




COVID-19

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**Coronavirus / COVID-19
Response Team**


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1

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**EEOC's Updated Guidance
in the World of COVID-19**

» Mary Tabin
Sarah Willey

MILLER 
JOHNSON
Attorneys

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3

EEOC Updated COVID-19 Guidance

- Previous Miller Johnson April 24 Webinar
- Updated issued June 11, 2020
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

4

EEOC Refresher

- EEOC: Federal Equal Employment Opportunity Commission
 - Enforces workplace anti-discrimination laws
 - Americans with Disabilities Act (ADA)
 - Disability, employer medical exams and inquiries, reasonable accommodations
 - Title VII
 - race, religion, sex, pregnancy, national origin, etc.
 - Genetic Information Nondiscrimination Act
 - Age Discrimination in Employment Act (ADEA)
 - 40 years and older
 - Michigan law

CDC Guidelines Trump Regular ADA Prohibitions

- The ADA does not interfere with employers following advice from the CDC and other public health authorities regarding appropriate steps to take relating to the workplace and the prevention of COVID-19 spread in the workplace
- CDC guidelines are ever-changing and evolving

EEOC Update Rule of Thumb

How Do Employers Have to **Accommodate** Certain Employees During the COVID-19 Pandemic?

Family Members

Q. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at a higher risk of severe illness from COVID-19 due to underlying medical condition?

A. No. The ADA does not require an employer accommodate an employee without a disability based on the disability-related needs of a family member with whom s/he is associated.

Family Members/Close Contact

- Remember [Michigan EO-36](#)
- Stay home when workers or their close contacts are sick
- Employers are prohibited from terminating, disciplining or retaliating against any employee who does not report to work because s/he has had close contact with any individual who tests positive for COVID-19 or displays one or more of the principal symptoms of COVID-19

Return to Work Accommodations

Q. How do employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?

A. The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity.

Return to Work Accommodations

Q. What does an employee need to do to request a reasonable accommodation because s/he has one of the medical conditions that CDC says may put him/her at higher risk for severe illness from COVID-19?

A. The employee or medical provider must let the employer know that s/he needs a change for a reason related to a medical condition (here, the underlying condition)

Return to Work Accommodations

Q. An employer knows that an employee has a medical condition that places the employee at a higher risk for severe illness under the CDC guidelines if they get COVID-19. The employer is concerned that his/her health will be jeopardized upon returning to work but the employee has not requested an accommodation.

A. If the employee does not request a reasonable accommodation, the ADA does not allow the employer to exclude the employee from the workplace solely because the employee has a disability that the CDC identifies as potentially placing him/her at “higher risk for severe illness” if s/he gets COVID-19. Direct threat under the ADA is a high standard.

Return to Work Accommodations

Q. As a best practice, and in advance of having employees return to work, are there ways for an employer to invite employees to request flexibility in work arrangements?

A. Yes. The ADA allows employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return.

Age

Q. Individuals age 65 and over are at higher risk for a severe case of COVID-19 and the CDC has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under federal employment discrimination laws?

A. ADEA prohibits employers from involuntarily excluding an employee from work based on his or her being 65 or older, even if the employer acted for benevolent reasons.

Age (Cont.)

A. Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age.

However, the EEOC states that employers are free to provide flexibility to workers age 65 and older even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison

- ** Medical conditions that fall under ADA
- ** Michigan law (protects all ages)

Gender

Q. If an employer provides telework, modified schedules, or other benefits to employees with school-aged children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

A. Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics

Pregnancy

Q. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy?

A. No. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntarily leave, layoff, or furloughs.

Pregnancy

Q. Is there a right to accommodation based on pregnancy during the pandemic?

A. Two federal laws that may trigger accommodation for employees based on pregnancy.

- Pregnancy-related medical conditions are protected under the ADA
- Title VII protects women affected by pregnancy, childbirth, and related medical conditions and they must be treated the same as others who are similar in their ability or inability to work.

COVID-19 Accommodation Process

Down To Earth Practical Advice

- COVID-19 Accommodation Process
 - Complies with ADA accommodation requirements (disability)
 - Complies with Title VII accommodation requirements (religion)
 - Is non-discriminatory (gender, disability, religion, familial status, association with a disabled person)
 - Is applied consistently

Step 1: Decide Approach

- Option 1: Provide only legally required accommodations (disability and religion + FMLA, FFCRA & EO-36 time off)
- Option 2: Reasonably accommodate all employees whose request is based on any protected class
 - Above categories
 - Age, pregnancy, familial status, disability association
- Option 3: Reasonably accommodate all employees whose request is related to COVID
 - Above categories
 - General concern/fear about COVID, family members who work in healthcare, etc.

Step 2: Employee Request

- “I’m not comfortable returning to in-person work yet because I am pregnant.”
- “I’m not able to return to work because I am recovering from COVID-19.”
- “I am not able to wear gloves because of a latex allergy.”
- “I am not able to wear a face covering due to my religion.”
- “I have a hearing difficulty, and face masks make it difficult for me to read lips.”

COVID-19 Accommodation Request Form

- Employee and position/job title
- Explain reason for request
- If based on a health condition, description of condition
- Identify preferred accommodation(s)
- Employee signature

Disability-Related Requests

- For disability-related requests, require Accommodation Medical Verification Form
 - Description of condition
 - List EJs employee unable to perform
 - Duration of need for accommodation
 - Ability to perform other positions
 - Whether leave would allow employee to return and perform EJs
 - If so, whether need for leave is indefinite

Step 3: Interactive Reasonable Accommodation Process

- Review nature of request
- Evaluate potential accommodations
- Assess undue hardship
 - Undue Hardship Worksheet for leaders to complete
- **NOTE:** Due to nature of COVID-19, the length of many requests may be indefinite or unknown. That is a relevant factor for both reasonableness and undue hardship.



Mary Tabin

616.831.1753

tabinm@millerjohnson.com



Sarah Willey

269.223.2957

willeys@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007

Back to Work Resource Center

<https://resources.millerjohnson.com/>

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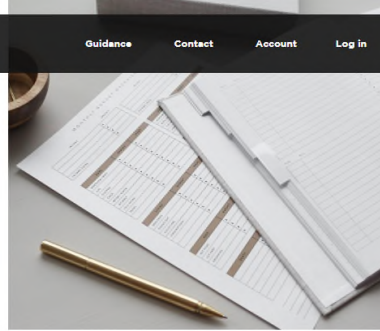
Guidance Contact Account Log in

Our **Back to Work Resource Center** provides a single source option for employers who are wrestling with the legal and practical consequences of a changed world.

For less than the cost of a typical handbook update, you gain access to an extensive collection of resources and Miller Johnson work product that we are confident will provide meaningful support to your efforts to navigate waters that are not only choppy but continuously changing direction.

Here is a sampling of what subscribers will find:

- Forms, Plans and Policies - we have drafted templates for you to put into service immediately
- Practical Guidance - tools to effectively, safely and confidently return to work incorporating best practices from outside organizations, including community partners such as Spectrum Health
- Industry Specific Guidance - pages devoted to industries singled



27