



What You Need to Know About Employment During COVID-19 in Colorado

ACCOMMODATIONS

If you have a disability and need a reasonable accommodation, your employer **must provide** one (absent undue hardship) when an accommodation is requested.

If you have a condition that places you at a higher risk for serious illness related to COVID-19, your employer **should provide** an accommodation to allow you to continue working. Your employer **cannot** compel you to perform in-person work if you have a known medical condition putting you at a higher **risk** and you request an accommodation to avoid in-person work.

If it is not possible to perform your job remotely, your employer **should attempt** to accommodate you through job/hour modifications, allowing the use of PTO or unpaid leave, or other arrangements that allow you to keep your job.

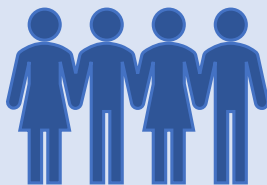
If you have close members of your household at higher risk for serious illness related to COVID-19, your employer **may** be flexible and allow an alternative work schedule/setup in order to reduce the risk of exposure to that person; however, your employer **is not** required to provide an accommodation.

Your employer **may** consider COVID-19 related difficulties when assessing the reasonableness of an accommodation, but your employer should explore alternatives if a specific accommodation causes an undue hardship.

IN-OFFICE CONSIDERATIONS

Under the current Executive and Public Health Orders, your employer should be (1) enforcing **mask-wearing** while in the office, (2) avoiding gatherings unless **social distancing** can be maintained, (3) **cleaning and disinfecting** high-touch areas, and (4) working with employees to provide **reasonable accommodations** for those with disabilities or those at higher risk for severe illness from COVID-19.

To the greatest extent possible, your employer should be encouraging and allowing **remote work** setups.



Your employer may take **reasonable symptom-screening** measures, such as temperature checks or asking about symptoms associated with COVID-19.

Also, your employer should ask employees with COVID-19 or COVID-19 symptoms to stay home, and your employer may require a certification stating that the employee is safe to return to work.

Aside from testing positive for COVID-19 or displaying symptoms, your employer cannot exclude you from the workplace based on a medical condition unless you are a **direct threat** to health and safety.

WHERE TO FIND MORE INFORMATION

EEOC's Guidance on Anti-Discrimination Laws during COVID-19:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

CCRD's Guidance for Employers during COVID-19:

<https://docs.google.com/document/d/14DNDIBBr8guROAjjwtfplxio24qbexF6xatv2t7bpRU/edit>.

CDC's Guidance on certain medical conditions and risk factors:

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

The Job Access Network's Guidance on COVID-19 and providing accommodations:

<https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>.

Colorado Executive and Public Health Orders:

<https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders>.

For a more detailed discussion about each topic, see below:

If you are a Colorado resident navigating your employment during the COVID-19 pandemic, you have probably questioned how to approach certain issues. If you or someone you know has a disability that places them at a higher risk for severe illness related to COVID-19, your concerns are likely even greater. As employment challenges and limitations change with time, it is vital to interact with your employer communicate your needs and concerns. The information provided below provides a variety of laws, orders, and guidance that can help guide your decisions and provide knowledge on how to go approach your employer.

1. Executive and Public Health Orders

While Governor Polis has been issuing several executive orders during the pandemic, the most current relevant orders include (1) Safer at Home and in the Vast, Great Outdoors¹, and (2) Protect Our Neighbors.² Along with mandating the publication of certain guidance and public health orders, these executive orders provide important points for “Vulnerable Individuals.” Vulnerable Individuals include:

- Individuals who are 65 years of age or older;
- Individuals with chronic lung disease or moderate to severe asthma;
- Individuals who have serious heart conditions;
- Individuals who are immunocompromised;
- Pregnant women; and
- Individuals determined to be at high risk of severe illness from COVID-19 by a licensed health care provider.

In some instances, the term “Vulnerable Individuals” is replaced by “individuals at risk of severe illness from COVID-19.” However, these terms are given the same definition by the different orders.³

Safer at Home and in the Vast, Great Outdoors and Protect Our Neighbors

Currently, most areas in Colorado are under the Safer at Home/Outdoors order. This order directs Vulnerable Individuals to continue to stay at home or outdoors away from others, limit social interactions, continue social distancing, and wear face coverings in public. Importantly, this order states that employers cannot compel Vulnerable Individuals to perform in-person work. This means that, when a vulnerable employee expresses a desire to avoid in-person work, employers should be engaging in an interactive process to provide a reasonable accommodation that allows the

¹ Executive Order D 2020 091, available at <https://drive.google.com/file/d/1gzySbpk2MwLAHzfMaABcHGTKpxxqsHw0/view?usp=sharing>, and amended and extended by Executive Order D 2020 123, available at <https://drive.google.com/file/d/1eHgVwZqFtBVgoytQ6DKQTVI9JOIjFHHn/view?usp=sharing>.

