

To: Oregon School Staff

From: Nancy Willard, M.S., J.D., Embrace Civility

Re: Civil Rights Complaints for Failure to Provide Accommodations Related to Covid

Date: January 6, 2021

This document does not, and is not intended to constitute legal advice. All information, content, and materials is for general informational purposes only. If an Oregon school staff member intends to file a complaint with the Oregon Bureau of Labor and Industry, you are strongly advised to contact the Oregon State Bar for a referral to an attorney who practices employment law. <https://www.osbar.org/public/ris/>. 503-684-3763, You will be able to receive 30 minutes of legal guidance for \$35. This would be money well-spent. It is also possible to call BOLI Civil Rights at 971-673-0761 or help@boli.state.or.us to discuss your situation.

According to a survey of Portland Public Schools teachers, about one-third are at higher risk of serious illness and 43% have a family member at higher risk. Every school staff member who is at higher risk should be granted accommodations to work from home. School staff members may also be able to request accommodations to work from based on mental disability — extreme anxiety and traumatic distress.

On January 5, 2021, I spoke with a representative from BOLI Civil Rights about the concern of school districts refusing to provide accommodations for school staff who are at higher risk of serious illness from Covid-19 or who have family members who are at higher risk. As this BOLI representative told me, every case is different.

It appears that having health conditions that place one at higher risk of serious illness will be considered to be a physical disability by BOLI warranting accommodations for the staff member. However, based on federal standards, it does not appear that staff members can gain accommodations due to a family member being at higher risk.

Based on my perspective of the comments made by teachers on Oregon Safe Return to Schools, many more school staff members could potentially make a request for accommodations based on mental disability that is impairing the ability of that staff member to think, communicate, work, and to interact with students and others. This is because I am seeing many posts that from my perspective constitute evidence of serious anxiety and traumatic distress. These include mention of suicide ideation, nightmares, consistent crying, and other evidence of high distress.

If a school staff member lives with someone who has a serious physical condition that places them at higher risk and that school staff member is now required to be in school, it is possible that the school staff member is now suffering from a mental disability due to this situation that is or will interfere with their ability to effectively do their job. The extent of this disability will have to be determined by a health care professional. Because this is a new concern, it is likely that the staff member will not have a past history of mental health concerns. Be sure to document all of the distress symptoms you are having. It is likely best to try to find a mental health professional who has significant expertise in understanding trauma.

Steps to Take

If you have not filed for accommodations, first get documentation from your doctor and/or mental health provider. Then, talk with an attorney. Let the attorney review this documentation and your request to see if this is as strong as it should be. Then, file with your district.

If you have already filed a request and this was denied, talk with an attorney or BOLI. But I would take advantage of the \$35 for 30 minutes offer from the Oregon State Bar.

Oregon Law

Oregon employers are prohibited from discriminating against employees on the basis of disability. The basic information is on this page: <https://www.oregon.gov/boli/civil-rights/Pages/disability-rights.aspx>. READ THIS!

Key concepts taken from this page:

There are federal and state laws that protect people with disabilities against discrimination in terms, conditions or privileges of employment: the federal Americans with Disabilities Act (ADA), 42 USC sec. 1201 et seq., amended in 2008 by the Americans with Disabilities Act Amendments Act (ADAAA), 42 USC Sec. 12101, et seq., and Oregon's disability law, amended in 2009 to be consistent with federal law in most respects, ORS 659A.103, et. seq.

How do state and federal laws define a "person with a disability"?

Both federal and state laws define a person with a disability as an individual who has a physical or mental impairment that substantially limits one or more major life activities.

What are major life activities?

Federal and state statutes contain a long, non-exhaustive list of major life activities including self-care, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, thinking, communicating, working, interacting with others, and the operation of major bodily functions including but not limited to the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. The impairment or perceived impairment is one that restricts one or more major life activities of the individual as compared to most people in the general population.

Are temporary conditions considered disabilities?

Under current law, the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting, and therefore a disability.

How is "reasonable accommodation" defined?

Reasonable accommodation is a modification or adjustment that enables a person with a disability to apply for a job (i.e., holding a job interview in an accessible location); to perform the essential functions of a position (i.e., purchasing an amplifier to allow a hearing-impaired person to talk on the telephone); or to enjoy the same benefits and privileges of employment as other employees (i.e., holding a company function in a location accessible to all employees). (ie: teaching or providing an educational service from a remote location)

When does reasonable accommodation become unreasonable?

It becomes unreasonable if it would cause the employer an undue hardship. An undue hardship is an action that is significantly difficult or expensive in relation to the size of the employer, the resources available and the nature of the business. Undue hardship is not a bright-line test. An employer that refuses an accommodation based on undue hardship should be prepared to prove that the accommodation would in fact create an undue hardship=.

