



COVID-19 and Job Applicants and Employees with Disabilities: Emerging Practices to Employ and Protect Workers

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INTRODUCTION

The coronavirus disease 2019 (COVID-19) pandemic imposes significant challenges to employers and employees. Employers must address a myriad of questions to facilitate the employment and health and safety of all job applicants and employees, including qualified individuals with disabilities. These include:

- What **strategies** can employers use to recruit, hire, and onboard new employees?
- What **information** may an employer request of an employee or job applicant? What steps must an employer take to maintain confidentiality of medical records?
- What **protocols** or practices may an employer adopt to prevent the transmission of COVID-19 in the workplace?
- Are there reasonable **accommodations**, including telework, that will ensure equal employment opportunities for individuals with disabilities that do not pose a direct threat to the health and safety of the individual or others?

How these questions are answered may concern job applicants and employees with disabilities because of the history of discrimination faced by this population and because working during the pandemic may pose unique challenges for individuals with disabilities. On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law. The ADA prohibits discrimination on the basis of disability by employers, including State and local governments, and in the provision of public accommodations. The Equal Employment Opportunity Commission (EEOC) adopted regulations implementing Title I of the ADA (employment) and recently issued sub-regulatory guidance specifically addressing the ADA and COVID-19. Other federal agencies, including the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the Department of Homeland Security's Federal Emergency Management Agency (FEMA) have issued additional guidance.



THE ADA AND COVID-19: INTERSECTING ISSUES

The ADA is relevant to the COVID-19 pandemic in at least three major ways:

- 1 It regulates covered employers' permissible disability-related inquiries and medical examinations for all applicants and employees.
- 2 It prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation) to themselves or others.
- 3 It requires reasonable accommodations for individuals with disabilities (absent [undue hardship](#)).

The purpose of this policy brief is to highlight emerging practices that employers may use as workers return to the workplace during and after the COVID-19 pandemic in ways that facilitate equal employment opportunity for qualified individuals with disabilities and protect the health and safety of all employees. The policy brief may be useful to a variety of audiences, including human resources (HR), equal employment opportunity (EEO), and diversity and inclusion (D&I) professionals, and companies' legal teams, so that all involved understand the different perspectives that should be considered.

Consistent with the sub-regulatory guidance issued by the EEOC, this policy brief recognizes that employers and employees should follow guidance from the CDC and state and local public health authorities on how best to slow the spread of COVID-19 and protect workers, customers, clients, and the general public. It also recognizes that the provisions of Title I of the ADA and the provisions of Title V of the Rehabilitation Act (which incorporate by reference or adopt the ADA Title I requirements) do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. To reiterate, the ADA (and the practices described in this policy brief) do not interfere with employers' ability to follow recommendations of the CDC or other public health authorities.

Employers should also remember that guidance from the CDC and state and local public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should follow the most current information on maintaining workplace health and safety.

Specific topics addressed in this policy brief concerning the COVID-19 pandemic and the ADA include:

- ✓ Interviewing job applicants, hiring, and onboarding new employees;
- ✓ Inquiries about medical conditions and medical exams administered to current employees;
- ✓ Confidentiality of information obtained from medical inquiries and examinations;
- ✓ Prevention of transmission to and among employees; and
- ✓ Reasonable accommodations, including telework.

The policy brief also includes a section describing the legal context and a section highlighting resources.



SCREENING JOB APPLICANTS AND HIRING AND ONBOARDING NEW EMPLOYEES

With respect to interviewing job applicants and hiring and onboarding new employees, practices that take into consideration the impact of COVID-19 and are consistent with the ADA include:

- Testing job applicants for COVID-19, including taking an applicants' temperature and screening for symptoms of COVID-19 after making a conditional offer of employment. This applies as long as the employer does so for all entering employees in the same type of job. (Note: the efficacy of temperature testing is limited, given that some people with COVID-19 do not have a fever).
- Delaying the start date of an applicant who has COVID-19 or symptoms associated with it.
- Withdrawing a job offer when the employer needs the applicant to start the job immediately, but the individual has COVID-19 or symptoms of it.



