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# Protecting the Rights of People with Disabilities

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**SUMMARY**. One in four Americans — a diverse group of 61 million people — experience some form of disability (Okoro, 2018). On average, people with disabilities experience significant disparities in education, employment, poverty, access to health care, food security, housing, transportation, and exposure to crime and domestic violence (Pendo & Iezzoni, 2019). Intersections with demographic characteristics such as race, ethnicity, gender, and LGBT status, may intensify certain inequities. For example, women with disability experience greater disparities in income, education, and employment (Nosek, 2016), and members of underserved racial and ethnic groups with disabilities experience greater disparities in health status and access to health care (Yee, et. al, 2016). These longstanding inequities are compounded by the COVID-19 pandemic and by governmental and private responses that discriminate on the basis of disability. Legal protections of people with disabilities are governed by two key federal laws: the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act ("Section 504" or "Rehabilitation Act"). Together, these laws ensure that people with disabilities have equal opportunities in employment, in state and local services and programs, and to goods and services. The broad reach of these laws impact a host of issues raised by the COVID-19 pandemic. Enforcing agencies have provided COVID-19-specific guidance on the application of the laws in health care and in employment. However, gaps in protections as well as widespread lack of knowledge of and noncompliance with the ADA and the Rehabilitation Act limit their impact. Recommendations include: continued enforcement of the laws; clear and current agency guidance on how to comply with the laws; education about the requirements of the laws, especially in health care settings; and improved data collection and reporting.

## The Americans with Disabilities Act

The ADA was enacted to address widespread discrimination against people with disabilities. The law provides a clear national mandate for eliminating discrimination and ensuring equal opportunities in all arenas of American life. It prohibits discrimination based on disability in employment (Title I), public programs, services, and activities (Title II), public transportation and places of public accommodations (businesses generally open to the public) (Title III), and telecommunications (Title IV). The ADA expands the protections of the Rehabilitation Act, an earlier federal statute that prohibits disability discrimination in federal employment and in programs and activities that receive federal financial assistance. The laws have similar requirements, and courts have used cases under the Rehabilitation Act to assist in interpreting the ADA.

The ADA has two features that distinguish it from other civil rights laws. First, only individuals with a disability as defined in the ADA are protected.

Congress amended the ADA in 2008 to clarify that the statutory definition of disability should be construed in favor of broad coverage of individuals. Disabilities are diverse, and can be physical, sensory, cognitive, intellectual or developmental. Mental health conditions, substance use disorder, and chronic illness can also be disabilities. Underlying health conditions that put individuals at greater risk of severe illness from COVID-19 such as lung disease, serious heart conditions, immune-suppressing conditions, and diabetes would be considered disabilities in virtually all cases. A longer-term or symptomatic case of COVID-19 would be considered a disability if has a substantial impact on a major life activity, such as breathing.

Second, beyond simply prohibiting disability-based discrimination, the ADA imposes an affirmative obligation to ensure that people with disabilities have equal opportunities. For example, Title I requires employers to provide reasonable accommodations, which are changes to the way a job is done or to the work environment that allow an employee to do their job. Under Title II, state and local governments make reasonable modifications to ensure

people with disabilities have an equal opportunity to participate in or receive the benefits of services, programs, or activities. Businesses must comply with similar requirements to ensure full and equal enjoyment of their goods and services under Title III. Reasonable modification might include, for example, an exception to a state, local, or retailer policy requiring masks for individuals with disabilities that make it difficult or inadvisable to wear masks (Pendo, et. al. 2020).

The ADA's broad reach means that it applies to a host of issues raised by the COVID-19 pandemic, many of which are addressed in other Chapters. This Chapter will focus on two critical areas that impact the diverse population of people with disabilities: access to health care and protections in the workplace.

