



# The Intersection of Employee Health and the Workplace

Successfully Managing Obligations Under the ADA, FMLA, PWFA and State Laws



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## EEOC Reinvigorated

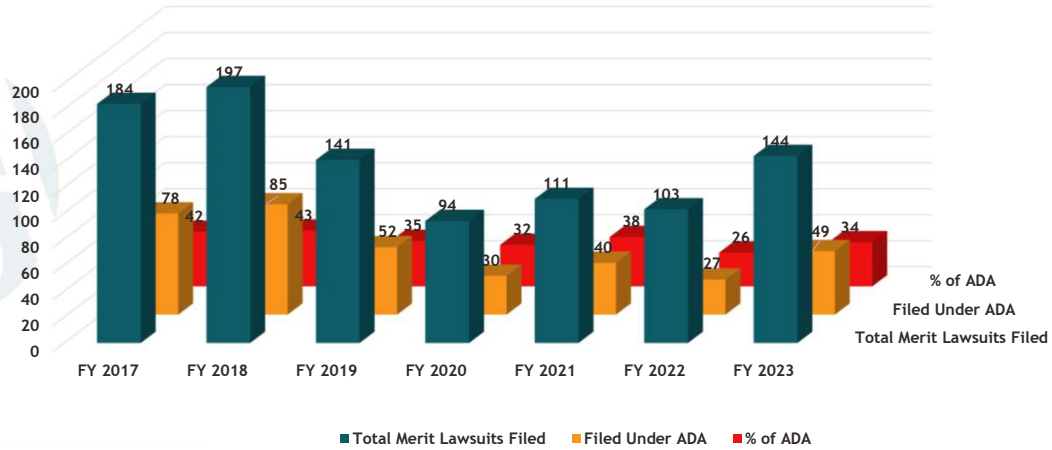


- Better staffed/leadership in place
- Strategic Plan - with focus on persons with disabilities
- Significant rise in number of lawsuits brought in FY 2023
- Expect more enforcement going forward

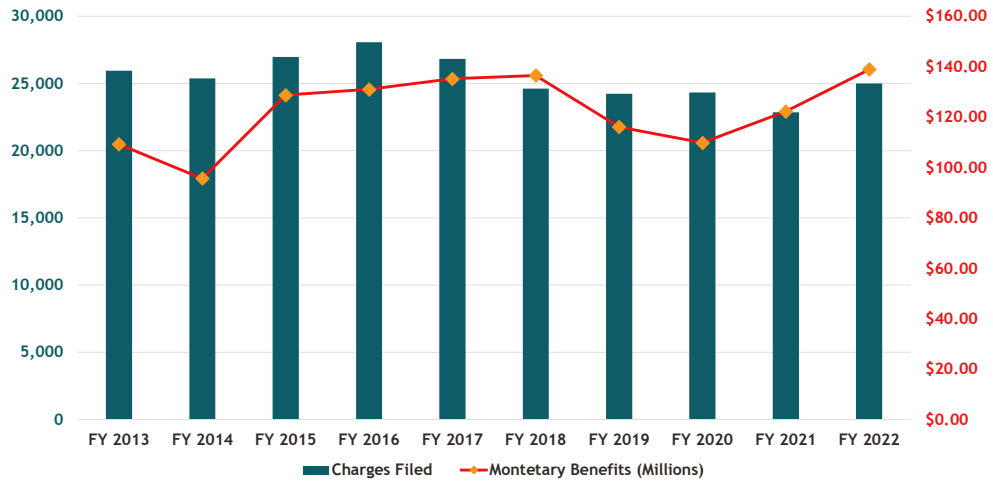
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## EEOC Lawsuits Filed Under the ADA



## ADA Charge Statistics



## EEOC Regulatory Actions Impacting Workplace Health

- Hearing Disabilities in the Workplace and the ADA, January 24, 2023 (technical assistance)
- Proposed regulations issued under the Pregnant Workers Fairness Act (“PWFA”)
- Proposed Enforcement Guidance on Harassment in the Workplace, September 29, 2023 (explicitly covering disability harassment)

## ADA and Remote Work

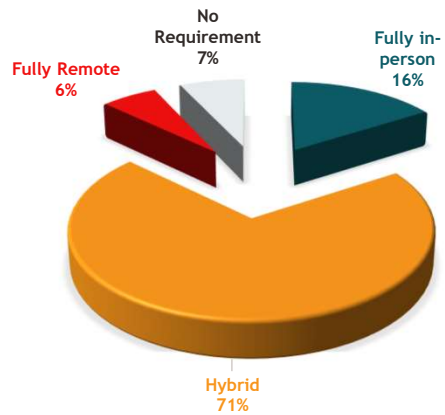
Has the Covid remote-work-experiment changed ADA analysis?

