

COVID-19 mandates and the ADA, Supreme court redistricting – Transcript

The Ideas Network on Wisconsin Public Radio Interview with Peter Blanck

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Rob Ferrett:

It's Central Time. I'm Rob Ferrett here with us here on the Ideas Network. First, millions of Americans are at higher risk for severe disease or death from COVID-19. That includes people with underlying health conditions like obesity, diabetes, and heart disease, older people, and people with intellectual disabilities who research has shown are six times more likely to die from COVID-19. Most states don't have mask mandates in place raising concerns that people who are at risk will be even more vulnerable. The Americans with Disabilities Act mandates that public spaces, jobs, and schools be accessible to people with chronic illnesses and disabilities. Some lawsuits have been filed arguing that this 1990 law should apply during the pandemic to decisions that could put people with disabilities at a higher risk. We're talking about the intersection of disability, the law, and the pandemic, and you can join in at 800-642-1234.

Rob Ferrett:

Do you or a loved one have a disability or chronic condition that puts you at higher risk for severe disease or death from COVID-19? Do you want to see places like your local school or workplaces require masks? What are your thoughts on the Supreme Court overturning the Biden administration's workplace vaccine mandate? Call it at 800-642-1234. That's 800-642-1234, or post on The Ideas Network Facebook page. Professor Peter Blanck is a university professor and chairman of the Burton Blatt Institute at the Syracuse University College of Law. He's an expert on disability law and co-author of the treatise Disability Civil Rights Law and Policy, which explores the legacy of the Americans with Disabilities Act and cases that came following the passage of the law in 1990. Peter, thanks a lot for joining us today.

Peter Blanck:

Oh, it's a pleasure to be with you. Delighted to say hi to all my friends in Wisconsin. Spent many years there.

Rob Ferrett:

Well, welcome back then. Well, before we get into the Americans with Disabilities Act as it relates to COVID, could you give us a quick reminder, a quick overview of the kind of protections and guarantees that come with the ADA?

Peter Blanck:

Well, at the highest level, if there was one examination at the end of a law school three years, that could cover every single aspect almost of the law from constitutional law to administrative law to health law, you name it, they would be well suited to ask a question about what we're talking about today. And the ADA, the Americans with Disabilities Act is one piece of this very complex social, cultural and economic question during this emergency, which relates to the ways in which people with disabilities can be equally included in society. And the ADA in a nutshell is a very comprehensive law. It's one of the most comprehensive in the world. It was passed in 1990. And it covers employment. It covers educational issues. It covers state and local government operations. It covers private entities like hotels and businesses and restaurants. So it's quite a comprehensive law. And at the end of the day, if you are deemed covered, and we can talk about that, as a person by the law, as a person with a disability for purposes of the ADA, then you have protections with regard to not only anti-discrimination in these areas, but the affirmative obligation to provide what's called reasonable accommodations or changes to the way things are done that don't create a hardship for the entity, but still allow people with disabilities to participate equally.

Rob Ferrett:

Let's dive in now to some of the ADA issues that have come up during COVID-19. Here's one of them. Last year, parents in nine states sued over mask mandate bans in their school district. So states in many cases said schools can't issue mask mandates. The parents here say banning these mandates discriminated against their kids with disabilities and chronic conditions who are at higher risk. It affects saying without masks present, our kids are at higher risk. They don't have an equal opportunity, an equal platform in these schools. Can you talk about how the ADA does and I guess doesn't apply here?

Peter Blanck:

Well, this is being fought out in courts across the country with different results. There's a case in Texas right now that's dealing with some of these very same issues. In a nutshell, again, to what extent is it discriminatory and exclusive if your child cannot attend public school because they have asthma, a chronic health condition, immuno sensitivity, pick your condition. And if masks are not used in the classroom, then they are super

susceptible to getting sick and therefore any reasonable parent would not send them to school. So the question is, can a state, and a school district would be a state entity, either enforce or not enforce such mandates? And to what extent would they exclude children who otherwise should and would be able to go to school with some form of accommodation?

