

COVID-19 PANDEMIC

REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)

Prepared by the Texas State Teachers Association Legal Division
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INTRODUCTION

Gov. Abbott declared a disaster emergency in response to COVID-19, a novel coronavirus declared as a global pandemic by the World Health Organization. This emergency has been and remains unprecedented. As we reopen, COVID-19 cases are increasing in the state, and it is possible that we may still face a second wave of the virus.

In the meantime, public schools are planning for a new school term. We know that TSTA members have many questions about returning to work, and that members who have underlying medical conditions may be especially concerned since they may be at higher risk for severe illness should they contract COVID-19.

This Q&A explains the Americans with Disabilities Act and when members with underlying illnesses may request reasonable accommodations under that Act. If, after reviewing this Q&A, you believe you may be entitled to a reasonable accommodation, please contact the TSTA Help Center at 877-ASK-TSTA (877-275-8782).

1. Who is at “high risk” for complications related to COVID-19?

According to the CDC, individuals at high risk for severe illness from COVID-19 include people age 65+ and individuals of all ages with the following underlying medical conditions: chronic kidney disease; COPD; immunocompromised state from organ transplant; obesity (BMI 30+); serious heart conditions such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; and Type 2 diabetes. *See: Coronavirus Disease 2019: Who Is at Increased Risk for Severe Illness?* (updated June 25, 2020) at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

2. Who is potentially at “high risk” for complications related to COVID-19?

The CDC explains that people with the following conditions *may* be at increased risk: moderate-to-severe asthma; cerebrovascular disease; cystic fibrosis; hypertension; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; and Type 1 diabetes. *See: Coronavirus Disease 2019: Who Is at Increased Risk for Severe Illness?* (updated June 25, 2020) at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

The CDC has identified a recent study suggesting that pregnant women with COVID-19 are “more likely to be hospitalized and are at increased risk for intensive care unit (ICU) admission and receipt of mechanical ventilation.” *See: Coronavirus Disease 2019: Pregnancy Data* (updated July 9, 2020) at:

<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html>.

3. What should I do if I am at high risk of complications due to COVID-19?

If your underlying medical condition qualifies as a disability under the Americans with Disability Act, you may request that your employer provide a reasonable accommodation so that you are able to perform the essential functions of your position. Employers are not required to provide accommodations if, even with the requested accommodation, the employee would still be unable to perform a job's essential functions.

4. What is the Americans with Disabilities Act (ADA)?

The ADA, enacted in 1990 and amended in 2008, is a federal law prohibiting discrimination based on disability (or the record or perception of a disability), and ensuring that people with disabilities “have the same opportunities as everyone else to participate in the mainstream of American life — to enjoy employment opportunities, to purchase goods and services, and to participate in state and local government programs and services.” *See: Introduction to the ADA* at: https://www.ada.gov/ada_intro.htm.

Under the ADA, a “qualified individual” with a “disability” is entitled to a “reasonable accommodation.” Employers do not have to provide any accommodation that poses an “undue hardship.” *See: The ADA: Questions and Answers* (issued May 1, 2002) at: <https://www.eeoc.gov/laws/guidance/ada-questions-and-answers>.

5. What is a qualifying disability under the ADA?

A qualifying disability is a “physical or mental impairment” that “substantially limits one or more major life activities.” The impairment does not have to be permanent but may be transitory (lasting less than 6 months). *See: 29 C.F.R. 1630.2(j)(1)(ix)* (the “effects of an impairment lasting or expected to last fewer than six months can be substantially limiting”).

Physical or mental impairments include:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

Any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major life activities include:

Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

See: 29 C.F.R. § 1630.2(i)(1)(i), (ii).

6. How do I know if I have a qualifying disability?

The Equal Employment Opportunity Commission (EEOC), which enforces the ADA, has said that individuals with cancer, diabetes and HIV/AIDS “should easily be found to have a disability” within the definition of ADA.

Other risk factors for COVID-19 identified by the CDC may or may not be qualifying disabilities depending upon the degree of impairment and the impact on major life activities.

7. Is COVID-19 a qualifying disability?

The EEOC stated in a March 27, 2020 Outreach Webinar that it is unclear if COVID-19 is a disability under the ADA. See: *Transcript of March 27, 2020 Outreach Webinar* at: <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>.