² Executive Order D 2020 127, available at https://drive.google.com/file/d/1WQi5_Cgcjge8W1nIsOqoHoshtAXMjRV1/view?usp=sharing.

³ Additionally, the Centers for Disease Control (CDC) published a list of conditions and the risk factors associated with them. To view these conditions, visit <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

employee to continue to work, unless doing so would cause an undue hardship.⁴ Employers cannot require employees with the identified high-risk conditions to perform in-person work; however, if a job cannot be performed remotely, this limitation may cause issues. If a person in a high-risk category requests an accommodation to avoid in-person work, but the essential functions of their job cannot be performed outside of the job site, employers are encouraged to provide an accommodation that will allow the employee to keep the job during the pandemic. Examples of this include reorganization or modification of job duties, creating special hours or spaces for the vulnerable employee to work in while avoiding in-person contact, allowing employees to use paid time off or unpaid leave time, and others.⁵

While the “Protect Our Neighbors” order loosens some of the general restrictions on businesses operations, the directives towards Vulnerable Individuals remain the same. Along with this, local communities must take certain steps to qualify for “Protect Our Neighbors” status, meaning most areas will continue to fall into Safer at Home/Outdoors for the near future.

Public Health Orders

Along with the executive orders being issued, public health orders have also been released that describe how businesses should be operating during the pandemic. The public health order coinciding with the “Protect Our Neighbors”⁶ order mentions several important considerations for employers and their employees, including:

- All businesses must adhere to social distancing requirements, including critical businesses, government functions, or non-critical office-based businesses;
- Critical businesses and critical government functions should adopt work-from-home/telework policies and implement strategies that encourage social distancing;
- All employers should designate a COVID-19 workplace coordinator to address issues;
- “High touch” areas should be cleaned and disinfected, and proper hygiene notices should be posted;
- Gatherings of more than 10 people should be avoided or done only when social distancing may be followed;
- High-risk employees should be accommodated and cannot be compelled to go to work during the pandemic, and those who may have child/elder/vulnerable individual care concerns should be provided with flexible or remote scheduling as much as possible.

While this list is not exhaustive or inclusive of every action employers should take, these are the basic considerations that should be guiding employers.

⁴ “Undue Hardship” is defined as “significant difficulty or expense,” and it considers an accommodation’s nature and cost, the resources available to the company as a whole, and the operation of the business. For more information, see <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation>.

⁵ One type of leave that may be available is leave under the Family and Medical Leave Act (FMLA). To read more about FMLA leave, you can either visit <https://www.dol.gov/agencies/whd/fmla> or ask your Human Resources representative for information.

⁶ To view the full order, visit https://drive.google.com/file/d/11F0Gd7DfVONN4p4yNa5h6_00xJB34SZm/view?usp=sharing.

Mask Order

On July 16, 2020, Governor Polis issued an executive order mandating that non-medical face coverings be worn in all “Public Indoor Spaces.”⁷ While there are certain limited exceptions for activities that may be hindered by mask-wearing, this order essentially mandates that Colorado residents wear a mask whenever they are in a public place located indoors. This means that employers *must* require employees to wear a mask when working inside. The mask order presumptively lasts for 30 days, unless it is subsequently amended or extended—at the moment, the mask order would expire at or around August 15, 2020.

2. Guidance and Recommendations

The Colorado Civil Rights Division (CCRD) published updated guidance to coincide with the various orders affecting employment. This guidance includes a chart that offers clarification on how the mandates should be applied in employment:

Guidance for Employers

- As of July 16, 2020, **Must** require that all employees wear masks under the conditions of [Executive Order D 2020 138](#). ([Additional information](#)).
- **Must** make reasonable accommodations requested by employees with disabilities (absent undue hardship) to allow them to continue working.
- **Should** make reasonable accommodations to offer protection to those at *greater risk of severe illness due to COVID-19*, absent undue hardship, meaning significant difficulty or expense.
- **Should** consider accommodations for those who request reduced contact due to a disability, e.g. one way aisles, plexiglass or other barriers, etc.
- **Should** implement temporary job restructuring, temporary transfers, or modifying a work schedule to accommodate individuals with a disability who have requested reduced contact with others.
- **May** consider whether any restructure or accommodations present undue hardship to the employer, and should work with individuals with a disability to determine alternative solutions.
- **May** require employees to wear protective gear, e.g. facial coverings and/ or gloves, and observe infection control practices. However, if a disability under the Americans with Disabilities Act (ADA) or religious accommodation under Title VII is requested and needed, employers **should** provide the necessary modification or alternative, absent undue hardship.
- **May** ask employees if they are experiencing symptoms consistent with COVID-19, but must maintain all information as a confidential medical record under the ADA.
- **May** require a note from a health care provider, but under current circumstances may accept a form, stamp, or email from a doctor or local clinic.
- **May** screen job applicants for COVID-19 symptoms only *after* making a conditional offer, but must apply rules consistently across all employees entering the same type of job.
- **May** withdraw a job offer if a prospective employee has COVID-19 symptoms *only* if the employer needs the applicant to start immediately.
- **May not** postpone or withdraw a job offer if an individual is at higher risk of contracting COVID-19, such as being 65 years or older or pregnant. Telework may be offered as an alternative.

