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Back to School: Guidance on Reasonable Accommodations During COVID-19 Pandemic for Schools, School Districts, Educators, and Support Staff

The 2020 COVID-19 Pandemic has raised many novel questions regarding an employer's duty to provide reasonable accommodations to employees with disabilities under both the federal Americans with Disabilities Act (ADA) and the Rehabilitation Act (applicable to certain employers who receive federal funding) as well as Vermont's Fair Employment Practices Act (VFPEA). With the fall season brings back-to-school, which also means back to work for some of Vermont's largest employers - school districts, colleges, and universities.

The Vermont Attorney General's Office would like to take this opportunity to remind school employers of employee rights and employer obligations under disability and related laws. While this guidance is focused on educators, these concepts apply to any employer covered under the various laws discussed herein.

Q1: Must an employer consider a request for a reasonable accommodation for an employee whose disability puts them in a "high risk" category should they contract COVID-19?

A1. Yes. The federal Equal Employment Opportunity Commission (EEOC), responsible for enforcing the ADA, has stated that employers must consider requests for modifications to the workplace from employees who have a medical condition [identified by the Centers for Disease Control and Prevention \(CDC\)](#) as potentially putting them at greater risk of COVID-19 as requests for reasonable accommodations.¹ This is especially important where the employee's job position may require them to interact with many individuals, such as in-person teaching or serving food in the cafeteria, where they may have an increased risk of contracting the virus. Employees responsible for cleaning high-traffic areas may likewise face heightened risks.

While an employer is obligated to consider these types of requests for reasonable accommodations, employers are allowed to request verification that the employee does in fact

¹ EEOC legal counsel addressed these issues in a March 27, 2020 webinar, Ask the EEOC. The full transcript is available here: <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar> (accessed September 17, 2020). See also the EEOC's *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, updated on March 21, 2020 with specifics regarding the COVID-19 pandemic: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (accessed September 17, 2020).

have a disability as defined by law and that the disability places the employee in a higher risk group.²

The answer remains the same under VFEPA, Vermont's state law counterpart to the ADA. Importantly, VEFPA applies to employers with 1 or more workers, whereas the ADA applies to employers with 15 or more employees.³ The Office of Attorney General's Civil Rights Unit (CRU) enforces VFEPA for all employees except for those employed in state government. The Vermont Human Rights Commission (HRC) enforces the law on behalf of state government workers.

Q2. What must an employer do if an employee asks for a reasonable accommodation for a disability that places them at an increased risk of severe illness from COVID-19?

A2. The short answer is: *Talk it through* with the employee to try and find a workable solution.

State and federal law require employers to address reasonable accommodation requests one-by-one, because every employee's health-related needs are unique. Blanket policies regarding accommodation requests or broad assumptions about certain disabilities (e.g., assumptions about the risks associated with diabetes) may run afoul of the law.

Upon receiving a reasonable accommodation request, whether related to COVID-19 or not, the employer must consider the employee's individual needs and start what the EEOC calls the "interactive process" to figure out whether or how it can enable the employee perform the essential functions of job.⁴ This interactive process involves discussion between the employer and employee to determine, among other things:

- (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 his position (that is, the fundamental job duties).⁵

² *Id.*

³ For the employer size requirements under the ADA and VFEPA, see [42 U.S.C. § 12111\(5\)](#); [21 V.S.A. § 495d\(1\)](#), respectively.

⁴ For the ADA regulations defining interactive process, see [29 C.F.R. § 1630.2\(o\)\(3\)](#).

⁵ Quoting the EEOC's *What you Should Know About COVID-19 and the ADA, the Rehab Act, and Other EEO Laws, Technical Assistance Questions and Answers – Updated September 8, 2020*, found at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated September 8, 2020) (accessed September 17, 2020)

Even if an employer find that the type of accommodation requested is not feasible because it creates an undue hardship⁶ or presents serious risks to others⁷, it still must work to see if another form of accommodation would be feasible and accommodate the employee's limitation.

For more information on the navigating accommodations requests and the interactive process during COVID-19, the Job Accommodation Network (JAN) has compiled a helpful set of resources here: [Accommodation and Compliance: Coronavirus Disease 2019 \(COVID-19\)](#).

Q3. Is a request to work remotely/telework during the COVID-19 pandemic a reasonable accommodation request that an employer must grant?

A3. It can be; it depends upon the nature of the job.

