



EMPLOYMENT LAW ALERT

What Employers Can Say and Do in the Time of Coronavirus

This post is based on common client questions we have received. Please contact us if you have a specific question because, while it is chock full of great information, it is not legal advice.

The ADA and other Equal Employment Opportunity laws continue to apply during this COVID-19 pandemic, but the EEOC has noted some exceptions when employers are following CDC guidelines.

The EEOC has posted some important guidance during the Pandemic:

- Updated Guidance on all EEOC laws can be found [here](#).
- ADA and Reasonable Accommodation Guidance during Pandemics can be found [here](#).

Masks:

We think more states and localities will mandate that masks be worn at work throughout the country, following the CDC guidance recommending individuals wear a mask outside their home. Los Angeles became the first locality to require certain non-healthcare workers to wear cloth masks while at work. Rhode Island is requiring employees to wear masks beginning 4/18/20 for all retail, client facing and manufacturing businesses. While an employer can require its employees to wear personal protective equipment, such as masks, designed to reduce the transmission of pandemic infection, employees with a disability may need a related reasonable accommodation under the ADA. See question 12 [here](#).

The CDC has stated that individuals who have trouble breathing, whether from a disability or otherwise, should not wear these cloth masks. More information [here](#).

An employer has the obligation to provide a reasonable accommodation under the ADA, even during this pandemic situation, which could mean excluding certain individuals from this requirement or finding an alternative reasonable accommodation.

Temperature Taking:

During this COVID-19 pandemic, employers can require employees to submit to a temperature check prior to beginning work for the day. This is an exception to the general prohibition on medical examinations in the workplace, due to the direct threat that sick individuals with COVID-19 could pose to others.

Employers should be aware that some individuals may have COVID-19 even if they do not have a fever.

Asking an Employee about their Symptoms:

During a pandemic, an employer is able to ask an employee if they are experiencing flu-like or COVID-19 symptoms, such as:

- Fever;
- Chills;
- Cough;
- Sore Throat; and
- Shortness of Breath.

Employers continue to be prohibited from asking employees who do not have flu-like symptoms to disclose whether they have a medical condition that could make them especially vulnerable to the illness.

An employer can ask employees who call in sick if they are experiencing symptoms of the pandemic virus. If you record any of this information, it must be kept confidential, as explained below.

Confidentiality:

If your organization decides to take your employees' temperatures or ask about symptoms – any documentation or records of this information must follow the ADA requirements on confidentiality. If you do collect this form from employees, you must maintain all information about employee illness as a confidential medical record in compliance with the ADA. More information on that [here](#).

Any medical information about an employee must be stored separately from the employee's personnel file in order to limit access. Employers should store this information in any existing medical files.

This requirement includes any of the following:

- Statement that the employee has COVID-19 or suspects they may have it;
- Documentation on Symptoms or Temperature recordings; or
- Other Notes from questioning employees on symptoms.

Reasonable Accommodations:

Employers still need to comply with the ADA during this challenging time, including the interactive process to determine if there are any reasonable accommodations that can be made to a disabled employee.

The Center for Disease Control (CDC) has identified individuals who may be at a higher risk of severe illness from COVID-19, including the following:

- People aged 65 or older
- People of all ages with underlying medical conditions:
- Chronic lung disease or moderate to severe asthma
- Serious heart conditions
- Immunocompromised
- Severe obesity (body mass index [BMI] of 40 or higher)
- Diabetes
- Chronic kidney disease undergoing dialysis
- Liver disease

Employers can offer some reasonable accommodations that reduce contact with others, including:

- Teleworking;
- One-way aisles;
- Plexiglass, tables or other barriers to ensure minimum distances;
- Temporary job restructuring;
- Temporary transfers; or
- Modifying a work schedule.

An employer does not need to offer one of these accommodations if it would be an undue hardship on the employer's business.

Exposure to COVID-19:

The CDC has issued new guidance noting that in essential businesses, some critical workers may be permitted to continue work following potential exposure to COVID-19, provided the employee is asymptomatic and additional precautions are implemented by the employer. Guidance can be found [here](#). These additional precautions include:

- Self-monitoring symptoms;
- Employer monitoring symptoms;
- Require masks to be worn;
- Maintain social distance; and
- Regular disinfection of workspaces.

Fitness for Duty Certifications:

Employers can require an employee who has had COVID-19 or COVID-19 symptoms to require a doctor's note to return to work. Many health care providers are overloaded, so employers can alternatively require a note from a health care provider noting that the employee does not have COVID-19.

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