

LABOR AND EMPLOYMENT

ALERT

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How Can Pennsylvania Employers Comply with State Health Orders in Light of the EEOC's Updated COVID-19 Guidance?

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Pennsylvania has issued new safety directives to businesses in an attempt to protect essential workers and others who are most at risk of contracting the coronavirus. On April 15, 2020, Pennsylvania's Secretary of Health, Dr. Rachel Levine, released an Order addressing safety measures that employers are required to take to protect workers from becoming infected with COVID-19. The Order specifically exempts health-care workers.

Meanwhile, the federal Equal Employment Opportunity Commission ("EEOC") has published several iterations of guidance for employers on issues involving COVID-19, the Americans with Disabilities Act ("ADA"), and other federal laws, most recently updated on April 17, 2020.

In attempting to comply with Pennsylvania's April 15 Order, employers should take the EEOC guidance into consideration to avoid possible violations of the ADA and other federal laws. The EEOC may still find violations of the ADA even when an employer is seeking to comply with state law.

See the following resources, referenced throughout this article:

- Order of the Secretary of the PA Dept. of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations (April 15, 2020)
<https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf>

- U.S. Equal Employment Opportunity Commission, Guidance (updated April 23, 2020)
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ad_a_rehabilitaion_act_coronavirus.cfm
- Centers for Disease Control and Prevention, Guidance (updated April 20, 2020)
<https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>

COVID-19 SAFETY REQUIREMENTS UNDER PENNSYLVANIA LAW

Pennsylvania's April 15 Order provides for universal safety standards for all businesses continuing to operate (exempting health-care workers), as well as more stringent safety standards for businesses open to the public during the pandemic. Moreover, all businesses must take specific, responsive steps upon being notified of COVID-19 exposure at the worksite. Enforcement of the Order began April 19, 2020.

While employers should review all of the state safety standards, this Alert is directly focused on what is required with respect to employees. See the Appendix at the end of this article for a more detailed outline of the April 15 Order. To summarize, all businesses must:

- Provide social distancing of six feet for employees by staggering start and stop times, rearranging spaces used for breaks and meals, conducting meetings virtually or with fewer than 10 employees in the room, and additional mandates.

- Clean high-touch areas and common areas on a regular basis and between shifts.
- Provide employees with masks, handwashing soap, and disinfecting materials.
- Take extra steps when aware of COVID-19 exposure in the worksite, including closing off and ventilating areas, cleaning areas and high-touch surfaces, identifying and notifying other employees who were in close contact with the infected individual, requiring these workers to follow CDC safety practices, and additional mandates.

Note that businesses aware of COVID-19 exposure must also implement temperature screening for all employees, following specific procedures in the April 15 Order.

- Ensure that employees having symptoms notify supervisors, stay home, and follow CDC safety practices.
- If worksites are open to the public, take specific steps to install barriers and maintain social distancing at check-out areas, require customers to wear masks, assign employees to clean carts and handbaskets, and follow additional mandates.
- Ensure that sufficient staff are assigned to implement and enforce these requirements.
- Communicate these requirements and procedures to all employees in their preferred language.

POTENTIAL ISSUES UNDER THE ADA AND OTHER FEDERAL LAWS

Complying with Pennsylvania health safety law may not excuse a violation of federal anti-discrimination law. In general, the ADA requires employers to provide reasonable accommodations to employees with known disabilities unless doing so would result in significant difficulty or expense for the employer, also known as an “undue hardship.” Once an employee requests an accommodation, employers should engage in an “interactive process” with the employee to determine the nature and scope of the proposed

accommodation as well as whether potential alternative accommodations exist. Where more than one accommodation meets employee needs, employers may choose which accommodation to provide.

The EEOC’s recent guidance relaxes the “undue hardship” doctrine by specifically stating that significant difficulty or expense can be based on business needs during the COVID-19 pandemic. This minor clarification notwithstanding, employers that implement changes to comply with Pennsylvania’s April 15 safety directive may want to consider how any implemented change may be affected by the EEOC’s updated ADA guidance for COVID-19. Below are some common situations employers may encounter when implementing new safety rules to comply with the April 15 Order.

Managing Temperature Checks

In those situations where employers are required to conduct temperature screens, employers should retain that information as a confidential medical record. Therefore, employers may want to consider avoiding the assignment of one employee to record the temperatures of all employees at the worksite. Instead, it may be beneficial in appropriate settings for managers and supervisors to be responsible for confidentially performing these screens.