## Health Care

### The Impact of COVID-19 on Disability Access to Health Care

People with disabilities are at higher risk for COVID-19 infection and serious disease because of pre-existing disparities in health status, access to health care, and other social determinants of health (Pendo & Iezzoni, 2019). They have higher rates of underlying health conditions (Garg, 2020) and are more likely to live in nursing homes and other congregate living situations (Okoro, 2018). People with disabilities may be less able to take protective measures against the spread of COVID-19. For example, some disabilities make it difficult or inadvisable to wear a mask, and reliance on direct care workers — many of whom do not have access to personal protective equipment — may preclude physical distancing (Drum, 2020). However, we do not have a clear national picture of the number of disability-related COVID-19 infections or deaths because that data is not consistently collected.

People with disabilities have well-founded concerns of discrimination and unequal treatment if they do seek health care services related to COVID-19, as research shows that people with disabilities experience significant disparities in health outcomes and access to health care (Pendo & Iezzoni, 2019). For example, in response to the burden placed on our health care system by COVID-19, states and health care facilities are developing medical scarce resource allocation policies to determine how to allocate critical health care resources when there is not enough capacity to treat all patients (see Chapter 24). Disability advocates and organizations have raised serious concerns about the impact of medical allocation policies that explicitly and implicitly exclude, disadvantage, or otherwise discriminate on the basis of disability. Concerns have also been raised regarding lack of effective communication with patients with disabilities (such as patients who are Deaf or hearing impaired) and hospital visitor policies that exclude direct care workers and others who provide needed assistance and support.

### Legal Response to Health Care Policies

The ADA prohibits exclusion of or discrimination against people with disabilities in health care in state policies and health care services offered by public hospitals (Title II), and in private physician's offices and private hospitals (Title III). Section 1557 of the Patient Protection and Affordable Care Act (ACA) amends the Rehabilitation Act to provide additional protections against discrimination in health care. These laws require: physical access to health care services and facilities, including accessible spaces and the removal of barriers; effective communication, including auxiliary aids and services such as the provision of sign language interpreters or materials in alternative formats; and reasonable modification of health care policies, practices, and procedures when necessary to accommodate individual needs.

**THE ADA PROTECTS INDIVIDUALS WHO HAVE:**

a) a physical or mental impairment that substantially limits one or more major life activities,

b) a record of such an impairment, or

c) are regarded as having such an impairment.

The U.S. Dept. of Justice (DOJ) is charged with the enforcement of Section 504 and Titles I, II, and III of the ADA. The U.S. Dept. of Health and Human Services (HHS) Office for Civil Rights (OCR) is also responsible for enforcing Title II of the ADA, the Rehabilitation Act, and Section 1557 of the ACA with respect to health care. These agencies issued regulations and guidance regarding the requirements of these laws in various health care settings prior to COVID-19, and OCR recently has provided specific guidance on the application of these laws to health care policies (Ctr. For Pub. Representation, 2020).

**Medical Scarce Resource Allocation Policies and Crisis Standards of Care Protocols.** On March 28, 2020, OCR issued a bulletin on the application of federal disability rights laws to medical scarce resource allocation policies (Ctr. For Pub. Representation, 2020). The bulletin reaffirms that these laws, like other civil rights laws, remain in effect during the pandemic. It also provides:

> ". . . [P]ersons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative "worth" based on the presence or absence of disabilities or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence."

The bulletin also emphasizes legal requirements including the obligation to ensure effective communication with individuals who are Deaf, hard of hearing, blind, have low vision, or have speech disabilities, and to make reasonable modifications to address the needs of individuals with disabilities.

As of July 1, OCR has resolved three complaints about medical scarce resource allocation policies, which provide specific guidance about what types of provisions constitute discrimination. One settlement, for example, was reached after Tennessee removed categorial exclusions based on disability or resource

intensity, consideration of long-term survivability, or reallocation of personal ventilators from its allocation plan, and added the requirement of reasonable modifications to assessment tools (such as Sequential Organ Failure Assessment scores) (Ctr. For Pub. Representation, 2020) (see Chapter 24).

