

EEO Laws in the Time of the COVID-19 Pandemic

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EEOC Resources

All EEOC resources on COVID-19: www.eeoc.gov/coronavirus. Including:

- ❖ **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws**

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (check here for updates)

- ❖ **COVID-19 “Ask the EEOC” free recorded webinar with written transcript**

<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>

- ❖ **Pandemic Preparedness in the Workplace and the ADA**

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Direct Threat

- At this time, if employee physically entering workplace, Americans with Disabilities Act (ADA) allows employers to screen for & exclude those with COVID-19 or its symptoms, because of “direct threat” posed to health of others:

-- WYSK question A.8

- However, ADA does not allow employers to involuntarily exclude employee without COVID-19 or symptoms solely because of underlying disability (e.g., diabetes, heart disease, etc.)

- Employer would have to analyze & show that employee poses “direct threat to self,” a high standard to meet, and even then exclusion only allowed if no accommodation possible:

-- WYSK questions G.4 and G.5



Disability-Related Inquiries and Medical Exams

What May Employers Ask/Do

- **Examples of employer worksite screening for COVID-19 that ADA allows at this time:**

questions about COVID-19 diagnosis or if employee has been tested: *WYSK question A.8*

questions about COVID-19 symptoms: *WYSK question A.2*

questions about exposure to *anyone* with COVID-19 -- but Genetic Information Nondiscrimination Act (GINA) violation to ask specifically about family members: *WYSK question A.10*

questions if call in sick or feel ill at work: *WYSK question A.12*

taking temperature: *WYSK question A.3*

administering COVID-19 viral tests (but not anti-body tests); continue to check for updated recommendations from CDC and state/local public health authorities: *WYSK questions A.6-A.7*

- **Employers may instruct employees to stay home or send them home if they have COVID-19 or symptoms: *WYSK question A.4***

Disability-Related Inquiries and Medical Exams (cont'd)

- ADA allows **screening of all employees** for COVID-19 as long as consistent with best available objective medical evidence, *e.g.*, recommendations from CDC and state/local public health authorities: *WYSK question G.1*
- No disparate treatment on protected basis (*e.g.*, African-Americans, Asian-Americans) in selecting who is screened: *WYSK question G.1*
- Employees may make requests for alternative methods of screening based on disability or religious beliefs: *WYSK question G.7*
- Employer may bar employee from workplace for refusal to answer/be screened: *WYSK question A.11*
 - *To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal or remind the employee about confidentiality: WYSK question A.11*

Disability-Related Inquiries and Medical Exams (cont'd)

- Employer may ask reason for unexplained failure to report to work:
WYSK question A.13
- ADA generally does not prohibit questions about employee travel (work or personal): *WYSK question A.14*
- ADA allows employer to require doctor's note for return after COVID-19 illness: *WYSK question A.5*
- ADA allows screening **job applicants** for COVID-19/symptoms if post-offer for all applicants entering same job, but not pre-offer:
WYSK questions C.1 and C.2

Confidentiality of Medical Information

- COVID diagnosis, fact of fever, or any symptoms all subject to ADA confidentiality; documents may be placed in existing medical file: *WYSK questions B.1 and B.5*
- Manager may only share name of someone with COVID-19 (or its symptoms) with other managers who have **need to know because of specific way they must use this information (e.g., in charge of notifying employees of possible exposure)**; cannot generally share name with other managers: *WYSK question B.5*

Confidentiality of Medical Information (cont'd)

- Employer may tell coworkers employee is teleworking or on leave, but can't reveal reason is COVID-19/its symptoms: *WYSK question B.7*
- Employer must not disclose name of employee with COVID-19 to workforce, but may say "someone at this location," "someone on the 4th Floor," or similar descriptor to notify potentially exposed coworkers: *WYSK question B.5*
- Employer may disclose name of employee with COVID-19 to public health authority: *WYSK question B.3*
- Managers/supervisors must keep medical information confidential even while teleworking: *WYSK question B.8*

