

## EEOC Updates Its COVID-19 Guidance (Again)



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On September 8, 2020, the EEOC released an updated technical assistance document addressing COVID-19 and the federal anti-discrimination laws enforced by the agency, including the Americans with Disabilities Act (“ADA”). Our previous posts about the EEOC’s prior COVID-19 guidance are available [here](#) and [here](#).

The updated guidance includes 18 new questions and answers, most of which were adapted from a webinar conducted by the agency in March. Several other responses have also been updated. Most of the new questions and updates involve three topics: (1) disability-related inquiries and medical examinations, (2) confidentiality of medical information, and (3) reasonable accommodations. The following are some highlights from the guidance on each of these topics.



### ***Disability Related Inquiries and Medical Examinations***

The ADA places restrictions on the medical information employers may request from applicants and employees and when employers may (and may not) conduct medical examinations. To that end, the updated guidance clarifies that during the COVID-19 pandemic, employers may ask employees who will be physically present in the workplace if they have COVID-19, symptoms consistent with COVID-19, or received a test for COVID-19.

Employers may also administer COVID-19 testing to detect the presence of the virus on a periodic basis or before employees are permitted to enter the workplace. However, as set forth in previous guidance based on caution issued by the CDC, the EEOC makes clear that employers may **not** condition employees’ return to the workplace on undergoing testing for COVID-19 antibodies.

Employers conducting COVID-19 viral testing should ensure that: (1) their testing program is consistent with current CDC guidance, and (2) that the tests they are using are considered accurate and reliable. According to the guidance, employers may then exclude those with COVID-19 or symptoms associated with COVID-19 from the workplace. Employees who refuse to answer questions or submit to testing may also be barred from

entering. However, if an employee requests an accommodation with respect to the screening process, the employer's usual reasonable accommodation process should be followed.

Despite the leeway that the guidance provides to employers to screen employees for COVID-19, it also includes a number of practices that employers should avoid. For example:

- Employers should **not** request information regarding COVID-19 symptoms or illness or require COVID-19 testing for employees who are 100% teleworking and therefore not interacting with coworkers or customers.
- Employers should **not** ask employees whether they have family members who have COVID-19 or symptoms associated with COVID-19, as the Genetic Information Nondiscrimination Act ("GINA"), among other things, prohibits employers from inquiring into family medical history, including asking questions about the manifestation of a disease or disorder in an employee's family members. However, according to the guidance, GINA "does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease" – that is, phrasing the inquiry more broadly to focus on employee close contact with *anyone* (including, but not limited to family members) who may have the virus.
- While employers are permitted to conduct universal COVID-19 screenings and testing and to make certain inquiries of its employees as set forth above, employers should **not** single out a particular employee to answer COVID-19-related questions or to undergo testing unless the employer has "a reasonable belief based on objective evidence that this person might have the disease."

### ***Confidentiality of Medical Information***

The ADA generally requires employers to keep medical information confidential and in a separate file from the employee's regular personnel file. The updated guidance clarifies that an employee who knows that a coworker has COVID-19 symptoms may report this information to a supervisor without violating the ADA. The ADA also "does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities." The guidance, however, advises employers to "make every effort to limit the number of people who get to know the name of the employee."

After an employer learns that an employee has or may have COVID-19, the guidance states that employers may interview the employee to determine which other individuals may have been exposed. The employer may then notify these people, so long as the employer does not reveal the employee's identity. Even if other employees are able to ascertain the employee's identity based on the overall circumstances, the employer is prohibited from confirming this information.

Regarding the requirement that employers keep medical information separate from the employee's regular personnel file, the guidance advises that a manager or supervisor who receives medical information while teleworking should follow the employer's existing confidentiality protocols to the extent feasible. To the extent this is not feasible, the guidance advises that the supervisor must safeguard this information to the greatest extent possible until it can be properly stored.

### ***Reasonable Accommodations***

The ADA requires employers to provide reasonable accommodations to qualified employees with disabilities so that they can perform essential functions of the job, unless doing so would place an undue hardship on the employer. With more employees teleworking during the pandemic, employers and employees who require

accommodations should discuss “whether the same or a different accommodation could suffice in the home setting.” The updated guidance acknowledges that some employees “may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.” The guidance advises employers and employees to be “creative and flexible” to ensure that employees can telework effectively.

In addition, when businesses reopen and employees return to the worksite following a period of telework during the COVID-19 pandemic, employers are not **automatically** required to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement. According to the updated guidance, “if there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.” In addition, if the employer can effectively address the employee’s need with another accommodation at the workplace, the employer may choose that alternative. Finally, because the “ADA never requires an employer to eliminate an essential function as an accommodation,” employers are not required to continue telework if doing so requires excusing the employee from performing an essential job function. This is true even if the employer temporarily excused performance of one or more essential functions during the period of remote work.

Nevertheless, the remote work period during the COVID-19 pandemic may still be relevant to determining whether or not the employee is entitled to telework as an accommodation. According to the guidance, this remote work period may inform “whether or not this employee . . . could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”

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Our team is closely monitoring the EEOC’s guidance on the COVID-19 pandemic and will continue to provide updates as they become available.

Proskauer’s cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

U.S. REGIONS: NATIONWIDE

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