

The EEOC Releases New COVID-19 Guidelines

Many labor and employment commentators assumed that OSHA would take the laboring oar in addressing the COVID-19 pandemic. Despite OSHA's various pronouncements which we have addressed [here](#) and [here](#), its enforcement has been spotty.

Since President Trump's March 13, 2020 declaration of a national emergency, the number of [OSHA-issued citations has dropped by nearly 70%](#), and the inspection rate has also dropped. As of May 18th, an OSHA spokesperson reported the agency has not issued a single citation related to the COVID-19 pandemic.

The EEOC has stepped into the void left of OSHA as America returns to work. Today, the EEOC issued new [Technical Assistance Questions and Answers](#) that many employers will find relevant. Employers do not have to worry about an avalanche of lawsuits filed by the EEOC anytime soon. However, we would expect private-sector plaintiffs' attorneys to use these guidelines against employers who fail to follow them.

The EEOC has issued guidelines off and on since March 17, 2020. What follows are paraphrased questions and answers that our clients confront most often.

Disability-Related Inquiries and Medical Exams

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? (3/17/20)

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.

When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? (3/17/20)

Generally, measuring an employee's body temperature is a medical examination. 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.

When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? (3/17/20)

Yes. 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.

Confidentiality of Medical Information

If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? (4/9/20)

Yes.

May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? (4/9/20)

Yes.

Hiring and Onboarding

If an employer is hiring, may it screen applicants for symptoms of COVID-19? (3/18/20)

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.

May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? (3/18/20)

Yes.

Return to Work

An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? (4/17/20)

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.

G.4. The CDC identifies a number of medical conditions that might place individuals at [“higher risk for severe illness”](#) if they get COVID-19. An employer

knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? (5/7/20)

If the employee does not request a reasonable accommodation, the ADA does not mandate that the employer act.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee - or take any other adverse action - *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace - or take any other adverse action - unless there is no way to provide a reasonable accommodation (absent undue hardship).

Age

The [CDC has explained](#) that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged

employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? (6/11/20)

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Caregivers/Family Responsibilities

If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? (6/11/20)

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have [caretaking responsibilities](#) for children.

Pregnancy

Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy? (6/11/20)

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

Employer Takeaways

The COVID-19 pandemic allows employers to engage in “medical examinations” like taking temperatures which are ordinarily prohibited. Similarly, Employers can be much more intrusive with their questioning of employees regarding their present wellness in light of the pandemic. Employers should remember, however, that no good deed goes unpunished. Employers should not paternalistically make decisions for older employees, obese employees, pregnant employees, or other employees who might be in a high risk category. Instead, employers should educate employees about the risks at hand, but treat those high risk employees no differently than other employees.

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