

EEOC Updates Workplace COVID-19 Guidance

by Colin H. Hargreaves - Wednesday, September 16, 2020



On September 8, 2020, the Equal Employment Opportunity Commission (EEOC) updated its [technical assistance related to COVID-19](#). While short on groundbreaking developments, the update does offer some helpful reminders on how to protect your workplace without violating employees' rights.

Here is an overview of the new additions to the guidance.

Medical Inquiries and Examinations

The Americans with Disabilities Act (ADA) requires that employee medical information be maintained confidentially, and that all medical examinations and inquiries must be job-related and consistent with a business necessity. In this regard, the updated guidance provides:

- Employers may ask all employees entering the workplace if they have COVID-19, symptoms associated with COVID-19, and/or if they have been tested for the virus. Employers may exclude from the workplace those with the virus or experiencing its symptoms since their presence would be a direct threat to the health or safety of others.
- Similarly, an employer may ask only selected individuals these same questions, but only if the employer has a reasonable belief based on objective evidence that the specific employees being questioned have the disease.
- Employers may not ask employees returning to work whether they have family members who have COVID-19 or symptoms associated with COVID-19 as it would violate the [Genetic Information Nondiscrimination Act](#) ("GINA"). Instead, employers should ask whether the

employee has had any contact with anyone (not just family members) diagnosed with COVID-19 or who may have symptoms associated with the disease.

- Employees may be kept from work if they decline to submit to temperature checks, health questionnaires, or other lawful screening measures. The EEOC recommends, however, that employers engage with such employees to find out why they are reluctant, and to offer assurances about confidentiality, possible accommodation and other applicable protections.

- As a part of workplace screening for COVID-19, employers may request further information from employees who report feeling ill or who call in sick.

- Employers may ask why an employee has been absent from work as this is a legitimate, non-disability-related inquiry. They may also ask where the employee travelled to during their time off; this also is not considered disability-related.

Confidentiality of Medical Information

- The EEOC reminded us a supervisor who learns that an employee has the virus or is experiencing its symptoms may inform appropriate employer officials without this being a breach of the employee's confidentiality. This information should be shared only with those who have a legitimate need to know, and the employer should take proper steps not to disclose the identity of the individual to others

- An employee also is permitted to tell his or her supervisor that a coworker is experiencing symptoms associated with COVID-19.

- With respect to employees who are teleworking because they have COVID-19 symptoms, an employer may confirm to others that the employee is telecommuting but must not divulge the reason for the teleworking arrangement.

- If a supervisor working remotely receives medical information about other employees, that supervisor must try to comply with the employer's confidentiality protocols. If this is not feasible, the supervisor must still safeguard the information to the greatest extent possible in the remote location until the employer's actual protocols can be implemented.

Reasonable Accommodation

In regard to the ADA's requirement of reasonable accommodation for disabled applicants and employees, the EEOC's updated COVID-19 technical assistance provides:

- Employers must still attempt to accommodate teleworking employees if such a request is made. However, the standard for determining undue hardship may be different since an accommodation that is suitable at work may not be feasible for a teleworking employee.

- The fact that the employer has allowed employees to telework in order to stop/slow the

spread of COVID-19 does not mean that teleworking is automatically a reasonable accommodation for a disabled employee. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide teleworking as a reasonable accommodation even if that employee did telework during a shutdown or quarantine.

– However, to the extent employees requested teleworking as a reasonable accommodation prior to the pandemic, but were rejected, any period of required teleworking (as a result of quarantine or slowing the spread) may serve as a trial period, which may show that an employee can in fact satisfactorily complete the essential functions of his or her job.

– The EEOC also highlighted that the pandemic may increase the amount of reasonable accommodation requests, and as such, it may produce excusable delays in the interactive process.

Other Reminders

The EEOC issued reminders that all employment practices must be conducted without regard to protected class status (e.g. race, gender, age, etc.). They pointed in particular to the need to ensure that furloughs and layoffs are conducted on a nondiscriminatory basis.

Bottom Line

Balancing COVID-related safety and EEO obligations can be tricky. EEOC's continuing updates in this regard are helpful reminders on how employers can stay safe while also remaining compliant.