



*A Union of Professionals*

## **Know Your Rights: Reasonable Accommodations During the COVID-19 Pandemic**

Union leaders must be an active participant in the discussions involving the reopening of the public worksites, including our members' rights to not return to the worksite. At a minimum, employers are obligated to comply with federal laws, like the Americans with Disabilities Act (ADA), and provide a reasonable accommodation to employees who have certain health conditions or substantially limiting impairments. In addition to the ADA, federal and state family leave laws are critical for addressing the needs of employees who require job-protected leave to care for themselves or a family member. Even under the best and most enlightened reopening plans, some public employees will still need individualized attention and accommodations to protect their own and their family's health and safety.

CDC guidance designed to reduce infection in workplaces underscores the importance of supporting employees who are at high risk for severe illness from COVID-19. (<https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>). Accommodation measures, including continuing to work remotely, not only help preserve the health of employees; these actions also avoid the brain drain that comes with high turnover. No one should be forced to choose between the financial security their job provides and placing themselves or their family in unreasonable danger.

This document has been prepared by the AFT Legal Department to assist AFT affiliate leaders and staff in answering members' questions about employers' obligations under federal law, as well as their rights if employers fall short of those obligations. The information provided here is not intended to constitute legal advice; instead, all information, content and links contained herein are for general informational purposes only and are subject to changes, which are occurring daily. If AFT affiliate leaders or staff have additional or situation-specific questions, they should contact the AFT Legal Department staff directly or via Mariame Toure (mtoure@aft.org), and they will do their best to assist you as quickly as possible.

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The American Federation of Teachers is a union of professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for our students, their families and our communities. We are committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.

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## COVID-19, reopening and the ADA: Frequently asked questions

1. When am I entitled to a reasonable accommodation under the ADA?

The Americans with Disabilities Act requires an employer to provide reasonable accommodations to employees with disabilities so long as the accommodation does not place an undue hardship on the employer. The ADA requires an “interactive process” between the employer and employee once an accommodation is requested. Some underlying health issues that place an individual at high risk during the pandemic may qualify as a disability necessitating reasonable accommodations by the employer.

2. What underlying health issues has the CDC said put a person at high risk during the pandemic?

Guidance from public health authorities and the CDC is likely to change as the COVID-19 pandemic evolves. Therefore, employees should continue to follow the most current information. Those at high risk, as identified by the CDC, currently include people with the following conditions:

- 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.

Those that “might be at an increased risk for severe illness” include people with the following conditions:

- 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); Thalassemia (a type of blood disorder);
- Type 1 diabetes mellitus.

View the CDC’s current list [HERE](#).

3. What are some examples of reasonable accommodation I could be entitled to if I have an underlying health condition that puts me at high risk?

Some examples of reasonable accommodations include: permitting telework; modified work schedules; some limited changes to working conditions; permitting the use of paid or unpaid leave; providing additional protective gear such as mask or respirator, or alternative protective gear such as non-latex gloves to employees with latex allergies.

4. If my employer states in its reopening plan that working remotely will be a “reasonable accommodation” only as a last resort, is that legitimate under the ADA?

Under the ADA, an employee’s preferred accommodation should be given primary consideration but is not necessarily controlling. The employer may choose among reasonable accommodations as long as the

chosen accommodation is effective. Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability. An employer is permitted to require the less expensive, easier or less burdensome of two equally effective accommodations.

5. I'm not in a high risk group but someone else in my home is. Am I entitled to a reasonable accommodation?

Employers would not be required to provide a reasonable accommodation for an employee because someone in the employee's home is in a high-risk group nor would an employee be legally protected from refusing work under the ADA because of concerns of putting someone in their home at risk. Depending on your collective bargaining agreement, any applicable state executive orders, and the flexibility of your employer, you may have the option of taking paid or unpaid leave in this situation.

6. Am I entitled to a reasonable accommodation based on my age because the CDC says the risk of severe illness increases with age?

Although the CDC says the risk of severe illness due to COVID-19 increases with age, age is not a protected category under the ADA. The Age Discrimination in Employment Act protects an employee against discrimination based on age, but does not itself have an accommodation provision like the Americans with Disabilities Act. However, if an employer is allowing other comparable workers to telework, or any other accommodations, it should make sure it is not treating older workers differently based on their age.

7. Am I entitled to a reasonable accommodation because of COVID-19's strain on my mental health?

The ADA treats certain mental health conditions as disabilities. The EEOC recognizes that stresses associated with the COVID-19 pandemic may exacerbate pre-existing mental health conditions. As a result, employees may be entitled to accommodations, subject to the same analysis and process applicable to other requests for accommodations in the workplace.

8. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, can they now be entitled to a reasonable accommodation (absent undue hardship)?

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist them and enable them to keep working; explore alternative accommodations that may effectively meet their needs; and request medical documentation if needed.

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

Pregnant workers are potentially entitled to a reasonable accommodation under two federal laws. First, some pregnancy-related conditions could be considered a "disability" under the ADA requiring employers to engage in the reasonable accommodation process under the ADA.

