



Avoiding ADA Compliance Pitfalls in a COVID-19 World

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Q&A with Presenter Rae T. Vann, Shareholder, Carlton Fields

PLEASE NOTE: THE ANSWERS PROVIDED BELOW ARE INTENDED ONLY AS GENERAL GUIDANCE, AND DO NOT CONSTITUTE LEGAL ADVICE. FOR HELP WITH SPECIFIC ISSUES, PLEASE CONSULT WITH LEGAL COUNSEL.

1. What if the employee voluntarily discloses that a family member has COVID? What do we need to do/not do to avoid a GINA violation?

If an employee volunteers that a family member is infected with COVID-19, then the employer has acquired that individual's genetic information, but the "inadvertent acquisition" exception may apply. Even still, the information may not be used to discriminate and must be kept strictly confidential. In addition, the EEOC's GINA implementing regulations (29 C.F.R. § 1635.8) specify that:

- If a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition of genetic information will not generally be considered inadvertent unless the covered entity directs the individual and/or health care provider from whom it requested medical information (in writing, or verbally, where the covered entity does not typically make requests for medical information in writing) not to provide genetic information.
- If a covered entity uses language such as the following, any receipt of genetic information in response to the request for medical information will be deemed inadvertent: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."
- A covered entity's failure to give such a notice or to use this or similar language will not prevent it from establishing that a particular receipt of genetic information was inadvertent if its request for medical information was not "likely to result in a covered entity obtaining genetic information" (for example, where



an overly broad response is received in response to a tailored request for medical information).

2. What if the employee volunteers that a family member tested positive? Is it okay to ask for details so we can determine how long the employee needs to quarantine?

See above. The follow-up questions have to be sufficiently narrow and carefully tailored to address the COVID-19 related concerns, such as to determine whether and when the employee may be able to return to the physical workplace.

3. Can you ask if a member of your household has been exposed to Covid-19 (as opposed to asking if a family member/relative has been exposed)?

To the extent that such a question is likely to elicit information about family members, it may be more prudent (and efficient) to ask whether employee has been in close contact with *anyone* exhibiting symptoms of, or who has been diagnosed with, COVID-19 infection. That approach is encouraged by the EEOC.

4. Should we have specific information from the medical provider stating that even though the employee is clear they are also aware of the positive family member and they can return even if the employee isn't negative? For example, you have an employee who tested negative and has no symptoms, but the family member is positive after they quarantine for 14 days they can return to work but our survey has a questions that ask if they have been near someone who has tested positive and if they answer yes they will receive a notice saying that they must again quarantine.

The EEOC encourages employers to follow current CDC guidance regarding the circumstances under which an individual should quarantine, including when he or she has been in close contact with an infected person. For more information, please refer to the CDC's webpage at
<https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>

5. If a medical provider verifies that an employee is at a higher risk of complications due to COVID and recommends continued remote work, is that covered by ADA?

Yes, in the sense that such information may trigger the employer's obligation under the ADA to engage in the interactive process and consider possible reasonable accommodations, including continued remote work. However, just because remote work is requested does not mean that it is the only option or, as discussed below, must be granted. In other words, if remote work is not needed to enable a qualified individual with a disability to safely perform the essential functions of the job, then the employer is not obligated to allow it. Similarly, if there are other alternatives that are both reasonable and effective in enabling the employee to perform the essential job functions, the employer may select



and implement one of those in lieu of allowing the worker to continue working remotely. Finally, even if remote work is reasonable and necessary, the employer does not have to allow it if doing so would impose an undue hardship on business operations.

- 6. Should we still use the same criteria we normally would to determine if a health condition is considered a disability under ADA before we move ahead with the interactive process for a COVID related accommodation request if this health condition puts the person at a higher risk for COVID? There can be health conditions that a healthcare provider says puts the employee at higher risk, but the health condition does not substantially limit a major life function.**

Yes, while being mindful of EEOC and CDC guidance regarding COVID-specific considerations. This is also discussed below.

- 7. If the accommodations are related to the location in which work occurs (such as request to continue working remotely) or for additional safety measures (such as installation of plexiglass barriers) but the employee's disability has not had an effect on their ability to perform their job duties -- should these "accommodations" actually be considered under the ADA?**

Any request for a reasonable accommodation under the ADA should be considered, but not every request must be granted. So if an individual with a disability requests continued remote work as a reasonable accommodation, he or she has to show why that particular accommodation is needed to enable him or her to safely perform the essential functions of the job. For example, an individual with hearing impairment may find it more productive and convenient to work remotely – which was not an option for his particular position prior to COVID-19.

To the extent that working from home is not necessary to enable that person to safely perform the essential job functions, it may be denied. However, if an employee is or may be at higher risk of serious illness from COVID-19 infection based on one or more underlying medical conditions that may not be individually disabling, then if a request for reasonable accommodation is made, you should consider it. For example, if an employee with a history of serious asthma could face a potentially disabling condition due to COVID-19 infection requests a workplace accommodation to minimize that risk – one that would enable her to safely perform the essential functions of the job – the employer should identify and implement an accommodation that is reasonable and effective, unless doing so would impose an undue hardship.

- 8. Where do you draw the line between providing an employee with an accommodation that increases the threat of other employees and others? E.g. an employee cannot wear a mask and an accommodation may be a clear face shield; however, scientific evidence suggests that a clear face shield doesn't shield respiratory droplets as effective as a mask/face-covering.**



This is where considerations of reasonableness, undue hardship, and direct threat come into play. An employer's obligation to an otherwise qualified individual with a disability requesting a workplace accommodation is to provide one that is both reasonable *and* effective in enabling the person to safely perform the job, without placing himself or others at serious risk of harm.

