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**NJEA LEGAL SERVICES
ACCOMMODATIONS FOR RETURN TO SCHOOL DURING COVID-19
FREQUENTLY ASKED QUESTIONS**

The following information is based on the current guidance of the Equal Employment Opportunity Commission (EEOC), which administers the federal law relating to disability accommodations, known as the Americans with Disabilities Act (ADA), regarding return to work and accommodation protocols during the COVID-19 pandemic for employees already employed by a public-school district who may need accommodations for health-related reasons. In addition to the Federal ADA, the New Jersey Law Against Discrimination (NJLAD) similarly protects individuals with disabilities who may be entitled to workplace accommodations. **If you have questions about accommodations, reach out to your local leadership, who will be in communication with NJEA UniServ representatives.**

Question: How can the ADA or NJLAD protect individuals with disabilities during the COVID-19 pandemic?

Answer: The ADA and the LAD apply to the pandemic in at least three major ways:

- (1) These laws prohibit an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances; and
- (2) They prohibit employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a ‘direct threat’ (i.e. a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. For example, if the employee has a communicable disease that might harm others in the workplace.); and
- (3) The ADA and the NJLAD require that an employer provide reasonable accommodations, absent undue hardship, for individuals with qualifying disabilities that allow the individual to perform the essential duties of the job, even during a pandemic.

Question: What is a qualifying disability under the ADA or NJLAD?

Answer: A qualifying disability is *any* physical or mental impairment that substantially limits one or more major life activities. Major life activities include e.g., performing manual tasks, breathing, learning, writing, sitting, sleeping; also, the operation of major bodily functions and systems, such as the immune system, normal cell growth, circulatory, respiratory, and cardiovascular. Impairments need not be permanent; they may be transitory (less than 6 months) and minor. Your disability must be serious enough to render you unable to perform one of your usual activities of daily living.

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Question: What does it mean if I am an individual with an ADA or NJLAD qualifying disability?

Answer: If you have a qualifying disability, as defined in the previous question, you can request a reasonable accommodation from your employer that will allow you to perform your job duties despite your disability. Unless the accommodation causes the employer an undue hardship, or you cannot perform the essential functions of your job either with or without accommodation, the employer must provide a reasonable accommodation.

Question: Are the high-risk conditions recognized by the CDC and by the NJ DOE guidance the only conditions that can be considered ADA/NJLAD qualifying disabilities?

Answer: No. The NJ DOE guidance, “The Road Back,” available here <https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf>, includes a non-exhaustive list of serious medical conditions that may require a reasonable accommodation. However, there are medical conditions not listed that may qualify as a disability under the ADA/NJLAD, and may also pose a high-risk for individuals who contract COVID-19. Having a condition that is not listed does not mean the employee with that condition will be denied an accommodation.

Question: What is a reasonable accommodation?

Answer: The ADA and NJLAD require employers to provide reasonable accommodations to qualified individuals with disabilities to allow them to perform the major functions of their jobs, unless to do so would cause the employer “undue hardship.” An accommodation is any change in the work environment or in the way the work is customarily performed that enables an individual with a disability to enjoy equal employment opportunities.

Question: How do I request an accommodation?

Answer: An individual must request an accommodation in order for the employer’s obligations under the ADA and the NJLAD to be triggered. It is recommended that the request for an accommodation be made in writing and mentioned that it is being made pursuant to federal and state disability law, though these are not requirements. While an employee may request an accommodation without providing medical documentation, in order to ultimately be entitled to an accommodation, the employee must provide medical documentation to support the application.

Question: When should I request an accommodation?

Answer: An individual with a disability may request a reasonable accommodation at any time during the period of employment. If you anticipate needing a reasonable accommodation for return to school during the COVID-19 pandemic, you should notify your employer *as soon as possible*.

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Question: What if my employer sent a survey asking if I need an accommodation, or asking about my health and ability to return to work?

Answer: Since each survey is different, if you have questions about a health survey that your employer is requiring you to complete, contact your local or your UniServ office before you submit your completed response. Members asked to complete a survey that would require notifying the district in advance of plans to seek an accommodation, the employee should contact local union representatives and seek guidance about whether to respond to the survey before doing so.

Question: What information should I begin gathering if I have or will be requesting an accommodation?

Answer: You will need a detailed medical report (not simply a doctor's handwritten note) outlining the nature of your disability, how that disability impairs one of the major life activities listed above, discussing your doctor's understanding of your essential job functions, and what accommodations are necessary to allow you to perform your duties given your disability. You should have the report reviewed by your local or your UniServ representative or an attorney before submitting it. A poorly written report could result in a rejection of your accommodation request, so it is important to have it reviewed before submitting it to your district.

Question: What happens after I request an accommodation?

Answer: The laws requires the employer and the individual with a disability to engage in an informal, good faith interactive process to clarify what the individual needs and identify an appropriate reasonable accommodation. This may take the form of email conversations, telephone conference, or video calls. The employer may ask the employee relevant questions or for more information that will enable it to make an informed decision about the request. This includes asking how the disability creates a limitation and what alternative reasonable accommodations might be appropriate. Due to the extraordinary circumstances during the pandemic and the likelihood of a large volume of requested accommodations, a delay in discussing requests may result. Employers should provide temporary accommodations in the interim.

Question: What information can my employer ask for *once I've requested an accommodation*?

