

Xpert HR

COVID-19 and Accommodation Requests: Your Top 10 Questions Answered

Guide



COVID-19 and Accommodation Requests: Your Top 10 Questions Answered

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1 What if an employee is now asking for time off because he has to care for his children because summer camps are closed? Can I ask him for documentation?

According to the Department of Labor's FAQs interpreting the [Families First Coronavirus Response Act](#) (FFCRA), an employee may be eligible for leave if their child's care provider (e.g. camp or other program in which the employee's child is enrolled) during the summer is closed or unavailable for a COVID-19 related reason. The FFCRA has specific [documentation requirements](#).

Further, an employer should review any applicable [state or local leave law](#) or [emergency leave laws](#) to determine if an employee is eligible for leave and any documentation requirements under the law.

2 If I have an employee that has requested a work from home accommodation due to a compromised immune system, how often can I re-certify the need to work from home with the medical provider if they do not provide an estimated return date?

This question is fact-specific, which may require you to seek legal counsel to discuss the particular situation. However, the [FMLA contains recertification requirements](#).

Further, the ADA contains requirements [regarding medical inquiries and documentation](#). If an employer needs to request medical information, the employer should limit such a request to information needed to determine if the employee has a qualifying disability under the ADA; how the disability limits the employee's ability to perform the essential functions of the job; whether or not the employee is a direct threat of danger to themselves or others; and the types of accommodations that may allow the employee to perform the essential functions of the job.

An employer's duty to provide a reasonable accommodation is ongoing. An employer should periodically check in with an employee to ensure that the provided accommodation is still adequate, effective and/or necessary.



An employer should always be willing to explore the effectiveness of an accommodation and revisit or adjust an accommodation as needed. An employer should document this information as well. See [Documentation of the Interactive Process](#). However, an employer is not obligated to investigate whether an employee's condition or impairment has improved or gone into remission.

When monitoring the effectiveness of an accommodation, an employer should keep the following in mind:

- Maintain the accommodation. To the extent an employer has provided equipment as an accommodation, the employer should update the equipment as needed.
- Encourage ongoing communication. An employer should adopt [a voluntary open-door policy](#) so that an employee with a disability will feel comfortable communicating about issues related to their accommodations.

The ADA permits employers to require an examination or inquiry when an employee wishes to return to work after an injury or illness. The examination or inquiry must, however, be job-related and consistent with business necessity. However, the EEOC guidance indicates that as a practical matter, doctors and health care professional may be too busy during and immediately after the pandemic breakout to provide fitness-for-duty documentation.

Further, you should consider any state FMLA or disability law requirements when seeking information from an employee.

3 If an employee submits a doctor's note stating they are being treated for chronic conditions, are we able to ask what type of chronic conditions they are being treated for?

If an employee has a physical or mental impairment that substantially limits one or more major life activities and that employee is seeking a reasonable accommodation for that impairment, an employer [may ask for results from a medical examination or may inquire about a current employee's medical condition](#) if the inquiries are job-related and consistent with business necessity.

In particular, such requests should be limited to information regarding:

- Whether or not the employee poses a direct threat to their own or to others' safety; and
- The types of accommodations that may allow the employee to perform essential job functions.

As with all requests for medical information, make sure to abide by all applicable confidentiality and privacy requirements.

When evaluating whether an individual has a disability, consider any [state or local disability laws](#). The definitions of what constitutes a physical or mental impairment or a major life activity may vary, and states and/or localities may provide additional benefits for individuals with disabilities.

4 The ADA doesn't necessarily cover everyone who is at high risk, correct? Age and some other at-risk groups don't fall under a disability.

In its [guidance](#), the EEOC confirms that employees may request [reasonable accommodations](#) for one of medical conditions that the [U.S. Centers for Disease Control and Prevention \(CDC\)](#) considers to place them at "higher risk" for severe illness from COVID-19. After receiving a request, the employer may [ask questions or seek medical documentation](#) to help decide if the individual has a disability and if there is a reasonable accommodation, barring [undue hardship](#), that can be provided.

With respect to age, the EEOC guidance provides that the ADEA does not include an accommodation provision requiring an employer to grant an older employee's request for an accommodation based on COVID-19 concerns. However, if an employer provides a similar accommodation to comparable workers, it should not treat an older worker differently. In addition, if an older worker has a medical condition they may be entitled to a reasonable accommodation for a disability under the ADA as opposed to age.

5 If an employee does not accept "return to work" due to purposes covered under traditional protected leaves and the new extended FMLA or emergency paid sick, does the employee continued to be classified as furloughed or does the employer have a responsibility to engage in the covered protected leaves?

Under the [Emergency Family and Medical Leave Expansion Act](#) provisions of the [Families First Coronavirus Response Act \(FFCRA\)](#) employees who were laid off or otherwise terminated on or after March 1, 2020, and then rehired by their employer (that is covered under the FFCRA), meet the 30-calendar-days requirement if they had worked for the employer for at least 30 of the last 60 calendar days prior to being laid off or otherwise terminated. Under the [Emergency Paid Sick Leave](#) provisions of the FFCRA, there are no length-of-service or hours-worked eligibility requirements.

