

EEOC Releases Updated Guidance to Employers Regarding ADA-Compliant Practices During the COVID-19 Crisis

The Updated EEOC Guidance Provides Further Clarity for Employers Concerning the ADA and COVID-19

SUMMARY

Updated September 10, 2020. On September 8, 2020, the Equal Employment Opportunity Commission (“EEOC”) released additional updates to its technical assistance bulletin entitled, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”](#) The new guidance incorporates into the technical assistance bulletin prior EEOC guidance from its updated 2009 publication [“Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,”](#) and its March 27, 2020 [recorded webinar](#). The updated bulletin, among other things, explains that COVID-19 testing administered by employers in accordance with current CDC guidance will meet the ADA’s “business necessity” standard and clarifies that employers may inform the workforce that employees with disabilities may request accommodations in advance of return-to-work.

Updated June 17, 2020. On June 17, 2020, the EEOC released additional updates to its technical assistance bulletin entitled, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.” The new guidance explains that in light of current CDC guidelines, the ADA currently does not allow employers to require antibody testing before allowing employees to return in person to the workplace.

Updated June 12, 2020. On June 11, 2020, the EEOC released additional updates to its technical assistance bulletin entitled, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act,

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and Other EEO Laws.” The new guidance, among other things, provides best practices for employers to determine if employees need an accommodation, such as by making information available in advance to all employees about who to contact, if they wish, to request accommodation for a disability that they may need upon return to the workplace, or by sending a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. A summary of the new guidance that addresses accommodation requests under the ADA and Rehabilitation Act has been incorporated into this memorandum, including in the section entitled, “Reasonable Accommodations—Inviting Employees to Make Requests.”

Updated May 11, 2020. On May 5 and 7, 2020 the EEOC released additional updates to its technical assistance bulletin. This new guidance addresses employers’ obligations to employees with certain underlying medical conditions that the CDC has identified as placing them at higher risk for severe illness if they were to contract COVID-19, and is addressed below in the Reasonable Accommodation Section. The EEOC initially issued guidance on this issue on May 5 but retracted it, in part, just hours later, stating that the information had been “misinterpreted in press reports and social media.”¹ The EEOC’s updates with respect to the ADA have been incorporated into this memorandum.²

Updated April 23, 2020. On April 23, 2020 the EEOC released another update to its technical assistance bulletin. The EEOC’s April 23 additions with respect to the ADA have been incorporated into this memorandum.

Updated April 17, 2020. On April 17, 2020 the EEOC released another update to its technical assistance bulletin. The EEOC’s April 17 additions with respect to the ADA have been incorporated into this memorandum.

Updated April 13, 2020. On April 9, 2020, the EEOC released an updated technical assistance bulletin. The EEOC’s April 9 additions with respect to the ADA have been incorporated into this memorandum.

Updated April 8, 2020. The CDC has updated its guidance regarding groups that may be at higher risk of severe illness due to COVID-19. These updates have been incorporated in this updated memorandum.

On March 21, 2020, the EEOC updated its more than ten-year-old “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” guidance to include specific guidance related to Coronavirus (“COVID-19”), on March 27, 2020, the EEOC released a recorded webinar on the same subject, and on April 9, 2020 the EEOC released an updated technical assistance bulletin entitled, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (together, the “guidance”).³ The ADA generally restricts an employer from making medical examinations and medical inquiries of employees⁴ unless such examinations and inquiries are job-related, consistent with business

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necessity, and there is objective evidence that (a) an employee's ability to perform essential job functions will be impaired by a medical condition, or (b) an employee will pose a direct threat due to a medical condition. The EEOC's guidance explains that the COVID-19 pandemic meets the "direct threat" standard required for that exception to apply. The new EEOC guidance also identifies other ADA-compliant practices that employers may lawfully use to address the ongoing COVID-19 pandemic—both with existing and prospective employees.

BACKGROUND

The EEOC's 2009 publication, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," which was originally released during the H1N1 virus outbreak, has now been updated by the EEOC to apply to the specific facts of the COVID-19 pandemic. In its guidance, the EEOC notes that the ADA continues to apply to employers during the pandemic but that the statute does not interfere with guidance from the Centers for Disease Control and Prevention ("CDC") or from state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. In its guidance, the EEOC "recognizes that guidance from public health authorities will change as the COVID-19 situation evolves" and "employers should continue to follow the most current information on maintaining workplace safety."