Answer: The employer may ask the individual for reasonable documentation about his/her disability and functional limitations. Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA/NJLAD qualifying disability, and that the disability necessitates a reasonable accommodation. An

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employer may require that the documentation about the disability and the functional limitations come from an appropriate health care professional, usually a medical doctor.

Question: Can my employer require me to be examined by a doctor of their choosing?

Answer: Yes. The ADA/NJLAD does not prevent an employer from requiring an individual to be examined by an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician to substantiate that s/he has an ADA/NJLAD disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner before the employer resorts to its own medical examination.

Question: Will I get the specific accommodation I requested?

Answer: Not necessarily, no. You are entitled to an “effective” accommodation. If there are several different accommodations possible, as long as you get an accommodation that is effective, you may not get the exact accommodation you want.

Question: Can I work remotely as my accommodation?

Answer: The accommodation provided must be “reasonable.” The employer is not required to provide exactly the accommodation you request. Rather, the employer must provide what would be considered “reasonable.” What is “reasonable” will differ from case to case. Remote work may be a reasonable accommodation under certain circumstances, but not all situations will require an employer to allow an employee to work remotely, and some jobs may not be able to be done remotely.

Additionally, the employee must be able to perform the “essential functions” of his or her job with or without the accommodation. Before the pandemic, an “essential function” for all school employees likely required that the school employee attend school in-person. However, given the circumstances and the implementation of remote teaching this past spring, there is an argument to be made that an employee may be able to perform the essential functions of his/her teaching job while working from home during the pandemic. Due to the unprecedented nature of the current situation, we do not know how the issue of reporting to work as an essential function will be viewed by courts.

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Question: Can my employer deny my request for an accommodation?

Answer: Under certain circumstances, yes. An employer is not required to provide a particular reasonable accommodation if it poses an undue hardship, which means significant difficulty or expense. Whether an accommodation presents an undue hardship is a fact specific assessment taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business, and it will account for the impact of COVID-19 on these factors. Additionally, an employer is not required to eliminate an essential function, i.e., a fundamental duty of the position, or lower performance standards in order to accommodate an employee.

Question: Can my employer disclose my medical information or the fact that I’m receiving an accommodation?

Answer: Employers are only allowed to disclose accommodation information in very limited circumstances, such as to your supervisor if the supervisor needs to know about your work restrictions or accommodations, or health care personnel if you might require emergency treatment. The employer cannot disclose such information to your coworkers generally. Your medical information and documentation is to be treated as a confidential medical record, kept separate from your regular personnel file.

Question: I am 65 or older. Does that allow me to not go back to work?

Answer: Age is not considered a qualifying disability under the ADA or the NJLAD. However, both the CDC and NJ DOE have recognized that this age group is a higher risk category for serious complications if the contract COVID-19. The NJ DOE guidance, “The Road Back,” states that reasonable accommodations should be provided for individuals in that age category. That guidance does not provide any guidance on what accommodations are required or advisable for individuals who are over 65. You may wish to speak with your medical doctor to obtain medical information that may support your request for an accommodation due to your age.

Question: If a member of my household is high risk, can I stay at home?

Answer: The ADA and NJLAD only address an individual’s own disability. These laws do not provide you with an accommodation to allow you to stay home simply because you have a family member who is in a COVID-19 high risk category. You should consult your local association to address any health or safety concerns you may have in seeking safety assurances related to your return to the workplace as it may affect your high risk family member. Additionally, depending on the circumstances, it is possible you could qualify for leave under the Family and Medical Leave Act (FMLA) to care for yourself or a family member who has a serious health condition,

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the New Jersey Family leave Act (NJFLA) to care for a family member, or under the newly enacted Families First Coronavirus Response Act (FFCRA), which may entitle you to leave to care for someone who is subject to a quarantine/isolation order because of COVID-19. You should be aware that these leave entitlements have strict limitations about the amount of time you may take and if you exhaust these leaves, you should consult your local association about what your options are moving forward.

Question: I am pregnant. Am I entitled to an accommodation (absent undue hardship)?

Answer: Pregnancy itself is not an ADA or NJLAD qualifying disability, but pregnancy-related disabling medical conditions may be, and are treated in the same manner as other ADA/NJLAD accommodation requests. Additionally, the federal Pregnancy Discrimination Act requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work.

Question: I have a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic. Am I entitled to a reasonable accommodation (absent undue hardship)?

Answer: Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. If these employees have an ADA/NJLAD qualifying disability, an accommodation request will be treated as any other. As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

Question: Can my employer exclude me from the work place if I am high risk but want to report to work in person?

Answer: The ADA/NJLAD prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e. a significant risk of substantial harm to themselves or others even with reasonable accommodation). Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities. The CDC has determined that the COVID-19 pandemic meets the high standard of a direct threat. An employee who has contracted COVID-19 may be excluded

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from the workplace. With regard to an employee who is high risk, the employer must first engage in an interactive discussion about whether a workplace accommodation can eliminate or reduce the risks sufficiently. Only after exhausting the interactive discussion may an employer make a decision to exclude a high risk employee from the workplace. Since COVID-19 is so new, this is an issue that has not been tested. Thus, if you have questions or issues related to being excluded due to your high risk, you should consult your local association or Uniserv Representative.

Resources:

EEOC

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf

https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_111

<https://www.youtube.com/user/TheEEOC>

CDC

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html

NJDOE

<https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf>