

EEOC COVID-19 Guidance

ADA Accommodations and Avoiding Discrimination and Harassment

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Equal Employment Opportunity Commission enforces workplace anti-discrimination laws:

- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Pregnancy Discrimination Act (PDA)
- Rehabilitation Act (applies ADA to federal employees)
- Title VII of the Civil Rights Act

All EEO laws continue to apply during pandemic



COVID-19: New workplace issues

- Hiring – “screening” candidates takes on new meaning
- Preventing exposure as businesses reopen employees are recalled
- Increased frequency of accommodation requests, for reasons other than disability
- High risk employees – protection or discrimination?
- Harassment of employees



Pandemic Preparedness in the Workplace and the ADA

- ★ On March 11, 2020 COVID-19 was declared a pandemic.
- ★ EEO laws do not interfere with or prevent employers from following guidelines and suggestions by the CDC or state/local public health authorities
- ★ Adopted the 2009 publication written during the H1N1 outbreak, but has been updated to address COVID-19



ADA requirements and standards

The ADA protects **applicants** and **employees** from discrimination based on disability.

Pandemic relevance:

1. ADA's regulations on employers' disability-related inquiries and medical exams
2. Covered employers are prohibited from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat
3. ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic



1. Disability-related inquiries and medical exams

Slippery Slope:

- An inquiry is disability-related if it is likely to elicit information about a disability
- A medical exam is a procedure or test that seeks information about an individual's physical or mental impairments or health



Disability-related Inquiries and Medical Exams

Before a conditional offer of employment, NOT allowed

After conditional offer, but before start, allowed *IF*

- all entering employees in the same job category are subject to the same inquiries and examinations
- Confidentiality



Disability-related Inquiries and Medical Exams

During employment, prohibited **UNLESS** job-related and consistent with business necessity

- When employer has “reasonable belief” that
 - An employee’s ability to perform essential job functions will be impaired by a medical condition; OR
 - An employee will pose a direct threat due to a medical condition
- An employer may require an employee who has been away from the workplace to provide a doctor’s note certifying fitness to return to work



Disability-related Inquiries and Medical Exams

New under COVID-19

As of March 2020, COVID-19 meets the direct threat standard meaning that there is a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace (As CDC and state/local public health authorities update their guidelines and assessment of COVID-19, the direct threat standard may no longer be met)



Disability-related Inquiries and Medical Exams

New under COVID-19

After conditional offer of employment:

- may screen the applicant for COVID-19 symptoms, as long as it does so for all entering employees in the same type of job (applies regardless of whether the applicant has a disability)
- Medical exams – same (any medical exams are permitted after an employer has made a conditional offer of employment)
- Can delay start date for an applicant who has COVID-19 symptoms b/c per CDC that person should not be in the workplace
- If an applicant is needed to start immediately, but individual has COVID-19 symptoms, job offer can be withdrawn (because individual cannot safely enter the workplace based on current CDC guidance)
- CANNOT withdraw a job offer or postpone a start date, if a post-offer medical exam reveals a medical condition that puts the applicant at high risk *unless* direct threat
- Follow recommendations of CDC or public health authorities without interference of the ADA



2. Prohibiting individuals from the workplace

Covered employers are prohibited from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat

Direct threat –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

Note: The employer's assessment must be based on objective, factual information, not on subjective perceptions or irrational fears about a specific disability

- The duration of the risk
- The nature and severity of the potential harm
- The likelihood that potential harm will occur
- The imminence of the potential harm



Discrimination of High Risk Individuals

- The EEOC makes very clear that the ADEA prohibits a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer is acting for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19
- An employer may not exclude an employee from the workplace involuntarily due to pregnancy even if motivated by benevolent concerns
- A pregnant worker may not be singled out on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff or furlough



Reasonable Accommodation

- **Reasonable Accommodation** is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.
- **Undue hardship** – when an accommodation results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business. If undue hardship, an employer is not required to provide it, but still must consider other accommodations that do not pose an undue hardship
- Generally, the ADA requires employers to provide reasonable accommodations for **known** limitations of applicants and employees with disabilities



ADA Compliance and Workplace Readiness

Surveying employees to identify high risk individuals

Before a pandemic

“no pandemic=no direct threat”

(If voluntary disclosure, keep confidential and ask the type of assistance the employee anticipates will be needed)



ADA Compliance and Workplace Readiness

Surveying employees to gauge workforce availability in the event of a pandemic

Before pandemic – okay as long as not disability-related

In the event of a pandemic, would you be prevented from coming to work for any of the following reasons:

- a) Loss of child care and/or school closure
- b) Loss of public transportation
- c) If you or a member of Your household fall into one of the categories identified by the CDC as being A at high risk for serious complications from the pandemic, you would be advised by public health authorities not to come to work (e.g. example pregnant women, persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions, persons less than 65 years of age with underlying chronic conditions, or persons over 65)



