

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **EEOC updates COVID-19 guidance**

On September 8, the EEOC updated its guidance on COVID-19 and the ADA, Rehabilitation Act, and other EEO laws. Eighteen new Q&As focus on COVID-19 testing and screening, disability-related inquiries, confidentiality of medical information, and reasonable accommodation issues.

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#### **Background**

Since March, the Equal Employment Opportunity Commission (EEOC) has been issuing and updating COVID-19 guidance for employers on a rolling basis. A series of Q&As has addressed a range of return-to-work issues businesses are navigating as they resume or ramp up operations. Earlier guidance clarified numerous employer obligations, including those with respect to at-risk workers, disability-related inquiries, testing, confidentiality, hiring, pandemic-related harassment, and reasonable accommodations under the Americans with Disabilities Act (ADA), Title VII, and the Age Discrimination in Employment Act (ADEA). (See, for example, our [June 24, 2020 FYI](#).)

#### **Latest EEOC guidance**

On September 8, the EEOC updated its guidance titled [What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws](#), adding 18 new Technical Assistance Q&As. The latest additions focus on employee testing, disability-related inquiries, confidentiality considerations, telework, and other reasonable accommodations. Below are a few highlights.

#### **Testing and screening**

Prior EEOC guidance confirmed that employers may test employees for COVID-19 before permitting them to enter the workplace but may not condition their re-entry on submission to antibody testing without running afoul of the ADA. The new Q&As further clarify that periodic testing is permissible to confirm that employees who have returned to work do not have the virus and pose a direct threat to others. They also made clear that viral testing consistent with current CDC guidance will satisfy the

ADA’s “business necessity” standard and that following CDC recommendations on whether, when, and whom to test or screen is appropriate.

### Disability-related inquiries

The guidance confirms that employers may ask employees re-entering the workplace (not those teleworking) whether they have been diagnosed with COVID-19, are experiencing any symptoms, or have been tested for the virus, as long as the same questions are asked of all employees. If, however, the employer questions or requires only one employee — as opposed to all employees — to have their temperature taken or undergo other screening or testing, the ADA requires it to reasonably believe that the individual may have the virus. Employees who refuse to answer questions designed to determine if they have COVID-19, have their temperature taken, or undergo other screening or testing can be barred from re-entry.

While employers may ask returning employees whether they have been in close contact with anyone who has been diagnosed with COVID-19 or has associated symptoms, the guidance explains that asking whether anyone in the employee’s family has COVID-19 or its symptoms is prohibited by the Genetic Information Non-Discrimination Act (GINA).

The EEOC confirms that employers may ask employees who work onsite — whether regularly or occasionally — and report feeling ill or call in sick, questions about their symptoms as part of workplace screening for COVID-19. Similarly, questioning employees why they were absent from work would be permissible because it would not be considered a disability-related inquiry.

### Confidentiality of medical information

The ADA requires that an employer keep all medical information about employees confidential, including whether an employee has symptoms, or a diagnosis, of COVID-19. While emphasizing that employers should limit the disclosure of the name of the employee who has been diagnosed or has symptoms of COVID, the guidance clarifies that the ADA does not prevent managers from reporting that information to appropriate persons in the organization so that they can take actions consistent with CDC guidance such as contact tracing. Similarly, a temporary staffing agency or a contractor that places an employee in an employer’s workplace or a worker would not violate the ADA by reporting the COVID-19 status of a coworker in the same workplace to their manager.

### Reasonable accommodations

The updated guidance addresses whether an employer that permitted employees — disabled or not — to work from home due to state or local shutdown orders must allow employees with disabilities to continue to telework when the workplace reopens. The EEOC concluded that employers are not required to allow post-virus telework, acknowledging they have “no obligation under the ADA to refrain from restoring all of an employee’s essential duties at such time as it chooses to restore the prior work arrangement.” Rather, a new or continued accommodation request must be evaluated under the usual ADA rules.

At the same time, the EEOC recognizes that there may be circumstances where the period of remote working may be relevant in determining whether telework or a different accommodation may be warranted. For example, employers should consider new accommodation requests in light of that information when an employee renews a request to telework that was denied prior to the pandemic. Further, the EEOC cautions that an employer that is allowing other comparable workers to telework should make sure it is not treating older workers less favorably based on their age.

## In closing

The EEOC's latest guidance provides further clarifications on the application of the ADA, the Rehabilitation Act, and other EEO laws to pandemic-related issues. As the COVID-19 situation continues to evolve, businesses should be prepared to adapt their reopening strategies and return-to-work protocols in light of updated guidance from public health authorities and government agencies.

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