



*The Women's Bar Association
of the State of New York*

presents

Continuing Legal Education Series

**Re-Opening Business:
What Employees Need to Know**

June 25, 2020
12:00 pm - 1:30 pm

Presenters: Alexandra Berke, Esq.
Laura M. Fant, Esq.

Re-Opening Businesses: What Employees and Employers Need to Know

Women's Bar Association of New York

June 25th, 12:00pm-1:30pm

Presented by: Alex Berke, Esq. (Berke-Weiss Law PLLC) and Laura M. Fant, Esq. (Proskauer)

With thanks to Law Clerk Kacie Candela (Berke-Weiss Law PLLC) and Jacob Tucker, Esq. (Proskauer)

A. State and Federal Requirements For Employer Safety Plans

• **Federal: CDC Guidance**

○ **The CDC Interim Guidance for Businesses and Employers¹**

- Updated regularly to reflect new learning about Covid-19.
- Safety Plan that is workplace-specific, identifies all areas and job tasks with potential Covid-19 exposure, and includes control measures to reduce and eliminate such exposures.
- Employers should seek employee and union input.

○ **CDC Recommendations**

- How to identify and react: screening (questionnaires and temp. checks), encourage sick employees to stay home, have protocol in place for sick employees (e.g. notifying co-workers and disinfecting the office).
- Change workplace policies and practices (e.g. flexible sick leave, protecting high risk employees, social distancing, and minimizing employee transit).
- Communicate measures to employees (e.g. new policies, best practices in the workplace and at home).

○ **Recommendations for Office Buildings²**

- Check the building's ventilation system.
- Create a cleaning and disinfecting schedule and protocol.
- Develop flexible work policies and staggering shifts to limit employee interaction.

• **Federal: OSHA Guidance**

○ **General Duty Clause³**

○ **Guidance Documents⁴**

- Focused on preparing the workplace, preventing or minimizing exposure, and ensuring social distancing.
- Not new legal obligations, just recommendations and best practices.
- Additional guidance based on exposure risk by job type.⁵

¹ CTRS. FOR DISEASE CONTROL AND PREVENTION, INTERIM GUIDANCE FOR BUSINESSES AND EMPLOYERS RESPONDING TO CORONAVIRUS DISEASE 2019 (COVID-19) (May 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

² CTRS. FOR DISEASE CONTROL AND PREVENTION, COVID-19 EMPLOYER INFORMATION FOR OFFICE BUILDINGS, <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html> (last visited June 2, 2020).

³ 29 U.S.C. 654.

⁴ *OSHA Publications on COVID-19, Novel Coronavirus*, U.S. DEP'T OF LABOR, <https://www.osha.gov/pls/publications/publication.athruz?pType=Industry&pID=651> (last visited June 2, 2020).

- **Cleaning Correctly**
 - Only use safe and effective cleaning products.⁶
 - Consult EPA and CDC guidelines.⁷
 - New York City employers should also consult guidance the New York City Department of Health.⁸
- **Reporting vs. Recording Requirements for Employers**
 - OSHA Recording Requirement.⁹
 - When an employer learns that one of its employees has Covid-19, they must **investigate** how the employee may have contracted the virus. If there is a likely workplace connection, the employer must **record it as an “occupational illness.”**¹⁰
 - **It does apply to:**
 - Employers with 11 or more employees in most industries.
 - **It does not apply to:**
 - Employers with 10 or fewer employees.
 - Certain employers in low hazard industries.
 - These employers need only report work-related Covid-19 illnesses that result in a fatality or an employee’s in-patient hospitalization, amputation, or loss of an eye.¹¹
 - **What an employer must do:**
 - Investigate Covid-19 cases.
 - Make a determination of work-relatedness.
 - If it is work-related, list each recordable workplace illness on the OSHA 300 log, coded as a respiratory illness.
- **New York State Requirements**
 - **New York Forward**¹²
 - Authorizes gradual reopening for nonessential businesses.¹³

⁵ OCCUPATIONAL SAFETY & HEALTH ADMIN., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, <https://www.osha.gov/Publications/OSHA3990.pdf> (last visited June 2, 2020) [hereinafter *OSHA Workplace Guidance*].

⁶ Christopher Wilkinson et al., *How to Avoid A Legal Mess When Disinfecting Workplaces*, LAW360 (June 2, 2020, 5:46 pm), <https://www.law360.com/employment/articles/1278907>.

