



EEOC Addresses Right of Employers to Require Periodic COVID-19 Testing and Other Issues

Please contact our
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with any questions you may have.

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As the pandemic continues to evolve, the EEOC has been providing updates addressing new questions that have arisen concerning Equal Employment Opportunity (EEO) laws. Those laws include the Americans with Disabilities Act (ADA) and the Rehabilitation Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA) and the Genetic Information Nondiscrimination Act. The EEOC's COVID-19 updates may be found on their website located [HERE](#).

The most recent update issued by the EEOC provided that employers are permitted to require employees to undergo periodic COVID-19 testing to ensure the continued safety of the overall workforce. Below are questions discussed by the EEOC, along with abbreviated answers, concerning what employers may and may not do with regard to COVID-19 while still complying with EEO laws.

Disability-Related Inquiries and Medical Exams

Generally, the ADA restricts the timing of and extent to which employers, or potential employers, may ask medical questions or require physical examinations of employees. During the COVID-19 pandemic, several employer options have been provided that, ordinarily, might not be deemed permissible.

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

Employers may ask employees if they are experiencing symptoms of COVID-19, including fever, chills, cough, shortness of breath or sore throat. Information collected about employees must remain confidential.

When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19?

Employers should follow guidance provided by the CDC, public health authorities and reputable medical sources in determining what symptom-related questions will be asked of employees. Currently, symptoms in addition those mentioned above may include a new loss of smell or taste and gastrointestinal problems such as nausea, diarrhea and vomiting.

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

Employers are permitted to take employee temperature. This may be done once upon initial return to work or more often.

Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

Yes.

When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty?

Yes.

May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?

Employers may require COVID-19 testing initially before permitting employees to return to work and periodically in order to protect the overall workforce. Employers should make sure that the tests are accurate and reliable. In addition, employers should continue to require that employees follow infection control procedures such as physical distancing and regular hand washing.

CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace?

Currently, employers may not require antibody testing because such test does not meet the ADA requirement that a medical exam or inquiry for current employees be "job related and consistent with business necessity."

May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19?

Yes.

May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing?

Under the ADA, an employer may do this as long as the employer has a "reasonable belief based on objective evidence" that the person may have COVID-19, such as a display of COVID-19 symptoms.

May an employer ask an employee why he or she has been absent from work?

Yes.

May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?

No. The EEOC stated as follows:

The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19?

Currently, an employer may bar an employee from the workplace if the employee refuses to have his or her temperature taken or refuses to answer questions about whether he or she has COVID-19, has symptoms of COVID-19, or has been tested for COVID-19.

During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick?

Yes.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled?

No.

Confidentiality of Medical Information

Maintaining the confidentiality of employee information is still a requirement during the COVID-19 pandemic. Responses to health-related questions, information about an employee's diagnosis or treatment and the fact that an individual has requested or is receiving a reasonable accommodation all fall within the confidentiality requirement.

May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information?

Medical information about employees must be stored and maintained separate from an employee's personnel file.

If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?

Yes.

May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?

Yes.

May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19?

Yes.

Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do?

Medical information should be kept confidential; however, supervisors and managers may report information that an employee has symptoms of or was diagnosed with COVID-19 to appropriate employer officials.

An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor?

No.

An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why?

Yes.

Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely?

In response to this question, the EEOC stated:

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means

that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

Hiring and Onboarding

Generally, prior to making a conditional job offer, disability-related inquiries and medical exams are prohibited. They are permitted, however, between the time of the offer and date the applicant begins work, provided everyone within the same job category is subjected to the same inquiries or exams.

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

Yes.

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

Yes.

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

Yes.

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?

Yes, based on current CDC guidance.

May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?

No.

Reasonable Accommodation

Reasonable accommodations are required to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless doing so would pose an undue hardship, meaning "significant difficulty or expense."

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

Reasonable accommodations may offer protection for an individual with a disability that puts him or her at a greater risk from severe illness which might result from COVID-19. Such accommodations may be required under the ADA, even if the same is only offered on a temporary basis, so long as it does not cause an undue hardship on the employer.

If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?

Perhaps. Employers must conduct inquiries to determine whether the condition, in conjunction with the COVID-19 pandemic, is sufficient to require an accommodation.

In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?

Not necessarily.

What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?

Employees already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship on the employer.

During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability?

Yes, if the condition is not obvious or already known.

During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?

Yes, if it is not obvious or already known.

If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?

Yes.

May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace?

Yes.

Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

Yes. Employers do not have to provide a reasonable accommodation if doing so poses an undue hardship, which means significant difficulty or expense.

What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant difficulty” during the COVID-19 pandemic?

The answer to this question depends on the particular job and workplace involved.

What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant expense” during the COVID-19 pandemic?

