

# COVID-19 Accommodation Trends Relating to Vaccination and Remote Work

October 14, 2021

## Introduction

The ongoing COVID-19 pandemic has altered the American workplace in countless ways, including with respect to workplace disability accommodation needs and issues. Since the start of the pandemic in early 2020, the U.S. has experienced 35,556,516 total cases of COVID-19 (including over 140,000 new cases associated with the Delta and other COVID-19 variants) and over 600,000 deaths.<sup>[1]</sup> While the introduction (and widespread general availability) of COVID-19 vaccines has helped reduce the incidence of serious illness resulting from COVID-19 infection, it has not eliminated the danger entirely, and there currently is no 100% effective way to prevent its transmission.

This places some individuals with disabilities – and individuals with certain underlying medical conditions, even if not currently disabling – at greater risk. It also means that employers may encounter individuals who may not have required a workplace accommodation previously but who may be at greater risk of COVID infection and therefore may be in need of one now, especially as many businesses are poised to return partially or entirely to in-person operations.

## *COVID-19 Year One: Shutdowns, Leave, Layoffs, and Remote Work*

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 a major life activity, such as, for instance, seeing, breathing, hearing, walking, or interacting with others.

At the outset of the pandemic, it was unclear whether COVID infection itself was sufficient to trigger coverage and the right to workplace accommodations under the ADA. In fact, in its initial COVID-19 guidance, the EEOC indicated that it was too soon to know whether an individual with COVID infection could or would qualify as an individual with an ADA-covered actual disability.<sup>[2]</sup> However, the agency also made clear that to the extent an individual could suffer complications – or have underlying health issues – that combine to create a disabling condition, he or she could be entitled to an ADA reasonable accommodation.

The CDC has advised since the start of the pandemic that certain individuals, including older persons and individuals (of any age) with certain medical conditions – such as diabetes, certain heart conditions, and overweight and obesity – may be more susceptible to serious illness or death from COVID-19. These risks were of particular concern prior to FDA approval (under Emergency Use Authorizations (EUA)) in December 2020 of COVID-19 vaccines.

There are many possible accommodations that workers with disabilities may seek in connection with COVID-19. These may include telework and/or leave, exemption from a vaccination mandate, and/or on-the-job accommodations such as modified duties, a change in work schedule, or reassignment to vacant position.

## Telework as a Reasonable Accommodation

### *Individuals with Disabilities*

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."

However, the general consensus among the federal courts of appeals is 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 him or her (or them) 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.

Importantly, the fact that many businesses were forced to implement mass work-from-home arrangements early into the pandemic due to the national, state, and local states of emergencies and

mandatory shutdown orders does not mean that physical presence at work no longer can be considered essential. Addressing this issue head-on, the EEOC in its COVID guidance provides:

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 continues or new accommodations under the usual ADA rules.

Conversely, there may be instances in which an individual with a disability performs best in the office, and seeks accommodations that will enable them to perform their essential job functions remotely, where remote work is required due to COVID-19. For example, an individual with a mental disorder characterized by inattentiveness, or that is exacerbated by social isolation, may face serious barriers to performing their jobs effectively from home. In other words, employers should be mindful of the possible negative impacts of a forced work-from-home arrangement on certain individuals depending on the nature of their disability.

### ***Individuals with Underlying Conditions or Who Care for Seriously Ill Family Members***

In addition to disability accommodations, employers poised for office re-openings should prepare to address COVID-19 related issues stemming from an employee's individual serious health condition, or his or her status as a caregiver to a seriously ill family member. If an employee discloses a medical condition that may not interfere with her ability to perform her job under ordinary circumstances, but which places her at higher risk of serious illness from COVID-19, the employer should discuss with the employee what options are available to enable successful performance of his or her essential job functions. These may include continued work-from-home for some period of time, modified job duties, a temporary change in work location, a shift change, leave of absence, or other adjustment that would enable the employee to safely perform her job duties.

While there is no obligation under the ADA to provide a workplace reasonable accommodation to a nondisabled employee for purposes of caring for (or protecting from COVID-19 infection) a seriously ill or disabled family member, employees may be entitled to take paid or unpaid leave under a variety of federal, state, and local workplace family sick leave laws. Employers should understand the various leave laws and entitlements that may apply to their employees and ensure that their leave procedures are adjusted to comply with those rules.

# 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."

However, simply because an employee has asked for leave – triggering an employer's obligation to consider the request – does not 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 is 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.

## COVID-19 Vaccines: Return-to-Work Game-Changer?

The availability of vaccines has not eliminated the need for COVID-related reasonable accommodations and, in fact, has prompted a number of novel ADA questions.