The EEOC explains that the ADA—which protects both applicants and employees from disability discrimination—is relevant to pandemics in three ways: "First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a 'direct threat' (*i.e.* a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic." The EEOC's publication provides to employers the guidance described below with respect to what actions may and may not be taken during the COVID-19 pandemic to remain in compliance with the ADA. In providing this guidance, the EEOC specifically noted that this guidance applies to the current public health situation, and certain guidance may change in the future when COVID-19 does not pose the risks it does today.

ADA COMPLIANT EMPLOYER PRACTICES DURING COVID-19 PANDEMIC

COVID-19 as "Disability" Under the ADA. The EEOC stated that it is currently unclear whether being infected with COVID-19 is or could be a disability under the ADA, but even if COVID-19 is or could be considered a disability under the ADA, an employer may bar an employee with COVID-19 from entering the workplace because the employee poses a direct threat to others.

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The ADA's Direct Threat Standard. The EEOC's guidance explains that "[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard" of the ADA. Accordingly, at this time, employers may lawfully exclude individuals with COVID-19, or exhibiting its symptoms, from the workplace for health and safety reasons, and may conduct medical examinations or may make disability related inquiries to screen employees to determine whether individuals exhibit symptoms of COVID-19. The EEOC notes that "[a]ll information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential."

Screening Employees

- **Sending Employees Home.** Employers are permitted to send employees home if they have been diagnosed with COVID-19, or are displaying symptoms associated with COVID-19. Symptoms of COVID-19 currently include: fever, chills, cough, shortness of breath and sore throat, as well as new loss of smell or taste, or gastrointestinal problems. The EEOC notes that the list of symptoms may expand as public health authorities and doctors learn more about COVID-19. Employers should rely on the CDC, other public health authorities, and other reputable medical sources for guidance on symptoms of COVID-19.
- **Soliciting Health Information from Employees.** Employers may ask all employees physically entering the workplace questions to determine if they have or may have COVID-19, including whether they have COVID-19 or symptoms of COVID-19, and whether they have been tested for COVID-19.⁵ Employers, however, should refrain from asking employees whether they have family members who have COVID-19 or who exhibit symptoms of COVID-19 because this would violate the Genetic Information Nondiscrimination Act ("GINA"). Instead, the EEOC recommends asking whether the employee has had contact with *anyone* who has been diagnosed with COVID-19 or who has symptoms of the virus.

If an employer wishes to ask *one* employee questions to determine whether that person has COVID-19, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have COVID-19. For example, if an employee is exhibiting COVID-19 symptoms, such as a persistent hacking cough, the employer could ask about the cough, whether the employee has visited a doctor recently and whether the employee knows whether they have or might have COVID-19. Contrastingly, if an employee simply appears distracted at work, the employer likely does not have a sufficient basis to ask similar questions.

- **COVID-19 Testing.** The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Under the current circumstances of the COVID-19 pandemic, employers are permitted to administer COVID-19 testing to employees before they enter the workplace and/or periodically to determine whether their presence poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other health authorities regarding COVID-19 testing. The guidance notes that testing administered by employers that is consistent with current CDC guidance will meet the ADA's "business necessity" standard. Employers should ensure that COVID-19 tests are accurate and reliable by consulting with guidance from the U.S. Food and Drug Administration, the CDC, and other public health authorities. Employers may also wish to consider the incidence of false-positives or false-negatives. Employers should bear in mind that a positive test result reveals only that an individual most likely has a current infection and may be able to transmit the virus to others and a negative test result does not indicate that an employee will not contract the virus at a later date.
- **Antibody Testing.** The CDC has said in its [Interim Guidelines](#) that an antibody test "should not be used to make decisions about returning persons to the workplace." An antibody test constitutes

a medical examination under the ADA, and currently does not meet the ADA's "job related and consistent with business necessity" standard. Presently, employers are not permitted to require antibody testing before allowing employees to re-enter the workplace under the ADA. The EEOC noted that it will continue to monitor the CDC's recommendations on this topic. Our blog, "[CDC Issues Interim Guidelines for COVID-19 Antibody Testing](#)," discusses the CDC's guidance on this topic.

