

COVID-19 and Return to Work

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Topics

- Definition of Disability
- Returning to Work
 - ◊ Options and Issues
- Returned to Work
 - ◊ Medical Inquiries and Tests
 - ◊ Mask Requirements
 - ◊ Higher Risk for Severe Illness
- Association Discrimination
- Resources

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Definition of Disability

Does the ADA apply to people with pre-existing conditions who may be at higher risk due to COVID-19?

- **Yes. Remember the definition of disability:**
 - ◊ **Actual Disability:** Impairment that substantially limits a major life activity
 - ◊ **Record of:** History/record of an impairment that substantially limits a major life activity
 - ◊ **Regarded as:** Regarded as/perceived to have an impairment

Preview: We will discuss how the ADA has certain protections for people who associate with people with disabilities

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Definition of Disability

According to the CDC (updated as of July 2020):

- **Increased risk of severe illness from COVID-19:**
 - ◊ Cancer, chronic kidney disease, COPD, immunocompromised state from solid organ transplant, serious heart condition, sickle cell disease, type 2 diabetes
- **Might be at an increased risk for severe illness:**
 - ◊ Asthma (moderate to severe), cerebrovascular disease, cystic fibrosis, hypertension/high blood pressure, immunocompromised state from blood/bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or other immune weakening medicines, neurological conditions, such as dementia, liver disease, pulmonary fibrosis (scarred lung tissues), thalassemia (blood disorder), type 1 diabetes

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Definition of Disability

Silver v. City of Alexandria
2020 WL 3639696 (W.D. La. July 6, 2020)

- Case brought by 98-year-old man with "significant, inoperable, aortic valve disease, and systolic heart failure" with a pacemaker
- Lawsuit under Title II and Section 504 for accommodated access (by phone) to the city council meeting
- **City argued:** Plaintiff's disabilities are only COVID-related – situational so he is not entitled to accommodations
- **Court:** "We find easily that he has a qualifying disability."
 - ◊ Must consider impairments with COVID-19 pandemic
 - ◊ Laws consider the totality of health circumstances in conjunction with social circumstances

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Definition of Disability

Is COVID-19 itself a disability under the ADA?

It depends. We don't yet know everything about COVID-19.

- **Actual disability and "record of"**
 - ◊ Is COVID-19 an impairment?
 - ◊ Does it cause a substantial limitation to a major life activity?
 - In severe cases → breathing, lung functioning
 - But even in mild cases → interacting with others, communicating, working
 - What about long-term impacts?
- **"Regarded as"**
 - ◊ Is COVID-19 an impairment?
 - ◊ Does it fall within the exception for "transitory and minor"?
- **No courts (that we know of) have decided this question (yet)**

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Definition of Disability

Does the ADA apply to the following groups of people who are at greater risk for COVID-19:

- **People over 65:** Not protected by the ADA based on age
- **Pregnant women:** Pregnancy-related impairments (ex: gestational diabetes) = protected by the ADA
 - ◊ Pregnancy in and of itself = not protected by the ADA
 - ◊ *Tip:* Consider federal Pregnancy Discrimination Act or state/local laws (ex: Illinois Human Rights Act has an accommodation provision for pregnant workers)
- **People with obesity:** While not all – most courts have held that obesity (without an underlying condition) is not a covered disability under the ADA
 - ◊ *Tip:* Employees should identify another risk factor, if possible, to bring in the ADA's protection

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Returning to Work

Common Scenario

- Employee has a disability that puts them at high-risk if they get COVID-19
- Their workplace has been closed (or has been work-from-home) during COVID-19
- They have been asked to come back to work

What should the employee do?
What should the employer do?

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Returning to Work – Without Formal Accommodations

Option 1: Return to work *without* requesting any formal accommodations

- **Employees:** Consider what the work site will look like when you return. Discuss with healthcare professional.
 - ◊ Is your employer distributing the PPE you need for your disability to everyone?
 - ◊ Is workplace already set up to keep employees safe?
 - ◊ Examples: Large building? Space between employees? No direct communication with clients, customers, patients, public?
 - ◊ Are you comfortable disclosing your disability?
- **Employers:** Good example of “universal design” – making workplace accessible might be good for everyone
- **Tip:** Communication about protocols is key

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Returning to Work – With Accommodations

Option 2: Return to work *with* a reasonable accommodation

Examples of common reasonable accommodations specific to COVID-19 concerns

- Personal protective equipment
 - ◊ PPE itself may need to be accommodated (ex: clear face masks; non-latex gloves)
- Changes to the physical worksite
 - ◊ Add space between work stations
 - ◊ Create barriers with plexiglass
 - ◊ Create one-way aisles

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Returning to Work – With Accommodations

Examples of common reasonable accommodations (cont.)

