BARKAN MEIZLISH | LLP
DeRose Wentz McInerney Peifer

250 E. Broad Street
10th Floor
Columbus, OH 43215
Phone: 614-221-4221
Fax: 614-744-2300
Toll Free: 800-274-5297
jwentzf@barkanmeizlish.com

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ATTORNEY CLIENT PRIVILEGED

Randi Weingarten
President
American Federation of Teachers
555 New Jersey Ave. N.W.
Washington, DC 20001

VIA EMAIL

Dear President Weingarten:

This opinion letter addresses the right of at-risk employees to workplace accommodations under the Americans with Disabilities Act, the Family Medical Leave Act, the Families First Coronavirus Response Act, and through the collective bargaining process, during the COVID-19 pandemic.

A. Summary

The novel coronavirus (COVID-19) pandemic poses a significant threat in the workplace, particularly for disabled and other at-risk employees. Employees with serious health conditions and older employees are at greater risk of life-threatening medical complications if they contract COVID-19. Bargaining unit employees must rely on disability and leave laws to protect themselves, their families and their jobs. While disability laws require employers to reasonably accommodate qualified, disabled workers when doing so is not an undue hardship, there is no general obligation to protect all at-risk workers from COVID-19 infection.

The Centers for Disease Control and Prevention (CDC) has made recommendations to reduce the risk of contracting and spreading the virus at work, including at hospitals, schools and in other industries where AFT represents employees. Some CDC recommendations may form the basis for reasonable accommodation requests under disability laws. Affiliates should seek to hold employers accountable for following CDC recommendations for the benefit of all workers. However, prior to COVID-19, courts scrutinized disabled employees' requests for accommodations, such as teleworking, leaves of absence and schedule changes, among others. Disabled employees have been denied the accommodations they need. In the COVID-19 era, it is reasonable to expect that employers will raise revenue shortfalls and budget cuts as a defense. The Equal Employment Opportunity Commission (EEOC) has stated that

accommodations that did not impose undue hardship prior to the pandemic may be viewed differently today. We anticipate litigation over the rights of employees to COVID-19 related accommodations.

Absent protections from disability laws, workers may receive some COVID-19-related protections from federal family leave laws. The Family and Medical Leave Act (FMLA) provides unpaid leave for employees who have "serious medical conditions" or who are caring for a family member with a serious health condition. Whether COVID-19 is a serious health condition may depend on how an employee reacts to the virus. Is the employee asymptomatic or experiencing mild or severe symptoms? By analogy, some courts have held that a serious flu is a serious health condition under the FMLA if there is continued medical treatment as defined in the law. Further, the recently enacted Families First Coronavirus Response Act (FFCRA) provides eligible employees with up to12 weeks of protected leave if the employee is unable to work (or telework) due to a need to take leave to care for the son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. Some paid leave is also available under the new law. A corollary to the new law provides leave for employees who are experiencing symptoms of COVID-19 and seeking a medical diagnosis, are caring for an individual who is subject to a quarantine or isolation order or has been advised by a healthcare provider to self-quarantine, or who is caring for their child due to a school or place of care closing or whose child care provider is unavailable due to COVID-19. Regrettably, healthcare employers may exempt themselves from the emergency leave and paid leave provisions of the FFCRA.

Employees do not have to rely upon disability and leave laws exclusively. Through collective bargaining initiatives, affiliates may be able to secure accommodations and protections for all bargaining unit employees, including those at high risk of serious medical complications and death from contracting COVID-19.

B. Americans With Disabilities Act (ADA)

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, applies to private employers with 15 or more employees, state and local government employers, employment agencies and labor unions. Based on its broad scope, the statute applies to most, if not all, workplaces where AFT-represented bargaining unit employees are employed.

1. Key Provisions of the ADA

a. Qualified Individuals

The ADA protects qualified individuals with disabilities from certain forms of employment discrimination. The ADA defines a "qualified individual" as:

> [A]n individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that

> such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. 12111(8).

b. Essential Functions of the Job

The federal regulations to the ADA define “essential functions” in the following manner:

> (n) Essential functions - (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.
>
> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
>
> (3) Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. 1603.2(n).

c. Impairments That Substantially Limit a Major Life Activity

Under the ADA, a person is disabled if the individual has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are regarded as having a substantially limiting impairment. The Code of Federal Regulations, 29 C.F.R. 1630.2(g), defines a disability under the ADA as follows:

> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (ii) A record of such an impairment;[1] or
>
> (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

A "physical or mental impairment" includes:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain

[1] "The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, the "record of" provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. … Individuals who are covered under the "record of" prong will often be covered under the first prong of the definition of disability as well. …Thus, an individual who has cancer that is currently in remission is an individual with a disability under the "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the "record of" prong based on his history of having had an impairment that substantially limited normal cell growth." 29 C.F.R. 1630, Appendix to 1630, Interpretive Guidance on Title I of the ADA, Section 1630.2(k) – Record of a Substantially Limiting Impairment.

> syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. 1630.2(h)(1) and (2).

As stated above, to be protected under the ADA, an employee must have, have a record of, or be regarded as having a substantial, as opposed to a minor, impairment. A substantial impairment is one that ***significantly limits or restricts a major life activity, including but not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working*****.**

29 CFR 1630.2(i)(1).

Major life activities also include ***the operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system*****.**

29 C.F.R. 1630.2(i)(2).

d. The Ability to Perform the Essential Functions With or Without a Reasonable Accommodation

An employee with a disability, as defined above, must be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA. This means that the employee must:

- satisfy the employer's job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

https://www.eeoc.gov/publications/ada-your-responsibilities-employer

e. Reasonable Accommodations

The federal regulations to the ADA, 29 CFR 1630.2(o), define "reasonable accommodation" as follows:

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[2]

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section).[3]

[2] Specific accommodations are discussed, below.

[3] An employer is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified employee who meets the definition of disability under the “actual disability” prong (§1630.2(g)(1)(i)), or “record of” prong (§1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (§1630.2(g)(1)(iii)). See 42 U.S.C. 12201(h). An impairment is transitory if it lasts or is expected to last six

f. Undue Hardship

An employer is not required to provide an accommodation if doing so would result in an "undue hardship." The regulations to the ADA, at 29 C.F.R.1630.2, define an undue business hardship:

> (p) Undue hardship—(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.
>
> (2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:
>
> (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
>
> (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
>
> (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

The EEOC has stated that lost revenues and financial constraints caused by

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(6) months or less. Note that some "transitory" physical or mental impairments result in substantial rather than minor limitations. Therefore, a qualified individual who has an actual disability for a period of six (6) months or less may be entitled to a reasonable accommodation.