- **Temperature Checks.** While "[g]enerally, measuring an employee's body temperature is a medical examination," "[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020" employers are permitted to measure the body temperature of employees who are physically entering the workplace. "As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements." Employers who choose to conduct temperature checks before allowing employees to enter the workplace may maintain a log of the results, as long as this information is kept confidential (see below, "Confidentiality" section). The EEOC also notes that employers should be aware that not all people who have COVID-19 will have a fever.
- **Request for Alternative Screening Method.** If an employee entering the worksite requests an alternative method of screening due to a medical condition, this is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the EEOC suggests that the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and the specific limitations which require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship. Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.
- **Employees Who Refuse Screening.** Should employees refuse to answer health questions or submit to medical examinations, employers are permitted to bar those employees from the workplace. Employers may wish to ask employees for their reasons for refusal, and offer reassurance that the information is being requested to maintain safety in the workplace, is consistent with health screening recommendations from the CDC, and that any information gained will be kept confidential.
- **Employees Who Are Teleworking.** Employees who are teleworking are not physically entering the office or interacting with coworkers. As such, employers generally are not permitted to ask teleworking employees health questions or require them to submit to medical examinations.
- **Employee Absences.** Employers are permitted to ask an employee who did not show up to work the reason why that person was absent, as asking such a question is not a disability-related inquiry. Employers are entitled to know why an employee did not report to work.
- **Possible Employee Exposure During Recent Travel.** Employers need not wait until an employee develops COVID-19 symptoms to ask questions about where an employee has traveled, as travel questions are not disability-related. Employers may follow the advice of the CDC and state/local health authorities regarding what information is needed to permit employees to return to work after visiting certain locations, whether for business or personal reasons. The CDC currently suggests that individuals returning from travel maintain social distance, wear masks, wash their hands often, and monitor their health.⁶

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- **Confidentiality.** The ADA requires that employers keep all medical information confidential including a COVID-19 diagnosis or the fact that an individual is receiving a reasonable accommodation. Information related to symptoms of COVID-19 or a diagnosis of COVID-19 is considered medical information and must remain confidential. Employers, therefore, should limit sharing this information beyond those who need to know the identity of an individual who is diagnosed with or exhibiting symptoms of COVID-19. Employers should ensure that these employees understand that such information must be kept confidential. An employer representative may interview an infected individual to determine who the employee possibly came into contact with in the workplace in order to notify those employees. All employer officials who have been designated as responsible to know the identities of COVID-19 positive employees should be specifically instructed that this information must remain confidential. The employer should not reveal or confirm the identity of the infected individual when notifying other employees but the use of general descriptors, such as “someone on the fourth floor” has tested positive for COVID-19, does not violate the ADA.

Relatedly, if an employee notices a colleague is exhibiting COVID-19 symptoms, he or she is not prevented from communicating to a supervisor about the co-worker’s symptoms and identity. After learning of this information, the supervisor should contact appropriate management officials to discuss next steps. If an employee is teleworking due to COVID-19 infection, the employer may communicate the fact of the teleworking arrangement to other employees, but should not disclose the reason is due to a COVID-19 diagnosis. If an employee is on leave because of COVID-19, symptoms associated with COVID-19, or any other medical condition, an employer may communicate that the employee is on leave, but is prohibited from disclosing the reason for the leave. Similarly, a staffing agency or contractor that places an employee in an employer’s workplace may notify the employer and disclose the name of the employee if the staffing agency or employer learns the employee has COVID-19 because the employer may need to determine if this employee had contact with anyone in the workplace.

Employers should also be mindful of the requirement that medical information be stored separately from personnel files and the importance of maintaining confidentiality of this information, particularly with many employees working from home. If managers or supervisors are unable to follow the regular confidentiality protocols due to a teleworking arrangement, the employer may want to suggest that they use other practices to ensure confidentiality of this information, such as using initials in notes or password protecting documents.

Employers may disclose certain employee health information related to COVID-19 to the CDC and other health authorities.

Reasonable Accommodations—Inviting Employees to Make Requests

In planning for a return to in-person operations, employers may be considering which employees to return to the workplace. Employers should be careful not to single out certain employees based on actual or perceived medical conditions, disabilities or age that the CDC identifies as placing them at higher risk for severe illness if they contract COVID-19. The EEOC’s guidance provides suggestions for best practices for employers to invite employees to make requests for accommodations or flexibilities in work arrangements. In addition to this guidance, which is detailed below, other reopening considerations can be found in our prior memorandum, COVID-19 Response—[Return-to-Work Considerations for Employers](#).

