



## FAQS ON ADA/REASONABLE ACCOMODATIONS AND CORONA VIRUS INFORMATION

### **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 the 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.

### **Q: What underlying health issues has the CDC said put a person at high risk during the pandemic?**

**A:** The guidance from public health authorities and the CDC is likely to change as the COVID-19 pandemic evolves. Therefore, employers and 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
- Organ donor status
- Obesity (body mass index [BMI] of 30 or higher)
- Serious heart conditions, such as heart failure, coronary artery disease or cardiomyopathies
- Sickle cell disease

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>

**Also, employees who “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
  - Liver disease
  - Pregnancy
  - Pulmonary fibrosis (having damaged or scarred lung tissues)
  - Thalassemia (a type of blood disorder)
  - Type 1 diabetes mellitus
- <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with>

**Q: What are some examples of reasonable accommodations I could be entitled to if I have an underlying health condition that puts me at high risk?**

**A:** Examples of reasonable accommodations include: permitting remote/hybrid/online teaching; modified work schedules; some limited changes to working conditions; permitting the use of paid or unpaid leave; and providing additional protective gear such as N95 masks or respirators, or alternative protective gear (such as non-latex gloves to employees with latex allergies).

**Q: If my College/University states in its reopening plan that teaching online will be a “reasonable accommodation” only as a last resort, is that legitimate under the ADA?**

**A:** Under the ADA, an employee’s preferred accommodation should be given

primary consideration but is not necessarily controlling, i.e., it is not necessarily the deciding word on which accommodation winds up being used. The employer may choose among reasonable accommodations if the chosen accommodation is effective. Thus, as part of the interactive process that the ADA requires, 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.

**Q: I am not in a high-risk group but someone else in my home is. Am I entitled to a reasonable accommodation?**

A: 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 under the ADA if they refused to work because of concerns of putting someone in their home at risk.

Remember, that as the COVID situation evolves, applicable state Executive Orders and the flexibility of your administration may give you the option of adding "high risk groups" to qualifying events for ADA. Currently, the only option our members have is taking paid (see Article XXIV.C. and FMLA) or unpaid leave in this situation. (see Article XXVI. A. and FMLA)

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

A: Although the CDC says the risk of severe illness due to COVID-19 increases with age, unfortunately, age is not a protected category under the ADA. The Age Discrimination in Employment Act protects an employee against discrimination based on age, but it does not have an accommodation provision like the Americans with Disabilities Act.

**However**, if the administration is allowing other younger, comparable workers to work remotely (either teaching or staff related duties), or creating any other accommodations, it should make sure it is not treating older workers differently based on their age. Age-related accommodations could be part of your local union's advocacy and the basis for bargaining local agreements with your administration. (*\*this may require Local Union intervention in the form of an information request, at the very least*).

**Q: Am I entitled to a reasonable accommodation because of COVID-19-related strain on my mental health?**

**A:** The ADA treats certain mental health conditions as disabilities. The Equal Employment Opportunity Commission recognizes that stresses associated with the COVID-19 pandemic may exacerbate pre-existing mental health conditions. Accordingly, employees may be entitled to accommodations, subject to the same analysis and processes applicable to other requests for accommodations in the workplace.

**Q: If an employee has a pre-existing mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may that employee now be entitled to a reasonable accommodation (absent undue hardship)?**

**A:** Although we all may feel significant stress due to the COVID-19 pandemic, AFT bargaining unit members with certain pre-existing mental health conditions (for example, anxiety disorder, obsessive-compulsive disorder or post-traumatic stress disorder) may have more difficulty navigating the severe disruptions to daily life, the lack of previously available supports and resources (such as face-to-face therapy and specific treatment modalities), and the considerable uncertainty and anxiety that have accompanied the COVID-19 pandemic.

As with any accommodation request, employers **may** (*but are not required to*): ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist the employee and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation if needed.

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

**A:** Pregnant workers are potentially entitled to a reasonable accommodation under two federal laws:

(1) Some pregnancy-related conditions could be considered a “disability” under the ADA, requiring employers to engage in the reasonable accommodation process under the ADA.

(2) Title VII of the Civil Rights Act prohibits discrimination against employees who are pregnant. This means that a pregnant worker may be entitled to job modifications, including remote work accommodations, 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.

**Q: If my College/University is open, but my child's local school or childcare provider is closed, am I entitled to a reasonable accommodation?**

**A:** No, but you could be entitled to paid leave under the Families First Coronavirus Response Act, (herein FFCR) (see below).

