

Reasonable Accommodations under the Americans with Disabilities Act (ADA) and Leave Time Options during the COVID-19 Pandemic

Q&A

Prepared by: Wanda Otero, Esq., Vermont-NEA General Counsel (current as of 7/22/20)

As schools prepare for a new school term, many Vermont-NEA members have questions about returning to work. Members with underlying medical conditions may be especially concerned since they may be at higher risk for severe illness should they contract COVID-19.

This Q&A explains the Americans with Disabilities Act and when members with underlying illnesses may request reasonable accommodations under that Act. It explains other options that may be available in particular cases.

1. What is the Americans with Disabilities Act (ADA)?

The ADA, enacted in 1990 and amended in 2008, is a federal law prohibiting discrimination based on disability (or the record or perception of a disability), and ensuring that people with disabilities “have the same opportunities as everyone else to participate in the mainstream of American life — to enjoy employment opportunities, to purchase goods and services, and to participate in state and local government programs and services.” *See: Introduction to the ADA* at: https://www.ada.gov/ada_intro.htm.

Under the ADA, a “qualified individual” with a “disability” is entitled to a “reasonable accommodation.” Employers do not have to provide any accommodation that poses an “undue hardship.” *See: The ADA: Questions and Answers* (issued May 1, 2002) at: <https://www.eeoc.gov/laws/guidance/ada-questions-and-answers>.

2. Who is at “high risk” for complications related to COVID-19?

According to the CDC, individuals at high risk for severe illness from COVID-19 include people age 65+ and individuals of all ages with the following underlying medical conditions: chronic kidney disease; COPD; immunocompromised state from organ transplant; obesity (BMI 30+); serious heart conditions such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; and Type 2 diabetes. *See: Coronavirus Disease 2019: Who Is at Increased Risk for Severe Illness?* (updated June 25, 2020) at:

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>

3. Who is potentially at “high risk” for complications related to COVID-19?

The CDC explains that people with the following conditions may be at increased risk: moderate-to-severe asthma; cerebrovascular disease; cystic fibrosis; hypertension; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; and Type 1 diabetes. See: *Coronavirus Disease 2019: Who Is at Increased Risk for Severe Illness?* (updated June 25, 2020) at:

<https://www.cdc.gov/coronavirus/2019-ncov/need-extraprecautions/people-at-increased-risk.html>.

The CDC has identified a recent study suggesting that pregnant women with COVID-19 are “more likely to be hospitalized and are at increased risk for intensive care unit (ICU) admission and receipt of mechanical ventilation.” See: *Coronavirus Disease 2019: Pregnancy Data* (updated July 9, 2020) at:

<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html>

4. What should I do if I am at high risk of complications due to COVID-19?

If your underlying medical condition qualifies as a disability under the ADA, you may request that your employer provide a reasonable accommodation so that you are able to perform the essential functions of your position. Employers are not required to provide accommodations if, even with the requested accommodation, the employee would still be unable to perform a job’s essential functions. Employers are also not required to provide accommodations if these would create an “undue hardship” for the employer, i.e., accommodation is too difficult to provide or too expensive.

5. What is a qualifying disability under the ADA?

A qualifying disability is a “physical or mental impairment” that “substantially limits one or more major life activities.” The impairment does not have to be permanent but may be transitory (lasting less than 6 months). See: 29 C.F.R. 1630.2(j)(1)(ix) (the “effects of an impairment lasting or expected to last fewer than six months can be substantially limiting”).

Physical or mental impairments include:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

Any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major life activities include:

Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system. See: 29 C.F.R. § 1630.2(i)(1)(i), (ii).

6. How do I know if I have a qualifying disability?

The Equal Employment Opportunity Commission (EEOC), which enforces the ADA, has said that individuals with cancer, diabetes and HIV/AIDS “should easily be found to have a disability” within the definition of ADA. Other risk factors for COVID-19 identified by the CDC may or may not be qualifying disabilities depending upon the degree of impairment and the impact on major life activities.

7. Is COVID-19 a qualifying disability?

The EEOC stated in a March 27, 2020 Outreach Webinar that it is unclear if COVID-19 is a disability under the ADA. See: *Transcript of March 27, 2020 Outreach Webinar* at: <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>.

