

COVID-19 and the Workplace: A Guide to Successful Reopening

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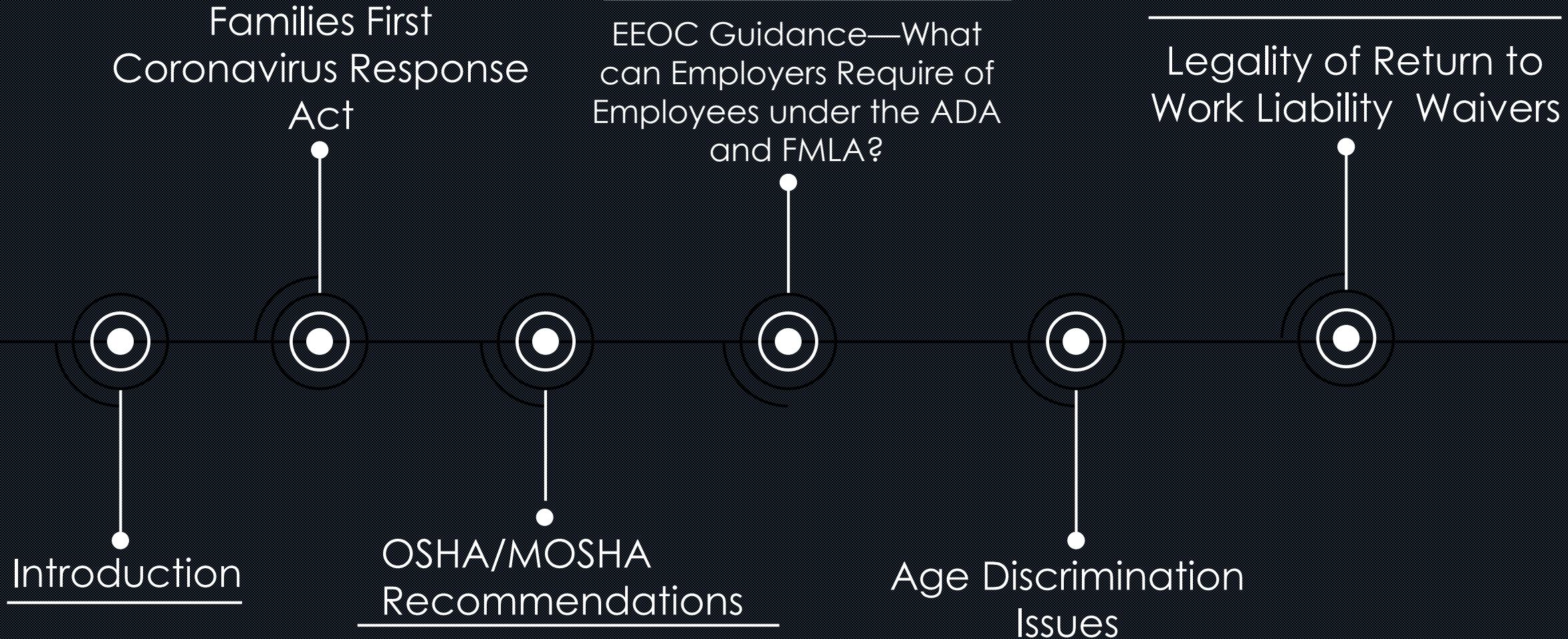
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Roadmap



Families First Coronavirus Response Act (FFCRA) Pub.L. 116-127

The Act became effective on April 2, 2020.

The intent of the act is to provide paid leave, establish free coronavirus testing, support unemployment benefits, expand food assistance for vulnerable children and families, protect front-line health workers, and to provide additional funding to states in response to the ongoing economic consequences of the pandemic.

Its provision apply from its effective date through December 31, 2020.

FFCRA – Covered Employers

- Applicability:
 - To certain public and private employers with fewer than 500 employees.
 - Employers with fewer than fifty employees are exempt from its provisions.



Requirements under the FFCRA

- All covered employers must provide all employees with
 1. Up to two weeks of paid sick leave at the employee's regular rate of pay when the employee is unable to work, quarantined, and/or experiencing COVID symptoms or is seeking a medical diagnosis.
 2. Up to two weeks of paid sick leave at two thirds of the employee's regular rate of pay, because employee is unable to work because of bona fide need to care for an individual subject to quarantine or care for a child whose school is closed.
- All covered employers must provide all employees employed for at least thirty days with
 1. Up to an additional ten weeks of paid expanded family and medical leave at two thirds the employee's regular rate of pay, where the employee is unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is unavailable for reasons related to COVID-19.

