

New Guidance Issued by the EEOC: What Employers Need to Know About the ADA and the COVID-19 Pandemic

EEO laws still apply during a public health crisis, such as the current COVID-19 pandemic. Several years ago, following the H1N1 pandemic, the EEOC issued guidance titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" to assist employers with ADA compliance in preparation for, during and after a pandemic. The EEOC has now updated this guidance to assist employers with managing the impact of COVID-19 in the workplace.

The EEOC makes clear that the ADA does not interfere with employers following advice from the Centers for Disease Control and other public health authorities on appropriate steps to take relating to the workplace. Because disability-related inquiries and medical examinations implicate the interplay among ADA requirements, new federal laws, and CDC recommendations, the EEOC has issued new guidance. This guidance serves to help answer questions that employers may have as they continue to operate during the pandemic or are planning for re-opening in the future.

DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMS DURING A TIME OF DIRECT THREAT

First, it is important to remember that the ADA prohibits "disability-related inquiries" and requiring "medical examinations" except in limited circumstances. Disability-related inquiries and medical exams are governed by the ADA in the pre-employment phase as well as during employment. The ADA prohibits employee disability-related inquiries or medical examinations unless they are "job-related and consistent with business necessity." Generally, a disability-related inquiry or medical exam of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) An employee's ability to perform essential job functions will be impaired by a medical condition; or (2) An employee will pose a direct threat due to a medical condition. 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, he or she is not protected by the nondiscrimination provisions of the ADA.

The EEOC has explained that if the CDC or state or local authorities determine that a disease is more severe than seasonal influenza, then it may be a direct threat. This determination would provide objective evidence needed to justify disability-related inquiries and medical examinations. The EEOC acknowledges that as of March 2020, COVID-19 meets the direct threat standard.

HOW CAN EMPLOYERS MAINTAIN ADA COMPLIANCE DURING A PANDEMIC?

The new EEOC Guidance is specific to the COVID-19 pandemic and addresses the questions posed below.

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

Yes. The CDC states that employees who become ill with influenza-like symptoms at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related prohibited action if the illness is akin to seasonal influenza or the 2009 H1N1 virus. Additionally, the action would be permitted under the ADA if the illness was severe enough to pose a direct threat.

Applying this principle to current CDC guidelines on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms of it.

During a pandemic, how much information may an ADA-covered employer request from employees

04.24.20

who report feeling ill at work or who call out sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever, chills, cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Applying this principle to current CDC guidelines on COVID-19, employers may ask employees who report feeling ill at work, or who call out sick, questions about their symptoms to determine if they have or may have COVID-19. Currently, these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

However, employers should be aware that some people with influenza, including the 2009 H1N1 virus or COVID-19, do not exhibit a fever.

Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and have issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding the information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.

During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC states could make them especially vulnerable to influenza complications?

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in 2009, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees, including those who may be at increased risk of developing complications.

If an employee voluntarily discloses (without a disability-related inquiry) that he or she has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer

must keep this information confidential. The employer may ask the employee to describe the type of assistance the employee thinks will be needed (e.g., telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications.

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he or she had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify reasonable alternative accommodations.

The rapid spread of COVID-19 has disrupted regular work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in a delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

HIRING EMPLOYEES DURING COVID-19 PANDEMIC

If an employer is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA regulation allowing post-conditional offer medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

04.24.20



May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

Yes. Medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not exhibit a fever.

May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidelines, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

The CDC has issued guidelines applicable to all workplaces generally but also has issued more specific guidelines for particular types of workplaces (e.g., health care workers). Guidelines from public health authorities will change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current guidelines on maintaining workplace safety.

May an employer withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it?

Based on current CDC guidelines, this individual cannot safely enter the workplace, and therefore, the employer may withdraw the job offer.

Comment: It can be overwhelming for an employer to ensure compliance with the ADA and while also following the latest CDC guidelines and maintaining day-to-day business operations. Many different challenges will continue to present themselves as the pandemic continues, and as stay-at-home orders may be modified or lifted. We will keep you informed of updates in the EEOC Guidance, as well as any new laws or regulations that impact employers.