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

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
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

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

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)
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

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?

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
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 (e.g., clear face masks; non-latex gloves)
- Changes to the physical worksite
  - Add space between work stations
  - Create barriers with plexiglass
  - Create one-way aisles

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

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
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

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

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
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

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)

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
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)

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

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

(Resources about FMLA at the end of the PPT)
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

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

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
**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"

**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

**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
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.

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.

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.
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

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

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
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**

- COVID-19 – Ask the EEOC Webinar: [www.youtube.com/watch?v=X5G7h41Nkg](www.youtube.com/watch?v=X5G7h41Nkg)
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

Equip for Equality COVID-19 Employment Resources

• COVID-19 in the Workplace: www.equipforequality.org/covid-work
• Returning to Work During COVID-19: www.equipforequality.org/covid-rights

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
General ADA Resources

- ADA National Network – www.adata.org
- Job Accommodation Network – www.askjan.org
- U.S. Department of Justice – www.ada.gov