

Jessica L. Roe  
Attorney

612-351-8305 (D)  
612-810-1807 (C)  
jroe@roelawgroup.com

60 South Sixth Street  
Suite 2670  
Minneapolis, MN 55402  
612-351-8300 (O)  
612-351-8301 (F)  
www.roelawgroup.com

## How to Handle the Influx of Accommodation Requests

We want to be done with the pandemic. Yet, while many of us are eager to return to pre-pandemic life, employers are facing resistance from employees recalled to the office, particularly from those whose medical conditions put them at greater risk for complications from COVID-19. How can we get people back without getting sued (and keeping our teams happy)? What are the best practices under the Americans with Disabilities Act (ADA) and the Equal Employment Opportunity Commission (EEOC) to help us engage in an effective interactive process with employees seeking disability accommodations for risks associated with COVID-19?

Thirty-one years ago, on July 26, 1990, the ADA was passed. The idea behind this law was to protect the fundamental rights of people with disabilities — the right to equal opportunity, economic self-sufficiency, independent living, and equitable participation in every aspect of American life. [Yesterday, President Biden said](#), “For more than three decades, the ADA has made our communities, our economy, and our country stronger and more vibrant. It has helped to uphold the dignity of the estimated 61 million Americans who live with a disability — in short, it is a triumph of American civil rights.”

When you google “ADA” or “Return to Work,” these are the questions (and answers) that come up:

1. We are still in a pandemic. Can I be forced to work? Generally, your employer may require you to come to work during the COVID-19 pandemic. However, some government emergency orders may affect which businesses can remain open during the pandemic. Under federal law, you are entitled to a safe workplace. Your employer must provide a safe and healthful workplace.
2. I’m afraid of an infection, can I refuse to go to work or can I work from home? It depends on the employer’s policies and local and state law.
3. How do I know if I have a disability (or a disability from COVID-19)? Some people who have had COVID-19 continue to experience ongoing symptoms for months afterward, known as Post-Acute COVID-19 Syndrome or Long COVID-19. If you have Long COVID-19, you might have difficulty working in the same way you did before and may be entitled to workplace accommodations so you can do your job. What’s important to know is that even if you don’t think of yourself as having a disability, you may meet the ADA’s definition.
4. How do I know if I’m entitled to workplace accommodations? If you need an accommodation, the best thing to do is ask for it. Under the ADA, you are entitled to accommodations if you meet the definition of an individual with a disability and are qualified for the job with the reasonable accommodation. An individual with a disability is a person who has a physical or mental impairment that substantially limits major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Whether a particular condition is a disability as defined by the ADA requires a case-by-case determination. But employers are free to provide accommodations even if someone doesn't meet the definition of disability – and they must provide accommodations if they do meet it, absent undue hardship.

### **What's an Employer to Do?**

#### **I. Step One: Is there an ADA-covered disability?**

Under the ADA, employers are required to provide reasonable accommodations to employees with disabilities as long as doing so does not pose an “undue burden” on the employer (which is generally a high burden for employers to meet). All employers, including state and local government employers, with 15 or more employees are covered employers under the ADA. Integral to this assessment is the nature of the mental or physical condition.

The ADA defines a disability as one of the following: (a) a physical or mental impairment that substantially limits a major life activity; (b) a record of a physical or mental impairment that substantially limited a major life activity; or (c) being regarded as having such an impairment.

According to the Equal Employment Opportunity Commission (EEOC), the ADA Amendments Act (ADAAA) includes impairments that would automatically be considered disabilities. They include deafness, blindness, intellectual disability, completely or partially missing limbs, mobility impairments that require the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

The definition of major life activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major bodily functions include functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The definition of a disability also includes situations in which an employer takes an action prohibited by the ADA based on an actual or perceived impairment—for example, removing from customer contact a bank teller who has severe facial scars because customers may feel uncomfortable working with this employee or may perceive the employee as having an impairment when, in fact, they do not.

The ADAAA directs that if a “mitigating measure,” such as medication, medical equipment, devices, prosthetic limbs or low vision devices eliminates or reduces the symptoms or impact of the impairment, that fact cannot be used in determining if a person meets the definition of having a disability. Instead, the determination of disability should focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This rule, however, does not apply to people who wear ordinary eyeglasses or contact lenses.