⁷ U.S. ENVTL. PROTECTION AGENCY, LIST N: DISINFECTANTS FOR USE AGAINST SARS-COV-2, <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> (last visited June 3, 2020).

⁸ *COVID-19: General Guidance for Cleaning and Disinfection for Non-Health Care Settings*, N.Y.C. DEP’T OF HEALTH (May 29, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>.

⁹ OCCUPATIONAL SAFETY & HEALTH ADMIN., REVISED ENFORCEMENT GUIDANCE FOR RECORDING CASES OF CORONAVIRUS DISEASE 2019 (COVID-19) (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

¹⁰ Kacie Candela, *Employers Must Investigate and Report Work-Related Covid-19 Cases to OSHA*, BERKE-WEISS LAW BLOG (June 3, 2020), <https://www.berkeweisslaw.com/blog/2020/6/2/employers-must-investigate-and-report-work-related-covid-19-cases-to-osha>.

¹¹ See 29 C.F.R. §§ 1904.1(a)(1), 1904.2.

¹² *Reopening New York*, *infra* note 16.

- Four-phase regional approach based on health metrics¹⁴ recommended by the CDC.¹⁵
 - Regions-by-region where each region has an oversight institution monitoring health metrics and dictating reopening.¹⁶
 - At least two weeks in between each phase.¹⁷
 - Each Phase contains different industries, each with its own guidance.¹⁸
- **Three Requirements for Reopening**¹⁹
 1. Meet industry-specific requirements, and, ideally, follow the state's recommended guidance. The requirements differ by business category.
 2. Submit an affirmation form.²⁰
 3. Write and conspicuously post a comprehensive and detailed business safety plan on the premises.
 - The plan does not need to be submitted to a state agency for pre-approval.
- **Three factors the state says businesses should consider in developing safety plans**²¹
 1. **People:** Protection for employees and customers.
 2. **Places:** Changes to the physical workspace.
 3. **Processes:** Public health obligations.
- **Industry-Created Guidance**
 - **Example:** SAG-AFTRA and major production companies.²²
- **What Tests Can Employers Conduct and/or Require? – EEOC Guidance**
 - **Confidentiality:** all medical information obtained on an employee related to Covid-19 falls under the ADA's confidentiality rules.²³
 - **Temperature Taking:**

¹³ N.Y. Exec. Order No. 202.31: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (May 14, 2020), <https://www.governor.ny.gov/news/no-20231-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁴ *Regional UnPause Dashboard*, N.Y. FORWARD, <https://forward.ny.gov/regional-unpause-dashboard> (last visited June 2, 2020).

¹⁵ THE WHITE HOUSE & CTRS. FOR DISEASE CONTROL AND PREVENTION, GUIDELINES: OPENING UP AMERICA AGAIN, <https://www.whitehouse.gov/openingamerica/> (last visited June 2, 2020).

¹⁶ *N.Y. Forward: A Guide to Reopening New York & Building Back Better*, N.Y. STATE, 54-55 (May 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>.

¹⁷ *Id.* at 56.

¹⁸ *Reopening New York*, N.Y. FORWARD, <https://forward.ny.gov/> (last visited on June 2, 2020).

¹⁹ Lorie Almon et al., *New York Issues Detailed Reopening Plan and Guidance as the State Looks Forward to Phase Two*, SEYFARTH SHAW LLP FOR JD SUPRA (June 1, 2020), <https://www.jdsupra.com/legalnews/new-york-issues-detailed-reopening-plan-45245/>.

²⁰ *Business Affirmation*, N.Y. FORWARD, <https://forms.ny.gov/s3/ny-forward-affirmation> (last visited June 2, 2020).

²¹ *N.Y. Forward: A Guide to Reopening New York & Building Back Better*, *supra* note 21 at 58. *See also*, Sholinsky & Popper, *supra* note 13.

²² Mike LaSusa, *Hollywood Orgs Send Back-To-Work Proposals to Calif.*, NY, LAW360 (June 1, 2020, 11:42pm), <https://www.law360.com/employment/articles/1278936>.

²³ U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (May 7, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter *EEOC: COVID-19 and the ADA*].

