

ADA AND COVID-19 IN THE WORKPLACE

COVID-19 Legal Issues Webinar
Lawyers Coordinating Committee
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The intent of this outline is to provide legal and practical information, rather than discussing the legislative or policy considerations or disputes. Two points about terminology. First, although the title of the paper references the Americans with Disabilities Act (ADA), similar rules would apply under the Rehabilitation Act of 1974, and may also apply to state and local laws that track these federal statutes. Second, although the paper refers to actions and obligations of employers, many of the same principles will apply to actions and obligations of a union.

1. Employer coverage

- a. **ADA**—applies to, among others,
 - i. Private employers with 15 or more employees
 - ii. Non-federal governmental employees
 - iii. Unions in many circumstances
 - iv. Employment agencies
- b. **Sec. 501**—applies to most federal-sector employees
- c. **Sec. 503**—applies to employees of entities with federal goods or service contracts or subcontracts worth more than \$10,000 (DOL administrative remedies only)
- d. **Sec. 504**—applies to employees of public or private entities are recipients of federal financial assistance (i.e., do-good money)
- e. **State or local laws**—should be considered, but are beyond the scope of this paper

2. Is COVID-19 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 function), and the fact that it is temporary is not dispositive
- b. **“Regarded as” disability**—if an employer believes—correctly or incorrectly—that an employee has COVID-19 and takes adverse action against the worker, there is a “regarded as” claim unless the employer can show that the condition was both transitory (likely) and minor (unlikely)
- 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, the ADA may not protect

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 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
- ii. 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
 2. Ask an employee why he or she has been absent from work
 3. Require employees to adopt infection-control practices (e.g., regular hand washing)
 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)
 5. Encourage employees to get a vaccine if one becomes available, but employers may not be able to compel it. See 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)
 7. Require medical input certifying fitness for duty when an employee returns to work
 8. 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
 9. Delay the start date of an applicant who has symptoms
 10. Withdraw a job offer for one with COVID-19 or symptoms, if it needs the applicant to start immediately.
- ii. Employer cannot:
 1. Ask asymptomatic employees if they have medical conditions that would make them especially vulnerable
 2. Compel employees to take a vaccine if they have a medical condition that prevents doing so safely.¹
- iii. Employers must maintain all information about employee illness as a confidential medical record

¹ Note, too, that under Title VII, employers may also need to accommodate employees who have religious beliefs that prevent taking the vaccine.

- d. **Withdrawing accommodations**—During a pandemic, an employer must continue reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.
- e. **Forced leave**
 - i. Employers may send employees home if they voluntarily disclose that they have COVID-19 (i.e., even though the employer did not ask)
 - ii. Employers may send employees home if they display symptoms associated with COVID-19
 - iii. An employer can only force leave on an individual with a condition that puts them at higher risk if (a) the employee voluntarily disclosed the condition (i.e., even though the employer did not ask), and (b) continuing at work would pose a direct threat
- f. **Firing**
 - i. An employer likely violates the ADA if it fires an individual on the basis of COVID-19, because it is likely a disability, and because contract rights, employer leave policies, or reasonable accommodations will likely address safety concerns
 - ii. An employer likely violates 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 also 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

4. **Worker’s need for reasonable accommodations**

- a. **Because of having COVID-19**—If the condition is an “actual” disability (or a past or “record of” disability), the employee is entitled to a reasonable accommodation if needed
- b. **Because of another disability that creates a heightened risk**—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. On the other hand, employers should not assume that all disabilities increase the risk of complications; many do not.
- 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
- 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
 - 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 or video-remote interpreting for employees with deafness

- ii. Leave
 1. Because of the short duration of COVID-19, a period of leave for one with the diagnosis is normally reasonable.
 2. Leave can be unpaid unless a contract or company policy makes paid leave available.
 3. Longer leave—for example, to avoid exposure due to an underlying disability that heightens the risk—may be reasonable depending on the details
 - iii. Mask or respirator
 - iv. Isolation; other things
 - e. **“Undue hardship”**—This is the statutory defense to accommodation, and it will likely not apply to many cases, but may in certain cases
 - f. **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
 - g. **Retaliation**—Requesting an accommodation is protected activity for retaliation claims
 - h. **Needs related to caring for family members**—The ADA does *not* require an employer to provide reasonable accommodations (e.g., leave) to allow an employee to care for a family member, but the employer may be obligated to provide such leave if it provides leave for reason unrelated to disability²
5. **Changes in enforcement procedures**—Be aware that some EEOC and FEP offices are closing, and are taking charges of discrimination by fax or email only.
6. **Resources**—The EEOC has information on, or linked to, the following webpage: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

² The FMLA or state laws may provide such leave. Note, too, that legislation passed on March 18, 2020 expanding the FMLA’s coverage and leave rights. Other legislation may be forthcoming.