

EVEN DURING A CRISIS, PEOPLE WITH DISABILITIES HAVE RIGHTS

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Topics to be discussed

- The ADA and the Covid-19 Pandemic
- Non-Discrimination Requirements
- Public Spaces – Social Distancing
- Access to PPE
- Face Covering Requirements
- Transportation
- Closure of Services/Programs
- Education
- What does the future hold?

The ADA and COVID-19

- The ADA is a civil right
 - Civil rights are still in effect during a pandemic but “modifications” may be necessary to address the potential “threat” posed by the pandemic
 - Local and State Government Officials continue to have obligations for compliance with the ADA during a pandemic but may need to make adjustments to policies and procedures in order to address any “health and safety” risks to individuals and the public
 - Situations such as the COVID-19 Pandemic are not directly addressed in the language of the ADA but we still utilize the framework of the ADA to address the issues (Title II and III)
 - Non- Discrimination
 - Modification of policy, practice and procedure
 - Unless poses a fundamental alteration in the programs, services or activities
 - Reasonable Accommodation
 - Effective Communication or the provision of Auxiliary Aids and Services
 - Program Access

Public Spaces – Social Distancing

- Access to public spaces may be limited due to the inability for maintaining social distancing and the “risk” associated with congregate groups, etc.
- The concept of Social Distancing eliminates any “Hugging”, handshaking, touching or close contact
 - Impacts the ability to give direct assistance to someone who may need it at the store, in the workplace, restaurant, etc.
 - Results in “limiting” the number of individuals who can be in any one space at any one time
 - Gyms
 - Workspaces
 - Restaurants
 - Stores
- Individuals with disabilities who may require assistance to complete tasks may request that they be allowed to bring an individual to assist them
 - The requirement that a business entity provide the one-on-one assistance may not be “reasonable” due to potential for transmission of Covid-19

Access to Personal Protective Equipment (PPE)

- Shortages of PPE has resulted in lack of access for individuals in community settings
 - High cost due to “shortages” and price gouging by sellers
 - Equipment directed to healthcare providers and others versus supporting individuals living in the community
- Individuals with disabilities and their caregivers need access to PPE as well
 - Organizations have been created to assist people with disabilities obtain appropriate PPE but shortages remain
- Proper use of PPE by caregivers and individuals with disabilities continues to be an issue for discussion, education and need with policy makers/funders

Face Covering Requirements

- Exemptions to Face Covering Requirements necessary when someone is unable to utilize due to a disability
 - Unable to wear at all? Unable to tolerate wearing for a longer period of time?
- Lack of education/awareness of the public and business, etc. in terms of what types of situations may make use of Face Coverings problematic for persons with disabilities
 - Abuse of the exemption by individuals who don't have disabilities
 - Use of "Fake" cards indicating that they cannot wear a mask due to disability
 - Cannot ask for "documentation" of a disability to prove you can't use a face covering
 - May deny access based on "legitimate safety criteria"
- Entities are required to make "reasonable modification of policy, practice and procedures" to accommodate a person with a disability who is unable to use a face covering
 - Alternative service delivery option (curb side service, home delivery, etc.)
 - Alternative options for receiving care (telehealth, waiting in car until appt time and escorted to the Dr. office to minimize contact with others, etc.)

Transportation

- Public Entities have made adjustments to operations for public transportation in light of COVID-19
 - Social Distancing on Buses and Trains
 - May have to wait longer for a bus/train due to capacity constraints
 - Elimination/temporary stop to providing door to door services and individuals must independently get to the vehicle and board (with exception of assistance for tiedown of mobility devices)
 - May bring someone to assist them during transport
- Taxi/Ride Share programs require use of Face Coverings or can deny ride
 - Close proximity of contact within vehicle puts driver/passenger at risk

Closure of Programs/Services

- Parks, camps, swimming pools and other public spaces remain closed in most areas
 - Re-opening will only occur with social distancing and when COVID-19 #'s decrease and capacity limits likely with reduced programming available
 - Libraries are re-opening but with restrictions in terms of social distancing, facial coverings and programs offered (limited programming/size of groups, etc.)
 - Parking lots closed near public parks/spaces
 - Accessible Parking only required where parking is made available to the general public

Education

- K-12 education likely to remain “remote” and/or a Hybrid option for the Fall of 2020 and beyond until a vaccine is available
 - School systems are being challenged to address specialized education needs for the fall 2020
 - Shutdown in Spring 2020 left little time for planning and implementation of effective education strategies for individuals with disabilities
 - Significant negative impact on individuals with disabilities who require additional supports for their education programs
 - Legal challenges occurring across the country with relation to provision of services to individuals with disabilities in the schools
- Post Secondary education is mainly “remote” with some hybrid options being deployed institution by institution
 - Accommodations for students with disabilities remain responsibility of the institution during distance learning

What does the future hold?

