

ADVOCATING
FOR AND
SUPPORTING
AT-RISK
EDUCATORS

- Reasonable Accommodations and Leave Rights
- The Interactive Process
and
- Collective Approaches to Individual Rights

NEA Office of General Counsel & NEA Center for Organizing
Webinar, August 31, 2020

INTRODUCTION

Agenda

- ADA Reasonable Accommodations
- Federal Leave Rights
- Accommodations: Navigating the Interactive Process
- Accommodations: Doctor's Note Template
- ADA Rights in Collective Contexts

Presenters

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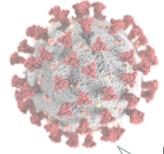
California Teachers Association

WHAT YOU NEED TO KNOW ABOUT THE ADA

- Americans with Disabilities Act (ADA) – Federal law prohibiting discrimination against people with disabilities
 - Prohibits discrimination in employment based on employee's disability, *or relationship/association with someone with a disability*
 - Requires employers to provide reasonable accommodations
 - Prohibits retaliation against employees for asserting their ADA rights
- Enforced through filing with EEOC/state agencies, prior to private lawsuit
- There may also be state or local laws that apply
 - ❖ Check with your state general counsel or local legal counsel



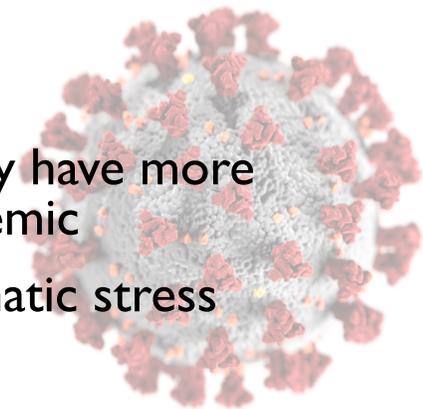
ADA DISABILITIES AND COVID-19



- Disability = Physical or mental *impairment* that *substantially limits* one or more major life activities

- Health conditions that may put someone at higher risk for serious complications from COVID would likely also qualify as an ADA-covered disability
 - But age (alone) and pregnancy (alone) are not disabilities

- Mental health: Employees with certain mental health conditions may have more difficulty coping with the stress and disruption caused by the pandemic
 - E.g., anxiety disorders, obsessive-compulsive disorder, post traumatic stress disorder



Symptoms

Testing

Prevent Getting Sick

If You Are Sick

Daily Life & Going Out

People Who Need Extra Precautions

Who Is at Increased Risk for Severe Illness?

Older Adults

People with Certain Medical Conditions

Other People Who Need Extra Precautions

Resources for Limited-English-Proficient Populations

Pets & Other Animals

People of Any Age with Underlying Medical Conditions

Updated June 25, 2020

Languages ▾

Print



Summary of Recent Changes

Revisions were made on June 25, 2020 to reflect available data as of May 29, 2020. We are learning more about COVID-19 every day, and as new information becomes available, CDC will update the information below.

People of any age with **certain underlying medical conditions** are at increased risk for severe illness from COVID-19:

People of any age with the following conditions **are at increased risk** of severe illness from COVID-19:

- [Chronic kidney disease](#)
- [COPD \(chronic obstructive pulmonary disease\)](#)
- [Immunocompromised state \(weakened immune system\) from solid organ transplant](#)
- [Obesity \(body mass index \[BMI\] of 30 or higher\)](#)
- [Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies](#)
- [Sickle cell disease](#)
- [Type 2 diabetes mellitus](#)

Children who are medically complex, who have neurologic, genetic, metabolic conditions, or who have congenital heart disease are at higher risk for severe illness from COVID-19 than other children.

COVID-19 is a new disease. Currently there are limited data and information about the impact of underlying medical conditions and whether they increase the risk for severe illness from COVID-19. Based on what we know at this time, people with the following conditions **might be at an increased risk** for severe illness from COVID-19:

- [Asthma \(moderate-to-severe\)](#)
- [Cerebrovascular disease \(affects blood vessels and blood supply to the brain\)](#)
- [Cystic fibrosis](#)
- [Hypertension or high blood pressure](#)
- [Immunocompromised state \(weakened immune system\) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines](#)
- [Neurologic conditions, such as dementia](#)
- [Liver disease](#)
- [Pregnancy](#)
- [Pulmonary fibrosis \(having damaged or scarred lung tissues\)](#)
- [Smoking](#)
- [Thalassemia \(a type of blood disorder\)](#)
- [Type 1 diabetes mellitus](#)

[Want to see the evidence behind these lists?](#)

The list of underlying conditions is meant to inform clinicians to help them provide the best care possible for patients, and to inform individuals as to what their level of risk may be so they can make individual decisions about illness prevention. We are learning more about COVID-19 every day. This list is a living document that may be updated at any time, subject to potentially rapid change as the science evolves.

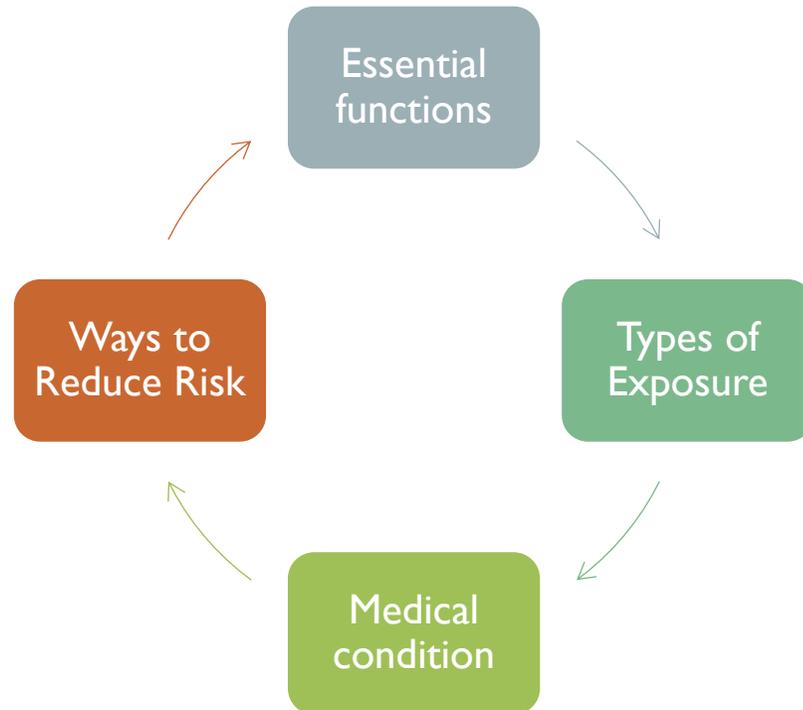
REASONABLE ACCOMMODATIONS UNDER THE ADA

- **Reasonable accommodation:**
 - Modification or adjustment to a job or work environment
 - that will enable an employee with a disability
 - to continue to perform the essential functions of their job and
 - enjoy equal benefits and privileges of employment
- ADA requires that employers provide reasonable accommodations to qualified individuals with disabilities *unless doing so would pose an **undue hardship***

UNDUE HARDSHIP



REASONABLE ACCOMMODATIONS AND COVID-19



Examples of Possible Accommodations:

- Additional PPE
- Additional cleaning of surfaces
- Engineering and schedule changes
- Transfer to a position with less contact with others
- Remote work
- Temporary leave

EDUCATORS WITH HIGH-RISK FAMILY MEMBERS

The Problem...

- Many educators who are not themselves “high risk” live with someone who is
- The ADA does not require employers to accommodate employees based on a family member’s disability
- Few legal rights to protect educators who may need accommodations to avoid infection risk for vulnerable family members

Possible Solutions...

- Negotiated as part of reopening plans
- **FMLA**
- **FFCRA**
- Leave under state law, CBA, MOU or school district policy
- Other creative legal claims?



FAMILY & MEDICAL LEAVE ACT

- Eligible employees may take
 - up to 12 weeks of job-protected, unpaid leave
 - during their employer's designated 12-month period
 - for several reasons related to their own health condition and certain family caregiving needs, including...
 - ***To care for a spouse, child, or parent with a serious health condition***
- Although leave is unpaid, FMLA at least provides
 - ✓ Job restoration rights
 - ✓ Continuation of health benefits
 - ✓ Prohibitions against interference with FMLA rights and retaliation



FEDERAL LEAVE FOR COVID-19: FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Two types of leave
 - ✓ Emergency Paid Sick Leave (80 hours) – To care for an individual who has been advised by a health care provider to self-quarantine, including because of increased vulnerability to coronavirus
 - ✓ Expanded FMLA (12 weeks, 10 partially paid) – To care for a son/daughter whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19
- Covered employers include private employers with fewer than 500 employees and **all public employers**



REQUESTING A REASONABLE ACCOMMODATION

- A disabled employee may – and should – request a reasonable accommodation so s/he can continue to perform the essential functions of the job.
- Once requested, the employer is required to engage in an *interactive process* with the employee to identify one or more reasonable accommodations.
- The employer is also required to initiate this process even without an employee request if it is aware that the employee has a disability or is experiencing disability-related difficulties in the workplace.