FFCRA Emergency Paid Sick Leave

If you are subject to a government quarantine or isolation order, have been advised by a health care provider to self-quarantine, or have COVID-19 symptoms and are seeking a diagnosis, you may be eligible for up to ten (10) days of emergency paid sick leave offered by the Families First Coronavirus Response Act (FFCRA). Emergency sick leave under FFCRA is paid at your regular rate of pay, not to exceed \$511/day or \$5,110 in total. This leave expires as of Dec. 31, 2020. See: *Families First Coronavirus Response Act: Employer Paid Leave Requirements* at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

Other Leave

You may also use any sick leave or other accrued leave and may be entitled to up to 12 weeks of unpaid leave under the Family and Medical Leave Act (FMLA) if you meet eligibility requirements and are suffering from a “serious health condition” as defined by the FMLA.

Workers' Compensation

While you could consider applying for workers' compensation benefits, it may be difficult to prove that your sickness is work-related unless your doctor is willing to state, "with a reasonable degree of medical certainty," that you contracted the virus at school. However, a new Vermont law gives employees who 1) have a documented exposure to COVID-19 while on the job and who; and, 2) contract the virus within 14 days of that exposure, a rebuttable presumption of contracting the virus while at work. This entitles the employee to workers' compensation benefits; however, the employer may be able to rebut the presumption.

8. Are there risk factors identified by the CDC that are not qualifying disabilities?

Yes. Please see below.

Age – Age alone is not considered a disability under the ADA. Although employees over 40 years of age are protected under the Age Discrimination in Employment Act (ADEA), the ADEA does not include the right to reasonable accommodations. The EEOC has stated that "employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison." If you are 65 or older, you should speak with your doctor about any underlying medical conditions that could provide a basis for a reasonable accommodation.

Pregnancy – Although pregnancy itself is not a qualifying disability under the ADA, certain pregnancy-related medical conditions may be. If you are pregnant, you should speak to your doctor regarding any pregnancy-related medical conditions that could provide a basis for a reasonable accommodation.

Obesity – It is not clear that severe obesity in and of itself is a disability. However, if an employee's severe obesity is caused by an underlying disorder or condition that qualifies as a disability under the ADA, then the employee would be able to seek accommodations for any limitations resulting from that disability, including limitations arising from the employee's severe obesity. If you have *severe obesity* (Body Mass Index of 30 or higher), you should speak to your doctor regarding any underlying medical conditions that could provide a basis for a reasonable accommodation. If you have *morbid obesity*, (BMI of 40 or higher), you are more likely to qualify for an accommodation.

Smoking – Tobacco usage is not protected under the ADA. However, certain conditions caused by smoking—e.g., lung cancer—may be considered disabilities. If you are a smoker, talk to your doctor about any underlying medical conditions that could provide a basis for a reasonable accommodation.

9. What if a family member or someone I live with is considered high risk?

The ADA prohibits discrimination based on an employee's association with a disabled individual. However, it does not require that an employer accommodate a non-disabled employee based on the disability-related needs of a family member or other person they associate with. The EEOC has specifically stated that 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."

FFCRA

If you have a *bona fide* need to care for a family member who is quarantined under a government order or the advice of a health care professional, you may be eligible for up to ten (10) days of emergency paid sick leave offered by the FFCRA, at two-thirds of your regular rate of pay, not to exceed \$200/day or \$2,000 in total. This leave expires on Dec. 31, 2020. *See: Families First Coronavirus Response Act: Employer Paid Leave Requirements* at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

FMLA

Twelve weeks of unpaid leave under the FMLA may be available if you meet eligibility requirements and you are caring for an immediate family member (i.e., spouse, child, or parent) who suffers from a "serious health condition" as defined by the FMLA. *See: Family and Medical Leave (FMLA)* at: <https://www.dol.gov/general/topic/benefits-leave/fmla>

10. What if I have anxiety or another mental health condition that has been exacerbated by the COVID-19 pandemic?

Certain mental health conditions like anxiety disorders, obsessive-compulsive disorder, or PTSD are considered disabilities if they substantially limit one or more major life activities. You will need to have a diagnosed mental health impairment. General concern about COVID-19 or apprehension about returning to the workplace does not entitle an employee to reasonable accommodations under the ADA.

