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Legal Sidebar

COVID-19, Workplace Accommodations, and Federal Antidiscrimination Statutes: Selected Issues

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The COVID-19 pandemic has forced unprecedented workplace changes and raised a host of legal issues. Employers may struggle with how to protect workers from infection, including whether to make any special changes for at-risk employees. Employers may worry about workers' well-being, disruptions from absenteeism, and potential liability if an employee falls ill. Federal law requires reasonable accommodations for one risk group, people with disabilities. At the same time, antidiscrimination statutes restrict employers from singling out employees based on three characteristics that put them at enhanced risk, or impose uncertain risk, for COVID-19: disability, age, or pregnancy. This Sidebar provides general background on antidiscrimination considerations that might arise as employers consider accommodations for at-risk employees.

Reasonable Accommodations for At-Risk Employees Under the Americans with Disabilities Act and the Rehabilitation Act

The Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (applying ADA standards to federal employers) protect applicants and employees from disability discrimination. Not everyone with a medical condition has a disability, and some characteristics that may place a person at greater risk of serious illness from COVID-19 infection, such as being an older adult, have not previously qualified as disabilities for ADA and Rehabilitation Act purposes.

The ADA defines disability as an "impairment that substantially limits one or more major life activities," and the Rehabilitation Act employs a substantially similar definition. The Equal Opportunity Employment Commission (EEOC), charged with enforcing the two statutes, has taken the view that it is not yet clear whether coronavirus infection or risk of infection amounts to a disability. The uncertainty is understandable—much remains unknown or speculative about the disease and about how various employers may seek to curb workplace infections as businesses reopen. And it may be possible to argue that a characteristic that does not amount to a disability under normal conditions is a disability now, because of an accompanying COVID-19 risk. Courts have yet to address these questions. The ADA and

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Rehabilitation Act, however, protect people with substantially limiting conditions, including some conditions that put them at greater risk for severe COVID-19 illness, such as moderate to severe asthma, serious heart disease, and immunosuppression (including in HIV).

Federal law bars employers from taking adverse action against a worker because of disability. At the same time, the law requires employers to provide requested reasonable accommodations unless they would impose an undue hardship on the employer. Disability law calls for an "interactive process" tailoring the accommodation to the employee's and employer's needs. This individualized exchange reflects the disability and workplace circumstances. Generally, the interactive process begins with the employee. The employee should *request* an accommodation if he or she believes it is needed. Indeed, the ADA and Rehabilitation Act restrict employers from initiating some disability inquiries.

During the COVID-19 emergency, employers must still consider accommodation requests and engage in the interactive process. With this in mind, an employee whose disability puts her at risk might request temporary job restructuring, work at home, distancing from coworkers or customers, or other measures.

Leave requests are common, applicable accommodations even in COVID-19-free times, and the EEOC has issued guidance for employees who request leave as an accommodation. In general, the ADA requires managers to allow an employee with a disability the same leave privileges permitted other employees. In addition, as an accommodation, an employer should provide a reasonable amount of unpaid leave, unless this imposes an undue hardship. Factors for determining whether leave is a reasonable accommodation include the amount of leave, its scheduling, effects on coworkers, and the impact on workplace operations.

There are instances, in the context of the COVID-19 pandemic, when an employer could likely exclude an employee from the workplace rather than accommodate her disability. Enabling this response is an important, little-used exemption in the ADA: the "direct threat" exception. Under it, employers need not accommodate employees with disabilities if their presence would create a "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." The EEOC has concluded that this provision applies in pandemic circumstances, allowing employers to exclude infected employees from work. The exception might justify refusal to accommodate uninfected employees who are at higher risk of serious illness if infected by the coronavirus on account of a disability, but only after an individualized, objective assessment of the risk's duration and magnitude, together with any potential, mitigating accommodations. More generally, the EEOC clarified that "[t]he ADA and the Rehabilitation Act do not interfere with employers following advice from the [Centers for Disease Control and Prevention (CDC)] and other public health authorities on appropriate steps to take relating to the workplace."