THE INTERACTIVE PROCESS

- It's called an "interactive process" for a reason: it's intended to be both:
 - *Interactive* – a non-adversarial back-and-forth between employer and employee; and
 - *A process* – an ongoing, collaborative problem-solving exercise, possible over multiple meetings.
- This is intended to be an accessible and user-friendly process.
 - No required "magic words" to initiate or engage in the process.
 - No specialized legal or medical knowledge required.
- The employee does not need to engage in the process alone – s/he can be assisted by a coworker, friend, family member or other representative.

THE INTERACTIVE PROCESS – CONT'D.

- Parties must participate in good faith – sharing information (within reason) and exchanging ideas in order to identify one or more reasonable accommodations.
- Beyond this, however, there is no required format, procedure, or timing, and the process may be re-engaged in as necessary.
- Though reasonable accommodations may be proposed, considered, and rejected, this is not collective bargaining or formal negotiations. The process can be initiated before identifying an accommodation, multiple accommodations can be proposed, and there is no impasse.

THE INTERACTIVE PROCESS – CONT'D.

- While there is no required format, the interactive process often proceeds as follows:
 - **Identify** – the employee's disability (i.e., the physical or mental limitations impacting the ability to perform the work); the barriers that exist to performing the work; and the essential functions of the job.
 - **Brainstorm** – about ways that the employee's disability could be accommodated to allow the employee to perform the essential functions of the job.
 - **Assess** – whether a proposed accommodation is likely to be effective, reasonable, and not present an undue hardship.
- These steps can – and often are – performed repeatedly, and over multiple meetings.

HELPING EDUCATORS IN THE INTERACTIVE PROCESS

- Employees do not need to participate in the interactive process by themselves – they can be assisted by a representative.
- Union leaders are ideally positioned to support disabled employees seeking workplace reasonable accommodations.
- Remember: the interactive process is intended to be an accessible exercise in problem-solving , *not* a formal proceeding requiring specialized legal or medical knowledge.
- What's most important is understanding the employee's limitations, job duties, and work environment – and coming prepared with a collaborative, problem-solving attitude.

MEDICAL DOCUMENTATION

- The employer can request medical documentation from an appropriate health care /rehabilitation professional, but only if:
 - The disability and need for an accommodation is not obvious; or
 - The employer does not already have documentation confirming the disability and need for an accommodation.
- The employee must show the nature of the impairment, the activity that it impacts, and the need for an accommodation.
- The employer can ask for clarification – but must identify the information required and provide reasonable time for the employee to provide it.
- The employer **cannot** ask for the employee's complete medical file.
- The employer must keep all medical information confidential.

NEA RESOURCE: DOCTOR'S NOTE TEMPLATE

What It Includes

- Summary of what should be included in medical provider's letter to the employer
- Appendix A - Fillable template for medical providers to use in drafting support for employee request for accommodations
- Appendix B – List of CDC-identified medical conditions and bodily systems impacted
- Appendix C – List of NEA job types, points of potential virus exposure, and possible accommodations

Ways to Utilize

- Resource for individual members and their medical providers
- Starting place for considering groups of members who may be covered by the ADA, and thinking about the range of possible accommodations for teachers and ESPs

**Sample Letter from Health Care Professional Supporting
Workplace Request for Accommodations Related to COVID-19**
*[Replace the above text with your professional letterhead. This letter must be
individualized.]*

[Date]

Dear [Supervisor or Human Resources Staff] OR [To Whom It May Concern]:

I am the [treating physician, nurse practitioner, healthcare professional, etc.] for
[Patient].

My patient, [patient's name], has been diagnosed with [condition – **Appendix B
contains a list of COVID-19 high-risk health conditions and the bodily systems they
impair**], a medical condition that substantially limits [the bodily system impaired].
Specifically, this patient's body [describe the impairment].

People with [condition] face a higher chance of experiencing serious
complications from COVID-19. The CDC has advised individuals with [condition]
to take additional precautions in order to avoid exposure to the coronavirus. In
particular, given my patient's condition, they [Explain any complications the
patient has that would make them even more vulnerable to serious illness from
COVID-19.]