COVID-19 may have the effect of rendering some accommodations an undue hardship that would not have been so prior to the pandemic. “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Questions D.9-D.11 (June 17, 2020).

g. Interactive Process and Providing Medical Information During the Pandemic

The required interactive process between employers and employees described in the regulations quoted above continues to apply when an employee requests a COVID-19 related accommodation. The EEOC’s June 17, 2020, guidance states the following:

> D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*
>
> Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (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).
>
> D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*
>
> Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.
>
> Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May

> 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.
>
> Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," Question D.6-D.7, (June 17, 2020).

As indicated in the above-quoted guidance from the EEOC, employers may request medical information from employees who request an accommodation, subject to the following restrictions:

> When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.
>
> Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC, Notice 915.002, Question 6 (October 17, 2002).

h. Employee's Preferred Accommodation

An employee's preferred accommodation should be given primary consideration but is not necessarily controlling. EEOC guidance addresses the matter as follows:

> The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.
>
> If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."

(citations omitted) Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC, Notice 915.002, Question 9 (October 17, 2002).

2. Accommodating Employees in the COVID-19 Era

a. Is COVID-19 a Disability Under the ADA?

i. Positive Coronavirus Tests

Whether an employee who contracts COVID-19 is disabled within the meaning of the ADA must be determined on a case-by-case basis. For example, is the employee who tested positive for the virus asymptomatic, experiencing mild symptoms or having a severe reaction to COVID-19? Applying the factors described above, an employee who is physically and/or mentally unable to work because of COVID-19-related symptoms or medical complications might be considered disabled under the ADA, depending upon the severity and duration of the symptoms.[4] By contrast, an employee who tests positive

[4] Note as well that in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987), the United States

and experiences only mild symptoms, or no symptoms at all, would not likely be considered disabled even if the individual is required to quarantine due to the positive test.

ii. Employees at High-Risk of COVID-19-Related Serious Health Problems or Death

Employees who are at high risk of serious health problems or death if they contract COVID-19 may be entitled to an accommodation under the ADA; provided, they prove that their condition meets the definition of a disability, as described above, they can perform the essential functions of their job, with or without an accommodation, and the accommodation does not result in an undue hardship. The Centers for Disease Control and Prevention (CDC) recognizes that certain persons are "high risk" for COVID-19 complications, including serious health problems and death:

> Everyone is at risk for getting COVID-19 if they are exposed to the virus. Some people are more likely than others to become severely ill, which means that they may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html (Updated June 25, 2020)

The risk of COVID-19 complications increase with age:

> … people in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

Certain underlying serious medical conditions also increase the risk of life-threatening complications associated with COVID-19. Scientists and medical professionals continue to study and learn more about the virus. As a result, the list of serious medical conditions, below, is not finite. According to the June 25, 2020, CDC guidance, the following medical conditions place individuals, of any age, in the high-risk category:

- Chronic kidney disease

Supreme Court held that a school teacher suffering from the contagious disease of tuberculosis can be a "handicapped person" within meaning of the federal Rehabilitation Act of 1973, 29 U.S.C. 794, thereby entitling the employee to certain accommodations in the workplace. This precedent applies to employers who have received federal funds, such as schools and hospitals.

- COPD (chronic obstructive pulmonary disease)
- Immunocompromised state (weakened immune system) from solid organ transplant
- Obesity (body mass index [BMI] of 30 or higher)
- Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
- Sickle cell disease
- Type 2 diabetes mellitus

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.

The same CDC guidance states that individuals with the following conditions "might be at an increased risk for severe illness" from COVID-19:

- Asthma (moderate-to-severe)
- Cerebrovascular disease (affects blood vessels and blood supply to the brain)
- Cystic fibrosis
- Hypertension or high blood pressure
- Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
- Neurologic conditions, such as dementia
- Liver disease
- Pregnancy
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Smoking
- Thalassemia (a type of blood disorder)
- Type 1 diabetes mellitus,

Id.

According to the CDC, the best way for an individual at higher risk of complications to protect themselves and help reduce the spread of the disease is to:

- Limit your interactions with other people as much as possible.
- Take precautions to prevent getting COVID-19 when you do interact with others.[5]

Id.

[5] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

b. **CDC Guidance for Workplaces**

CDC has issued guidance to reduce the risk of infection and spread of COVID-19 in workplaces. https://www.cdc.gov/coronavirus/2019-ncov/community/index.html CDC-recommended measures to reduce the risk of exposure and spread include but are not limited to wearing cloth masks, following hygienic and sanitary policies and procedures, and social distancing. In addition, CDC has made detailed, industry-specific recommendations to protect employees. As an example, below are summaries of and excerpts from CDC's guidance for reopening schools:

- Schools should actively encourage employees and students who are sick or who have recently had close contact with a person with COVID-19 to stay home. In furtherance thereof, CDC encourages schools to develop policies that encourage sick employees and students to stay at home without fear of reprisal, and ensure employees, students, and students' families are aware of these policies. Consider not having perfect attendance awards, not assessing schools based on absenteeism, and ***offering virtual learning and telework options***, if feasible.

- Offer options for staff at higher risk for severe illness (including older adults and people of all ages with certain underlying medical conditions) that limit their exposure risk (***e.g., telework, modified job responsibilities that limit exposure risk***). In addition, "[o]ffer options for students at higher risk of severe illness that limit their exposure risk (***e.g., virtual learning opportunities***). The CDC encourages schools to implement flexible sick leave policies and practices that enable staff to stay home when they are sick, have been exposed, or caring for someone who is sick. ***Leave policies should be flexible and not punish people for taking time off, and should allow sick employees to stay home and away from co-workers. Leave policies should also account for employees who need to stay home with their children if there are school or child care closures, or to care for sick family members***.

- For group events, gatherings, meetings, field trips, assemblies, special performances, schoolwide parent meetings, and spirit nights, the CDC encourages schools to pursue "**virtual"** options, if possible. When in-person events are held, ***promote social distancing*** of at least 6 feet between people if events are held. ***Limit group size to the extent possible***. Limit any nonessential visitors, volunteers, and activities involving external groups or organizations as possible—especially with individuals who are not from the local geographic area (e.g., community, town, city, county). Pursue options to convene sporting events and participation in sports activities in ways that

minimize the risk of transmission of COVID-19 to players, families, coaches, and communities."