Qualifying Reasons for Leave under the FFCRA

- If an employee is unable to work or telework due to
 1. A federal, state, or local quarantine or isolation order related to COVID-19
 2. An advisement by a healthcare provider that the employee should self-quarantine in relation to COVID-19
 3. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
 4. The employee is caring for an individual subject to a quarantine or isolation order described above or an individual in self-quarantine.
 5. The employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons relating to COVID-19
 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Calculation of Pay under the FFCRA

- An employee unable to telework
 1. Due to a governmental quarantine or isolation order relating to COVID-19, advisement from a physician or healthcare worker that the employee should self-quarantine, or if the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis:
 - The employee taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).
 2. Due to the employee caring for an individual subject to a quarantine or isolation order or an individual in self-quarantine, or an employee experiencing a substantially-similar condition specified by the Secretary of Health and Human Services
 - The employee taking leave shall be paid at two thirds of their regular rate or two thirds of the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).
 3. Due to an employee's care for a child whose school is closed or childcare provider unavailable because of reasons relating to COVID-19
 - The employee taking leave shall be paid at two thirds of their regular rate or two thirds of the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a twelve-week period that includes two weeks of paid sick leave followed by up to ten weeks of paid expanded family and medical leave).

Prohibition Against Discrimination under the FFCRA.

- An employer may not discharge, discipline, or discriminate against any employees that take paid sick leave under the FFCRA and files a complaint or brings action pursuant to any of its provisions.

OSHA/MOSHA Guidance on Preparing Workplaces for COVID-19

The Occupational Safety Health Act requires employers to comply with safety and health standards promulgated by OSHA.

Specifically, Section 5(a)(1) of the Act, known as the "General Duty Clause," requires "employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm."

Steps all Employers can Take to Limit Employee Exposure to COVID-19

1

Develop an Infectious Disease Preparedness and Response Plan.

2

Prepare to Implement Basic Infection Prevention Measures.

3

Develop Policies and Procedures for Prompt Identification and Isolation of Sick People.

4

Develop, Implement and Communicate about Workplace Flexibilities and Protections.

5

Implement Workplace Controls.

Develop an Infectious Disease Preparedness and Response Plan



Make sure to stay informed on the latest guidance from federal, state and local authorities, as recommendations frequently change.



Evaluate levels of risk associated with opening/operating different worksites and further evaluate the level(s) of risk associated with specific job duties and assignments.



Consider employees' individual risk factors (e.g., older age, presence of chronic medical conditions, immunocompromising conditions and pregnancy).



Develop contingency plans to account for the possibility of spikes or additional waves of the virus.

Prepare to Implement Basic Infection Prevention Measures

- Promote frequent and thorough handwashing.
- Encourage employees to stay home if they feel sick.
- Encourage respiratory etiquette, including covering coughs and sneezes and provide tissues and trash cans.
- Discourage employees from using other employees' phones, desks, offices or other work tools or equipment.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment and other elements of the work environment.

Develop, Implement, and Communicate About Workplace Flexibilities and Protections

- Actively encourage sick employees to stay home.
- Ensure that sick leave policies are flexible and consistent with public health guidance. Further, communicate these policies so that employees are aware.
- Do not require a healthcare providers note for employees who are sick with acute respiratory illness to validate their illness or return to work.
- Maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay home to care for sick children or other sick family members than usual.

Implement Workplace Controls

Administrative Controls

- Encourage sick workers to stay home.
- Minimize contact among workers, clients, and customers by replacing face-to-face meetings with virtual communications (including telework).
- Establish alternating days or extra shifts that reduce the total number of employees in a facility at a given time.
- Discontinue non-essential travel.
- Develop emergency communications plans.
- Provide workers with up-to-date education and training (including training workers on how to properly utilize protective equipment).
- Require employees to wear face cloth face coverings in common areas.

Implement Workplace Controls

Engineering Controls

- Install high-efficiency air filters.
- Increase ventilation rates in the work environment.
- Install physical barriers, such as clear plastic sneeze guards and drive-through windows.
- Close common areas where employees are likely to congregate and interact.
- Place hand sanitizer at the building entrance and throughout the office.
- More thorough cleaning and sanitization of the office.

OSHA- Revised Enforcement Guidance for Recording Cases of COVID-19

OSHA requires employers to record employees infected with COVID-19 if

- The CDC confirms an employee has COVID-19; or
- The case is “work-related” under 29 CFR § 1904.5; or
- If the case involves one or more general recording criteria as set forth in 29 CFR § 1904.7.