## Remote Work - How much of the U.S. workforce is working remotely:

### Bureau of Labor Statistics:

27% of U.S. workforce working remotely at least part of the time, August-September 2022

LITTLER ANNUAL EMPLOYMENT SURVEY REPORT



## Pew Research Center

Of those employees with teleworkable jobs:

	January 2023	January 2022
Work remotely all of the time	43%	35%
Hybrid (net)	35%	41%
Remote most of the time	17%	20%
Remote some of the time	18%	21%
Rarely remote	11%	12%
Never remote	11%	12%

## ADA and Remote Work

### Trend:

- More frequent requests for remote work
- Decisions are complicated by hybrid schedules that may undermine employer's claim that in-person presence is an essential function
- Courts are beginning to question in-person requirements
- Individually evaluate each request and make decision based on specific facts

## Long Covid

- CDC says:
  - 1 in every 13 American adult (7.5%) has “long Covid”
  - 1 in every 5 who have had Covid still have “long Covid”
- Symptoms may be significantly disabling
- EEOC recognizes that long Covid can be a disability

# ADA and Harassment

## Covid and masks

- EEOC and case law have recognized disability-based harassment and hostile environment claims
- Pandemic era created divisions in the workplace
- Case to watch - supervisor refused to let pharmacy technician wear a mask during early days of Covid

# Adults with Disabilities

- Employment rate:

	Disabled	Not disabled
2022	21.3%	65.4%
2021	19.1%	63.7%

- Unemployment rate:

	Disabled	Not disabled
2022	7.6%	3.5%
2021	10.1%	5.1%

## Invisible Disabilities

- Most persons with invisible disabilities tend not to disclose them to employer:
  - 47% - SHRM Study 2023
  - 88% - Harvard Business Review, 2023
- Why?
  - Stigma
  - Isolation by co-workers
  - Increased scrutiny at work
  - Don't believe they will be treated fairly



## ADA Challenges

### Mental health issues on the rise

- The percentage of adults who receive mental health treatment increased between 2019 and 2021 among adults aged 18-44, from 18.5% to 23.2%\*
- 30% of ADA EEOC charges in FY 2022 were based on mental health discrimination claims (up from 10% in 2010)
- Anxiety, depression and PTSD are the leading conditions, accounting for 11.6%, 8.2% and 5.1% of all ADA charges in FY 2022

## ADA Challenges

- When disability is disclosed after performance problems or difficult conduct has occurred
- Generally, there is no requirement to consider retroactive requests for accommodations
- But was employer on notice?

## ADA Challenges

What is employer's obligation to accommodate requests relating to commuting?

- Courts are divided about this issue
- Recent case from the 7<sup>th</sup> Circuit (Chicago)

*EEOC v. Charter Communications*



## ADA Challenges

- Lawful opioid use, including use in recovery program
- Considering additional leave as an accommodation when FMLA runs out or when FMLA does not apply

## ADA Challenges

### Hearing impairments

- Priority for EEOC - several cases filed in 2023
- Recent case - jury awarded \$36 million in damages

## Meaning of Disability is Broad

- Case law under the ADA
- State laws define more broadly under state disability laws

## ADA Best Practices

Obtain medical documentation when considering accommodations

- Permitted under the ADA
- Clarifies the condition and how it impacts work and avoids blurriness when things go wrong or get more complicated
- Employees sometimes overstate the need for accommodations, inadvertently or deliberately

## ADA Best Practices

Scope of medical documentation needed:

- Diagnosis?
- How condition impacts major life activities?
- How condition impacts ability to perform job duties?
- How long condition will last?
- Recommended accommodations?

## ADA Best Practices

Employers recognize when the interactive process has been triggered

- Triggered when employer is on notice that a physical condition may impact performance
- No magic words
- May be informal or arise in casual conversation with supervisor or co-worker
- HR might not have necessary information

## Pregnant Worker Fairness Act (PWFA)

- Requires accommodations for pregnancy
- Avoid ADA definition of disability

## FMLA Leave

Employers must provide appropriate notices

- 3+ FMLA notices are required:
  - Posting/handbook
  - Notice to specific employee when employer acquires knowledge of need for leave, with Notice of Rights (within 5 business days)
  - Designation Notice after employer receives enough information to determine if leave qualifies (e.g., receipt of medical certification) (within 5 business days)

## FMLA Leave

- Employee must provide advance notice of foreseeable leave
- Employee may be required to use the employer’s “usual and customary” method to notify of need for leave
- Employee must give notice as soon as possible for unforeseen leave

## State Paid Leave and Sick Pay Laws

- Paid family leave
  - Enacted by at least 12 states plus Washington, DC
  - Others considering legislation
- Paid Sick leave
  - Enacted in at least 18 states and Washington, DC

## State Paid Leave and Sick Pay Laws

- Variety of approaches
  - State pays
  - Employer pays
  - Opt in

## State Paid Leave and Sick Pay Laws

- Multi-state employers must become familiar with laws
- Written policies to advise employees of rights
- Notice requirements



# Questions?



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