

# Returning to work presents ADA compliance challenges for employers

As you prepare your return to work plan, consider the impact reopening will have on disabled workers. Some will want to get back to work immediately. Others may want to remain home longer to avoid possible infection. Don't think that simply telling disabled employees they won't be recalled until the pandemic is over is legal. The Americans with Disabilities Act (ADA) protects disabled workers who want to return and disabled workers who don't.

Employers have to provide help to keep vulnerable disabled workers safe when they insist on returning or you need them. Fearful returning workers with newly diagnosed mental health disabilities will need reasonable accommodations. These may include more time off, continuing or new telework arrangements, and perhaps mental health treatment with FMLA time off. Here's a breakdown for easing return to work for disabled workers.

## Screening workers

No doubt the first concern when opening up facilities again is that everyone who returns is COVID-19 free. You will need a protocol for screening everyone that doesn't violate the ADA. Your opening plan should include screening before return to work – ideally every shift. It should also include clear mandates for any sick worker to stay home. Anyone who develops symptoms at work should also immediately go home. You should be very clear about what symptoms should prompt a call-off. Do review your leave policy to see if you should temporarily extend extra leave. That way, a worker won't come in sick for fear of losing pay. Just make sure you apply these rules to everyone and don't single out workers you deem at higher risk. For example, don't tell a worker you know has heart disease to go home but allow others to stay.

The ADA bars employers from asking questions that are likely to reveal an employee's disability. Such questions aren't allowed because they can reveal a disability that the employee wants to keep private. However, during a pandemic, employers have considerable leeway. The [EEOC's recent guidance](#) defers to employer guidance from the Centers for Disease Control (CDC). Employers may ask employees and applicants if they are experiencing symptoms of COVID-19. The CDC currently lists cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, or new loss of taste or smell as possible symptoms. This list may be updated as medical professionals learn more about the virus.

Employers may ask workers whether they have these symptoms as frequently as each time they enter the workplace. Many employers have started taking employees' temperature when they arrive at work. This does not violate the ADA. However, if you store the information, you must do so in a confidential file. Don't, for example, create a checkoff list that's viewable by others.

Any employee who exhibits symptoms of COVID-19 can be barred from the workplace. They should be instructed to seek medical care and testing. You can delay their return until they have received a negative test or completed a 14-day self-quarantine. Of course, if they test positive, you can also require a negative test before returning. A fitness for duty certification, including a negative test, does not violate the ADA if uniformly applied.

## Basic ADA return to work rules for disabled workers

Employees who are at high risk for COVID-19 may request reasonable accommodations to limit their exposure to co-workers or customers. The working assumption should be that someone with an underlying condition that predisposes them to serious Covid-19 complications is disabled. The condition would seem to substantially impair a major life activity such as working due to the inherent exposure risk. That may even be true for conditions not normally considered impairing like obesity – one of the newest underlying risk factors.

Right now, it may not be possible for employers to obtain medical records to decide whether the worker is disabled. One option is to grant temporary accommodation with an expiration date with the intent of making a final determination later.

What might those accommodations look like? In the retail setting, possibilities include moving a disabled worker from a cashier role to the stockroom. But be aware that you shouldn't do this unilaterally because you perceive the worker as disabled. Instead, suggest it as an accommodation if the employee asks for one. There may be disabled workers who do not want an accommodation, especially if they perceive it as punishment for disability.

The EEOC suggests simple fixes as accommodations. For example, for those who must interact with customers, employers should designate one-way aisles and install Plexiglass shields and barriers. They can also close down some checkout lines to leave 6 feet between cashiers. And of course, provide workers with masks and gloves throughout the facility.

For non-retail settings, there are other possible reasonable accommodations. These can be temporary. In fact, the EEOC encourages two forms of temporary accommodations. Let's say a disabled employee was using adaptive technology at work before you were shut down. You could arrange for that equipment to be delivered and set up at his home temporarily.

Employers should expect that many disabled workers who can work from home will want to continue doing so. If telework was successful before you began formulating a return to work plan, consider including it for disabled workers. Even before the pandemic struck, the EEOC considered telework a preferred accommodation for many disabled workers. Now, employers have data to show one of two things. Telework was either effective or not overall. They also now can see whether individuals successfully teleworked. If the employee teleworked successfully during the pandemic, it's hard to argue against it now. On the other hand, if performance was below other co-workers, you could argue against the accommodation. Simply put, you could show the telework accommodation didn't allow the disabled employee to successfully perform the job's essential functions.

## Return to work and mental health

Experts widely expect that workers returning to work will have new mental health issues. According to a recent [Kaiser Family Foundation survey](#), nearly 45% of adults reported that the pandemic was harming their mental health. Causes include economic stress, dealing with personal COVID-19 illness, or that of a family member or pre-existing problems.

Expect that returning workers may have newly diagnosed conditions like anxiety, panic attacks, depression, and alcohol or drug addictions. Still, others may suffer from post-traumatic stress disorder (PTSD). [Experts](#) are also seeing a resurgence of alcohol and drug abuse even among those long in recovery before the pandemic. Stay-at-home orders meant only virtual Alcoholics Anonymous and Narcotics Anonymous meetings. It was more difficult to access treatment centers. And isolation plus stress meant more temptation to relapse into alcoholism and drug abuse.

Under the ADA, alcoholism and drug addiction are covered disabilities. So are many common mental health problems like anxiety and PTSD. Affected employees – especially those with anxiety and related mental health

issues – may need more time off. Your return-to-work policies should reflect this. First, consider whether the employee has unpaid FMLA leave available. If not, consider whether it would be a reasonable accommodation to allow more time off.

But what about returning workers who may be anxious but don't have a diagnosis? Your return to work plans should also include addressing their concerns. Consider bringing in safety experts to allay exposure fears. Offer counseling to ease anxiety and stress.