

# COVID-19 AND THE ADA

## Labor & Employment Law Section October Webinar Oct. 15, 2020

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This outline provides legal and practical information about the employers' obligations to provide reasonable accommodation and avoid employment discrimination. To date, I have found one reported decisions under the ADA dealing with these issues, although many such cases have now been filed.

### 1. Employer coverage

- a. **ADA**—applies to, among others,
  - i. Private employers with 15 or more employees. 42 U.S.C. § 12111(5)(A).
  - ii. Non-federal governmental employees. 42 U.S.C. § 12111(5)(B)(i).<sup>1</sup>
  - iii. Unions and employment agencies. 42 U.S.C. § 12111(2).
- b. **Sec. 501**—applies to most federal-sector employers, and adopts ADA liability standards. 29 U.S.C. § 791; 29 C.F.R. § 1614.203(b).
- c. **Sec. 503**—applies to entities with federal contracts or subcontracts for goods or services worth more than \$10,000. 29 U.S.C. § 793. There are DOL administrative remedies,<sup>2</sup> but not a private right of action. *Conner v. Nucor Corp.*, No. 2:14-CV-4145, 2015 WL 5785510, at \*5 (D.S.C. Sept. 30, 2015) (collecting cases).
- d. **Sec. 504**—applies to public or private entities that are recipients of federal financial assistance, and it adopts ADA liability standards. 29 U.S.C. § 794.
- e. **State law**—generally tracks the ADA's coverage. *See* Tex. Lab. Code § 21.002.

### 2. Mandatory questioning and screening

- a. **Employer can:**
  - i. Require employees to adopt infection-control practices (e.g., regular hand washing). *Pandemic Preparedness in the Workplace and the Americans*

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<sup>1</sup> Note that the ADA's employment standards apply to certain entities of the Legislative Branch by virtue of the Congressional Accountability Act., 24 U.S.C. § 1311; to the Executive Office of the President (with some exceptions), per 3 U.S.C. § 411; and to some aspects of the White House per 3 U.S.C. § 421.

<sup>2</sup> For information in filing a complaint, see <https://www.dol.gov/agencies/ofccp/contact/file-complaint>.

*with Disabilities Act*, Question 11 (EEOC Mar. 21, 2020) (hereafter “EEOC’s Pandemic Preparedness”).<sup>3</sup>

- ii. Require employees to wear personal protective equipment (e.g., masks, gloves, or gowns), but it should provide related reasonable accommodation (e.g., non-latex gloves, gowns designed for individuals who use wheelchairs). *Id.*, Question 12; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Question G.2 (EEOC June 17, 2020) (hereafter “What You Should Know”).<sup>4</sup>
- iii. Take the temperature of employees, or ask if they have symptoms associated with COVID-19, e.g., fever, chills, cough, shortness of breath, or sore throat (even though that is not normally permitted). *EEOC’s Pandemic Preparedness*, Question 7. But if a manager asks only one employee—as opposed to asking all employees—the employer must have a reasonable belief based on objective evidence that this particular person might have the disease. *Transcript of March 27, 2020 Outreach Webinar* (EEOC), Question 3 (hereafter “EEOC Webinar”).<sup>5</sup> And alternate screening methods could be required as an accommodation. *What You Should Know, supra*, Question G.7.
- iv. Require medical input certifying fitness for duty when an employee returns to work. *EEOC’s Pandemic Preparedness, supra*, Question 20.
- v. Take the temperature or otherwise screen job applicants for symptoms, so long as it is done after a conditional job offer, and for all entering employees in the same type of job. *EEOC’s Pandemic Preparedness, supra*, Questions 16–17.
- vi. Interview an employee who has COVID-19 to get a list of people who may have had contact in the workplace, and notify those individuals. But the *name* of the infected employee should generally not be disclosed to other staff. *EEOC Webinar, supra*, Questions 5 and 8.

