

New York Re-Opening Plans for 2020: Medical Accommodation Requests

As plans for reopening take shape an area of major concern is how will we support members who are medically compromised, or who live with medically compromised people.

This memo will review the most commonly discussed issues around this topic. Many of the outcomes will depend on the application of very complicated laws to specific fact patterns. For direct questions about someone's specific situation, a more thorough review will be necessary as there are many nuances that need to be explored.

- I. What laws, rules and/or regulations protect someone who may have a disability or a serious health condition, or is medically vulnerable or high risk?

The Laws:

In New York, among other things, we are covered by both the federal Americans With Disabilities Act ("ADA") and Executive Law §296, known as the New York State Human Rights Law, ("NYSHRL"). The federal Equal Employment Opportunity Commission ("EEOC") administers the ADA and the NYS Division of Human Rights ("NYDHR") administers the Human Rights Law. Other laws such as the Family and Medical Leave Act may also apply.

Health Conditions and Protections for Disabilities:

The ADA requires an employer to provide a reasonable accommodation to someone with a disability as long as the accommodation is reasonable and does not place an undue burden on the employer. A covered disability may be temporary or permanent, and substantially impairs a major life activity. Examples of covered disabilities include chronic conditions, diseases and illness ranging from cancer to Crohn's disease to diabetes. Mental health conditions are also covered in certain cases. The employee will need to make a request for an accommodation which usually requires the employee to produce medical documentation. The request can include a requested remedy, but the employer is not required to accept that accommodation outright. Instead, the employer and employee must enter an interactive process to balance the employee's approach with the employer's right for it not to impose an undue burden on it. Sometimes the employee and employer will need to attempt a variety of approaches before finding an acceptable solution. With COVID-19, the conversation will likely center around the medical advice from the employee's doctor for minimizing risk to exposure.

For example, if an employee suffers from asthma and has a reaction to seasonal grass cutting the employee might ask for air conditioning. The employer might respond by directing the grounds staff not to cut the grass on that side of the building until after the employee has left for the day if that will prevent the person from having a reaction. If it is sufficient, then the accommodation has been met, even if it is not what the employee prefers. If the employee does not believe that such accommodation meets their need, they can attempt to further engage in the interactive process or, if the employer refuses, seek to enforce their rights.

Disagreement on Accommodation:

If, after engaging in a dialogue, there is no agreement for a mutually acceptable accommodation, the employee has the right to file a complaint with the EEOC or NYSDHR. This is a fairly straightforward process with the employee making an online submission to initiate the complaint.

II. How are People's Jobs Protected During the COVID-19 Crisis?

ADA/NYSHRL Protections:

The Centers for Disease Control ("CDC") has established a comprehensive (and rapidly changing) list of conditions that place someone at greater risk from contracting COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>

Someone suffering from a covered condition has the right to request additional accommodations based on the risk exposure. It does not mean that the employee can demand tele/remote work as the automatic and only solution, though in certain circumstances it could be one. As with the prior example, if the employer cannot accommodate that specific request, the same interactive process applies.

ADA/NYSHL disability protections only applies to the employee's own disability. It does not extend to an employee who is not disabled living with or caring for someone who is disabled.

The Family and Medical Leave Act ("FMLA"):

This federal law allows for employees to utilize 12 weeks of unpaid leave during a 12-month period for a serious health condition for the employee or a family member.¹ While taking the leave, the employee continues to receive health insurance (less any normal premium share) and returns to work in the same or similar position. **Many collective bargaining agreements also provide for arrangements in which sick or other paid leave can be taken during or in connection with a FMLA leave.**

Families First Coronavirus Response Act ("FFCRA") and NY's Emergency Paid Sick Leave Act:

FFCRA is a federal law that provides two weeks pay without charge to sick leave of anyone who has tested positive or has been placed in mandatory quarantine. In addition, if the employee is the primary caregiver for someone who has been diagnosed with COVID-19 or is in a mandatory quarantine, the employee is eligible to receive 2/3 paid sick leave for up to 80 hours to care for that person. The 2/3 paid leave also applies to care the for a school-age minor whose school or daycare is closed² provided the employee is not deemed an "essential worker" and does not have

¹ Provided the employee has worked 1,250 hours prior to taking the leave.

² This appears to sunset at age 12 for children without special needs, as law requires custodial care only through age 11 for such children.

an offer of child-care placement through the employer's essential worker care program. Some exceptions may apply. The FFCRA sunsets on December 31, 2020.

NY's law provides similar benefits but is coordinated with the federal benefit, so the benefits are not cumulative.

Coronavirus Aid, Relief and Economic Security Act ("CARES"):

This law provided for expanded unemployment insurance benefits. One of these benefits is Pandemic Unemployment Assistance ("PUA"). Under PUA, if someone is the parent or guardian of a minor whose school is closed due to COVID-19 and becomes unemployed in order to provide care, there is additional unemployment support available, subject to a wage calculation.

NY Paid Family Leave ("PFL"):

This law allows all employees to be eligible to take 5 days per year to care for an ill family member. It was expanded to provide for Family Care to employees with a dependent who has been diagnosed any serious health condition, including a diagnosis of COVID-19 or quarantine for COVID-19 exposure. This law applies to private sector and not-for-profit employers, in the public sector it requires opt-in and needs to be collectively bargained to apply.

Many of these laws are related and may require use of paid leave accruals. Specific questions should be discussed with the Local President and Labor Relations Specialist.

Collective Bargaining Agreement ("CBA"), the Taylor Law and the National Labor Relations Act ("NLRA"):

All of these laws need to be read alongside a union's CBA and any rights from an enforceable past practice that exist under either the Taylor Law (public sector) or the NLRA (private or not-for-profit sectors). Often, there are additional leave time benefits and protections available from being in a union. The Local President and the NYSUT LRS can provide guidance on how these provisions- that are unique to each and every workplace-impact these laws.

III. How to Address Concerns about Returning to Work:

Based on the above, any member who is concerned about returning to work—and is not in a quarantined state for themselves or a family member— should consider the following:

- What tele/video assignments, if any, are available for employees? Are there conditions, term, or rules around receiving such an assignment? Does the employee meet those terms?
- Does the employee have a personal health concern or is concern focused on a family member?

- If the concern is a personal health one, determine if there is a condition that can support an ADA/NYSHRL accommodation. If so, notify the union and ask for its support in obtaining the accommodation.
- If there is no individual condition, but there is a family condition, speak to the union about helping arrange for a leave under the applicable laws and/or under a local collective bargaining agreement or other right to additional benefit that exists locally.
- If the issue relates to the school closure for an employee's child, determine if the employer has daycare options for the child. If not, work with the local union to determine what, if any, leave options or tele/video work options are available locally.
- As there are so many different reasons for requests, each with different obligations for review, locals are encouraged to create an intake process where all members who intend to seek assistance inform the Local, which in turn can provide a list of those requesting to the employer. That list will need to be worked through by the employer, along with the individual accommodation discussions, but if the Local facilitates this process it should be able to be reviewed faster and more effectively than if each member makes individual submissions.
- Locals should regularly work with LRS' to assist in addressing these and all other aspects around re-opening strategies, plans and concerns. Again, this guidance is intended to provide a general overview of these areas. Specific situations will require specific review and analysis with Local leadership and NYSUT staff.