Condition	Bodily system(s) affected	Known/likely COVID risk
Asthma (moderate to severe)	Respiratory system	Likely risk
Cancer	Normal cell growth	Known risk Chemotherapy also increases risk of infections
Cerebrovascular disease	Circulatory system	Likely risk
Chronic kidney disease	Kidney function	Known risk at any stage of kidney disease
Chronic Obstructive Pulmonary Disease (COPD)	Respiratory system	Known risk
Cystic fibrosis	Respiratory and digestive system	Likely risk
Hypertension or high blood pressure	Cardiovascular system	Likely risk
Immunocompromised state from solid organ transplant	Immune system	Known risk
Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, or use of immune weakening medicines such as corticosteroids	Immune system	Likely risk
Liver disease	Liver function	Likely risk, especially if you have scarring of the liver
Neurologic conditions such as dementia	Neurological system	Likely risk
Obesity* (BMI of 30 or above)	Multiple	Known risk
Pregnancy**	Multiple	Likely risk; COVID-19 infection may also increase risk of preterm birth

Job Type*	Potential Points of Exposure to Coronavirus	Examples of Possible Accommodations
Classroom teachers	Multiple daily contacts with students and co-workers; some contact with parents/guardians; exposure to surfaces; extended periods of time in buildings	Assignment to provide virtual instruction; all “general accommodations” (below); temporary transfer to a position with less student contact; temporary leave
Specialized Instructional Support Personnel (SISP)**	Multiple daily contact with students and co-workers; exposure to surfaces; extended periods of time in buildings	Assignment to provide services and/or instruction virtually; all “general accommodations” (below); temporary transfer to a position with less student contact; temporary leave
Food Service ESPs*** (cooks and food preparation workers; dietitians and dietary technicians; food service workers; cashiers; non-managerial supervisors)	Some prolonged periods of contact with students and co-workers; exposure to surfaces; extended periods of time in buildings	All “general accommodations” (below); temporary transfer to a position with less student contact; scheduling changes to reduce contact with others; temporary leave
Custodial and Maintenance ESPs (building and grounds maintenance staff; custodians; mechanics (except vehicle) and repairers; laborers, helpers, and warehouse personnel; non-managerial supervisors)	Some contact with students and co-workers; exposure to surfaces; extended periods of time in buildings	All “general accommodations” (below); scheduling changes to reduce contact with others; enhanced levels and types of PPE for those working with chemicals and potential contaminants; temporary leave

GENERAL ACCOMMODATIONS (IF NOT ALREADY IN PLACE)

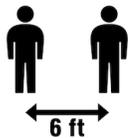
Appendix C



Personal Protective Equipment (PPE) and hand hygiene protocols; cleaning and disinfecting – appropriate face covering on patient (if necessary, specifying cloth face covering, mask, or respirator); appropriate face covering on all others in the school building or other worksites (including school buses); face shields; mandatory hand-washing multiple times a day and hand sanitizer; daily cleaning and disinfecting, regular disinfecting of high-touch surfaces.



Building/Worksite Modifications – plexiglass protections; HVAC system and other ventilation modifications to increase air flow, air filtration, and circulation of clean air



Distancing / Modifications to Work Environment & Schedules – reductions in class size or other (e.g. school bus, office space, maintenance shop, etc.) capacity; reconfiguration of all spaces where students and/or staff gather; adjustments to school schedules and traffic patterns

ADA ACCOMMODATIONS IN A COLLECTIVE CONTEXT

- Usual paradigm of ADA analysis focuses on individuals
 - ✓ Individualized assessments
 - ✓ One-on-one interactive processes
- Pandemic → Large numbers of people with ADA-qualifying disabilities who may never previously needed an accommodation
 - Shared basis for need for accommodation: reduction of risk of exposure to coronavirus
 - Creates Opportunities for Collective Actions
 - Raising the health and safety floor for everyone
 - Coordinating large volume of requests
 - Challenging broad district/school policies that violate the ADA

RAISING THE FLOOR FOR EVERYONE

- Historical examples: workplace smoking bans; curb cuts
- See Doctor's Note Template: - "General Accommodations (if not already in place)":
 - ✓ Personal Protective Equipment (PPE) and hand hygiene protocols
 - ✓ Building/Worksite Modifications
 - ✓ Distancing / Modifications to Work Environment & Schedules



COORDINATING LARGE VOLUMES OF REQUESTS

- E.g., Elizabeth, NJ School Board votes to go all-remote (Aug. 11, 2020)
- “As of Monday, 375 teachers have notified the district that they cannot report to work inside a school building in September due to health related issues. There would be insufficient staff to open safely in person with that many teachers unavailable for in-person instruction,” said Pat Politano, a spokesman for the Elizabeth School District.
- Other examples?



CHALLENGING
BROAD
DISTRICT/SCHOOL
POLICIES THAT MAY
VIOLATE ADA

- Blanket statements that high-risk individuals must take a leave of absence if they don't want to return;
- Across-the-board requests for broad medical releases;
- Issuing "boilerplate" denials without considering individual requests



QUESTIONS?

Additional Resources

NEA Resources for Members

- <https://educatingthroughcrisis.org/your-rights/>

ADA, COVID High-Risk (CDC), and Accommodations

- <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- <https://askjan.org/>

Families First Coronavirus Response Act

- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>