

EEOC Updates COVID-19/ADA Guidance As We Move Toward Reopening the Economy

Labor & Employment Law Update

on April 17, 2020

Back on March 18th as we were entering the COVID-19 health crisis, we addressed EEOC guidance on the impact of the ADA on COVID-19 preventative measures. Fast forward to today, as our collective focus shifts to talk of “re-opening the economy,” the EEOC has updated its guidance. Uncertainty abounds as to whether it will be business as usual or a new normal. Undoubtedly though, employers will need to be mindful to avoid ADA pitfalls as restrictions are lifted, furloughed workers return and/or as new hires are brought onboard.

The EEOC’s updated guidance addresses the following areas (new and revised information in **bold**):

Disability-Related Inquiries and Medical Exams

- Our prior guidance regarding questioning employees about COVID-19 symptoms, measuring temperature, requiring employees with symptoms to stay at home and asking them to provide doctor’s notes is unchanged.
- Employers can still ask employees to disclose whether they are experiencing COVID-19 symptoms. **The list of symptoms has been expanded, and may continue to expand, as experts learn more (symptoms now include loss of smell/taste and gastrointestinal problems).**
- As the burden on health care providers is lightened, it will become easier to require employees to provide doctors notes and fitness-for-duty documentation. Of course, as we recommended before, employers should follow CDC and WHO guidelines on this issue.

Confidentiality of Medical Information

- Consistent with the ADA and our prior guidance, any medical information, including temperature checks, must be kept confidential and stored in employee’s medical files (kept separately from personnel files).
- **Information may be disclosed to local public health agencies.**

- **Staffing agencies may disclose information of any affected individual to employers.**

Hiring and Onboarding guidance

- When hiring, employers may continue to screen or conduct medical examinations following a conditional offer, bearing in mind that candidates may still be asymptomatic.
- Start dates may be delayed.
- Offers may be withdrawn if an individual is unable to start right away as a result of a COVID-19 diagnosis or symptoms.

Reasonable Accommodation

- **Individuals might require accommodation because their disability makes them particularly vulnerable to COVID-19. This could give rise to new forms of accommodations. Examples given include one way aisles and plexiglass or other physical barriers to provide protection and/or ensure distancing.**
- **Pandemic might exacerbate some disabilities such as anxiety, OCD and PTSD.**
- **The duty to provide reasonable accommodation can extend to any work environment.**
- **Temporary changes prompted by the pandemic (including work from home) can give rise to (or eliminate) the need for reasonable accommodation or alter the effectiveness of an accommodation provided previously.**
- **Employees can still be asked to substantiate disability and need for accommodation.**
- **As always, engage with employees to assess accommodation needs and undue hardship on a case by case basis, given the particular circumstances.**

Pandemic-Related Harassment

- **Harassment based on an individual's race or national origin, or other legally protected characteristic, must not be tolerated. Enough said.**

Furloughs and Layoffs

- **Reminder that special rules apply when severance or other benefits are offered to a group of employees in exchange for a release – a reference to the OWBPA requirements for group terminations. The law here has not changed.**

EEOC
Updates
COVID-19/
ADA
Guidance
As We Move
Toward
Reopening
the Economy

Return to Work

- **As stay-at-home orders or other restrictions are lifted, employers will still be able to take action pursuant to EEOC, CDC and/or state health officials' guidance.**
- **Disability-related inquiries and medical exams will be appropriate if job-related and consistent with business necessity.**
- **As with any ADA analysis, employers will be able to exclude employees with medical conditions that pose a direct threat to the health or safety of others.**
- **Employers will need to review CDC guidelines with respect to returning employees, including those deemed "critical workers."**
- **Employers will need to work with returning employees about protective equipment requirements and infection control practices.**
- **Employers will need to engage in the interactive process with any employees seeking ADA reasonable accommodations regarding protective equipment, i.e. non-latex gloves, modified facemasks, or religious accommodations under Title VII (modified equipment due to religious garb).**

EEOC
Updates
COVID-19/
ADA
Guidance
As We Move
Toward
Reopening
the Economy