

The Legal Environment Amidst COVID 19: A review of what has passed and what to consider as you return to campus

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How should COVID accommodation requests be processed?

- Use the employee disability accommodation process for medically established COVID co-morbidities
 - Examples:
 - heart or lung diseases
 - diabetes
 - obesity
 - immune system related conditions (e.g. rheumatoid arthritis, lupus, AIDS, cancer, etc.)
 - other disabilities
- Use a separate process for all other accommodations
 - Example
 - Family member with a co-morbidity

Is the exacerbation of a pre-existing mental illness a disability requiring accommodation?

- Likely yes but depends on case-specific facts
- Employers may ask questions to determine the extent of the disability and the required accommodations.
 - Note that fear of COVID, standing alone, is not a disability



Do COVID disability accommodation requests require medical documentation?



- Yes
- Under existing disability accommodation procedures, medical documentation may be required to establish the disability and to support the requested accommodation.

Should requests for accommodations owing to age (over 65) be handled through the disability accommodation process?

- No.
- Age is not considered to be a disability
 - Although age-related conditions may qualify as a disability



Should the disability accommodation process be used for accommodations requests related to household or family members with co-morbidities?

- No.
- The EEOC's COVID guidance: the ADA does NOT require an employer accommodate an employee based on the needs of a disabled or at-risk family member.
- The EEOC specifically notes an employee is NOT entitled under the ADA to telework as an accommodation to protect a disabled family member from potential COVID-19 exposure.



Can we provide accommodations for employees beyond what is required by the ADA?

- Yes.
- An employer is always free to provide additional flexibilities that are not required by disability discrimination laws.
- However, such requests should be handled outside the disability accommodation process

Remember to:

- Treat people equally
- Base decisions upon institutional needs
- Handle at the unit level

May we require COVID symptom monitoring of employees?



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- Yes.
- But over 50% of COVID transmissions are believed to be from asymptomatic or pre-symptomatic individual
- Symptom monitoring should only be one part of a campus safety plan.



Do we have to keep COVID-related medical information confidential?

- Yes
- Medical information, including COVID medical information, must only be shared on a need-to-know basis (e.g. with supervisors, HR, and medical/safety personnel).
- COVID positive tests and exposures should be shared with county health departments



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May we require employees to notify the university of a positive test?



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- Yes
- Make sure any requirements are clearly communicated to employees



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Are we required to provide telework as an accommodation if an employee's physician requests it?



No



Decide based on your existing accommodation process



Many positions may either not have telework options or may require some on-campus work.



We have two-employees doing the same job but can provide telework to only one of them.

Do we have to give preference to the individual requesting telework as a disability accommodation?

- Yes.

Are we required to provide accommodations to employees whose disability interferes with wearing a mask or other safety equipment?

- Yes.
- An employee should make a request through the disability accommodation process.
- Real life example:
 - A physician required a custodian be allowed to remove their mask for ten minutes each hour.
 - The request was accommodated.



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Is pregnancy a disability requiring special accommodation during the COVID pandemic?



- Pregnancy is not a disability, but pregnancy needs must be addressed under other anti-discrimination laws and family/medical leave laws.
- There is some evidence that pregnant women are at more risk from COVID complications than others.

Is COVID covered under worker's compensation?

- If an individual can prove that they contacted COVID at work, then they would be eligible for worker's compensation.
- National dialog as to whether this should be changed.



Other questions about COVID and employment law?



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Other employment law questions?



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Not COVID, but let's talk about *Bostock*!

- Discrimination based on sexual preference or sexual identity is discrimination based on sex.
- Even if sex discrimination was only part of the reason for the employer's decision, termination for sexual preference or sexual identity is in violation of Title VII.
- This is a textual interpretation of Title VII. Congress could have made exceptions, but chose not to.
- What does this approach mean for other things? Affirmative Action?