INQUIRIES ABOUT MEDICAL CONDITIONS AND MEDICAL EXAMS ADMINISTERED TO CURRENT EMPLOYEES

With respect to medical inquiries and medical exams administered to employees, practices that take into consideration the impact of COVID-19 and are consistent with the ADA include:

- Adopting COVID-19 screening protocols that are implemented consistent with advice from the CDC and public health authorities for a particular type of workplace regarding whether, when, or for whom testing or other screening is appropriate, including:
 - Medical inquiries and medical exams of all employees before they enter the workplace and/or periodically to determine if they have the virus or symptoms associated with the virus or if they have been tested for the virus (pose a direct threat to the health of others) or are at higher risk of developing complications from the virus (pose a direct threat to the health of self);
 - Medical inquiries only of a particular employee to determine if the individual has the virus or has had their temperature taken so long as the employer has a reasonable belief based on objective evidence that the individual might have the virus; and
 - Requiring information about employees returning to the workplace after visiting a specified location, whether for business or personal reasons.
- Asking employees, including employees who are absent from work or call in sick, if they are experiencing symptoms of COVID-19 (e.g., fever, chills, cough, shortness of breath, sore throat, gastrointestinal problems such as nausea, new loss of smell or taste, or other symptoms identified by CDC and public health officials).
- Measuring employees' body temperature. (Note: employers should be aware that some people with COVID-19 do not have a fever).
- Administering valid and reliable COVID-19 tests to employees before they re-enter the workplace to determine if they have the virus. (Note: accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later).
- Not using antibody tests to make decisions about allowing persons to return to or enter the workplace.



CONFIDENTIALITY OF INFORMATION OBTAINED FROM MEDICAL INQUIRIES AND EXAMINATIONS

With respect to maintaining the confidentiality of inquiries and medical information obtained, practices adopted by employers that take into consideration the impact of COVID-19 and are consistent with the ADA include:

- Maintaining all information about an employee's illness related to COVID-19 as a confidential medical record. This includes results of daily temperature checks. It also includes an employee's statement that he or she has the disease or suspects that he or she has the disease, or the employer's notes or other documentation from questioning an employee about symptoms. The fact that information related to COVID-19 is considered medical information does not:
 - Prevent the manager from reporting to appropriate employer officials so that they can take action consistent with guidance from CDC and other public health authorities; and

- o Interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact so the employer can notify those whom may have come into contact with the employee, without revealing the employee's identity.
- Storing all medical information about a particular employee separately from the employee's personnel record, thus limiting access to this confidential information.
- Disclosing that an employee is teleworking or on leave so long as the employer does not disclose the reason the employee is teleworking or taking leave.
- Disclosing the name of an employee to a public health agency when it learns that the employee has COVID-19.



PREVENTION OF TRANSMISSION

In order to prevent the transmission of COVID-19, practices that take into consideration the impact of COVID-19 and are consistent with the ADA include employers requiring employees to:

- Wear gear such as cloth face coverings and gloves;
- Observe infection control practices (such as social distancing, regular handwashing, coughing and sneezing etiquette, proper tissue uses and disposal, and other measures) in the workplace;
- Leave the workplace if they become ill with symptoms of COVID-19; and
- Stay at home if they have symptoms of the COVID-19.

If an employer is concerned about an employee's health being jeopardized upon returning to the workplace because of a pre-existing condition identified on a CDC list of conditions that pose a significant "higher risk for severe illness" from getting COVID-19, the employer may not exclude the employee or take adverse action solely because the employee has a disability included on the CDC list. The determination must be an individualized assessment based on the factors in the EEOC regulations for determining a direct threat to the health or safety to self or others and include a determination of whether a reasonable accommodation (absent undue hardship) will reduce or eliminate the direct threat to the employee.

