

# THE ADA, AGE DISCRIMINATION, AND WORKER HEALTH DURING THE COVID-19 PANDEMIC— Disability Discrimination and Reasonable Accommodations

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The intent of this outline is to provide legal and practical information about the employers' obligations to provide reasonable accommodation and avoid employment discrimination. This paper will not address wage and hour issues, the FLSA, the FMLA, OSHA, unemployment compensation, and the new pandemic relief statutes. Finally, although the paper often refers to the "ADA" (Americans with Disabilities Act), most of the information described below applies equally to claims under the Rehabilitation Act of 1973, and may also apply to claims under state or local laws that track those federal counterparts.

## 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 goods or service contracts or subcontracts worth more than \$10,000, 29 U.S.C. § 793, and there are DOL administrative remedies,<sup>2</sup> but not 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 or local laws**—should be considered, but are beyond the scope of this paper.
- f. **Essential workers**—Note that the above federal laws also apply to applicants or employees who are classified as "critical" or "essential" workers. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Question D.12 (EEOC May 7, 2020) (hereafter "What You Should Know").<sup>3</sup>

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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>.

<sup>3</sup> Available online at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

## 2. Is COVID-19 itself a disability?

- a. **“Actual” disability**—COVID-19 may be an actual disability under the ADA Amendments Act if—in its active state and in the absence of mitigating measures and treatment—it substantially limits a major life activity or bodily function (e.g., respiratory, circulatory, or immune function); the fact that it is temporary is not dispositive. 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(g)–(j).
- b. **“Regarded as” disability**—if an employer believes—correctly or incorrectly—that an employee has COVID-19 and takes adverse action against the worker because of that, there likely is a “regarded as” claim, unless the employer can show that the condition was both transitory (likely in most cases) and minor (much less likely). 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(l).
- c. **Future fear**—If the employer knows that the person does not currently have COVID-19, but takes adverse action because it fears that the worker may get it 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).

## 3. Questions presented by employer actions

### a. Closing down

- i. If an employer’s decision to close affects all employees equally, this would not appear to state an ADA claim.
- ii. But consider whether there is discrimination in the handling of any RIFs, transfers, or employer assistance with getting alternate employment.

### b. Moving business online

- i. Employer’s decision to change to online operations is not an ADA violation, and telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation. *Compare Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, § III.B, Question 10 (EEOC Mar. 21, 2020) (hereafter “EEOC’s Pandemic Preparedness”).<sup>4</sup>
- ii. But employer must consider accommodations to ensure that people with disabilities can access online technologies and systems. See 4(d)(i) below.

### c. Mandatory questioning, screening, or testing

- i. Employer can:
  1. Ask employees returning from travel about their exposure. *EEOC’s Pandemic Preparedness, supra*, Question 8.
  2. Ask an employee why he or she has been absent from work. *Id.*, Question 15 and Ex. E.
  3. Require employees to adopt infection-control practices (e.g., regular hand washing). *Id.*, Question 11.
  4. 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, supra*, Question G.2.

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<sup>4</sup> Online at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

5. Encourage employees to get a vaccine if one becomes available. *EEOC's Pandemic Preparedness, supra*, Question 13. [But employers may not be able to *compel* getting a vaccine. See Part 3(c)(ii)(2) below.]
  6. 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). *Id.*, 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>
  7. Require medical input certifying fitness for duty when an employee returns to work. *EEOC's Pandemic Preparedness, supra*, Question 20.
  8. Administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus, so long as the test used is accurate and reliable. *What You Should Know, supra*, Question A.6.
  9. 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*, Question 16.
  10. Delay the start date of an applicant who has symptoms. *Id.*, Question 18.
  11. Withdraw a job offer for one with COVID-19 or symptoms, if it needs the applicant to start immediately. *Id.*, Question 19.
  12. Disclose the name of an employee to a public health agency when it learns that the employee has COVID-19. *What You Should Know, supra*, Question B.3; *EEOC Webinar, supra*, Question 10.
  13. Disclose the name of a staffing-firm employee with COVID-19 to the client company where the individual is working. *What You Should Know, supra*, Question B.4.
  14. 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.
- ii. Employer may not be able to:
1. Ask asymptomatic employees if they have medical conditions that would make them especially vulnerable. *EEOC's Pandemic Preparedness, supra*, Question 9.
  2. Ask an employee if they have family member with COVID-19 or symptoms associated with it. This question may violate the Genetic

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

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.

3. 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 to, and take action recommended by, public-health authorities. *EEOC Webinar, supra*, Questions 5, 8, and 10.
  4. Compel employees to take a vaccine if they have a medical condition that prevents doing so safely. *EEOC's Pandemic Preparedness, supra*, Question 13.<sup>6</sup>
- iii. Employers must maintain all information about employee illness as a confidential medical record. *Id.*, § II.A.2, and Questions 3, 6, 7, and 9.

**d. Pre-existing accommodations**

- 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, it must still consider whether previous accommodations should be continued. *EEOC Webinar, supra*, Question 20.
- iii. Moreover, an employee with a disability may need additional, or different accommodations during the pandemic. *What You Should Know, supra*, Question D.4.

