

NJSBA

PANDEMIC TASK FORCE

BEST PRACTICES REGARDING EEO ISSUES

**ACCOMMODATION REQUESTS,
CONFIDENTIALITY, HARASSMENT
AND DISCRIMINATION**



NJSBA: HERE FOR

YOU

Firms must consider state and federal Equal Employment Opportunity (EEO) laws when addressing issues related to COVID-19 and return-to-work planning. In addition to complying with New Jersey's broad anti-discrimination statute (the New Jersey Law Against Discrimination (LAD)), firms also should consider guidance issued by the Equal Employment Opportunity Commission (EEOC).¹ Here are some best practices to help employers navigate return-to-work issues, while remaining compliant with EEO laws.

CONFIDENTIALITY OF COVID-RELATED MEDICAL INFORMATION

- Ensure that all employee medical information is stored separately from the employee's personnel file—ideally in a separate confidential medical file. This includes information gathered through medical screenings, self-health questionnaires, and the results of any COVID-19-related medical testing (e.g., temperature checks, medical reports, etc.).
- Do not disclose the name or identity of an employee who has tested positive for COVID-19 or who reports exposure to or symptoms of COVID-19, except to those with a legitimate need to know this information.
- Limit disclosure of all other confidential medical information (e.g., temperature screening results, test results, etc.) only to those with a legitimate need to know this information.
- Train supervisors and managers on the importance of keeping medical information confidential (including medical information provided by employees and health care providers, temperature logs, self-health questionnaires, etc.).

REASONABLE ACCOMMODATIONS RELATED TO COVID-19

- Ensure that written job descriptions accurately describe the current essential functions of the role and have been updated to reflect any changes in job functions (e.g., not whether “attendance” or “in-office attendance” is required).
- Develop a process for evaluating and addressing reasonable accommodation requests for employees who have COVID-19 (or have been exposed to it) or who may have health issues (physical or mental health conditions) that put them at risk or may require accommodations.
 - You may proactively request that employees notify you of any accommodations they believe will be needed when your workplace re-opens *prior to re-opening*.

- If an employee advises you that they cannot return to the physical workplace due to a disability—or needs some other type of accommodation—engage in a timely interactive process with them and attempt to identify a reasonable accommodation that will allow them to continue to perform the essential functions of their job.

Examples of potential accommodations include:

- *Physical modifications to the workplace* (e.g., installing barriers, designating one-way areas, use of a private office, moving work location to provide more social distancing, etc.)
- *Additional or enhanced special personal protective equipment* (e.g., special masks, gowns, gloves, or other gear beyond what you may typically provide)
- *Temporary modification to work schedule or shift modifications* (e.g., allowing the employee to work modified hours to decrease contact with coworkers and/or the public while working or commuting)
- *Remote work* (full or part time)
- *Commute-related request* (e.g., permission to park onsite to avoid mass transit)
- *Elimination or substitution of certain “marginal” job functions* (i.e., less critical or incidental job duties as distinguished from the “essential” functions of a particular position)
- *Leave of absence* (Leaves can be paid or unpaid, depending on the circumstances. In addition to evaluating your own paid time off (PTO) and sick leave policies, as well as pre-existing state and federal leave laws, the *Families First Coronavirus Response Act (FFCRA)* requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for six (6) enumerated reasons related to COVID-19; these FFCRA provisions apply from April 1, 2020 through December 31, 2020. See FFCRA resources provided below for details.)
- *Temporary transfer to another position* Identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of your workspace. When evaluating accommodation requests, it may be helpful to consult the Job Accommodation Network (JAN) website for various types of accommodations, askjan.org [JAN’s materials specific to COVID-19 are at askjan.org/topics/COVID-19.cfm]. Employers and employees are encouraged to be creative and flexible.