Peter Blanck:

And the courts have been mixed on this question. As you said, in Florida and elsewhere, the state governments have opposed these mask mandates. Nine states, I believe, require most people, California, Hawaii, New Mexico, I don't believe Wisconsin is one of those, that have a mask mandate mostly indoors. But a lot of the... In the school districts, there's a lot of debate and issue about whether these should be enforced. For example, people might say under the constitution of the United States, that if their children are forced to wear a mask, this could conceivably influence their freedom of speech, their freedom of religion and other civil rights they might have under the Bill of Rights.

Rob Ferrett:

Talking to Syracuse University law professor Peter Blanck about the Americans with Disabilities Act and COVID-19 regulations, mask mandates, the absence of mask mandates, and vaccination requirements we'll get into. You could join in with your maybe experiences maybe as a person with a chronic condition or a disability. Do you feel limited in what you can do based on Wisconsin's current status of no-mask mandates, no-vaccine requirements? Or do you worry that it's an imposition, maybe even discrimination, against some people to require vaccinations or masks? Do you have a question about how this all works in the law? Call 800-642-1234. That's 800-642-1234, or post on The Ideas Network Facebook page. Now there's also have been talk about discrimination related to a vaccination or, I guess in this case, unvaccinated status. One bill currently in the Wisconsin legislature would ban schools from discriminating against students based on vaccine status. Now this would be a state law. I don't think this is invoking the Americans with Disabilities Act in any way. Is there a claim from someone under the ADA who says, "Yeah, my workplace can't make me be vaccinated. I would view it as discriminatory against me under the ADA."?

Peter Blanck:

Well, yes. It could be discriminatory hypothetically, if for some religious or medical reasons, the person could not take the vaccine or wear the mask. And as a matter of fact, those are the types of cases that are percolating through the courts. So the ADA has been interestingly applied by both opponents and proponents of these mandates and these vaccination requirements. The historical basis for this goes back to about 1905 when the Supreme Court decided a case called *Jacobson v. Massachusetts*. And in

that case, an individual, Mr. Jacobson, opposed being vaccinated for smallpox as was required of adults in Massachusetts over age 21. In fact, he had had a bad experience with a smallpox vaccination type opportunity or experience when he was in Sweden. And he didn't want to repeat that. The Supreme Court held basically that while you're always weighing competing interests, in this case, it was a legitimate purpose of the state to care for the public health and safety, and therefore to enforce the vaccination requirement. Now, the United States Supreme Court of course has come out differently depending upon the nature of the employee, if it's a federal employee or a state employee, the nature of the business, if it receives federal funds or if it's a private business, but there really is no definitive answer yet as a legal matter with regard to some of the issues you're talking about.

Rob Ferrett:

Let's bring on a caller now at 800-642-1234. Joshua is with us in Madison. Joshua, hi.

Joshua:

Hi, how you doing? I had a question for Peter.

Rob Ferrett:

Go for it.

Joshua:

So my question Peter is most accommodations, at least in my imagination, are not burdens on each and every employee in the workplace. So a reasonable accommodation might be a ramp or additional parking. So isn't the idea of masks as a reasonable accommodation different because it burdens each and every employee rather than say the employer as a whole?

Rob Ferrett:

Interesting question, Joshua. Yeah.

Peter Blanck:

That's a brilliant question that many of us have been thinking about, Joshua. And to put it in a complimentary way, when you think of an accommodation, it's typically for the particular individual, say, to wear a mask in an environment, because he or she might be susceptible to a medical injury. But now this is kind of flipped. So that in order for that individual to be protected, everybody must wear a mask as a reasonable accommodation. And I would say that there are precedents for that in this area. Now a reasonable accommodation, as you said, Joshua, cannot dramatically disrupt the nature

of the business financially or programmatically. And the individual cannot necessarily pose a health threat to others in the workplace. So there are limits on this concept of reasonable accommodation. But you raise a very good point, which is also unsettled, to what extent must others in that environment affirmatively change their behavior so that they can accommodate the person who is susceptible with a disability? And there are examples of that. For example, regular health requirements in the workplace and other sorts of changes in workplace safety and other sorts of issues, but it is a complicated question particularly when that individual's accommodation may affect literally tens, hundreds of other people in the way they engage in the workplace. Very good question, Joshua.

