

How to Accommodate At-Risk Workers

By Allen Smith, J.D.

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The Equal Employment Opportunity Commission (EEOC) has updated its guidance (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>) on COVID-19 and the Americans with Disabilities Act (ADA), clarifying how to accommodate individuals who are at high risk for severe illness from the coronavirus.

If an employee with a disability who is at high risk requests an accommodation, the EEOC noted that the employer may discuss with the employee:

- How the disability creates a limitation. The employer may request medical documentation of a disability that isn't obvious, including health records or prescriptions if doctors are difficult to reach, said Barry Hartstein, an attorney with Littler in Chicago.
- How the requested accommodation will effectively address the limitation.
- Whether another accommodation could solve the issue.
- How the proposed accommodation will enable the employee to continue performing the job's essential functions.

"On the other hand, in the event that an employer is considering keeping an employee out of the workplace because the employee is part of the higher-risk group, the rules are far stricter," Hartstein said.

Direct-Threat Standard

In such circumstances, the EEOC requires:

- Application of the "direct-threat standard." Under this standard, an employee must pose a direct threat to himself or herself or to others to be excluded from the worksite. The EEOC defines direct threat in its guidance on pandemics and the ADA (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>) as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
- An individualized assessment based on reasonable medical judgment about the employee's disability—not the disability in general—using the most current medical knowledge and the best available objective evidence.

Even if an employee's disability poses a direct threat, the EEOC expects employers to consider potential reasonable accommodations, Hartstein emphasized.

The first goal is to find a way, through discussions with the employee, to return him or her to work while still performing essential job functions. If that fails, the employer should consider other types of accommodations, such as telework, leave or reassignment, he said.

Barring an employee from the workplace is a last resort, Hartstein said.

At-Risk Workers

According to the U.S. Centers for Disease Control and Prevention (CDC), employees with conditions that put them at a higher risk for severe illness from the coronavirus include individuals who are immunocompromised as well as people with:

- Chronic kidney disease who are undergoing dialysis.
- Chronic lung disease.
- Diabetes.
- Liver disease.
- Moderate to severe asthma.
- Severe obesity (body mass index of 40 or higher).

The CDC provides that many conditions can cause a person to be immunocompromised, including:

- Bone marrow transplantation.
- Cancer treatment.
- Immune deficiencies.
- Organ transplantation.
- Poorly controlled AIDS or HIV.
- Prolonged use of corticosteroids and other immune-weakening medications.

There are many conditions, physical and mental, that could put someone at higher risk of severe illness, said David Fram, director of ADA services with the National Employment Law Institute, headquartered in Golden, Colo.

Randi Kochman, an attorney with Cole Schotz in Hackensack, N.J., said, "Employers should note that the EEOC makes express reference to employers' potential need to accommodate employees with pre-existing mental health disorders that may be exacerbated by COVID-19."

What If the Employee Does Not Request an Accommodation?

The EEOC guidance suggests that employers should not ask an employee if he or she has an underlying medical condition unless and until the employee puts the employer on notice of the condition, said Eve Klein, an attorney with Duane Morris in New York City.

If the worker does not request a reasonable accommodation, the ADA does not require that the employer discuss or provide accommodations.

But "once an employer is on notice of the employee's medical condition, it is advisable to inquire if the employee needs an accommodation in order to perform the essential duties" of his or her position, she said. "Certain state and local laws hold employers to a higher standard in this regard."

Requests for accommodation also may be made by third parties, such as doctors, spouses or friends, said Robin Samuel, an attorney with Baker McKenzie in Los Angeles.

Klein said some employees are requesting accommodations to lower their risk of contracting COVID-19 and exposing a high-risk individual they live with or care for. "Employers are generally not required by law to honor such an accommodation request, but many are attempting to do so when practicable," she said.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Managerial Training

"Managers should be trained on current CDC and local health department guidance so that they understand the seriousness of this pandemic and the risks exposure may pose to immunocompromised and other more-vulnerable employees," Klein stated.

She urged employers to train managers on the confidentiality requirements for all medical information received from employees.

In addition, she said managers should be taught that the consideration and provision of accommodations requires discussion with employees and flexibility by employers whenever possible.

Klein said managers should be aware of the proper protocol for responding to an employee's accommodation request, including who to contact.

Responsive Process

An employer may wish to designate a person or group of people to deal with requests from employees who do not wish to return to work, said Chai Feldblum, an attorney with Morgan Lewis in Washington, D.C., and a former commissioner at the EEOC. "Some employees will have legal rights under the ADA or paid-leave laws, while others will not," she noted.

"Even for those without legal rights, it will be useful for employers to have a process for providing alternative workplace arrangements that takes into account both legal and business needs."

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