

New Jersey Guidance an ADA and Leave Options Road Back To Restarting School

Introduction

The current COVID-19 pandemic presents questions on whether and how an employee can be accommodated due to personal/family COVID-19 health related issues. This joint advisory is intended to provide a summary of the various leave options school staff may have available to them under the federal Americans with Disabilities Act (ADA) and/or other federal emergency and traditional and state leave laws. It is intended to provide all public-school district employers and employees with some clarity on the complex laws and rules that impact the Road Back to school. This is not intended to provide legal advice.

Different rules will apply depending on the employee's situation.

Staff may need accommodations or leave because of a medical condition that increases the risk of serious illness or death from COVID-19; residing with an individual who is at high risk; older age; pregnancy and childcare responsibilities. See, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>

Federal and state laws, CDC guidance, collective bargaining agreements (CBA), memoranda of understanding (MOU), and school policies will inform an employee of the type of leave they may qualify for.

ADA Accommodations & Leave Rights Relating To The Covid-19 Pandemic

Qualifying for an Accommodation Under the ADA

A **disability** includes a physical or mental impairment that **substantially limits** one or more *major life activities*. The State Law Against Discrimination may also apply.

Disability is interpreted broadly to include in some cases impairments that are not permanent. Typically, the ADA covers disabilities lasting more than 6 months although an employee with a disability lasting a shorter period of time may be entitled to reasonable accommodation if the disability is sufficiently severe. See *Eshelman v. Patrick Industries*, decided by the Third Circuit on May 29, 2020.

Major life activities include:

Caring for oneself, performing manual tasks, seeing, hearing, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, thinking, communicating, interacting with others.

The operation of a major bodily function, includes functions of the immune system, special sense organs and skin; normal cell growth, digestive, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, lymphatic, musculoskeletal and reproductive functions.

See: 29 C.F.R. § 1630.2(i)(1)(i), (ii)

On June 25, 2020, the CDC revised its guidance to reflect additional conditions that may place people at an increased risk for severe illness from COVID-19. You are encouraged to verify the CDC guidance as it is being updated as conditions change.

People Who Are at Increased Risk for Severe Illness Under the ADA

People of any age with certain underlying medical conditions are at increased risk for severe illness. These conditions as per the CDC as of June 25, 2020 currently include: chronic kidney disease, COPD, immunocompromised state from solid organ transplant, obesity (body mass index of 30 or higher), a serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, sickle cell disease, type 2 diabetes mellitus.

See, Coronavirus Disease 2019: Who is at Increased Risk for Severe Illness? (updated June 25, 2020): <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

People Who Are Potentially At Increased Risk for Complications Related to the Covid-19 Virus Under the ADA

The CDC explains that the following conditions **may place an individual at increased risk** for contracting the COVID-19 virus: asthma (moderate to severe), cerebrovascular disease, cystic fibrosis, hypertension or high blood pressure, an immunocompromised state from a bone or blood marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines, neurological conditions, such as dementia, liver disease, pregnancy, pulmonary fibrosis, smoking, thalassemia (a blood disorder), Type I diabetes mellitus.

In indicating who might be at greater risk, the CDC has identified three categories of evidence.

- Strongest and most consistent evidence: Defined as consistent evidence from multiple small studies or a strong association from a large study,
- Mixed evidence: Defined as multiple studies that reached different conclusions about risk associated with a condition, or
- Limited evidence: Defined as consistent evidence from a small number of studies. categorization for a condition's association with severe illness from COVID-19, the condition was added to the list (if not already on the previous underlying medical conditions list [originally released in March 2020]).

Note that the legal obligation to provide accommodations under the ADA where there is mixed or limited evidence has not been determined and readers are encouraged to consult with your legal counsel in determining the obligations that may attach for conditions that are identified by the CDC based on mixed evidence or limited evidence.

See, *Coronavirus Disease 2019: Who is at Increased Risk for Severe Illness? (updated June 25, 2020)*: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

The CDC has identified a recent study suggesting that pregnant women with COVID-19 are “more likely to be hospitalized and at increased risk for intensive care (ICU) admission and receipt of mechanical ventilation.

See, *Coronavirus Disease 2019: Pregnancy Data (updated July 9 2020)*: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/special-populations/pregnancy-data-on-covid-19.html>.

It is important to note that the CDC’s list of conditions that may subject a worker to an increased risk of contracting the COVID-19 virus. For an explanation of the list of the conditions. See: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html>

Mental Health Conditions may also qualify as a disability, such as an intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities, post-traumatic stress disorder, obsessive compulsive disorder, anxiety disorder. The condition must substantially interfere with one or more major life activities, as described above.

As with any accommodation request, employers can ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist them and allow them to work; explore alternative accommodations that may effectively meet their needs; and request medical documentation if needed.

General concerns about COVID-19 or apprehension about returning to school does not automatically entitle an employee to reasonable accommodations under the ADA.

Pregnancy & Age

Though pregnancy itself is not a qualifying condition under the ADA, certain pregnancy-related medical conditions may be. If you are pregnant, you should consult with your doctor regarding possible accommodations.

Age alone is not considered a disability under the ADA. The EEOC and CDC recognize that while employees who are 65 and older are at higher risk for developing complications from the COVID-19 virus, they nonetheless do not qualify for accommodations under the ADA based only on their age. However, if these individuals have underlying medical conditions, they may be eligible for ADA accommodations. Employer and Employee

should also refer to the NJ Department of Education’s then current Road Back guidance.