The Age Discrimination in Employment Act (ADEA)

Other groups not necessarily covered by the ADA and Rehabilitation Act also face increased risk of severe COVID-19 illness. People over 65 are among these, and so employers may consider making workplace changes to protect older workers. But laws protecting older employees differ from disability laws; the ADEA has no accommodation provisions. The EEOC has stated that an employer need not grant older employees' requests for special precautionary measures in response to the COVID-19 pandemic.

What is more, the ADEA bars employers from taking adverse action against an employee or applicant "because of" age. So employers generally cannot single out older workers and alter their employment conditions. The EEOC has explained that, under the statute, employers may not send older workers home and put them on mandatory telework or involuntary leave because of increased COVID-19 susceptibility.

That said, voluntary actions (such as offering work at home or schedule changes) and neutral actions (such as spacing out workstations for older workers when the stations are equivalent) would generally not

violate the ADEA. This is because an ADEA claimant must identify a "materially adverse" employment action before making a complaint.

Nor does the ADEA prevent employers from giving older workers employment advantages denied younger workers. Thus, an employer may afford workers over 65 special protections, such as telework opportunities, flexible schedules, protective equipment, or options for social distancing. Younger employees left without these advantages cannot claim age discrimination.

The Pregnancy Discrimination Act

To date, the CDC advises that data suggest pregnant people have the same COVID-19 risk as other adults. But the CDC recommends pregnant women protect themselves from infection.

The Pregnancy Discrimination Act (PDA), an amendment to Title VII of the Civil Rights Act of 1964, bars employers from singling out pregnant workers for adverse action. Like the ADEA, the PDA does not expressly require accommodation. It mandates pregnant women "be treated the same ... as other persons not so affected but similar in their ability or inability to work." Even in pandemic circumstances, the PDA limits employers' unilateral efforts to shield pregnant workers from perceived risk. In the EEOC's view, managers cannot furlough a pregnant worker, postpone her start date, or rescind an employment offer, even if the employer cites concerns about COVID-19 infection.

At the same time, employers cannot deny pregnant women pandemic-related adjustments—such as leave, flexible schedules, protective gear, or work at home—granted other employees with a similar ability to work. And if a pregnancy-related complication is so limiting that it amounts to a disability, whether or not tied to the pandemic, the pregnant employee enjoys ADA protections.

Considerations for Congress

Congress has recently enacted measures that would provide pandemic-related leave for many workers. The Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act allow additional leave tailored to COVID-19 circumstances. Other CRS products describe these provisions. Congress has also recognized special, pandemic-related needs of the elderly and those with disabilities in provisions for funding public housing.

In considering the enhanced risk or uncertain risk faced by older workers, pregnant women, and people with disabilities, Congress may consider changing federal employment measures as well. There is still much uncertainty about how accommodation provisions of the ADA and Rehabilitation Act apply in pandemic circumstances. Their focus on individualized assessments makes it hard to predict how employers, agencies, and courts will apply them to COVID-19 risks. In addition, it may be hard for employers to make some of the required decisions and evaluations quickly, because the interactive process allows for back-and-forth communication, input from medical providers, and case-specific analysis. To facilitate a more uniform response, Congress might opt to specify whether or not COVID-19 infection or infection risk is a disability under existing law.

Alternatively, Congress could address pandemic workplace concerns with independent legislation that provides specific rules for COVID-19-related practices including testing, leave, reassignment, protective equipment, the interactive process for accommodation, and social distancing at work. Congress might modify restrictions on employers asking disability-related questions to facilitate infection control and response to risk factors.

Finally, Congress could consider recalibrating the class of employees entitled to accommodations. New laws might require managers to accommodate and protect older employees, pregnant employees, and those with nondisabling medical conditions that put them at unique risk during the COVID-19 pandemic.

Another approach would be to authorize employers to decide for themselves whether to impose prophylactic measures on older, disabled, and pregnant workers, adjusting antidiscrimination laws that currently limit different treatment.

Author Information

April J. Anderson
Legislative Attorney

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