

Revised Guidance on What Employers Should Know About COVID-19 and the ADA and Rehabilitation Act

On April 23, 2020, the Equal Employment Opportunity Commission (EEOC) provided revised guidance regarding employers' obligations with respect to anti-discrimination laws, amid the challenges posed at the workplace and to the workforce by the COVID-19 pandemic. While this guidance may not provide answers for every situation, it highlights issues employers will have to consider before making decisions that affect their employees.

Disability-Related Inquiries and Medical Exams

- During a pandemic, employers subject to the Americans with Disabilities Act (ADA) may ask their employees if they are experiencing symptoms of the COVID-19 whenever employees call out sick. These symptoms now include fever, chills, cough, shortness of breath or sore throat.
- Employers may measure employees' body temperature, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.
- When employees return to work, the ADA allows employers to require a doctor's note certifying fitness for duty.
- Employers may choose to administer COVID-19 diagnostic testing to employees before they enter the workplace to determine if they have the virus because an individual with the virus will pose a direct threat to the health of others.

Confidentiality of Medical Information

- An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease or the employer's notes or other documentation from questioning an employee about symptoms of COVID-19.
- An employer who requires employees to undergo a daily temperature check before entering the workplace may maintain a log of the results, but the log must remain confidential.
- An employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19.
- A temporary staffing agency or a contractor that places an employee in an employer's workplace may notify the employer if it learns the employee has COVID-19 and, in doing so, disclose the name of the employee.

Hiring and Onboarding

- An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all entering employees in the same type of job.
- An employer may take an applicant's temperature as part of a post-offer, pre-employment medical exam (any medical exams are permitted after an employer has made a conditional offer of employment).
- An employer may delay the start date of an employee or withdraw a job offer when it needs the employee to start immediately, if the employee has COVID-19 or associated symptoms associated. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- An employer may not postpone the start date or withdraw a job offer because the individual is in a category that places them at higher risk of contracting COVID-19. However, an employer may choose to allow such an employee to telework or discuss with such employees if they would like to postpone their start date.

Reasonable Accommodation

- The ADA and the Rehabilitation Act apply to applicants and/or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act or other equal employment opportunity laws. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the employee is an individual with a disability and whether a reasonable accommodation can be provided without undue hardship to the employer.

Return to Work

- As government stay-at-home orders and other restrictions are modified or lifted in your area, employers may screen employees for COVID-19 when entering the workplace as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. Employers should make sure to not engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.
- An employer may require employees to wear protective gear (e.g., masks and gloves) and observe infection control practices (e.g., regular hand washing and physical distancing protocols). However, where an employee with a disability needs a related reasonable accommodation under the ADA (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) or a religious accommodation under Title VII (such as modified equipment due to religious attire), the employer should discuss the request and provide the modification or an alternative, if feasible, if doing so would not create an undue hardship for the employer's business operations under the ADA or Title VII.

If you wish to further discuss these updates or have any questions, please contact Swift Currie attorneys:

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The foregoing is not intended to be a comprehensive analysis of the full effect of these changes. Nothing in this notice should be construed as legal advice. This document is intended only to notify our clients and other interested parties about important recent developments. Every effort has been made to ascertain the accuracy of the information contained within this notice.