Second, Title VII of the Civil Rights Act prohibits pregnancy discrimination. This means that a pregnant worker may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or

inability to work.

10. If my employer is open, but my child's local school or childcare provider is closed, am I entitled to a reasonable accommodation?

No, but you could be entitled to paid leave under the Families First Coronavirus Response Act, detailed further below.

11. My reopening plan calls for temperature checks, medical questionnaires or collecting other personal medical data on us. Do I have to comply? If they send me home as a result of these checks, do I still get paid?

While not normally permissible under the Americans With Disabilities Act, because COVID-19 has been declared a pandemic, the EEOC has [said](#) that an employer is permitted to require temperature checks or ask an employee about symptoms prior to the employee working. This information must be kept confidential by the employer under the ADA.

An employer can send an employee home if they exhibit COVID-19 symptoms. If an employee is scheduled to work but gets sent home, payment of wages would be dependent on whether the employee actually reported to work and worked any hours, any applicable collective bargaining agreement, whether the employee is hourly or on salary, and applicable state wage and hour laws. An employee may also be eligible for FFCRA paid sick leave, detailed more fully below.

In general, federal wage and hour laws only require employers to pay hourly employees for hours actually worked; if an employee was scheduled to work but did not work the employee is not entitled to any pay. Salaried employees are required to be paid their full weeks wages only if they worked some hours during the week the employer sent the employee home. "Professional employees," such as those jobs which require an advanced degree, are not covered by federal wage and hour laws. You may also be able to take paid or unpaid leave.

12. Is there a privacy issue related to testing and the gathering of medical information? Does my employer have the right to have the results?

The EEOC has said an employer must keep COVID test results and other medical information it gathers such as temperature checks confidential, and segregate that information from the employee's regular employment file or record and limit other employee access to the information.

13. What if tests are unavailable at my workplace or in my community?

Decisions about COVID-19 testing are made by state and local health departments or healthcare providers. Check with your state's Department of Health to find the nearest community testing centers or to find what the procedure is to secure a test if these testing centers are inaccessible to you. If this information is unavailable, contact your Department of Health or healthcare provider directly.

If you have symptoms of COVID-19 and are not tested, it is important to self-isolate. If you are asked to come into work despite showing symptoms of COVID-19, you can file a complaint with the appropriate occupational health and safety agency for workplace safety violations if you live in one of the 28 states with a state OSHA plan that covers state and local government employees or make a complaint to your local government. Critical workers, in particular, have specified CDC guidelines that suggest testing for employees. If these tests are not being provided, this would be grounds for a possible OSHA violation. Leaders should consider bargaining language about test availability in any Memorandum of Understanding or Collective Bargaining Agreement and, if necessary, file a grievance for any violations.

14. What should I do if there is not an ADA accommodation available to us but I still feel at risk?

If you are not eligible for an ADA accommodation, there may be similar state laws that offer greater protections. Check with the state labor enforcement agency in your state to find out.

In addition, you may qualify for a form of federal paid leave depending on your reason for feeling at risk. The Families First Coronavirus Response Act (FFCRA) reimburses employers who keep workers on payroll when the business is closed due to the pandemic. It applies to government, public school employees, and those who work for companies with 50 or more employees.

Those covered by the FFCRA are eligible for up to two weeks of paid leave at their regular pay rate if they cannot work because they are quarantined or experiencing COVID-19 symptoms. If they are caring for someone else in quarantine, they are eligible for up to two weeks paid sick leave at two-thirds their regular pay rate. Employees who have been employed for at least 30 days and must care for a child because schools are closed are eligible for up to 10 additional weeks of paid leave at two-thirds their regular pay rate. The U.S. Department of Labor has granted governors broad discretion to exempt employees a governor deems necessary to respond to the COVID-19 crisis.

The Family and Medical Leave Act (FMLA) also offers 12 weeks of unpaid, job-protected leave for employees who have worked for their employer for at least 12 months, have worked at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles. FMLA leave is designed for employees who are incapacitated by a serious health condition, or those who must take care of covered family members with a serious health condition. Leave taken for the purpose of avoiding exposure to Covid-19 would not be protected. Check your state law as some offer more than 12 weeks, including DC whose law provides 16 weeks.

If none of these options are available for you, or even if they are, make sure to work with your fellow employees and union representatives to add language on expanded protections and accommodations to any collective bargaining agreement or memorandum of understanding with your employer. If your MOU is being violated, check for the grievance procedure under your CBA and request changes from your employer.

15. Do I need to use leave before being entitled to a reasonable accommodation?

No, an employee does not need to use leave before asking for a reasonable accommodation or getting a reasonable accommodation.

16. Am I protected from retaliation if I ask for a reasonable accommodation?

Yes. Employers cannot retaliate against employees who make a good faith request for a reasonable accommodation. If you feel you are retaliated against after making a request for a reasonable accommodation, you should talk to your union or legal counsel.

17. If someone calls out of work with symptoms or tests positive, what protocol should my workplace follow for notifying and assessing coworkers who may have been in contact? Do I have a right to know if people in my workplace are sick?

