

Using the EEOC's "Interactive Process" Framework to Address COVID-19 Reasonable Accommodation Requests

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Even for companies experiencing significant business interruptions due to the ongoing COVID-19 crisis, human resources and workplace compliance professionals remain hard at work, trying to support workforces that (1) may have shifted to work-from-home status for most or all employees; (2) due to the nature of the work or services provided cannot offer work from home as an option; or (3) have moved to some combination of work-from-home and on-premises staffing arrangements.

Managing requests for workplace accommodations from individuals with disabilities could be challenging even before COVID-19; now, the many new and unique issues that have arisen during the crisis have added an additional layer of complexity to the process.

The Equal Employment Opportunity Commission (EEOC) has provided written guidance, updated as recently as last week, addressing some of the COVID-19 workplace accommodations issues that many employers are facing. In addition to this new COVID-19 guidance, there is a wealth of existing EEOC enforcement guidance that may be very helpful - including the agency's long-standing "interactive process" framework for handling reasonable accommodation requests under the Americans with Disabilities Act (ADA).

In this latest installment of our "Practical Workplace Issues" series, we examine the ADA reasonable accommodations process from a COVID-19 perspective.

The Reasonable Accommodation "Interactive Process"

In addition to barring workplace disability discrimination, the ADA also imposes an affirmative obligation on employers to provide whatever reasonable accommodations are necessary, to the point of undue hardship, to enable an individual with a disability to (1) access the employer's hiring and selection process on a nondiscriminatory basis (i.e., equal opportunity in the application process); (2) perform the essential functions of his or her job; or (3) enjoy all the terms, conditions, and privileges of employment to the same extent as nondisabled employees.

The EEOC has said that the best way to successfully address an individual's request for a workplace reasonable accommodation is for the employer and the employee to engage in "a flexible, interactive process" to identify options and implement a workable and effective solution.

It has outlined the following four-step process for considering requests for workplace reasonable accommodations that involves:

1. **Analyzing** the job in question to determine its essential functions;
2. **Consulting** with the employee to determine the nature of his or her disability, what job-related limitations it poses, and how those limitations may be addressed through reasonable accommodations;
3. **Identifying**, in consultation with the individual, potential accommodations and assessing the effectiveness of each option; and
4. **Selecting and implementing** an accommodation that is reasonable and effective, taking into consideration as appropriate the individual's preferred accommodation.

In its COVID-19-related guidance, the EEOC has urged both employers and employees engaging in the interactive process to be especially flexible and creative during this time.

COVID-19 and ADA Reasonable Accommodations

As has always been the case, an employer's obligation to consider reasonable accommodations extends only to individuals with an actual (or record of) disability who (1) meet the qualifications of the job and (2) are able to perform the essential functions of the position with or without reasonable accommodation.

An "actual disability" is a physical or mental impairment and substantially limits one or more major life activities, such as seeing, breathing, hearing, walking, or interacting with others - just to name a few. According to the Centers for Disease Control and Prevention, the main symptoms of COVID-19

include fever, cough, and shortness of breath. "Emergency warning signs" of a more severe infection include trouble breathing, persistent pain or pressure in the chest, new confusion or inability to arouse, and/or bluish lips or face.

So is COVID-19 infection considered a "disability" under the ADA? According to the EEOC, not yet. In other words, the EEOC has said that it is too soon to know whether an individual with coronavirus qualifies as an individual with an ADA-covered actual disability.

Nevertheless, an individual with a nondisabling condition could suffer complications - or have underlying health issues - that combine to create a disabling one for which reasonable accommodations must be considered. For instance, an individual with an underlying impairment who contracts COVID-19 could develop disabling complications for which reasonable accommodations may be needed.

What are some examples of COVID-19-related ADA reasonable accommodation requests?