- ***Ensure that student and staff groupings are as static as possible by having the same group of children stay with the same staff*** (all day for young children, and as much as possible for older children). Limit mixing between groups if possible.

- Stagger arrival and drop-off times or locations by cohort or put in place other protocols to limit contact between cohorts and direct contact with parents as much as possible. ***When possible, use flexible work sites (e.g., telework) and flexible work hours (e.g., staggered shifts) to help establish policies and practices for social distancing (maintaining distance of approximately 6 feet) between employees and others***, especially if social distancing is recommended by state and local health authorities.

- ***Make use of modified classroom layouts****,* to include space seating/desks at least 6 feet apart when feasible, turn desks to face in the same direction (rather than facing each other), or have students sit on only one side of tables, spaced apart, and create distance between children on school buses (e.g., seat children one child per row, skip rows) when possible.

- ***Install physical barriers, such as sneeze guards and partitions***, particularly in areas where it is difficult for individuals to remain at least 6 feet apart (e.g., reception desks).

- ***Provide physical guides, such as tape on floors or sidewalks and signs on walls***, to ensure that staff and children remain at least 6 feet apart in lines and at other times (e.g., guides for creating "one-way routes" in hallways).

- ***Close communal use shared spaces such as dining halls and playgrounds with shared playground equipment if possible***; otherwise, stagger use and clean and disinfect between use.

- ***Ensure ventilation systems operate properly and increase circulation of outdoor air as much as possible, for example by opening windows and doors****.* Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling, triggering asthma symptoms) to children using the facility.

- ***Add physical barriers, such as plastic flexible screens, between bathroom sinks*** especially when they cannot be at least 6 feet apart.

- Monitor absenteeism of students and employees, cross-train staff, and ***create a roster of trained back-up staff*** and train staff on all safety protocols.

https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html

CDC has made similar, detailed recommendations for the healthcare industry, several of which are identified below:

- During the COVID-19 pandemic, healthcare systems should adjust their standard approaches of delivering healthcare services to ***reduce the need to provide in-person care*** to minimize risk to patients and health care personnel.
- ***Telehealth services should be optimized***, when available and appropriate.
- When possible, manage ***mildly ill patients with COVID-19 at home***.
- In response to the infection prevention and control challenges posed by COVID-19, CDC has developed infection prevention and control recommendations for COVID-19 in healthcare settings. These recommendations provide detailed guidance for care of patients with suspected or confirmed COVID-19 in healthcare settings and considerations for care of patients not suspected or confirmed to have COVID-19. ***Healthcare facilities must be familiar with these recommendations and provide staff the necessary tools and training to effectively follow the guidance as part of a comprehensive strategy to manage operations during the COVID-19 pandemic.*** CDC has also developed strategies for optimizing the supply of personal protective equipment in times of shortages.
- To prevent SARS-CoV-2 transmission by symptomatic and pre-symptomatic persons, healthcare facilities should use ***source control for all persons entering a healthcare facility*** (e.g., staff, patients, visitors).

Inpatient facilities

- Place ***visual alerts, such as signs and posters*** in appropriate languages, at entrances and in strategic places for hand hygiene, respiratory hygiene (including the use of cloth face coverings), and cough etiquette.
- ***Maintain physical distance*** as much as possible:
    - ***Use video conferencing and increase workstation spacing***.
    - **Reduce the number of individuals allowed in common areas such as breakrooms and on elevators.**

- ***Limit visitors*** to the facility to only those essential for the patient's physical or emotional well-being and care.
    - ***Assess visitors for fever and other COVID-19 symptoms*** before entry to the facility.
    - ***Instruct all visitors to wear a facemask*** or cloth face covering while in the facility, perform frequent hand hygiene, and restrict their visit to the patient's room or other areas designated by the facility.

Outpatient facilities and ambulatory care practices

- ***Contact patients who may have an increased risk of severe illness from COVID-19-***related complications to ensure they are adhering to current medications and therapeutic regimens, confirm they have access to sufficient medication refills, and instruct them to notify their provider by phone if they become ill.
- Ask ***symptomatic patients who require an in-person visit to call before they leave home*** so staff are ready to receive them using appropriate infection control practices and personal protective equipment.
- Do not penalize patients for canceling or missing appointments because they are ill.
- ***Set up waiting rooms to allow patients to be at least 6 feet apart. If your facility does not have a waiting area, then use partitions or signs to create designated areas or waiting lines***.
- ***Reduce crowding in waiting rooms by asking patients to remain outside*** (e.g., stay in their vehicles or in a designated outdoor waiting area), if feasible, until they are called into the facility for their appointment. Another option is to set up triage booths to screen patients safely.

https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html

Many of CDC's recommendations are applicable across industries and are relevant to accommodating high-risk employees in all AFT-represented workplaces. Affiliates should monitor CDC guidance related to the industries they represent as recommendations may be relevant to accommodating high-risk employees. As discussed below, the EEOC has identified potential reasonable accommodations that overlap with CDC's workplace guidance.

c. Types of Accommodations

Employees with underlying serious medical conditions that increase the risk of serious health problems and/or death caused by the coronavirus may be entitled to a reasonable accommodation under the ADA; provided, the accommodation does not

result in an undue hardship to the employer.[6] Several potential accommodations are discussed below.

i. Masks, Social Distancing, Modified Workspaces, Virtual Meetings and Similar Measures as Accommodations

> If employers comply with CDC workplace guidance (or similar state and local laws, executive orders, guidance, etc.), the risk of infection and spread is reduced. The following CDC guidelines may also reduce the risk to employees that fall into the CDC's high-risk category. Employees who are at higher risk of serious medical problems or death as a result of COVID-19 infection may request that their employer implement CDC mitigating strategies -- as reasonable accommodations -- for their disabilities. The EEOC recognizes such measures as potential reasonable accommodations:
>
> D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a pre-existing disability, is at higher risk from COVID-19?*(4/9/20)*
>
> There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.
>
> Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances

[6] Pregnancy and age alone are not disabilities under the ADA. Certain pregnancy-related conditions and complications, however, may be disabilities under the ADA. Similarly, pregnancy may exacerbate other medical conditions resulting in a disability. Under the federal Pregnancy Discrimination Act, 42 U.S.C. 2000e, a covered employer is responsible for making job-related modifications (or accommodations) for pregnant workers when the employer does so for other employees who are similarly limited in their ability to perform job functions. The Age Discrimination in Employment Act, 29 U.S.C. 621, prohibits employment discrimination against workers age 40 or older. Older employees with medical conditions that make them more susceptible to COVID-19 complications may qualify for an accommodation under the ADA on the same basis as all other employees.