- Unknown timeline for a vaccine and predicted that we will continue to be dealing with COVID-19 outbreaks throughout the fall/winter of 2020-21
- Gradual “re-opening” of services and programs will occur as the COVID-19 #'s decrease or “level off” but “fear” will remain a driving force for much of the response going forward.
- State by state differences in how things are managed will continue to create confusion
- Individuals with disabilities and their advocates need to continue to be at the table for discussion of plans within their communities, schools, organizations, etc.



ADA Employment Issues During COVID-19

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Topics to be discussed

- **COVID-19 and ADA Disability**
- **Returning to Work**
- **Telework**
- **Medical Inquiries and Tests**
- **Mask Requirement**
- **Association Discrimination**
- **Resources**

Is COVID-19 itself a disability under the ADA?

- **Actual disability and “record of”**
 - ❖ Is COVID-19 an impairment?
 - ❖ Does it cause a substantial limitation to a major life activity?
 - In severe cases → breathing, lung functioning
 - But even in mild cases → interacting with others, communicating, working
- **“Regarded as”**
 - ❖ Is COVID-19 an impairment?
 - ❖ Does it fall within the exception for “transitory and minor”?

Options for people with disabilities when returning to work

Option 1: Return to work with no accommodations

Option 2: Return to work with accommodations – common accommodation examples:

- ❖ Provision of personal protective equipment
- ❖ Creation of barriers between employees and coworkers or clients
- ❖ Modifying job duties – removing non-essential tasks – only performing tasks that are possible to be performed off-site or that can be performed while social distancing
- ❖ Working from home or telework

Options for people with disabilities when returning to work

Option 2: Return to work with accommodations

- ❖ After identifying a solution, employee should request reasonable accommodation and then employee and employer engage in the interactive process
- ❖ Employer is entitled to reasonable documentation about employee's disability and the need for the accommodation
- ❖ Employer must keep disability-related information confidential
- ❖ **Note:** Employers only need to provide accommodations if there is a link between the disability and the need for an accommodation

Options for people with disabilities when returning to work

Option 3: Reassignment as a reasonable accommodation

- If no accommodations enable employee to return to work in previous job, employee can ask for reassignment to a different, vacant position
- Reassignment may be a good option if employer has a vacant position; employee is qualified for the vacant position; it would be safe for employee to work in the vacant position; the position is not subject to a bona fide seniority system.
- Reassignment is considered the accommodation of last resort (accommodating employee in current position is preferred)

Options for people with disabilities when returning to work – request leave

Option 4: Request leave

- If employee cannot return to current job with or without accommodations and reassignment is not an option, leave is another option to consider. Employees may pursue leave under the following policies and laws:

A. Employer policies

- ❖ Some employers have internal policies offering a medical or personal leave.
- ❖ Important that employers apply these policies consistently

Options for people with disabilities when returning to work – request leave

B. Expanded Family Medical Leave Act (FMLA) from the Families First Coronavirus Response Act (FFCRA)

- ❖ Applies to employers with 50 to 500 employees and some public employees;
- ❖ Employees may be entitled to **up to 12 weeks of job-protected leave** to care for a child (or adult child with a disability) whose school is closed or whose childcare provider is unavailable for reasons related to COVID-19.

Options for people with disabilities when returning to work – request leave

C. Emergency Paid Sick Leave from the Families First Coronavirus Response Act

- ❖ Private employers with 50 to 500 employees and some public employers may provide up to **2 weeks of paid sick leave** to employees unable to work/telework and who need leave because they are:
 - (1) subject to a government quarantine or isolation;
 - (2) advised by a health care provider to self-quarantine;
 - (3) experiencing COVID-19 symptoms & seeking medical diagnosis;
 - (4) are caring for an individual subject to quarantine/isolation;
 - (5) are caring for a child whose school or place of care is closed; or
 - (6) are experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services

Options for people with disabilities when returning to work – request leave

D. Family Medical Leave Act (FMLA)

- ❖ Provides employees up to 12 weeks of job-protected leave if they or a family member are incapacitated by a serious health condition
- ❖ According to U.S. Department of Labor, serious health condition can include COVID-19
- ❖ **Caution:** FMLA does *not* require employers to provide FMLA for the purpose of *avoiding exposure* to COVID-19.

Options for people with disabilities when returning to work – request leave

E. Americans with Disabilities Act (ADA)

- ❖ Under the ADA, employees with disabilities may be entitled to leave as a reasonable accommodation – potentially ADA provides leave in addition to previous leaves discussed
- ❖ However, this leave is not considered job protected and some courts have found that more than a month of leave under the ADA is not a reasonable accommodation. ADA leave is also unpaid leave.
- ❖ **Limit:** Only applies to employees, not family members
- ❖ ADA applies to employers with **15 or more** employees – FFCRA and FMLA apply if **50 or more** employees

Options for people with disabilities when returning to work

F. Consider Unemployment Insurance

- Employees may be eligible for unemployment insurance if they cannot return to work due to a medical condition
 - ❖ Illinois Department of Employment Security administers unemployment: www2.illinois.gov/ides
- Employees should seek legal advice about rights to unemployment before deciding not to return to work
 - ❖ Learn more from [Legal Aid Chicago](http://www.legalaidchicago.org)
 - ❖ Unemployment Helpline: (800) 445-9025
 - ❖ www.legalaidchicago.org/newsroom/in-the-news/covid-19

Do employees have a right to continue working from home?