ADA Compliance and Workplace Readiness

During a COVID-19 Pandemic

- Can send employees home if they display COVID-19 symptoms. Employees should leave the workplace.
- May ask an employee who calls in sick or isn't feeling well at work questions about their symptoms to determine if they have or may have COVID-19
- May take employee's temperature (subject to confidentiality) b/c CDC and state/local health authorities have acknowledge community spread and issued this is a precaution
- If an employee returns from travel to specified locations (CDC hot spots), employer is allowed to ask questions about possible exposure while traveling to determine whether the employee is permitted to return to the workplace

Direct threat provides objective evidence that certain symptoms will make the employee more susceptible to complications



ADA Compliance and Workplace Readiness

During a COVID-19 Pandemic - CONTINUED

- If an employee is asymptomatic, employers may make disability-related inquiries or require medical exams to identify high risk, if direct threat standard has been met
- Can encourage employees to work remotely (also a reasonable accommodation under the ADA)
- Employer may require employees to adopt infection-control practices
- May require PPE (may have to provide an accommodation absent undue hardship)



What if an employee becomes ill at work? What can I ask?

- During Pandemic
 - Can ask if experiencing flu-like symptoms. Information must be maintained confidentially like an employee medical record
- Now – COVID-19
 - Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19



Requests for Reasonable Accommodation

Best Practice

- Provide all employees information as to the process for requesting an accommodation related to a disability
 - List of CDC medical conditions that place certain individuals at higher risk of serious illness if they contract COVID-19
- Identity and contact information where employee should direct request
 - Could be multiple
 - Could be based on nature of the accommodation
 - Ensure the company representative is well trained on dealing with employees in a non-discriminatory manner
 - “accommodation” is not necessary
 - “[Company] is willing to consider any requests from employees who have these or other medical conditions on an individual basis”



Requests for Reasonable Accommodation

Optional

- Make a general inquiry advising employees “willing to consider [other kinds of] requests for accommodation or flexibilities on an individual bases.
- Wait to receive request



Request Received

1. Determine if the accommodation request is based on a protected basis for accommodation (e.g. physical disability, pregnancy)
2. Is the disability covered under the ADA?
3. Are there applicable state and local laws?
4. Engage in an interactive process with the employee

Goal:

- Find a reasonable accommodation that allows the employee to perform the essential functions of the job
- Does not impose an undue hardship on the employer's business



Accommodations based on Disability of Others

- An employee is not entitled to accommodation under the ADA to avoid exposing a high risk family member to COVID-19
- ADA's prohibition on discrimination based on association with an individual with a disability is limited to disparate treatment or harassment.
- An employer is not required under the ADA to accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom associated
- Most state and local laws prohibit discrimination based on familiar or caregiver status also do not require accommodation but check to be sure.



Disability Accommodation - Screening

- Health screenings – if employee asks for alternative screening process, they are asking for an accommodation, so treat as any other ADA-protected request (i.e. engage in interactive process to see if the employee can be reasonably accommodated)
- If easy to provide and inexpensive, employer may voluntarily choose to make it available to anyone who asks without going through interactive process
- If disability is not obvious or known, then ask employee for information to establish the condition is a disability and what specific limitations require an accommodation
- May request medical documentation to support the employee's request
- Then determine if the requested accommodation or an alternative effective accommodation can be provided absent undue hardship



Telework as a reasonable accommodation

- ADA does not require an employer to allow remote work as an accommodation in order to protect a family member, but may choose to do so.
- Make sure to treat employees consistently with respect to such requests and check whether such an obligation exists under state or local law (e.g. governor's executive order, agency guidance for temporary protections)



What if remote work isn't available...

If remote work is not an option because the job can only be performed at a worksite and the employee is high risk, determine if additional actions may be taken, presumably on a temporary basis, to eliminate possible exposure

- reduced contact with others with one-way travel routes, plexiglass dividers, or other barriers per CDC guidelines)
- Modified work schedule
- Temporary transfers to another position

Employers and employees are expected to be flexible in determining if an alternative is available.



Accommodations for a not-covered disability?

- The EEOC has suggested that employers consider having flexible policies to allow for accommodations even when not for a covered disability.
- Employers with flexible policies must make sure that policies and procedures are applied consistently to all employees to avoid disparate treatment of a protected class under Title VII.
- Is the employee entitled to caregiver leave under the FFCRA, FMLA or other state or local leave or pandemic-related law such as sick time law



Families First Coronavirus Response Act (FFCRA)

- If an employee asks for an accommodation due to school closure, consider whether the employee is eligible for caregiver leave under the FFCRA
- What about FMLA?
- What about state or local leave or pandemic-related law?



