

# COVID-19 and the Americans with Disabilities Act

July 30, 2020



**RETAIN**

Retaining Employment and Talent After  
Injury/Illness Network

 **AIR**<sup>®</sup>  
AMERICAN INSTITUTES FOR RESEARCH<sup>®</sup>

  
**ODEP**  
Office of Disability  
Employment Policy

# Presenter

## **Leslie L. Dawson**

State Administrator, Business Relations Program

Vocational Rehabilitation Services

Alabama Department of Rehabilitation Services (ADRS)

### **Disclaimer**

These materials were prepared for the U.S. Department of Labor (DOL), Office of Disability Employment Policy, and Retaining Employment and Talent After Injury/Illness Network (RETAIN) state grantees, by the American Institutes for Research and its contracted subject matter expert. The views expressed are those of the authors and should not be attributed to DOL, nor does mention of trade names, commercial products, or organizations imply endorsement of same by the U.S. Government.

The information contained in this presentation is intended as general guidance. It does not constitute legal advice and is not binding. CDC and EEOC guidance regarding COVID-19 changes often, so checking specific guidance frequently is encouraged.

# COVID-19 and ADA: Overview

- Who is covered
  - Businesses
  - Individuals with disabilities
- Medical Inquiries and Examinations
- Direct Threat
- Returning to Work and Accommodations

# COVID-19 and ADA

**ADA Title I - purpose is to prevent discrimination on the basis of disability with respect to hiring, firing, and other terms, conditions, and privileges of employment.**

“The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC](#) about steps employers should take regarding the Coronavirus.”

**Three areas of application:**

- 1. Disability-related inquiries and medical examinations for applicants and employees**
- 2. Exclusion of individuals with disabilities from the workplace**
- 3. Reasonable Accommodations during a pandemic**

Source: Equal Employment Opportunity Commission:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# Who is Covered as an Employer?

- 15 or more employees for each working day in each of 20 or more calendar weeks of the current or preceding year (42 U.S.C. § 12111(5)(A))
- Includes private sector and state and local government entities (42 U.S.C. § 12111(5)(A))
- Excludes tax-exempt private membership clubs, Indian tribes, and religious entities (42 U.S.C. § 12111(5)(B))

## Section 503 of the Rehabilitation Act of 1973

- Prevents federal contractors and subcontractors from discriminating in employment against individuals with disabilities
- Section 188, the nondiscrimination provisions, of the Workforce Investment and Opportunity Act applies to state and local government entities that are recipients of federal financial assistance. For more information about your legal obligations under Section 188, please review the regulations at 29 CFR 38.

# Who is Covered as an Individual with Disability

- **Physical or mental impairment that substantially limits one or more of major life activities**
  - COVID-19 could cause such impairments
- Record of such an impairment
- Regarded as having such an impairment
- Associative discrimination: Discrimination based on an employee's known relationship with a person with a disability

# ...Physical or Mental Impairment...

- **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 (29 CFR 1630.2(h)(1))
- **Mental or psychological disorder**, such as intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities. (29 CFR 1630.2(h)(2))

# ...Substantially Limits...

- Should be construed broadly (29 CFR 1630.2(j)(1)(i))
- Does not require extensive analysis (29 CFR 1630.2(j)(1)(iii))
- Duration of impairment not determinative with respect to whether impairment “substantially limits.” Impairment of 6 months or less can be substantially limiting (but cannot serve as the basis for a claim based on “being regarded as having such an impairment”) (42 U.S.C. § 12102(3)(B))
- Covers impairments that are episodic or in remission, if they would substantially limit a major life activity when active (42 U.S.C. § 12102(4)(D)):
  - e.g., epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia, and cancer
- **Definition could cover persons with COVID-19 or persons who, due to a preexisting disability, are at higher risk for COVID-19**



# ...One or More Major Life Functions...

- 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 (29 CFR 1630.2(i)(1)(i))
- Operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions (29 CFR 1630.2(i)(1)(ii))

## **Not Covered:**

- A person who is currently using illegal drugs – or using drugs illegally (29 CFR 1630.3(a))

