

Managing Reasonable Accommodation

The ADA in Response to COVID-19

Employers all over the country are responding to the coronavirus situation in unprecedented ways in an effort to be part of the solution to reduce the spread of the virus. This public health situation is growing rapidly and we are all becoming increasingly aware of its impact on the workplace.

Employers need to make reasonable accommodation decisions (for employees with eligible disabilities) based on facts, what is actually happening, and not speculation. Under the Americans with Disabilities Act (ADA), employers can make decisions based on safety concerns, but they have to be real. So, employers should determine what's really going on.

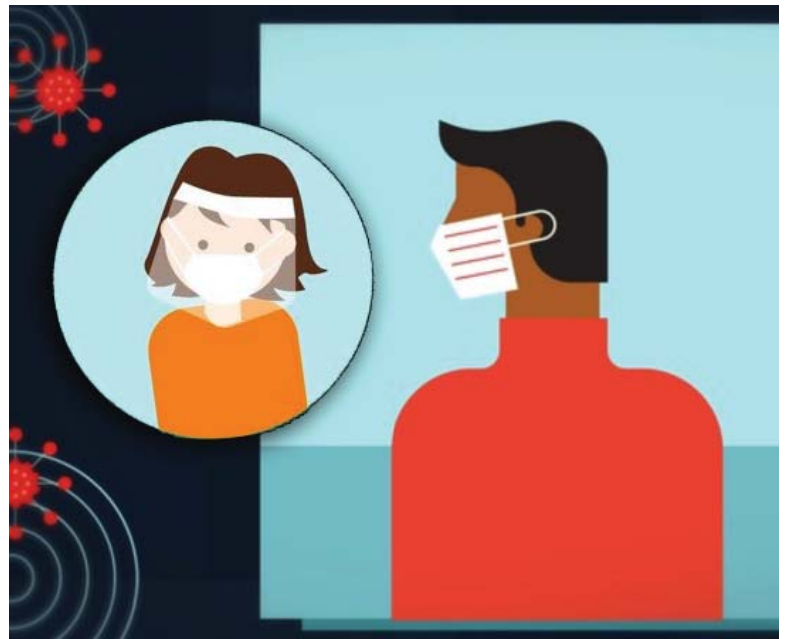
Must employers provide reasonable accommodations under the ADA in response to the pandemic coronavirus situation?

Yes. Many employers are inquiring about their responsibilities under the ADA to accommodate employees who have concerns about exposure to the coronavirus. Generally, these questions have centered around individuals who may be at higher risk for developing complications associated with the coronavirus. According to the Centers for Disease Control and Prevention (CDC), this includes older adults and individuals who have serious chronic medical conditions, like heart disease, diabetes, lung disease, and compromised immunity. This means that when an employer receives a request for accommodation to reduce the risk of exposure to the coronavirus, an employer must consider this request under the ADA and engage in the interactive process to provide reasonable accommodations, barring undue hardship.

Who can receive reasonable accommodations under the ADA?

To be eligible to receive workplace reasonable accommodations under the federal ADA, an individual must have an "actual" or a "record of" a disability, as defined by the ADA Amendments Act. Also, there must be some connection between the impairment and specific need for accommodation.

For example, the individual might have an underlying impairment and limitation that, if infected with coronavirus, would lead to serious complications. There is no comprehensive list of such impairments, but



individuals with heart disease, diabetes, lung disease or asthma, a weakened immune system, kidney disease, cirrhosis, etc. are considered at higher risk for developing serious complications, according to the CDC. Coronavirus alone may not be considered a disability under the ADA, due to the illness being transitory and having limited impact on major life activities in ordinary circumstances.

People 65 years and older and women who are pregnant are also at higher risk for developing complications from coronavirus but will not qualify to receive accommodations under the ADA solely on the basis of age or ordinary pregnancy. Employers receiving accommodation requests from employees in these higher risk groups will need to consider their responsibilities under state and local requirements, the federal Pregnancy Discrimination Act (PDA), and Occupational Safety and Health Administration (OSHA) requirements.

RECENTLY UPDATED REASONABLE ACCOMMODATION GUIDANCE FROM THE EEOC

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

There may be reasonable accommodations that could

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offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may ask questions to determine whether the condition is a

disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability?

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

Note that disability-related documentation is not required in order to approve an accommodation under the ADA, but employers may ask for information to establish the right to receive an accommodation. The following practical suggestions may be useful:

- ▲ Ask the individual for specific information about their impairment, limitations, and need for accommodations related to the coronavirus situation (e.g., what is the underlying disability-related need for accommodations)
- ▲ Consider whether the employer already has sufficient information on file about the impairment and limitations for which an accommodation is needed
- ▲ Accept information from a personal medical record from a past visit to a health-care provider
- ▲ Accept a telemedicine consult with an appropriate provider, a form or stamped note from a clinic, or an e-mail from a health-care provider that establishes the need for an accommodation

During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee



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may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of his position (that is, the fundamental job duties).

If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the “interactive



process” and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process - and devise end dates for the

accommodation - to suit changing circumstances based on public health directives.

May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?

Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Employers may begin the “interactive process” - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an “undue hardship,” which means “significant difficulty or expense.” In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant difficulty” during the COVID-19 pandemic?

An employer may consider whether current circumstances create “significant difficulty” in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant expense” during the COVID-19 pandemic?

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer’s overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer’s operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.