

# HR COMPLIANCE BULLETIN



## EEOC Updates Employer Guidance on Coronavirus and the ADA

On April 9, 2020, the Equal Employment Opportunity Commission (EEOC) issued additional [answers to frequently asked questions](#) (FAQs) about how employers should comply with the Americans with Disabilities Act (ADA) while also observing all applicable emergency workplace safety guidelines during the coronavirus pandemic. The new FAQs were added to guidance that the EEOC previously issued on March 18, 2020.

The FAQs draw from the EEOC's existing pandemic publication, [Pandemic Preparedness in the Workplace and the ADA](#), to help employers navigate workplace issues related to the coronavirus (COVID-19). In particular, the EEOC's FAQs include information from a section of the publication that answers employer questions about what to do after a pandemic has been declared. This HR Compliance Bulletin contains the EEOC's updated FAQs.

Employers are subject to the ADA if they have 15 or more employees. Smaller employers may be subject to similar rules under applicable state or local laws.

### Action Steps

All employers should follow the most current guidelines and suggestions for maintaining workplace safety, as issued by the [Centers for Disease Control and Prevention](#) and any applicable state or local health agencies.

Employers with 15 or more employees should also become familiar with and follow the guidance provided in the EEOC's FAQs about ADA compliance. These and all smaller employers should ensure that they comply with state and local anti-discrimination laws as well.

### Highlights

#### ADA Rules Still Apply but Do Not Prevent Safety Measures

Employers must follow ADA rules while observing emergency guidelines issued by federal, state and local health authorities during the pandemic.

#### Employer Guidance

The EEOC's pandemic guidance clarifies that employers may:

- ✓ Ask employees if they have COVID-19 symptoms;
- ✓ Require employees to stay home (and to provide medical notes before returning to work) if they have COVID-19 symptoms; and
- ✓ Screen applicants for COVID-19 symptoms after making conditional job offers.



## Disability-Related Inquiries and Medical Exams

**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 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.

**NEW AS OF APRIL 9, 2020:** When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as [examples](#), or may it ask about any symptoms identified by public health authorities as associated with COVID-19?

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

**When may an employer take employees' body temperature 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.

**May employers require employees to stay home if they have COVID-19 symptoms?**

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, may an employer require doctors' notes certifying their fitness for duty?**

Yes. These inquiries are permitted under the ADA either because they would not be disability-related or would be justified under the ADA standards for disability-related inquiries. 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. For example, employers could rely on local clinics to provide a form, stamp or e-mail to certify that an individual does not have the pandemic virus.

## Confidentiality of Medical Information

**NEW AS OF APRIL 9, 2020:** May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information?

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The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this [confidential information](#). An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

**NEW AS OF APRIL 9, 2020:** If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?

Yes. The employer needs to maintain the confidentiality of this information.

**NEW AS OF APRIL 9, 2020:** May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?

Yes.

**NEW AS OF APRIL 9, 2020:** May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19?

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

## Hiring and Onboarding

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

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 regardless of whether 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?**

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

**NEW AS OF APRIL 9, 2020:** May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

## Reasonable Accommodation

*In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) [website](#) for types of accommodations. JAN's materials specific to COVID-19 are available [here](#).*

**NEW AS OF APRIL 9, 2020:** If a job may only be performed at the workplace, are there [reasonable accommodations](#) for individuals with disabilities absent [undue hardship](#) that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per [CDC guidance](#) or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

**NEW AS OF APRIL 9, 2020:** If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may:

- Ask questions to determine whether the condition is a disability;
- Discuss with the employee how the requested accommodation would assist him and enable him to keep working;
- Explore alternative accommodations that may effectively meet his needs; and
- Request medical documentation if needed.



**NEW AS OF APRIL 9, 2020:** In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

**NEW AS OF APRIL 9, 2020:** What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

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

**NEW AS OF APRIL 9, 2020:** What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their [national origin, race](#), or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment [policy tips](#) for small businesses;
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
  - [Report](#);
  - [Checklists](#) for employers who want to reduce and address harassment in the workplace; and
  - [Chart](#) of risk factors that lead to harassment and appropriate responses.

## Furloughs and Layoffs

**NEW AS OF APRIL 9, 2020:** Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs?

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Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's [technical assistance document on severance agreements](#).