- **Contacting All Employees.** Employers may inform the workforce that employees with disabilities may request in advance accommodations that they believe they will need when the workplace re-

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opens. If an employee opts not to request an accommodation in advance, and instead chooses to request one at a later date, the employer must consider the accommodation request at that time.

- **If No Return Date Is Scheduled.** Even if no date has been announced for employees' return to the workplace, the ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact, if they wish, to request accommodation for a disability that they may need upon return to the workplace. If requests are received in advance, the employer may begin the interactive process. When contacting all employees, an employer may choose to 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.
- **Employees Who Are Designated to Return.** Alternatively, an employer may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request (e.g., different contacts for employees with disabilities, who are pregnant, or whose request is based on age or childcare responsibilities). Employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply.
- **Excusable Delays in Providing Reasonable Accommodations.** Employers may experience unexpected or increased requests for reasonable accommodations as a result of COVID-19, which may cause delays in discussing requests and in providing accommodations. Employers and employees should address these requests as soon as possible and are encouraged to use interim solutions to enable employees to keep working as much as possible.
- **Providing Additional Flexibilities.** Employers may choose to provide flexibilities beyond what the law requires. For example, as discussed below, the EEOC has said that employers are still "free to provide flexibility" to employees in the over-65 age pool, noting 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." In doing so, employers should be careful not to engage in disparate treatment on a protected EEO basis.

Reasonable Accommodations—Types of Employees

- **Higher Risk Employees.** The CDC has identified certain groups of people as being at higher risk of a severe illness if he or she contracts COVID-19, including older adults and people with certain pre-existing medical conditions, such as asthma. The CDC also provides information on "Others At Risk" which includes pregnant women.⁷ While certain other EEOC regulations prohibit discrimination based on, *inter alia*, gender and age, the EEOC's ADA-related guidance addresses whether employers need to provide reasonable accommodations for certain at-risk groups. The EEOC's guidance provides that an employer is not required to provide accommodations to an employee for purposes of protecting an employee's family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.
- **Employees with Pre-Existing Medical Conditions.** Where an employee has a medical condition that puts him or her at greater risk of a severe illness if he or she contracts COVID-19, that employee may request reasonable accommodations from the employer. The employee, or a third party on behalf of the employee, must let the employer know that he or she "needs a change for a reason related to a medical condition." The request does not need to reference the ADA, use the term "reasonable accommodation", or be in writing. When an employer receives a request for an accommodation, the employer may ask the employee (or the third party) for information to determine whether the pre-existing medical condition rises to the level

of a disability, and may verify the accommodation is needed because the particular disability may put the individual at higher risk. Employers seeking such documentation from a healthcare provider should be mindful of the potential delay in obtaining such documents given the ongoing health crisis, and consider other ways to verify the existence of a disability (such as a prescription or health insurance record). Employers also should consider the provision of a temporary accommodation pending receipt of such documentation.

Employers are *not* required under the ADA to provide employees with reasonable accommodations because they live in the same household as a person who is at greater risk of severe illness if he or she contracts COVID-19.

