

On March 27, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) posted a pre-recorded Webinar wherein three EEOC attorneys addressed questions arising under any of the federal Equal Employment Opportunity Laws and COVID-19 Pandemic. The format was in the form of questions and answers (Q&As). Closed captioning is available on the Webinar. The link to the Webinar appears below:

<https://youtu.be/5tarmSM0iUI>

The Office of Equity, Diversity, and Inclusion (EDI) took notes during the Webinar and framed them in the form of Q&As by subject matter. We took care not to change the wording of the questions that EEOC responded to or the words used in their answers. While not a complete transcript, we did not alter the text to preserve the meaning.

We hope this will assist you as you navigate EEO related matters during this COVID-19 Pandemic. The EEOC emphasized that the responses to these questions were as of the date of the Webinar, that is, March 27, 2020.

**In this extraordinary time, the laws enforced by the EEOC continue to apply (e.g., Title VII, ADEA, ADA, Rehab Act, GINA).**

#### **DIAGNOSES/SYMPTOMS:**

***EEOC has explained in the Updated 2020 EEOC Pandemic publication that at present, the COVID-19 Pandemic permits an employer to take the temperature of employees who are coming into the workplace. Is there anything else an employer could do at the current time to determine if employees physically coming into the workplace have COVID-19 or symptoms associated with the disease?***

*As of 3/27/2020:*

- Employers may ask all employees who will be physically entering the workplace if they have COVID 19, or symptoms associated with COVID 19, or ask if they have been tested for COVID-19.
- Employers may exclude from the workplace those who have tested positive for COVID 19 or symptoms associated with COVID-19, which include coughing, sore throat, fevers, chills, shortness of breath. This is because their presence would pose a direct threat to the health or safety of others in the workplace.
- Teleworking employees are not physically interacting with other employees, so an employer is generally not permitted to ask a teleworking employee these questions.

***What may an employer do under the ADA if an employee refuses to permit the employer to take their temperature, or refuses to answer questions about whether they COVID-19, or has symptoms associated with COVID-19, or has been tested for COVID-19? Under the circumstances existing as of 3/27/2020:***

- The ADA allows an employer to bar an employee from being physically present in the workplace if:
  - they refuse to answer questions about whether they have COVID -19
  - They refuse to have their temperature taken by their employer
  - have symptoms associated with COVID-19
  - or has been tested for COVID-19

- To gain the cooperation of the employee, employers may wish to ask the reasons for refusal. The employer can provide information to reassure the employee that they are taking these steps to provide for the safety of all employees in the workplace.
- Employees may be reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace – ADA prohibits this disclosure.

***May a manager ask only one employee, as opposed to asking all employees, questions designed to determine if they have COVID-19, or require that their temperature be taken?***

- If an employer wishes only to ask a particular employee to answer such questions or to have their temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. The employer must articulate why they need this from this particular employee. Example: if the employee has a persistent hacking cough – they could ask about the cough, if the employee has been to the doctor, and whether the employee knows or might have COVID-19 since this is a symptom associated with COVID - 19. The reason is that type of cough is associated with COVID-19.
- If an employer notices that an employee seems distracted, that is not enough to ask the questions about COVID-19 or symptoms.

***May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?***

- From a public health perspective, only asking an employee about their contact with family members, unnecessarily limits the possible extent of the employee's potential exposure to COVID-19. A better question from a public health and workforce management perspective is whether an individual has had contact with anyone whom the employee knows has tested positive for COVID-19 or who has symptoms associated with COVID-19. This is a better question from a public health perspective.
- Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from asking employees medical questions about family members.

**CONFIDENTIALITY:**

***A manager learns and confirms that an employee has COVID-19 or symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should they do?***

- The ADA requires that an employer keep all medical information confidential, even if that information is not about disability.
- In this example, while this is medical information, the fact that it is medical information does not prevent the manager from reporting it to appropriate employer officials so that they can take actions consistent with guidance from CDC and other public health authorities.
- The question is, what information can be conveyed? The answer as to who exactly in the organization needs to know the identity of the employee will depend on each workplace and why the specific official needs this information. Employers should make every effort to limit the number of people who get to know the identity of the employee. A designated representative of the employer may interview the employee and get a list of all employees with whom the employee was in contact.

- However, this does not require disclosing the employee's name. For small agencies, employees may guess, but the employer cannot reveal the identity of the employee or confirm the identity if asked.
- Plan what supervisors and managers should do in these situations. Who will be responsible, and what is their role?

***An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does the ADA confidentiality prevent the employee from disclosing the coworker's symptoms to a supervisor?***

- No. ADA confidentiality does not prevent this employee from communicating with their supervisor about the coworker's symptoms. This would not be an ADA violation.
- After learning about the situation, the supervisor should report the situation to the correct agency officials and discuss the next steps.

***An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease and that they are in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why?***

- Yes, staff may need to know how to contact the employee, even if that employee is not working in the workplace. Disclosure of this information is permissible without saying why the employee is teleworking.
- If the employee was on leave because they have COVID-19 or symptoms of the disease, the employer cannot disclose the reason for the leave just the fact that they are on leave.