Further, the DOL clarified in its Q&As that employees who are laid off or furloughed are not entitled to paid sick leave or expanded family and medical leave under the FFCRA but may be eligible for unemployment benefits. An employee who is already taking paid sick leave or expanded family and medical leave when their workplace closes must be paid for any paid sick leave used before the employer closed. As of the date of the closure, the employee is no longer entitled to paid sick leave or expanded family and medical leave but may be entitled to unemployment benefits.

Eligibility requirements may differ under [state or local leave laws](#).

6 What about employees who may have a spouse or family member in a high-risk category and ask for an accommodation?

According to updated EEOC guidance, an employer is not required to [accommodate an employee](#) without a disability based on the disability-related needs of a family member or other person with whom the employee is associated.

Of course, an employer may provide such flexibilities if it so chooses. If so, an employer should be careful not to engage in disparate treatment on a protected EEO basis.

7 How do we handle an employee who does not have a disability and is not high-risk but is uncomfortable returning to the office (they have been working from home)? Can we legally require them to return?

Many employees may feel uncertain about the risks involved with returning to the workplace. [Understanding the needs of employees](#) and being creative and understanding can go a long way in improving employee morale and the company's reputation.

If an employee has safety concerns, discuss the [health and safety](#) protocols and policies that have been put in place, such as:

- Increased cleaning and disinfecting measures;
- Temperature screening;
- Wearing gloves, masks and other personal protective equipment (PPE);
- Social distancing;
- Frequent handwashing;
- Reporting any COVID-19 symptoms; and
- Periodic COVID-19 testing.

Consider, as well, whether the company's policies and practices provide means of providing an accommodation and/or easing the employee back into the workplace.

If an employee is not entitled to an accommodation or leave under [federal, state or local law](#) or guidance, an employer may legally require the employee to return to the workplace. An employer should be careful such a policy is not applied in a disparate manner on a protected EEO basis.

8 **One of the most controversial questions we're getting is, "If we want to require masks, but someone feels they cannot wear one for mental health reasons, are we putting our company at risk by allowing some not to wear masks if they can't stay socially distanced?"**

If an employee feels they cannot wear a mask for mental health reasons, consider exploring other safety options such as implementing physical barriers between that employee and others, transferring them to a different part of the facility where there are a reduced number of employees, and having them work remotely (if possible).

Also consider encouraging them to utilize the emergency assistance program (EAP) for navigating the emotional and physical effects of the pandemic as well as other specific pandemic-related issues that may be present in the workplace.

9 **What are the guidelines/requirements to notify people in the workplace if someone tests COVID positive? What if disclosing that will reveal the identity of the person?**

If a person in the workplace tests positive for COVID-19, consider consulting health officials who may be able to provide important guidance and, in some cases, access to additional resources, including assistance with the testing of other employees. Employees who may have been had close contact with an individual who has tested positive should be urged to follow CDC guidelines, including staying home, until it's determined that they are safe to be at work. The guidelines specify that an employee may return to work when the employee is free of fever (100.4° F or greater) and any other symptoms for at least 72 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants). However, refrain from providing health advice; instead, counsel the employee to consult with their health care provider with any questions or concerns they may have. Also, consider having those who test positive to disclose who they had close contact with in the workplace in the last 14 days in order to have a credible list of individuals to notify.

While the Health Insurance Portability and Accountability Act (HIPAA) does not apply to all employers, other laws like the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA) and various state privacy laws protect certain employee medical information. Therefore, do not reveal the name or other identifying information (e.g., title) of an employee who tests positive for COVID-19. Any information that may disclose who had tested positive should be on a strict need-to-know basis.

Also, in order to know who to notify, consider requiring those who do test positive to inform HR (or another contact in the organization) immediately and to provide the following information:

- When they first began experiencing symptoms of COVID-19;
- The last time they were in the workplace;
- The areas of the workplace they visited; and
- The individuals (e.g., coworkers, vendors, clients) that they had close contact with within the 14 days prior to testing positive.

10 **We are in a really tough position, where we have been working from home but will need our childcare providers to return to work in a couple weeks, and at the same time will need to lay off 4 of the 6 staff. How do we handle balancing the needs for layoffs with the need for folks to return and the needs of employees who have medical conditions and are not ready to return?**

Balancing multiple decisions is difficult. The first priority is to make sure to remain compliant with applicable federal, state and local laws, such as providing leave or accommodations for employees under federal and state laws, like [the ADA](#), FMLA, [FFCRA](#), or [state and local laws](#). Then review the requirements for [conducting a layoff or furlough](#) and how to determine the employees that will be affected.

You also will want to review [what constitutes "an undue hardship"](#) as it applies to your current circumstances.

By breaking out the separate decisions and legal requirements (i.e., the things you must do), you may be able to more clearly identify what options are available.

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