- **Pregnant Women.** “Pregnant employees are protected under Title VII of the Civil Rights Act” as well as the Pregnancy Discrimination Act, which requires “Women affected by pregnancy . . . to be treated the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work.” Employers therefore should not base decisions about layoffs, furloughs or other workplace responses to COVID-19 on pregnancy. Employers should bear in mind that although “certain pregnancy-related medical conditions sometimes can be ADA disabilities” and therefore trigger ADA accommodation rights, pregnancy itself is not considered an ADA disability. The EEOC further notes that a pregnant worker should not be denied an adjustment that the employer provides to other employees for other reasons but who are similar in their ability or inability to work. As such, employers are also not required to grant an accommodation to a pregnant employee due to the fact that the potential increased risks associated with COVID-19 are unknown. In addition to the ADA, Title VII’s Pregnancy Discrimination Act may entitle a pregnant employee 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.
- **Older Employees.** Employers may not exclude from the workplace older employees who are not showing symptoms associated with COVID-19. Employers should treat all employees the same way, regardless of age, in determining workplace arrangements to prevent the spread of COVID-19. Employers are also not required to grant an accommodation to an employee simply due to his or her age putting the employee at higher risk of severe illness if he or she contracts COVID-19. The EEOC’s guidance notes that the Age Discrimination in Employment Act (“ADEA”) prohibits an employer from involuntarily excluding an individual from the workplace based on his or her age placing him or her in the CDC’s high-risk category of individuals age 65 and older. Though the ADEA does not include a right to a reasonable accommodation, it also does not prohibit employers from providing flexibility to employees age 65 and older, even if it results in workers ages 40 to 64 being treated less favorably based on age in comparison.
- **Employees with Pre-existing Disabilities.** Situations may arise where accommodations are requested because an employee’s current disability is exacerbated by the current situation. Employers may verify the existence of the employee’s disability, discuss why an accommodation is required, and discuss the type of accommodation that would meet the employee’s health concerns.
- **Employees with Pre-existing Mental Illnesses or Disorders.** Employers should be aware that employees with pre-existing mental conditions, such as anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder may have greater difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. The EEOC explains that when an employee seeks a reasonable accommodation because a pre-existing mental illness or disorder has been exacerbated by COVID-19, 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.”

Reasonable Accommodations—Accommodation Analysis

- **Employer Not Required to Take Action Unless Employee Requests Accommodation.** Although employers may be required to provide accommodations to certain employees if they request such accommodations, the ADA does not require an employer to take action if an employee does not request a reasonable accommodation. Even if an employer is concerned that an employee's health will be jeopardized upon returning to the workplace, the employer may not exclude or take "any other adverse action" against an employee "solely because the employee has a disability that the CDC identifies as placing him at 'higher risk for severe illness' if he gets COVID-19."⁸
- **Direct Threat Analysis.** If, however, an employee's disability "poses a 'direct threat' to his health that cannot be eliminated or reduced by reasonable accommodation," then the employer may bar that employee from the workplace.

The direct threat standard requires an employer to show that the employee "has a disability that poses a 'significant risk of substantial harm' to his own health." This assessment must be "an individualized assessment based on a reasonable medical judgment about the employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence." The ADA requires an employer to consider: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. In analyzing these factors, the employer may wish to consider the severity of the pandemic in a particular area, the employee's health, and his or her particular job duties. An employer should also consider the likelihood that the employee will be exposed to COVID-19 in the workplace, including precautionary measures that the employer is taking to protect its workers.

- **Reasonable Accommodation Analysis.** If an employer determines that an employee's disability poses a direct threat to the employee's health, the employer cannot exclude the employee from the workplace unless there is no way to provide a reasonable accommodation absent undue hardship. The ADA requires that an employer consider "whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions." This may involve an "interactive process" with the employee. The guidance notes that "[i]f there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment." Under the ADA, an employer may *only* bar an employee from the workplace if "after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation."

The EEOC explains that accommodations that may eliminate a direct threat to self could include gear beyond what an employer may generally provide to its employees returning to the workplace, such as gowns, masks, gloves, and other items. Accommodations also may include additional or enhanced protective measures, such as erecting a barrier or increasing the space between an employee with a disability and others. Additional reasonable accommodations may include "the elimination or substitution of particular 'marginal' functions," "temporary modification of work schedules" or "moving the location of where one performs work." The EEOC notes that determining effective reasonable accommodations depend upon an employee's job duties and workplace design, among other things. The EEOC encourages employers and employees to remain creative and flexible, as with all discussions with respect to reasonable accommodations during COVID-19. If a job may only be performed in the workplace and an employee who is at greater risk from COVID-19 requests reasonable accommodations to eliminate possible exposure, some accommodations may meet an employee's needs on a temporary basis without causing an undue hardship on the employer. "Low-cost solutions achieved with materials already on hand or easily obtained may be

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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 . . . or other accommodations that reduce changes of exposure.” The EEOC states that other options may include “[t]emporary job restructuring or 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.” The EEOC also states that “[f]lexibility by employers and employees is important in determining if some accommodation is possible in the circumstances.”

