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# EEO Best Practices for Employers During the COVID Pandemic

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This pandemic has altered our ways of conducting business. For those of us fortunate enough to still be in business, we face new challenges in some obvious, and some not-so-obvious ways. The more obvious changes include social distancing, the wearing of masks, and the huge increase in reliance on Zoom and related technology. But the pandemic also impacts human resources issues, particularly with respect to non-discrimination, equal employment opportunity, and providing reasonable accommodations.

## Screening for Symptoms

Generally, the Americans with Disabilities Act (ADA) prohibits employers from measuring an employee's body temperature, as it is a medical examination. However, because the Centers for Disease Control (CDC) and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers *may* measure employees' body temperature. The guidelines on what symptoms may be screened has been updated several times, as medical knowledge about COVID-19 emerges.

Although employers may screen employees for certain symptoms, employers *may not* screen for COVID-19 antibodies.<sup>2</sup> Employers are likewise prohibited from asking employees *who do not have influenza symptoms* (and/or other COVID-19 symptoms) to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications.<sup>3</sup> Such an inquiry of employees *without* symptoms is prohibited by the ADA. However, if an employee voluntarily discloses (without a disability-related inquiry) that the employee has a specific medical condition or disability that puts the employee at increased risk of COVID-19 complications, the employer may ask the employee to describe the type of assistance that will be needed (e.g. telework or leave for a medical appointment). Further, employers should not assume that all disabilities increase the risk of COVID-19 complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

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<sup>1</sup> This is an application of the Direct Threat analysis. A "**direct threat**" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

<sup>2</sup> As of 9/15/2020.

<sup>3</sup> Only if the pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, may employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of COVID-19 complications.

**Best Practice:** Keep all screening results in a confidential file.

What is not widely understood, is that the aforementioned “medical exams” allowed for employees during a pandemic are still *prohibited for applicants*, prior to an offer of employment. Thus, an employer who is screening employees who are coming to a physical workplace does not have the right to screen someone who is coming in for a job interview. However, 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 employees in the same type of job.

**Best Practice:** Conduct all job interviews remotely.

### **Requests for Reasonable Accommodation**

Absent undue hardship,<sup>4</sup> an employer is required to provide reasonable accommodation to employees with disabilities. In general, it is best to treat requests for reasonable accommodation as before, by requesting medical documentation and by engaging in the interactive process. Keep in mind that employees with certain preexisting mental health conditions (i.e. 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. This may result in an employee requesting a reasonable accommodation, who did not previously need one. Also, some employees who have had one type of reasonable accommodation may now need a different accommodation (i.e. as a result of working at home).

**Best Practice:** To allow for a smooth transition, begin discussions *now* with employees who have disabilities, regarding the need for reasonable accommodation upon their return the office.

The employer’s responsibility for providing reasonable accommodation is limited to the need specifically related to the employee with the disability, and not an employee’s association (or shared living space) with a person with a disability. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee, in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.

**Best Practice:** While the ADA may not require the provision of accommodations to employees who do not self-disclose that they are an individual with a disability, employers may find it beneficial to honor such requests for the following reasons:

- They may have an undisclosed disability
- It will improve employee morale

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<sup>4</sup> Denial of reasonable accommodation may be allowed if, as a result of pandemic, there is “significant difficulty or expense” due to “undue hardship,” as a result of the pandemic. A decline in revenues and cash in hand are relevant issues.

- It will help keep your employees safe

**Best Practice:** Make information available in advance to **all** employees about who to contact to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return.

The notice should:

- include all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19,
- provide instructions about who to contact, and
- explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

Maintain a log of all requests for reasonable accommodation, and the disposition of the request. (This is a requirement for all federal contractors.)

## **Discrimination and Harassment**

### *Race and/or National Origin*

Many place the blame of the pandemic on China. This has resulted in a surge in discrimination and harassment against Chinese Americans, as well as Asians, generally. To prevent harassment and discrimination in the workplace, employers are advised to issue strong language letting their employees know that such behavior will not be tolerated. Harassment can happen on-line, too. In fact, sometimes the lack of face-to-face encounters can embolden harassers, as it is easier to make careless comments when you aren't able to see a person's reaction.