- While each accommodation request should be assessed on an individualized basis, employees who are similarly situated should be treated *consistently*. It is helpful to centralize all accommodation decisions to ensure consistency.
- If an employee requests an accommodation for a disability that is not obvious or already known, you may ask questions or request medical documentation to determine whether the employee’s disability necessitates an accommodation, either the one s/he requested or another. During the current pandemic, however, recognize that it may be difficult for employees to obtain medical documentation of a COVID-19-related disability from their medical provider. As such, consider conditionally granting the accommodation until the medical documentation can be reasonably obtained.
- You may require employees to wear protective gear (e.g., masks) and observe infection control practices (e.g., regular hand washing and social distancing protocols). However, if an employee needs a modification to those practices due to a disability (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, etc.) or a religious accommodation (such as modified equipment due to religious garb), you should follow the accommodation process outlined above.
- You can—and should—prohibit employees from the workplace if they have tested positive for COVID-19, are displaying symptoms of COVID-19, have been exposed to COVID-19, or are under a mandatory quarantine order due to travel. However, you *cannot* exclude an employee from the workplace – or take any other adverse action against them – *solely* because the employee has an underlying medical condition that potentially places them at a higher risk if they contract COVID-19 (unless the employee’s condition poses a “direct threat” that cannot be eliminated or reduced by reasonable accommodation).
- Ensure that supervisors, managers, and human resources personnel are trained on your processes and know how to: (i) handle accommodation requests and/or (ii) escalate them to the proper channel(s) within your firm.

POTENTIAL DISCRIMINATION AND HARASSMENT ISSUES RELATED TO COVID-19

Age

- Develop a plan for your employees who fall within vulnerable populations and might not be covered by disability laws (e.g., employees age 65 and older). [According to the CDC, individuals age 65 and over are at higher risk if they contract COVID-19.]

- Though you are not required to provide a “reasonable accommodation” to employees due solely to their age, you are free to provide flexibility to those age 65 and older due to increased health risks associated with COVID.
 - Workers age 65 and older may have medical conditions that bring them under the protection of the Americans with Disabilities Act (ADA) and/or the LAD as individuals with disabilities. In that case, those employees may request reasonable accommodation for their disability (as opposed to their age).
- You may *not* prohibit or involuntarily exclude an employee from the workplace based on the employee’s age, even if you are acting for benevolent reasons.

Caregivers/Family Responsibilities

- You may provide flexibility to your employees to assist with caregiver responsibilities related to COVID-19-required closures of school and childcare facilities—such as telework, modified schedules, etc. [NOTE: This is in addition to the paid leave required under the FFCRA, as well as other statutory leave requirements.].
- If you offer voluntary modifications or flexibility, ensure that you do *not* treat employees differently based on gender or other EEO-protected characteristics. For example, female employees cannot be given more favorable treatment than male employees because of gender-based assumptions about who may have caretaking responsibilities for children.

Pregnancy

- Pregnant employees may be entitled to COVID-19-related accommodations. If you receive an accommodation request from an employee based on pregnancy or a pregnancy-related medical condition, you should engage in the interactive process outlined above.
- You are *not* permitted to single out workers on the basis of pregnancy for adverse employment action related to COVID-19, including involuntary leave, layoff, furlough, or exclusion from the workplace.

Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

- You can help reduce the chance of harassment by explicitly communicating to your employees that fear of the COVID-19 pandemic should not be

misdirected against individuals because of a protected characteristic, including their national origin, race, age, disability, or other prohibited characteristics. This can be done through formal training, written communications, or a combination of both.

- You also should consider a special reminder to supervisors and managers of their legal obligations and the important role they play in detecting, addressing, and reporting harassment and/or discrimination.
- If you become aware of any alleged harassment or discrimination, take the same actions you would take under your existing policy to promptly investigate and remediate the situation (even if the conduct occurs while employees are working remotely).

Furloughs and Recalls

- Ensure that selections for furloughs/layoffs (and returns) are supported by legitimate business reasons, in order to avoid claims of unlawful discrimination.

RESOURCES**

- EEOC materials related to COVID-19 are collected at: eoc.gov/coronavirus
- New Jersey Division of Civil Rights | Civil Rights and COVID-19: Frequently Asked Questions nj.gov/oag/dcr/downloads/NJ-DCR-FAQs-on-COVID-19.pdf
- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (last updated June 17, 2020) eoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act eoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
- Job Accommodation Network (JAN) COVID-19/ADA Accommodation Guidance askjan.org/topics/COVID-19.cfm
- EEOC Press Release Regarding Antibody Testing (June 17, 2020) content.govdelivery.com/accounts/USEEOC/bulletins/2914824

- Families First Coronavirus Response Act (FFCRA) | Questions and Answers
dol.gov/agencies/whd/pandemic/ffcra-questions
 - Families First Coronavirus Response Act (FFCRA) Notice of Rights
dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- ** Guidance from state and federal EEO agencies is likely to change as the COVID-19 pandemic evolves. Employers should continue to follow the most current guidance.