> between customers and co-workers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.
>
> 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 or while commuting.

"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," Question D.1 (June 17, 2020).

Whether a request is reasonable under the circumstances depends on the factors identified above, including whether the accommodation would result in an undue hardship. The fact that the CDC recommends a mitigation measure may be relevant and beneficial to employees in need of an accommodation. Insisting that employers adopt and implement CDC recommendations will benefit all employees, and especially those who are at high risk of serious illness or death if they contract COVID-19.

ii. Telework/Remote Instruction as an Accommodation

The EEOC has long recognized telework as a potential accommodation for employees with disabilities. CDC guidance specifically encourages schools and other employers to offer telework options to staff at higher risk for severe illness (including older adults and people of all ages with certain underlying medical conditions) to reduce their exposure risk. Indeed, telework may represent a reasonable accommodation for employees facing a higher risk of serious medical issues or death from COVID-19. The EEOC has stated in its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02), Question 34, an employer "must modify its policy concerning where work is performed" to allow an employee to work at home if this accommodation is effective and would not cause an undue hardship.

A central question for at-risk employees is whether the essential functions of the job can be performed away from the workplace. The EEOC has acknowledged that certain jobs (e.g., a food server, a cashier) can only be performed at a work site, while other jobs (a telemarketer, a proofreader) may be able to be performed at home. The EEOC considers factors such as "the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home." *Id.* According to the EEOC, ***"other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary***; and whether the position in question

requires the employee to have immediate access to documents or other information located only in the workplace." (emphasis added) https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation. Employers will likely consider the aforementioned factors when reviewing requests to telework.

Courts have also acknowledged that new technologies make telework more feasible than in the past. For example, in *Bilinsky v. American Airlines, Inc*., 2019 U.S. App. LEXIS 19101 (7th Cir. 2019), the court held that an employee's physical presence may have become an essential function of a communications specialist's job because the company changed the job to require on-site crisis management, among other things. However, the court also stated that "technological development and the expansion of telecommuting" is making telework more common and feasible. The court stated that employers should "assess what's reasonable under the statute under current technological capabilities, not what was possible years ago." *In Robert v. Board of County Commissioners of Brown County*, 691 F.3d 1211, 1217, fn. 2 (10th Cir. 2012), the court held that "when an individual can execute the essential functions of her job from home, working remotely may be a reasonable accommodation. When a disability renders an employee completely unable to perform an essential function, however, the only potential accommodation is temporary relief from that duty." The court found that the employee could not perform her job from home because she was required to do in-person field work.

A pre-COVID-19 case decided by the Fourth Circuit examined a teacher's request for an accommodation in the form of teleworking. In *Tyndall v. Nat'l Edu. Ctr. Inc.*, 31 F.3d 209 (4th Cir. 1994), the court rejected the teacher's argument that telecommuting was a reasonable accommodation for the teacher's lupus erythematosus, an autoimmune system disorder. The teacher was a part-time instructor in the medical assisting program at the Kee Business College Campus, a school in Richmond, Virginia, owned by the National Education Centers. The court accepted that the teacher's condition was a disability under the ADA, but stated that she was not "qualified" for the job because she held a position that could not be performed away from campus, as her position required that she teach the assigned courses during the scheduled class times and spend time with her students. Further, the teacher had missed approximately 40 days of work during a seven-month period, and missed the beginning of an instructional cycle, a key time for the school's operations, twice in a row and requested permission to be absent for a third time. Thus, the court noted that although she possessed the necessary teaching skills and performed well when she was at work, the teacher's frequent absences rendered her unable to function effectively as a teacher. Citing *Matzo v. Postmaster Gen.,* 685 F.Supp. 260, 263 (D.D.C.1987) (holding that a legal secretary's poor attendance rendered her unqualified for her job, even though she possessed fine secretarial skills), aff'd, 861 F.2d 1290 (D.C.Cir.1988).

It should be noted that remote technology has progressed significantly since the Fourth Circuit's decision. Still, pre-COVID-19 court decisions routinely stressed that

reporting to work itself can be an essential function of the job. *Law v. United States Postal Serv*., 852 F.2d 1278, 1279–80 (Fed.Cir.1988) (holding that attendance is a minimum function of any job); *Walders v. Garrett*, 765 F.Supp. 303, 309 (E.D.Va.1991) (holding that "reasonably regular and predictable attendance is necessary for many [jobs]"), aff'd, 956 F.2d 1163 (4th Cir.1992); *Santiago v. Temple Univ*., 739 F.Supp. 974, 979 (E.D.Pa.1990) ("attendance is necessarily the fundamental prerequisite to job qualification"), aff'd, 928 F.2d 396 (3d Cir.1991).

More recent, pre-COVID-19 cases have examined teleworking as a reasonable accommodation. Some courts have held that teleworking as an accommodation would not be reasonable. In *E.E.O.C. v. Ford Motor Co*., 752 F.3d 634, 647, 29 A.D. Cas. (BNA) 1140 (6th Cir. 2014), reh'g en banc granted, opinion vacated, (Aug. 29, 2014) and on reh'g en banc, 782 F.3d 753, 31 A.D. Cas. (BNA) 749 (6th Cir. 2015), a split three-judge panel found that the employer should have allowed an employee who had irritable bowel syndrome to telecommute, even though her job duties required in-person contact with suppliers and computer work that could not be easily performed from a remote location. The court later overturned that decision *en banc*, concluding that the ADA "does not endow all disabled persons with a job—or job schedule—of their choosing," and that "regular and predictable on-site job attendance" was a requirement of the employee's job, such that telecommuting was not a reasonable accommodation in those circumstances. *E.E.O.C. v. Ford Motor Co*., 782 F.3d 753, 773–86, 31 A.D. Cas. (BNA) 749 (6th Cir. 2015); *Mosby-Meachem v. Memphis Light, Gas & Water Division*, 883 F.3d 595, 605, 33 A.D. Cas. (BNA) 1585 (6th Cir. 2018) (recognizing the possibility of teleworking as a reasonable accommodation, particularly for a finite period of time, and holding that the jury could have reasonably concluded from the evidence presented at trial that employee could perform all the essential functions of her job remotely for 10 weeks).