The EEOC's statement on the topic of race and national origin discrimination is here:

[https://www.eeoc.gov/eeoc/newsroom/wysk/national\\_origin\\_race\\_discrimination\\_covid-19.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/national_origin_race_discrimination_covid-19.cfm)

**Best Practice:** Remind employees and supervisors of your nondiscrimination policy and underscore that such discrimination, as well as harassment, will not be tolerated.

### *Age Discrimination in Employment Act (ADEA)*

The CDC has identified that increased age can be a significant factor in the impact of contraction of COVID-19. Thus, employers may be more reluctant to hire workers in the protected age group (40 years and older). Employers may also be more likely to send older workers home, while younger workers are allowed to come to work. Such practices would be considered unlawful discrimination, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, workers age 65 and older may have medical conditions that bring them under the protection of the ADA, as individuals with disabilities. As such, they may request reasonable accommodation for their disability.

**Best Practice:** Employers are free to provide flexibility to workers age 65 and older. The ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

### *Pregnancy*

Pregnancy is not considered a disability, however, pregnancy-related medical conditions may themselves be disabilities under the ADA. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Further, Title VII, as amended by the Pregnancy Discrimination Act, specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work.

**Best Practice:** Employers should ensure that supervisors, managers, and human resources personnel know how to handle requests for accommodations, which may be based on any number of reasons, to avoid disparate treatment in violation of Title VII.

During the pandemic, an employer may choose to provide *telework, modified schedules, or other benefits* to employees with school-age children due to school closures or distance learning, so 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 their children.

**Best Practice:** Offer all employees with school-age children the option to telework or have a modified schedule.

## **Summary**

The rules and regulations regarding permissible and prohibited actions will necessarily be revised as the severity of the pandemic changes. Thus, it is critical that employers keep abreast of updates from the CDC and EEOC. Below are some of the actions that are permissible, because we continue to operate in this pandemic.

*DURING THE PANDEMIC Employers MAY:*

- Take the temperature of employees entering workplace;
- Require a test for COVID-19 before permitting an employee from entering workplace;
- Disclose the name of an employee to a public health agency when it learns that the employee has COVID-19;
- Ask employees whether they are experiencing flu-like (or other COVID-19) symptoms;
- Encourage/require telework;
- Require infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal;
- Require employees to wear personal protective equipment;
- Require employees to stay home if they have symptoms of the pandemic influenza virus; and
- Require doctor's note certifying fitness for duty upon return to work.

## **Additional Resources from the EEOC**

The U.S. Equal Employment Opportunity Commission (EEOC) recently posted an updated technical assistance document, "[What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws](#) (WYSK)," which incorporates information from other agency resources and modifies

two existing Q&As in order to create a user-friendly comprehensive guide that addresses common questions about COVID-19 and federal equal employment opportunity laws for employers, advocates, and workers.

The updated WYSK adds 18 questions and answers that have been adapted from two other EEOC technical assistance resources: "[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)" and a March 27, 2020 publicly available EEOC [webinar](#). These newly incorporated Q&As are identified on the WYSK with a parenthetical that lists today's date and provides the source from which it was adapted.

In addition, the EEOC updated two existing WYSK Q&As in order to provide helpful clarifications that reinforce prior EEOC statements about COVID-19 and the EEO laws. First, in the updated "A.6.," the EEOC more fully explains its existing position about employers administering COVID-19 tests before permitting employees to enter the workplace. Second, in the updated "D.8.," the EEOC clarifies its existing position on employers' authority to invite employees not currently in the workplace to request disability accommodation in advance of their expected return if they choose to do so.

The EEOC advances opportunity in the workplace by enforcing federal laws prohibiting employment discrimination. More information is available at [www.eeoc.gov](http://www.eeoc.gov).

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