- **Undue Hardship.** Employers are not required under the ADA to provide a reasonable accommodation that would pose an undue hardship, which means a “significant difficulty or expense.” There may be instances in which a reasonable accommodation would not have posed an undue hardship before the pandemic, but does pose one now.
 - **Significant Difficulty.** To determine whether current circumstances create “significant difficulty” in providing accommodations, employers may consider the “facts of the particular job and workplace.” For example, it may be significantly more difficult during this pandemic to “conduct a needs assessment or to acquire certain items.” If an accommodation poses an undue hardship, employers should work with employees to determine whether there is a suitable alternative available.
 - **Significant Expense.** “Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer’s overall budget and resources.” However, it is relevant to consider that some employers have now lost all or some of their revenue due to COVID-19. The amount of discretionary funds presently available, and whether there is an expected date by which current restrictions will be lifted, are also relevant considerations. Employers must “weigh the cost of an accommodation against its current budget while taking into account the constraints created by this pandemic.”
- **Teleworking as a Reasonable Accommodation.** When employees are required to telework, employers should carefully consider the needs of their employees with disabilities. The EEOC suggests that employers and employees discuss telework accommodations and determine whether modifications should be made. Employers should be aware that undue hardship considerations may differ when reviewing telework accommodations. A reasonable accommodation that is feasible and does not cause an undue hardship in the workplace might cause an undue hardship in work-from-home. The EEOC encourages employers and employees to be flexible and creative in these circumstances.

In situations where employers have chosen to permit employees to telework to stop the spread of COVID-19, and the public health measures are no longer necessary, employers are not required to automatically grant telework as a reasonable accommodation to employees claiming disabilities. Employers are entitled to receive information from the employee concerning the disability-related limitation that is claimed to necessitate an accommodation. If employers are able to accommodate employees at the workplace, employers may choose that alternative to telework.

An employer that has opted to permit its employees to telework because of COVID-19 and has chosen to excuse employees from performing one or more essential functions, is not required to grant a request to continue to telework after the workplace reopens if it requires continuing to excuse the employee from performing essential functions. The ADA never requires an employer to eliminate an essential function as a reasonable accommodation.

Similarly, employers may encounter situations in which, prior to the COVID-19 pandemic an employee requested to telework as a reasonable accommodation for a disability, but the

employee's request was denied due to productivity concerns. In the past the employee had continued going to the workplace, but has been working remotely during the pandemic. When the temporary telework period ends, and if the employee renews his request, the EEOC suggests that the employer should consider the request and look at the temporary period of telework as a trial period to determine whether the employee was able to perform all essential functions while teleworking.

- **Reasonable Accommodations Unrelated to COVID-19.** Employers' ADA responsibilities remain in place during the COVID-19 pandemic. The EEOC explains that an employee who was receiving a reasonable accommodation prior to COVID-19 "may be entitled to an additional or altered accommodation, absent undue hardship." Employers are permitted to 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."

Employers should address reasonable accommodation requests as quickly as possible, although the EEOC recognizes that the circumstances surrounding COVID-19 may cause delay in discussing requests and providing accommodations. As with other reasonable accommodations, employers may seek information to verify the disability and the need for an accommodation, such as requesting medical information and asking questions about the disability and related limitations, how the accommodation will effectively address the limitation, whether another form of accommodation could effectively address the issue and how a proposed accommodation will enable the employee to continue performing their fundamental job duties. Because healthcare providers may be delayed in providing documentation, the EEOC encourages employers and employees "to use interim solutions to enable employees to keep working as much as possible."

In a workplace where all employees are required to telework, employers may give higher priority to discussing requests for reasonable accommodations that are required for teleworking, but may begin discussing on-site requests as well. Employers may collect the information that is needed to make a decision and may be able to make arrangements for the reasonable accommodation in advance of the employee's physical return to the workplace. In addition, employers may ask employees now if they will need a reasonable accommodation in the future when they are permitted to return to the workplace.

If there is urgency to provide an accommodation, or the employer has limited time available to discuss the request during the pandemic, some employers may choose to forego the "interactive process" of asking questions and requesting medical information, and grant the employee's request on a temporary basis. Employers should be aware that employees' needs for accommodations may change when government restrictions change or are lifted, which may result in an increase in requests for accommodations, particularly short-term accommodations. As such, employers "may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives." The EEOC's guidance notes that employers may choose to place an end date on the accommodation or opt to provide the accommodation "on an interim or trial basis" with an end date, pending receipt of medical documentation. Employers must consider employees' requests for extensions, particularly if current government restrictions are extended or expanded.

Return to Work. As government stay-at-home orders and other restrictions are modified, the EEOC's guidance reminds employers that the "direct threat" standard is determined based upon "the best available objective medical evidence" which includes guidance from the CDC and other public health authorities. Employers' actions will be 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." Such screening mechanisms may include continuing to take temperatures and asking about symptoms (or

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requiring self-reporting) of all those entering the workplace. Employers must be sure “not to engage in any unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.”

The EEOC’s guidance explains that employers may require employees returning to the office to wear protective gear, such as masks and gloves. Employers may also observe infection control practices, including social distancing protocols and regular handwashing. Where an employee with a disability needs a related reasonable accommodation, the employer should discuss the request and provide the modification or an alternative, provided the modification is feasible and does not cause undue hardship to the operation of the employer’s business.

EMPLOYER HIRING PRACTICES DURING COVID-19 PANDEMIC

The EEOC’s current guidance also provides employers with guidance concerning certain hiring procedures during the COVID-19 pandemic.

Post-Offer, Pre-Employment Screening, Including for Temperature Checks. Employers are permitted to screen job applicants *after* making a conditional job offer “as long as it does so for all entering employees in the same type of job.” The screening may include medical exams, including temperature checks, *after* a conditional offer of employment has been made. The EEOC notes that employers should be aware that not everyone who has COVID-19 has a fever.

Delaying an Applicant Start Date. If an applicant has COVID-19 or is showing symptoms of COVID-19, an employer may delay that applicant’s start date.⁹ The EEOC writes: “CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). 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. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.”

Withdrawing an Offer for Employment. When a position requires that an applicant start work immediately, but that applicant is unable to do so due to testing positive for or exhibiting symptoms of COVID-19, current CDC guidance explains that the applicant cannot safely enter the workplace. Thus, the employer is permitted to withdraw its offer of employment.

Higher-Risk Applicants. Employers may not unilaterally postpone the start date or withdraw a job offer of individuals who are 65 years old or older or pregnant because the CDC has identified such individuals

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as being at greater risk. Employers are permitted to allow these individuals to telework or to discuss with them whether they would prefer to postpone their start date.

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ENDNOTES

- ¹ THE U.S. EQUAL EMPLOYMENT AND OPPORTUNITY COMMISSION, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (September 8, 2020) <https://web.archive.org/web/20200505230833/https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited on September 8, 2020).
- ² The EEOC's guidance also applies to the Rehabilitation Act, which covers federal employees.
- ³ See THE U.S. EQUAL EMPLOYMENT AND OPPORTUNITY COMMISSION, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (page last modified March 21, 2020) https://www.eeoc.gov/facts/pandemic_flu.html (last visited September 8, 2020).
- ⁴ CDC designations such as "critical infrastructure workers" and "essential critical workers," or other designations of employees, do not eliminate coverage under the ADA, the Rehabilitation Act, or any other equal employment opportunity law.
- ⁵ The EEOC's guidance is silent as to whether employees may be excluded from the workplace based on contact with infected persons. CDC guidance provides that "employees who are well but have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions." CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19), Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (page last reviewed March 22, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited March 31, 2020).
- ⁶ See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19), Travel During COVID-19* (Updated September 8, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (last visited September 8, 2020).
- ⁷ See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19), People Who Need Extra Precautions* (page last reviewed April 7, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations.html> visited April 13, 2020).
- ⁸ In addition to its revised May 7 guidance, the EEOC released a statement to "clarify that the ADA does not allow exclusion of employees simply because they have an underlying medical condition" that the CDC has identified as one that may put employees at a higher risk of severe illness if they were to contract COVID-19. EEOC's Legal Counsel, Andrew Maunz, stated, "It is important that employers understand that the ADA does not allow them to act against employees solely because the employee has a CDC-listed underlying medical condition," and that "[e]mployers must do a thorough direct threat analysis, which includes an individualized assessment based on relevant factors and a determination of whether the threat can be reduced or eliminated through a reasonable accommodation." Press Release, U.S. Equal Employment Opportunity Commission, EEOC UPDATES COVID-19 TECHNICAL ASSISTANCE PUBLICATION (May 7, 2020).
- ⁹ Both EEOC guidance and CDC guidance are silent as to whether an applicant's start date may be deferred due to contact with infected persons.

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