

# Employment Practices Liability

April 22, 2020

## Equal Employment Opportunity Commission Issues Updated Guidelines on COVID-19

By Cindy M. Cieslak, Partner; Rauchell Beckford-Anderson, Associate; and Rose Kallor, LLP

On April 17, 2020, the Equal Employment Opportunity Commission (“EEOC”) provided an updated and expanded technical assistance publication on questions relating to the COVID-19 pandemic, including disability and medical exams; confidentiality of medical exams; hiring and onboarding; reasonable accommodations; pandemic-related harassment; furloughs and layoffs; and returning employees to work.

The EEOC is the agency responsible for enforcing anti-discrimination laws in the workplace. These laws include the Americans with Disabilities Act (ADA), the Rehabilitation Act (includes the requirement for reasonable accommodation and non-discrimination with respect to disabilities), Title VII of the Civil Rights Act (prohibits discrimination based on race, color, religion, national origin, and sex, including pregnancy), the Age Discrimination in Employment Act (prohibits discrimination based on age, 40 or older) and the Genetic Information Nondiscrimination Act.

Here is a summary of the updated and expanded technical assistance publication:

### Disability-Related Inquiries and Medical Exams

- An ADA covered employer may ask its employees if they are experiencing pandemic related symptoms (fever, cough, chills, sore throat, and shortness of breath), however, an employer must keep this information confidential.
- When screening employees entering the workplace during the COVID-19 pandemic, employers may ask employees about COVID-19 symptoms. In doing so, employers should rely on the CDC and public health authorities for guidance in determining which symptoms to ask employees about.
- Although measuring an employee’s body temperature is considered a medical examination, employers may measure an employee’s body temperature during the COVID-19 pandemic.
- Employers may require employees to stay home sick if they have COVID-19 symptoms.
- Employers may require a doctor’s note when an employee returns to work. This is permitted by the ADA. Also keep in mind that doctors and healthcare professionals may be too busy during a pandemic to provide such documentation.

### Confidentiality of Medical Information

- All employees wear a facemask at all times while at work. Employers can either provide their employees with facemasks or approve employee supplied cloth face covering if there is a shortage. It is important to note that these face coverings must comply with all workplace safety requirements.
- An employer must store an employee’s medical information separately from the employee’s personnel file to maintain confidentiality. An employer is not required to maintain a separate COVID-19 medical file for the employee, rather, an employer may store this information with other existing medical information for that employee. This includes a statement from the employee that he has, or suspects that he has the disease, or management’s notes from questioning an employee about symptoms.
- If an employer requires all employees to have daily temperature checks before entering the workplace, the employer needs to maintain a log of the results. Additionally, this needs to remain confidential.
- An employer may disclose the name of a COVID-19 positive employee to a public health agency when it learns this information.

- A temporary staffing agency or contractor that places employees in an employer’s workplace may notify the employer and disclose the name of an employee if it learns an employee is COVID-19 positive. This is important because the employer may need to determine if this employee encountered other employees in the workplace.

### Hiring and Onboarding

- When hiring, an employer may screen applicants for COVID-19 symptoms, after making a conditional job offer, as long as the employer does so for all employees in the same job type. This ADA rule is applicable whether or not the applicant has a disability.
- An employer may take an applicant’s temperature as part of a post-offer or pre-employment medical exam. This is permitted after making a conditional offer of employment.
- An employer is allowed to delay the start date of an applicant who has COVID-19 or COVID-19 symptoms.
- An employer may withdraw a job offer when it needs an applicant to start immediately but the employee has COVID-19, or symptoms, because, based on CDC guidance, the employee cannot safely enter the workplace.
- An employer cannot postpone the start date or withdraw an offer because the applicant is 65 years old or pregnant, even though the CDC has identified such individuals as being at a greater risk. An employer may discuss with the applicant the option of postponing the start date, but an employer may not require postponement. Alternatively, employers may allow the applicant to telework.

### Reasonable Accommodation

- Absent undue hardship to the employer, there may be a reasonable accommodation that an employer can offer individuals with disabilities. A reasonable accommodation may include a request for reduced contact with others such as implementing one-way aisles, using tables, plexiglass, or other barriers. An employer may consider temporary job restructuring, temporary transfers to a different position, or modified work schedules.
- If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, in response to a request, an employer may ask questions to determine whether the condition is a disability, and whether the employee is now entitled to a reasonable accommodation, absent undue hardship.
- If all employees are required to telework during this time, an employer should not necessarily postpone discussing a request for an accommodation from an employee with a disability that will not be needed until he returns to the workplace when telework ends. An employer may give priority to requests for reasonable accommodations needed by employees who are teleworking.
- An employer may need to provide an additional or altered accommodation to an employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic, absent undue hardship.
- An employer may still request information from an employee who requests an accommodation for a medical condition at home or in the workplace if it is not obvious or already known. Under the ADA, an employer may request medical documentation or ask questions to determine if the employee has a disability.
- An employer may still engage in the interactive process during the

pandemic and ask questions and request information from its employee about why the employee needs an accommodation if it is not obvious or already known.