## II. Step Two: Do You Have a Policy and Procedure for Handling Accommodation Requests?

You'll want job descriptions for all jobs that are up to date. You'll want to confirm they include all aspects of the job and list all essential functions, including any physical requirements such as standing or sitting for long periods of time or lifting requirements.

## III. Step Three: Is the Employee "Qualified"?

This really is just whether the employee has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

## IV. Step Four: The Interactive Process

Employers must engage in an interactive process with employees, and often their health care providers, to learn about the nature of the employee's disability and evaluate what (if any) reasonable accommodations would allow the employee to perform the essential functions of their role.

### **Best Practices for the Interactive Process (including Accommodation)**

If you are mandating vaccinations, you may have to engage in the interactive process and accommodate employees that cannot do so because of a disability or religious need. For a religious accommodation you will need documentation from (and this is not clearly defined) a religious organization that this person is a member and that they prohibit or discourage vaccination. This is why the Catholic church came out with a [statement](#) encouraging (or not prohibiting) vaccinations. For a disability accommodation you will need documentation from the employee's physician.

If you are not mandating the vaccine but have employees who are at higher risk for developing complications from COVID-19 who may require accommodations – including those individuals who are 65 years and older, pregnant, and/or have underlying impairments (such as heart disease, asthma, and diabetes) – you are going to have to engage in the interactive process and make accommodations for those employees.

Each situation depends on individualized factors and involves a fact-intensive assessment. In anticipation of receiving an accommodation requests (which will trigger the interactive process) We should revisit the interactive/accommodation process to ensure compliance with the ADA.

### I. What Should You Request to Get Started?

Employers can request information about why a COVID-19-related accommodation is needed.

Sample questions include:

1. How the disability creates a limitation;
2. How the requested accommodation will effectively address the limitation;
3. Whether another form of accommodation could effectively address the issue; and
4. How a proposed accommodation will enable the employee to continue performing the “essential functions” of their position (that is, the fundamental job duties). Think about this last one and how you might approach this question.

## II. How Should You Request This Information?

1. Get it in writing.
2. Be a bit flexible. You can approve pending formal documentation at a later date.
3. Accept information from a past medical visit.
4. Explore a short-term accommodation, identifying start and end dates. This could be an interim accommodation.
5. Request authorization from the employee to communicate directly with the health care provider.

## III. What is the Interactive Process?

Generally, this is the process of gathering information from the employee and the health care provider so that you can each share information about the nature of the disability and the limitations that may affect the employee’s ability to perform the essential job duties. You will need to show a “good faith effort” which is not met by just sending a few emails and making a decision. You will want to ensure that you discuss with the employee the limitations or performance issues the employee’s disability may pose. The purpose of this discussion is to determine what (if any) accommodations may be needed.

You also show good faith by having an accommodation request process and reviewing the request form. This is a form (whether in a letter or an actual form) where you ask the health care provider to answer certain questions to help you and the employee make a decision about the need for an accommodation and the needs of the business.

The employee should be asked to provide appropriate documentation from their health care provider regarding the nature of any impairment(s), severity, duration, activities limited by the impairment(s), and the extent to which the impairment(s) limits the employee’s ability to perform the job’s essential duties/functions.

In the event you need to consult with the employee’s health care provider, you must obtain a written medical release or permission from the employee. The employee’s health care provider may not disclose information or answer questions about the employee’s disability without the employee’s permission.

## IV. What Are the Options For Accommodation?

If you teleworked during the pandemic, you do not have to automatically grant continued telework to disabled employees: once workplaces reopen, employees can be required to request an

accommodation in order to continue teleworking. You can restore all of an employee's essential duties (including working at the workplace), and then evaluate any requests for continued or new accommodations under the usual ADA rules.

If there is no disability-related limitation that requires teleworking, then you do not have to provide telework as an accommodation. Similarly, if you can effectively address the disability-related limitation with another form of reasonable accommodation at the workplace, then you can choose that alternative to telework.

