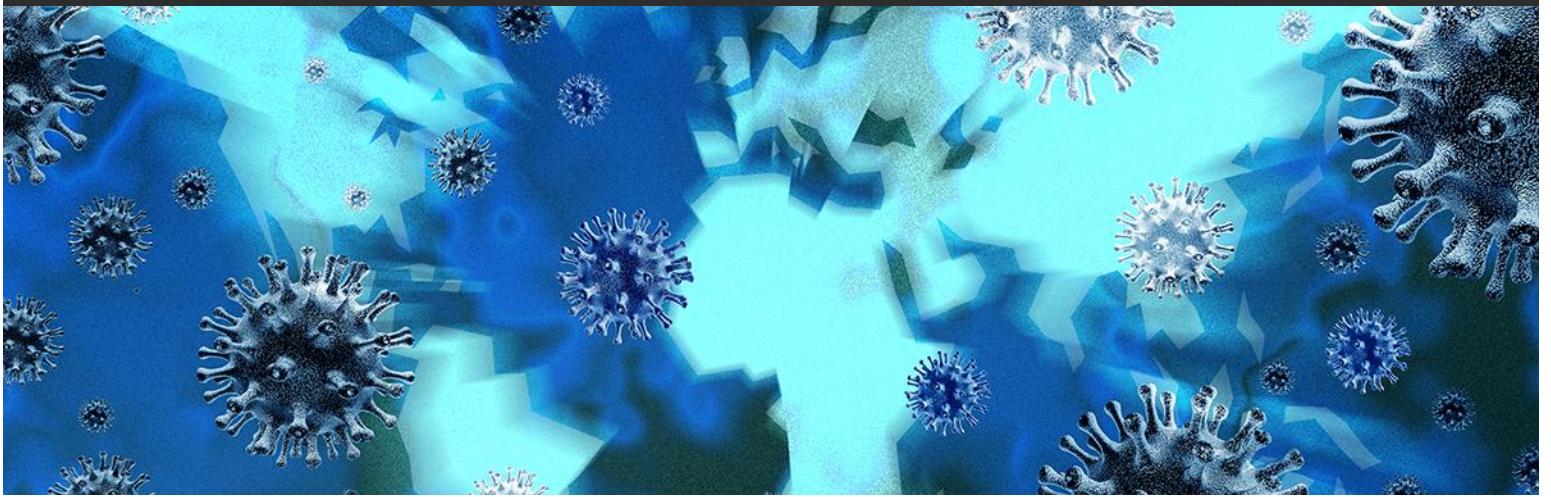


Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



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EEOC Coronavirus Disease 2019 Guidance to Employers

The U.S. Equal Employment Opportunity Commission (EEOC) issued a bulletin this morning advising that **Field Offices have temporarily stopped conducting in-person intake interviews** due to the current health situation. Before closing its doors, though, the EEOC confirmed in a short online article, **What You Should Know About the ADA, the Rehabilitation Act, and COVID-19**, that the anti-discrimination laws it enforces do not interfere with or prevent employers from following **U.S. Centers for Disease Control and Prevention (CDC) guidelines** related to planning, preparing for, and responding to Coronavirus Disease 2019 (COVID-19). The EEOC provided a link to **EEOC guidance** issued in 2009 regarding the H1N1 pandemic, guidance that provides timely and helpful information applicable to today's COVID-19 pandemic. This GT Alert summarizes the EEOC guidance on pandemic preparedness in the workplace.

The guidance focuses on legal restrictions on disability-related inquiries and medical examinations. The Americans with Disabilities Act (ADA) generally prohibits them, subject to two major exceptions. Employers can make disability-related inquiries and conduct medical examinations if the inquiries and examinations are job-related and consistent with business necessity – that is, if there is objective evidence that (a) an employee's ability to perform essential job functions will be impaired by a medical condition, or (b) an employee will pose a direct threat due to a medical condition.

Many Employer Responses to the Pandemic Do Not Implicate the ADA

According to the EEOC, many pandemic-related inquiries are not disability-related inquiries restricted by the ADA in the first place. For example, according to the EEOC guidelines, **the following inquiries are generally not restricted disability-related inquiries:**

- *Asking an employee whether he or she has experienced cold or flu-like symptoms*
- *Asking an employee who travelled during a pandemic about exposure to pandemic influenza during the trip*
- *Asking an absent employee why he or she is absent and when he or she expects to return to work*

By contrast, asking whether someone's immune system is compromised is a disability-related inquiry, according to the EEOC, "because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS."

Like the inquiries bulleted above, sending an employee home because he or she displays influenza-like symptoms during a pandemic is permissible because it is not disability-related. Similarly, employers may encourage employees to work from home; require employees to adopt infection-control practices while at work (such as regular handwashing); and require employees to wear personal protective equipment during a pandemic. The EEOC guidelines advise that these measures do not generally implicate the ADA.

The guidelines also provide advice for employers that want to identify, in an ADA-compliant way, employees who are more likely to be unavailable for work in the event of a pandemic. The guidelines advise making inquiries "designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications." They even provide a sample ADA-compliant employee survey for employers.

The guidelines also note that after a pandemic, employers may require employees who have been away from work during a pandemic to provide a doctor's note certifying fitness to return to work. "Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees."

At all times, employers may require new entering employees to undergo post-offer medical examinations to determine general health status, as long as all entering employees in the same job category are required to undergo the medical exam, and the information collected and maintained is kept separate from other employee documentation and treated as a confidential medical record.

Responses Restricted by the ADA Are Permitted If the Pandemic Is a "Direct Threat"

In contrast to the inquiries and medical examinations discussed above, others are generally prohibited. For example, according to the EEOC, employers generally may not take employees' temperatures to determine whether they have a fever. They generally may not ask employees who do not have influenza symptoms to disclose whether they have medical conditions the CDC says could make them especially vulnerable to influenza complications. And they generally may not require employees to take the influenza vaccine regardless of medical conditions or religious beliefs.

These generally prohibited inquiries and examinations, however, may be permitted if employees pose a direct threat due to medical conditions. According to the EEOC, “whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness.” The 2009 spring/summer H1N1 influenza did not pose a direct threat or justify disability-related inquiries or medical examinations, the EEOC guidance states. According to the EEOC, however, ***if health authorities determine the current Coronavirus pandemic “is significantly more severe” than the 2009 spring/summer H1N1 influenza, then the Coronavirus could pose a direct threat and justify disability-related inquiries and medical examinations.*** The EEOC guidance encourages employers to rely on the latest CDC and state and local public health assessments. Of course, any information obtained through disability-related inquiries or medical examinations must be kept confidential.

Employers Must Continue to Provide Reasonable Accommodations

Finally, the guidelines note that even during a pandemic, the ADA continues to require employers to provide reasonable accommodations for known limitations of employees with disabilities. For example, if an accountant with low vision has a screen-reader at work and the employer issues laptops to all accountants in preparing for a pandemic, then the employer should provide the accountant with a laptop that has a screen-reader installed. The only exception to the continued obligation to provide accommodations is if the accommodation requested poses an “undue hardship,” i.e., if it “results in a significant difficulty or 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.”

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