



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

June 10, 2020

Via Email

Janet Dhillon, Chair
Victoria A. Lipnic, Commissioner
Charlotte A. Burrows, Commissioner
Andrew Maunz, Legal Counsel
Sharon Fast Gustafson, General Counsel
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: Disability Coverage, “Direct Threat,” and Reasonable Accommodation Related to COVID-19

Dear Chair Dhillon, Commissioners Lipnic and Burrows, Mr. Maunz, and Ms. Gustafson:

We write as co-chairs of the Consortium for Citizens with Disabilities (CCD) Rights and Employment Task Forces to urge the Commission make important clarifications to its recent statements regarding the “direct threat” analysis in the context of COVID-19. We also encourage the Commission to provide additional guidance regarding reasonable accommodations for employees with disabilities related to the pandemic. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

Coverage of COVID-19 as a Disability

The Commission should clarify in its current guidance that any person with a current COVID-19 infection will, as a practical matter, have a “disability” under the ADA. COVID-19 substantially limits various major life activities, including interacting with others, working, the operation of the circulatory system, functions of the immune system, and respiratory functions, and/or would substantially limit such major life activities when active. In addition, evidence indicates that at least in many cases, the effects of COVID-19 on the major functions such as respiratory

function, and major life activities such as concentrating and thinking, are long-lasting or even permanent.¹

Accordingly, “[a]pplying the principles set forth in paragraphs (j)(1)(i) through (ix) of [29 C.F.R. § 1630.2(j)], the individualized assessment of” COVID-19 “will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section.” As the Commission’s regulations state, “[g]iven their inherent nature, [certain] impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.”

Direct Threat and Reasonable Accommodation in the Workplace During the Pandemic.

The Commission has stated that “an individual with the [COVID-19] virus will pose a direct threat to the health of others.”² The Commission has also referred to the pandemic itself as a direct threat, stating: “Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”³

We agree that, based upon our current scientific knowledge about COVID-19, a court might find that an employee diagnosed with active COVID-19 infection could pose a significant risk of substantial harm to others in the context of a daily, indoor, enclosed shared workspace with other employees working in close proximity. The harm is particularly great for others with pre-existing conditions that make them particularly vulnerable to COVID-19, including conditions like diabetes that are disproportionately experienced by Black individuals and other people of color.

In this context, and based on the direct threat analysis, employees with COVID-19 might lawfully be excluded from the workplace until they are no longer contagious.⁴ However, the

¹ See, e.g., Ed Yong, “COVID-19 Can Last for Several Months,” The Atlantic, June 4, 2020, <https://www.theatlantic.com/health/archive/2020/06/covid-19-coronavirus-longterm-symptoms-months/612679/?fbclid=IwAR2C9zmlWY64UeQJWjiMcfvAcQTBY6ICzvyxRhggSwddJfvH8I1pFZlmGpU>; George Citroner, “What We Know About the Long-Term Effects of COVID-19,” Healthline.com, Apr. 21, 2020, <https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19>.

² Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (What You Should Know), question A.6., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>; see also *id.* at A.2. & G.1.; Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (Pandemic Preparedness)* (update Mar. 21, 2020), question 5, <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

³ Pandemic Preparedness at section II(B).

⁴ The employer is still obligated to accommodate the individual. COVID-19 infection is an actual “disability” under the ADA, as it substantially limits various major life activities, including interacting with others, working, and the operation of the circulatory system, and/or would substantially limit such

significance of a direct threat must be individually determined “based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”⁵

As you know, the direct threat analysis also requires that even when an individual would pose a significant, appreciable risk in the workplace, the employer is still obligated to determine whether reasonable accommodations would sufficiently reduce or remove that risk.⁶ As the Commission should state, relevant accommodations for a COVID-19-positive employee could include: medical leave, telework, and/or modified duties or schedule; delivering necessary personal and employment-related items from the workplace to the individual’s residence; and remote communications to discuss human resources matters such as insurance coverage.

Context is key to the direct threat analysis. Many employees are now teleworking and are not entering the workplace at all. An employee with COVID-19 working from home is obviously not a danger to other employees. There are those who work under solitary conditions or outside and have no direct contact with others; in that context the likelihood of transmission is much lower and the direct threat may not apply. And it is important to note that with respect to whether an individual is “qualified” generally, many individuals have mild symptoms during the infectious period, recover from COVID-19 quickly, and are able to return to work.

The same context-specific analysis applies to individuals who are not COVID-positive but who are particularly vulnerable to the coronavirus due to pre-existing conditions. As the EEOC has discussed, vulnerable employees may not be terminated simply because transmission of the virus would pose a “direct threat” to them.⁷ Instead, employers must consider and provide reasonable accommodations to reduce the possibility of transmission, and thereby to eliminate any direct threat.