Religious Accommodation

- Employees have a right to a reasonable accommodation for sincerely held religious beliefs under Title VII
- If requests an alternative method of screening as a religious accommodation, employer must consider whether a reasonable accommodation is available.
- Recent 11th Circuit decision – “where ... the employer’s business involves the protection of lives, we are reluctant to restructure its employment practices.”
- Consult with your attorney before altering previously approved accommodations.



Accommodations based on Age

- Neither the ADEA or Age Discrimination in Employment Act (ADEA) entitles employees to a reasonable accommodation solely due to age, but providing an accommodation on that basis is not prohibited by the ADEA and is consistent with the ADEA, the ADA and with CDC guidance
- Employers may lawfully accommodate an older person even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison



Accommodations Based on Pregnancy

- A pregnant employee may have accommodation rights under either or both the ADA or Title VII. Under the ADA, a pregnancy-related medical condition may be a protected disability, even though pregnancy itself is not
- Pregnancy Discrimination Act amended Title VII to require that women affected by pregnancy, childbirth and related medical conditions be treated the same as other who are similar in their ability or inability to work



Harassment

- Employers cannot tolerate harassment of employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins
- Such harassment can occur when employees are working remotely or on leave, as well as in the workplace
- Can take place through electronic communication tools such as email and social media



Harassment Prevention

- Understand how to recognize any kind of harassment, including when related to COVID-19 pandemic
- Train managers on their legal obligations to be alert to “demeaning, derogatory, or hostile remarks directed to employees” and “to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.”
- Be aware that the perpetrator of harassment can be a contractor, customer, client, or visitor as well as a supervisor or co-employee
- Consider sending a “reminder” to all workers, including contractors, reiterating the legal prohibitions on harassment, the company’s policy forbidding harassment and the potential disciplinary repercussions for engaging in such misconduct, and the procedures available “for anyone who experiences or witnesses workplace harassment to report it to management”



Important Actions Employers Can Take Now

- ❖ Understand your obligations under all applicable anti-discrimination and accommodation laws, including federal, state and local laws, regulations, and agency guidance, and ensure that all staff is aware of the importance and how-to's of compliance, regardless of whether they are working on site or remotely
- ❖ Determine whether to announce to employees the process for seeking accommodations; if you decide to do so, prepare any announcement in line with applicable legal requirements
- ❖ Ensure that all managers and other individuals who may receive inquiries regarding accommodations understand the legal requirements and how to handle such requests (including whom to refer the requesting individuals to)



Important Actions Employers Can Take Now

- ❖ If you decide to adopt “flexible” policies providing accommodations for employees where no legal mandates exist, make sure that those policies are fairly and consistently applied, so that they do not result in disparate treatment of employees in a particular protected group
- ❖ Stress to all employees the importance of complying with the law and company policy on matters of discrimination, harassment, and accommodation, and clearly communicate any new policies to all employees
- ❖ Train managers and human resources staff on reasonable accommodation requests and how to consistently implement any new policies or practices



Best Practices for Policy Updates

- Prepare the draft
 - A clear explanation of prohibited conduct
 - Assurance that employees will not be retaliated against for reporting a harassment complaint or participating in an investigation
 - Describe clearly the reporting process with all available methods
 - Assure confidentiality to the extent possible
 - Ensure that the process provides a prompt, complete and impartial investigation
 - Assure that immediate and appropriate corrective action will be taken in response to harassment
- Finalize and distribute
- Train employees, supervisors and management
- Enforce the policies
- Documentation



Documentation

- Policy effective date
- Distribution and acknowledgment of receipt
- Training with documentation of attendance
- Address supervisor interactions and promote progressive discipline
- Adopt a meaningful performance appraisal process/platform



Additional EEOC and Related Resources

Disability-related Inquiries and Medical Examinations of Employees under the ADA (2000)

<https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (2001)

<https://www.eeoc.gov/facts/evacuation.html>

Enforcement Guidance: Preemployment Disability-related Questions & Medical Examinations (1995)

<https://www.eeoc.gov/policy/docs/preemp.html>

Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA (as revised 2002)

<https://www.eeoc.gov/policy/docs/accommodation.html>

Work at Home/Telework as a Reasonable Accommodation (2003)

<https://www.eeoc.gov/facts/telework.html>

CDC Guidance for Employers and Workplaces on COVID-19:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

Occupational Safety and Health Administration

<https://www.osha.go>

Preparing Workplaces for COVID-19

<https://www.osha.gov/publications/OSHA3990.pdf>

COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act

<https://www.dol.gov/agencies/whd/fmla/pandemic>



Thank you, AALA!