The CDC has issued guidance on [workplace exposure and COVID 19](#), providing that “if an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The fellow employees should then self-monitor for [symptoms](#) (i.e., fever, cough, or shortness of breath).”

18. What are my rights to leave under the Families First Coronavirus Response Act?

The Families First Coronavirus Response Act provides emergency paid sick and family leave to many workers. Emergency paid sick leave must be made immediately available to employees, regardless of how long they have worked for the employer. However, there are several exceptions to the new law that AFT

members should be aware of. While the new law covers employees of public agencies it exempts private employers with more than 500 employees, and empowers employers and the Department of Labor to potentially exempt certain healthcare and public employees from the requirement that employees be given leave to care for children whose school or daycare has closed because of the crisis. Therefore, many large nongovernmental higher education institutions may be exempt, and some employers may assert healthcare employees such as nurses are exempt.

For employees that the new law covers, the new law provides full-time workers with emergency paid sick leave for two weeks—or 80 hours—of missed work that is related to COVID 19. Part-time employees are entitled to the typical number of hours that they work in a typical two-week period. Pay is broken down in two ways: at the employee's regular rate, to quarantine or seek a diagnosis or preventive care for the coronavirus; or at two-thirds the employee's regular rate to care for a family member quarantined or to care for a child whose school has closed or whose child care provider is unavailable due to the coronavirus.

19. What are my rights to leave if my employer is open but my child's school or childcare provider is closed?

The Families First Coronavirus Response Act provides additional leave rights for parents whose children's school or childcare provider is closed due to COVID-19. In order to take this leave, an employee must be employed for at least 30 days. A covered employee is entitled to 10 weeks of additional leave (along with 2 weeks of paid sick detailed above) leave at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

This leave is not in addition to FMLA leave an employee may have taken in the past. If an employee has used FMLA leave prior to this, it would count against their 10 weeks of leave. Even though the new FFCRA leave related to a child's school or childcare provider is paid, if you take this leave, it counts against your entitlement to preexisting FMLA leave in a 12 month period your employer uses for FMLA purposes.

You may also be able to take advantage of leave under the [Family Medical Leave Act \(FMLA\)](#) or [state and local leave laws](#).

20. Do I have to use my accrued leave before using FFCRA leave?

Employers cannot require an employee to use accrued leave before taking their two weeks paid sick leave under FFCRA. Employers can require employees to substitute their accrued paid leave for their 10 weeks of paid childcare leave under FFCRA.

21. My employer only allows people to stay home if they've tested positive, but I'm feeling ill and I haven't been able to get tested or am still waiting on the results. What should I do?

The CDC recommends that if you are having COVID-19 symptoms, you should not leave your house except to seek medical care. A covered employee under the Families First Coronavirus Response Act is entitled to take leave to seek a medical diagnosis while experiencing Coronavirus symptoms, among other coronavirus-related reasons.

22. I was in contact with someone with COVID-19, am I entitled to leave?

In order to be entitled to FFCRA paid sick leave, you need to be experiencing COVID-19 symptoms and seeking a medical diagnosis, under advisement by a healthcare provider to self-quarantine, be subject to a Federal, State, or local quarantine or isolation order or caring for an individual under advisement to self-quarantine or subject to a quarantine or isolation order. While the CDC recommends if you have been in direct contact with someone who has COVID 19 to stay home to prevent further spread of the virus, your employer could still require you to show one of these circumstances before granting you FFCRA

protected sick leave. State law or a collective bargaining agreement may provide additional protected leave under these circumstances.

23. Can my boss require me to have a camera or video conferencing app open/pointed at my workspace during working hours while I'm working from home as part of my accommodation?

If you have a union, your employer will likely have to bargain about any changes to employee monitoring policies. For at-will employees without union protections, an employer can implement new monitoring policies without your consent and as a condition of the reasonable accommodation.

With respect to an employer's ability to video record you at home, public sector employees may have some rights under the U.S. Constitution against unreasonable search but private sector employees do not. Additionally, some states have very specific privacy protections for employees. For example, the [law](#) in Connecticut prohibits an employer from operating any electronic surveillance device or system for the purpose of monitoring their employees in areas designed for the "employees' health or personal comfort or for the safeguarding of their possessions, such as restrooms, locker rooms, or lounges." Connecticut [law](#) also requires that an employer must notify employees it intends to surveil. This area of law is very much still being developed as employers come up with more and more invasive types of surveillance and as that surveillance intrudes into people's physical and virtual personal space.

Local AFT affiliates can contact the AFT legal department with any specific workplace surveillance questions.

24. I'm required to work online but I don't have (adequate) internet at home or access to other necessary tools. Is my employer required to provide access or reimburse me for additional cost?

If you have a union, the employer likely needs to bargain about this. An employer may be required to purchase equipment as part of a reasonable accommodation under the ADA depending on the cost and the burden. A few states, like California, Illinois, Iowa, and New Hampshire, provide that the employer must reimburse you for those costs. But even if your employer does require you to purchase equipment and is not required by law to reimburse you, you can still organize with your co-workers to demand that the employer reimburse you.