**Q: If my reopening plan calls for temperature checks, medical questionnaires or collecting other personal medical data on us, do I have to comply?**

**A:** These types of requirements are not normally permissible under the Americans with Disabilities Act, but 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. However, the employer cannot compel you to undergo invasive tests such as blood-based antibody testing.

**\*ALL COVID-19 test information must be kept confidential by the employer under the ADA.**

**Q: Is there a privacy issue related to testing and the gathering of medical information?**

**A:** The EEOC has said an employer must keep COVID-19 test results and other medical information it gathers, such as temperature check results, confidential, and must segregate that information from the employee's regular employment file or record and limit other employee access to the information.

**Q: Does my employer have the right to have the results?**

**A:** This is HIPAA protected information. The EEOC has said an employer must keep COVID-19 test results and other medical information it gathers, such as temperature check results, confidential, and must segregate that information from the employee's regular employment file or record and limit other employee access to the information.

**Q: If they send me home because of these checks, do I still get paid?**

**A: An employer can send an employee home if employees exhibit COVID-19 symptoms.** However, because AFT unit members are salaried employees, you will be paid your full week's wages only if you worked some hours during the week that your College/University sent you home. You may also be able to take paid or unpaid leave under Article XXIV (Paid Leaves) and Article XXVI (Unpaid Leaves)

**Q: What if tests are unavailable at my workplace or in my community?**

**A:** Decisions about COVID-19 testing are made by NJ and local health departments or healthcare providers. Check with your NJ'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 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 New Jersey Public Employees Occupational and Safety Health Administration for workplace safety violations or make a complaint to your local/municipal government.

<https://www.nj.gov/health/workplacehealthandsafety/peosh/>

**Q: What should I do if there is not an ADA accommodation available to me, but I still feel at risk?**

**A:** If you are not eligible for an ADA accommodation, you may qualify for a form of federal paid leave under the Families First Coronavirus Response Act (FFCRA) depending on your reason for feeling at risk, detailed further below.

**Q: Do I need to use leave before being entitled to a reasonable accommodation?**

**A:** No, you do not need to use leave before asking for a reasonable accommodation or getting a reasonable accommodation.

**Q: Am I protected from retaliation if I ask for a reasonable accommodation?**

**A:** Yes. Your employer cannot retaliate against you for making a good faith request for a reasonable accommodation. If you feel you are retaliated against after making a request for a reasonable accommodation, contact your Local's grievance officer for guidance.

**Q: If someone calls out of work with symptoms or tests positive, what protocols should my supervisor/Dean follow for notifying and assessing co-workers who may have been in contact? Do I have a right to know if people in my workplace are sick?**

**A:** The CDC has issued guidance on workplace exposure and COVID-19, providing that: "if you are confirmed to have COVID-19 infection, your employer must 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). You should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath)."

**Q: What are my rights to leave under the Families First Coronavirus Response Act?**

**A:** The *Families First Coronavirus Response Act* <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> 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. For employees covered by the new law, the law provides full-time workers with emergency paid sick leave for two weeks—or 80 hours—of missed work related to **COVID-19**. Part-time employees are entitled to paid leave for 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 a child whose school has closed or whose child care provider is unavailable due to the coronavirus.

**Q: What are my rights to leave time if my College/University is open but my child's school or childcare provider is closed?**

**A:** 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. To take this leave, you must be employed for at least 30 days. A covered employee is entitled to 10 weeks of additional leave (along with two weeks of paid sick 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 any 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.

**Q: Do I have to use my accrued leave before using FFCRA leave?**

**A:** Colleges/Universities 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 child-care leave under FFCRA.

**Q: My College/University only allows people to stay home if they have tested positive, but I am feeling ill and I have not been able to get tested or am still waiting on the results. What should I do?**

**A:** 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.

**Q: I was in contact with someone with COVID-19. Am I entitled to leave?**

**A:** In order to be eligible for FCRA paid sick leave, you need to be: (1) experiencing COVID-19 symptoms and seeking a medical diagnosis; (2) under advisement by a healthcare provider to self-quarantine; (3) subject to a federal, state or local quarantine or isolation order; or (4) caring for an individual under advisement to self-quarantine or subject to a quarantine or isolation order. While the CDC recommends that you stay home if you have been in direct contact with



someone who has COVID-19, in order to prevent further spread of the virus, your administration could still require you to document one of these circumstances before granting you FFCRA-protected sick leave.

**\*This FAQ is current as of July 28, 2020. However, the CDC and New Jersey employment rules and regulations continually evolve. The Council will strive to provide the latest information related to your health and safety in the workplace.**