

Know Your Rights: Reasonable Accommodations under the Americans with Disabilities Act During the COVID-19 Pandemic

Returning to school is important for the educational success, healthy development and well-being of children. But reopening our schools can only be pursued in an environment that is safe for all students, teachers and staff.

In addition to the American with Disabilities Act, 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 faculty and staff will still need individualized attention and accommodations to protect their own and their family's health and safety.

All guidance provided by the AFT is, by necessity, simply for general informational purposes and is 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 we will do our best to assist you as quickly as possible.

For NTU members, [review your contract](#) or please reach out to mmaillaro@newarkteachersunion.com with any specific concerns or questions.

COVID-19, school 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 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.

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, 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
- 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 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
- 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/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).

4. If my employer states in its reopening plan that teaching online 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—i.e., it is not necessarily the deciding word on which accommodation winds up being used. The employer may choose among reasonable accommodations as long as 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.

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

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 it does not have an accommodation provision like the Americans with Disabilities Act. However, if an employer is allowing other younger, comparable workers to telework, 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 bargaining with the employer. There may also be provisions in your existing collective bargaining agreement that could provide age-related protections.

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

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. 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 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)?

Although many people feel significant stress due to the COVID-19 pandemic, employees 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: 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.

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 discrimination against employees who are pregnant. 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 child care 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. If 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 such requirements are 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 the employee exhibits 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 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, the employee is not entitled to any pay under those laws. Salaried employees are required to be paid their full week's wages only if they worked some hours during the week the employer sent the employee home. Teachers and other professional employees are not covered by federal wage and hour laws. In this situation, 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-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.

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. You could also contact your local union, which could provide relevant information.

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 Occupational Safety and Health Administration for workplace safety violations or make a complaint to your local government. Critical workers, in particular, are covered by specific CDC guidelines that suggest testing for employees. If these tests are not being provided, this would be grounds for a possible OSHA violation.

Private sector workers may also be protected by the National Labor Relations Act if they take action with their co-workers to improve working conditions. This would include taking concerted action against unsafe working

conditions caused by symptomatic employees being forced to show up to work. Also, look for language about test availability in any memorandum of understanding or collective bargaining agreement bargained for by your union and, if necessary, file a grievance for any violations.

14. What should I do if there is not an ADA accommodation available to me 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 under the Families First Coronavirus Response Act depending on your reason for feeling at risk, detailed further below.

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 protocols should my workplace 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?

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 such as K-12 schools and state colleges and universities, it exempts private employers with more than 500 employees. It also empowers employers and the Department of Labor to potentially exempt certain healthcare employees and exempt

businesses with fewer than 50 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 that healthcare employees such as nurses are exempt.

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.

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

The Families First Coronavirus Response Act provides additional leave rights for parents whose children's school or child care 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 two weeks of paid sick leave, as detailed above) 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.

You may also be able to take advantage of leave under [NJ FLA and FLI](#)

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 child care 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; 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 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 employer could still require you to document 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 supervisor require me to have a camera or video conferencing app open/pointed at my workspace during working hours while I'm working/teaching 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. However, if you don't have a union, 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.

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

24. I'm required to teach/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 is obligated 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, such as 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 speak with your union as well as organize with your co-workers to demand that the employer reimburse you.

25. I will generate a lot of online content as part of my accommodation. What intellectual property rights do I have over that content? Can my school use my content in the future without my consent? Can it require me to sign over my rights to this content as a condition of accommodation?

Generally, absent any written agreement, materials created by K-12 teachers in the scope of their employment are deemed “works for hire” under the Copyright Act of 1976, and therefore the school owns them. However, it is possible that your employment contract or collective bargaining agreement provides copyright protections that would allow teachers to control their materials. Your union may also be able to bargain about this. Those teaching in higher education are likely to have policies or collective bargaining agreements that lay out the allocation of rights as between faculty and the university.