

# Applying EEOC guidance in a post-COVID world

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In May 2023, the Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 Technical Assistance in view of the U.S. government’s declaration that the COVID-19 public health emergency had ended.

As the EEOC chair announced, “The end of the public health emergency is an important milestone, and this will help employees and employers understand how the Americans with Disabilities Act, the Rehabilitation Act, and other federal laws continue to protect our nation’s workforce from employment discrimination. The EEOC remains committed to vigorous enforcement of these laws.”

Highlights of the updated guidance include:

- An admonition that the end of the COVID-19 public health emergency does not alter employers’ obligation to continue to reasonably accommodate workers who suffered and/or continue to suffer from pandemic-related conditions, such as long COVID. These situations must be considered on a case-by-case basis, just as with any other accommodation requests. Employers may, however, review individual circumstances to assess whether, in consultation with employees and presumably subject to appropriate documentation, accommodations granted during the public health emergency need to be continued.
- “Reasonable accommodations” can include a variety of simple to complex adjustments to the employee’s workspace, lighting, scheduling, rest breaks, and adjustments to functions and responsibilities.
- Additional accommodations may include paid or unpaid leave for post-COVID-19 related medical conditions. Notably, a reasonable accommodation may also include continued remote work.
- Providing tips for employers to address COVID-related harassment of employees who need to continue wearing a face mask or who are taking other related precautions.

## The definition of ‘disability’ under the ADA and Rehabilitation Act relating to COVID-19

The guidance outlines the standard considerations in determining whether an individual suffers from a qualified disability and emphasizes that these considerations apply to individuals who suffer currently from COVID-19, as well as to those who suffer from long COVID symptoms. As the guidance states, at N.2:

A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks — with no other consequences — will not have an actual disability within the meaning of the ADA. However, depending on the specific facts involved in a particular employee’s medical condition, an individual with COVID-19 might have an actual disability....

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In short, while COVID-19 related symptoms do not automatically qualify as constituting a “disability,” an analysis needs to be done with the same care and consideration as with any other claimed disabilities, applying the historical standards espoused by the EEOC and the Courts in determining whether a qualified disability has been established.

## Reasonable accommodation dialogue and analysis

Employers certainly recall the various emergency statutes and regulations that were enacted during the pandemic on both a federal and state basis, including those requiring the grant of leave for reasons that were not previously included under the ADA or the federal Family and Medical Leave Act. As the pandemic began to draw to an unofficial close, employers were eager to require a physical return to the workplace, whether immediate or on a transitional basis. This eagerness has clearly escalated as of the official end of the public health emergency.

While some of the reasons for leave that were included in the emergency acts have no longer been required as of the expiration of those acts, the EEOC in its guidance reminds employers that all previously qualified reasons remain in play. Hence, employees who suffered from COVID-19 may return with long COVID conditions that qualify as disabilities under federal or state laws. As the guidance specifies:

For employees with Long COVID, the updates include common examples of possible reasonable accommodations,

including a quiet workspace, use of noise cancelling devices, and uninterrupted worktime to address brain fog; alternative lighting and reducing glare to address headaches; rest breaks to address joint pain or shortness of breath; a flexible schedule or telework to address fatigue; and removal of “marginal functions” that involve physical exertion to address shortness of breath. Many of these are low or no-cost accommodations.

Critical to note, employers may, and should, still require medical documentation to support any such accommodation requests. Best practice would include ensuring an indication of the anticipated duration of the need for accommodation is included in medical documentation. In addition, employers should remain mindful of the often need for periodic updates depending on the nature of the request.

*Employers still can raise “undue hardship” in response to accommodation requests relating to COVID-19; however ... the standards applied in establishing undue hardship present a high burden to employers.*

So as not to forget Title VII protections regarding reasonable accommodation requests, the EEOC guidance provides (I.1.)(i.e., relative to accommodations such as remote work for caregivers):

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caregiving responsibilities<sup>1</sup> for children.

....For example, employers may not require more burdensome processes for employees of a certain race or national origin who are requesting schedule changes or leave related to COVID-19 caregiving. Employers also may not deny such requests more frequently, or penalize employees for requesting or receiving schedule changes or leave for caregiving purposes, based on employees’ race or national origin.<sup>2</sup>

### Direct threat analysis

As has been the case under the ADA, an employer may prevent an employee from returning to work if that employee is deemed a “direct threat” to him/herself or to others. The “direct threat” standard presents, like the undue hardship standard (see below), a high burden to employers. The guidance provides some additional examples of reasonable accommodations that, absent establishing undue hardship, could reduce or eliminate any perceived “direct threat” to an employee or others. At G.5:

... additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide

to, or require from, employees returning to its workplace. Reasonable accommodations also may include additional or enhanced protective measures, such as High Efficiency Particulate Air (HEPA) filtration systems/units or other enhanced air filtration measures, erecting a barrier that provides separation between an employee with a disability and coworkers/the public, or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include telework, modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting), or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more physical distancing).

