

## EEOC Clarifies Employer Rights During COVID-19 Outbreak

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The Equal Employment Opportunity Commission just weighed in on the impact that the COVID-19 coronavirus is having on American workforces and issued a press release today titled “What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.” The publication takes a Q&A format and tackles some common areas of concern for employers. In summary, the EEOC has confirmed that during the COVID-19 pandemic employers can do the following without violating the provisions of the Americans with Disabilities Act (ADA) or the Rehabilitation Act:

- ask employees if they are experiencing symptoms of COVID-19, provided that the information is maintained as a confidential medical record;
- measure employees’ body temperature;
- tell employees who become ill with symptoms of COVID-19 to stay home (or leave work);
- require employees returning to work to provide a doctor’s note stating they are fit for duty;
- screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job; and
- withdraw a job offer when it needs the applicant to start immediately but the individual tests positive for COVID-19 or has symptoms of it.

### Agency Issues Q&As

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In issuing its guidance, the EEOC expressly reaffirms its prior guidance on pandemics (publication entitled “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act”) that was issued during the H1N1 outbreak in 2009. The EEOC further recognizes that the World Health Organization has declared COVID-19 to be an international pandemic. Applying its prior guidance on pandemics in the current environment, the EEOC issued the following Q&As:

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

- **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**



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Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

- **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

### What This Means For Employers

While the situation remains fluid, the above guidance confirms that when it comes to the ADA and Rehabilitation Act, the EEOC is deferring to recommendations and guidance from the CDC on steps that must be taken to protect both employees and members of the public. However, you must also be cognizant of state-specific requirements and workplace safety requirements that further impact your operations.

For example, if your organization decides to institute temperature checks and your company is subject to the California Consumer Privacy Act (CCPA), then you must provide employees a CCPA-compliant notice prior to or at the same time as your collection of temperatures. Further, OSHA has outlined recommended steps that you should take if you task a worker with taking the temperature of employees, applicants, or customers (which can be found in our firm's Comprehensive FAQs).

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our COVID-19 Taskforce, or review our Comprehensive and Updated FAQs.

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