29 CFR § 1904.7 implicates situations where an illness results in

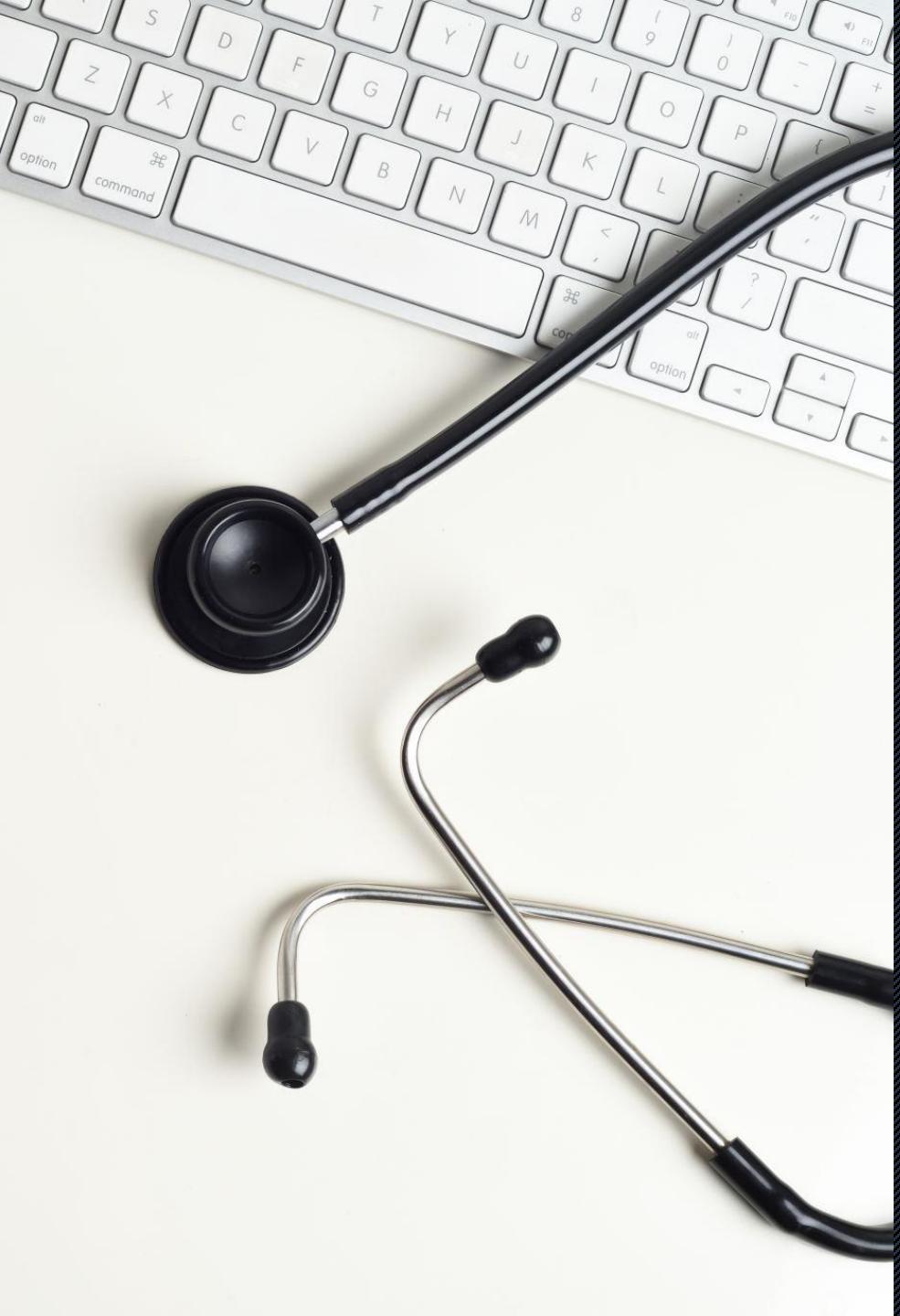
- The employee’s death;
- The employee missing work;
- The employee being put on restricted work or transferred to another job;
- The employee requiring medical treatment beyond first aid;
- The employee losing consciousness; or
- The employee suffering from a significant injury or illness diagnosed by a physician or other licensed healthcare professional.



EEOC GUIDANCE—WHAT CAN EMPLOYERS REQUIRE OF EMPLOYEES?

The Americans with Disabilities Act (ADA)

- General Rule → “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112 (2012).
- An inquiry is “disability related” if it is likely to elicit information about a disability. Equal Employment Opportunity Comm’n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, § B.1 of “General Principles” (2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4>.
- A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. *Id.* at § B.2 of “General Principles.”



When are medical examinations permissible?

- A covered entity “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 122112 (d)(4)(A) (2012).