If you are subject to a government quarantine or isolation order, have been advised by a health care provider to self-quarantine, or have COVID-19 symptoms and are seeking a diagnosis, you may be eligible leave offered by the Families First Coronavirus Response Act (FFCRA). This leave expires as of Dec. 31, 2020. It must be offered by all government employers and private sector employers who have fewer than 500 employees, although certain provisions may not apply to employers with fewer than 50 employees. See: *Families First Coronavirus Response Act: Employer Paid Leave Requirements* at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

You may use accrued leave, and may be entitled to up to 12 weeks of unpaid leave under the Family and Medical Leave Act (FMLA) if you meet eligibility requirements and are suffering from a “serious health condition” as defined by the FMLA.

Contact the TSTA Help Center for assistance with leave requests.

8. Are there risk factors identified by the CDC that are not qualifying disabilities?

Yes. Please see below.

Age – Age alone is not considered a disability under the ADA. Although employees over 40 years of age are protected under the Age Discrimination in Employment Act (ADEA), the ADEA does not include the right to reasonable accommodations. The EEOC has stated that “employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.” If you are 65 or older, you should speak with your doctor about any underlying medical conditions that could provide a basis for a reasonable accommodation.

Pregnancy – Although pregnancy itself is not a qualifying disability under the ADA, certain pregnancy-related medical conditions may be. If you are pregnant, you should speak to your doctor regarding any pregnancy-related medical conditions that could provide a basis for a reasonable accommodation.

Obesity – Generally, physical impairments under the ADA do not include features like eye color, height, or weight. Severe obesity in and of itself is likely not a disability. However, if an employee’s severe obesity is caused by an underlying disorder or condition that qualifies as a disability under the ADA, then the employee would be able to seek accommodations for any limitations resulting from that disability, including limitations arising from the employee’s severe obesity. If you have severe obesity (*i.e.*, have a Body Mass Index of 30 or higher), you should speak to your doctor regarding any underlying medical conditions that could provide a basis for a reasonable accommodation.

Smoking – Tobacco usage is not protected under the ADA. However, certain conditions caused by smoking—*e.g.*, lung cancer—may be considered disabilities. If you are a smoker, talk to your doctor about any underlying medical conditions that could provide a basis for a reasonable accommodation.

9. What if a family member or someone I live with is considered high risk?

Although the ADA prohibits discrimination based on association with a disabled individual, it does not require that an employer accommodate a non-disabled employee based on the disability-related needs of a family member or other person they associate with. The EEOC has specifically stated that an “employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.”

Depending on your individual circumstances, you may be eligible for paid or unpaid leave offered by the FFCRA. This leave expires on Dec. 31, 2020. It must be offered by all government employers and private sector employers who have fewer than 500 employees, although certain provisions may not apply to employers with fewer than 50 employees. Your Help Center advocate will be able to give you more information. *See: Families First Coronavirus Response Act: Employer Paid Leave Requirements at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.*

Twelve weeks of unpaid leave under the FMLA may be available if you meet eligibility requirements and you are caring for an immediate family member (*i.e.*, spouse, child, or parent) who suffers from a “serious health condition” as defined by the FMLA. *See: Family and Medical Leave (FMLA) at: <https://www.dol.gov/general/topic/benefits-leave/fmla>.*

10. What if I have anxiety or another mental health condition that has been exacerbated by the COVID-19 pandemic?

Certain mental health conditions like anxiety disorders, obsessive-compulsive disorder, or PTSD are considered disabilities if they substantially limit one or more major life activities. You will need to have a diagnosed

mental health impairment. General concern about COVID-19 or apprehension about returning to the workplace does not entitle an employee to reasonable accommodations under the ADA.

11. What should I do if I think I have an underlying medical condition that places me at risk and qualifies as a disability?

Contact the TSTA Help Center for assistance. You will most likely be advised to obtain a medical diagnosis as to your underlying condition. The Help Center advocate can also advise you as to what other information and recommendations may be helpful from your doctors.

12. What is a reasonable accommodation?

A reasonable accommodation is any change in the work environment, or the way things are customarily done, that enables a qualified individual with a disability to enjoy equal employment opportunities. Reasonable accommodations to mitigate COVID-19 exposure might include installing a plexiglass shield, additional cleaning of surfaces, extra space for social distancing, moving a desk or workstation farther away from other workers, or staggering work hours or work breaks to reduce contact with other employees, or working remotely.

Temporary use of accrued leave or other paid or unpaid leave might also be a reasonable accommodation. Examples include sick leave available under school board policy, other leave including disability leaves available under employer's policies, unpaid FMLA leave, or other approved unpaid leaves of absence.

13. How do I request a reasonable accommodation?

There are no magic words that need to be used, but the employer does need to be notified. TSTA members who believe they need a reasonable accommodation should request assistance from the Help Center.

