

# Implementing Workplace Accommodations During COVID-19: What Employers Do and Don't Have to Do

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Employers have known for some time the necessity of providing reasonable accommodations to employees with disabilities. For most employers, since the establishment of the Americans with Disabilities Act (“ADA”) in 1990, providing these accommodations has become routine, if not simple. As a result, “accommodations” and “individuals with disabilities” have come to fit together like the proverbial “lock” and “key.”

This has changed in the era of COVID-19. Accommodations are no longer exceptional arrangements made to assist a handful of workers with disabilities. With fears of COVID-19 looming large, droves of employees, disabled and non-disabled alike, have been seeking accommodations, most often in the form of remote work, in order to isolate from others. As a result, in some workplaces, accommodations are exceptions that have begun to rival the rule. Typical office settings long have adapted to a majority of workers working remotely. However, for businesses and organizations whose work requires employees to be onsite primarily, the recent surge in requests for remote work accommodation is proving a substantial impediment to resuming operations. When faced with record numbers of accommodation requests and/or when attempting to resume onsite operations while a significant proportion of employees seek to remain offsite, what is an employer to do?

### **1. DO KNOW AND OBEY THE LAW.**

#### **Employees with Disabilities**

The ADA applies to employers with over 15 employees and prohibits discrimination against individuals with disabilities. A disability is defined as a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment. When an employee with a disability makes his/her need for a reasonable accommodation known to the employer (unless the need is obvious), the employer should engage the employee in the interactive process to arrive at a reasonable accommodation that will permit the employee to perform his/her essential job functions.

In the era of COVID-19, the process for arriving at a reasonable accommodation has not changed. The employer still must recognize the accommodation request, then appropriately solicit information to determine whether an employee has a disability.<sup>1</sup> If it is established that an employee has a disability, the employer must explore possible accommodations with the employee, implement, and then monitor the chosen accommodation.

What has changed during the pandemic is the volume and type of accommodation requests many employers are receiving, as well as the status of the requestor. At this time, many employers are fielding more accommodation requests than ever before; a large proportion of the requests seek remote work or leave; and a large proportion of the requests, a majority in many instances, are from non-disabled employees. Must these non-disabled employees be accommodated as well?

## **2. DO LEARN AND IMPLEMENT THE GUIDANCE, TO THE EXTENT PRACTICABLE.**

While employers must provide reasonable accommodations to employees with disabilities, the Equal Employment Opportunity Commission (“EEOC”) has “encouraged” employers to “be creative” and to offer “accommodation and flexibilities” to non-disabled persons who the Centers for Disease Control (“CDC”) has determined “to be at higher [or increased] risk” of severe illness<sup>2</sup> in the event they contract COVID-19 as well as non-disabled persons who the CDC has determined “might be at higher [or increased] risk” of severe illness in the event they contract COVID-19.

### **Employees at “Higher” or “Increased” Risk**

The CDC has determined that persons age 65 and over and/or persons with any of the following underlying medical conditions are at higher or increased risk:<sup>3</sup>

- Cancer;
- Chronic kidney disease;
- COPD (chronic obstructive pulmonary disease);
- Immunocompromised state(weakened immune system) from solid organ transplant;
- Obesity (body mass index “BMI” of 30 or higher);
- Serious heart conditions, such as failure, coronary artery disease, or cardiomyopathies;
- Sickle cell disease; and
- Type 2 diabetes mellitus.

While the CDC has deemed individuals age 65 and over to be at higher risk for a severe case of COVID-19, employers must be mindful. While they are free to provide accommodation and flexibility to workers age 65 and over — even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison — they may not go so far as to involuntarily exclude an individual from the workplace based on his or her being 65 or older, even for the benevolent purpose of protecting the individual due to his/her higher risk. At the same time, neither the ADA nor the Age Discrimination in Employment Act (“ADEA”) include a right to a reasonable accommodation for older workers due to age. Put plainly, the EEOC encourages “maximum flexibilities” for this group of at-risk workers. It encourages accommodation and, seemingly standard, flexibility for all others at-risk.

### **Employees Who Might be at “Higher” or “Increased” Risk**

The CDC has determined that smokers, as well as persons with the following underlying medical conditions, might be at higher or increased risk:<sup>4</sup>

- Asthma (moderate-to-severe);
- Cerebrovascular disease (affects blood vessels and blood supply to the brain);
- Cystic fibrosis;

- Hypertension or high blood pressure;
- Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines;
- Neurologic conditions, such as dementia;
- Liver disease;
- Pregnancy;
- Pulmonary fibrosis (having damaged or scarred lung tissues);
- Thalassemia (a type of blood disorder); and
- Type 1 diabetes mellitus.

The EEOC's encouragement is similar here. Employers who are able should be flexible in attempting to accommodate employees who might be at higher risk.

**3. DO NOT FEEL COMPELLED TO IMPLEMENT EVERY ACCOMMODATION REQUESTED, PARTICULARLY WHERE THERE IS AN UNDUE HARDSHIP.**

Although popular, remote work is just one of many possible accommodations employers can consider, since employees have no entitlement to any specific accommodation. Employers, thus, are encouraged to review an array of accommodations, including additional or enhanced protective gowns, masks, gloves, or other gear. Possible accommodations also may include additional or enhanced protective measures, such as erecting a barrier that provides separation between employees or an employee and the public. Another possible accommodation may be the elimination or substitution of certain “marginal” functions (i.e., incidental job duties, as distinguished from the “essential” functions of a particular position). Accommodations also may include temporary modification of work schedules or physical relocation to a more remote area within the facility.

Notwithstanding the broad array of available accommodations, it still is the case that an employer need not accommodate a non-disabled employee or provide an accommodation that poses an “undue hardship.” Factors considered in determining undue hardship include the following:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation;
- the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- the impact of the accommodation on the operation of the facility.

This always must be a careful and individualized assessment.

## TAKE AWAY:

In the broader analysis, what has emerged from a review of relevant anti-discrimination laws and health-related guidance is something approaching a tiered system of accommodation. Federal statute continues to compel employers to provide reasonable accommodations to disabled employees. Meanwhile, federal agency guidance recommends that employers treat employees, who are and who may be particularly vulnerable to COVID-19, similar to disabled employees, to the extent the employer is able. Neither disabled nor non-disabled employees are entitled to a specific accommodation nor one that presents an undue hardship.

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<sup>1</sup> A COVID-19 diagnosis is not, in and of itself, a disability, giving entitlement to reasonable accommodation. Rather, the disability determination associated with a COVID-19 diagnosis will depend on the severity of the employee's symptoms. If medical information and/or response to inquiry indicate a severe COVID-19 experience, the employee should be deemed to have a disability warranting reasonable accommodation.

<sup>2</sup> The CDC has explained that severe illness means that the person with COVID-19 may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.

<sup>3</sup> This CDC list is current as of September 2, 2020 (list last revised by CDC on July 17, 2020).

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