



## **COVID-19 Protections for Immunocompromised Workers Q&A with Attorney Heather Heilman**

### **What types of conditions may qualify me for an accommodation?**

A: Under the Americans with Disabilities Act, an employee might have the right to a reasonable accommodation if they have a disability, defined as a physical or mental impairment that substantially limits a major life activity, and if they nevertheless able to fulfill the essential functions of their job, with or without an accommodation.

The ADA was not really intended to address a situation like we are in today, where we are in the middle of a pandemic that can infect anyone and where even otherwise healthy people can have serious, life-threatening symptoms.

However, we know that there are certain underlying health conditions that put one at higher risk of developing serious symptoms or complications from Covid-19. The EEOC has recognized that people with those conditions identified by the CDC may have the right to a reasonable accommodation in the workplace.

The health conditions that the CDC has identified as putting one at higher risk are:

- Cancer
- Chronic kidney disease
- COPD – chronic obstructive pulmonary disease
- Being immunocompromised because of an organ transplant
- Obesity (BMI of 30 or higher)
- Serious heart conditions such as heart failure, coronary artery disease, or cardiomyopathies.
- Sickle cell disease
- Type 2 diabetes

It has also identified a number of conditions that MIGHT put people at increased risk:

- Moderate to severe asthma
- Cerebrovascular disease (affecting blood supply to brain)
- Cystic fibrosis
- Hypertension/high blood pressure
- Immunocompromised because of blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medications
- Neurologic conditions, such as dementia.
- Liver disease

- Pregnancy
- Pulmonary fibrosis
- Smoking
- Thalassemia (a blood disorder)
- Type 1 diabetes

Although being over the age of 65 is a risk factor, age is not considered a disability.

**A doctor has said I am immunocompromised, and my boss wants me to come into work? What can I do? What process should I engage in with my employer?**

A: You should request an accommodation from your employer. The request can be verbal or in writing, and can be made to your supervisor, an ADA coordinator if there is one at your workplace, or someone in HR. It's best to make the request in writing, to actually use the words "I am requesting an accommodation" and to copy your supervisor, the HR office, and the internal EEO office if there is one. That way there won't be any ambiguity about what you are asking for, and your request is less likely to be overlooked. It's also a good idea to talk to your doctor first and have them put something in writing about your health condition and why you need to work from home or whatever other accommodation you are asking for.

**What types of special accommodations can I request? Is telework included?**

A: You can request whatever it is you think you need, including telework. Just be aware that the employer is not necessarily obligated to grant your request to telework. One good resource is the JAN (job accommodation network) website at [askjan.org](http://askjan.org). JAN is a nonprofit organization that works with employees and employers to find workable accommodations under the ADA.

**What is the employer's obligation when I put in my request?**

A: The employer is obligated to engage in an "interactive process" with you, in which they will seek more information about your health condition, they will look at the essential functions of your job, and they will try to find an accommodation that does not cause an "undue hardship" for them. Even though telework seems like the best reasonable accommodation for anyone who is able to do their job from home, it really depends on the facts of each individual's situation.

**Can employers deny my accommodations request?**

A: If you have an disability as defined in the ADA, and if you are able to do the essential functions of your job with a reasonable accommodation, the employer is obligated to provide and accommodation, but not necessarily the accommodation that you requested. If you think your rights under the ADA have been violated, you can file a complaint with the EEOC or the Maryland Commission on Civil Rights.

***EQUAL EMPLOYMENT OPPORTUNITY COMMISSION***

(BALTIMORE OFFICE)

800-669-4000

103 Howard Street

Baltimore, MD

[www.eeoc.gov](http://www.eeoc.gov)

**MARYLAND COMMISSION ON CIVIL RIGHTS**

410-767-8600

6 St. Paul Street

Baltimore, MD

[www.mccr.maryland.gov](http://www.mccr.maryland.gov)

**What do I do if management isn't responding in a timely manner, management isn't engaging in an interactive process, or I feel like I've been unfairly denied?**

A: You can contact a union shop steward about filing a grievance. Understand that normally this type of issue would not be considered the basis of a grievance because ultimately it involves rights that you have not through the MOU or state personnel law, but from other sources. However, a grievance might be helpful in getting the interactive process started. Also, as mentioned before, you can file a complaint with EEOC of MCCR.

**What can I do until my request is considered? Do I have to come into work?**

A: Going to work might be best from a work-preservation standpoint, if there are means of protecting yourself. The DOL has taken the position that you can't take FMLA simply to avoid being exposed to Covid-19. However, if you have a doctor who is backing you up that you have a serious health condition that places you at risk, that might be different.

**Are there any other types of leave available to me if I feel unsafe going into work because of my health condition?**

A: The Families First Coronavirus Response Act provides for extended paid leave for some employees, but only when the employee has Covid-19, has been advised by a doctor to quarantine, to care for someone who is sick or quarantined, or to care for a child if the school or daycare is closed. This leave cannot be used in order to avoid exposure to the Covid-19.

**If management is denying my request can I use the general duty clause to get out of the assignment? (what is the general duty clause)**

A: The general duty clause is a requirement in the OSHA statute that says that employers are responsible for providing a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." OSHA has provided guidelines for how to provide a safer workplace during the pandemic, but they are not mandatory. Basically, OSHA is telling employers to do their best, but that there will not be any liability if they fail to follow those guidelines. Although OSHA allows employees to refuse to work in conditions that present an imminent risk of death or serious bodily harm (after reporting and asking employer to remedy the situation), I would not recommend that people rely on that in this situation. First, because it is not clear that there is truly an imminent risk of death or serious harm (although this could depend on the workplace), and second because under this administration OSHA seems more interested in protecting employers from liability than in protecting workers from harm. MOSH has not done anything to go beyond federal law on this issue.

**Do my performance measures automatically change when I have a special accommodation?**

A: No, but you might ask for modified performance standards as part of your accommodation.