14. Do I have to provide a letter from my doctor when I make the request?

You are not required to provide medical documentation at the time that you request the accommodation, but the employer may ask for it to determine if you have a qualifying disability. In addition to providing a diagnosis, your doctor should be specific as to your limitations and the possible accommodations that will allow you to perform the essential functions of your job. If multiple accommodations are likely, they should be identified. Prior to requesting an accommodation, you should work with your TSTA Help Center advocate to ensure that you have proper documentation from your physician.

15. What happens after I request a reasonable accommodation?

Your employer must consider your request and engage with you in a flexible, interactive process to try to find a suitable accommodation. Employers and employees are to work together to identify possible accommodations. You should keep the Help Center advocate involved as you engage in the interactive process.

16. Can my employer refuse to accommodate my disability?

If, after going through the interactive process, the employer determines that the only reasonable accommodation available would cause an "undue hardship"—that is, if providing the accommodation would result in significant difficulty or expense, taking into account the nature and cost of the accommodation, the resources available, and the operations in place—the employer is not required to provide the accommodation.

Recent EEOC guidance seems to provide employers with greater leeway, due to the pandemic, in assessing whether or not a specific accommodation creates an undue hardship. Employers may now consider factors like: a sudden loss of income stream, difficulty conducting needs assessments, and difficulty removing marginal functions or providing temporary assignments.

17. Can I request leave as a reasonable accommodation?

Employers cannot immediately dismiss a period of leave as unreasonable. Instead, the interactive process must focus on the reasonableness of that request and whether it will enable the employee to perform their essential job functions in the near future. A request for indefinite and open-ended leave is never reasonable.

18. What if more than one accommodation exists?

If multiple accommodations work, employers may choose which one to apply. If an employer rejects the employee's preferred accommodation in lieu of an alternative—*but still reasonable*—accommodation, the employee is not required to accept it. However, if the employee rejects the employer's proffered accommodation and cannot, as a result of that rejection, perform the essential functions of the position, the employee will no longer be considered a qualified individual.

19. Can I request accommodations for a preexisting disability even if I have never previously requested accommodations?

Yes. Employees are not barred from seeking accommodations just because they declined to do so in the past; however, depending upon the facts and circumstances, the employer may be more likely to question the disability or the need for the accommodation.

20. What if my employer allowed me to telework during the COVID-19 pandemic, but is now refusing to allow me to work remotely as a reasonable accommodation?

Recent EEOC guidance explains that “[t]he fact that an employer temporarily excused performance of one or more essential functions during the COVID-19 crisis to enable employees to telework for the purpose of protecting their safety, or otherwise chose to permit telework, does not mean that the employer has permanently changed a job's essential functions, or that telework is a feasible accommodation, or that it does not pose an undue hardship.”

21. How is the ADA enforced?

The EEOC enforces the ADA and an individual may file a charge with the EEOC within 180 days of the alleged violation. *See: Time Limits for Filing A Charge* at: <https://www.eeoc.gov/time-limits-filing-charge>.

You should know that the EEOC process will not be a quick one. The EEOC may select the charge for mediation. *See: Questions & Answers: Association Provision of the ADA* (issued October 17, 2005) at: <https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada>.

If the EEOC does not address a charge within 180 days after filing, the employee may request a “right to sue letter.” A lawsuit must be initiated in federal court within 90 days of receiving a right to sue notice.

Any enforcement of federal disability law will take time. Cases are often litigated for years, and in the meantime the employee is out of work.

22. What if I do not qualify for an accommodation under the ADA but I do not want to report to work due to my fear of exposure to COVID-19?

With the increase of infection in Texas and other states, it is understandable that employees are nervous about the reopening of schools and have many questions and apprehensions. While TSTA and your local association are not in control of local decision-making, it can help make sure your school entity explains its health and safety plan, outlines the steps it will take to protect students and employees, and hears and responds to the concerns of its employees.

TSTA believes that schools should only reopen if they are using strategies that reduce health risks. These include properly sanitizing facilities, enforcing social distancing, and wearing face coverings in common spaces. Schools should also be prepared to transition to online learning if necessary.

CONCLUSION

The situation is fluid and there will no doubt be developments from now until the date that schools are to reopen. Assuming that schools reopen, they will undertake various mitigation strategies to different degrees depending on their location and other factors.

If you have an underlying medical condition that makes you susceptible to complications from COVID-19, notify the TSTA Help Center. Depending upon your job responsibilities and health conditions, reasonable accommodations might be possible. It is imperative that you contact the Help Center to discuss all options and how to best proceed.

Contact the TSTA Help Center

877-ASK-TSTA (877-275-8782)

**At TSTA.org, enter your query at the bottom of the page
where it says Help Center.**