

# EEOC Provides Additional Guidance on Reasonable Accommodation Issues For ‘High Risk’ Employees Returning to Work

Article By:

Susan Gross Sholinsky

Lauri F. Rasnick

Elizabeth Houghton LaGreca

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On May 5, 2020, and again on May 7, the Equal Employment Opportunity Commission (the “EEOC”) updated its technical assistance for employers, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”](#)

The EEOC has updated its guidance multiple times since the beginning of the COVID-19 pandemic. Most recently, on April 17, the EEOC provided guidance on employers’ reasonable accommodation obligations under the Americans with Disabilities Act (the “ADA”) and included a section on [“Return to Work” issues](#). On April 23, the EEOC issued an update addressing [COVID-19 testing by employers](#).

In its latest update, the EEOC adds to its Return-to-Work guidance with Frequently Asked Questions (“FAQs”) addressing reasonable accommodation. The new FAQs will likely be particularly relevant with respect to employees who may be reluctant to return to the workplace because they are at higher risk for severe illness from COVID-19. Specifically, the newly-released guidance states:

**G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19?**

*An employee – or a third party, such as an employee’s doctor – must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term “reasonable accommodation” or reference the ADA, she may do so.*

*The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask*

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questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

**Note:** This FAQ confirms that it is the employee's obligation to ask for a reasonable accommodation because of a medical condition, but the employee need not use the phrase 'reasonable accommodation' when making such a request. (The CDC has [posted](#) a list of high risk factors for becoming severely ill from COVID-19). The request, which may be oral or in writing, entitles the employer to ask questions and to seek medical documentation as part of the interactive process for determining whether and what reasonable accommodation may be provided.

**G.4. The CDC identifies a number of medical conditions that might place individuals at “higher risk for severe illness” if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation?**

*First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.*

*If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at “higher risk for severe illness” if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a “direct threat” to his health that cannot be eliminated or reduced by reasonable accommodation.*

*The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a “significant risk of substantial harm” to his own health under 29 C.F.R. section 1630.2(r). 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. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. 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.*

*Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar*

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*an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.*

**Note:** The EEOC first posted a FAQ on this topic on May 5, but removed it the same day after certain information was, according to the agency, “misinterpreted in press reports and social media.” In reissuing this guidance on May 7, the EEOC clarified that the ADA does not allow exclusion of employees simply because they have an underlying medical condition that the CDC says might pose a higher risk of severe illness if the individual contracts COVID-19. This revised guidance makes it clear that employers must complete a “direct threat” analysis, which includes an individualized assessment based on factors relevant to the employee and the nature of the threat, and a determination of whether the threat can be eliminated or sufficiently reduced through a reasonable accommodation. In making this analysis, and considering potential reasonable accommodations, employers should refer to CDC guidance.

**G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self?**

*Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).*

*These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network ([www.askjan.org](http://www.askjan.org)) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.*

**Note:** Here, the EEOC provides various examples of accommodations that may mitigate a “direct threat” to an employee who is at increased risk for severe illness from COVID-19, and reiterates its advice to employers to be “creative and flexible” in responding to accommodation requests related to the COVID-19 pandemic.

The new FAQs, like the EEOC’s prior guidance, are anchored in traditional ADA principles, i.e., having a covered disability, engaging in the interactive process, and demonstrating flexibility in assessing reasonable accommodations. While this guidance can help provide some parameters for employers to consider, employers will need to individually assess their own workspaces, business needs, employees’ duties and responsibilities, and how they can best attend to requests by employees for reasonable accommodations. In order to do so, employers should analyze how to create safe workspaces, consider what modifications are feasible, and create solid processes to handle the inevitable requests for accommodations.

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