

## **Return to Work Questions Related to COVID-19**

**June 10, 2020**

*The information provided does not, and is not intended to, constitute legal advice; instead, all information, content, and materials are for general informational purposes only. Individuals should contact their attorney to obtain advice with respect to any legal matter. No reader or user of this information should act or refrain from acting based on information provided without first seeking legal advice.*

---

### **What are the characteristics or medical conditions that increase the risk for severe COVID-19 illness?**

COVID-19 can affect anyone, and the disease can cause symptoms ranging from mild to very severe. For some other illnesses caused by respiratory viruses, some people may be more likely to have severe illness than others because they have characteristics or medical conditions that increase their risk. These are commonly called “risk factors.” People with risk factors may be more likely to need hospitalization or intensive care if they have COVID-19, or they may be more likely to die of the infection.

Based on currently available information and clinical expertise, older adults and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19.

These underlying medical conditions or risk factors include:

- Asthma,
- Chronic kidney disease being treated with dialysis,
- Chronic lung diseases, such as chronic obstructive pulmonary disease (COPD) (including emphysema and chronic bronchitis), idiopathic pulmonary fibrosis and cystic fibrosis,
- Diabetes, including type 1, type 2, or gestational,
- Hemoglobin disorders such as sickle cell disease (SCD) and thalassemia,
- Immunocompromised from cancer treatment, bone marrow or organ transplantation, immune deficiencies, HIV with a low CD4 cell count or not on HIV treatment, and prolonged use of corticosteroids and other immune weakening medications,
- Chronic liver disease, including cirrhosis,
- Older adults, 65 years and older,
- People who live in a nursing home or long-term care facility,
- Serious heart conditions, including heart failure, coronary artery disease, congenital heart disease, cardiomyopathies, and pulmonary hypertension, and
- Severe obesity.

Source: Centers for Disease Control and Prevention.

---

### **My employee has requested a reasonable accommodation or has refused to return to work because he/she has one of the medical conditions listed above that CDC says may put him/her at higher risk for severe illness from COVID-19, what do I do now?**

Individuals with disabilities have the right to request “reasonable accommodations” from employers that are subject to the Americans with Disabilities Act and/or the Minnesota Human Rights Act. If an employee has a disability that affects their risk of contracting COVID-19 or being harmed if they do contract the virus, they have the right to request a reasonable accommodation from their employer. Examples of reasonable accommodations include:

1. Teleworking;
2. Paid, sick, unpaid leave;
3. Staggered work schedules; and
4. Changing workstations to practice social distancing.

An employee – or a third party, such as an employee’s doctor – must let the employer know that he/she needs a change for a reason related to a medical condition. Individuals may request accommodation in conversation or in writing. While the employee or third party does not need to use the term “reasonable accommodation” or reference the Americans with Disabilities Act, they may do so.

The employee or their representative should communicate that they have a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided. An employer does not have to provide a particular reasonable accommodation if it poses an undue hardship which means "significant difficulty or expense."

Even with the constraints imposed by a pandemic, some accommodations may meet the employee's needs on a temporary basis without causing undue hardship on the employer. Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace. However, in most cases, reasonable accommodation does not require an employer to allow an employee a leave of absence for an indefinite period of time.

It is possible that given the size and staff required to operate a dental office that a reasonable accommodation is not able to be made without undue hardship, but the employer should make every effort to work with the employee to explore all options.

Source: United States Equal Employment Opportunity Commission and Minnesota Department of Employment and Economic Development.

---

**If an employee has an underlying health condition that places them at greater risk if they contract COVID-19, can the employee refuse to work?**

An employee does have the right to refuse to work under conditions that the employee, in good faith, reasonably believe present an imminent danger of death or serious physical harm to the employee. Serious physical harm may include a work illness that results in permanent disability, temporary total disability or medical treatment. A reasonable belief of imminent danger of death or serious physical harm includes a reasonable belief of the employee that the employee has been assigned to work in an unsafe or unhealthful manner with an infectious agent. Coronavirus is considered to be an infectious agent. However, it is unlikely that dental offices that are complying with the current CDC and other guidelines and using proper PPE would automatically be considered an unsafe work environment.

You may not terminate an employee or otherwise discriminate against the employee for their good faith refusal to perform assigned tasks if the employee has asked you to correct the hazardous conditions, but they remain uncorrected.

Source: Minnesota Department of Employment and Economic Development.

---

**I know that an employee has one of the conditions identified by the CDC (and listed above) that place him/her at higher risk for severe illness if they contract COVID-19. I am concerned that his/her health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the Americans with Disabilities Act apply to this situation?**

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing them at “higher risk for severe illness” if they get COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a “direct threat” to their health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a “significant risk of substantial harm” to his own health under 29 C.F.R. section 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to their own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation, absent undue hardship. The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment. An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

Source: United States Equal Employment Opportunity Commission.

---

**I have decided to reopen my dental office and I have an employee who is receiving unemployment benefits who has no underlying health condition that places him/her at greater risk if they contract COVID-19. Can the employee choose not to return to work and continue to receive unemployment benefits?**

If an employer chooses to reopen their place of business and the employee is able to return to work (and not otherwise exempt under [Executive Order 20-05](#)), the employee must return to work. Workers who are offered the opportunity to return to work and don't qualify for an exemption under [Executive Order 20-05](#) or state unemployment insurance law are no longer eligible to receive benefits. State unemployment insurance law prevents the state from continuing to pay benefits to those who are no longer eligible. Every unemployment assistance applicant is asked on a weekly basis whether they have refused an offer of suitable employment. If an employee refuses an offer to return to work and does not inform the MN Unemployment Insurance division about it, but and they later find out about that refusal from the employer, the employee may be held overpaid for unemployment benefits he/she has already received.

Source: Minnesota Unemployment Insurance Program

---

**I have learned that my employee may be gathering in groups larger than 10 people and not maintaining effective social distancing. What can I do?**

This is a very challenging question. In normal circumstances, employees are generally free to engage in whatever lawful activities they choose during their non-work hours. In this case, however, there is a potential that the employee's non-work activity could result in a greater risk of COVID-19 exposure for patients and staff. Under current federal and state guidance, the employer does have the right to monitor all employees' health by taking daily temperature checks, health symptom surveys, and even to ask for COVID-19 testing if it is job-related and consistent with business necessity. As such, it appears that if the employee has disclosed that they have been involved in a potential exposure activity like gathering in large groups, then the employer may want to consider asking the employee to quarantine or to obtain a COVID-19 test (which could be difficult due to some testing shortages). It is very important that the employer makes sure that he/she treats all similarly situated employees equally with regard to how they handle this type of situation in order to avoid a claim that an employee was singled out.