Can Employers Require a Temperature Check Before Entering the Workplace?

- Generally, yes.
- This will be considered a medical examination but since the CDC, along with State and local health officials, have acknowledged the community spread of COVID-19, this will be considered “job-related” or “consistent with business necessity.”
- Employers may also verbally ask employees if they have COVID-19 or symptoms associated with the novel virus. However, the employer cannot ask about the employee's family members.
- The ADA allows an employer to bar an employee from the workplace if they refuse to have their temperature taken.

When an Employee Refuses to Submit to a Temperature Check or Answer Screening Questions

- Under the ADA, the employer may permissibly bar the employee from entering the workplace if an employee refuses to submit to a temperature check or answer screening questions relating to COVID-19 symptoms.
- In most instances, the employer should attempt to inquire as to the reason for the employee's refusal and explain that the procedures are in place to ensure a safe working environment to assuage the employee's concerns.

What Should an Employer do When an Employee Entering the Worksite Requests an Alternative Method of Screening Based on a Medical Condition?

- Such a request would constitute a request for accommodation under the ADA or the Rehabilitation Act.
- If the disability is not apparent or not already known to the employer, the employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation.
 - An employer, if necessary, may also request medical documentation to support the employee's request and then determine if an accommodation or alternative effective accommodation can be provided, absent undue hardship.
- When an employee requests an alternative method of screening as a religious accommodation, the employer should determine if such accommodation is available under Title VII.

May an Employer Require Employees to Take a COVID-19 Test Before Entering the Workplace?

- Yes.
- This is a permitted medical examination because an individual with the virus could pose a serious threat to the health of other employees or third-parties associated with the business.
- Even with testing, employers should follow guidance on infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace.

May an Employer Determine Whether an Employee may Return to Work Based on the Results of a COVID-19 Antibody Test?

- No.
- Although an antibody test is considered a medical examination under the ADA, the Center for Disease Control (“CDC”) does not permit its use in this context.
- In an interim guideline, the CDC indicated that COVID-19 antibody tests should not be used to determine whether an employee should return to the workplace.
- In that guideline, the CDC made clear that COVID-19 antibody tests do not satisfy the ADA’s “job related and consistent with business necessity” standard applicable to medical examinations or inquiries for current employees.

May an Employer ask Screening Questions to or Request a Temperature Check Only from a Specific Employee, Instead of All Employees?

- Generally, no.
- Under the ADA, an employer may only single out an individual employee for screening questions or temperature checks if
 - The employer has a reasonable belief based on objective evidence that the employee may have COVID-19.
 - For instance, if an employee is presently displaying symptoms associated with COVID-19, the employer would likely be entitled to ask screening questions or take a temperature check from an individual employee, without requiring others to submit to the same.

May an Employer Require Employees to Take a COVID-19 Test Before Entering the Workplace?

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Can Employers Require a Doctor's Note Certifying an Employee's Fitness for Duty?

- Yes.
- According to the EEOC, these inquiries are permitted because they are either non-disability related, or because of the pandemic, would be justified under ADA standards.
- The EEOC does note, as a practical matter, that healthcare professionals may be too busy to conduct these examinations during a pandemic, making it necessary to permit alternate fitness-for-duty evaluations.
- Suitable alternatives include reliance on local clinics to provide a form, stamp, or email to certify that the individual does not have COVID-19.

Employee Travel During the Pandemic

- Asking employees questions concerning recent travel does not constitute a disability-related inquiry under the ADA.
- If the Center for Disease Control or state/local health officials recommend that individuals traveling to or from specific areas engage in self-quarantine for a period of time upon their return.
 - An employer may ask whether the employee has traveled to or returned from one of these locations, even where the travel was not work related, *i.e.* personal travel.

Confidentiality of Medical Information

An employer is permitted to store COVID-19 related medical information (such as test results and temperature readings) in existing medical files.

Under the ADA, all medical information must be stored separately from the employee's personnel file to limit access to confidential information.

An employer is not permitted to specifically name an employee who has tested positive for COVID-19; however, the employer can provide information to potentially exposed employees that they have been in contact with someone who has tested positive.

Employers can disclose the name of an infected employee to a public health agency.

Hiring and Onboarding

An employer can take a job applicant's temperature as part of a post offer, preemployment medical exam.

An employer is permitted to delay the start date of an applicant who has symptoms or has tested positive for COVID-19.

If a candidate has COVID-19 and cannot start on time, and the employment position demands that they begin immediately, the employer is able to withdraw the offer of employment.