Federal Law

It is also important to read this document that provides the employee guidelines from the Federal government related to Covid-19. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

From this document:

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? (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 has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

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.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? (4/17/20; updated 9/8/20 to address stakeholder questions)

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? (4/17/20)

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "[undue hardship](#)," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? (4/17/20)

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be

significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? (4/17/20)

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "[critical infrastructure workers](#)" or "[essential critical workers](#)" by the CDC? (4/23/20)

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? (6/11/20)

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

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D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? (9/8/20; adapted from 3/27/20 Webinar Question 21)

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? (9/8/20; adapted from 3/27/20 Webinar Question 22)

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

Documentation

If you are going to pursue a route of requesting accommodation to continue to work remotely and filing a complaint if this is denied, it will be important to keep all documentation. Keep all email communications and any other written correspondence.

If you have an in-person meeting or a telephone call, document what is being said at the meeting or call. Then following the meeting or call, write an email to all attendees outlining your recollection of everything important that was said. Ask that if anyone has a different perspective, they respond to this email promptly. This is how to create a "paper trail" of an in-person or telephone call.

Mental Disability

The two most likely diagnoses related to a mental disability that impair the ability to think, communicate, work, and to interact with students and others. One is Anxiety and the other is Other Specified Trauma-and Stressor-Related Disorder.

A determination of Anxiety is generally straightforward. It is my suggestion that the condition of Other Specified Trauma-and Stressor-Related Disorder may be more appropriate — and can be included as an additional determination.

The standards for PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) focuses on major acute traumatic events, not chronic or complex traumatic situations.

However, another category in *DSM-5* Stress Disorders appears to be highly relevant to situations of chronic, persistent, pervasive hurtful conduct. This is Other Specified Trauma-and Stressor-Related Disorder. Under this diagnosis, clinically significant distress or impairment in functioning predominate, but full criteria for another disorder in this category is not met. The criteria that is missing in the the Covid-19 pandemic school situation is the acute traumatic event.

The following are the additional key criterion for PTSD, not including the acute traumatic event (Criterion A), along with suggestions of how these criterion may manifest when a school staff member is facing the prospect of having to return to an in-school working situation.

- **Criterion B: Re-experiencing Symptoms.** Staff members may demonstrate intrusive memories of what is happening to them, as well as nightmares. They may experience significant distress thinking about what might happen to them when news about school reopening emerges.
- **Criterion C: Avoidance Symptoms.** Staff members may demonstrate significant signs of avoidance. This may be mental avoidance of thinking about a return to school or real-time avoidance of such return.
- **Criterion D: Negative Cognitions and Moods.** Staff members may have persistent negative evaluations of themselves, others, and the world. Such negative emotional states are pervasive. There is also a loss of interest in activities, feeling detached, and an inability to experience positive emotions.
- **Criterion E: Arousal Symptoms.** Staff members may be consistently hyper vigilant and very likely to trigger. They often have difficulties concentrating and working, as well as problems sleeping.
- **Criterion E Symptoms last more than a month.** Staff members will likely be experiencing these symptoms for more than a month because the pressure to return to schools has been ongoing.
- **Criterion F: Symptoms cause distress and/or interference.** Staff members may manifest distress symptoms that could include psychosomatic illnesses, such as headaches and stomach aches. They may have difficulties concentrating and working.

Medical Documentation

Make sure to explain to your doctor and/or counselor that you need a letter documenting that it is “necessary” (not “recommended,” not “advisable”) that you continue to perform your work from a remote location.

Undue Hardship

School districts are obviously going to respond to a request for accommodations with the assertion that it would be an “undue hardship” on the district if it could not force a staff member to work at school. This is likely going to be a tough battle, which is why staff members are strongly advised to consult with an attorney. The school district perspective will likely be that if they grant too many accommodations to teachers and other staff they will not be able to open the school.

Likely, they will argue that the staff member’s concerns are not warranted. They will likely assert that the data has shown that schools are not the source of significant transmission.

This excellent study can be used to rebut this position: To What Extent Does In-Person Schooling Contribute to the Spread of COVID-19? Evidence from Michigan and Washington. <https://epicedpolicy.org/wp-content/uploads/2020/12/COVID-and-Schools-Dec2020.pdf>. This study found that school districts offering in-person instruction do not contribute to community spread of COVID-19 **as long as there are relatively low levels of preexisting infections in the surrounding areas!** If the infection rate in the community is high, then there is risk at school. The infection rate in Oregon is profoundly high.

One argument against the assertion that this would create an undue hardship is that many districts in Oregon are not opening in person demonstrates that school staff are able to perform the essential functions of their position remotely. As noted, this is not a "bright line" test, and will likely be different from different staff people. It is possible for teachers and instructional aides to argue that they can work from home, whereas this assertion will not work for a bus driver.