Rob Ferrett:

Thanks for calling in, Joshua. Peter Blanck is a university professor and chair of the Burton Blatt Institute at the Syracuse University College of Law. He's talking to us now about disability rights during the pandemic and the Americans with Disabilities Act. You could join in with your experiences, your questions at 800-642-1234. Do you have a disability or a health condition that makes you high risk when it comes to COVID? What does your experience of the pandemic look like? Do you think that not having things like mask mandates could violate your protections under the Americans with Disabilities Act? Or in general, do you have questions about how this all works? Call 800-642-1234. That's 800-642-1234. We'll continue the conversation coming up on Central Time.

Speaker 1:

The National Poison Control Center calls the COVID pandemic a prime time for poisonings with hand sanitizer, cleaning products, wipes, and meds all around us. Tomorrow in the morning show, we talk with the toxicologist with the Wisconsin Poison Center after 8:00.

John Udel:

I'm John [Udel 00:12:56]. I'm from across Wisconsin. I donated my car to Wisconsin Public Radio. We've had this vehicle for a dozen years. It's been many trips and back and forth and lots of family time. And it's time to move on. We didn't need it anymore. The people we talked to were very kind and thoughtful. They made it very easy. Within a couple days, someone was there and the car was picked up and taken off our premises.

Speaker 1:

Find out how you can donate at wpr.org/vehicle. Thank you.

Speaker 6:

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Rob Ferrett:

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Speaker 6:

Support also comes from Isthmus Eats, a Madison-based meal kit company who partners with local farms to hand-deliver cooking kits to homes. Information on menu options and no contract plans at isthmuseats.com.

Rob Ferrett:

You're listening to Central Time. I'm Rob Ferrett. Right now, we're picking up the conversation about disability rights and the pandemic. The US Supreme Court overturned President Biden's vaccine or test mandate for businesses saying the federal government is overstepping its bounds. We're looking at vaccination requirements, mask requirements. There are lawsuits, a plenty out there. We're talking to Syracuse University law professor and disability law expert Peter Blanck about how the law protects and does not protect people with disabilities or chronic conditions during the pandemic. You can join in with your thoughts, your experiences, or your questions for our guest at 800-642-1234. That's 800-642-1234. Let's go back to your calls now. Susan is with us in Coon Valley. Susan, hi.

Susan:

Hi there.

Rob Ferrett:

What did you want to ask about, Susan?

Susan:

Well, I'm curious. Those of us that have disabilities, we try to protect ourselves and we go into certain environments, whether it be Walmart or grocery stores or sports activities where people are not wearing masks. So what about empowering us to say, okay, we're going to start lawsuits against these places that are not enforcing or requiring people to wear masks? I mean, we're at a disadvantage here and I think maybe we need to start empowering ourselves and saying, okay, we're going to start lawsuits. What do you think?

Rob Ferrett:

Peter, what do you think?

Peter Blanck:

Well, it's a very good question and comment, Susan. I should say, as you well know, Susan, number one, the disability community is not at all monolithic on these issues. Disability for all of us who are touched in different ways is just a natural part of what we're experiencing in life. And so people might disagree even within the disability community. But Susan, now you're talking about another area of the law, which is quite interesting. I'm not aware of such lawsuits and that is basically negligence and that of reasonable care. If somebody with a disability and a susceptibility were to go into a hotel or someplace else or a restaurant, and in fact, they were not diligent reasonably to protect that individual who may or may not choose to wear a mask, then there is potential for the type of litigation you're talking about. It's less available under the Americans with Disabilities Act and more available under traditional what's called tort or injury litigation.

Rob Ferrett:

Susan, thanks for that call at 800-642-1234. Peter, something I saw in the news today, the US Supreme Court decided not to take up a challenge to a federal mask mandate on public transportation. Well, I got to wear a bus or a mask when I get on the bus to come to work in the morning? You have to wear it on airplanes. And there was a challenge from a citizen who said, "Yeah, me and my kid, we can't wear a mask for long periods of time." The US Supreme Court saying, we're not going to take that up. So that one stands. Do you see other potential avenues for somebody to challenge that federal transportation mask mandate under the ADA?