11. What is a reasonable accommodation?

A reasonable accommodation is any change in the work environment, or the way things are customarily done, that enables a qualified individual with a disability to enjoy equal employment opportunities. Reasonable accommodations to mitigate COVID-19 exposure might include:

-Installing a plexiglass shield, additional cleaning of surfaces, extra space for social distancing, moving a desk or workstation farther away from other workers, or staggering work hours or work breaks to reduce contact with other employees;

-Working remotely;

-Temporary use of sick leave or other paid or unpaid leave; examples include sick leave, other leave including disability leaves available under your CBA or employer's policies, unpaid FMLA leave, or other approved unpaid leaves of absences, additional unpaid personal leave at the employer's discretion.

12. Do I have to provide a letter from my doctor when I make the request for a reasonable accommodation?

You are not required to provide medical documentation at the time that you request the accommodation, but the employer may ask for it to determine if you have a qualifying disability. Your doctor should be specific as to your limitations and the possible accommodations that will allow you to perform the essential functions of your job. If multiple accommodations are likely, they should be identified.

13. Can my employer refuse to accommodate my disability?

If the employer determines that the only reasonable accommodation available would cause an "undue hardship"—that is, if providing the accommodation would result in significant difficulty or expense, taking into account the nature and cost of the accommodation, the resources available, and the operations in place—the employer is not required to provide the accommodation.

Also, recent EEOC guidance seems to provide employers with greater leeway, due to the pandemic, in assessing whether or not a specific accommodation creates an undue hardship. Employers may now consider factors like: a sudden loss of income stream, difficulty conducting needs assessments, and difficulty removing marginal functions or providing temporary assignments.

14. Can I request leave as a reasonable accommodation?

Yes. Employers cannot immediately dismiss a period of leave as unreasonable. Instead, they must engage in the interactive process to determine the reasonableness of the request and whether it will enable the employee to perform their essential job functions in the near future. A request for indefinite and open-ended leave is never considered reasonable.

15. What if more than one accommodation exists?

If multiple accommodations work, the employer may choose which one to apply. If an employer rejects the employee's preferred accommodation and offers a different—but still reasonable—accommodation, the employee is not required to accept it. However, if the employee rejects the employer's proffered accommodation and cannot, as a result of that rejection, perform the essential functions of the position, the employee will no longer be considered a qualified individual and the employer has no further obligation. The employee may be terminated.

16. Can I request accommodations for a preexisting disability even if I have never previously requested accommodations?

Yes. Employees are not barred from seeking accommodations just because they declined to do so in the past. However, be aware that depending upon the facts and circumstances, the employer may be more likely to question the disability or the need for the accommodation. If the employer does question this, contact your UniServ Director for advice before responding to the inquiry.

17. What if my employer allowed me to telework during the COVID-19 pandemic, but is now refusing to allow me to work remotely as a reasonable accommodation?

Recent EEOC guidance explains that “[t]he fact that an employer temporarily excused performance of one or more essential functions during the COVID-19 crisis to enable employees to telework for the purpose of protecting their safety, or otherwise chose to permit telework, does not mean that the employer has permanently changed a job's essential functions, or that telework is a feasible accommodation [once schools reopen], or that it does not pose an undue hardship.”

18. What if I do not qualify for an accommodation under the ADA but I do not want to report to work due to my fear of exposure to COVID-19?

With the increase of infection in other states, periodic “outbreaks” in Vermont and concerns about a “second wave,” it is understandable that employees are nervous about the reopening of schools and have many questions. While your local association is not in control of local decision-making, it can advocate with your employer to help make sure the administration has a clear health and safety plan, explains the plan to employees, outlines the steps it will take to protect students and employees, and hears and responds to the concerns of its employees.

Vermont-NEA believes that schools should only reopen if they can do so safely. This includes properly sanitizing facilities, enforcing social distancing, and requiring all students and staff to wear facial coverings at all times. Schools should also be prepared to transition to online learning if necessary.

The COVID-19 pandemic, as well as school reopening plans will doubtless continue to evolve between now and the date that schools are to reopen. Assuming that schools do reopen, they will undertake various mitigation strategies to different degrees depending on their location and other factors. If you have an underlying medical condition that makes you susceptible to complications from COVID-19, please speak with your physician about your health and the possible return to in-person education at your school, and notify your local association and UniServ Director. Depending upon your job responsibilities and health conditions, reasonable accommodations might be possible.