Mental Health and Pandemic Response

Many employers with public-facing businesses may have employees who indicate concern about cleaning items used by the public, which is a requirement under Pennsylvania’s Order. While a worker’s statement of concern by itself may not require an employer to engage in the interactive process or require an employer to provide an accommodation, it may be more likely that an employer could have an obligation to engage in the interactive process under the ADA if an employee previously disclosed a relevant mental health issue.

For instance, employers with knowledge of an employee’s pre-existing anxiety disorder should consider engaging in the interactive process with the employee if the employee expresses fear of a panic attack if assigned to clean items used by the public. During the interactive process, the employee may propose shift-

ing cleaning duties to another employee at the worksite as an accommodation for the anxiety disorder. In considering this option as an accommodation, employers may evaluate whether granting the request poses an undue hardship in light of the COVID-19 pandemic.

In considering this type of employee request, the EEOC's guidance encourages employers to be flexible, and to avoid outright rejection of a request for an accommodation. Businesses should be especially careful in considering disciplinary action against an employee for refusing to perform job duties that the employee believes could exacerbate an existing medical condition.

Masks in the Workplace

Pennsylvania's April 15 Order requires employees to wear masks in the workplace and requires employers to provide workers with masks. A well-intentioned employer that issues masks with tight seals may be faced with a situation where an employee objects to wearing a tight-seal mask because, for example, of a skin condition or because the employee, consistent with his religious beliefs, has a beard. Pennsylvania's Order does not require employees to wear tight-fitting masks. Thus, employers may consider discussing alternative types of masks as appropriate. The Order provides employers with flexibility for the kind of mask employees may wear, unless OSHA or other safety requirements apply. Note that religious discrimination issues are addressed by Title VII of the Civil Rights Act of 1964.

The Modified Undue Hardship Standard

Within its recent guidance, the EEOC provided a modified "undue hardship" standard. Traditionally, an employer's ability to deny a requested accommodation has required an employer to demonstrate that a proposed accommodation would be significantly expensive or difficult to implement. The EEOC has modified its stance and recognized that these terms should be defined in light of the ongoing COVID-19 pandemic.

The EEOC guidance states, "It may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to

readily hire temporary workers for specialized positions." Similarly, the EEOC recognizes "an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic."

Practically speaking, this does not automatically excuse employers from engaging in the interactive process. But the EEOC guidance may provide employers with greater flexibility in demonstrating that an accommodation is not reasonable. For example, where granting an unpaid leave of absence as an accommodation in the past may have been deemed as reasonable in some circumstances, even if it created additional labor costs for an employer, it might not be reasonable now in light of the significantly reduced revenue streams of many businesses.

The EEOC's relaxed interpretation of the "undue hardship" requirement will likely be the subject of litigation and court decisions over the coming months and years.

PRACTICAL TAKEAWAYS

Employers that continue to operate their businesses may have concerns with the safety of the workplace. In Pennsylvania, employers who implement standards consistent with the April 15 Order must balance safety with the requirements of other employment laws, including the ADA. In short, complying with a state law by itself may not be an effective defense to a claim of discrimination under the ADA or other federal laws.

If, in the midst of implementing practices consistent with the April 15 Order, an employer receives a request for an accommodation, the employer should engage in the interactive process. Should an employer decide a proposed accommodation does not impose an undue hardship in light of the pandemic and still allows compliance with Pennsylvania's Order, the employer can move forward in granting the requested accommodation. On the other hand, if an employer decides a proposed accommodation would be an undue hardship, the employer may consider further conversation with the employee to determine whether there is an alternative reasonable accommodation that would allow the employee to perform his or her job duties and the employer to comply with the Order.

APPENDIX: Summary Outline of the April 15, 2020 Order of the Secretary of the PA Dept. of Health

- Order of the Secretary of the PA Dept. of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations (April 15, 2020) - <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf>

NOTE: Health-care workers are exempted from this Order.