Employees falling under these categories who are seeking accommodations, may however be eligible for leave under other federal, state and local laws, such as the Age Discrimination Employee Act, the Pregnancy Discrimination Act https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm, and Occupational Safety and Health Administration) requirements. The New Jersey Law Against Discrimination requires employers to provide a pregnant worker with reasonable accommodations upon request.

What Rights Does an Employee Have to a Job Modification Under the ADA?

The ADA requires the employer to provide reasonable accommodations to qualified individuals with disabilities unless doing so would pose an undue hardship for the employer.

A reasonable accommodation is an adjustment or modification to a job or work environment that will enable an employee with a disability, to continue to perform the essential functions of their job and enjoy equal benefits and privileges of employment.

The ADA Accommodation Process

Under the ADA, accommodations can be requested upon hiring or at any point during employment when a need arises.

The ADA does not require documentation of your medical condition when requesting an accommodation. The employer can request medical information that is relevant to deciding about whether you have a qualifying disability. This can be done in advance of the start of the school year. The request triggers the interactive process, the process by which appropriate accommodations are determined.

During this process, the EEOC recommends that the employer review the job description, and in consultation with the employee and any medical information from their medical provider, to understand the specific job-related limitations that the disability presents and what reasonable accommodations may be available. Every request for an accommodation is fact specific.

Employers and employees must work together to identify possible accommodations. The employer is not required to provide the requested accommodations and can offer alternatives.

An employer can deny an accommodation request if it causes an “undue burden” or if there is insufficient

information about the medical condition or requested accommodation. An undue burden could include significant difficulty or expense, taking into account the nature and cost of the accommodation, available resources, and the operations in place. The employer is not required to provide the accommodation if it requires undue hardship. An example of insufficient medical information would be a generalized medical note used to request an accommodation. The employer may ask the employee for additional information.

Possible Accommodations During COVID-19

Additional PPE, cleaning of surfaces, changes in classroom environment or school buildings, transfer to a position with less contact with others, telework,

and temporary leave may represent reasonable accommodations in some instances, although each situation must be analyzed on a case by case basis to determine if the accommodation will result in undue hardship. The EEOC recommends the Job Accommodation Network (JAN) website for ideas on types of accommodations, although the examples provided on the JAN website may or may not be appropriate based on the individualized analysis that takes place. See, <https://askjan.org/soar.cfm>

Other Leave Options

The ADA does not require accommodations for people who are living with someone who is at high risk. But there are other possible leave options.

Emergency Family & Medical Leave

The emergency federal Family and Medical Leave Act (FMLA, <https://www.dol.gov/agencies/whd/fmla>; <https://www.dol.gov/agencies/whd/fmla/pandemic>) is part of the Families First Coronavirus Response Act (FFCRA) and provides new and temporary job protected leave for any full or part time employee's or family member(s) medical needs, including caring for a spouse, child, or parent who has a serious medical condition through December 31, 2020.

Eligible employees must have worked for at least 30 days and have a "qualifying need related to the public health emergency." The "qualifying need" is limited to circumstances where an employee cannot report to work or telework to care for a family member

The law allows for a total of 12 weeks of leave.

Under the FFCRA, the first 2 weeks are unpaid but the worker can substitute accrued paid leave, including emergency paid sick leave.

Up to 10 weeks of the 12 weeks is paid at 2/3 the regular rate of pay (capped at \$200/day; \$10,000 total)

The leave can be intermittent.

Emergency Paid Sick Leave Act

Another part of the FFCRA provides employees immediate eligible paid sick leave due to:

1. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolate;
5. the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

How Much Paid Leave is Required? Employees are entitled to the following:

- **Full-time employees:** 80 hours at their regular rate of pay. However, when caring for a family member (for reasons 4, 5, and 6 above), sick leave is paid at two-thirds the employee's regular rate.
- **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period (also two-thirds pay for reasons 4, 5, and 6)

The law limits paid leave to \$511 per day (\$5,110 in total) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in total) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

Rule Sequence For Leaves During The COVID-19 Pandemic

Employers can let employees use the sick leave provided for under the FFCRA, followed by any other accrued paid leave under other laws or the CBA. <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>

The employer cannot require the employee to first use accrued leave, nor can it retaliate against an employee. Penalties for failure to pay wages are included in the law.

The Collective Bargaining Agreement may also provide for additional leave.

The FFCRA provides for up to 80 hours of emergency paid sick leave through December 31, 2020 for workers that are unable to work or telework for certain COVID-19 related reasons due to self-quarantine or caring for someone who is under self-quarantine on the advice of a medical provider.

This leave can be used BEFORE any other paid benefits are used.

Other Leave Options

Traditional leave options may also be available to workers.

FMLA provides for up to 12 weeks of unpaid, job protected leave for a serious health condition that prevents the worker from performing the essential functions of the job. The employee must have 12 months/1,250 hours of employment to be eligible for regular FMLA leave purposes. Additionally, up to 12 weeks of unpaid, job protected leave may be available to care for a family member with a serious medical condition under the New Jersey Family Leave Act (NJFLA). Whether FMLA and NJFLA leave taken for an overlapping purpose runs consecutively or concurrently depends upon the individual CBA, past practice, or board policy.

CBAs, MOUs and district policy may also allow for additional time.