**b. Employer may not be able to:**

- i. Ask asymptomatic employees if they have medical conditions that would make them especially vulnerable. *EEOC’s Pandemic Preparedness, supra*, Question 9.
- ii. Ask an employee if they have family member with COVID-19 or symptoms associated with it. This question may violate the Genetic Information Nondiscrimination Act (GINA), and a better question is whether an individual has had contact with *anyone* diagnosed with COVID-19 or who has symptoms associated with it. *EEOC Webinar, supra*, Question 4.
- iii. Disclose to staff the name of an employee who has COVID-19. On the other hand, the identity may be shared with those few employees who have a need to know, such as those designated to do contact tracing, or those who report

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<sup>3</sup> Online at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

<sup>4</sup> Available online at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>5</sup> Online at <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>.

to, and take action recommended by, public-health authorities. *EEOC Webinar, supra*, Questions 5, 8, and 10.

- c. **Confidentiality**—Employers must maintain all information about employee illness as a confidential medical record. *EEOC’s Pandemic Preparedness*, § II.A.2, and Questions 3, 6, 7, and 9.

### 3. Accommodation obligations

#### a. General observations

- i. During a pandemic, an employer must continue reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring direct threat or undue hardship. *Id.*, Question 14.
- ii. If the employer moves its operations online, the employer should consider whether previous accommodations should be continued. *EEOC Webinar, supra*, Question 20.
- iii. An employee with a disability may need additional, or different accommodations during the pandemic. *What You Should Know, supra*, Question D.4.

#### b. Need for accommodations

- i. Because of a disability that creates a heightened risk
  - 1. If an employee discloses an underlying disability that puts her at increased risk of complications from COVID-19, and requests accommodation, she may be entitled to one if needed. *EEOC Webinar, supra*, Question 17. See also *What You Should Know, supra*, Question G.3 (need for request); *EEOC’s Pandemic Preparedness, supra*, § II.C (“Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities.”); *id.*, § II (“Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.”).
  - 2. On the other hand, employers should not assume that all disabilities increase the risk of complications; many do not. *EEOC’s Pandemic Preparedness, supra*, Question 9.
- ii. Because of exacerbation of mental-health conditions
  - 1. COVID-19 is taking a psychological toll: distress among Americans has tripled during the pandemic compared to 2018. *Texas Democratic Party v. Abbott*, No. CV SA-20-CA-438-FB, 2020 WL 2541971, at \*5 (W.D. Tex. May 19, 2020), *preliminary injunction vacated and remanded on other grounds*, No. 20-50407, \_\_\_ F.3d \_\_\_, 2020 WL 5422917 (5th Cir. Sept. 10, 2020).<sup>6</sup>

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<sup>6</sup> The article is described in Markham Heid, *COVID-19’s Psychological Toll: Mental Distress Among Americans Has Tripled During the Pandemic Compared to 2018* (Time May 7, 2020), <https://time.com/5833619/mental-health-coronavirus/>, which also has a link to the draft paper.

2. Some employees may be entitled to a reasonable accommodation because the pandemic has exacerbated a psychiatric impairment. *What You Should Know, supra*, Question D.2.
- iii. Because of having COVID-19?
  1. If COVID-19 is an “actual” disability (or a “record of” disability), the employee is entitled to a reasonable accommodation if needed. 42 U.S.C. § 12112(b)(5)(A).<sup>7</sup>
  2. The employee may also have leave rights under the FMLA, or under the pandemic-assistance statutes.

