



## EEOC Updates its COVID-19 Guidance to Employers.

The EEOC recently issued and updated the following two Guidance documents to address implications of the COVID-19 pandemic in the workplace:

1. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (updated April 23, 2020) -- [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
2. Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (updated March 21, 2020) -- [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

In Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (updated March 21, 2020), the EEOC emphasized:

- "First, the ADA regulates employers' disability-related inquiries and medical examinations of all applicants and employees, including those who do not have ADA disabilities."
- "Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless the individual would pose a 'direct threat' (i.e. a significant risk of substantial harm even with reasonable accommodation) of harm to themselves or to others."
- "Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic."
- "All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Information about the medical condition or medical history of an employee must be collected and maintained on separate forms and in separate medical files and must be treated as a confidential medical record."
- "Direct threat is an important ADA concept during an influenza pandemic.... Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard."

In What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (updated April 23, 2020), the EEOC provided the following additional specific guidance (in Q & A format organized by subject heading):



## Medical Inquiries and Medical Examinations

- Employers may ask employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat; the CDC has periodically expanded the list of COVID-19-related symptoms.
- “Employers should rely on the CDC, public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.”
- Measuring an employee's body temperature is a medical examination, but because the CDC and public health authorities have acknowledged community spread of COVID-19 and issued related precautions, employers may measure employees' body temperature. “However, employers should be aware that some people with COVID-19 do not have a fever.”
- Employers may require employees with symptoms of COVID-19 to stay home. “The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.”
- Employers may require employees returning to work to present a doctor’s note certifying their fitness for duty. “As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.”
- “Employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.”
- “Consistent with the ADA standard, employers should ensure that COVID-19 employee testing is accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require employees to observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.”

## Confidentiality of Employee Medical Information

- Employers may store all medical information related to COVID-19 in existing medical files, so long as it is stored separate from personnel 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.



- Employers may disclose the name of an employee to a public health agency if the employer learns the employee has COVID-19.
- Temporary staffing agencies may notify the employer and disclose the name of its employee if the staffing agency learns its employee has COVID-19 because the employer may need to determine whether the infected employee had contact with anyone in the workplace.

## Hiring

- Employers may screen applicants (regardless of whether the applicant has a disability) 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.
- Employers may take an applicant's body temperature as part of a post-offer, pre-employment medical examination, but may do so **only after the employer made a conditional offer of employment.**
- Employers may delay the start date of an applicant who has COVID-19 or has COVID-19 symptoms.
- Employers may withdraw a job offer when it needs the applicant to start immediately, but the applicant has COVID-19 or has symptoms of COVID-19.
- Employers **may not** postpone the start date or withdraw a job offer merely because the applicant is over age 60 or is pregnant, even though such applicants are at higher risk from COVID-19. "However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date."

## Reasonable Accommodation

- Employers are required to implement reasonable accommodations for individuals with disabilities, **absent undue hardship to the employer's business,** that eliminate or reduce risk of exposure for employees who, due to a preexisting disability, are at higher risk from COVID-19.
- "Even with the constraints imposed by a pandemic, some requested accommodations may meet an employee's need on a temporary basis without causing undue hardship on the employer."
- "If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance, or other accommodations that reduce the risk of exposure."
- "Employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed."



- “During the pandemic, if an employee requests an accommodation for a non-obvious medical condition, either at home or in the workplace, employers may still request medical information to determine whether the condition is a disability.”
- “During the pandemic, employers may still request medical information from an employee about why an accommodation is needed... Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the ‘essential functions’ of his position.”
- Employers may ask disabled employees on leave or layoff status to request accommodations that they believe they may need when the workplace re-opens. “Employers may begin the interactive process, i.e., the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed, before the workplace reopens.”
- In determining whether “undue hardship” would result from a requested accommodation, employers may consider whether current circumstances create “significant difficulty,” considering the facts of the particular job and the workplace. “For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, 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.”
- “Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer’s overall budget and resources... But, the sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration. Also relevant is 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). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.”

### Reasonable Accommodation Related to Compliance with Workplace Infection Control Measures

- “An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social 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 garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer’s business under the ADA or Title VII.”

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