**Hospital Visitor Policies.** OCR also resolved a complaint after Connecticut issued an executive order regarding non-visitation policies for short-term hospitals, outpatient clinics, and outpatient surgical facilities to ensure that people with disabilities are not denied reasonable access to needed support persons.

### Assessment

OCR has provided clear guidance that medical allocation and other policies that explicitly and implicitly exclude, disadvantage, or otherwise discriminate on the basis of disability violate federal nondiscrimination laws. A coalition of disability rights organizations published a document and evaluation framework that provides additional advice on how states, health care institutions, and health care providers can make reasonable modifications to policies and practices to avoid disability discrimination (Ctr. For Pub. Representation, 2020).

However, reports of disability bias and discrimination persist and there is evidence of widespread pre-existing lack of knowledge of and noncompliance with the ADA and the Rehabilitation Act in the health care setting (Pendo & Iezzoni, 2019). Lack of knowledge is complicated by misrepresentation of the law in other contexts. For example, some anti-mask activists encourage their followers to falsely represent themselves as disabled to avoid mask requirements. There are reports of official-looking flyers or identification cards with statements regarding the ADA and mask requirements. The DOJ issued a statement in response, COVID-19 ALERT: Fraudulent Face Mask Flyers, clarifying that the documents were not issued or endorsed by the Department.

Finally, we lack data related to COVID-19 testing, infections, and outcomes for people with disabilities. As with other disproportionately impacted groups, data is needed to assess risks for people with disabilities, to develop health protection measures, and to identify and address important disparities. There are data collection standards for disability status that could be used for federal, state, and local collection and reporting of COVID-19 data. The ACA already requires all federally conducted or supported health care and public health programs to collect data on disability status using, at a minimum, the six disability questions in the American Community Survey used to gauge disability among the U.S. population (Pendo & Iezzoni, 2019).

## Employment

### The Impact of COVID-19 on Workers with Disabilities

A disproportionate number of people with disabilities have lost jobs due to COVID-19, compounding pre-existing disparities in employment and economic security (Global Disability Inclusion, 2020). Workplaces are also impacted by new health and safety concerns, and many have instituted new workplace policies to reduce the risk of exposure. Some employer responses to COVID-19 greatly benefit the reported 30% of the workforce with a disability, such as flexible and remote work programs (Jain-Link & Kennedy, 2020). Other responses have the potential to disproportionately impact people with disabilities, such as COVID-19 screening and testing regimes that unnecessarily reveal disability-related information (such as the presence of underlying health conditions).

### Legal Guidance on Employment Practices and Policies

Title I of the ADA requires employers with 15 or more employees to avoid discrimination in terms, conditions, and privileges of employment, and to provide reasonable accommodation of qualified individuals with a disability within certain limits. It also limits the collection of medical and disability-related information in the workplace in order to reduce the potential for disability-based bias and discrimination. The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcement of Title I of the ADA, and has provided specific and current guidance on the application of the ADA in light of COVID-19 (EEOC, 2020).

**COVID-19 Screening and Testing.** The ADA limits medical exams and disability inquiries in the workplace to ensure people with disabilities are assessed on merit, rather than the presence or absence of disability, while protecting the rights of employers to make sure that employees can perform their jobs safely. The law creates three categories of medical inquiries and exams by employers. Before an offer is made, an employer is generally prohibited from asking disability-related questions or requiring medical exams. After an offer is made, the employer can request medical information and require exams as a condition of starting work as long as it does so for all entering employees in the same job category. During employment, an employer may request medical information and require exams that are "job-related and consistent with business necessity," for example where the employee may pose a "direct threat" (a significant risk of substantial harm to the health or safety of the employee or others, which cannot be eliminated or reduced by a reasonable accommodation).

According to the EEOC, screening and testing of employees for COVID-19 is permitted under the ADA because an employee with the virus poses a direct threat to health and safety (EEOC, 2020). Consistent with current CDC guidance, reliable and accurate testing measures such as taking temperatures, asking about symptoms, or testing employees for present infection with the virus that causes COVID-19 are permitted under the ADA. However, the CDC currently recommends against using tests for COVID-19 antibodies (evidence of past infection with the virus that causes COVID-19) to make decisions about returning employees to the workplace. Accordingly, antibody test requirements are not allowed under the ADA (EEOC, 2020).