- Employers *may* measure employees' body temperatures, but doing so is generally a medical examination, and is therefore subject to the ADA's confidentiality rules.
 - Like all medical information about a particular employee, temperature check logs must be stored separately from the employee's personnel file.
 - **COVID-19 Testing:**
 - An employer *may* administer Covid-19 testing before permitting employees to enter the workplace.
 - The ADA requires that mandatory medical testing of employees be “job-related and consistent with business necessity.”²⁴
 - Under the EEOC guidance, “employers may take steps to determine if employees entering the workplace have Covid-19 because *an individual with the virus will pose a direct threat to the health of others.*”
 - Such testing must be safe and accurate, according to the FDA's guidance²⁵ and any other relevant guidance from the CDC or other public health authorities.
 - **COVID-19 Test Result Documentation:**
 - The ADA does permit employers to require a certificate from a medical professional verifying that the employee does not have Covid-19 (“fitness-for-duty” documentation).
 - This may be a doctor's note or a note, stamp, or email from a local clinic.
 - **Antibody Testing:**
 - The CDC has advised employers *not* to use antibody testing to make decisions about returning employees to the workplace because we don't yet know whether a positive antibody test result certainly indicates immunity, or how long any such immunity may last.²⁶
 - The ADA's confidentiality requirement for medical information likely applies to antibody test results as well.
- **Recourse for Employees & Liability for Employers**
 - Failure to comply can expose businesses to investigations, fines, and potentially civil liability.
 - **Places to file complaints**
 - **NYS Covid-19 ‘New York on PAUSE’ Enforcement Task Force:** individuals, such as customers (not employees), can file online complaints regarding the operation of businesses or gatherings.²⁷
 - **NYS Department of Labor (“DOL”):** employees should file complaints against their employers using the online form at labor.ny.gov/COVIDcomplaint.²⁸

²⁴ 42 U.S.C. § 12112(d)(4)(A).

²⁵ U.S. FOOD & DRUG ADMIN., FAQs ON TESTING FOR SARS-CoV-2, (June 3, 2020) <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2>.

²⁶ CTRS. FOR DISEASE CONTROL AND PREVENTION, INTERIM GUIDANCE FOR COVID-19 ANTIBODY TESTING, <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html> (last visited June 4, 2020).

²⁷ *New York State COVID-19 ‘New York on PAUSE’ Enforcement Task Force Violation Complaint Form*, N.Y. STATE, <https://mylicense.custhelp.com/app/ask> (last visited June 2, 2020).

²⁸ *Complaints Related to COVID-19 Regulations*, N.Y. STATE DEP’T OF LABOR, <https://labor.ny.gov/workerprotection/laborstandards/coronavirus-complaints.shtm> (last visited June 2, 2020).

- As of last month (May 18), the DOL received 20,000 complaints about workplace safety issues tied to the coronavirus pandemic.²⁹
- Complaints are handled by workforce protection inspectors or turned over to local municipalities.
- It's not clear whether any complaints have led to sanctions on employers.
- **OSHA complaints:** *The Strikewave* has built an interactive map and data analysis of Covid-19 complaints made to OSHA nationwide.³⁰
- **Under the NLRA:** applies to union and non-union employees, can't be personal to the individual, but employees can raise such concerns that affect other employees as well, such as inadequate PPE.
- **Liability for Employers**
 - **Workers' compensation for workplace illnesses (NYS)**
 - Covid-19 is not yet in the New York statute, but there is a bill in the State Legislature to add it.³¹
 - The NYS Workers' Compensation Board issued guidance in June on Covid-19 claims,³² recognizing that most workers will never be able to pinpoint the exact moment and method of exposure.³³
 - Instead, workers must show a "significantly elevated risk in their workplace," and that "exposure to Covid-19 was prevalent."³⁴
 - Workers do not need a positive Covid-19 test; a medical diagnosis may suffice.³⁵
 - **Civil suits for personal injury, wrongful death, or intentional infliction of emotional distress:** cases have already been filed, but it is unclear whether they will be successful.³⁶
 - **Civil suits based on other legal theories**
 - **Example:** April lawsuits by the N.Y. State Nurses Association challenging the failure of the NYS Department of Health and two hospitals to adequately protect the health and safety of nurses treating Covid-19 patients, and asking for an injunction mandating that the hospitals comply with the state directives for healthcare workers.³⁷

²⁹ Joe Mahoney, *N.Y. Labor Department gets 20,000 virus safety complaints*, THE DAILY STAR (May 18, 2020, updated May 30, 2020), https://www.thedailystar.com/news/local_news/n-y-labor-department-gets-20-000-virus-safety-complaints/article_fc3256b-9695-5bea-8ac8-7c8f68ff89e4.html.

