid leave as a form of reasonable accommodation.[43]

Application of the ADA

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

Definition of Disability and Isolation. Isolation, as noted previously, separates individuals who are sick from those who are well. Generally, individuals with long-term contagious diseases would be considered individuals with disabilities.[44] In *Bragdon v. Abbott*,[45] the Supreme Court held that HIV infection was a physical impairment that was a substantial limitation on the major life activity of reproduction. It might be argued that an individual who is infected with a pandemic influenza virus and who manifests symptoms would have a substantial limitation on a major life activity such as breathing. Therefore, it could be argued that an individual who is isolated because of this illness would be covered under the ADA.

However, determination of coverage under the ADA is dependent on an individualized determination; the mere fact of having a particular condition does not necessarily make an individual an individual with a disability. If an individual's symptoms were mild or short-term, the condition might not be considered to be a substantial limitation on a major life activity. For example, in *Toyota Motor Manufacturing v. Williams*,[46] the Supreme Court found that an individual who could brush her teeth, wash her face, do laundry, and fix breakfast was not substantially limited in a major life activity, even though her condition caused her to occasionally seek help dressing and to reduce the amount of time she played with her children, gardened, and drove long distances. In addition, the EEOC has indicated that the duration or expected duration of the impairment is a factor to be considered in

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

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

[45] 524 U.S. 624 (1998).

[46] 534 U.S. 184 (2002).

determining whether an individual is substantially limited in a major life activity.[47] In its discussion regarding the ADA and individuals with cancer, the EEOC indicated that, when determining whether cancer is a disability under the ADA, duration of the condition is a factor to be used in determining if the condition substantially limits a major life activity. The EEOC stated that "where the condition lasts long enough (i.e., for more than several months) and substantially limits a major life activity, such as interacting with others, sleeping, or eating, it is a disability within the meaning of the ADA."[48] Similarly, in the question-and-answer publication by the EEOC and the Department of Justice quoted earlier, "flu" was specifically listed as the kind of "minor, nonchronic condition of short duration" that would not be covered.[49]

Thus, an argument could be made that an individual who is isolated due to infection with a pandemic influenza virus would not be considered to be an individual with a disability. However, this conclusion is dependent on an individualized determination, and may turn on whether an individual had any long-lasting residual effects from the infection. If an individual who was isolated due to infection with a pandemic influenza virus was determined to be an individual with a disability, the next step in determining whether there would be ADA coverage would be to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Since an individual in isolation would most likely be too ill to work, the major question would concern the use of leave, paid or unpaid, as a reasonable accommodation.[50]

Definition of Disability, Employment Discrimination, and Quarantine. Quarantine separates individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection.[51] Since the individual who is quarantined is not yet sick and may never become sick, the first prong of the definition of disability, having a physical or mental impairment that substantially limits one or more of the major life activities of such individual, is not applicable. The second prong of the definition, having a record of a disability, would also not be applicable since the individual has not been ill. The third prong protects individuals who are "regarded as" having a

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[47] 29 C.F.R. §1630.2(j)(2).

[48] EEOC, "Questions and Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA)," [http://www.eeoc.gov/facts/cancer.html].

[49] It should be noted that this reference to "flu" would not necessarily include pandemic influenza, which may not be a "minor, nonchronic condition of short duration." Of particular importance concerning whether this interpretation could be distinguished would be the extent to which an individual may have long-lasting residual effects from infection with a pandemic influenza virus. For a chart listing differences between seasonal influenza and pandemic influenza, see [http://www.pandemicflu.gov/season_or_pandemic.html].

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

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

disability. The EEOC defines regarded as having a disability as meaning an individual who

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined ... but is treated by a covered entity as having a substantially limiting impairment.[52]

Of these three subsets of the category of being regarded as having a disability, the situation of a quarantined individual appears to fit the last one — having none of the impairments but being treated as having a substantially limiting impairment. It might be argued that an employer might treat a quarantined individual as significantly restricted as to the condition, manner, or duration under which he or she can perform a particular major life activity.[53]

The next hurdle regarding ADA coverage is whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Can an individual who is quarantined perform the essential functions of a job? The answer to that question depends in large part on what the job is. If the job is serving food at a restaurant, the answer is clearly no. However, an individual might be able to perform a job on a computer by teleworking. The EEOC has interpreted the reasonable accommodation as including work at home[54] and the use of paid or unpaid leave.[55] However, several cases have found that physical attendance at a job is an essential function of a job relying on employer's arguments concerning the need for supervision and teamwork.[56]

Another potential issue would arise if a quarantined individual who is considered an individual with a disability because he or she is "regarded as" having a disability asks to be able to work from home as a reasonable accommodation.

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[52] 29 C.F.R. §1630.2(l).

[53] If the individual was quarantined due to a relationship or association with an individual who was ill with pandemic influenza, the ADA's prohibition against excluding or otherwise denying equal jobs or benefits because of the known disability of an individual with whom the qualified individual was known to have a relationship or association might be applicable. 42 U.S.C. §12112(b)(4). However, this assumes that the individual ill with pandemic influenza is an individual with a disability, which would not necessarily be the case.

[54] See [http://www.eeoc.gov/facts/telework.html].

[55] EEOC, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," [http://www.eeoc.gov/policy/docs/accommodation.html].

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

There is considerable controversy over whether an individual who is regarded as having a disability is entitled to reasonable accommodations.[57]

Definition of Disability and Snow Days. "Snow days," a type of social distancing, is the recommendation or mandate by authorities that individuals and families limit social contacts by remaining within their households.[58] Since there would not even be the connection to possible infection that there might be in a quarantine situation, an argument that individuals taking snow days would be individuals with disabilities would be unlikely to be successful. Similarly, it is unlikely that an argument that individuals taking snow days are regarded as having a disability would be successful. However, it is possible to argue that individuals taking snow days may be unimpaired, but are treated as having a substantially limiting impairment. It could be argued that an employer might treat a such an individual as significantly restricted as to the condition, manner, or duration under which he or she can perform a particular major life activity. If this argument were successful, the next step would be to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. The analysis of these issues would be the same as discussed previously regarding individuals who are quarantined.

Summary of ADA Application. The preceding discussion illustrates the complexity of applying the ADA's nondiscrimination mandates to employment issues arising during an influenza pandemic. Although it is possible that the ADA might be found to apply in some circumstances, since ADA coverage is to be individually determined, generally, it is unlikely that the ADA would provide protection to individuals who are denied salary or terminated from employment because of an influenza pandemic. This is due, in large part, to the difficulty of meeting the definition of individual with a disability.[59]

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[57] For a discussion of the cases on this issue, see Cynthia A. Crain, "The Struggle for Reasonable Accommodation for 'Regarded As' Disabled Individuals," 74 U.Cin.L.Rev. 167 (2005).

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

[59] A similar conclusion about the inapplicability of ADA was reached in a discussion of Severe Acute Respiratory Syndrome (SARS). See Institute for Bioethics, Health Policy and Law, *Quarantine and Isolation: Lessons Learned from SARS*, at 123 (November 2003).