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Critical Workers and Direct Threat to Self: EEOC Publishes More Technical Guidance

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The Equal Employment Opportunity Commission (“EEOC”) continues to post updated guidance addressing issues related to the COVID-19 pandemic. The most recent additions to the agency’s expanding [technical assistance Q&A’s](#) deal with the ADA’s application to “critical workers” and employees who may be at a higher risk for severe illness from COVID-19.

- **The ADA and the Rehabilitation Act apply to applicants and employees classified as “critical infrastructure workers” and “essential critical workers.”** While [critical workers](#) may continue reporting to work despite shelter-in-place orders or other restrictions, and in some instances [after exposure to COVID-19](#), such a designation does not exempt workers from coverage under equal employment opportunity laws. Accordingly, employers must treat a critical worker’s request for accommodations on par with everyone else, and consider whether such requests may be granted absent undue hardship.
- **If a “high risk” employee requires a change to working conditions, he or she must let the employer know that the request is necessary to meet a medical need.** The CDC has identified a number of [medical conditions](#) that put an individual at higher risk for severe illness from COVID-19. If an employee requires an accommodation because of one of these underlying conditions, the employee may make the request orally or in writing. The request need not refer to a “reasonable accommodation” or the ADA, but it must communicate that the requested change is necessary to meet a medical need. The employer may then seek information and documentation to determine if the employee has a disability and/or whether it can accommodate the employee absent undue hardship.
- **If an employer knows that an employee is at a higher risk for severe illness due to COVID-19 but the employee has not requested an accommodation, the employer may not bar that employee from returning to the workplace unless that employee’s disability poses a “direct threat” to his or her health that cannot be eliminated or reduced by reasonable accommodation.** An employer may not exclude an employee from returning to the workplace based *solely* on the employer’s knowledge that the individual may be at a higher risk for severe illness due to COVID-19. Instead, the employer must conduct an individualized assessment to determine whether the employee’s return to work will pose a “direct threat” to the employee’s health that cannot be eliminated or reduced by reasonable accommodation.¹ The assessment must be based on a reasonable medical judgment about the employee’s disability (not the disability in general), using the



most current medical knowledge and/or reliance on the best available objective evidence. In addition to the direct threat assessment factors identified at 29 C.F.R. § 1630.2(r), the EEOC identified the following factors as relevant to the individualized assessment in this particular circumstance:

- the severity of the pandemic in the employee’s area,
- the employee’s own health (for example, whether his or her disability is well-controlled),
- the employee’s job duties, and
- the likelihood that the employee will be exposed to COVID-19 in the workplace (which, in turn, should take into account any measures the employer has taken to protect all employees in the workplace).

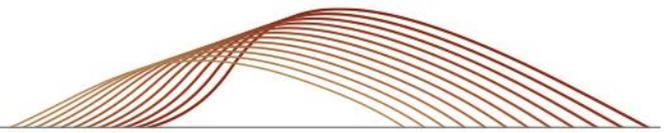
An employee does *not* pose a direct threat to self—and the employer may *not* exclude him or her from the workplace or take any other adverse action—if the employer can reduce or eliminate the threat through a reasonable accommodation. The EEOC identified the following accommodations that may permit the employee to safely return to work and still perform the essential functions of the role, depending on the nature of the employee’s duties, the design of the workplace, and the burden to the employer:²

- additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace,
- additional or enhanced protective measures (e.g., barriers that physically separate or increase space between an employee with a disability and coworkers or customers),
- elimination or substitution of “marginal” functions of the role,
- temporary modification of work schedules to decrease interpersonal contact, and
- physically relocating the employee to another area of the workplace to allow for greater social distancing.

If there are no accommodations that permit a high risk employee to safely return to work, the employer must consider other measures including telework, leave, or reassignment (for example, to a different role that permits the employee to telework or otherwise safely return to the workplace).

We will continue to monitor for additional guidance from all relevant agencies during the COVID-19 pandemic. [Click here](#) to read more from our Coronavirus series.





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- ¹ The EEOC cautions that the direct threat requirement is a “high standard.” On May 5, 2020, the EEOC removed a prior version of this Q&A because the agency felt that its guidance was misinterpreted, likely because media coverage suggested that employers could readily exclude high risk workers from the returning to the workplace. The EEOC has since modified its guidance to make clear that an employer’s ability to take such action against a high risk employee is much more restricted.
- ² The EEOC recommends that employers consult the [Job Accommodation Network](#) to identify additional ways to accommodate employees with disabilities in the workplace.

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