Peter Blanck:

Well, that's very interesting. I actually hadn't seen that yet, but this issue really goes to the nature of society as a whole and group interests versus individual rights. And it even of course transcends the law, the dialogue we're having here now. And I haven't seen that decision. Maybe there's a dissent by the judges who I would expect to, the justices who I would expect to dissent, but the federal government through its Department of Transportation certainly has the authority to promulgate such requirements. Obviously they were challenged and the Supreme Court chose not to take it up depending upon the composition of the court, and I don't mean to oversimplify it, but certainly it could have come out differently. And so it's a very interesting time in the law because of this terrific social, cultural, political overlay, which is, in large part, driving these outcomes. Now, why did the Supreme Court not take this up? I'd have to look at the decision. Am I

surprised? Not particularly, given the nature of the makeup of the court and the focus on individual rights, religious rights, speech rights, all of which could be potentially implicated by such a requirement.

Rob Ferrett:

We're talking to Syracuse University law professor Peter Blanck about the Americans with Disabilities Act, disability protections and requirements, mandates for masks and vaccines during this COVID-19 pandemic. Still time for you to join in if you have a question or thought at 800-642-1234. Peter, the Americans with Disabilities Act was not written and passed during a major global pandemic. Is it being stretched, tested a lot in this unusual circumstance we've seen for the last couple of years?

Peter Blanck:

Well, that's another very interesting question. And I would say it's almost completely true what you said. To some extent, aspects of the Americans with Disabilities Act in its passage and the early case law was influenced by the AIDS epidemic of the 1980s. And as a matter of fact, the first case involving disability decided by the United States Supreme Court, a case called *Bragdon versus Abbott*, was about a woman with asymptomatic HIV disease and whether a local dentist was required to treat her in his office using universal precautions in a safe way, even though it was against his ideas about how he'd like to practice. And the United States Supreme Court ruled that the individual's rights trumped in that case, and it was discriminatory for the dentist in this case to fill a cavity, not to fill the cavity of this woman named Sidney Abbot because she had HIV disease and because he could have done it in a way that was safe.

Peter Blanck:

But they considered that an element of discrimination. So in many ways, the ADA was influenced by, wasn't a pandemic certainly, but certainly a major health crisis and [inaudible 00:20:35] of the early cases went to such sorts of decisions. And other case in which I was involved with before the United States Supreme Court was what they called *Chevron v. Echazabal* was essentially whether or not an employer had to hire an individual who had a particular type of liver disease and might be harmed by working in that environment. In that case, the Supreme Court said they did not have to hire that person because his health condition could have worsened in the environment, and would've been a direct threat, so it's called, to his and other's safety in the workplace. So it's really a complex area, but the ADA certainly has not been immune to these sorts of questions prior.

Rob Ferrett:

And Peter, just in our last minute or so, you mentioned earlier a lot of these cases making their way through courts into legislatures and more. What are some of the questions you are interested in seeing courts answer over the next few months or so?

Peter Blanck:

Well, I think this education question is really important for so many of us, people who have children with disabilities or health conditions and universities of course and other sorts. But so how do we balance the obvious protection for health and safety with our individual rights, our fundamental rights to speak freely? Some people say wearing a mask shows a political form of speech, forces that politic form of speech that you are basically speaking as the government would like you to speak. Can you argue with that in good conscience when it's brought by reasonable people? And that's what makes these cases so complex. It transcends health. And it goes to essentially how we view the nature of our rights in a republic. And to what extent can those rights be compromised or changed as a result of this unprecedented health emergency? And we're just going to have to wait and see how the courts almost on a daily basis are grappling with these sorts of questions. And it's unlikely then that we'll see one sort of national ruling or order given the complexity and the variations among the states and districts, businesses and so forth.

Rob Ferrett:

Peter, we'll leave it there. Thanks so much for joining us today.

Peter Blanck:

Oh, it's a great pleasure. And I look forward to hearing more about your views on this issue.

Rob Ferrett:

That's Peter Blanck, university professor and chair of the Burton Blatt Institute at the Syracuse University College of Law. He joined us for a look at the Americans with Disabilities Act and how it applies to pandemic protections. Still time to share your thoughts on these issues over on The Ideas Network Facebook page.