Reasonable Accommodation: Who May/May Not Be Entitled to Accommodation

- Employee may be entitled to accommodation for pre-existing disability that places employee at higher risk of serious illness from COVID-19, or that is exacerbated by current situation created by pandemic (particularly certain mental illnesses or disorders, e.g., including anxiety disorders, obsessive-compulsive disorders, and PTSD): *WYSK questions D.1, D.2, and G.5*
- “Critical infrastructure workers” and “essential critical workers” have the same accommodation rights as other employees: *WYSK question D.12*
- ADA does not require accommodation of employee for association with an individual with a disability: *WYSK question D.13*

NOTE: EEOC has not addressed whether someone with COVID-19 is an “individual with a disability” under the ADA

Reasonable Accommodation (cont'd)

- Possible approaches for **inviting** employees – if they wish – to request disability accommodations, or flexibilities to meet other needs, due to pandemic: *WYSK question G.6*
- Employee still required to request accommodation: *WYSK question G.3*
- Employer still may conduct an interactive process, including requesting medical documentation, to determine if has disability and needs accommodation: *WYSK questions D.5 and D.6*
- COVID-19 circumstances may delay usual processing of accommodation requests: *Pandemic Preparedness question III.B.14*
- Circumstances created by pandemic and workplace shutdown may be relevant to undue hardship: *WYSK questions D.9-D.11*

Reasonable Accommodation (cont'd)

- Examples of accommodations for disabilities to allow individuals to remain in the workplace: *WYSK questions D.1 and G.5*
- Telework, leave, and reassignment may be reasonable accommodations for disabilities that require staying out of the workplace: *WYSK question G.4*
- If employer recalls employee to work, continued telework need not be granted as reasonable accommodation unless ADA requirements met
 - Employer can restore essential functions if they were temporarily altered due to mandatory telework: *WYSK question D.15*
 - Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace re-opens: *WYSK question D.16*

Infection Control/Personal Protective Gear and Reasonable Accommodation

- Employer may require infection control measures (e.g., frequent handwashing) and protective gear (e.g., masks, gloves), but employees may be entitled to disability/religious accommodation: *WYSK question G.2 and Pandemic Preparedness questions III.B.11 and 12*

Age

- Under ADEA, which prohibits age discrimination against those age 40+, employer may not involuntarily exclude older workers based on age-related risk of more severe illness from COVID-19: *WYSK question H.1*
- No ADEA right to accommodation based on age/age-related risks from COVID-19.
 - Older workers, however, may request ADA accommodation for medical conditions: *WYSK question H.1*
- No disparate treatment based on older age if granting flexibilities to comparable workers: *WYSK question H.2*

Pregnancy

- Under Title VII, as amended by Pregnancy Discrimination Act (PDA), employer may not involuntarily exclude employee from workplace based on pregnancy, notwithstanding any possibility of any greater risk from COVID-19: *WYSK question J.1*
- PDA's disparate treatment prohibition may require accommodation or flexibility for pregnancy where afforded others who are not pregnant but are similar in ability/inability to work: *WYSK question J.2*
- Pregnancy not a disability under ADA, but ADA accommodation for pregnancy-related medical condition if it is disability and other ADA requirements met: *WYSK question J.2*

Caregivers/Family Responsibilities

- Employers may offer flexibilities such as telework, modified schedules, or other benefits to employees with caregiver/family responsibilities, but cannot engage in EEO disparate treatment.
- *Example:* Prohibited for employer to offer female employees more preferable benefits because of sex-based assumptions about who in the workforce has caregiver responsibilities: *WYSK question 1.1*

Harassment: National Origin/Race/Other Bases

- Harassment related to COVID-19 based on national origin, race, or any other protected characteristic is prohibited:
WYSK question E.1 and 3/27/20 webinar question 15
- Managers should be alert to harassment involving COVID-19, including its origins, against those who are or are perceived to be of Chinese or other Asian national origin:
WYSK question E.3
- Harassment may originate with contractors, customers and clients: *WYSK question E.3*

Harassment: National Origin/Race/ Other Bases

- Harassment may occur whether employees are in the workplace, teleworking, or on leave, including via emails, phone calls, platforms for video or chat communication: *WYSK questions E.3 and E.4*
- Recommended steps to prevent harassment as workplaces reopen: *WYSK question E.2*
- Managers should know their legal obligations and employers may remind workforce of harassment prohibition and consequences: *WYSK question E.3*
- EEOC resources/tools for employers: *WYSK question E.1*