Other examples of reasonable accommodations include job restructuring, part-time or modified work schedules, acquiring or modifying equipment (including assistive technologies), and changing tests, training materials, or policies.

#### V. Your Accommodation or Theirs?

The ADA does not require employers to have a particular policy and procedure in place for determining or granting reasonable accommodations, but it does recommend that you develop your own policy.

You will want to look at issues such as whether there is an undue hardship by granting a particular accommodation, or how it will work with the business needs. Remember, the EEOC does not see an impact on employee morale as a reasonable undue hardship. You will want to seek input from the employee's supervisor, who has knowledge about the duties of the position and the worksite, to help determine the feasibility and what may be a "reasonable" accommodation.

After the type of accommodation has been determined, the employer should document specific accommodations that will be made and notify the employee, in writing. You will want to maintain all copies of accommodation requests, supporting medical information and documentation, including denials, in a file separate from the employee personnel file, consistent with the confidentiality requirements of the ADA.

Best practices for you as you navigate the interactive process:

1. Prepare comprehensive job descriptions for all positions that give detailed explanations of all essential functions of the role. These job descriptions will be critical during the interactive process and should be provided to an employee's medical provider so it can accurately assess whether any reasonable accommodations would allow the employee to perform the essential functions of their job.
2. Engage in an open dialogue with the employee about the reasons why they believe that their requested accommodation will allow them to perform all of the essential functions of their position (keep in mind that regular attendance is generally an essential function of a position!).
3. Ensure that this interactive dialogue is being properly documented, including any modifications to the accommodation or follow-up discussions. Using template forms can be a way to standardize the process and ensure consistent documentation. For example,

consider creating a questionnaire to use as a guide for discussions with employees seeking an accommodation to work remotely.

4. Be aware that you need not give an employee their requested or preferred reasonable accommodation; you have the discretion to choose among effective accommodations. Similarly, you need not create a new position tailored to the employee's abilities or limitations.
5. Train managers and human resources employees to recognize requests for accommodation (employees often do not make formal requests and they do not need to reference the ADA by name!). Provide training and support for the individuals who are tasked with engaging in the interactive process with employees.

### **How To Communicate, Implement, And Enforce Your (COVID-19) Work from Home Expectations**

1. Eligibility. Employers need to determine what positions are eligible to work remotely, and state them in their policy. Some jobs may not be conducive for remote work. If you do not have remote-compliant positions your policy should state that fact.
2. Availability. If you do allow remote work, then availability expectations should be outlined in the policy. Whether it's having a blanket 9 a.m. to 5 p.m. work requirement, or letting employees set their own schedules, either should be put in a policy. Setting schedule requirements from the start eliminates any possible frustration between employees based on time. If one employee is allowed to make their own schedule, but another is given set hours, that can create an unfair atmosphere.
3. Responsiveness. Implement a specific rule on response time. Define whether or not a remote employee is expected to respond to a coworker immediately, and also specify what modes of communication should be used. Organizing expectations around communication creates a healthy relationship between employees and supervisors – no one will have concerns about productivity expectations or be left in the dark.
4. Productivity Measurements. Remote work policies should specify how an employee's productivity will be measured. Productivity can be measured in a number of ways, whether it be time spent on a project, number of cases resolved, amount of client interactions, and more. Companies need to determine how they want to evaluate their employees.
5. Equipment. Remote workers need the right tools to complete their work. Therefore, you need to state what equipment the company is willing to offer to these employees. If they expect employees to provide their own computers, for example, and high-speed internet, then they need to specify that.
6. Tech Support. Along with equipment, companies need to specify if any tech support is offered to remote workers.
7. Termination. You will want to plainly state that no employee will be terminated on the basis of working remotely. This is also where communication comes into play. Open and

frequent communication is necessary between remote workers and managers so that no one can question the work that is being done.

8. Security. When information is taken out of the office, security is not guaranteed. Employees need to be extremely careful when doing work in public places. If companies have specific requests – for example, if they don't want employees working on public Wi-Fi – then that should be stated in the policy.
9. Client Confidentiality. Going hand-in-hand with security, client confidentiality must be addressed in a policy. Again, keeping information confidential is much easier in a protected workspace.