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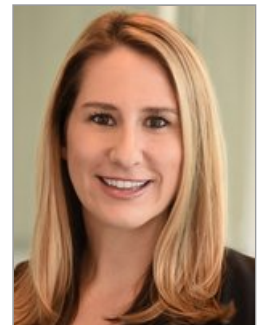
An Employer's Guide To ADA Obligations During COVID-19

By **Natalia Delaune and Efrat Schulman** (June 25, 2020, 4:21 PM EDT)

As states lift stay-at-home restrictions, employers face a patchwork of orders and guidelines they must navigate to reopen the workplace. At the federal level, the U.S. Equal Employment Opportunity Commission has stated that the discrimination laws it enforces do not hinder employers from following guidance issued by the Centers for Disease Control and Prevention.

Despite this assurance, employers face tough calls about when to bring employees back to the workplace, which employees to bring back, and how to respond to requests for accommodations. As employers wrestle with difficult business decisions, they continue to navigate evolving medical and legal risks.

This article provides practical guidance to employers who must develop legally sound approaches to employee screening and meeting their accommodation obligations.



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Screening Employees Before Permitting Entry to the Workplace

Under normal, nonpandemic circumstances, the Americans with Disabilities Act prohibits medical examinations and disability-related inquiries of employees unless the examination or inquiry is shown to be "job-related and consistent with business necessity."^[1] This test is satisfied when the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition.



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The EEOC has concluded that, at this time, COVID-19 poses a direct threat both to individuals with the disease and to those with whom they come into contact.^[2] This determination gives employers some leeway to adopt infection control strategies that would not be permitted in the absence of a pandemic.

Permissible Measures

So long as CDC guidelines encourage employers to require daily symptom and temperature screenings before employees enter the workplace, employers can adopt certain measures without violating the ADA.

One challenge for employers is that the EEOC has not provided any specific guidance on the protocols to be followed in taking an employee's body temperature or administering a COVID-19 test. Accordingly, employers should balance the CDC's health and safety guidance against the risk that their testing or inquiries will be found impermissible under the ADA.

Screening Questionnaires

Employers should be mindful in developing a list of permissible inquiries for employees to answer before they will be deemed nonthreatening to enter the workplace. Permissible topics include:

- Sick inquiry: Employers may ask employees whether they are experiencing symptoms of COVID-19.
- Exposure inquiry: Employers may ask employees if they have been exposed to individuals who may have COVID-19, including whether they or anyone in their household has come into close contact with an individual who has tested positive for COVID-19.
- Travel inquiry: Employers may ask employees if they have traveled to an area that is under a U.S. Department of State travel advisory.
- Away-from-work inquiry: Employers can request that employees who have been away from the workplace provide a doctor's note certifying their fitness to return and/or a local clinic's note certifying that the individual does not have COVID-19.

It is important for employers to consult applicable state and local orders for required health screening inquiries.[3] In addition to requiring answers to screening questions, employers can plan for absenteeism or other modifications to the workplace by implementing an early process for employees to request accommodations before they return to work.

COVID-19 Testing

The ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity."

The EEOC has applied this standard to the current COVID-19 pandemic and determined that individuals with the virus pose a direct threat to the health of others, and, therefore, COVID-19 testing that is established as accurate and reliable is currently permissible. Up-to-date guidance from the U.S. Food and Drug Administration, CDC and local public health authorities must inform the decision on what types of tests meet this threshold.

There are three types of COVID-19 testing currently available on the market: (1) molecular testing, (2) antigen testing and (3) antibody testing. At present, the FDA has indicated that molecular tests involving swabs of the respiratory tract are highly accurate but that neither antigen testing nor antibody testing can reliably diagnose COVID-19 illness.

Specifically, the FDA has indicated that while currently available antigen tests have highly accurate positive results, the rate of false negatives is high. This means that antigen tests cannot reliably rule out COVID-19 illness at this time, and employers cannot depend upon negative results to make return-to-work decisions.