Employers must maintain the confidentiality of any medical information they receive. Confidentiality requirements do not prevent employers from complying with directions from the CDC or other public health authorities. For example, an employer may disclose the name of an employee who has COVID-19 to a public health agency (but not to the workplace generally, or to the public absent consent from the infected individual) (EEOC, 2020).

**Reasonable Accommodations.** The ADA requires employers to provide reasonable accommodations that allow a disabled employee to do their job. Employers do not have to provide accommodations that pose an undue hardship (involving significant difficulty or expense) or a direct threat. For example, an employer can require an employee to stay home if the employee tests positive for COVID-19 or has COVID-19 symptoms. However, the employer should consider whether the direct threat can be minimized through a reasonable accommodation that allows the employee to stay on the job, such as working remotely. Employers must also consider reasonable accommodations for individuals who are at increased risk of COVID-19 due to underlying health conditions that meet the ADA definition of disability.

Employers are not required to provide ADA accommodations to employees without disabilities who are at increased risk of COVID-19 due to a reason other than disability (such as age or ordinary pregnancy) or to employees without disabilities who are related to someone at increased risk due to disability (such as a child with an underlying medical condition). Of course, an employer may choose to accommodate these workers (EEOC, 2020).

### Assessment

The EEOC has provided specific, regularly-updated guidance on the application of the ADA to the workplace in light of COVID-19. The EEOC's guidance has raised awareness of the ADA and its protections as non-essential businesses begin to reopen.

There is also evidence that employer attitudes toward remote working have shifted as a result of COVID-19. Prior to COVID-19, many employers and courts were reluctant to allow working remotely as a reasonable accommodation. Now, major employers report that they will continue to let employees work remotely after workplaces reopen.

However, there are significant gaps in the ADA's protections. Not all jobs can be done remotely, and not all employees who are at risk or have family members who are at risk are entitled to work remotely. Although some employers are accommodating more employees that required by the ADA, others are not. There is also confusion about the interaction of the ADA with other workplace laws and policies regarding leave.

# Recommendations for Action

## Federal government:

- OCR should continue to enforce and provide COVID-specific guidance on the requirements of the ADA, Rehabilitation Act, and Section 1557 for health care providers, institutions, and systems regarding medical allocation policies, hospital visitor policies, and other policies that impact care for people with disabilities.
- Congress should require HHS to collect and publicly report standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status using data collection standards for disability that have been developed under the ACA.
- The EEOC is providing clear, timely, and COVID-specific guidance on the requirements of the ADA in the workplace. The DOJ should provide similar guidance on the requirements of the ADA and Rehabilitation Act in COVID-related policies adopted by state, local, and retail and other business entities, including mask-wearing policies.

## State governments:

- State agencies should enforce and provide COVID-specific guidance on the requirements of state laws that prohibit discrimination based on disability.
- States should review and revise state and local policies related to COVID-19, including medical scarce resource allocation policies, hospital visitor policies, and mask-wearing policies, to ensure that they comply with requirements of federal disability rights law.
- Pursuant to federal direction or on their own initiative, states should require the collection and public reporting of standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status, using data collection standards for disability that have been developed under the ACA.
- States should adopt policies that encourage employers to allow all employees to work remotely where possible, regardless of disability.

## Local governments:

- Local governments should review and revise local policies related to COVID-19, including mask-wearing policies, to ensure that they comply with requirements of federal disability rights law.
- Pursuant to federal or state direction or on their own initiative, local governments should require the collection and public reporting of standardized data related to COVID-19 testing, infections, treatment, and outcomes including data disaggregated by disability status, using data collection standards for disability that have been developed under the ACA.
- Local governments should adopt policies that encourage employers to allow all employees to work remotely where possible, regardless of disability.

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