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**THE REGISTER CITIZEN**

# **MARKET MATTERS: Reasonable accommodation in the workplace and COVID-19**

By Gary Phelan

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Photo: Contributed Photo; Gary Phelan

The Americans with Disabilities Act states that an employer must provide a reasonable accommodation to an employee with a disability unless the accommodation causes undue hardship. The Equal Employment Opportunity Commission, which enforces the ADA in the workplace, has stated that “it is unclear at this time whether COVID-19 is or could be a disability under the ADA,” reasoning that “this is a very new virus and, while medical experts are learning more about it, there is still much that is unknown.” Nevertheless, the ADA’s reasonable accommodation requirement is playing a vital role in workplaces navigating COVID-19’s impact.

In its COVID-19 guidance, the EEOC notes that persons with certain impairments are at greater risk from COVID-19 and, as a result, may be entitled to an accommodation. A report from the Centers for Disease Control and Prevention illustrates how important accommodations may be. According to the CDC, individuals with underlying medical impairments such as heart disease

and diabetes were hospitalized at six times the rate of, and died 12 times as often as, otherwise healthy individuals. The CDC identified several medical conditions that might place individuals at higher risk, including serious heart disease, diabetes, asthma, kidney disease, hemoglobin disorders, liver disease, severe obesity and immunocompromised (including cancer treatments, HIV and immune deficiencies).

Employers should anticipate receiving accommodation requests from people who otherwise had not previously indicated there was an underlying medical condition — conditions for which no prior accommodation was needed.

An employer's duty to provide a reasonable accommodation is not triggered unless the employee requests it. The employee is not required to use the specific words "reasonable accommodation." Rather, the employee or a third party — such as the employee's doctor — must request some kind of workplace change or adjustment and link that request to a medical condition. After reviewing the request, the employer may seek medical documentation to verify existence of a disability and whether a reasonable accommodation can be provided. Employees should ask their physician to provide a letter explaining the nature of the medical condition, the accommodation requested and why the employee needs the accommodation.

Due to stay-at-home orders implemented across the country, many employees have already been working remotely. Therefore, permitting employees with medical impairments to continue to work from home is the most common type of accommodation being used for persons with underlying medical conditions. Approximately 40 percent of employees hold positions that could be performed remotely. Therefore, employers will need to consider accommodation requests by employees who work in the 60 percent of positions that cannot be performed remotely. The EEOC encourages all parties to be flexible and consider options such as physical changes to the work environment, temporary reassigning of marginal job duties, temporary transfer to a different position, or modifying work schedules or shift assignments. Nevertheless, employers will not be required to provide an accommodation if it would cause an "undue hardship," which means "significant difficulty or expense."

Employees generally will not be able to refuse to return to the workplace based solely on fear of contracting COVID-19. The equation may change, however, for employees with preexisting

mental health conditions which may be exacerbated by the COVID-19 pandemic. If the employee with a mental health condition requests an accommodation, the employer may ask for medical documentation and discuss possible accommodations with the employee.

Employers may not disclose to a disabled employee's coworkers why it is providing an accommodation to an employee. Employers may not force employees to accept an accommodation because the employer believes the employee is in a high-risk category.

Under the ADA, an employer who suspects an employee has a medical condition cannot ask the employee whether he or she has an impairment and/or needs an accommodation. However, employers should consider adopting a policy that it provides to all employees, addressing the availability of accommodations for "at-risk" employees, describe how an employee who seeks such an accommodation may do so and to whom that request should be directed. An employer should consider adopting such a policy even if it has already "reopened."

*Gary Phelan is an attorney with Mitchell & Sheahan, P.C. in Stratford, where he practices employment law. He is the co-author of "Disability Discrimination in the Workplace" and teaches disability law at Quinnipiac University School of Law.*