Compliance Update
March 2020

Federal Developments

EEOC Updates 2009 Pandemic Preparedness Guidance
The EEOC issued more guidance! On March 19, 2020, the Equal Employment Opportunity Commission updated its 2009 Pandemic Preparedness Guidance to address questions concerning the COVID-19 pandemic. The document is entitled, “What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.” This COVID-19 communication repeatedly references the EEOC’s 2009 pandemic guidance, which was originally released in connection with the H1N1 outbreak.

The EEOC’s revised pandemic guidance states that the COVID-19 pandemic meets the direct threat standard based on the guidance of the CDC and public health authorities. This statement affects the analysis of many of the questions and answers posed in pandemic guidance. Employers should read the revised guidance thoroughly and consult counsel, however, as the EEOC’s guidance does not address state-specific concerns or provide comprehensive information about other legal requirements related to employee privacy, compensation, etc.

Many of the significant additions are included below, with COVID-19 updates in bold (quoted verbatim):

- May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

  Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.

- During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

  ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.
Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently, these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

- During a pandemic, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?

Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.

However, employers should be aware that some people with influenza, including the 2009 H1N1 virus or COVID-19, do not have a fever.

Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees’ body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

- When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding the information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.

- May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer's business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. As of the date this document is being issued, there is no vaccine available for COVID-19.

- During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer’s ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities. If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship.
In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in a delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

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

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. 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 allowing post-offer (but not pre-offer) medical inquiries and exams apply to all applicants, 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. CDC has issued guidance applicable to all workplaces generally but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.

- 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. Finally, it is noteworthy that the EEOC prefaced its updated pandemic preparedness guidance by stating "employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace."

Please be aware that substantial changes in the governmental guidance and even in the underlying laws are occurring on almost a daily basis, which will impact the analysis of the legal issues related to COVID-19.

Other Developments

COVID-19: DOL Reminds Employers of Their Duties Under the FMLA, ADA, and FLSA

In addition to guidance given to employers by the Occupational Health and Safety Administration, the U.S. Department of Labor’s Wage & Hour Division (WHD) issued several reminders to employers regarding their duties under the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and Fair Labor Standards Act (FLSA) in the wake of the COVID-19 pandemic outbreak, addressing topics such as:

- Circumstances in which FMLA coverage and protection would be available for employees who have contracted COVID-19 or who are caring for family members that have contracted COVID-19;
- Whether employees can use FMLA leave to avoid exposure to COVID-19. Even if they cannot, be attuned to potential ADA obligations;
- Use of paid sick leave when available;
- Revising paid sick leave policies to address work shortages or financial issues;
- Preventing abuse of leave;
- Whether employers can require employees who are out sick with COVID-19 to provide a doctor’s note, submit to a medical exam, or perform a self-quarantine;
- The use of “volunteers” or temporary employees in the event a business has a shortage of workers;
- Whether employers can require salaried, exempt employees to take a vacation or unpaid leave during an office closure resulting from the COVID-19 pandemic without impacting the employees’ exempt status;
- Use of teleworking and FLSA-related issues; and
- An employer’s FLSA-related obligations to employees under government-imposed quarantine.