

Resource Center

UPDATED GUIDANCE FROM EEOC FOR END OF COVID-19 PUBLIC HEALTH EMERGENCY

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On May 15, 2023, following the end of the COVID-19 Public Health Emergency (“PHE”), the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 technical guidance: *“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”* (“Guidance”). The Guidance addresses many issues that will continue to concern employers and gives them the green light to continue following the majority of their current COVID-19 policies and procedures.

What Employers Can Do

Generally, medical exams or inquiries of current employees must be job-related and consistent with a business necessity. Employers can establish the business necessity standard if an employee has a medical condition that would pose a “direct threat” to health and safety that cannot be addressed with a reasonable accommodation. According to the EEOC, this standard allows for consideration of whether an individual may have COVID-19. In the health care industry, a staff member with COVID-19 could potentially compromise the health and safety of the patients and other care providers. The Guidance therefore allows healthcare providers to ask employees about COVID-19 symptoms, ask if employees have been diagnosed with or tested positive for COVID-19, perform viral testing in accordance with Centers for Disease Control and Prevention (“CDC”) guidance, and make other inquiries that are job-related and consistent with a business necessity. The EEOC encourages employers to follow CDC guidance and recommends that they routinely check for guidance updates from medical and public health authorities.

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The Guidance includes further clarification on asking employees about exposure to others with COVID-19. While an employer can ask whether an employee has had contact with anyone with COVID-19 or COVID-19 symptoms, the Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees specifically whether any of their family members have been diagnosed with or have symptoms related to COVID-19.

What if an Employee Refuses Employer Screening?

The EEOC confirmed that an employer may ask employees if they have COVID-19, common symptoms of COVID-19, or if they have been tested for COVID-19, and if so, ask about the result. As part of their business necessity, health care providers also may take an employee's temperature or require a COVID-19 viral test. If an employee refuses to cooperate by answering these questions or taking these medical examinations, the Guidance allows an employer to take whatever action it deems appropriate, consistent with its applicable policies or procedures. This could include prohibiting an employee from entering the physical workspace, or other necessary measures.

The Guidance does suggest that employers work with employees and consider the reasons for the employee's refusal. For example, employees may be reluctant to provide medical information because they fear that information may be spread among the workplace. Employers should reassure employees that this information must be kept confidential and only disclosed in specific circumstances under the law. Finally, if an employee requests reasonable accommodation with respect to screening, the usual reasonable accommodation considerations and process should be followed.

Remember: All Information is Confidential

The Guidance reminds employers that the Americans with Disabilities Act ("ADA") requires all medical information about individual employees to be stored separately from the employee's personnel file. An employer may store all medical information related to COVID-19 in existing medical files. This not only includes the results of any viral testing but should also contain any notes about symptoms or documents about COVID-19 completed by the employee.

Pre-Hiring Screening

Prior to making a conditional job offer, medical exams and inquiries are generally prohibited. They are permitted between the time of the offer and when the applicant begins working, if they are required for everyone in that same job position. The Guidance reaffirms that an employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so consistently across all applicants for that job. In addition, if an employer screens **everyone** for COVID-19 (i.e., screens all applicants, employees, contractors, and visitors because anyone potentially might have COVID-19) before permitting entry to the facility or campus, then an applicant in the pre-offer stage who needs to be in the workplace as part of the application process (e.g., for a job interview) may likewise be screened for COVID-19. Employers should continue to include information regarding screening and vaccination requirements in job descriptions and job postings for potential

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hiring.

Reasonable Accommodations for Employees with COVID-19

The Guidance reiterates that the end of the Public Health Emergency does not automatically mean that employers can terminate reasonable accommodations for employees with COVID-19 (or Long COVID) that may continue to be necessary for circumstances such as an ongoing high risk to individuals with certain disabilities if they contract COVID-19 (according to the CDC). However, employers may engage in the interactive process with individual employees to determine if accommodations are still necessary or if alternative accommodations might meet their needs. Finally, the Guidance reminds employers that harassment of an employee who requires accommodations, such as a disability-related need to wear a mask or take other precautions, or harassment of someone receiving an accommodation to forgo mandatory vaccination, may violate equal employment opportunity laws.

What's next?

The Guidance allows, but does not require, employers to continue some of the COVID-19 protocols that were in place during the pandemic. Employers should remember that the informal Guidance is subject to revision based on changing circumstances and advisement from the CDC and other public health authorities. Moving forward, employers should consider whether their policies and procedures make sense for their current conditions. Conner & Winters attorneys stand ready to assist you in navigating these laws and related guidance as they continue to evolve following the end of the Public Health Emergency.