

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Does the ADA permit employers to require employees who've been infected with COVID-19 to present a doctor's note/medical excuse in order to return to work ?

**Answer:**

Yes, these requests are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.



Yes, the ADA supports an employer requesting medical documentation from an employee who has been out of work due to being infected with COVID-19. It is an acceptable practice because it is not disability-related in nature.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to administer a COVID-19 viral test to employees as workplace practices to safeguard others?

**Answer:**

Employers are allowed to administer the COVID-19 viral test to its employees as long as it is “job-related and consistent with business necessity.” They are allowed to use this practice as part of screening steps to determine if an employee entering the workplace has been infected with the virus that could potentially expose others to the virus and threaten the health and welfare of others. As long as testing is consistent with the current CDC guidance, it will meet the ADA’s “business necessity standard.”



As long as the COVID-19 viral test is considered to be “job-related and consistent with business necessity” then it is permissible in the workplace. The viral testing must be consistent with the most up to date CDC guidance, and this will allow it to meet the ADA’s “business necessity standard.”

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to administer a COVID-19 viral test to employees as workplace practices to safeguard others?

**Answer continued:**

The EEOC has indicated that the COVID-19 viral tests are permissible under the ADA; however, the antibody test is not permissible under ADA guidelines. The antibody test does not meet the “job related and consistent with business necessity.” The EEOC continues to monitor the recommendations of the CDC for updates.



As mentioned on the previous slide, the COVID-19 viral test is permissible under the ADA regulations as long as it is considered to be “job-related and consistent with business necessity.” While the viral test is permissible in the workplace, the antibodies test is not permissible in the workplace. The antibodies test does not meet the “job related and consistent with business necessity” under the ADA guidelines.



## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to store medical information for employees related to COVID-19 within their employee files such as temperature check logs, employee information regarding a diagnosis of the virus, medical documentation, etc. ?

**Answer:**

No, employers are not allowed to store any medical information within an employee's personnel file. Medical information should be maintained in a safe and secure location separately from the employee's personnel file. Any COVID-19 medical information may be stored with all other medical information for the employee.



Medical information should not be kept inside of an employee's personnel file. A separate file that's maintained by management should be created that is strictly designated for confidential medical information. Any COVID-19 related information should be kept in this medical file.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ If a member of the management team learns of an employee's diagnosis of COVID-19 or is experiencing symptoms of the virus, is it a violation of ADA to discuss it with others?

**Answer:**

It is a requirement of the ADA that all medical information be kept strictly confidential; however, this medical information does not prevent management from discussing it with the proper/designated employer officials. It is important to know that only certain designated personnel should be made aware of the identity of the individual and why is this information needed. Every effort should be made to limit the number of personnel who are informed of the name of the employee who has been diagnosed with COVID-19.



Only designated employer officials should be privy to any confidential medical information. This information should not be communicated with anyone else in the workplace who does not need to know. Per ADA, all medical information should be kept strictly confidential. Also, management should be reminded that the number of personnel receiving this information should be limited in number. The name of the employee infected with COVID-19 should remain confidential at all times and only shared with those who may need to know this information.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ If a member of the management team learns of an employee's diagnosis of COVID-19 or is experiencing symptoms of the virus, is it a violation of ADA to discuss it with others?

**Answer continued:**

It is not a violation to discuss it with other personnel; however, the designated personnel should be officials such as management. The ADA does not become involved with a designated official or representative from the company interviewing the employee to receive a list of other employees with whom the employee became in contact within the workplace. This is needed because the employer will need to take the necessary steps to notify those employee who may have been exposed without revealing the identity of the infected employee.



Please keep in mind that while it is not a violation to discuss this information with other personnel, the designated personnel should only be considered as management. If this information is shared with others outside of management, it then becomes a violation of ADA guidelines.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ If an employee requests a reasonable accommodation for a medical condition while working from home or in the workplace during the pandemic, can the employer request documentation to determine if the said condition is a disability?

**Answer:**

Yes, it is acceptable for the employer to ask questions or even request medical documentation to determine if indeed the employee has a disability. It is defined by the ADA as “a physical or mental impairment that substantially limits a major life activity, or a history of substantially limiting impairment.”



Yes, an employer has authorization to inquire with the employee and even ask for supporting medical documentation of the disability. Per the ADA’s guidelines, a disability is defined as “a physical or mental impairment that substantially limits a major life activity, or a history of substantially limiting impairment.”