- Modifying job duties or shifts
 - ◊ Removing non-essential tasks - only performing tasks that are possible to be performed off-site or that can be performed while social distancing
- Working from home or telework (to be discussed)

Requesting and responding to requests

- **Employee** requests reasonable accommodation
 - ◊ **Tip:** Put request in writing; use phrase "reasonable accommodation under the ADA"; keep copy of request
- **Employer** initiates the interactive process
 - ◊ Or given pandemic, employers may choose to forego the interactive process and grant the employee's request

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Returning to Work – With Accommodations

Applying the traditional interactive process to the "new normal"

- Employers can require reasonable documentation about the employee's disability and the need for the accommodation
 - ◊ If employee cannot get medical documentation due to pandemic, consider alternatives or granting request for an interim period
- Be flexible and open-minded (within reason)
 - ◊ Remember these are difficult times for everyone
- The interactive process is on-going
 - ◊ Employee *and* employer needs may change as government restrictions change
- Consider short-term or trial period accommodations
 - ◊ **Tip:** Use JAN's trial accommodations form - <https://askjan.org/topics/Temporary-Accommodations.cfm>

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Returning to Work – With Accommodations

Interactive process principles

- Employers only need to provide an "effective" accommodation not necessarily an employee's "preferred" accommodation
- Employers – remember you can do more than the ADA requires, and there may be benefits to you for keeping employees in the workplace
 - ◊ Ex: Removing essential functions

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Focus on Telework

Employee worked from home during COVID-19; do they have a right to keep working from home as a reasonable accommodation?

It depends.

- Questions to consider:
 - ◊ When the employee worked from home, did they perform all essential functions of the job?
 - ◊ How did telework impact workplace and ability to get work done?
- Silver lining of pandemic:
 - ◊ Remote work became possible for many employees
 - ◊ Eliminates employee commute time/costs
 - ◊ Potentially saves employer money
 - ◊ New technology for employees to telework
 - ◊ Greater employer acceptance of telework

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Focus on Telework

Bilinsky v. American Airlines, Inc. 928 F.3d 565 (7th Cir. 2019)

- **Facts:** Employee with MS worked remotely from Chicago instead of Texas; after company merger, telework no longer permitted
- **7th Cir.:** Found for employer – **but important language**
 - ◊ Technological development and the expansion of telecommuting means this accommodation is not as extraordinary as it was
 - ◊ Inquiry is context-specific – telework might be reasonable for a software engineer but not for a construction worker
 - ◊ Assess reasonableness under current technological capabilities

Prevalence of telework due to COVID is likely to change how employers and courts view telework as an accommodation

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Returning to Work – Reassignment

Option 3: Return to work in a *different job* (request reassignment as a reasonable accommodation)

- Reassignment is considered the accommodation of “last resort”
 - ◊ It is best to accommodate employee in current position
- Reassignment is a good option if:
 - ◊ Vacant position exists
 - ◊ Position would make it possible for employee to work (perhaps better suited for social distancing or telework)
 - ◊ Employee is qualified for position
 - ◊ Position is not subject to bona fide seniority system

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Returning to Work – Reassignment

- According to most courts and the EEOC – if there is a vacant position, must place the employee in it without competition
- **Employees:**
 - ◊ If possible, identify specific position and request to be placed in the position as a reasonable accommodation
- **Employers:**
 - ◊ Interactive process is key – help employees identify positions
 - ◊ Again – you can go above-and-beyond (better to do a temporary reassignment during COVID-19 than lose an employee)

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Returning to Work – Leave

Option 4: If employee cannot return to work – and no reasonable accommodations enable them to return to work – consider leave

The following policies and laws may give employees leave rights:

A. Employer policies

- Some employers have internal policies offering a medical or personal leave
- Employers: It is important to apply policies consistently
- Avoid “inflexible leave” policies

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Returning to Work – Leave

B. Expanded Family Medical Leave Act (FMLA) from the Families First Coronavirus Response Act (FFCRA)

- Applies to employers with 50 to 500 employees and some public employees
- Employers with fewer than 50 employees may be exempt
- Employees may be entitled to **up to 12 weeks of job-protected leave** to care for a child (or adult child with a disability) whose school is closed or whose childcare provider is unavailable for reasons related to COVID-19

(Resources about FFCRA at the end of the PPT)