- An employer may provide a temporary accommodation if there is an urgency to provide the accommodation, or the employer has limited time available to discuss the request during the pandemic. An employer may also apply an end date to the temporary accommodation. Additionally, an employer must consider an employee's request for an extension, especially if government restrictions are extended, or new ones are adopted.
- An employer may ask an employee with a disability now if the employee will need reasonable accommodations when they are permitted to return to the workplace.
- If a particular reasonable accommodation poses an undue hardship (significant difficulty or expense) to an employer, the employer is not required to provide it. A hardship may arise during a pandemic that was not necessarily a hardship previously.
- An employer may determine whether current circumstances create undue hardship when providing certain accommodations. Employers and employees should work together if an accommodation poses an undue hardship, to determine if there is an alternative.
- An employer may consider the following to determine if a requested accommodation poses undue hardship: sudden loss of all or some of an employer's income and the availability of discretionary funds. This does not mean that the employer can reject an accommodation that costs money; instead, the employer should weigh the cost against its current budget to make the determination.

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

There are practical tools available to employers to help reduce and address workplace harassment that may arise as a result of COVID-19. Employers should explicitly communicate to their employees that their fear of COVID-19 should not be directed against individuals because of their protected characteristics, such as their race or national origin.

Additionally, an employer should take additional steps to address possible harassment and discrimination against coworkers when it re-opens. An employer may remind its employees, when it re-opens, that it is against the federal law to harass or discriminate against coworkers based on race, national origin, color, sex, religion, age, disability, or genetic information. Employers should try to remind managers and supervisors of their role in enforcing these laws. Employers should make it clear that all allegations of harassment or discrimination will be reviewed immediately.

## Furloughs and Layoffs

Employers should consult their attorney and the EEOC's [technical assistance document on severance agreements](#) for special rules that apply when offering employees severance packages in exchange for a general release of all discrimination claims against an employer.

- Permit employees to wear masks/face coverings and/or gloves, and in some jurisdictions, employers are obligated to provide face coverings (see above).
- Provide all delivery workers with flexible work hours, for example staggering shifts where feasible, and minimize interactions between drivers and customers by leaving deliveries at loading docks, doorsteps or other locations that don't require person-to-person contact.
- Provide workers with alcohol-based hand sanitizer containing at least 60% alcohol, if they don't have access to soap and water to wash their hands.

- Provide disinfectant sprays and wipes for workers to clean their work surfaces, including vehicle interiors.

## Return to Work

As government stay-at-home orders are lifted, it is important for employers to understand what steps they can take, consistent with the ADA, to screen employees for COVID-19, when permitting them to re-enter the workplace. Employers are permitted by the ADA to make disability related inquiries, and to conduct job-related medical exams consistent with business necessity. These inquiries and exams meet this standard if they are necessary to exclude employees with a medical condition that would create a direct threat to health or safety.

An employer can determine direct threat based on the best available objective medical advice, such as the CDC or other public health authorities. Therefore, an employer should ensure that any screening implemented is consistent with advice from the CDC and public health authorities. These screenings may include continuing to take temperature and asking employees about their symptoms.

If an employee requests an accommodation due to the need for wearing modified protective gear, the employer should discuss this request and provide the modification, or a feasible alternative, and one that does not pose an undue hardship on the employer's operation.

## Pandemic Preparedness in the Workplace

The EEOC also provides guidance on implementing strategies for workplace protection and rules to navigate the impact of COVID-19 at work. You can find them here: [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act | \[PDF version\]](#). Although the EEOC provided these guidelines during the H1N1 outbreak, they continue to be applicable today throughout the COVID-19 pandemic.

Although EEOC laws, including the ADA and Rehabilitation Act, continue to apply during the COVID-19 pandemic, they do not prevent or interfere with following guidelines and suggestions made by state or local public health authorities or the CDC regarding the steps an employer should take regarding COVID-19. Because guidance from public health authorities is constantly evolving, employers should always follow the most current information on workplace safety.

If you are an employer that has any questions or concerns about compliance with federal or state law during the COVID-19 pandemic, Rose Kallor, LLP provides a full range of legal counseling to private and public-sector employers. Please contact us with any COVID-19-related issues you face or anticipate facing, and we will be happy to assist you.

---

The attorneys at Rose Kallor, LLP regularly represent and advise private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Marketing and Creative Design Associate at [jsmith@ccm-ct.org](mailto:jsmith@ccm-ct.org).

**For more information about CIRMA's Employment Practices Liability Helpline Program, please contact your CIRMA Risk Management Consultant.**



---

**Have a question or concern about Employment Practices?**

Call CIRMA's EPL Helpline at **833-544-4110**

or email at

[cirmahotline@rosekallor.com](mailto:cirmahotline@rosekallor.com)

---