# Record of Impairment

- Should be construed broadly (29 CFR 1630.2(k)(2))
- Includes individuals with history of a disability or misclassified as having a substantially limiting impairment (29 CFR 1630.2(k)(1))
- Individuals with a record of a substantially limiting impairment may be entitled to a reasonable accommodation if needed and related to the past disability. (29 CFR 1630.2(k)(3))
  - e.g., for follow-up or “monitoring” appointments with a healthcare provider

# Regarded as Having an Impairment

- Subjected to prohibited action because of an actual or perceived physical or mental impairment, whether or not currently substantially limited in a major life activity (29 CFR 1630.2(I)(1))
- Focus is on how a person is treated because of a perceived disability (29 CFR 1630.2(I)(1))  
e.g., failure to hire; termination; demotion; harassment
- Do not have to provide a reasonable accommodation, unless actual disability or record of disability
- Does not include impairments with a duration of 6 months or less (42 U.S.C. § 12102(3)(B))
  - **Note: COVID-19 may cause such transitory impairment**

# Associative Discrimination

- Cannot discriminate on the basis of relationship to a disabled person (29 CFR 1630.8)
- Extends family, business, social or other relationships (29 CFR 1630.8)
- **Could include association with/exposure to an individual with COVID-19**
- Do not have to provide reasonable accommodations

# Qualified Individual

An individual **with a disability** who:

- Satisfies the **pre-requisite skill or required skill**, experience, education and other job-related requirements of the employment position
- Can perform the **essential functions** of such a position according to job standards
- With or without **reasonable accommodation** (29 CFR 1630.2)

# ADA: Medical Inquiries

- ADA prohibits an employer from making **disability-related inquiries** except under limited circumstances (42 U.S.C. § 12112(d))
- **Disability-related inquiry** if question elicits information about a disability
  - Example – Asking if immune system is compromised is not allowed because a weakened immune system is associated with cancer, HIV/AIDS, auto-immune disorders
  - Example – Asking about symptoms of a cold or the seasonal flu is okay because it does not elicit information about a disability
    - employers may ask employees if they are experiencing symptoms of COVID-19

# ADA: Medical Evaluations

- ADA prohibits an employer from conducting **medical examination** except under limited circumstances (42 U.S.C. § 12112(d))
- **Medical Examination** – Procedure or test that seeks information about an individual’s physical or mental impairments or health
  - Determined by considering if the test involves medical equipment; is it invasive; is it designed to reveal a physical or mental impairment; is it given or interpreted by a medical professional

# ADA: Medical Inquiries and Evaluations

## ADA:

- Prohibits employers from making disability-related inquiries and requiring medical examinations before a conditional offer of employment is made during interview  
(42 U.S.C. § 12112(d)(2)(A))
- Permits employers to make disability-related inquiries and conduct medical examinations after a conditional job offer but before an individual begins work IF this is done for all entering employees in the same job category  
(42 U.S.C. § 12112(d)(3)(A); 29 CFR 1630.14(b))
- Prohibits disability-related inquiries and medical exams during employment (for existing employees)
  - Unless job-related and consistent with business necessity, based on objective evidence that employee can't perform the essential functions of the job **OR** that the employee poses a direct threat.



# COVID-19: Medical Inquiries and Evaluations

- Taking employees' temperatures?
  - Considered a medical examination
  - However, allowed because CDC issued attendant precautions in March 2020
    - But don't forget confidentiality requirements
    - Review all relevant EEOC guidance on taking employee temperatures
  - Note: recording temperatures may trigger OSHA recordkeeping requirements.
- Asking questions about employee's symptoms who report feeling ill at work or who call in sick?
  - Considered a medical examination. However, allowed – CDC guidance says to ask questions regarding COVID-19 symptoms such as fever, chills, cough, shortness of breath, or sore throat (list may be expanded by public health authorities)
- Sending employees home if they exhibit COVID-19 symptoms?
  - Considered denial of access to employment
  - However, allowed – CDC states employees who become ill with symptoms during a **pandemic** should leave the workplace. Not a disability-related action, so allowed under ADA. Also, illness could pose a direct threat at the workplace.

