

COVID-19 and Return to Work Issues

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Equip For Equality

- ▶ Protection and advocacy (P&A) system for the State of Illinois
- ▶ **Mission:** Advance the human & civil rights of people with disabilities in Illinois
- ▶ **Free legal assistance** for people with disabilities about issues related to their disability
- ▶ **Legal teams:** Civil Rights, Special Education, Abuse Investigations

Voice: 800.537.2632 TTY: 800.610.2779
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Employment Rights Helpline

- ▶ For job seekers and employees with disabilities
- ▶ Helpline staff can:
 - ▶ **Discuss** employee rights under the ADA
 - ▶ **Answer** employment rights questions
 - ▶ Assist with **reasonable accommodations**
 - ▶ Help callers understand their **options**
 - ▶ Share **fact sheets** , **sample letters** and **forms**
 - ▶ Give **referrals** and other assistance as needed

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Topics

- ▶ Overview of the ADA
 - ▶ Who is covered by the law
- ▶ Common Questions
 - ▶ Returning to Work
 - ▶ Returned to Work
 - ▶ Association Discrimination
- ▶ Resources
- ▶ Questions
 - ▶ Facebook feed
 - ▶ Email:
contactus@equipforequality.org





Americans with Disabilities Act

- ▶ Federal civil rights law
- ▶ Title I: Employment
- ▶ Applies to private employers with 15+ employees and all public employers
- ▶ Protects people with “disabilities” as defined by the ADA
- ▶ Has some protections for people who are “associated” with people with disabilities

I am “high risk” if I contract COVID-19. Am I covered by the ADA?

The ADA protects **some** people who are at high risk of serious complications due to COVID

Definition of “disability ” under the ADA:

- ▶ **Actual Disability**
 - ▶ An individual who has an **impairment** that **substantially limits a major life activity**
- ▶ **Record of**
 - ▶ **Record of** or **history of** an actual disability
- ▶ **Regarded As**
 - ▶ **Perceived** to have an impairment

Increased risk of severe illness

If your risk is based on an underlying medical condition/impairment, then you are probably covered by the ADA:

- ▶ **Examples** from CDC guidelines updated 12-23-20
- ▶ Cancer, chronic kidney disease, COPD, Down Syndrome, immunocompromised state from solid organ transplant, serious heart condition, sickle cell disease, type 2 diabetes

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

Increased risk of severe illness

If your risk factor is **not** an underlying impairment, then you are probably not covered by the ADA:

- ▶ **Age (65+):** Not protected by the ADA
- ▶ **Pregnancy:** Pregnancy-related impairments (ex: gestational diabetes) = impairments under the ADA
 - ▶ Pregnancy in and of itself = not impairment
 - ▶ Tip: Illinois Human Rights Act requires certain accommodations for pregnant workers
- ▶ **Obesity:** Most courts have held that obesity without an underlying condition is not an impairment
- ▶ **Tip: Consider other risk factors to support request**

Common Scenario

- ▶ You have a disability that puts you at high risk of severe complications if you get COVID-19
- ▶ Your workplace has been closed (or has been work-from-home) during COVID-19
- ▶ You have been asked to come back to work

What should you do?

What are your options?



Option 1: Return to work without requesting formal accommodations

Consider what the work site will look like when you return. Discuss with your healthcare professional.

- ▶ Is your employer distributing the PPE you need for your disability to everyone?
- ▶ Is workplace already set up to keep employees safe?
- ▶ Examples: Large building? Space between employees? No direct communication with clients, customers, patients, public?
- ▶ Are you comfortable disclosing your disability?

Option 2: Return to work with a reasonable accommodation

Examples of common COVID-19 accommodations

- ▶ Personal protective equipment (PPE)
 - ▷ PPE itself may need to be accommodated
 - ▷ Ex: clear face masks; non-latex gloves
- ▶ Changes to the physical worksite
 - ▷ Add space between work stations; create barriers with plexiglass; one -way aisles
- ▶ Modifying job duties or shifts
 - ▷ Removing non-essential tasks - only performing tasks that can be performed off - site or while social distancing

Option 2: Focus on Telework

Do you have a right to continue to telework?

It depends. Questions to consider:

- ▶ When you worked from home, did you perform **all** essential functions of the job?
- ▶ How did telework impact your workplace and the ability for others to get work done?