***Employers may be concerned that telling employees that "someone at this location" or "someone on the 4<sup>th</sup> floor" has COVID-19 may not provide sufficient information to allow people to know if they should take further steps to protect themselves or others. Therefore, can employers tell the workforce the name of the employee with COVID-19?***

- No. The ADA does not permit such a broad disclosure of the medical condition of a specific employee. The CDC does not recommend this broad disclosure.
- Employers must maintain the confidentiality of individuals with COVID-19.

***Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely?***

- The ADA Requirement that medical information is kept confidential includes the requirement that the medical information is stored separately from regular personnel files.
- If the supervisor can safeguard this information to the greatest extent possible, then they should.
- If the supervisor has access to the confidential medical record that already exists for this employee, then they should add the information to that secure file. If the supervisor does not have access to the secure medical file for the employee, then they should secure the information to the extent possible while they are teleworking and away from the office. This means that notes, laptops, and other records must be stored confidentially until the manager can return to the office and store the medical information in their customary secured medical files for the employee.

***Does the ADA permit employers to notify public health authorities if they learn an employee has COVID-19?***

- Yes, the ADA permits this notification to public health authorities, because COVID-19 poses a Direct Threat both to individuals with the disease and to those with whom they come into contact.
- ADA defines a direct threat in this situation to mean when an individual's medical condition (here - COVID-19) poses a significant risk of substantial harm to themselves or others.
- ADA does not preempt state, county, or local laws that are designed to protect the public health from a direct threat like that posed by COVID-19 at the time of this Webinar -3/27/2020.

**DISABILITY**

***Is COVID-19 a disability under the ADA?***

- This is a new virus, and while medical experts are learning more about it, there is still much to be discovered. It is unclear at this time whether COVID-19 is or could be a disability under the ADA.
- Regardless of whether COVID-19 is or could be a disability, employers can bar employees from the workplace who have COVID because of Direct Threats to others in the workplace. Employers should continue to take action involving persons with COVID-19 or who may have COVID-19 based on the most current guidance available from the CDC or other public health authorities.

**Reasonable Accommodation**

***What are an employer's ADA obligations when an employee says that they have a disability that puts them at higher risk of severe illness if they contract COVID-19, and therefore asks for reasonable accommodation?***

- The CDC has identified a number of medical conditions (including chronic lung disease or serious heart condition) as potentially putting individuals at higher risk; therefore, this is clearly a request for reasonable accommodation. It is a request for a change in the workplace due to a medical condition. Because the ADA would not require an accommodation where the employee has no disability, the employee may verify that the employee does have a disability, as well as verifying that the accommodation is needed because the particular disability may put the individual at higher risk.
- There could also be a situation where an accommodation is asked for because the current situation exacerbates their disability. The employer can verify that the employee has a disability and the need for the accommodation regarding the particular disability. They can also inquire as to the type of accommodation that will meet the employee's health concerns.
- An employer may also consider whether a reasonable accommodation may impose an undue hardship. The employer may assess whether a specific form of accommodation would pose significant expense and difficulty under the current circumstances.
- The employer must be aware that because of the current circumstances, the private health care provider may not get documentation back quickly. The employer must think of other ways to get verification of the underlying health condition such as looking at insurance records, or prescription records may document the existence of the disability. The employer also must consider granting interim accommodations until the underlying health condition can be verified.

This is particularly critical where the request is for telework or leave where the disability puts them at higher risk for COVID-19.

***What are an employer's ADA obligations to provide a reasonable accommodation if an employee says that they live in the same household as someone who, due to a disability, is at greater risk of severe illness if they contract COVID-19?***

- Only the employee only has a right to reasonable accommodation for their disability in a situation where the employee does not have a disability, only a member of their household. However, the employer should consider if it is treating the employee differently than other employees with a similar need before it responds to the request.

***What practical considerations should employers and employees keep in mind about the interactive process in the current COVID-19 situation?***

- The interactive process refers to the process that an employer and employee should use to adequately discuss a request for accommodation so that the employer can obtain the necessary information to make an informed decision.
- In the current situation, some requests may need an employer's prompt attention, such as the situation with employees with disabilities that put them at higher risk. Employers may provide the accommodation temporarily while the employer is discussing the request with the employee or waiting to obtain medical information.
- In the current situation, employers and employees should be as flexible and creative as possible. There may be accommodations that are not ideal but will meet the employee's needs on a part-time basis.
- The current COVID-19 Pandemic Crisis constitutes an extenuating circumstance in exceeding the reasonable timelines they must follow in processing requests for and providing reasonable accommodations.