Another court explicitly stated that teleworking may constitute a reasonable accommodation but declined to rule in the employee's favor, by requiring the accommodation, based on the employee's conduct and the unique facts of the case. In *McDaniel v. Wilkie*, No. 17CV91, 2019 WL 626547, at *1 (N.D. Ohio Feb. 14, 2019), aff'd, No. 19-3304, 2020 WL 1066007 (6th Cir. Jan. 31, 2020), the U.S. District Court for the Northern District of Ohio found that telecommuting constitutes a reasonable accommodation under the Americans with Disabilities Act (ADA) if it would enable an employer to satisfactorily perform the essential functions of their position and does not impose an undue burden on the employer. However, the employer's decision to withdraw a telework agreement did not violate the ADA where the employee's performance declined while teleworking and she failed to provide a disability related medical release to the employer.

Much like in teleworking cases, where an employee asks for some relief from physically appearing in the workplace, the courts would analyze whether the employee's physical presence in the workplace is required in order to perform the essential duties of the job. In cases where the accommodations require the assistance of another employee physically present in the workplace, courts have been hesitant to overturn an employer's determination that the employee is not qualified, either with the

accommodation or without, because the employee cannot perform the essential job functions. As cases have noted, and without more, shifting duties onto another employee is not a reasonable accommodation.

In *Belasco v. Warrensville Heights City School Dist*., 634 Fed. Appx. 507, 25 Wage & Hour Cas. 2d (BNA) 1404 (6th Cir. 2015), a fourth-grade teacher suffering from balance problems and shortness of breath, as a result of renal failure and associated dialysis, failed to satisfy the burden of showing, as an element of her failure-to-accommodate claim under the ADA, that there were reasonable accommodations which would have enabled her to perform essential functions of her job. The teacher requested the ability to use a walker, to have a permanent teacher's aide assigned to her classroom and to transfer unruly students. The court stated that maneuvering quickly around the classroom is necessary in order to ensure student safety and deal with any emergencies that occur. Further, the court noted that the requested accommodations and transferring unruly students who created disturbances to another teacher were not shown to remedy mobility problems noted in two fitness-for-duty tests and were not reasonable accommodations. The court noted that shifting a teacher's responsibilities onto an aide or onto a teacher in another classroom is not a reasonable accommodation. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C. 12101 et seq.; *Belasco v. Warrensville Heights City School Dist*., 634 Fed. Appx. 507, 25 Wage & Hour Cas. 2d (BNA) 1404 (6th Cir. 2015). The court further noted that "the ADA does not require employers to accommodate individuals by shifting an essential job function onto others." Citing *Hoskins v. Oakland Cnty. Sheriff's Dep't*, 227 F.3d 719, 729 (6th Cir.2000). Likewise, the ADA does not require employers to hire a second person to fulfill the job responsibilities ordinarily performed by one person. Citing *Johnson v. Cleveland City Sch. Dist*., 443 Fed. Appx. 974, 986 (6th Cir.2011) (rejecting a request for a teacher's aide as unreasonable)." In addition, the teacher in this case failed to provide some documentation from her doctor, which contributed to the court's decision to find in favor of the school district.

In *Willis v. Norristown Area School Dist*., 2 F. Supp. 3d 597 (E.D. Pa. 2014), a teacher diagnosed with depression requested an accommodation from his school in the form of a three-day overlap with his classroom's substitute teacher. The court found that his accommodation request was unreasonable, as the teacher's ability to engage in appropriate interactions with the students is an essential function of the job. Further, the court noted, even if the proposed accommodation would have been effective, the teacher's prior misconduct, which included unprofessional interactions with students prior to the teacher's request for an accommodation, was not required to be excused by the school district.

There is no COVID-19-era case considering whether telework/remote instruction is a reasonable accommodation under the ADA. The cases summarized above establish that courts have historically considered an employee's physical presence in the workplace to be fundamental absent proof that the employee can perform the essential functions of the job remotely. Nonetheless, recent decisions acknowledge that changes in technology require employers to consider the feasibility of telework based on current conditions rather than the past. Indeed, in the COVID-19 era, remote meetings

have become ordinary and routine for millions of workers and remote instruction has been implemented. CDC recommendations concerning telework are relevant but not binding on employers or courts. Absent legislative action, it is highly likely that the issue of telework as a reasonable accommodation for at-risk employees will be the subject of litigation across judicial districts.

iii. Leaves of Absence as an Accommodation

Before the COVID-19 pandemic, the EEOC recognized the important role temporary leaves of absence play in accommodating disabled employees:

> Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.
>
> An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:
>
> - obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
> - recuperating from an illness or an episodic manifestation of the disability;
> - avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC, Notice 915.002. “Types of Reasonable Accommodations Related to Job Performance” (October 17, 2002).

For employees at high risk of serious complications from COVID-19 due to underlying medical concerns, a key consideration likely will be whether a leave is necessary and the length of the requested leave of absence. Courts have held that a leave of unlimited duration is not reasonable; therefore, an employer who denies a request for an indefinite or unlimited leave of absence does not violate the ADA. Conversely, a leave of absence for a definite period of time may be reasonable depending upon the facts of the case. Whether a leave request is reasonable under the statute will depend on whether the amount of leave time the employee requires imposes an undue hardship on the employer, whether the individual is still considered “qualified,”

and as the case law makes clear, quite possibly the appellate circuit in which the request is made. ADA cases considering the length of leaves of absence requests are summarized in Midwest Labor and Employment Law Seminar, Reference Manual Volume 19-008A, Ohio State Bar Association and quoted, below:

> For example, in *Echevarria v. Astrazeneca Pharmaceuticals*, 2017 U.S. App. LEXIS 7774 (1st Cir. 2017), the court held that, although leave is unquestionably an accommodation, the employee's request for 12 additional months (after she had already taken five months) was not facially "reasonable" because "the sheer length of the delay … jumps off the page." The court noted, however, that it was not deciding that "a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case." In *Sanchez v. Vilsack*, 695 F.3d 1174 (10th Cir. 2012), the court reiterated its position that a leave of absence for medical care would be a reasonable accommodation, specifically noting other decisions which have held that several months of leave were required under the facts of those cases. In *Cleveland v. Federal Express Corp.*, 2003 U.S. App. LEXIS 24786 (6th Cir. 2003)(unpublished), the court held that there is no "bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation" and, therefore, the plaintiff's requested six-month leave could be a reasonable accommodation for her lupus. In *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), the court suggested that it might not be an undue hardship for an employer to hold a job open for a lengthy period of time where its own benefits policy allowed employees to take up to one year of leave and it regularly hired seasonal employees to fill positions. However, in *Melange v. City of Center Line*, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012)(unpublished), the court suggested that an employer is not generally required to hold a position open for longer than one year.
>
> Similarly, in *Robert v. Board of County Commissioners of Brown County*, 691 F.3d 1211 (10th Cir. 2012), the court held that an employee is only entitled to "leave" as an accommodation if s/he will be able to perform the job "in the 'near future." Although the court did not specify how long is too long, it noted another court's determination that six months is too long.
>
> In contrast to most courts, in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), the court held that "long-term medical leave" is not a reasonable accommodation because an employee who needs such leave "cannot work and thus is not a 'qualified individual' under the ADA." The court stated that, "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." Specifically, the court stated that a "multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA." [By contrast], "a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a

part-time or modified work schedule" and, therefore, be a required accommodation. In this case, the court held that the furniture manufacturer did not have to provide the employee 2-3 months of medical leave beyond his FMLA leave because of his disc compression surgery, which was performed while he was on FMLA leave. In *Golden v. Indianapolis Housing Agency*, 2017 U.S. App. LEXIS 20257 (7th Cir. 2017)(unpublished), the court reaffirmed this view, holding that "an employee who requires a multi-month period of medical leave" for breast cancer (in this case six months in addition to her FMLA leave) "is not a qualified individual."

Courts have held that holding certain jobs open for just over several months can cause an undue hardship. For example, in *Winnie v. Infectious Disease Associates, P.A.,* 2018U.S. App. LEXIS 31609 (11th Cir. 2018)(unpublished), the court held that providing a four-month leave of absence for an IV nurse caused an undue hardship because of the specialized nature of the medical practice, the high skill-level of the nurses (who used "special needles" to inject "extremely potent drugs"), the patient demand was "at an all-time high," and the center was understaffed with only four nurses. In *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014), the court held that the employer was not required to provide more than six months of leave as an accommodation to an associate professor with cancer. The court noted that although "a brief absence" from work can be a reasonable accommodation, an employer almost never needs to give more than six months of leave. The court also noted that "extensive time off" would be "more problematic" for an emergency medical professional than for a tax preparer who is not subject to an imminent deadline. In *Epps v. City of Pine Lawn*, 353 F.3d 588 (8th Cir. 2003), the court held that a six-month leave of absence was not a required reasonable accommodation for a police officer with a small municipality which could not reallocate his job duties among its small staff of 15 to 22 police officers. The court noted that "an employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform."

Because leave is an accommodation so that the employee will be able to come back to work, if there is no evidence that the employee will return to the job, leave would likely not be a required accommodation. For example, in *Gamble v. JP Morgan Chase & Co.*, 2017 U.S. App. LEXIS 8376 (6th Cir. 2017)(unpublished), the court held that the employee was not qualified where "the evidence suggests that [he] had no intention of returning to work" at the company when his long-term disability leave ended.

The above summary of ADA-leave cases identifies several issues of importance to employees at high risk of COVID-19-related serious health problems. First, an

employee who requests an indefinite or lengthy leave of absence may be deemed no longer qualified to perform the essential functions of the job. Second, the longer a requested leave of absence, the greater the scrutiny it will receive in court. Third, for some employees, the underlying medical condition responsible for the increased risk of serious illness or death from COVID-19 may be permanent. At the same time, much remains unknown about the virus, its duration and spread (e.g., the possibility of an effective vaccine and its distribution, whether a second wave will occur in the fall, whether the spread of the disease will vary significantly by state, county, city, locality, etc.). As a result of these complicating factors, it may be difficult for an employee to specify the duration of the leave required to accommodate the disability.

It is important that employees consult with their healthcare providers regarding the need for a leave of absence and its probable duration. To assist healthcare providers, employees should provide information about what steps, if any, their employer is taking to limit exposure and spread of COVID-19 (e.g., the CDC recommendations, above). Employees should also be encouraged to consult counsel familiar with state and federal disability law. As a rule, employers are permitted to request medical information concerning the employee's disability and the need for an accommodation. Employees should be prepared to provide medical information about the underlying serious health condition/disability and the need for the requested accommodation, including signing appropriate medical releases. As with all requests for an accommodation under the ADA, employees who require a leave of absence must engage in an interactive process with their employer. The ADA anticipates and requires dialogue over the need for and types of accommodations that apply in individual cases.

iv. Modified Schedules, Part-Time Status, Transfer to Vacant Positions and Other Changes to Working Conditions

The EEOC and the courts have recognized changes to employees' schedules, reduction of hours to part-time status, reassignments to vacant positions for which the employees are qualified when they can no longer perform the essential functions of their regular job, among other changes to working conditions, are potentially reasonable accommodations. Each case must be examined based on its unique facts and circumstances. An employee must first prove that their condition rises to the level of a disability, that the employee can perform the essential functions of the job, and that a reasonable accommodation does not cause undue hardship to the employer. Ordinarily, an employer is not required to violate collectively bargained seniority systems in order to accommodate an employee's request for reassignment:

> Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system. This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be undermined if employers had to make the type of individualized,

> case-by-case assessment required by the reasonable accommodation process.
>
> However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system. In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference. Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter. Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

(citations omitted) Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC, Notice 915.002, Question 31 (October 17, 2002).

If a potential accommodation conflicts with the terms of the collective bargaining agreement, affiliates should consult local counsel to review any questions concerning the affiliate's rights and obligations with respect to the labor agreement, the duty of fair representation and individual employees.

v. Accommodating Mental Health Conditions

The ADA treats certain mental health conditions as disabilities. EEOC guidance recognizes that stresses associated with the COVID-19 pandemic may exacerbate pre-existing mental health conditions. As a result, employees may be entitled to accommodations, subject to the same analysis applicable to other requests for accommodations in the workplace:

> **2. If an employee has a pre-existing mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?** *(4/9/20)*
>
> Although many people feel significant stress due to the COVID-19 pandemic, employees with certain pre-existing 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.
>
> 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.