Helpline fact sheet about telework:

<https://www.equipforequality.org/telework/>

Option 2: Reasonable Accommodation Process

You request reasonable accommodation

- ▶ Put request in writing; use phrase “reasonable accommodation under the ADA”; keep copy of request

Employer then initiates the interactive process

- ▶ Can request reasonable medical documentation
- ▶ Preferred v. effective accommodations
- ▶ Employers can always do more than the ADA requires
- ▶ The interactive process is ongoing – needs change
- ▶ Consider short-term/trial accommodations
<https://askjan.org/topics/Temporary-Accommodations.cfm>
- ▶ Helpline fact sheet about reasonable accommodations:
<https://www.equipforequality.org/request-accommodation/>

Option 3: Return to work in a different job (reassignment)

Reassignment is the accommodation of “last resort”

- ▶ Best to accommodate in current position

Reassignment is a good option if:

- ▶ Vacant position exists (not required to create job)
- ▶ Position would make it possible for you to work (perhaps better suited for social distancing or telework)
- ▶ You are qualified for position; not a promotion
- ▶ Position is not subject to bona fide seniority system

Option 3: Return to work in a different job (reassignment)

If there is a vacant position, and certain conditions are met, employers generally must place you in the job

- ▶ **Tip:** Identify specific position and request to be placed in the position as a reasonable accommodation
- ▶ Given temporary nature of COVID pandemic, you could request temporary reassignment

Helpline fact sheet about reassignment:

<https://www.equipforequality.org/reassignment/>

Option 4: If there is no safe way to return, consider leave

Employer policies

- ▶ Some employers have internal policies offering a medical or personal leave

Families First Coronavirus Relief Act (FFCRA)

- ▶ Expired on 12-31-2020; Voluntary until 3 -31-2021
- ▶ Provided two-weeks sick leave + expanded FMLA under certain circumstances
- ▶ Applies to employers between 50 -500 employees and public employers
- ▶ https://www.dol.gov/agencies/whd/pandemic/ffcra_questions -

Option 4: If there is no safe way to return, consider leave

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 –including COVID-19
- ▶ **Caution:** FMLA does *not* require employers to provide FMLA for the purpose of *avoiding exposure* to COVID-19

Leave as an ADA accommodation

- ▶ ADA potentially provides unpaid leave; courts have limited ADA leave to no more than a couple of weeks
Limit: Only applies to employees, not family members (compare FMLA)

Option 5: Consider unemployment insurance

- Employees *maybe* eligible for unemployment insurance if they cannot return to work due to a medical condition
- Employees should seek legal advice about rights to unemployment before deciding not to return to work
 - Many legal aid organizations are offering helplines about unemployment insurance

Returned to Work: Medical Exams and Inquiries

General Rule: Employers can only ask employees for **disability information** or perform **medical tests** if it is **job-related** and **consistent with business necessity**

Questions during COVID -19:

- ▶ **Can ask** if employees are experiencing symptoms of COVID-19 (ex: fever, chills, cough)
- ▶ **Cannot ask** employees unrelated medical questions
- ▶ **Cannot only** ask these questions of people with disabilities



Returned to Work: Medical Exams and Inquiries

Exams during COVID -19:

- ▶ Can take employees' temperature
- ▶ Can administer COVID-19 test (per EEOC, permitted due to the CDC's stated precautions to determine if someone would pose a direct threat)
- ▶ Cannot only perform these tests on people with disabilities
- ▶ Cannot require antibody testing (per EEOC, not job-related and consistent with business necessity)

Must keep all medical information confidential

Returned to Work: Masks

Common question: My employer requires all employees to wear masks. I cannot wear one due to a disability. Can I be excused under the ADA?

- ▶ Generally, employers can require employees to wear masks if necessary to protect health/safety of others
- ▶ **But** if you cannot wear a mask due to a disability, your employer should consider:
 - ▶ Is it necessary to protect health/safety of others?
(Ex: Do you work in an isolated workspace?)
 - ▶ Are there any accommodations that would enable you to keep working?

Returned to Work: Vaccines

Similar question and similar answer

- ▶ Employers are generally able to impose safety - based requirements, like vaccine requirements
- ▶ If the vaccine requirement would screen out an employee with a disability, employer will need to consider:
 - ▶ Whether it is truly necessary for the safety of the workplace?
 - ▶ Whether accommodations would mitigate any risk?



ADA Association Discrimination

Common question: I do not have a disability, but my child does and is at increased risk for serious complications. Does the ADA help me?

No reasonable accommodation. Unfortunately, the ADA's accommodation requirements only apply to the person with a disability.

But the ADA's general non-discrimination principles still apply. If other employees offered to telework or take leave for any reason, cannot treat you differently because your need is related to someone with a disability



Resources

- ▶ **EEOC:** [What You Should Know About COVID19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- ▶ **JAN:** [Job Accommodation Network page with resources on COVID19](#)
- ▶ **ADA National Network:** [Disability & Covid - 19/Employment Website](#)
- ▶ **CDC:** [Guidance for Businesses and Employers Responding to Coronavirus Disease](#)
- ▶ **EFE Employment Rights Helpline:** [COVID19 & Return to Work Issues](#)

Questions?

Employment Rights Helpline

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We love feedback:

<https://www.surveymonkey.com/r/NTPJ8Q3>