As well, the Commission should discuss additional accommodations that may be relevant to a person who is not COVID-19-positive but who, for reasons related to another disability, cannot tolerate wearing a face covering either at all or for long periods extending over the work day. These may include some individuals with intellectual and developmental disabilities, asthma, panic disorder, COPD, and cystic fibrosis, and some autistic people.⁸ And some individuals

major life activities when active. Relevant accommodations could include: medical leave, telework, and/or modified duties or schedule; delivering necessary personal and employment-related items from the workplace to the individual’s residence; and remote communications to discuss human resources matters such as insurance coverage.

⁵ 29 C.F.R. § 1630.2(f); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

⁶ 42 U.S.C. §§ 12111(3), 12113(b).

⁷ What You Should Know at sections D & G (discussing reasonable accommodations for vulnerable employees including changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers, telework, leave, and reassignment).

⁸ See, e.g., Shannon Des Roches Rosa, Some autistic people can’t tolerate face masks. Here’s how we’re managing with our son, Washington Post (May 11, 2020, 11:30 a.m.), <https://www.washingtonpost.com/lifestyle/2020/05/11/some-autistic-people-cant-tolerate-face-masks-heres-how-were-managing-with-our-son/#comments-wrapper>; Centers for Disease Control and

including many hard of hearing people cannot communicate effectively with other people who are wearing face masks.⁹ These individuals are entitled to reasonable accommodations that will allow them to continue working safely and effectively. These accommodations may include modified face coverings, telework, and accommodations that reduce or eliminate contact with others. As rapid testing becomes more accurate and widely available, frequent rapid testing may also play a role.

Non-Employment Contexts.

As important, it is critical that the Commission understand the impact of its broad statements about COVID-19 meeting the direct threat standard on the other titles of the ADA as well as other federal civil rights laws. As you know, the direct threat standard applies across the spectrum of disability rights laws, including to titles II and III of the ADA, Section 504, and the Fair Housing Amendments Act. These laws cover circumstances significantly different than those found in employment, including transactions in grocery stores, banks, buses, doctor's offices, lawyer's offices, hospitals, drug stores, subways, taxis, state courts, police stations, city and town halls, government benefit offices, voting, home health care and support services, and housing. These settings include those designed for relatively short-term interactions (such as grocery stores, drug stores, and banks) and settings that are specifically designed for people with infectious diseases including COVID-19 (such as hospitals and doctor's offices). They include settings that are analogous to working at home, such as housing or a hotel room needed to self-quarantine from COVID-negative household members.

The Commission's broad statement that "an individual with the [COVID-19] virus will pose a direct threat to the health of others" may create confusion in these other, non-employment contexts. Given the differences in the fact patterns that arise in these other settings, and the role of reasonable modifications and infection control measures, the outcome of the direct threat analysis may frequently vary from the Commission's conclusion.

Requested Clarification.

We request that the Commission clarify that the direct threat analysis regarding an individual with COVID-19 remains an individualized and context-specific assessment, and that its guidance and analysis regarding COVID-19 are specific to the context of the typical workplace (that is, a setting which includes a number of employees working in proximity throughout the day in a congregate setting) and our current scientific understanding.

Prevention, Cloth Face Coverings: Frequently Asked Questions, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html> (last updated Apr. 4, 2020), ("Cloth face coverings should not be placed on ... anyone who has trouble breathing, or is unconscious, or otherwise unable to remove the cover without assistance...").

⁹ Deepa Shivaram, *New normal of masks is an 'added barrier' for deaf and hard-of-hearing community*, NBC News (May 23, 2020, 7:01 a.m.), <https://www.nbcnews.com/news/us-news/new-normal-masks-added-barrier-deaf-hard-hearing-community-n1212456>.

The following language or similar language would be welcome additions to the Commission's documents:

Applying this standard to the current circumstances **and scientific knowledge** of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 **or current symptoms of COVID-19** because an **individual employee** with the virus will **typically** pose a direct threat to the health of others **in proximity at the worksite**. **The employer should consider any reasonable accommodations that will allow the employee to continue working**. *See* What You Should Know at A.6.

Based on guidance of the CDC and public health authorities as of March 2020, **an employee with COVID-19 typically poses a significant risk of substantial harm to others in proximity in the workplace, the COVID-19 pandemic** meets **ing** the direct threat standard... These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace **in proximity to others** at the current time. *See* Pandemic Preparedness, at section II(B).

Based on guidance of the CDC and public health authorities as of March 2020, an asymptomatic employee who cannot wear a face mask for reasons related to disability may pose a significant risk of substantial harm to others in close proximity in the workplace in the direct threat standard. The employer should consider the employee's specific job duties, whether the work is indoors or outdoors, the proximity of others in the workplace, the availability of accurate rapid testing, and any reasonable accommodations that will reduce the threat of infection and will allow the employee to continue working safely, including accommodations to ensure adequate distancing and/or modified face coverings. (New suggested paragraph.)

Your careful attention to these matters is especially important for those most affected by COVID-19, including Black people and others who are both disproportionately vulnerable to the virus and disproportionately subjected to job and wage loss. It is essential that your guidance documents deter unnecessary discrimination against those who have been hardest hit by the pandemic in employment, housing, and many other areas of life.

Should you be interested, we would be very willing to discuss this matter further by telephone or video conference.

Sincerely,



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