- **It depends:**
 - ❖ When employees worked from home during pandemic, did they perform all of the essential parts of the job?
 - ❖ If yes, it may be reasonable for employers to allow employees to continue to do so
 - ❖ If no, it is most likely not reasonable
 - ❖ Even if an employer excused employees from certain job tasks during the pandemic, the employer is not required to continue to excuse essential parts of the job
 - ❖ Telework accommodation previously disfavored, but may change after pandemic experience

Can employers require employees to provide medical information before returning to work?

- **General Rule:** Typically, employers are not allowed to ask for medical information or perform medical tests unless it is job-related and consistent with business necessity.
- **During COVID-19 Employers Can:**
 - ❖ Ask if employees are experiencing symptoms of COVID-19, like fever, chills, cough, shortness of breath or sore throat
 - ❖ Take employees' temperature daily or administer a COVID-19 test, even though this is typically considered a medical examination. (Anti-body tests however are not allowed)
 - ❖ Require employees to stay home and provide a doctor's note confirming they are not contagious before being allowed to return to work if experiencing symptoms of COVID-19

What if person can't wear a mask because of a disability?

- Employers are most likely allowed to require employees who interact with customers or other employees to wear a mask to help prevent the spread of the disease.
- The ADA most likely does not require employers to make exceptions to a reasonable mask-policy if necessary to protect the health and safety of its workforce.
- **However**, if employees cannot wear a mask because of a disability, they may ask for a reasonable accommodation and engage in the interactive process with the employer to see if there are any possible solutions.

Possible reasonable accommodations if an employee can't wear a mask

- **Examples of accommodations if employee can't wear a mask:**
 - ❖ Transferring to a more isolated work site that makes social distancing possible
 - ❖ Working the night shift, if it has fewer employees, to make social distancing possible
 - ❖ Telework
- Employees may also consider whether there are *any* masks that they could wear. Not all masks are equal and certain people find certain masks more breathable and less constricting and more comfortable.

ADA's Association Discrimination and COVID-19

- **General Rule:** People who associate with people with disabilities (like a family member) can't be treated differently simply because of their association.
- **Reasonable Accommodations Not Required:** Only people with disabilities are entitled to reasonable accommodations. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.
- **However,** employers can *choose* to provide more flexibility, even though not legally required.

Equal Employment Opportunity Commission (EEOC) COVID-19 Resources

- **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws:**
www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeoc-laws#A.6
- **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act** (updated in response to COVID-19 pandemic)
www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
- **COVID-19 – Ask the EEOC Webinar:**
www.youtube.com/watch?v=X50G7I41NKg

U.S. Department of Labor COVID-19 Resources

Families First Coronavirus Response Act:

- **Questions & Answers:**
www.dol.gov/agencies/whd/pandemic/ffcra-questions
- **Employee Paid Leave Rights:**
www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave
- **Employer Paid Leave Requirements:**
www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave

COVID-19 and FMLA Questions and Answers:

www.dol.gov/agencies/whd/fmla/pandemic

Equip for Equality COVID-19 Employment Resources

- **COVID-19 in the Workplace:**
www.equipforequality.org/covid-work
- **Reasonable Accommodations During COVID-19:**
www.equipforequality.org/wp-content/uploads/2020/05/COVID-19-Reasonable-Accommodations-at-Work-to-Stay-Safe.pdf
- **Returning to Work During COVID-19:**
www.equipforequality.org/covid-rights
- **Understanding When and How to Ask for Leave Under the Families First Coronavirus Response Act:**
www.equipforequality.org/wp-content/uploads/2020/05/COVID-19-Understanding-How-to-Ask-for-Leave.pdf

Other COVID-19 Employment Resources

- **Job Accommodation Network – ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19:**
www.askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-resonse-to-covid-19.cfm
- **The ADA at Work: Considerations for COVID-19:**
askearn.org/training-center/webinars/the-ada-at-work-considerations-for-covid-19
- **CDC - Interim Guidance for Businesses and Employers Responding to Coronavirus Disease:**
www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-respond.html

General ADA Resources

- **Great Lakes ADA Center** – www.adagreatlakes.org
- **Illinois ADA Project** – www.ada-il.org
- **Equip for Equality** – www.equipforequality.org
- **Job Accommodation Network** – www.askjan.org
- **Equal Employment Opportunity Commission** – eeoc.gov
- **U.S. Department of Justice** – www.ada.gov

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