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Is an employee permitted to receive additional reasonable or altered accommodations during the COVID-19 pandemic if already receiving a reasonable accommodation before the start of the pandemic?

**Answer:**

Yes, an employee may be entitled to receive an additional or altered reasonable accommodations during the pandemic, absent undue hardship. The employer should discuss with the employee the basis for this new request for an accommodation. Perhaps, the basis for this new request could be as a result of now teleworking from home that was previously used in the workplace.



Yes, an employee could very well be entitled to receive additional or modified/ altered reasonable accommodations during the COVID-19 pandemic, absent undue hardship. The employer should have an opportunity to speak privately with the employee to determine the basis for the new request.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ 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 a(n) underlying health condition(s)?

**Answer:**

No, the ADA does not require that employers accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom he/she is associated. The employer does have the liberty to provide flexibilities to the employee, if the employer chooses to do so. It should be remembered that offering these flexibilities beyond what the law requires should be extra cautious not to engage in disparate treatment/unfair treatment on a protected EEO basis.



Employees are not entitled to any accommodations under ADA without having a personal disability. Efforts for reasonable accommodations are to be made for the employee who has a disability and not on the basis of a family member who may be in the higher risk group for contracting COVID-19. Employers do have the option of providing flexibilities to employees requesting reasonable accommodations for these reasons; however, it should be noted that this could be considered unfair treatment under EEO guidelines since others may not be permitted to have these same accommodations made for them.

## Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Do employers have to grant accommodation requests for modified protective gear of employees returning to the workplace and being required to wear personal protective gear and engage in infection control practices?

**Answer:**

An employer may require employees to wear protective gear such as face masks, and implement infection control practices such as social distancing. If an employee with a disability requires a related reasonable accommodation per the ADA guidelines such as non-latex gloves, modified face masks(those who communicate with others through lip reading, gowns for employees in wheelchairs, etc. or a religious accommodation under Title VII such as modified equipment due to religious garb, the employer should discuss the request and provide the modification or an alternative if feasible and as long as it does not cause an undue hardship to the business.



Employers should take the time to discuss with the employee the reason for the request and provide the modification or an alternative if feasible as long as it does not cause an undue hardship to the business.

## COVID-19 and ADA/ADAAA Questions



An employee has entered the workplace and is experiencing some signs of a possible COVID-19 infection such as fever, coughing, and sore throat. Does the employer have the right to ask the employee to end his/her workday and to seek the necessary medical treatment in order to prevent exposure to other employees in the workplace.

**Answer:**

Yes, the employer has authority to exclude the employee from the workday in order to maintain a safe and healthy workplace environment for all others. The CDC states the employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following the guidelines and advice from the CDC.



The employer has the authority to have an employee to end his/her work day early due to experiencing symptoms related to COVID-19. The employer is following the guidelines of the CDC to ensure a safe and healthy working environment for others. The ADA will not interfere since these guidelines are per the CDC.

## COVID-19 and ADA/ADAAA Questions



Ella, an employee at ABC Company, has been diagnosed with COVID-19. Ella has notified her immediate supervisor, Ms. Brown, of her diagnosis. Ms. Brown informed Ella that she will need to inform Ella's cubicle buddy and her other team members as soon as possible since they sit within close proximity to each other. Ella became very concerned because she did not want her identity revealed. Ms. Brown stated that she must tell the employees her name. Has the employer followed proper protocol regarding the identity of the employee being diagnosed with COVID-19?

### Answer:

No, Ms. Brown has not followed the proper protocol because she must maintain confidentiality of this medical information along with the person's identity. Employers are strictly prohibited from revealing the identity of the employee per the ADA's prohibition of disclosure of confidential medical information. This information can only be shared with designated personnel (i.e., management) who will maintain confidentiality and conduct the next steps such as interviewing those who may have come in contact with the infected employee.



The supervisor, Ms. Brown, has violated the ADA's regulations because this confidential information should only be shared with those in management on a need to know basis. The goal is to limit medical information from being shared with only the designated employer officials. The supervisor can interview those in Ella's area where she sits; however, the name of the employee who has been infected with COVID-19 should not be shared with other employees. If the identity of Ella is revealed, ABC Company has violated ADA guidelines.

## COVID-19 and ADA/ADAAA Questions



Eric, an employee at ABC Company, is the primary caregiver for his elderly parents, and both of his parents have underlying health conditions that could cause them to be at a higher risk for contracting COVID-19. Eric has requested for his employer to provide him with an accommodation to telework to help decrease the chances of exposure to his parents. Does ABC Company have to grant this request for an accommodation?