Similarly, the FDA has indicated that antibody tests should not be used as the sole basis to diagnose COVID-19 due to the high false negative rates in early illness and in certain immunocompromised individuals. Moreover, the FDA has also indicated that antibody testing cannot be used as a basis to provide an immunity passport to individuals looking to return to work due to both high false positive rates and uncertainty about the protective effect of antibodies in preventing individuals from becoming reinfected.

In short, currently available antibody tests are not reliable for diagnosing current COVID-19 illness or for identifying individuals who are unlikely to become reinfected even if they have known past infection. The EEOC recently announced that employers may not require antibody testing as a condition to returning to the workplace.[4]

Relatedly, employers must keep in mind that while molecular testing does reliably reveal the presence or absence of active infection with COVID-19, the testing does not provide information about whether an employee with either a negative or positive molecular test will be at risk of acquiring COVID-19 in the future. Thus, current COVID-19 testing modalities, namely, molecular testing, are reliable for ensuring that employees do not have ongoing active infection but cannot form the basis for concluding that any particular employee is protected from future infection.

Employers wishing to engage in employee COVID-19 testing should, as a first step, ensure that the

specific testing kits have been FDA reviewed and authorized. Employers should also keep in mind that testing for COVID-19 constitutes a medical exam that must be conducted confidentially by appropriately licensed health care professionals. If testing results are maintained, they must be kept in a medical file separate from the employee's personnel records.

It remains unsettled whether employers can require vaccinations once a COVID-19 vaccine becomes available. In particular, it is not yet clear whether the increased health risks posed by COVID-19 and the current determination that the pandemic meets the direct threat standard may change the employer's obligations with respect to providing reasonable accommodations for employees that refuse vaccination. This is one of many areas where the EEOC and courts will need to react quickly and adapt to rapidly developing facts.

Impermissible Measures

Despite assurances that employers can follow CDC guidance, the EEOC has stated that employers cannot exclude an employee solely because of an underlying health condition that the CDC has identified as placing an individual at a higher risk for severe illness upon contracting COVID-19.[5] Nor can an employer ask whether an employee has such an underlying health condition in a screening questionnaire.

Such inquiries would be allowed only if a pandemic is severe enough in the relevant area that employees who have such underlying health conditions face a direct threat to their health by simply being present in the workplace.

If an employer is put on notice of an at-risk condition that triggers a concern about the employee's health being jeopardized upon returning to the workplace, the employer must engage in an individualized assessment of whether the condition poses a direct threat to the employee's own health.

This assessment should be based on reasonable medical judgment and should consider the severity of the pandemic in a particular area, the employee's job duties, and the likelihood that the individual will be exposed to the virus at the worksite.

And, even if an employer concludes that the employee's condition poses a direct threat to the employee's own health if he or she returns to the workplace, the employer still cannot exclude the employee unless there is no way to provide a reasonable accommodation. Employers also cannot require employees in high-risk categories to work remotely solely because they are determined to be at risk.

In all these ways, employers must carefully thread the needle to ensure compliance with CDC and other applicable guidelines while mitigating the risk of an ADA claim.

Meeting the ADA's Accommodation Obligations

The pandemic has led to an increased number of requests for accommodations from employees, including those who are at increased risk for severe illness from COVID-19, or who cannot wear face coverings on their skin due to a medical condition. Indeed, the EEOC's New York office has indicated that failure-to-accommodate claims have been the most common type of COVID-19 claims filed with that office,[6] and there is reason to believe the pattern is similar elsewhere.

As the EEOC's senior attorney adviser for the ADA, Sharon Rennert, has advised that employers and employees should "be as flexible and creative as possible" in order to reasonably accommodate employees' needs during the pandemic.[7] After receiving an accommodation request, employers may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation that can be provided without undue hardship.

Possible questions during the interactive process may include:

- How the disability creates a limitation;

- How the requested 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 the essential functions of his or her position — that is, his or her fundamental job duties.

Prior to COVID-19, courts were split about whether employers needed to allow employees to telework as an accommodation.[8] This issue will only become more important in light of COVID-19.