An employer’s overall budget and resources may be considered, including a sudden loss of some or all of an employer’s income stream due to the COVID-19 pandemic. The amount of discretionary funds available to an employer should also be considered.

Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as “critical infrastructure workers” or “essential critical workers” by the CDC?

Yes.

Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?

No.

When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace?

The answer to this question may vary based on the facts of a particular situation.

Assume 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, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation?

No.

Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request?

The temporary teleworking experience could be relevant to whether continued teleworking would be considered a reasonable accommodation going forward. The employee and the employer are encouraged to engage in an interactive process to determine whether it will be allowed.

Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

Employers should clearly communicate to the workforce that fear of COVID-19 should not be misdirected against particular individuals because of a protected characteristic, including their national origin, race, or another prohibited basis.

Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace?

Yes. Employers should remind all employees that it is against federal equal employment laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability or genetic information. All allegations of harassment or discrimination should be reviewed and appropriate action should be taken immediately.

An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take?

The employer should follow the same procedures as if the employee was in the workplace.

How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian?

Employers should be aware of the potential for employees who are or are perceived to be of Chinese or other Asian national origin to be subjected to harassment. Managers should be aware of their legal obligations and be instructed to identify and resolve potential problems quickly. Employees should be reminded that such harassment is prohibited.

Furloughs and Layoffs

Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs?

Special rules apply whenever an employer offers employees severance packages in exchange for a general release of all discrimination claims. The EEOC's technical assistance document on severance agreements, which may be found [HERE](#), should be followed.

What are additional EEO considerations in planning furloughs or layoffs?

Equal employment laws prohibit covered employers from selecting employees for furlough or layoff because of race, color, religion, national origin, sex, age, disability, protected genetic information or in retaliation for protected equal employment opportunity activity.

Return to Work

As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?

Employers are permitted to make disability-related inquiries and conduct medical exams if the same is job-related and consistent with business necessity. Medical inquiries and reliable medical exams meet the standard if they are necessary to exclude employees who have a medical condition that would pose a direct threat to health or safety of others.

An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?

Employers may require employees to wear personal protective equipment and to observe infection control practices. If an individual with a disability needs a related reasonable accommodation under the ADA or a religious accommodation under Title VII, the employer should discuss the request and provide the modification, or an alternative, if the same is feasible and will not pose an undue hardship on the employer.

What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19?

The employee or a third party must let the employer know that a change is needed for a reason related to a medical condition. Accommodations may be requested verbally or in writing. The term “reasonable accommodation” may or may not be used.

The CDC identifies a number of medical conditions that might place individuals at “higher risk for severe illness” if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation?

If an employee does not request a reasonable accommodation, the ADA does not require an employer to take action to provide the same. Employers may not, however, exclude or take any other adverse action against an employee solely because the employee has a disability that potentially places him or her at “higher risk for severe illness” if he or she gets COVID-19. Under the ADA, such an action is not allowed unless an employee’s disability poses a “direct threat” to his or her health that cannot be eliminated or reduced by a reasonable accommodation.

What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self?

Accommodations may include any number of options, including, but not limited to, enhanced protective equipment and/or measures. Eliminating or substituting some less critical or incidental job duties or a modification of work schedules or locations are also options.

As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements?

Yes. Employers may provide information to all employees about who to contact and the process for requesting accommodation for a disability that may be needed upon return to the workplace, even if no date has been set for such return.

What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition?

Such a request would be considered a request for reasonable accommodation, and an employer should proceed accordingly.

Age

The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws?

The ADEA prohibits employment discrimination against individuals age 40 and older. An individual may not be involuntarily excluded from the workplace based on his or her being 65 or older, even if the employer's actions were taken to protect the employee due to higher risk of severe illness from COVID-19.

If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age?

No.

Caregivers/Family Responsibilities

If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

Employers may provide employment flexibilities as long as employees are not treated differently based on sex or other equal employment opportunity-protected characteristics. For example, under Title VII, females may not be given more flexibilities than males because of gender-based assumptions about who may have greater caretaking responsibilities for children.

Pregnancy

Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy?

No, as that would constitute sex discrimination prohibited by Title VII.

Is there a right to accommodation based on pregnancy during the pandemic?

The ADA would require an accommodation if a pregnancy-related medical condition rises to the level of a disability, even though pregnancy by itself does not. In addition, Title VII as amended by the Pregnancy Discrimination Act, specifically provides that women affected by pregnancy, childbirth, and related medical conditions must be treated the same as other employees who are similar in their ability or inability to work. Accordingly, pregnant employees may be entitled to job modifications which may include teleworking, altered work schedules or assignments and leave to the extent provided for employees who are similar in their ability or inability to work.

Conclusion

As more evidence becomes available and additional work situations are encountered by employers, additional guidance will be issued by the EEOC. We will continue to monitor the status of the same and provide updates as they occur. If you have any employment-related question or issue, please let us know. We will be happy to assist.

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