**c. Types of accommodations**

- i. Telework
  1. Given the prevalence of this arrangement during the pandemic, it would seem reasonable in many cases, depending on the job and other factors. *See EEOC’s Pandemic Preparedness, supra*, Question 10 and n.35.
  2. Workers with communication disabilities may need additional features to make teleworking successful, like a larger screen or screen-reader software for an employee with low vision, or video relay, video-remote interpreting, or captioning for employees who are deaf or hard of hearing. *Id.*, Question 14 Exs. C and D.
  3. When the employer decides to reopen for in-person business, it does not automatically have to continue providing a telework option, although it may be required to in certain circumstances. A successful telework experience during the pandemic may show that continuing such an accommodation is both reasonable, and not an undue hardship. *See EEOC Webinar, supra*, Questions 21–22.
- ii. Leave
  1. Almost all courts recognize medical leave as a reasonable accommodation so long as the leave is not indefinite
  2. Because of the short duration of COVID-19, a period of leave for one with the diagnosis is normally reasonable.
  3. Leave can be unpaid unless a contract, company policy, or pandemic-relief statute makes paid leave available. But unpaid leave may be unreasonable if there is another reasonable accommodation that would allow the individual to continue working.
  4. Longer leave—for example, to avoid exposure due to an underlying disability that heightens the risk—may be reasonable depending on the details
- iii. PPEs (formal and informal)—mask, respirator, etc.
- iv. Other things—separation, isolation, avoiding contact with the public, barriers, ventilation, filtration, hygiene requirements and products, cleaning, disinfecting, etc. *See, e.g., EEOC’s Pandemic Preparedness, supra*, n.35; *What You Should Know, supra*, Questions D.1 and G.5;

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<sup>7</sup> Note that a “regarded as” disability is not enough to support an accommodation claim. 42 U.S.C. § 12201(h).

*Coronavirus Disease 2019 (COVID-19) Response* (CDC May 2020);<sup>8</sup> *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)* (CDC May 2020);<sup>9</sup> *Guidance on Returning to Work* (OSHA June 2020);<sup>10</sup> *Guidance on Preparing Workplaces for COVID-19* (OSHA Mar. 2020).<sup>11</sup>

- d. **Confidentiality**—The employer must keep confidential the information about the disability disclosed during the accommodation process, limiting the information to those with a need to know. The worker may want to remind the employer of its privacy obligations. *EEOC’s Pandemic Preparedness*, *supra*, § II.A.2; *id.* at Questions 6, 7, 9, and n.19; *What You Should Know*, *supra*, Question B.1

#### 4. Associational discrimination

- a. **Disparate treatment**—Employers can be liable for disparate treatment of an employee because he or she is associated with a person with a disability. That may require, for example, that the employer provide leave if it provides leave for reasons unrelated to disability. *What You Should Know*, *supra*, Question D.13; *EEOC Webinar*, *supra*, Question 18. *See also Association Provision of the ADA*, *supra*, Examples J and K.
- b. **No accommodation obligation**—The ADA does *not* require an employer to provide reasonable accommodations (e.g., leave) to allow an employee to care for a family member. *What You Should Know*, *supra*, Question D.13; *EEOC Webinar*, *supra*, Question 18. *See also Questions & Answers: Association Provision of the ADA*, Question 4 (EEOC Oct. 17, 2005).<sup>12</sup>
- c. **State law**—It is not yet clear whether state law protects against associational discrimination.

5. **Employer’s fear that an employee may get COVID-19**—If the employer takes adverse action because it fears that a worker without a disability may get COVID-19 in the future, such conduct may not violate the ADA. *See, e.g., Equal Employment Opportunity Comm’n v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019) (employer’s fear of future exposure to Ebola did not support ADA claim).

#### 6. Forced leave

- a. Employers may send employees home if they voluntarily disclose that they have COVID-19. *EEOC’s Pandemic Preparedness*, *supra*, Question 5.

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<sup>8</sup> Online at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>.

<sup>9</sup> Online at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

<sup>10</sup> Online at <https://www.osha.gov/Publications/OSHA4045.pdf>.

<sup>11</sup> Online at <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>12</sup> Online at <https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada>.

