

## Employers May Shorten “Interactive Process” Concerning Accommodation Requests by Employees with Disabilities During the Public Health Crisis

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In response to the COVID-19 pandemic, new guidance for employers concerning accommodation requests by employees with disabilities under the Americans with Disabilities Act and the New Jersey Law Against Discrimination has been published by the U.S. Equal Employment Opportunity Commission (EEOC). Firstly, New Jersey employers are required to continue to provide reasonable accommodations for non-COVID-19 related disabilities to those disabled employees who have accommodations in place or who request them. If an employer’s workforce is now teleworking, these accommodations may need to be modified if workers continue to need the accommodations when working from home. For example, an employee with cognitive disability resulting from traumatic brain injury who needs advance notice of the dates that work assignments are due, and usually receives that information via an in-person discussion with his supervisor, must be provided with advance notice of due dates through a telephone call from his supervisor, or a written list of assignment due dates. In addition, accommodation requests specifically related to COVID-19 by those with mental and physical disabilities presents new criteria that employers must now manage in responding to requests for accommodation by disabled employees.

### **Accommodation Requests During COVID-19**

Employees with certain preexisting mental health conditions may experience added difficulty coping with the COVID-19 pandemic and being functional in their jobs. For example, workers afflicted with depression, anxiety disorder, obsessive-compulsive disorder or post-traumatic stress disorder may find the symptoms of their disabilities worsen due to the high stress level the pandemic has caused in every aspect of life, from the requirement to wear masks to the use of unfamiliar technology to hold workforce meetings. Such employees may request employer accommodations related to the mental health effects of COVID-19. These accommodation requests may ask for increased break time during the work day to cope with anxiety, flexible hours, or leave time. Employees with preexisting physical disabilities that make them vulnerable to developing serious health problems if they contract COVID-19 may also request workplace accommodations, such as working from home on a longer basis than other employees, or modifications in the use of personal protective equipment.

### **Responding to Accommodation Requests During COVID-19**

In a situation where an accommodation request may be more urgent because of the pandemic, e.g., the employee has a health condition that prevents him or her from coming into the workplace, or cannot get an appointment with a physician in a timely fashion because of the pandemic’s effect on the healthcare system, the EEOC recommends that an employer grant the accommodation request on a temporary basis until the required information has been submitted and reviewed by an employer.

In so doing, an employer may choose to shorten the “interactive process” between employer and employee temporarily, and forgo having all the required information needed to make an informed decision to accommodate the employee, at least temporarily. To provide the employer with some protection from possible legal liability in this situation, the employer can grant the request on a short-term basis. In granting temporary

accommodation resulting from a shortened “interactive process” concerning an accommodation request, employers may establish end dates based on state public health directives. For example, a possible short-term accommodation end date may be the date when the employee returns to the workplace, or the date when the state governor determines it is no longer necessary to wear a face mask. Similarly, the EEOC suggests that employers may try providing a requested accommodation on an interim or trial basis, and wait until receiving requested medical documentation before making a final decision.

### **“Undue Hardship” to Employers**

An employer does not have to grant an employee’s reasonable accommodation if the request would create an “undue hardship” for the employer, defined as significant financial difficulty or significant difficulty in operating the business if granted. Current EEOC guidelines allow employers to consider the business circumstances that the pandemic has caused when determining whether an accommodation, even temporarily, would create an “undue hardship.” For example, under normal circumstances, reassigning employees or providing them with temporary assignments to accommodate a request may not create significant difficulty, however the pandemic may provide no way for an employer to avoid experiencing significant difficulties and would therefore create an undue hardship for the employer if the accommodation request was to be granted. Likewise, under normal circumstances, it may not be an undue hardship for an employer to provide an unpaid leave of absence as a reasonable accommodation for a worker because temporary employees were readily available to perform the disabled employee’s job. However, because during the pandemic hiring a temporary worker has now become difficult, granting the request for unpaid leave for a disabled employee may create undue hardship to the employer.

In addition, an employer may consider the fact that it has lost its income stream and/or may no longer have discretionary funds available during the pandemic. According to the EEOC, “these considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.” Of course, an employer should also determine whether there are any no-cost or low-cost alternatives that would accommodate an employee in each situation before claiming that the requested accommodation creates an undue hardship.

To review the full EEOC guidance, [click here](#).

### **Takeaway: Employers may act more quickly to respond to requests for accommodation during the COVID-19 pandemic.**

If you are an employer and need help navigating a request for accommodation or any other employment law situation during the COVID-19 crisis, please contact [Stephanie Gironda](#) or any member of the [Wilentz Employment Law Team](#).

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