"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," Question D.2 (June 17, 2020).

vi. Other ADA Accommodations

The list of potential accommodations described above is ***not*** comprehensive. Affiliates and employees may wish to consult the following resources for additional information about potential accommodations:

- https://askjan.org/topics/COVID-19.cfm
- https://askjan.org/topics/Educators.cfm
- https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#reassignment
- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Many states have their own laws that prohibit discrimination in employment against disabled individuals. *See* https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx Employees who need an accommodation should consult an attorney in their own state who is familiar with both the state and federal disability laws.

vii. Difficulties in Obtaining Accommodations for Employees

The ADA may provide employees at high risk of COVID-19-related medical complications with necessary accommodations during the pandemic. However, COVID-19 is new, and related employment case law is, therefore, virtually nonexistent. Moreover, the EEOC guidance quoted above is relevant and persuasive authority, but it is not binding on the courts. Some of the pre-COVID-19 court cases summarized above resulted in a denial of the disabled employee's request for accommodation. Assuming employees prove they have a disability, COVID-19-related funding issues, understaffing, disagreements over the use and scope of remote work and other accommodations, and inconsistent and conservative treatment of accommodation requests in the courts may frustrate the efforts of individual employees to obtain relief.

Federal legislative action, including pandemic-related updates to disability and leave laws, that remove these uncertainties and protect employees at high risk of COVID-19-related health problems will reduce the risk of infection and the spread of COVID-19 in our workplaces, communities and nation.

C. FMLA and FFCRA Accommodations for Employees

Caregivers of individuals with disabilities are not entitled to receive workplace reasonable accommodations under the ADA but may be entitled to leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601, or the recently passed federal Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, § 2302(a)(1), 134 Stat. 178 (March 18, 2020). For example, if a caregiver's child, spouse or parent has COVID-19, leave under the FMLA may be available if leave is needed to care for the family member, or because the caregiver has COVID-19. The following is an overview of the FMLA and FFCRA as well as the Department of Labor's most recent, published views on the application of these laws during the COVID-19 pandemic.

1. FMLA: General Provisions

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The reasons eligible employees are entitled to take up to 12 workweeks of leave in a 12-month period include the following:

a. the birth of a child and to care for the newborn child within one year of birth;
b. the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
c. to care for the employee's spouse, child, or parent who has a serious health condition; serious health condition that makes the employee unable to perform the essential functions of his or her job; and
d. any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty."

(emphasis added) 29 U.S.C. 2612(a)(1)

The FMLA allows eligible employees to substitute appropriate earned or accrued paid leave, for up to a total of 12 workweeks in a 12-month period for qualifying FMLA reasons, or up to 26 workweeks in a single 12-month period for military caregiver leave.[7]

29 U.S.C. 2612(a); 29 C.F.R 825.100

An employer covered by the FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers who meet the FMLA's 50-employee coverage requirement are deemed to be "engaged in commerce or in any industry or activity affecting commerce" within the meaning of the FMLA. 29 U.S.C. 2611(4)(A). All public agencies

[7] Affiliate collective bargaining agreements may address substitution of paid leave for unpaid leave under the FMLA.

are covered employers under the FMLA without regard to the number of employees. However, employees of public agencies must meet all of the FMLA's eligibility criteria in order to take protected leave. Public and private elementary and secondary schools are covered entities under the FMLA. Such schools are not subject to the FMLA's 50-employee coverage requirement.[8] Other schools such as public and private colleges and universities and daycare providers are subject to the same criteria as private employers. 29 U.S.C. 2618; 29 C.F.R. 825.600 -.604. Educational employees who are employed permanently or who are under contract are considered on the payroll during any portion of the year when school is not in session and are counted when determining the number of employees at a worksite. 29 CFR 825.111(c).

Employees are eligible for FMLA leave if they meet all of the following criteria:

a. Works for an FMLA-covered employer;
b. Has been employed by the employer for at least 12 months;
c. Has at least 1,250 hours of service for the employer during the previous 12-month period;
d. Is employed at a work site with 50 or more employees at that site or within 75 miles of the work site.

29 U.S.C. 2611(2); 29 C.F.R. 825.110

For FMLA purposes:

a. A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment.
b. "Incapacity" means the inability to work, attend school, or perform other regular daily activities due to a serious health condition or its treatment or recovery.
c. "Treatment" includes examinations to determine if a serious health condition exists, evaluations of the condition, and actual treatment by or under the supervision of a healthcare provider to resolve or alleviate the condition. An examination or treatment requires a visit to the healthcare provider to qualify under the FMLA; a telephone conversation is not sufficient. Treatment does not include routine physical, eye or dental exams.

29 U.S.C. 2611(11); 29 C.F.R. 825.113. [9]

[8] The FMLA has other special rules concerning the use of FMLA leaves in schools codified at 29 U.S.C. 2618 with respect to intermittent leave, leave near the end of the school term, duration of leave and return to an equivalent position. See also, 29 C.F.R. 825.600 -.604.

[9] The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye

The FMLA is not intended to cover short-term conditions for which treatment and recovery are very brief. Unless complications arise, the following conditions generally will not meet the definition of an FMLA serious health condition: the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. The objective test defining what constitutes a serious health condition under the FMLA is controlling. Common ailments such as those listed above ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria. 73 FR 67946.

The FMLA regulations note that the flu is ordinarily excluded from the definition of serious health condition, unless complications arise. 29 C.F.R. 825.113(d). However, courts have held that the flu may fall under the FMLA's definition of a "serious health condition" if the "continuing treatment" requirement is satisfied. *See, e.g. Miller v. AT & T Corp*., 250 F.3d 820, 833 (4th Cir. 2001); *Thorson v. Gemini,* 123 F.3d 1140 (8th Cir. 1997). For example, FMLA protections may apply if an employee with COVID-19 receives medical treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a healthcare provider, by a nurse under direct supervision of a healthcare provider, or by a provider of healthcare services (e.g., physical therapist) under orders of, or on referral by, a healthcare provider; or treatment by a healthcare provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the healthcare provider. The requirement for a healthcare provider means an in-person visit to a healthcare provider.[10] The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. 29 C.F.R. 825.115. Affiliates may wish to consult local counsel to determine how these "continuing treatment" obligations are interpreted in their respective federal courts to maximize eligibility for FMLA pandemic flu coverage.