- b. Employers may send employees home if they display symptoms. *Id.*
- c. An employer can only force leave on an individual with a condition that puts them at higher risk if:
  - i. The employee voluntarily disclosed the condition (i.e., even though the employer did not ask), *cf. EEOC's Pandemic Preparedness, supra, Question 9*; and
  - ii. Continuing at work would pose a direct threat. For more on direct threat, see Part 4(f) below.<sup>13</sup>

**7. What about a vaccine?**— If a safe and effective vaccine becomes available:

- a. An employer can encourage employees to take it. *EEOC's Pandemic Preparedness, supra, Question 13.*
- b. Likely can require employees to take it, unless the individual:
  - i. Has a medical condition that is a disability and that prevents doing so safely. *EEOC's Pandemic Preparedness, supra, Question 13.*
  - ii. Has religious beliefs that prevent taking the vaccine. *Id.*

**8. Undue hardship**—This is the statutory defense to accommodation, and although it is unlikely to apply in many cases, it may in certain situations. 42 U.S.C. § 12112(b)(5), § 12111(10). *See also EEOC's Pandemic Preparedness, supra, § II.C; What You Should Know, supra, Questions D.9–11.*

**9. Direct threat**—This may be a defense in certain cases

- a. COVID-19 is serious and widespread enough to rise to the level of a direct threat to others in the workplace. *EEOC's Pandemic Preparedness, § II.B* (“Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”).
- b. It may be much more difficult for an employer to show that an individual poses a direct threat to her/himself based on the risks from an underlying condition.
- c. Even if the disability *does* pose a direct threat, the employer still cannot exclude the employee, or take any other adverse action, unless there is no way to reduce the risk by a reasonable accommodation (absent undue hardship). *What You Should Know, supra, Questions G.3–G.5.*

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<sup>13</sup> Also, an employer cannot exclude an employee who is 65 or older, or who is pregnant, just because the CDC has identified these factors as putting individuals at higher risk of severe illness if they contract COVID-19. *EEOC Webinar, supra, Questions 11 and 13.*

**10. Retaliation**—Requesting an accommodation is protected activity for retaliation or interference claims brought under 42 U.S.C. § 12203. *Solomon v. Vilsack*, 763 F.3d 1, 15 and n.6 (D.C. Cir. 2014) (collecting cases). State law is less clear.

**11. Case study**—The first substantive opinion I have seen on Westlaw regarding pandemic-related ADA employment claims is *Peeples v. Clinical Support Options, Inc.*, No. 3:20-CV-30144-KAR, 2020 WL 5542719 (D. Mass. Sept. 16, 2020), online at <https://www.leagle.com/decision/infdc020200917b70>. In this case a federal magistrate in Massachusetts granted preliminary injunctive relief to the employee.

a. The plaintiff, who has moderate asthma, was an assistant manager at a center that provided mental-health and other support services to crime victims. The employer denied a telework accommodation, the person returned to work, but the safety accommodations that had been offered were spotty at best, and the plaintiff was unable to adequately “social distance” at work. When the plaintiff indicated that he intended to resume teleworking, the employer said that it would “enforce its applicable policies” if the plaintiff tried to telework. The plaintiff interpreted this to mean that the employer would terminate him.

b. The court began the opinion by stating (cites and parentheticals omitted):

This matter is before the court on plaintiff Gabriel Peeples’ motion for a preliminary injunction under Fed. R. Civ. P. 65(a) and (b) to preclude the termination of their employment by defendant Clinical Support Options, Inc. Plaintiff, who suffers from moderate asthma, alleges that notwithstanding their increased vulnerability to the novel coronavirus, Defendant has refused to permit them to continue to telework in violation of the Americans with Disabilities Act (“ADA”), and Mass. Gen. Laws ch. 151B, § 16(4). The parties have consented to this court’s jurisdiction. After hearing from the parties via videoconference on September 11, 2020, Plaintiff’s motion for preliminary injunctive relief is GRANTED for the reasons and on the terms that follow.

c. The court’s order stated (*id.* at \*5):

Plaintiff is entitled to telework as a reasonable accommodation pursuant to the ADA and Chapter 151B for sixty (60) days or until further order of the court. During this period of time, CSO is entitled to seek further medical documentation concerning Plaintiff’s alleged disability. The parties are strongly encouraged to discuss a mutually acceptable resolution of their dispute. A status conference has been scheduled on October 8, 2020 at 10:00 A.M.

d. The status conference in the case has since been continued, and the court’s order extended by agreement.

**12. Resources**—The EEOC has further information on, or linked to, the following webpage: <https://www.eeoc.gov/coronavirus>.