

# EEOC GUIDANCE on the Impact of the ADA on COVID-19 Preventative Measures

## Labor & Employment Law Update

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As you know by now, COVID-19 is changing things on a daily, if not hourly or minute by minute basis. In reviewing this advice, you must understand that guidance will change as the COVID-19 pandemic evolves. As such, employers **MUST** continue to get up to date information from public health authorities on maintaining workplace safety.

The CDC, EEOC and World Health Organization (WHO) each have their own guidance on addressing the workplace and employees under a pandemic situation:

- CDC Interim Guidance for Businesses and Employers – Plan, Prepare and Respond to Coronavirus Disease 2019;
- EEOC Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (ADA). NOTE: The EEOC's pandemic publication was written during the H1N1 outbreak, but is still viewed as being relevant today and addressing ADA and Rehabilitation Act issues that may come up during a pandemic.
- WHO: Getting Your Workplace Ready for COVID-19

**WHO has declared COVID-19 to be an international pandemic.** Based upon this, the EEOC has provided the following clarity regarding the following questions which is very useful for employers:

- 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?
  - During a pandemic, ADA-covered employers may ask such 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. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

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- **Our Take** – Employers can also require employees to disclose if they are experiencing symptoms of the pandemic virus, including fever, chills, cough, shortness of breath or sore throat. In doing so, remind employees that this is a safety issue and that failing to do so can result in discipline up to and including termination.
- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
  - Generally, measuring an employee's body temperature is a medical examination.
  - **HOWEVER – Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature.**
  - That said, employers must be aware that people can have COVID-19 without experiencing a fever or any other symptoms.
  - **Our Take** – This clarifies that if you want to scan employees' body temperatures that appear to have symptoms or before entering your facility you can. However, you will want to make sure you are being consistent and non-discriminatory in doing. Additionally, you will want to be careful in how you are measuring an employee's body temperature to avoid potentially exposing employees (e.g. failing to implement proper safety procedures for who is taking the temperature, whether a thermometer that requires contact with skin is being used, etc.).
- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
  - Yes. 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.
  - **Our Take** – Due to the safety issues, if you have an employee who is showing symptoms of COVID-19, but does not want to go home, for safety reasons you can send the employee home. In doing so, you should document the symptoms and observable facts as to why you are sending the employee home.
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?
  - Yes. 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.
  - As a practical matter, however, doctors and other health care professionals may be too busy during immediately after a pandemic outbreak to provide fitness-for-duty documentation.

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- 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.
- **Our Take** – This is a difficult issue because sending an employee to a doctor or hospital, not only takes away health care resources that may be needed for the pandemic outbreak, but it could potentially expose the employee to COVID-19 as well. Another possible option is working with your workers' compensation provider to see if they will provide screenings for employees returning back to work. Ultimately, once an employee shows symptoms, the best practice may be to follow guidelines by Public Health Authorities, including the CDC and WHO regarding time an individual should remain out of the workplace or public gatherings after showing symptoms.
- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
  - Yes. An employer may screen job applicants 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. This ADA rule applies whether or not the applicant has a disability.
- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**
  - Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**
  - Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- **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?**
  - Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.