The question is especially thorny with respect to pregnant employees, who may be advised by their doctors to telework. Pregnancy itself is not an ADA disability, though pregnancy-related medical conditions can sometimes constitute ADA disabilities that trigger ADA accommodation rights.

Pregnant employees may also be entitled to accommodations, including telework, under Title VII as amended by the Pregnancy Discrimination Act. On the other hand, Title VII prevents employers from excluding pregnant employees from the workplace involuntarily due to the pandemic so it is important not to make assumptions about whether a pregnant employee should be provided a telework accommodation.[9]

Questions also will arise regarding accommodations for employees who feel significant stress due to COVID-19. Employers may ask questions to determine if the condition — whether it be an anxiety disorder, obsessive-compulsive disorder, post-traumatic stress disorder or something else — is a disability, and discuss how the requested accommodation would assist the employee in continuing to work.

In addition, COVID-19 may impact what courts consider to be a reasonable length of a leave of absence if an employee's doctor recommends the employee limit exposure to others by self-quarantining for an indefinite amount of time. Related questions will arise with respect to members of employees' households.

In particular, an employer is not required to provide an accommodation for an employee solely because the employee's household member is at a high risk for COVID-19, even though the employee seeks to protect that high-risk individual from potential COVID-19 exposure.[10] A related question is whether an employer may prevent an employee from coming to work if a household member has been diagnosed with COVID-19. The answer likely is yes.

Current CDC guidance indicates that it "is important to remember that anyone who has close contact with someone with COVID-19 should stay home for 14 days after exposure based on the time it takes to develop illness,"[11] and the EEOC's related guidance notes that COVID-19 poses a direct threat both to individuals with the disease and to those with whom they come into contact.[12] Thus, an employer can screen and remove from the workplace anyone whose household member has tested positive for COVID-19.

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[1] 42 U.S.C. § 12112(d)(4)(A).

[2] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[3] See, e.g., New York State Department of Health, Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency, available at

<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>; Texas Department of State Health Services, Checklist for All Employers and Event Organizers, available at <https://www.dshs.state.tx.us/coronavirus/opentexas.aspx#protocols>; Virginia Department of Health, Interim Guidance on Screening Monitoring and Testing Employees Returning to Work: Non-Essential Workforce, available at <https://www.vdh.virginia.gov/coronavirus/vdh-interim-guidance-for-daily-covid-19-screening-of-employees-and-visitors>.

[4] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[5] CDC, People Who Are at Higher Risk for Severe Illness, available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

[6] Braden Campbell, Pandemic Fueling Disability Accommodation Claims, Law360 available at <https://www.law360.com/articles/1277246/pandemic-fueling-disability-accommodation-claims>.

[7] EEOC, Transcript of March 27, 2020 Outreach Webinar, available at <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>.

[8] See, e.g., *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 758-61 (6th Cir. 2015) (en banc) (holding that employer was not required to accommodate employee by providing an option to work from home, and setting aside the panel decision which had held to the contrary); *Credeur v. Louisiana*, 860 F.3d 785, 793 (5th Cir. 2017) (noting a "general consensus among courts ... that regular work-site attendance is an essential function of most jobs"); *Konspore v. Friends of Animals, Inc.*, 3:10-cv-613, 2012 WL 965527, at *12 (D. Conn. March 10, 2012), cited in *McMillan v. City of New York*, 711 F.3d 120, 128 n.4 (2d Cir. 2013) ("The Second Circuit has implied that working from home might, in some cases, constitute a reasonable accommodation."); *Vangas v. Montefiore Med. Ctr.*, 6 F. Supp. 3d 400, 418 (S.D.N.Y. 2014) (concluding "that issues of fact exist regarding the reasonableness of Plaintiff's request to work from home").

[9] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Questions J.1 and J.2), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[10] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question D.13), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[11] CDC, When You Can be Around Others After You Had or Likely Had COVID-19, available at <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>.

[12] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.