Employees (or a third party such as a doctor):

- **Must** let an employer know that an accommodation is needed due to a medical condition. This request for accommodation may be made in conversation or in writing, and may reference the ADA in doing so.

⁷ To view the full order, visit <https://drive.google.com/file/d/13S9bLuKZbMVmHPucQnekVyOY2k6gYRa9/view>.

To view the full guidance document, visit

<https://docs.google.com/document/d/14DNDIBBr8guROAiywtfpIxi024qbexF6xatv2t7bpRU/edit>

3. Further Considerations

Along with the specific orders and guidance related to COVID-19, other considerations may affect an employee requesting a reasonable accommodation.

- Accommodations for Vulnerable Employees vs. Employees with Family/Household Members at High Risk
 - As outlined above, employers should be accommodating employees at a higher risk for complications related to COVID-19 whenever possible.
 - On the other hand, the Equal Employment Opportunity Commission (EEOC) has said that employers are not required to accommodate employees who are not themselves in the high risk group, but they want an accommodation to prevent exposure to a member of their household; however, the EEOC and CCRD have said that employers should consider such accommodations.⁸
- “Undue hardship” Standard
 - For an accommodation to be considered reasonable, it cannot be an undue hardship on the employer. This is defined as a “significant difficulty or expense.”
 - Specific circumstances determine undue hardship, including:
 - the nature and cost of the accommodation needed;
 - the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
 - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - the impact of the accommodation on the operation of the facility.⁹
 - Along with these factors, employers may consider COVID-19 related difficulties—these could include budgetary or spending restrictions, limitations on in-person contact, business slowdowns or shutdowns, and the other effects of COVID-19.
 - Because the current circumstances have affected employers in dramatic ways, certain accommodations may be an undue burden when they previously were not; however, employers should still work with employees to determine any alternative accommodations that will also be reasonable.
- “Direct threat” Assessment

⁸ The EEOC has published and updated a guidance document with Q&A on different discrimination issues, viewable at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁹ For an in-depth discussion of determining whether an accommodation is an undue burden, see https://askjan.org/articles/Undue-Hardship-is-a-Process.cfm?csSearch=2617296_1.

- While many vulnerable employees may request an accommodation to limit their interaction with others, some higher-risk individuals may wish to continue to work normally. If an employee does not request an accommodation, an employer generally cannot exclude a vulnerable individual or force the employee into an accommodation.
- For an employer to exclude someone with a disability from the workplace, they must show that the person is a “direct threat” to their own or someone else’s health. While an employee who contracts COVID-19 or displays symptoms can be excluded under the direct threat analysis, employers may only exclude vulnerable individuals, who wish to continue to work, if they can show that in-person work will subject that employee to an unavoidable threat.
- Showing an employee is a direct threat is a very high standard, and it is determined based on best available objective medical evidence.
 - This must be related to an individualized inquiry about the employee, not generalizations about a disability.
 - Considerations include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.
 - For high risk employees, an employer must first assess the usual considerations, and then the employer must conduct an individualized interactive process with the employee to determine if reasonable accommodation can eliminate or reduce the threat.
 - *Only after completing this assessment* may the employer exclude an employee from the workplace *if* the employee’s disability creates a direct threat to the employee’s health that cannot be eliminated or reduced by reasonable accommodation
- Though some employees may not desire a reasonable accommodation, you should request one if you cannot perform your job duties due to a disability-related barrier. If you do not request an accommodation and cannot perform your job duties, then your employer may be able to terminate you for performance issues.

Online Resources:

- EEOC’s Guidance on Anti-Discrimination Laws during COVID-19: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
- CCRD’s Guidance for Employers during COVID-19: <https://docs.google.com/document/d/14DNDIBBr8guROAjywtfpIxi024qbexF6xatv2t7bpRU/edit>.
- CDC’s Guidance on certain medical conditions and risk factors: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.
- The Job Access Network’s Guidance on COVID-19 and providing accommodations: <https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>.
- Colorado Executive and Public Health Orders: <https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders>.