**e. Forced leave**

- i. Employers may send employees home if they voluntarily disclose that they have COVID-19. *EEOC's Pandemic Preparedness, supra*, Question 5.
- ii. Employers may send employees home if they display symptoms associated with COVID-19. *Id.*
- iii. An employer can only force leave on an individual with a condition that puts them at higher risk if:
  1. The employee voluntarily disclosed the condition (i.e., even though the employer did not ask), *cf. EEOC's Pandemic Preparedness, supra*, Question 9; and
  2. Continuing at work would pose a direct threat. For more on direct threat, see Part 4(f) below.<sup>7</sup>

**f. Firing**

- i. An employer may violate the ADA if it fires an individual on the basis of COVID-19, because the virus may be a disability, and because contract

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<sup>6</sup> Note, too, that under Title VII, employers may also need to accommodate employees who have religious beliefs that prevent taking the vaccine. *EEOC's Pandemic Preparedness, supra*, Question 13.

<sup>7</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.

rights, employer leave policies, or other reasonable accommodations will often address safety concerns

- ii. An employer may violate the ADA if it fires an individual because it mistakenly thinks an individual has COVID-19 despite information that the person does not
- iii. An employer may violate the ADA if it fires an employee because of the individual's association with someone else who has COVID-19, because contract rights or employer leave policies will likely address safety concerns.
- iv. An employer may violate the ADA if it fires an employee on the basis of an underlying disability that it perceives as creating a higher risk of a serious case of COVID-19, because many disabilities do not create such a risk, and because for those that do, contract rights, employer leave policies, or other reasonable accommodations will often address safety concerns.

#### **4. Worker's need for reasonable accommodations**

**a. Because of having COVID-19**—If the condition 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>8</sup> The employee may also have leave rights under the FMLA, or under the pandemic-assistance statutes.

**b. Because of another disability that creates a heightened risk**

- i. If an employee discloses another disability that puts him or her at increased risk of complications from COVID-19, the employee is entitled to a reasonable accommodation if needed. *EEOC Webinar, supra*, Question 17. See also *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.”).
- ii. 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.

**c. Because of exacerbation of mental-health conditions**—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.

**d. 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

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<sup>8</sup> Note that a “regarded as” disability is not enough to support an accommodation claim. 42 U.S.C. § 12201(h).

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 necessarily have to continue providing a telework option, although it may choose to do so, and 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.
    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—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; *Coronavirus Disease 2019 (COVID-19) Response* (CDC May 2020), at pp.50–51;<sup>9</sup> *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)* (CDC May 2020);<sup>10</sup> *Guidance on Preparing Workplaces for COVID-19* (OSHA Mar. 2020).<sup>11</sup>
- e. 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.
- f. Direct threat**—This may be a defense in certain cases
- i. COVID-19 likely poses 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.”).
  - ii. 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. Even if the disability *does* pose a direct threat, the employer still cannot exclude the employee, or take any other adverse action, unless there

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<sup>9</sup> Online at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>.

<sup>10</sup> Online at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

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

is no way to provide a reasonable accommodation (absent undue hardship).  
*What You Should Know, supra*, Question G.4.

- g. 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
  - h. 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).
  - i. Needs related to caring for family members**
    - i. The ADA does *not* require an employer to provide reasonable accommodations (e.g., leave) to allow an employee to care for a family member. *EEOC Webinar, supra*, Question 18. *See also Questions & Answers: Association Provision of the ADA*, Question 4 (EEOC Oct. 17, 2005).<sup>12</sup>
    - ii. Employees may have leave rights under the FMLA or under pandemic-relief statutes.
    - iii. Employers can be liable for disparate treatment because of a disability association. That may require, for example, that the employer provide leave if it provides leave for reasons unrelated to disability. *EEOC Webinar, supra*, Question 18. *See also Questions & Answers: Association Provision of the ADA, supra*, Examples J and K.
- 5. Changes in enforcement procedures**
- a.** Claims under the ADA and Secs. 501 and 503 must be administratively exhausted by filing a complaint. *See Filing A Charge of Discrimination With the EEOC*.<sup>13</sup> Sec. 504 claims against non-federal employers need not be exhausted. *Taylor v. City of Shreveport*, 798 F.3d 276, 284 (5th Cir. 2015); *Freed v. Consol. Rail Corp.*, 201 F.3d 188, 192 (3d Cir. 2000) (collecting cases).
  - b.** Some EEOC and FEP offices may be accepting charges of discrimination by fax or email only, and in some cases may allow certain flexibility in the deadlines.<sup>14</sup>
  - c.** The EEOC (and the DOJ for charges against state and local government agencies) may be delaying the issuance of the right-to-sue notice.<sup>15</sup>
- 6. Resources**—The EEOC has further information on, or linked to, the following webpage:  
<https://www.eeoc.gov/coronavirus>.

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

<sup>13</sup> Online at <https://www.eeoc.gov/filing-charge-discrimination>.

<sup>14</sup> *See* <https://www.eeoc.gov/newsroom/eeoc-continues-serve-public-during-covid-19-crisis>;  
<https://www.eeoc.gov/processing-information-all-parties-federal-eeo-processing-under-29-cfr-part-1614>.

<sup>15</sup> *See* <https://www.justice.gov/crt/case-document/file/1272126/download>.