

Publications

The EEOC Provides Further Guidance on Managing Disability and Accommodation Issues in the Age of COVID-19 (Part I)

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While the COVID-19 pandemic has caused employers to cease or reduce operations, their legal obligations generally continue. The EEOC made clear in a recent webinar that “in this extraordinary time, the laws enforced by the EEOC -- Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act -- continue to apply.” At the same time, these laws “do not hinder employers from following the COVID-19 guidance from the Centers for Disease Control and Prevention (the CDC) and from state or local public health authorities.”

Below we summarize the EEOC’s most recent guidance on employers’ ADA obligations concerning disability-related inquiries and confidentiality with respect to COVID-19. Importantly, the EEOC notes that the answers to these questions may change as the risks presented by COVID-19 decrease.

Disability-Related Inquiries and Medical Exams

How much information may an employer request from an employee who calls in sick?

During the pandemic, employers may ask employees if they are experiencing symptoms of COVID-19, which include fever, chills, cough, shortness of breath, or sore throat. Employers may also ask if the employee has been tested for COVID-19. Employers must maintain all information about employee illness as a confidential medical record.

When screening employees entering the workplace, may an employer only ask employees about 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?

According to the EEOC, employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. Therefore, employers may also ask about additional symptoms beyond fever, cough, chills, shortness of breath, and sore throat – which currently include loss of smell or taste, nausea, diarrhea, and vomiting. Further, employers may ask employees if they have been tested for COVID-19 and, if so, the results.

When may an employer take the temperature of employees?

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 are permitted to measure employees' body temperature. The CDC defines fever as 100.4 F or higher. However, employers should be aware that some people with COVID-19 do not have a fever. Also, there are many other legal and practical issues to consider when implementing a temperature check procedure.

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

Yes. An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to health or safety.

What may an employer do if an employee refuses to permit taking his temperature, or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19?

The EEOC's position as of March 27, 2020, is that the ADA allows an employer to bar an employee from the workplace under these conditions.

Can an employer ask only one employee questions about COVID-19 or check the temperature of only one employee, or must it do so with all employees?

If an employer wishes to ask only a particular employee to answer such questions, or to have just a particular employee's temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have COVID-19. For example, if an employer notices the employee has a persistent, hacking cough, it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if he or she has or might have COVID-19. The reason these types of questions are permissible now is because this type of cough is one of the symptoms associated with COVID-19.

Can an employer ask an employee whether his family members have COVID-19?

No. The EEOC notes that the Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. Further, only asking an employee about contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19. Therefore, the EEOC states a better question from a public health and workforce management perspective is whether an individual has had contact with anyone who the employee knows has been diagnosed with COVID-19 or who may have symptoms associated with the disease.

Confidentiality of Medical Information

May an employer store COVID-19-related information in existing medical files, including the results of taking an employee's temperature or the employee's self-identification as having this disease?

Yes. An employer is not required to create a separate COVID-19 file. 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**. If a manager receives medical information while teleworking involving COVID-19 or any other medical information, the manager must follow an employer's existing confidentiality protocols if able to do so. If that is not feasible, the manager still must safeguard this information to the greatest extent possible until it can be properly stored.

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.

May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?

Yes, because at this time COVID-19 poses a significant risk of substantial harm.

Can a manager who learns that an employee has COVID-19 or symptoms of COVID-19 report that information (including the employee's name) to the employer?

Yes. But the EEOC notes that who needs to know the employee's identity depends on each workplace. Employers should make every effort to limit the number of people who get to know the name of the employee, and must be able to explain why a specific official needs this information. Thus, a designated representative may interview the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can notify those individuals. However, this does not require disclosing the employee's name. Even though co-workers in a small workplace might be able to figure out who the employee is, employers still are prohibited from confirming or revealing the employee's identity. The EEOC further counsels that managers who are designated as needing to know an employee's identity should be specifically instructed that they must maintain the confidentiality of this information.

Can employers share the name of an employee who has COVID-19 so that co-workers can take further steps to protect themselves?

No. Employers cannot tell the workforce the name of an employee with COVID-19, as this not permitted by the ADA. Further, the CDC specifically advises employers to maintain confidentiality of people with COVID-19.

Can an employee inform her employer that a co-worker has COVID-19 or symptoms of COVID-19?

Yes. The ADA's confidentiality requirements do not prohibit an employee from informing a manager about a co-worker's symptoms.

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 employee's name because the employer may need to determine if this employee had contact with anyone in the workplace.

Contact your Vorys lawyer if you have questions about the interaction between the ADA (and similar state laws) and COVID-19.

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Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).