³⁰ Kevin Reuning, *OSHA Complaint Tracker*, THE STRIKEWAVE (last updated May 25, 2020), <https://www.thestrikeyave.com/osha-complaint-map>.

³¹ Assemb. A10401, 2019-20 Sess. (N.Y. 2020), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10401&term=2019&Summary=Y&Text=Y

³² *COVID-19 & Workers' Compensation Q&A*, N.Y. STATE WORKERS' COMPENSATION BOARD (June 2020), <http://www.wcb.ny.gov/content/main/TheBoard/covid-19-workers-compensation-q-a-june-2020.pdf>

³³ *Id.* at 1

³⁴ *Id.*

³⁵ *Id.*

³⁶ Evelyn A. Haralampu & Mary Kate Geraghty, *Returning to the Workplace: What Employers Need to Know*, BURNS & LEVINSON FOR LEXOLOGY (May 29, 2020), <https://www.lexology.com/r.ashx?l=8Z0DXCP>.

³⁷ Erinn L. Rigney & David C. Lindsay, *Covid-19: Reopening Resources for Business—Examining Employer Liability Series—Workers' Compensation and Civil Liability Concerns*, K&L GATES FOR LEXOLOGY (May 29, 2020), <https://www.lexology.com/r.ashx?l=8Z07TNS>.

- **OSHA complaints**
- **ADA/discrimination claims** for failure to accommodate, or for unfair treatment relating to a health condition or an employee’s presumed or actual Covid-19 diagnosis.
- **Title VII/ADEA/NYSHRL/NYCHRL** for discrimination and/or retaliatory treatment in termination, furlough, salary, hour reduction, and/or applying policies unfairly to protected classes.
- **Leave laws:** FMLA, EPSLA, NYS/NYC law.
- **Whistleblower protections** under OSHA, NLRA, local laws.
- **Complaint Examples**
 - **Amazon workers** from a Staten Island warehouse filed suit against the company for failing to following laws and health guidelines during the pandemic, leading to the death and injury of warehouse workers and their families.³⁸
 - **Chicago McDonalds employees** are trying to certify as a class in a lawsuit alleging that the company and certain franchisees haven’t done enough to protect them amid the pandemic. A judge rejected McDonalds’ argument that governmental agencies were the proper venue and had primary jurisdiction, not the court.³⁹

B. Managing Staff Requests for Reasonable Accommodations

The ADA Generally:

- **Title I** of the ADA prohibits covered employers from discriminating against *qualified individuals with disabilities* in applying for jobs, hiring, firing, job training, and other terms, conditions, and privileges of employment.⁴⁰ This is enforced by the EEOC.
 - The ADA covers employers with 15 or more employees⁴¹
 - A “qualified individual with a disability” is an individual who:
 - satisfies the prerequisites for the position, and
 - can perform the essential functions of the position.⁴²
- An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business.
 - **Reasonable accommodations:** adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. They vary depending upon the needs of the individual applicant or employee.⁴³

³⁸ Lauren Berg, *Amazon Workers Say NY Warehouse Unsafe Amid COVID-19*, LAW360 (June 3, 2020, 10:05pm), <https://www.law360.com/articles/1279798/>.

³⁹ Lauraann Wood, *McDonald’s Can’t Dodge Ill. Workers’ COVID-19 Safety Suit*, Law360 (June 3, 2020, 2:46pm), <https://www.law360.com/articles/1279604/>.

⁴⁰ *Americans With Disabilities Act*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/disability/ada> (last visited June 2, 2020).

⁴¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACT SHEET: DISABILITY DISCRIMINATION (Jan. 15, 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination> [hereinafter *EEOC Fact Sheet*].

⁴² 29 C.F.R. § 1630.2(m). See 29 C.F.R. § 1630.3 for exceptions.

⁴³ *EEOC Factsheet*, *supra* note 47.

- Under Federal law, an employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one.⁴⁴
- Once a reasonable accommodation is requested, the employer and individual should discuss the employee’s needs and identify some possible accommodations.⁴⁵
- When more than one accommodation would work, the employer may choose the one that is less costly or easier to provide.⁴⁶
- **Undue hardship:** an action requiring significant difficulty or expense, when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.⁴⁷
 - An employer is not required to provide the accommodation but still must consider other accommodations that do not pose an undue hardship.