Employers may require employees returning to the workplace to provide a physician's note certifying fitness for duty and, alternatively, may use new approaches such as reliance on local clinics to provide a form, stamp, or email to certify that an individual did not have the virus when tested.



REASONABLE ACCOMMODATIONS

A "**reasonable accommodation**" is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment. Examples of reasonable accommodations include:

- Effective communication;
- Physical accessibility;
- Job restructuring;

- Part-time or modified work schedules;
- Telework; and
- Reassignment to a vacant position.

Employees with disabilities may request telework as a reasonable accommodation, even if the employer does not have a policy allowing it for other employees.

Generally, the ADA requires employers to provide reasonable accommodations for known limitations of job applicants and employees with disabilities, absent an undue hardship. An accommodation poses an “undue hardship” if it results in “significant difficulty” or “significant expense” for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business.-

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:

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- 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.

An employer may consider whether current circumstances create “significant expense” in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, the following are relevant considerations:

- The sudden loss of some or all of an employer’s income stream because of the COVID-19 pandemic.
- 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).

If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.



REASONABLE ACCOMMODATIONS AND COVID-19

In fulfilling their obligation to provide reasonable accommodations (absent undue hardship) to their employees, employers may adopt the following practices that take into consideration the impact of COVID-19 and are consistent with the ADA:

- Offer protection to an individual whose disability puts the individual at greater risk from COVID-19 and who requests such actions to eliminate possible exposure (changes to the work environment such as designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum distances between coworkers and customers, whenever feasible).

- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship.
- Discuss with an employee whether the same or a different disability is the basis for a new request and why additional or altered accommodation is needed.
- As with any accommodation request, an employer may:
 - Ask questions to determine whether the condition is a disability (if the disability is not obvious or already known);
 - During the interactive process discuss with the employee how the requested accommodation would be of assistance and enable him or her to keep working;
 - Explore alternative accommodations that may effectively meet his or her needs; and
 - Ask questions or seek medical documentation, if needed.
- More specifically, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation (if not obvious or already known). Possible questions for the employee may include:
 - How the disability creates a limitation;
 - How the requested accommodation will effectively address the limitation;
 - Whether another form of accommodation could effectively address the issue; and
 - How the proposed accommodation will enable the employee to continue performing the "essential" functions of his or her position (i.e., the fundamental job duties).
- If there is some urgency in providing an accommodation or the employer has limited time available to discuss the request during the pandemic, the employer may forego or shorten the exchange of information and grant a request or opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of more comprehensive medical documentation. Employees may request an extension that an employer should consider, particularly if government restrictions are extended or new ones adopted.
- For jobs performed at the workplace, the following are examples of reasonable accommodations, including for those who request protection due to a pre-existing disability that poses a higher risk from COVID-19, include:
 - Designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum distances between coworkers whenever feasible per CDC guidance;
 - Temporary job restructuring, including modifying a work schedule or shift assignment;
 - Temporary transfers to a different position;
 - Moving the location where one performs work;
 - Providing effective communication access;
 - Providing physical accessibility; and
 - Eliminating or substituting particular "marginal" functions.
- For jobs requiring employees to wear protective gear, if an employee asks for an accommodation due to a need for modified protective gear, discuss the request and provide the modification or an alternative if feasible (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs).



TELEWORK AS A FORM OF REASONABLE ACCOMMODATION

In response to the COVID-19 pandemic, many employers are adopting or updating their employment policies and practices to include teleworking for their employees, including employees with disabilities. In fulfilling their obligation to provide reasonable accommodations (absent undue hardship) to their employees, employers may adopt the following telework practices that take into consideration the impact of COVID-19 and are consistent with the ADA:

The information contained in this policy brief is for general guidance on matters of interest. The application and impact of laws and regulations can vary widely based on the specific facts involved including location. Accordingly, the information in this policy brief is provided with the understanding that EARN is not engaged in rendering legal advice and services. As such, it should not be used as a substitute for professional legal advice.