THE ADA AND REASONABLE ACCOMMODATIONS

The ADA and Reasonable Accommodations

- At this time, the EEOC has not definitively said whether the Coronavirus is a protected disability under the ADA but has issued substantial guidance as to reasonable accommodations available.
- Under the ADA, an employer can not discriminate against an employee for a failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. . . .” 42 U.S.C. § 12112(b)(5)(A) (2012).
- A reasonable accommodation may include “job restructuring, part-time, or modified work schedules.” 42 U.S.C. § 12111(9)(B) (2012).

Verifying an Underlying Disability

- The nature of the virus suggests that it may exacerbate underlying medical conditions.
- When an employee requests a reasonable accommodation, an employer may verify the existence of the underlying disability. The EEOC has advised that overcapacity in medical facilities may prolong this process. If a delay occurs, the employer should consider providing a temporary accommodation.
- As with any request for reasonable accommodation, the employer should consider whether a reasonable accommodation would pose an undue hardship, meaning that the employer may look at the specific accommodation requested and gauge the difficulty of the accommodation.

What if the Job can Only be Performed at the Workplace?



The EEOC advises that there may still be a reasonable accommodation even if the job can only be done on the worksite.



The EEOC recommends utilizing low-cost solutions and implementing policies to change the work environment.



Potential low-cost solutions include using plexiglass, tables, or other barriers to ensure minimum distance between employees.



The EEOC also recommends that employers be flexible in determining if an accommodation is possible. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift adjustment can also be reasonable accommodations.

Additional Accommodations and the Interactive Process

- Due to the pandemic, employees with a previous accommodation may be entitled to additional or altered accommodations, absent undue hardship to the employer.
- Employers are still encouraged to engage in the interactive process to accommodate their employees.
- The interactive process advises that employees ask questions such as (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of his or her duties.
- Employers can also survey employees before reopening to determine if an accommodation will be necessary once the business reopens.

Pregnancy Accommodations During a Pandemic

- An employer may not involuntarily exclude an employee from the workplace because of pregnancy, even if motivated by benevolent reasons.
- Sex discrimination under Title VII of the Civil Rights Act of 1964 includes discrimination based on pregnancy.
- Pregnant employees are likely entitled to a reasonable accommodation under either the ADA or Title VII as amended by the Pregnancy Discrimination Act

The End of Temporary Accommodations

- If there are not disability related reasons for an accommodation, the employer does not have to provide that accommodation.
- As such, an employer under the ADA has no obligation to excuse employees from performing essential job functions.
- For example, a business that is allowing telework does not have to continue to provide that option once the public health emergency has ended.
- When the employer deems the temporary accommodation no longer necessary, the employer can then evaluate any requests for continued or new accommodations under the usual ADA rules.

The Crossroads between the FMLA and ADA

The FMLA allows eligible employees to take twelve (12) weeks of leave during any twelve-month period for a “serious health condition that makes the employee unable to perform the functions” of their job. 29 U.S.C. § 2612(a)(1)(D) (2012).



An employee is eligible if the employee has been employed—“(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2)(a) (2012).



An eligible employee is entitled to return to employment with the same position, or a position that has equivalent employment “benefits, pay, and other terms and conditions.” 29 U.S.C. § 2614 (a)(1)(A-B) (2012).



What should we do with an employee who has exhausted FMLA but has not been able to have surgery due to COVID-19?

AGE DISCRIMINATION AND COVID-19

The ADEA

- The ADEA makes it unlawful "for an employer" to "fail or refuse to hire" or "otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (2012).
- The CDC has explained that persons over the age of 65 are at a higher risk of developing a severe case of COVID-19 if they contract the virus.
- The ADEA prohibits an employer from excluding an employee from the workplace even if the exclusion is made for benevolent reasons, such as protecting a high-risk employee.
- While the ADEA does not include a right to a reasonable accommodation, employers are free to provide flexibility to workers over the age of 65, even if that results in workers age 40-64 being treated less favorably.
- It is important for employers to remember that an individual 65 years of age or older may have a qualifying disability that also brings them within the reach of the ADA.

COVID-19 LIABILITY WAIVERS

Liability Waivers

- Many employers have begun to require employees sign a COVID-19 return to work waiver.
- Several states, but not Maryland, have enacted legislation that would exclude employers from liability when an employee contracts COVID-19 in the workplace. Legislation has also been proposed in Congress to limit liability for large sectors of the workplace.
- Employees cannot waive their Workers' Compensation Law rights.
- Employers cannot waive liability for gross negligence, reckless conduct, willful/wanton conduct or intentional acts.
- Due to the novel nature of COVID-19, it is currently unclear if courts will recognize these waivers, or how they will be interpreted.



Thank you!

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