

Can you Ask Employees Medical Questions during a Pandemic? The EEOC's Guidance on Complying with the ADA during COVID-19

Labor & Employment Law Update

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As COVID-19 rates are rising throughout the country, employers may want to review the safety measures they are taking to prevent spreading the coronavirus in the workplace. The U.S. Equal Employment Opportunity Commission recently released additional guidance on the interplay between COVID-19 and an employer's legal obligations under the Americans with Disabilities Act. Key questions and answers regarding steps that employers can lawfully take to safeguard their workplace are summarized below:

- **May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? Yes.** An employer may ask all employees who are entering the workplace if they have been tested for COVID-19 or have symptoms associated with COVID-19. An employer may prohibit an employee from physically entering the workplace if he has either tested positive or has symptoms. Employers may not ask these same questions for employees who are working remotely because soliciting this information must be for the purpose of eliminating a direct threat to the health of other employees, and remote workers cannot pose this sort of threat to employees physically present in the workplace.
- **May employers ask only certain employees about COVID-19 testing or symptoms as opposed to asking all employees? Yes.** However, the employer must have a reasonable belief based on objective evidence that the specific employee asked may have COVID-19. For example, the employee may be objectively exhibiting COVID-19 symptoms such as a persistent cough.
- **May an employer ask an employee who is physically coming into the workplace whether he has been in contact with anyone who has tested positive for COVID-19 or who has symptoms associated with COVID-19? Yes.** Employers must make sure that they frame this question as asking for exposure to anyone, not specifically asking about family members. The Genetic Information Nondiscrimination Act ("GINA") prohibits employers from asking about employees' family members' medical conditions. Asking about

exposure to anyone – beyond just family members – is also a better query because it is more inclusive and better designed to understand an employee's possible exposure.

- **May an employer bar an employee from entering the workplace if he refuses to have his temperature taken or to answer questions related to possible COVID-19 exposure or symptoms? Yes.** Before barring entry, an employer should explain its screening process in an attempt to persuade the employee to comply. For example, an employer may assure the employee that the medical information collected from the screening is kept confidential and that the employer is simply following health screening recommendations from the CDC.
- **May an employer ask for additional information if an on-site employee calls in sick? Yes.** During this pandemic, an employer may question an employee about their symptoms if they regularly or occasionally work onsite and report feeling sick. Relatedly, an employer may ask an employee why they did not report to work if the employee calls off without providing a reason.
- **May an employer ask employees about travel during the pandemic? Yes.** If the CDC or local public health officials recommend that people quarantine after visiting certain locations, an employer may ask its employees if they have traveled to those locations for work-related or personal travel.

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