- When an employer requires some or all its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework:
 - The employer and employee should discuss what the employee needs and why and whether the same or a different accommodation could suffice in the home setting; and
 - Employers and employees should be creative and flexible about what can be done when an employee needs a reasonable accommodation to work at home, recognizing that interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.
- Assuming 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, the employer may, but does not have to automatically grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA accommodation:
 - The employer is entitled to understand the disability-related limitation that necessitates the accommodation.
 - 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.
- For employees with disabilities whose preexisting condition places them at high risk of complications from COVID-19, telework may be considered a reasonable accommodation that reduces their chances of infection.
- For those employees who are teleworking and are not physically interacting with coworkers or others (e.g., customers), the employer generally would not be permitted to ask if they have COVID-19 or symptoms associated with COVID-19.



LEGAL CONTEXT

This section of the policy brief provides a description of the legal context related to the adoption of emerging practices for responding to the COVID-19 pandemic when individuals return to the workplace, consistent with the ADA and EEOC regulations and sub-regulatory guidance and guidance provided by other federal agencies such as CDC and FEMA. This context aligns to the three intersecting issues of disability-related inquiries and medical examinations, direct threat, and reasonable accommodations.

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DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances, as set forth below.

An inquiry is “disability-related” if it is likely to elicit information about a disability. For example, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS. By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.

A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.

The ADA regulates disability-related inquiries and medical examinations in the following ways:

- **Before a conditional offer of employment:** The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made.
- **After a conditional offer of employment, but before an individual begins working:** The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations.
- **During employment:** The ADA prohibits a covered employer from making disability-related inquiries or medical examinations of employees unless such inquiries are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:
 - o An employee’s ability to perform essential job functions will be impaired by a medical condition; or
 - o An employee will pose a direct threat due to a medical condition.

This reasonable belief must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination.

All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept **confidential**. Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and government officials investigating compliance shall be provided relevant information on request.



DIRECT THREAT

A “**direct threat**” is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. If an individual with a disability poses a direct threat despite reasonable accommodation, an employer may justify action taken against that individual.

A direct threat assessment cannot be based solely on the condition being on the CDC’s list identifying individuals at “higher risk for severe illness” if they contract COVID-19. Assessments of whether an employee poses a direct threat in the workplace must be individualized and based on objective information, not on subjective perceptions or irrational fears about a specific disability or disabilities. The EEOC’s regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area, the employee’s own health (for example, is the employee’s disability well-controlled), and his or her particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard, i.e., a significant risk of substantial harm would be posed by having an individual with COVID-19, or symptoms of it, present in the workplace.

CDC guidance recognizes that disability alone may not be related to higher risk for contracting COVID-19 or having severe illness. Most people with disabilities are not inherently at higher risk for becoming infected with or having severe illness from COVID-19. However, people with certain disabilities might be at a higher risk of infection or severe illness because of their underlying medical conditions. According to the CDC, all people seem to be at higher risk of severe illness from COVID-19 if they have serious underlying chronic medical conditions like chronic lung disease, a serious heart condition, or a weakened immune system.

FEDERAL RESOURCES

Equal Employment Opportunity Commission (EEOC) Regulations and Guidance

- [EEOC Regulations Implementing Title I of the ADA](#) [29 CFR part 1630] (1991)
- [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Updated September 8, 2020)
- [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#) (Updated March 21, 2020, in response to the COVID-19 pandemic)
- [EEOC Coronavirus and COVID-19 Webpage](#)
- [Work at Home/Telework as a Reasonable Accommodation](#) (2005)
- Enforcement Guidance: [Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#) (2002)
- Enforcement Guidance: [Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act](#) (2000)
- ADA Enforcement Guidance: [Preemployment Disability-Related Questions and Medical Examinations](#) (1995)

Centers for Disease Control and Prevention (CDC) Information

- [Coronavirus Disease 2019 \(COVID-19\) and People with Disabilities Webpage](#)
- [People Who Need to Take Extra Precautions](#)
- [Employers with Workers at High Risk](#)
- [Toolkit for Businesses and Workplaces](#)
- [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019](#)
- [Coronavirus Disease 2019 Guidance Documents](#)
- [Returning to Work](#)

