

# Application of Medical Leave and Accommodation Rights to the Virus

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## Employees with Coronavirus Qualify for FMLA Leave

The FMLA provides for 12 weeks of unpaid leave in the event an employee or his or her family member has a “serious health condition.” An employee with the coronavirus would qualify for leave under the FMLA because the coronavirus is likely a “serious health condition.” The FMLA allows eligible employees to take leave because of serious health conditions that prevent them from performing the essential functions of their position, or to care for immediate family members with a serious health condition. A “serious health condition” is an illness, injury, impairment or physical or mental condition that involves 1) inpatient care in a hospital, hospice, or residential medical care facility; or, 2) continuing treatment by a healthcare provider. Employees with the coronavirus would likely fulfill these two requirements. Thus, the FMLA would be triggered for such employees. Accordingly, employees who act as caregivers for family members with the coronavirus would also be eligible for FMLA leave.

## Employees with Symptoms Consistent with Coronavirus May Qualify for FMLA Leave

In addition to the expanded FMLA rights to care for children noted above, an employee without a diagnosis of the coronavirus, but who exhibits consistent symptoms, may also qualify for leave under the FMLA. Given the limited availability of coronavirus tests, employers may be faced with a situation where they are unsure if an employee has the coronavirus, but they are concerned about the possibility because of the employee’s symptoms. The Department of Labor guidance indicates that the FMLA may cover an employee with the typical flu if the employee can show that their condition is a “serious health condition” under the FMLA. The coronavirus presents with similar symptoms to the typical flu. Thus, an employee without a confirmed diagnosis of the coronavirus, but who exhibits similar symptoms, may qualify for FMLA leave.

### 1. Coronavirus is Likely Not a Disability under the Americans with Disabilities Act (ADA)

**The ADA and similar state law counterparts require employers to provide reasonable accommodations for employees with qualified disabilities.**

- a. The coronavirus likely fails to qualify as an “actual” or “record of” disability under the ADA because it does not “substantially limit” major life activities. It may, however, qualify as a “regarded as” disability.
- b. A disabled individual under the ADA has 1) a physical or mental impairment that substantially limits one or more of the major life activities, 2) a record of such an impairment; or 3) been regarded as having such an impairment.
- c. The coronavirus is certainly an impairment that affects major life activities. Nevertheless, the virus may not satisfy the “substantial limitation” requirement. For the vast majority of people, the virus is of short duration (2-3 weeks) and symptoms are mild (Note that practitioners may have different views on this question).

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- d. A person may be “regarded as” having a disability even if the impairment does not substantially limit a major life activity. Thus, employers should be cautious about potentially discriminatory statements that regard employees as having the coronavirus (i.e., “I don’t want you in the workplace because you have coronavirus”).
- e. Note that most states have separate disability discrimination laws that may be broader, so employers should check applicable state law as well.

## **2. Because Coronavirus is Likely Not a Disability, “Relationship” or “Association” Discrimination Liability is Unlikely**

Employers likely need not be concerned with potential “relationship” or “association” issues arising from the coronavirus because the coronavirus probably fails to qualify as a disability under the ADA. The definition of discrimination under the ADA includes “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” Employers may want to exclude an employee from the workplace because the employee has a relationship or association with someone who has the coronavirus. Employers can do this because coronavirus is likely not a disability. If an employer tells an employee not to come to work because of the employee’s relationship with someone with coronavirus, the employer is not excluding that employee because of the employee’s relationship with someone with a disability (since that person does not have a disability). This gives employers some leeway to exclude employees from the workplace where they have family member who has tested positive for the coronavirus, or if a family member is suspected of having it.

## **3. Working from Home Likely Not Required Accommodation, But be Wary of Underlying Conditions and Establishing Precedent for Working From Home**

- a. Under the ADA, employees are likely not entitled to work from home due to the coronavirus because the coronavirus is probably not a disability. But if an employee has an underlying disability that, for example, makes the employee more susceptible to contracting the coronavirus, then work from home may be a required accommodation (i.e., an employer may have to allow an employee with an autoimmune disorder to work from home).
- b. Employers have told many employees to work from home when they otherwise would not. When employees return to work, an employee may argue that (for even an unrelated reason), they have a disability and must work from home. Employers may want to tell the employee that the essential functions of the job cannot be performed at home; thus, work from home is not an option. The employee may point to the fact that they have worked from home for an extended period already. To mitigate this risk, employers should preface orders to work from home with language like the following:

“Because of the extraordinary situation in the workplace caused by the virus, you will be working remotely for a temporary period. We understand that you might not be able to perform all of your job’s essential functions during this period because you will be working remotely.”

If you have questions regarding these developments, please contact a member of the Labor, Employment & Benefits team.

For more guidance on issues related to the coronavirus pandemic, please visit our [COVID-19 resource center](#).

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