Although the EEOC has characterized COVID-19 infection as a direct threat and has suggested that there is no reasonable accommodation that could be put into place that would minimize the risk of allowing an infected person in the workplace, in this example, the issue is preventing possible spread of COVID-19 by those who may be asymptomatic. Thus, the question would be whether substituting a face shield for a face mask would be reasonable given the individual circumstances and, even if so, whether providing the accommodation would impose an undue hardship on business operations, such as by requiring extensive additional health and safety measures to guard against the increased risk of infection caused by one person not wearing a face mask.

Bear in mind that the EEOC has said that:

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.

9. Is there a different process we should be using if employees are asking for accommodations like face shields instead of masks? Would this type of accommodation become permanent?

The EEOC has made clear in its COVID-19 guidance that providing any one particular accommodation during the pandemic does not necessarily mean that the employer will be required to continue that accommodation permanently. Just as health guidance, return-to-work protocols, and the impact of the pandemic on particular communities continue to evolve, so too must an employer's approach to workplace reasonable accommodations.

In other words, while it may have been reasonable and appropriate to provide a certain type of adaptive equipment to an individual with a disability working from home under a community's mandatory shutdown orders, for example, once the employee returns to the physical work site, that accommodation may no longer be required.



- 10. Given the circumstances, we have provided remote work accommodations quite broadly for those who are confirmed at higher risk for COVID 19. (Our university is in person, hybrid and online this year). My concern is how we unwind some of these accommodations when circumstances improve down the road. For examples we would not typically have secretaries working remotely. What do we need to keep mind as we look to bring those individuals back to the workplace?**

See response above. In addition, it's wise to monitor public health and EEOC policy guidance closely for updates, especially as it relates to return-to-work issues.

- 11. If an employee has family members who are at risk or has to care for family members, can they request an accommodation?**

No. The EEOC has confirmed in its COVID-19 guidance that the duty to accommodate extends to qualified individuals with disabilities, not to disabled family members of nondisabled workers. However, the employee may have other rights under federal, state, or local law, such as the availability of paid and/or unpaid leave. In addition, as the EEOC notes in its COVID-19 guidance, "Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis."

- 12. When you are making an accommodation to work remotely due to COVID - how should you define what would constitute the end of the accommodation?**

See answer to Question 9 above.

- 13. Any tips on reviewing/ handling ADA requests which deals with anxiety/OCD related to COVID-19?**

As was the case pre-COVID, employers should utilize the interactive process and engage the employee in identifying potential reasonable accommodations that may be effective. In addition, the EEOC has said:

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.



14. If mandating flu inoculation, is providing a vaccine declination form which includes religion and disability exceptions sufficient?

The form should inform employees that reasonable accommodations will be considered, but each situation should be addressed on a case-by-case basis. In other words, employees with disabilities are not categorically entitled to be exempted from a vaccine requirement, and any declination form should serve as a practical matter as an invitation to initiate the interactive process.

15. How would you advise handling employees who have a condition that makes them at higher risk for serious illness due to COVID-19, but that condition is not necessarily a disability under the ADA? I am concerned that granting accommodations during COVID will lead to individuals expecting/desiring accommodations when it is "over."

There is no obligation under the ADA to provide reasonable accommodations to non-disabled individuals. However, Congress amended the ADA in 2007 to make it far less difficult for an individual to establish an ADA-covered disability. Many of the conditions identified by the CDC as higher risk could rise to the level of disabilities, depending on the particular circumstances. So it is important to engage the employee in a discussion and, where necessary, request medical documentation regarding the nature of his or her condition and how it may impact their ability to safely perform the essential functions of the job.

In addition, the EEOC has acknowledged that some temporary accommodations provided due to the pandemic may no longer be appropriate post-pandemic: “The employer has no obligation under the ADA to refrain from restoring all of an employee’s essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.”

16. The CDC has outlined conditions that place individuals at higher risk due to COVID, but that are not actual disabilities (i.e. obesity, smoking). What are our responsibilities as employers to accommodate those employees who want an accommodation to work remotely?

The EEOC has addressed this issue in the following FAQ:

D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.



Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per [CDC guidance](#) or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

17. Can the employer then disclose that the employee is covered by accommodation provided the employer does not disclose the underlying condition?

This issue is addressed by the EEOC in the following FAQ:

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? (9/8/20; adapted from 3/27/20 Webinar Question 7)

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

18. Our state requires you to work from home if your job allows you to. The University has required that positions that interface with students are required to return to deal with walk ins. The amount of foot traffic is minimal. If employees have concerns to return to work and based on Governor's orders can we require they return to work if the reasons are not ADA?

If the employee is not able to perform his aspect of his job remotely and is entitled to continue working remotely as a disability accommodation, then you may require him to return to work. However, keep in mind that the employee may be entitled to COVID-19 related leave under federal, state and/or local law.

The EEOC's COVID-19 guidance is instructive:

Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related



limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

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 workplace reopens—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 ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

19. Is there a list of medical conditions that place an individual at high risk?

Yes. The list is available from the CDC's website:

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html

20. An employee with a disability has requested leave in lieu of returning to campus as an accommodation. Must I grant it?

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."

But just because an employee has asked for leave – triggering an employer's obligation to consider the request – doesn't 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 addition, remember that employees may be entitled to take advantage of any number of COVID-related paid and unpaid leave programs provided under federal, state and/or local laws.