There are a number of conceivable accommodations that workers with disabilities may seek in the midst and/or at the end of the COVID-19 crisis, such as telework and/or leave, or on-the-job accommodations such as modified duties, a change in work schedule, or reassignment to a vacant position:

- Due to actual COVID-19;
- Due to an underlying condition that places the individual at greater risk of contracting COVID-19 (and thus exacerbating their primary disability);
- That are necessary during the COVID-19 crisis, even if under ordinary circumstances such accommodations would be considered unreasonable or unnecessary; or
- As a renewal of a previously denied request for telework or leave based on work adjustments the employer since has offered all employees to manage the COVID-19 emergency.

Telework as a Reasonable Accommodation

An otherwise qualified individual with a disability may request, and depending on the circumstances be entitled, to work from home as a reasonable accommodation. According to the EEOC, allowing an individual to work from home constitutes an adjustment to *where* the individual's job functions are performed that may be required "if such a change is needed as a reasonable accommodation."

One important limitation that certainly applied in the pre-COVID-19 world pertains to attendance at work as an essential job function. The general consensus among the federal appeals courts to this point has been that regular and predictable attendance can be an essential function of most jobs - meaning that an individual's inability to physically be at work may render the individual unqualified, that is, unable to perform the essential functions of the job with or without reasonable accommodations.

For instance, a critical care nurse assigned to a hospital's neonatal intensive care unit cannot perform the essential functions of her job from home, which means that if she cannot come to work, she is not otherwise qualified. In addition, telework would not be reasonable under those circumstances because it would not enable the nurse to perform her essential job duties.

Now that many businesses have implemented mass work-from-home arrangements in light of COVID-19, does that mean physical presence at work no longer can be considered essential? Not necessarily, according to the EEOC, which has said:

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request - after the COVID-19 crisis has ended - to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. ... The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties after the immediate crisis has passed, or at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

Again, as noted above, a request by a nondisabled employee with confirmed COVID-19 to telework will not trigger an employer's ADA reasonable accommodation obligations (although COVID-19-related state or federal rules may apply) because COVID-19 infection, in and of itself, is not considered an actual or record of disability. If an employee discloses a preexisting disability that is exacerbated by his or her COVID-19 diagnosis, however, the employer must consider the employee's request to telework as a reasonable accommodation and allow it (1) if doing so would be reasonable and effective and (2) would not impose an undue hardship.

Leave as a Reasonable Accommodation

When someone asks for time off from work as a reasonable accommodation, the individual often (but not always) is representing that he or she is currently unable to perform *any* of the essential functions of the job and that leave is needed to enable him or her to do so once again in the near

future. According to the EEOC, leave may be needed for a number of disability-related reasons, including several that may be especially relevant to COVID-19, such as:

- Obtaining medical treatment;
- Recuperating from an illness or an episodic manifestation of the individual's disability; or
- "Avoiding temporary adverse conditions in the work environment," for example, "an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis."

But just because an employee has asked for leave - triggering an employer's obligation to consider the request - doesn't mean that the request must be granted. First, employers are under an obligation to provide *reasonable* accommodations; a request for leave of indefinite duration, for instance, likely would not be considered reasonable. Second, if there are other effective reasonable accommodations available to the employee short of leave, then the employer may choose and implement an alternative to leave.

In other words, the employer is not required to provide leave simply because it's the employee's preferred accommodation, as long as there are other alternatives that would be reasonable and effective in enabling the individual to perform the essential functions of his or her job. In the third example above, the employer might have other options available to it short of placing the employee on leave, such as temporarily relocating the employee to another floor or building on the company's campus that has not been affected by the air conditioning breakdown. Similar alternatives may be available in the COVID-19 context, such as when an employee with a compromised immune system requests leave as a reasonable accommodation so as to limit her interaction with members of the public who may be infected.

What do you do about employees who were already on leave as a reasonable accommodation and whose jobs have now been eliminated due to a COVID-19-related business downturn? Must you continue to employ those individuals?

The short answer is that **there is no categorical right under the ADA to continued employment when doing so would impose an undue hardship on business operations.** That said, an employer under those circumstances is wise to ensure that its actions are nondiscriminatory, that is, that individuals with disabilities were not singled out for layoff or otherwise disproportionately impacted.

In addition, the EEOC takes the position that "if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be

reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position."

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