Department of Labor (DOL) Guidance and Information

- Workplace Safety: The Occupational Safety and Health Administration (OSHA) has resources to help employers and workers prepare for and respond to coronavirus in the workplace.
 - o [OSHA Guidance on Preparing Workplaces for COVID-19](#) – This guidance was developed in collaboration with the U.S. Department of Health and Human Services to help employers respond in the event of coronavirus in the workplace.
 - o [Temporary OSHA Guidance on Respiratory Protection Standard](#) – This guidance provides suggestions and options to help increase the availability of N95 filtering facepiece respirators for healthcare providers.
 - o [COVID-19 Webpage](#) – This guidance provides infection prevention information specifically for employers and workers.
- Wages, Hours, and Leave: DOL offers [information](#) on common issues employers and workers face when responding to COVID-19, including the effects on wages and hours worked under the Fair Labor Standards Act (FLSA) and job-protected leave under the Family and Medical Leave Act (FMLA).

U.S. Food and Drug Administration (FDA) Guidance

The FDA has issued [guidance](#) on COVID-19 diagnostic testing about what may or may not be considered safe and accurate testing. In addition, FDA has issued:

- [FAQs on Testing for SARS-CoV-2](#)
- [Policy for Coronavirus Disease-2019 Tests During the Public Health Emergency \(Revised\)](#)

U.S. Department of Homeland Security, Federal Emergency Management Agency (FEMA) Guidance

- [Ensuring Civil Rights During the COVID-19 Response](#)

ADDITIONAL RESOURCES

Job Accommodation Network (JAN)

- JAN's [Coronavirus Disease 2019 \(COVID-19\)](#) webpage highlights strategies that employers covered by the ADA should keep in mind when dealing with communicable diseases such as COVID-19 in the workplace.
- JAN published a blog post "[Accommodation Strategies for Returning to Work During the COVID-19 Pandemic](#)" which offers general strategies for accommodating employees with disabilities to return to work during the COVID-19 pandemic.
- The ADA and Reasonable Accommodations: JAN's blog post, "[The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19](#)" addresses topics such as employer requirements around providing reasonable accommodations under the ADA in response to the pandemic coronavirus situation; who can receive reasonable accommodations under the ADA; and disability-related documentation for accommodation requests related to reducing risk of exposure to the coronavirus.
- Stress and Mental Health Conditions: JAN's blog post, "[Coronavirus \(COVID-19\), Stress, and Mental Health Conditions](#)," regarding temporary accommodations that may help all employees who are feeling increased stress and facing personal difficulties at this time, and provides information on the ADA and the coronavirus, and accommodation compliance.

Articles by JAN concerning COVID-19 and reasonable accommodations include:

- [Engaging in the Interactive Process During the COVID-19 Pandemic](#)
- [Masks for COVID-19 Management & ADA Accommodations](#)
- [Teleconference Accessibility and Hearing - Keeping Deaf and Hard of Hearing Employees in the Loop](#)

Employer Assistance and Resource Network on Disability Inclusion (EARN)

- EARN's [March/April Newsletter Special Edition on COVID-19](#) provides resources that can assist employers and others in understanding the intersection between the pandemic and disability employment policies and practices.
- On April 1, 2020, EARN hosted a webinar on "[The ADA at Work: Considerations for COVID-19](#)" to discuss balancing guidance on COVID-19 containment from CDC with EEOC guidance on the ADA. Guest experts from two regional ADA Centers presented on the implications of the pandemic on disability-related inquiries, medical examinations, and interpreting direct threat. Reasonable accommodations for telework, requests for which have spiked due to the required social distancing period, was also discussed.

Partnership on Employment and Accessible Technology (PEAT)

- PEAT has developed an online toolkit about [Telework and Accessibility](#), which highlights resources to help equip employers with the information needed to ensure the digital workplace is accessible to everyone, including people with disabilities.