(1) All businesses must:

- Stagger work start and stop times for employees when practicable to prevent gatherings of large groups entering or leaving the premises at the same time;
- Provide sufficient amount of space for employees to have breaks and meals while maintaining a social distance of six feet, and also arrange seating to have employees face forward and not across from each other in eating and break settings;
- Stagger employee break times to reduce the number of employees on break at any given time so that appropriate social distancing of at least six feet may be followed;
- Limit persons in employee common areas (such as locker or break rooms, dining facilities, training or conference rooms) at any one time to the number of employees that can maintain a social distance of six feet;
- Conduct meetings and trainings virtually (*i.e.*, by phone or through the internet). If a meeting must be held in person, limit the meeting to the fewest number of employees possible, not to exceed 10 employees at one time, and maintain a social distance of six feet;
- Provide employees access to regular hand-washing with soap, hand sanitizer and disinfectant wipes, and ensure that common areas (including, but not limited to, break rooms, locker rooms, dining facilities, rest rooms, con-

ference rooms, or training rooms) are cleaned on a regular basis, including between any shifts;

- Provide masks for employees to wear during their time at the business, and make it mandatory that employees wear masks while on the work site, except to the extent an employee is using break time to eat or drink, in accordance with the guidance from the Pennsylvania Department of Health and the U.S. Centers for Disease Control and Prevention (“CDC”). Employers may approve masks obtained or made by employees in accordance with Department of Health guidance;
 - Ensure that the facility has a sufficient number of employees to effectively perform all required safety measures and in a manner that ensures the safety of the public and employees;
 - Ensure that the facility has a sufficient number of personnel to control access, maintain order, and enforce social distancing of at least six feet;
 - Ensure that all employees are made aware of these required procedures by communicating, either orally or in writing, in their native or preferred language, as well as in English or by a methodology that allows them to understand.
- (2) If an employer becomes aware of COVID-19 exposure in the worksite, it must:
- Close off areas visited by the person who has a probable or confirmed case of COVID-19. Open outside doors and windows and use ventilation fans to increase air circulation in the area. Wait a minimum of 24 hours, or as long as practical, before beginning cleaning and disinfection. Cleaning staff should clean and disinfect all areas such as offices, bathrooms, and common areas (including but not limited to employee break rooms, conference or training rooms, and dining facilities), as well as shared electronic equipment used by the exposed person such as tablets, touch

screens, keyboards, remote controls, and ATM machines, focusing especially on frequently touched areas;

- Identify employees who were in close contact (within about six feet for about 10 minutes) with a person with a probable or confirmed case of COVID-19 from the period 48 hours before symptom onset to the time at which the person isolated;
- If an employee who was in contact with the infected individual remains asymptomatic, the person should adhere to the practices set out by the CDC in its April 8, 2020 Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 (suggesting pre-shift temperature screens). See a link to this Guidance on the first page of this Alert;
- If an employee becomes sick during the work day, the person should be sent home immediately. Surfaces in the employee's workspace should be cleaned and disinfected. Information should be compiled on other employees who had contact with the ill employee during the time the employee had symptoms and 48 hours prior to symptoms. Others at the workplace with close contact within six feet of the employee during this time would be considered exposed;
- Promptly notify employees who were close contacts of any known exposure to COVID-19 at the business premises, consistent with applicable confidentiality laws;
- Ensure that the business has a sufficient number of employees to perform the above protocols effectively and timely;
- Implement temperature screening before an employee enters the business, prior to the start of each shift or, for employees who do not work shifts, before the employee starts work, and send employees home who have an elevated temperature or fever of 100.4 degrees Fahrenheit or higher. Ensure employees

practice social distancing while waiting to have temperatures screened;

- Require employees who have symptoms (*i.e.*, fever, cough, or shortness of breath) to notify their supervisors and to stay home from work;
- Encourage sick employees to follow CDC-recommended steps. Employees should not return to work until the CDC criteria to discontinue home isolation are met, in consultation with health-care providers and state and local health departments. Pennsylvania's Order encourages employers to implement liberal paid time off for employees who do not return to work because of their need to self-isolate.

(3) Employers whose worksites are open to the public have many obligations under the April 15 Order, including those that directly impact employees:

- Install shields or other barriers at registers and check-out areas to physically separate cashiers and customers or take other measures to ensure social distancing of customers from check-out personnel, or close lines to maintain a social distance of six feet between lines;
- Require all customers to wear masks while on premises, and deny entry to individuals not wearing masks, unless the business is providing medication, medical supplies, or food, in which case the business must provide alternative methods of pick-up or delivery of such goods; however, individuals who cannot wear a mask due to a medical condition (including children under the age of 2 years per CDC guidance) may enter the premises and are not required to provide documentation of such medical condition;
- Where carts and handbaskets are available for customer use, assign an employee to wipe down carts and handbaskets before they become available to each customer entering the premises. ◆

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders

should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

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