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Returning to Work – Leave

C. Emergency Paid Sick Leave from the Families First Coronavirus Response Act (FFCRA)

- Private employers with up to 500 employees and some public employers may need to provide up to 2 weeks of paid sick leave to employees unable to work/telework and who need leave because they are:
 - (1) subject to a government quarantine or isolation;
 - (2) advised by a health care provider to self-quarantine;
 - (3) experiencing COVID-19 symptoms & seeking medical diagnosis;
 - (4) are caring for an individual subject to quarantine/isolation;
 - (5) are caring for a child whose school or place of care is closed; or
 - (6) are experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services

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Returning to Work – Leave

D. Family Medical Leave Act (FMLA)

- Private employers with at least 50 employees and public employers
- Provides employees up to **12 weeks of job-protected leave** if they or a family member are incapacitated by a serious health condition
- According to U.S. Department of Labor, serious health condition can include COVID-19
- **Caution:** FMLA does *not* require employers to provide FMLA for the purpose of *avoiding exposure* to COVID-19

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Returning to Work – Leave

E. Americans with Disabilities Act (ADA)

- Employees with disabilities may be entitled to unpaid leave as a reasonable accommodation
- ADA potentially provides leave in addition to previous leaves discussed
- However, different courts find different amounts of leave reasonable
 - ◊ 7th Circuit (IL, WI, IN): Court decisions suggest that leave for more than a month of leave under the ADA is not a reasonable accommodation.
- **Limit:** Only applies to employees, not family members
 - ◊ ADA applies to employers with 15 or more employees

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Returning to Work – Unemployment

Option #5: Consider Unemployment Insurance

- Employees *may* be eligible for unemployment insurance if they cannot return to work due to a medical condition
 - ◊ Check your state's requirements
- Employees should seek legal advice about rights to unemployment before deciding not to return to work
 - ◊ Many legal aid organizations are offering helplines about unemployment insurance

Option #6: Check your state and local laws

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Returned to Work – Medical Tests and Inquiries

General Rule:

- Employers can only ask employees for **disability information** or perform **medical tests** if it is **job-related** and **consistent with business necessity**

During COVID-19 Employers:

- **Can ask** if employees are experiencing symptoms of COVID-19
 - ◊ Ex: Fever, chills, cough, shortness of breath or sore throat
 - ◊ Examples are not exhaustive; can include any symptoms identified by public health authorities as associated with COVID-19
- **Cannot ask** employees unrelated medical questions
- **Cannot only** ask these questions of people with disabilities

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Returned to Work – Medical Tests and Inquiries

During COVID-19 Employers:

- **Can** take employees' **temperature**
- **Can** administer **COVID-19 test**
 - ◊ **Note:** This is generally considered a medical exam but is permitted at this time due to the CDC's stated precautions to determine if someone would pose a direct threat
- **Cannot only** perform these tests on people with disabilities
- **Cannot** rely on inaccurate or unreliable tests (check FDA/CDC)
- **Cannot** require **antibody** testing
 - ◊ **CDC:** Antibody tests should not be used to make return-to-work decisions
 - ◊ **EEOC:** In that case, antibody testing is not "job-related and consistent with business necessity"

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Returned to Work – Medical Tests and Inquiries

During COVID-19 Employers:

- **Can** require employees with symptoms to stay home
- **Can** require employees returning to provide a doctor's note confirming they are not contagious before returning
 - ◊ **EEOC warns:** If doctors or other health care professionals are too busy to provide this type of certification, will need to consider alternatives

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Returned to Work – Medical Tests and Inquiries

General Rule:

- Employers must keep all medical information confidential

During COVID-19 Employers:

- **Must** Maintain all information about an employee's illness as a confidential medical record in compliance with the ADA
 - ◊ Includes information about daily temperature checks or responses to employer questions about symptoms
- **Can** disclose the name of employee with COVID-19 to a public health agency

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Returned to Work – Mask Requirements

Issue: Employer requires all employees to wear masks. Employee cannot wear a mask due to a medical condition. What happens?

- Employers are most likely allowed to require employees who interact with customers or other employees to wear a mask to help prevent the spread of the disease
 - The ADA most likely does not require employers to make exceptions to a reasonable mask-policy if necessary to protect the health and safety of its workforce

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Returned to Work – Mask Requirements

However, employees ask for a **reasonable accommodation** and employers must engage in the **interactive process** to see if there are any possible solutions.

Examples of accommodations if employee cannot wear a mask:

- Transferring to a more isolated work site that makes social distancing possible
- Working the night shift, if it has fewer employees, to make social distancing possible
- Telework

Employees may also consider whether there are *any* masks that they could wear. Not all masks are equal and certain people find certain masks more breathable and less constricting and more comfortable.

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Returned to Work – “Higher Risk for Severe Illness”

Can an employer exclude an employee from the workplace if they have a disability that places them at “higher risk for severe illness”?