As Applied to Covid-19:

- **Federal: Americans with Disabilities Act (“ADA”)**
 - The ADA continues to apply to pandemic-related inquiries, but does not interfere with or prevent employers from following or implementing guidelines and suggestions made by the CDC or state/local public health authorities.⁴⁸
 - Employers who receive requests for accommodation to reduce the risk of exposure to the coronavirus **must** consider this request under the ADA and engage in the interactive process to provide a reasonable accommodation, barring undue hardship.⁴⁹
 - What ADA-covered employers can and can’t ask employees about symptoms/illness:
 - **If an employee reports feeling ill at work or calls in sick**, employers may ask the employee questions about their symptoms to determine if they have or may have Covid-19. This information must be kept as confidential medical records in compliance with the ADA.⁵⁰
 - **If an employee does not have influenza symptoms**, employers may **not** ask employees whether they have a medical condition that the CDC says could make them especially vulnerable to Covid-19 complications. Employers should encourage all employees who are sick to stay home.⁵¹
- **New York State: adopted the EEOC’s guidance on ADA**
- **New York City: NYCHRL**

⁴⁴ 146 A.L.R. Fed. 1 (Originally published in 1998) (West).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 42 U.S.C.A. § 12111(10)(A-B).

⁴⁸ *EEOC: COVID-19 and the ADA*, *supra* note 29.

⁴⁹ Tracie DeFreitas, *The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19*, Job Accommodation Network (January 03, 2020), <https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>.

⁵⁰ Haralampu & Geraghty, *supra* note 42.

⁵¹ *Id.*

- New York City’s “**undue hardship**” standard is much more protective of employees than the federal standard and the NYSHRL.⁵²
- A Covid-19 infection (either confirmed or likely) qualifies as a disability under the NYCHRL.
- Employers covered under NYCHRL are required to engage in a cooperative dialogue to discuss the reasonable accommodation.⁵³
- Individuals do not need to request an accommodation to trigger the obligation.⁵⁴
- **Types of Reasonable Accommodations⁵⁵ - EEOC**
 - **Job restructuring**
 - **Leave of absence:** the requirement to provide unpaid leave as an accommodation applies even after an employee has exhausted all other leave.
 - **Modified or part-time schedule**
 - **Modified workplace policies:** this may include staggered schedules, additional equipment in the office including such as barriers between cubicles and protective gear, or daily temperature checks
 - **Reassignment**
 - **Teleworking/Remote Work:** employers should strongly consider requests for remote work even if after physical workplaces to open.
 - **Does not mean an elimination of any of the job’s essential functions**

Susceptibility to Covid-19 As a Disability and Telework as a Reasonable Accommodation:

- **Many employers are warming up to long-term telework⁵⁶ - Law360**
 - According to a **recent survey** of more than 1,000 employers:
 - **Work from home policies:**
 - More than 50% plan to be flexible with workers’ requests to work from home until the pandemic subsides
 - 30% said they plan to change policies to allow telework as long as employees have proven they can be productive
 - 13% said they will let employees in high-risk groups telework on a case-by-case-basis
 - 4% said they can’t grant remote work requests because their employees must work on-site
 - **Reopening timeline:** employers that aren’t already open are opening soon – making the need for safety plans all the more urgent
 - 24% within a month
 - 44% in 1-3 months

⁵² *Legal Enforcement Guidance on Discrimination on the Basis of Disability*, N.Y.C. COMMISSION ON HUMAN RIGHTS 18 (June 2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf [hereinafter *NYCCHR Disability Discrimination Guidance*].

⁵³ Local Law No. 59 § 1 (2018); N.Y.C. Admin. Code § 8-102.

⁵⁴ *NYCCHR Disability Discrimination Guidance*, *supra* note 58.

⁵⁵ U.S. EQUAL EMP. OPPORTUNITY COMM’N, GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#types> (*see* note 46, *Types of Reasonable Accommodations Related to Job Performance*).

⁵⁶ Braden Campbell, *As Virus Wanes, Employers Warm Up to Long-Term Telework*, LAW360 (June 2, 2020, 1:02 AM), <https://www.law360.com/corporate/articles/1278720>.