As stated above, employers need to handle telework requests from disabled employees on an individual basis by following the interactive process. Like the ADA,⁸ Vermont law specifically states that “job restructuring, part-time or modified work schedules” may constitute reasonable accommodations.⁹

If the interactive process makes clear that working remotely/teleworking would not be an effective accommodation or would constitute an undue hardship, the employer must consider what other accommodations may be feasible in the given circumstances. In some cases, that might mean transferring the employee to an open position with less exposure to other persons. In other cases, reasonable accommodation might mean providing personal protective equipment (PPE) or modifying the work site to provide plexiglass or other barriers. In still other cases, it may mean modifying the job position to address the heightened health risks to qualified, disabled employees.

It is important to note that unpaid leave may also be considered a reasonable accommodation for a disability under the ADA and Vermont law, and it is an option that should be considered should an employer not have teleworking opportunities available.¹⁰

An employer should not maintain a blanket policy refusing to consider any requests for a specific type of accommodation, as this type of policy might unlawfully deny the employee his/her right

⁶ VFEPA states that factors to be considered in determining whether an undue hardship is imposed by the requirement that reasonable accommodation be made for an individual with a disability include (i) the overall size of the employer's operation with respect to number of employees, number and type of facilities, and size of budget; and (ii) the cost of the accommodation needed.” [21 V.S.A. § 495d\(11\) \(c\)\(i\)-\(ii\)](#). Likewise, the ADA defines undue hardship as “significant difficulty or expense . . .when considered in light of the factors” set forth in detail in the regulations here: [29 C.F.R. § 1630.2\(p\)](#).

⁷ The ADA's definition of “direct threat” can be found here: [29 C.F.R. § 1630.2\(r\)](#).

⁸ The ADA states that “[R]easonable accommodations may include . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” [42 U.S.C. § 12111\(9\)\(B\)](#).

⁹ See Vermont's definition of “reasonable accommodation” here: [21 V.S.A. § 495d\(12\)\(b\)\(ii\)](#).

¹⁰ *Employer-Provided Leave and the Americans with Disabilities Act*, EEOC Guidance issued May 9, 2016, <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> (accessed September 21, 2020) (“an employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.”)

to seek a reasonable accommodation under the law, as well as constitute a failure on the part of the employer to engage in the interactive process. Further, such a blanket policy may have a chilling effect on employees, as it may discourage employees from seeking accommodations in the first place.

Q4. What about employees who do not have a disability, but live with a family member in a “high risk” group? Are they entitled to reasonable accommodation to keep from spreading infection at home?

A4. Not under the state and federal disability laws discussed above. However, they *may* be under other laws related to family leave or flexible work arrangements.

While the ADA does protect employees from discrimination based on their association with an individual with a disability,¹¹ neither VFEPA or the ADA require that employers treat requests of this type as reasonable accommodations requests when it does not involve the employee’s own disability.¹²

That said, in his [June 15, 2020 Amended and Restated Executive Order No. 01-20](#), Vermont Governor Phil Scott stated that “[e]mployers shall accommodate the needs of high risk individuals, those workers who may have childcare needs which cannot be met due to the closure of schools or child care facilities for reasons relating to COVID-19 and those individuals with concerns about personal health circumstances.”

It is also possible that, depending on the situation, other laws surrounding leave and scheduling may apply. For instance, Vermont’s Flexible Work Arrangements Law¹³ requires that employers consider employees’ requests for “intermediate or long-term changes in the employee’s regular working arrangements, including changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing.”¹⁴ While the employer is not required to grant every request for a flexible work arrangement, similar to obligations under federal and state disability laws, the employer must discuss the request in good faith and consider whether granting it would be “inconsistent with business operations.”¹⁵

In addition, Vermont’s Parental and Family Leave Act (VPFLA) provides for up to twelve weeks of job-protected leave for employees who may need to attend to a family member’s serious medical condition.¹⁶

¹¹ The ADA’s prohibition on discrimination based on association with a person with a disability can be found here: [42 U.S.C. § 12112\(b\)\(4\)](#).

¹² <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eco-laws> (See Question D.13) (accessed September 17, 2020).

¹³ Vermont’s Flexible Working Arrangements Law can be found here: [21 V.S.A. § 309](#).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Vermont’s PFLA statute can be found here: [21 V.S.A. § 470 et. seq.](#)

Employers and employees should also be aware of rights provided to employees under the federal Family First Coronavirus Response Act (FFCRA) to take leave for certain reasons related to COVID-19.¹⁷

Employers may also have other scheduling flexibility or leave policies contained in union collective bargaining agreements or in employee handbooks, and an employer should apply those policies uniformly and fairly across all employees.

For more information, please contact the Vermont Attorney General's Office, Civil Rights Unit, (802) 828-3657 or civilrights@vermont.gov.

¹⁷ See United State Department of Labor Fact Sheet: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (accessed September 17, 2020).

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