***When an employer requires some or all of its employees to telework because of COVID-19, or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations it provides to the individual in the workplace?***

- If such a request is made, the employer and employee should discuss what the employee needs are and why and whether the same or a different accommodation might suffice in the home setting.
- For example, the employee may already have things in their home to enable them to do their job so that they would not need to have all of the accommodations provided in the workplace.
- The undue hardship considerations might be different when evaluating a request for accommodation while teleworking, rather than when working in the workplace. In other words, a reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose an undue hardship in the home setting when considering the place where it is needed and the circumstances that necessitated the telework. For example, the fact that the period of telework may be temporary or unknown in duration may render the accommodations either not feasible or undue hardship. There may be constraints on the normal availability of items or on the ability of an employer to conduct a needed assessment. So, as a practical matter, given the circumstances that created the need for telework, employers and employees should both be flexible and creative about what can be done when assessing the accommodation that the employee may need while teleworking in these circumstances. If

possible, providing interim accommodations may be appropriate while the employer is assessing the request or waiting for medical documentation.

***Assume that an employer grants telework to the employees for the purpose of slowing or stopping the spread of COVID-19. After such public health measures are no longer necessary, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who wishes to continue this arrangement?***

- No. Anytime an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, the employer does not have to provide it as an accommodation. Or, if there is a disability-related limitation, but the employer can effectively address the need with another accommodation at the workplace, the employer can then choose that effective alternative to telework. To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request after the COVID-19 crisis has ended to continue teleworking as a reasonable accommodation does not have to be granted. This is because the ADA never requires employers to eliminate the performance of essential job functions as an accommodation for an individual with a disability.
- To protect the health and safety of employees during the COVID-19, an employer may choose to excuse one or more essential functions, or permit telework. But that does not mean that the employer has permanently changed the job's essential functions. Or that telework is a feasible accommodation. Or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring the employee's essential job functions after the COVID-19 Pandemic Crisis passes or as such time as it chooses to restore prior work arrangements and then evaluate accommodations, continued or new, under the normal, reasonable accommodation analysis.

***Assume that, prior to the emergence of the COVID-19 Pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for the accommodation. Still, the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee continued to come to the workplace. However, after the COVID-19 crisis has subsided and the temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer refuse the request?***

- Assuming all of the requirements for such a reasonable accommodation are satisfied, the temporary telework situation could be relevant in considering the request. In this situation, the period of providing telework because of the COVID-19 Pandemic could serve as a trial period to evaluate whether the person with a disability could satisfactorily perform all of the essential job functions while working remotely. And the employer should consider the new request, in light of this trial period. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative, interactive process.

## **OTHER STATUTES**

### **Age Discrimination in Employment Act**

***May an employer exclude from the workplace an employee who is 65 or older and who does not have COVID-19, or symptoms associated with the disease, solely because the CDC has identified this age group as being at a higher risk of severe illness if they contract COVID-19?***

- No. The Age Discrimination in Employment Act prohibits discrimination against employees who are age 40 and older.
- If the reason for an employment action is because of age (over the age of 40), the law will not permit employers to bar employees who are 40 or older from the workplace or require them to telework, or to place them on involuntary leave.
- One way to show that this is based on age is to show that the employer did not take similar actions against comparable employees who are under the age of 40.

***Do the EEO laws require an employer to grant a request to telework from an employee who is 60 or older because the CDC says older people are more likely to experience severe symptoms if they get COVID-19?***

- No. The Age Discrimination in Employment Act does not have an accommodation provision. But if the employer is allowing other comparable employees to telework, it must make sure it is not discriminating against anyone because of their age.

### **Pregnancy**

***The CDC list of people who are at higher risk for severe illness if they contract COVID-19 includes a recommendation to monitor women who are pregnant. Based on this CDC recommendation, may an employer decide to lay off or place on furlough a woman who is pregnant but does not have COVID-19, or symptoms associated with the disease?***

- No. Pregnant employees are protected under Title VII of the Civil Rights Act.
- Employment actions based on pregnancy are decisions based on sex and violate Title VII.

***Do the EEO laws require an employer to grant a request to telework from an employee who is pregnant because the CDC says there is a higher risk if she contracts COVID-19?***

- Title VII, as amended by the Pregnancy Discrimination Act, says that "women affected by pregnancy will be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." Therefore, a pregnant worker should not be denied a needed adjustment that the employer provides to other employees for other reasons who are similar in their ability or inability to work.
- Some pregnancy medical conditions may be ADA disabilities and may trigger ADA accommodation rights. But pregnancy in itself is not an ADA disability.

### **National Origin**

***May an employer single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19?***

***May an employer tolerate a hostile work environment based on an 'employee's national origin or religion because others link it to the transmission of COVID-19?***

- No. Title VII of the Civil Rights Act prohibits discrimination on the basis of national origin, regardless if it is linked to the current Pandemic.
- Employers may wish to remind workers about policies on workplace harassment and emphasize the broad nature of the prohibition against harassment based on National Origin even if the harassment is based on fears of COVID-19.

**Resources:**

- EEOC's 2009 "Pandemic Preparedness in the Workplace and the Americans With Disabilities Act" was updated March 2020 to include COVID-19 examples and information
  - [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- "What You Should Know About the ADA, the Rehabilitation Act, and COVID-19"
  - [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)