# COVID-19: Medical Inquiries and Evaluations

- Asking employees WHO DO NOT HAVE SYMPTOMS to disclose a medical condition that makes them vulnerable to COVID-19
  - Constitutes a medical inquiry
  - Making disability-related inquiries of employees *without* symptoms prohibited by the ADA
  - If employee voluntarily discloses specific medical condition or disability that puts him at increased risk of COVID-19 complications, employer can ask what type of assistance he thinks he needs (e.g., telework or leave for a medical appointment).
  - Employers should not assume all disabilities increase the risk of complications
  - However, if local, state or federal health officials feel the pandemic has become more severe and a direct threat is obvious, employer can make disability-related inquiries or require a medical exam of asymptomatic employees to identify those at higher risk for COVID-19 complications.

# COVID-19: Medical Inquiries and Evaluations

- Requiring employees to adopt infection-control practices and wear personal protective equipment
  - Allowed, but where employee with a disability needs related reasonable accommodation (e.g., non-latex gloves, gowns designed for individuals who use wheelchairs), employer should provide these, absent undue hardship.
- Requiring employees to get a vaccine (no COVID-19 vaccine yet – but...)
  - Employee may be entitled to exemption from a mandatory vaccination requirement based on a disability or sincerely held religious belief, practice, or observance that prevents him from taking the vaccine.

# *...with or without reasonable accommodation*

Many individuals with disabilities can perform the essential functions of jobs without accommodation. However, if the otherwise qualified individual with a disability cannot perform an essential job function because of the disability, the **employer must consider** whether there are modifications or adjustments that could enable the person to perform the function

## **REASONABLE ACCOMMODATION**

**(more to come on this later in presentation)**

# COVID-19: Hiring and Onboarding Generally

- Employer may screen job applicants (regardless of disability status) for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.
- Employer may delay start date of applicant who has COVID-19 or related symptoms.
- Employer may withdraw the job offer when it needs applicant to start immediately but the individual has COVID-19 or related symptoms.
- Employer may not postpone the start date or withdraw job offer because individual is older than 65 or pregnant.
  - However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

# Direct Threat...

- Direct threat defense requires an employer to show that individual has a disability that poses a “significant risk of substantial harm” to his own health under 29 CFR 1630.2(r).
- Specific and stringent requirements in order to establish Direct Threat (29 CFR 630.2(r)):
  - Significant risk of substantial harm
  - Specific risk must be identified and current
  - Assessment must be based on objective medical or other factual evidence
  - Employer must 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

# Direct Threat...

Even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a direct threat by use of reasonable accommodation  
(42 U.S.C. § 12111(3))

# Direct Threat

- Assessment is made by the CDC or public health authorities
- They will provide the objective evidence needed for a disability-related inquiry or medical examination
- Based on guidance of the CDC and public health authorities, as of March 2020, COVID-19 pandemic meets the Direct Threat standard.
- CDC and public health authorities will revise their assessment as time goes on.

Source: Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Issuing Authority. Updated March 2020 <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB>



# Direct Threat: Other Considerations

- Direct Threat for individuals is based on medical judgement about employee's disability – not the disability in general
- Consider duration of risk, nature and severity of potential harm, likelihood harm would occur, and imminence of potential harm
- Analysis of these factors include consideration of severity of the pandemic in particular area, employee's current health, and particular job duties
- Determination of Direct Threat also includes likelihood of individual's exposure at work
- Protective measures taken by employer are also considered in determining Direct Threat

# Reasonable Accommodations Generally

- What is a reasonable accommodation?
- A modification or adjustment to a job, the work environment or the way things are usually done that enables a qualified individual with a disability to enjoy an equal employment opportunity. (29 CFR 1630.2(o))
  - e.g., job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies (42 U.S.C. 12111(9)(B))

# Reasonable Accommodations— Legal Obligations

- Must be provided unless it can be shown to cause undue hardship (29 CFR 1630.2(o)(4))
- Applies to all aspects of employment
- Employment cannot be denied because of the need of an accommodation
- Is not required if the individual is otherwise not qualified
- Generally it is the obligation of the individual to request accommodation

# When Can an Employee Request an Accommodation?

- At any time during the application process or at any time during employment
- When the employee knows that there is a workplace barrier due to a disability which affects the application process, performing their job or accessing benefits
- Employee is encouraged to request an accommodation before performance suffers
- ADA does not preclude an employee from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer

# How to Request an Accommodation

- The employee lets the employer know that an adjustment or change is needed for reasons related to a disability.
- The employee need not mention ADA or use the phrase “reasonable accommodation.”
- The employee can use plain English.
- Someone else can request an accommodation on behalf of the individual.
- The request does not have to be in writing.
- An employer can ask for a written request or use a form or other type of documentation but cannot ignore the initial request.
- When disability and/or need for accommodation is not obvious, employer may ask for reasonable documentation about the disability/functional limitations.

# Selection of Reasonable Accommodation

- Employer chooses, but selection must be effective
- Do not have to show undue hardship to provide the less expensive accommodation as long as it is effective
- If more than one accommodation is effective, employer should give primary consideration to preference of individual Employer may not require qualified individual with a disability to accept the accommodation
- However, if the employee needs reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, may no longer be qualified

# Unreasonable Modifications or Accommodations

- Do not have to eliminate essential job functions
- Do not have to lower production standards
- Do not have to provide personal use items needed in accomplishing daily activities both on and off the job (e.g., prosthetic limb, wheelchair, or eyeglasses if also needed off the job)

# COVID-19: Reasonable Accommodations

- Does an employer have to consider accommodations for employees who are at higher risk for developing complications from COVID-19?
  - (e.g., older adults; individuals with serious chronic medical conditions such as heart disease, diabetes, lung disease or asthma, weakened immune system, kidney disease, cirrhosis of the liver, etc.)



# COVID-19: Reasonable Accommodations

- During COVID-19, employers must consider requests and engage in the interactive process to provide a reasonable accommodation, barring undue hardship
  - If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may provide a temporary accommodation
- Employee must have an actual or record of a disability
- An accommodation that would not have posed an undue hardship prior to the pandemic may pose one now
  - e.g., because of sudden loss of some or all of an employer's income stream, difficulty providing employees with temporary assignments or readily hire temporary workers

Source: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" Updated June 17, 2020 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# COVID-19: Reasonable Accommodations

- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation
  - e.g., an employee who is teleworking because of the pandemic may need a different type of accommodation than what s/he uses in the workplace
- Caregivers of individuals with disabilities are not entitled to workplace reasonable accommodations under ADA but may be entitled to leave under FMLA and FFCRA
- Employees are not entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19
  - Although the ADA prohibits associative discrimination, this is limited to disparate treatment or harassment

# Undue Hardship

An employer is not required to make reasonable accommodation if it would impose an undue hardship on the operation of the business.

# Undue Hardship: Specifics

- An action causing *significant difficulty or expense* (29 CFR 1630.2(p)(1))
- Factors considered include (29 CFR 1630.2(p)(2)):
  - Nature and cost of accommodation;
  - Financial resources of the covered entity;
  - Overall size of the business of the covered entity with respect to number of employees, and the number, type and location of facilities or
  - Type of operation or operations of the covered entity, including composition, structure and functions

# Undue Hardship (more)

- If Undue Hardship due to financial constraints:
  - The individual with the disability or another agency can purchase the accommodation
  - Individual should then be allowed to use the accommodation
- ADA requires maximum effort
- Decisions are on a case-by-case basis
- Employer bears the burden of proof
- Ongoing process
- Document, Document, Document

Sources: The ADA: Your Employment Rights as an Individual With a Disability.

<https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability>; What is considered an "undue hardship" for a reasonable accommodation? <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation>

# COVID-19 and Americans with Disabilities Act, July 30, 2020

**Leslie L. Dawson**

State Administrator, Business Relations Program

[Leslie.Dawson@rehab.alabama.gov](mailto:Leslie.Dawson@rehab.alabama.gov)

205-290-4457

Your feedback is important!

Please take 2 minutes to complete the following survey:

[https://www.surveymonkey.com/r/COVID19 RTW ADA 7-30-2020](https://www.surveymonkey.com/r/COVID19_RTW_ADA_7-30-2020)

*Thank you!*

**RETAIN**

Retaining Employment and Talent After Injury/Illness  
Network