Employers cannot exclude or take any other adverse action against an employee *solely* because the employee has a disability identified by the CDC as placing them a higher risk

Employers can only exclude someone if they pose a direct threat and the threat cannot be reduced with a reasonable accommodation

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Returned to Work – “Higher Risk for Severe Illness”

Direct threat = Significant risk of substantial harm to the health or safety of the employee or others

- Very high burden for employers
- Must be an individualized assessment based on a reasonable medical judgment about the employee’s specific disability
- Using the most current medical knowledge and/or best available objective evidence
- **Factors:** duration of the risk; nature/severity of potential harm; likelihood that harm will occur; imminence of harm

Consider: Severity of pandemic in particular area; Employee’s own health; Likelihood of exposure in particular worksite; Possibility of accommodations

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Returned to Work – “Higher Risk for Severe Illness”

Taylor v. Rice

451 F.3d 898 (D.C. Cir. 2006)

- **Facts:** State Department rejected applicant with HIV for a Foreign Service position because medical treatment might not be available in certain countries where he could be stationed.
- **Circuit Court:** Found for applicant (reversed summary judgment)
 - ◊ Must consider reasonable accommodations
 - ◊ Here – two possible accommodations
 - Only placing him at certain overseas posts
 - Permitting use of allotted leave to access medical care

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ADA and Association Discrimination

General Rule:

- **General non-discrimination principles apply.** People who associate with people with disabilities (like a family member) can’t be treated differently simply because of their association
- **Reasonable accommodations not required.** Only people with disabilities are entitled to reasonable accommodations

Applies to COVID-19:

- **Common scenario:** Employee does not have a disability but has an association with someone with a disability – like a spouse or child. Employee has been asked to return to work

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ADA and Association Discrimination

- **No reasonable accommodation**
 - Employee is not entitled to an accommodation (telework, leave, etc.) due to association with someone with a disability
- **But general non-discrimination principles still apply**
 - If employer is offering employees opportunities to telework or take leave for any reason, cannot treat employee differently because their need is related to someone with a disability
- **Tip: When considering leave due to needs of family members, consider FMLA or FFCRA**

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ADA and Association Discrimination

EEOC v. STME d/b/a/ Massage Envy-South Tampa
938 F.3d 1305 (11th Cir. 2019)

- Employee granted permission to take leave to visit sister in Ghana
- Then fired employee due to fear that she would become infected with Ebola and infect employees and clients upon her return
- Case brought under "regarded as" and "association" theories
- **District court:** Found for employer
 - Behavior is "deplorable" but not actionable
- **11th Cir:** Found for employer
 - Not regarded as having a *current* impairment
 - No association to someone with *current* impairment

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Equal Employment Opportunity Commission (EEOC) Resources

- **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws:**
www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act** (updated in response to COVID-19 pandemic)
www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
- **COVID-19 – Ask the EEOC Webinar:**
www.youtube.com/watch?v=X50G7I41NKg

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U.S. Department of Labor COVID-19 Resources

Families First Coronavirus Response Act:

- **Questions & Answers:**
www.dol.gov/agencies/whd/pandemic/ffcra-questions
- **Employee Paid Leave Rights:**
www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave
- **Employer Paid Leave Requirements:**
www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave

COVID-19 and FMLA Questions and Answers:

- www.dol.gov/agencies/whd/fmla/pandemic

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Equip for Equality COVID-19 Employment Resources

- **COVID-19 in the Workplace:**
www.equipforequality.org/covid-work
- **Reasonable Accommodations During COVID-19:**
www.equipforequality.org/wp-content/uploads/2020/05/COVID-19-Reasonable-Accommodations-at-Work-to-Stay-Safe.pdf
- **Returning to Work During COVID-19:**
www.equipforequality.org/covid-rights
- **Understanding When and How to Ask for Leave Under the Families First Coronavirus Response Act:**
www.equipforequality.org/wp-content/uploads/2020/05/COVID-19-Understanding-How-to-Ask-for-Leave.pdf

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Other COVID-19 Employment Resources

- **Job Accommodation Network page with resources on COVID-19, Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19:** <https://askjan.org/topics/COVID-19.cfm>
- **The ADA at Work: Considerations for COVID-19:**
askearn.org/training-center/webinars/the-ada-at-work-considerations-for-covid-19
- **CDC - Interim Guidance for Businesses and Employers Responding to Coronavirus Disease:**
www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

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General ADA Resources

- ADA National Network – www.adata.org
- Job Accommodation Network – www.askjan.org
- Equal Employment Opportunity Commission – www.eeoc.gov
- U.S. Department of Justice – www.ada.gov

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Illinois ADA *Project*

Questions?



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