### Undue hardship exception

Employers still can raise “undue hardship” in response to accommodation requests relating to COVID-19; however, as previously mentioned, the standards applied in establishing undue hardship present a high burden to employers, and rarely can employers rely on “costs” of the accommodation alone to meet that burden.

*The guidance is intended to serve as a strong emphasis that these [accommodation requirement] standards remain in effect despite the expiration of the COVID-19 public health emergency declaration.*

In *Groff v. DeJoy*,<sup>3</sup> the Supreme Court addressed the “undue hardship” standard under Title VII as it pertained to a religious accommodation request. The Court held:

showing ‘more than a de minimis cost’...does not suffice to establish undue hardship under Title VII.” Instead, the Supreme Court held that “undue hardship is shown when a burden is substantial in the overall context of an employer’s business,” “tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer.”<sup>4</sup>

Obviously, this ruling shed light on the continuing obligations of employers under Title VII when assessing religious based accommodation requests. At the same time, while not an ADA case, this recent ruling certainly provides insight into the standard of establishing “undue hardship” that would be applied to medically related accommodation requests.

## A compelling reminder to employers

In short, in its newly released guidance, the EEOC spends considerable content “reminding” employers of the interplay between the accommodation requirements pursuant to the Americans with Disabilities Act and the Rehabilitation Act, as well as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act.

Indeed, the guidance is intended to serve as a strong emphasis that these standards remain in effect despite the expiration of the COVID-19 public health emergency declaration.

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The bottom line is that employers should not leap to conclusions about the need to analyze employee accommodation requests linked to COVID-19 related issues because the declaration has expired. The same rules apply that have applied to all accommodation requests.

## Additional topics related to COVID-19 issues arising under federal EEO laws

The EEOC guidance also addresses issues such as medical examinations, confidentiality, harassment, and vaccinations (which includes reasonable accommodation requests based on disability or religious beliefs).

COVID-19 related records are to be treated as confidential, and separate from the personnel file, just as any other employee medical records. This obligation includes the mere fact the employee has or had COVID-19; was or was not vaccinated, and the like.

Harassment in this context, for example, refers to conduct toward employees who wish to continue to mask, and who exhibit other precautionary acts despite the expiration of the public health emergency, which can often be based on their own underlying condition that warrants extra protection against COVID-19.

The prohibition against harassment also includes conduct toward employees who were exempted from vaccination due to religious beliefs. Additionally, employers need to be aware of, and take remedial action to address, any harassment toward employees whose actual or perceived ethnicity is Chinese or Asian — a phenomenon that became more prominent during the pandemic.

## Continued remote work

It is this accommodation request that has triggered the most frequent issue in connection with accommodation requests, leading up to and increasing since the expiration of the public health emergency. Many employees wish to remain remote and use the historical ability to work remotely as *de facto* evidence the employer will not be presented with an undue hardship by allowing this arrangement to continue. Obtaining up to date medical documentation in this scenario is particularly important where remote work had been provided due to a medical condition.

In explaining how the EEOC would interpret discussions surrounding such a request, the following information is presented in D.14 of the guidance:

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

The important point here is that these requests cannot, and should not, be automatically denied simply because the employer wishes employees to physically return to the workplace. Again, the reasonable accommodation dialogue and analysis must occur.

At the same time, the EEOC makes it clear that simply because functions (whether essential or non-essential) may have been modified when the workplace was closed, as well as the fact that it permitted remote work, does not necessarily lead to a determination that the employer is deemed to have permanently modified the job’s essential functions, that remote work is always reasonable, or that these prior circumstances thereby mean their continuation does not pose undue hardship.

## Conclusion

In reviewing and interpreting the guidance, it is equally important to refer to prior guidance to the extent some concepts may still apply to the workplace; e.g., medical return to work certifications, vaccination requirements, and prevention measures for the physical workspace.

Undoubtedly, and as most employers would agree, the statutes which are addressed in this and in prior guidance can be minefields as they impact daily workplace operations. However, the guidance can, at least, provide a window into how the EEOC and/or the Courts would view employer decisionmaking in a post-COVID-19 world.

## About the author



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The link below is to the complete updates, which includes much more extensive information, along with a number of questions and answers that employers should find helpful in overseeing the post pandemic workplace: <https://bit.ly/3QR9PS8>

## Notes

<sup>1</sup> <https://bit.ly/45eplww>

<sup>2</sup> See also 1.2.

<sup>3</sup> 600 U.S. \_\_\_\_ at 15;143 S.Ct. 2279 (2023).

<sup>4</sup> *Groff*, 143 S.Ct. at \_\_\_\_.

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