### *Current CDC Guidance*

The Centers for Disease Control and Prevention (CDC) has consistently advised all who are able to receive a vaccination to do so, especially individuals who are immunocompromised, including those who:

- Are in active treatment for solid tumor and hematologic malignancies;
- Have received a solid-organ transplant and are taking immunosuppressive therapy

- Have received a CAR-T-cell or hematopoietic stem cell transplant (within 2 years of transplantation or taking immunosuppression therapy);
- Suffer from moderate or severe primary immunodeficiency (e.g., DiGeorge syndrome, Wiskott-Aldrich syndrome);
- Have advanced or untreated HIV infection; or
- Are undergoing active treatment with high-dose corticosteroids (i.e.,  $\geq 20$ mg prednisone or equivalent per day), alkylating agents, antimetabolites, transplant-related immunosuppressive drugs, cancer chemotherapeutic agents classified as severely immunosuppressive, tumor-necrosis (TNF) blockers, and other biologic agents that are immunosuppressive or immunomodulatory.

To ensure they have sufficient protection against the worst effects of COVID-19 infection, the CDC is now also recommending that individuals with moderately or severely compromised immune systems (resulting from certain cancer treatments, for instance) receive a third COVID-19 vaccine dose in addition to their initial, two doses of the Pfizer-BioNTech or Moderna vaccines.

In addition to those who are severely or moderately immunocompromised, there are individuals with less serious underlying medical conditions who stand to get seriously ill, or worse, if infected, and who may be medically unable to receive any of the currently available COVID-19 vaccines.

### ***Accommodating Individuals With Disabilities Who Cannot Get Vaccinated***

There may be individuals who, due to a disability or other health-related issue, cannot be vaccinated and thus may seek workplace accommodations designed to allow them to safely perform their essential job duties. As with any other reasonable accommodation request, an employer in that situation must consider and implement an appropriate accommodation (if one exists) that is reasonable and effective in enabling the individual to perform the essential functions of the job to the point of undue hardship.

The EEOC provides several examples of possible reasonable accommodations other than telework that may enable an unvaccinated individual with a disability to perform the essential functions of his or her job in the physical workplace, such as:

- Providing additional protective equipment or taking other measures, like installing protective barriers;
- Eliminating non-essential job functions; or

- Making temporary work schedule modifications, such as, for example, implementing staggered start times to further reduce the number of employees onsite at one time.

### ***Beware of Categorical Return-to-Office Mandates***

An employer that is requiring all workers to return to the physical office must remain mindful of potential ADA compliance traps. According to the EEOC, the ADA does not allow an employer to bar an employee from the workplace “or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at ‘higher risk for severe illness’ if he gets COVID-19.” Refusing to return an individual to work due to a disability that places him or her at higher risk of COVID-related complications generally is only justified on “direct threat” grounds, per agency guidance. A direct threat is a substantial risk of significant harm to the health or safety of the employee or to others *that cannot be significantly reduced or eliminated* through a reasonable accommodation.

In determining direct threat, the employer must look at the individual’s present ability to perform the essential functions, taking into account the duration or the risk; the nature and severity of the potential harm, and the likelihood (i.e. probability) and imminence (i.e. speed or timing) of the threat. The EEOC explains:

A direct threat assessment cannot be based solely on the condition being on the CDC’s list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee’s disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence.... Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee’s own health (for example, is the employee’s disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

In its May 2021 COVID guidance updates, the EEOC addresses direct threat specifically in the context of workers who cannot get vaccinated due to disability. The agency reiterates that to the extent a vaccination mandate amounts to a safety-based qualification standard that the individual cannot meet due to his or her disability, the employer may not lawfully apply the standard unless it can show that the person would pose a direct threat.

# Utilizing the EEOC's Reasonable Accommodation “Interactive Process”

The EEOC has said that the best way to successfully address an individual's request for a workplace reasonable accommodation, including in the COVID context, is for the employer and employee to engage in “a flexible, interactive process” to identify options and implement a workable and effective solution. Indeed, employers may be able to manage even new, COVID-related reasonable accommodation issues using the EEOC's familiar “interactive process” framework, which involves four steps:

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 assess 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.

This article has been published in the *PLI Chronicle: Insights and Perspectives for the Legal Community*, <https://plus.pli.edu>.

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[1] CDC data through 8/15/2021.

[2] Although as of this writing, the EEOC has not weighed in, on July 26, 2021, the U.S. Department of Justice and Department of Health and Human Services (HHS) published joint guidance on the rights of COVID “long haulers” under the non-employment provisions of the ADA. Among other things, the guidance specifies that “long COVID” can constitute an ADA-covered disability.

## Related Practices

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## Health Care

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