- 9% in 3-6 months
 - 1% in 6-9 months
 - 10% won't decide until the virus subsides or testing is widely available.
 - **Safety Plans:**
 - More than 80% will increase cleaning, limit employee contact in common areas, or provide face masks
 - 58% say they will do health screenings
 - 89% say they will conduct temperature checks
 - 72% said they will conduct "symptom screening"
 - Less than 10% say they will use antibody or other direct tests
 - **Employers' Legal Concerns** by level of concern: FMLA and leave laws, safety violations, workers' compensation, employee privacy
 - **Telework Takeaway:** employers would rather trust employees than spend valuable time doing time-consuming health screening when employees enter the building, increasing the risk of exposure, and disadvantaging employees who will still struggle to find childcare.
- **Guidance and Case Law: Teleworking as a Reasonable Accommodation**
 - **EEOC Guidance:** In 2003, the EEOC issued guidance on whether telework may be a reasonable accommodation under the ADA.⁵⁷
 - "[A]llowing an employee to work from home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense."⁵⁸
 - The process for determining whether a disabled employee needs to telework works the same way as any other reasonable accommodation request.
 - The employer may select "any" effective accommodation, even if it is not the one preferred by the employee, such as modifying the workplace or work schedules.
 - An employee may work at home only to the extent that their disability necessitates it.
 - **Legal Background:**
 - To state a claim for disability discrimination under the ADA, a plaintiff must properly allege that: "(1) the defendant is covered by the ADA; (2) plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA; (3) plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of [her] disability or perceived disability."⁵⁹
 - Discrimination in violation of the ADA includes not making a reasonable accommodation to a qualified individual with a disability.⁶⁰

⁵⁷ U.S. EQUAL EMP. OPPORTUNITY COMM'N, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003) <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>.

⁵⁸ *Id.*

⁵⁹ Kinneary v. City of N.Y., 601 F.3d 151, 155-56 (2d Cir. 2010).

⁶⁰ McBride v. BIC Consumer Prods. Mfg. Co., 583 F.2d 92, 96 (2d Cir. 2009) quoting 42 U.S.C. § 12112(b)(5)(A).

- **Frantti v. New York:** for a telework request to be reasonable, the plaintiff must show that either the essential functions of his job do not require him to be in the workplace, or that they can be completed while working from home.⁶⁸ If he **never actually asked** to work from home, the employer is not liable for failing to provide an accommodation that was never requested.⁶⁹
 - **Nixon-Tinkelman v. New York City Dept. of Health and Mental Hygiene:** assistance with commuting, such as telework or providing an employee with a car or parking permit, is a reasonable accommodation.⁷⁰
 - **Gronne v. Apple Bank For Sav.:** the commuting assistance an employer provides to a disabled employee need not be the employee’s stated preference to be transferred to another job location.⁷¹
- **What Issues Are Employers Facing Regarding the ADA and Covid-19?**
 - **Increased Risk**
 - Those with asthma, HIV, and other underlying conditions may be at increased risk.
 - Possible accommodations include: job restructuring, additional PPE, modified work schedules, physical barriers.
 - **Consider Other Discrimination Laws**
 - Do not inadvertently take adverse action based on a protected characteristic.
 - Example: Keeping older or pregnant employees from returning to the office.
 - **General Advice for Employers**
 - Request information from healthcare provider.
 - Tailor reasonable accommodation based on the job and working environment.
 - When in doubt, consider telework or changes to work schedule.
 - Other options include subsidizing transportation (though courts have generally held this is not required as a reasonable accommodation).

C. Leave Options Available

- **The Families First Coronavirus Response Act**
 - Emergency Paid Sick Leave Act (“EPSLA”), and
 - Emergency Family and Medical Leave Expansion Act (“Expanded FMLA” or “EFMLEA”)

⁶⁸ See *Frantti v. New York*, 414 F. Supp. 3d. 257, 287 (N.D.N.Y. 2019) (holding that an employee must do more than show that they asked an HR official about a modified work schedule and say after the fact he should have been allowed to work from home).

⁶⁹ See *Frantti v. New York*, 414 F. Supp. 3d. 257, 287, n. 8 (N.D.N.Y. 2019).

⁷⁰ See *Nixon-Tinkelman v. New York City Dept. of Health and Mental Hygiene*, 434 Fed. Appx. 17, (2d Cir. 2011) (holding that an employer may have an obligation to assist in an employee’s commute under the ADA and the Rehabilitation Act, including by allowing the employee to work from home or providing her with a car or parking permit).

⁷¹ See *Gronne v. Apple Bank For Sav.*, 1 Fed. Appx. 64 (2d Cir. 2001) (holding that the ADA does not require the employer to provide every accommodation that the disabled employee may request, so long as the accommodation requested is reasonable).