Thus, if an employee has COVID-19 but is asymptomatic or is caring for a covered family member who is asymptomatic, then this may not qualify as a "serious health condition" under the traditional FMLA. However, in such cases, leave may be available under the FFCRA, as discussed, below. If an eligible employee is symptomatic such that the FMLA's "serious health condition" requirement is satisfied, leave may be available under the law. Some employees may be unable to work because they must take care of a sick family member. If an employee is covered and eligible under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of job-protected,

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examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a healthcare provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. 29 C.F.R. 825.113(c).

[10] It is an open question whether "telehealth" or "virtual visits" to a qualified healthcare provider, which have been prevalent during the COVID-19 pandemic, will qualify under this regulation. So affiliates may wish to consult local counsel about the federal law in their jurisdiction on this point.

unpaid leave during any 12-month period and cannot be laid off. Some states may have similar family leave laws. Covered employers must comply with applicable state laws that provide greater leave rights to their employees. Employees are not entitled to leave under the FMLA merely because they fear exposure to COVID-19 in the workplace.

2. FFCRA for COVID-19

On March 18, 2020, FFCRA was signed into law. The law includes two new provisions (both of which expire on Dec. 31, 2020), an emergency expansion of the FMLA, and the new Emergency Paid Sick Leave Act, which requires paid leave for employees forced to miss work because of the COVID-19 outbreak in certain circumstances.

a. Emergency Family and Medical Leave Expansion Act

The key provisions of the leave portion of the statute are summarized, below:

i. Applies to private employers with fewer than 500 employees and to public employers that are covered by the FMLA regardless of size.
ii. Removes the prior FMLA exclusion that the employer must employ 50 employees within a 75-mile radius. As such, employers with fewer than 500 employees that may not otherwise qualify as employers under the FMLA will now be required to administer FFCRA-protected leave. It also removes the 12-month and 1,250-hour employee qualification for employees. Instead, an employee is eligible after he or she has been employed for at least 30 calendar days before the first day of the leave.
iii. Employees are entitled to 12 weeks of protected leave if the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. A public health emergency means an emergency with respect to COVID-19 declared by a federal, state or local authority.
iv. The first two weeks of leave are unpaid, but an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave.
v. After the first two weeks, leave is paid at two-thirds of the employee's usual pay, with a cap of $200 per day. For employees with schedules that vary from week to week, a six-month average is to be used to calculate the number of hours to be paid. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
vi. The Secretary of Labor is empowered to issue regulations to exclude healthcare providers and emergency responders from the definition of employees who can take such leave, and to exempt small businesses with

fewer than 50 employees if the required leave would jeopardize the viability of their business. ***To date, the Secretary of Labor has issued regulations permitting healthcare providers to exclude a broad range of employees from the new protections***. The Secretary of Labor will also consider small business exemptions on a case-by-case basis.

b. <u>Emergency Paid Sick Leave Act for COVID-19</u>

The new federal sick leave provisions require private employers with fewer than 500 employees and public employers regardless of size to provide paid sick leave to employees who are unable to work, or telework, because the employee:

i. Is subject to a federal, state or local quarantine or isolation order.
ii. Has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
iii. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
iv. Is caring for an individual who is subject to a quarantine or isolation order or has been advised by a healthcare provider to self-quarantine as described above.
v. Is caring for his or her child whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 precautions.
vi. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Hervices in consultation with the secretary of the treasury and the Secretary of Labor.

Full-time employees are eligible for 80 hours of leave, and part-time employees are eligible for the number of hours they work, on average, over a two-week period. Leave must be paid at the employee's regular rate if taken for the employee's own COVID-19-related condition (reasons i., ii. and iii. above) and is capped at $511 per day. Leave taken to care for another (reasons iv., v. and vi., above) is paid at two-thirds of the employee's regular rate. Employees are eligible for paid sick leave benefits regardless of how long they have been employed.

The paid sick time is in addition to any leave the employer provides employees, including under a collective bargaining agreement, and employees cannot be required to use other leave benefits provided by the employer before using the emergency sick leave benefits. An employer may not require, as a condition of providing paid sick time, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time. After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

D. Collective Bargaining Issues

Collective bargaining offers a mechanism to obtain necessary COVID-19-related protections for AFT bargaining unit members. Given the gaps in federal and state law regarding COVID-19 accommodations, as well as the myriad of other safety and health issues arising from the pandemic, affiliates may wish to demand collective bargaining over accommodations for employees who are at high risk for COVID-19-related medical complications. Bargaining may occur in negotiations for initial and successor contracts, as well as in mid-term negotiations, and through effects bargaining over reopening and related decisions, in accordance with applicable state collective bargaining statutes and the National Labor Relations Act (NLRA).

Today, most states make collective bargaining available to public employees, while several states strictly prohibit it. Most states limit the scope of bargaining to wages, hours, and terms of employment, while others are more permissive.[11] Since each state's law will define the scope of collective bargaining, affiliates should consult with legal counsel on what COVID-19-related matters are subject to bargaining. See, e.g. Annot., *Bargainable or Negotiable Issues in State Public Employment Labor Relations,* 84 A.L.R.3d 242 (2020). The terms of collective bargaining agreements, including zipper clauses and midterm bargaining procedures, may impact the right and scope of midterm bargaining over COVID-19-related accommodations.

Potential subjects of collective bargaining include accommodations for employees who are pregnant, have serious health conditions or fall into an age group that increases the risk of serious illness or death; telework/remote instruction opportunities; modifications to workplace to include social distancing, barriers, spacing and positioning of desks and work stations, disinfecting and cleaning procedures; personal protective equipment; virtual participation in a wide range of workplace events; and other CDC-recommended mitigation measures discussed in this memorandum. The right to bargain over these subjects and specific reopening related decisions and effects may be affected by statute or the terms of existing collective bargaining agreements. Affiliates should consult counsel as necessary to develop proposals.

Should you have any questions, please feel free to contact us.

Sincerely,

BARKAN MEIZLISH, LLP, by

/s/ Jonathan C. Wentz

Jonathan C. Wentz, Esq.

/s/ James Petroff

James Petroff, Esq.

[11] See generally, Emily Workman, *State Collective Bargaining Policies for Teachers*, Education Commission of the States, December 2011, available at http:// www.ecs.org/clearinghouse/99/78/9978.pdf.

/s/ Sarah Ingles

Sarah Ingles, Esq.