

## LABOR AND EMPLOYMENT

# ALERT

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## EEOC's Updated COVID-19 Guidance Addresses COVID-19 Testing in the Workplace and More

By Brian M. Wallen and Michael J. Wietrzychowski

On April 23, 2020, the federal Equal Employment Opportunity Commission ("EEOC") issued updated guidance: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* ("Guidance").

This Guidance provides technical assistance in a Q&A format designed to assist employers with implementing COVID-19 workplace protection procedures without running afoul of the Americans With Disabilities Act ("ADA") and other worker protection laws. Employers should review this Guidance to ensure that their COVID-19 mitigation plans are legally compliant.

Although the EEOC states that the ADA and other laws continue to apply during the COVID-19 pandemic, the EEOC makes clear that such laws are not intended to "interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19." The EEOC also emphatically states that "[e]mployers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety."

The Guidance is divided into seven sections: (A) Disability-Related Inquiries and Medical Exams; (B) Confidentiality of Medical Information; (C) Hiring and Onboarding; (D) Reasonable Accommodation; (E) Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics; (F) Furloughs and Layoffs; and (G) Return to Work.

In practice, employers may face complex judgment calls about balancing health and safety issues, state and local government orders, and the need to comply with federal laws. As we have written in other Alerts, employers who implement safety standards consistent with state and local orders should still consider the requirements of other employment laws, including the ADA. The new guidance from the EEOC does not change the fact that compliance with a state or local order by itself may not be an effective defense to a claim of discrimination under the ADA or other federal laws.

Attached to this Alert is the complete Q&A from the EEOC's updated Guidance.

For more information:

- EEOC's Updated Guidance of April 23, 2020 - [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- Schnader's Alert, "The EEOC's Coronavirus Guidance Amid Uncertain Times" (March 19, 2020) - <https://www.schnader.com/wp-content/uploads/2020/03/The-EEOC%E2%80%99s-Coronavirus-Guidance-Amid-Uncertain-Times.pdf>
- Schnader's Alert, "How Can Pennsylvania Employers Comply with State Health Orders in Light of the EEOC's Updated COVID-19 Guidance? (April 24, 2020) - <http://www.schnader.com/wp-content/uploads/2020/04/Complying-with-the-ADA-and-PA-Health-Orders-for-COVID-19-4-24-20.pdf>. ♦

*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](http://www.schnader.com/blog/covid-19-coronavirus-resource-center).*

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U.S. Equal Employment Opportunity Commission

## What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

*Technical Assistance Questions and Answers - Updated on April 23, 2020*

- All EEOC materials related to COVID-19 are collected at [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus).
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act.
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC or state/local public health authorities](#) about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.**
- The EEOC has provided guidance (a publication entitled [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act \[PDF version\]](#)), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold.**
- The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a [separate section](#) that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

### A. Disability-Related Inquiries and Medical Exams

#### A.1. [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.

#### A.2. **When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as [examples](#), or may it ask about any symptoms identified by public health authorities as associated with COVID-19?** (4/9/20)

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

#### A.3. [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. However, employers should be aware that some people with COVID-19 do not have a fever.

#### A.4. [Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?](#) (3/17/20)

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.

**A.5. When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? (3/17/20)**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic 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 and immediately after a pandemic outbreak to provide fitness-for-duty documentation. 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.

**A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? 4/23/20**

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review [guidance](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

## B. Confidentiality of Medical Information

**B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? (4/9/20)**

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this [confidential information](#). An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

**B.2. 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. The employer needs to maintain the confidentiality of this information.

**B.3. 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.

**B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? (4/9/20)**

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

## C. Hiring and Onboarding

**C.1. 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. This ADA rule applies whether or not the applicant has a disability.

**C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? (3/18/20)**

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.

**C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? (3/18/20)**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

**C.4. 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? (3/18/20)**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

**C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? (4/9/20)**

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

## D. Reasonable Accommodation

*In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, [www.askjan.org](http://www.askjan.org). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.*

**D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)**

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per [CDC guidance](#) or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

**D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? (4/9/20)**

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

**D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? (4/9/20)**

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

**D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? (4/9/20)**

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he [uses in the workplace](#). The employer [may discuss](#) with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

**D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? (4/17/20)**

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

**D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? (4/17/20)**

Yes, if it is not obvious or already known, an employer may ask questions or request [medical documentation](#) to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. [Possible questions](#) for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

**D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? (4/17/20)**

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process - and devise end dates for the accommodation - to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This [could also apply](#) to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

**D.8. May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace? (4/17/20)**

Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Employers may begin the "interactive process" - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

**D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? (4/17/20)**

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "[undue hardship](#)," which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

**D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? (4/17/20)**

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, 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. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

**D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? (4/17/20)**

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

**D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "[critical infrastructure workers](#)" or "[essential critical workers](#)" by the CDC?**

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

## E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

### E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? (4/9/20)

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their [national origin, race](#), or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment [policy tips](#) for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
  - [report](#);
  - [checklists](#) for employers who want to reduce and address harassment in the workplace; and,
  - [chart](#) of risk factors that lead to harassment and appropriate responses.

### E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? (4/17/20)

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

## F. Furloughs and Layoffs

### F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? (4/9/20)

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's [technical assistance document on severance agreements](#).

## G. Return to Work

### G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? (4/17/20)

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace. Similarly, the CDC recently posted [information](#) on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

### G.2. 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.