- **EPSLA**
 - Two weeks of paid sick leave
 - full time employees (up to 80 hours)
 - part time employees (equal to the number of hours they work on average in a 2 week period)
 - Six qualifying reasons for leave
- **Expanded FMLA or EFMLEA**
 - One additional qualifying reason for FMLA leave = Son or daughter whose school or child care provider is unavailable due to COVID-19
 - 12 weeks of job protected leave with continuation of health insurance from April 1, 2020 to December 31, 2020
 - First 2 weeks are not paid through EFMLEA,
 - the employee can use accrued PTO, vacation time, or sick days,
 - OR it can be combined with two weeks of EPSLA
 - remaining 10 weeks of leave paid at 2/3rd Employee's Regular Pay (Max \$200/day or \$10,000 total)
 - **Other Leave**
 - New York Emergency Paid Sick Leave
 - New York Emergency Paid Family Leave and Disability Benefits
 - New York City Earned Safe and Sick Time Act ("ESSTA")
 - Westchester County Earned Sick Time Leave Law
 - New York Paid Family Leave Law ("NYPFL")
 - New York Short Time Disability ("STD")
- **Interaction between Regular FMLA and Expanded FMLA: Pregnancy Example**
 - Expanded FMLA does not add weeks to regular FMLA.
 - For women who took all 12 weeks of regular FMLA for maternity leave in 2020 but before the pandemic, their expanded FMLA is exhausted and they only have 2 weeks of emergency paid sick leave (EPFLSA).
 - However, the FMLA expansion *could* help extend some women's maternity leave who haven't given birth yet this year. Examples:⁷²
 - (1) Pregnant women who have an older child or children whose daycare, school, or camp has closed because of the pandemic may be able to use the FMLA expansion to cover up to 10 weeks of partially-paid leave if they are unable to work as a result.
 - (2) Pregnant women whose partner or family member gets sick with Covid-19 may be able to use the FMLA expansion to cover up to 10 weeks of partially paid leave to help care for their family member.
- **NYS Paid Family Leave**
 - **New Paid Leave For Covid-19**⁷³
 - Paid leave is 60% of your average weekly wage, up to \$840.70/week.

⁷² *What you need to know about taking maternity leave during a global pandemic*, MOTHERLY, <https://www.mother.ly/work/maternity-leave-during-coronavirus-pandemic> (last visited June 4, 2020).

⁷³ *New York Paid Family Leave COVID-19: Frequently Asked Questions*, N.Y. STATE PAID FAMILY LEAVE, <https://paidfamilyleave.ny.gov/new-york-paid-family-leave-covid-19-faqs> (last visited June 4, 2020).

- If you are quarantined yourself under a mandatory or precautionary order by the state or local government (this is individualized, PAUSE does NOT count), leave is available. The benefit depends on the size of employer.⁷⁴
 - Paid Family Leave benefits can be taken simultaneously with Temporary Disability Insurance (“TDI”).
 - Employees can use these benefits when their Quarantine Leave benefits are exhausted.
- If your minor dependent child is quarantined by a state or local government-issued order, you can get leave.
- If an eligible family member contracts Covid-19, you can take NYSPFL Family Care, because Covid-19 is a serious health condition.
- **Standard NYS Paid Family Leave**
 - Employees can get up to ten weeks.⁷⁵
 - Family Care: covers caring for a qualifying relative who has a serious health condition (includes some underlying conditions that make people high-risk for Covid-19, such as asthma or diabetes)⁷⁶
- **NYS v. Federal:** the federal leave protections are stronger than NYS.
 - NYS Covid-19 leave only covers what is not covered once federal is used.
 - Covered employers: Federal is capped at 500 whereas NYS is everyone.

⁷⁴ *If You Are Quarantined Yourself*, N.Y. STATE PAID FAMILY LEAVE, <https://paidfamilyleave.ny.gov/if-you-are-quarantined-yourself> (last visited on June 4, 2020).

⁷⁵ *Benefits Schedule*, N.Y. STATE PAID FAMILY LEAVE, <https://paidfamilyleave.ny.gov/benefits> (last visited June 4, 2020).

⁷⁶ *Paid Family Leave for Family Care*, N.Y. STATE PAID FAMILY LEAVE, <https://paidfamilyleave.ny.gov/paid-family-leave-family-care> (last visited June 4, 2020).