**Answer:**

No, the ADA does not require ABC Company to accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom he/she is associated.



ABC Company is not required under ADA guidelines to provide accommodations for Eric due to the health status of his close family members because Eric does not have a personal disability.

## Note on Mitigating Measures

1. An employer can consider the positive and negative effects of mitigating measures when considering “reasonable accommodation” and “direct threat” issues.
2. Failure to use mitigating measures may affect whether an individual is qualified for a particular position.



The HR department will have to weigh out the pros and cons and all aspects of an employee’s disability. If it is determined that an employee is not using mitigating measures to deal with a disability, the employee could be subjected to termination.

## Enforcement of the ADA/ADAAA Policy

- ▶ All ADA/ADAAA matters and issues will go through the HR department in accordance with the regulations and guidance issued by the EEOC.
- ▶ What is HR's role?
  - ▶ Leader
  - ▶ Advisor
  - ▶ Facilitator of information
  - ▶ Liaison
  - ▶ Maintain Records – Document, Document, Document!
- ▶ HR will have final determination on who is covered under ADA/ADAAA.
  - ▶ Will ensure all determinations fall within EEOC compliance rules and regulations.
- ▶ HR will coordinate with the individual and the supervisor or manager to determine and arrange for reasonable accommodations.



The HR department is responsible for all ADA/ADAAA matters and issues. The HR department's role is to be a leader, adviser, facilitator, liaison, and to maintain records. The supervisor/manager has the responsibility to contact the HR department concerning these matters. The HR department makes the determination for a reasonable accommodation.

**ADA/ADAAA and Substance Abuse**

- ▶ An individual that uses and abuses illegal drugs will NOT be covered under the ADA/ADAAA.
- ▶ What about alcoholics?
  - ▶ Alcoholics and recovering alcoholics are NOT automatically denied protection because of use!
- ▶ Who makes that determination?

**HR is the only one who may determine eligibility and can provide guidance!!**



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Individuals that use illegal drugs are not protected under the ADA/ADAAA laws and regulations. The overconsumption of prescription drugs may be protected. Alcoholics have a responsibility to stay healthy. It's important to remember that alcoholics and recovering alcoholics are not automatically denied protection because they may have an episode "fallen off of the wagon." The HR department makes the determination if an individual is covered under the ADA/ADAAA.

## What is considered Reasonable?

**Remember, reasonable is not just what the employee wants!**

- ▶ Changes to the work environment:
  - ▶ Making facilities readily accessible
  - ▶ Job restructuring
  - ▶ Modify their work schedules
  - ▶ Telecommuting
  - ▶ Reassignment to a vacant position (even if it is temporary)
  - ▶ Acquisition or modification of equipment or devices
  - ▶ Adjustment or modifications of examinations, training materials or policies
  - ▶ Providing qualified readers or interpreters

**HR IS IN CHARGE!**



Reasonable accommodations can result in changes to the work environment or the duties of the job. Some examples include: making facilities more accessible, job restructuring, modifying work schedules, opportunity to telecommute, acquisition or modification of the necessary equipment or devices used, providing qualified readers or interpreters, etc. The HR department provides the reasonable accommodation for an employee. It is important to remember that reasonable is not just what the employee wants or desires.

## What about leave?

Sometimes, a reasonable accommodation means that the individual may need to take leave

- ▶ Types of leave:
  - ▶ Personal Time Off
  - ▶ Administrative Leave
  - ▶ FMLA
  - ▶ Short-Term and Long-Term Disability Leave

**HR IS IN CHARGE!**



A reasonable accommodation would be for the employee to take leave and the type of leave to be taken. The HR department will be able to determine which is the best form of leave for the employee to take. The HR department is in charge; they have the final say.

## Unreasonable Accommodations

- Undue Hardship
- Safety Threat
- Direct Threat
- Explore all options, not just the desire of the employees
- High cost of accommodations, financial burden
- Negative impact on the operations of the facility
- Will change the operation of the employer
- Create a new position?



An unreasonable accommodation can result in undue hardship, a safety threat, or possibly a direct threat. All options should be explored before making a final decision regarding a reasonable accommodation to prevent issues such as financial burdens placed on employers, a negative impact of the facility, or even an extremely high cost for the accommodation to be implemented.