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Questions Clients Are Asking About COVID-19

US Outlook: Top Privacy Questions For Businesses Amid New Coronavirus Outbreak

Businesses face new legal challenges as a result of the fast-paced spread of the novel coronavirus (COVID-19). For example, as we have discussed in detail in another memorandum on the topic, businesses must consider tort liability for contributing to its spread. On the flipside, however, liability also may lie in an invasion of privacy in a business's efforts to curtail the virus's spread. Privacy rules are not set aside in a pandemic – although they do contemplate changes to a business's obligations in view of a significant risk of substantial harm, including from a severe pandemic virus.[1] It is more critical than ever to negotiate a proper balance between privacy and safety. An overcompensation in either direction potentially gives rise to liability. This memorandum provides context to—and guidance for—some of the most pressing privacy questions currently being asked by businesses.

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Although businesses across the country are temporarily closing their doors, many must continue to operate with employees in the workplace, thus being forced to navigate how they will decide, for safety purposes, who should come in and who should stay home. And those businesses who have closed their doors may already be contemplating how they will decide who may come back to the workplace upon reopening (while keeping the workplace safe) and for whom they should find an alternative arrangement.

While businesses often may react with the intention of keeping people safe, they also must adhere to privacy laws, including those they may not have previously addressed. Since early February 2020, multiple governmental agencies have been publishing guidance to businesses in the wake of the COVID-19 outbreak. Examples of such guidance on privacy matters are the following:

- The Department of Health and Human Services (HHS) has posted a bulletin to "serve as a reminder that the protections of the [HIPAA] Privacy Rule are not set aside in an emergency," but has also provided conditions where sanctions and penalties against certain hospitals and health care providers for non-compliance with some HIPAA privacy provisions during the COVID-19 national emergency would be waived.[2]

- The CDC has issued guidelines for businesses with reminders of their confidentiality obligations pursuant to the ADA.[3]

- The EEOC is directing employers to "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," a guidance document prepared by the EEOC in the wake of the H1N1 outbreak.[4] That document identifies the relevant ADA requirements, standards, and principles in navigating a pandemic, including as to matters of privacy and confidentiality.[5]

Courts throughout the country also previously have grappled with issues affecting businesses arising from other outbreaks of communicable diseases.[6]

We address below the most pressing privacy questions, in view of the guidance provided by HHS, CDC, and EEOC as well as existing case law.

* * *

1) May we ask about an employee's exposure to COVID-19?

The ADA allows employers to inquire about an employee's potential exposure to COVID-19, even if the employee shows no symptoms and even if those inquiries relate to exposure during personal travel or from a household member.[7] OSHA's General Duty Clause requires employers to furnish to each worker "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."[8] Thus, such inquiries

into potential COVID-19 exposure—including whether it occurred in the workplace—generally are permissible under this standard, if not obligatory for the purpose of furnishing each worker a hazard-free work environment.

However, an employer's inquiry into a potential exposure is not without bounds. For example, the ADA prohibits medical inquiry and examinations unless they are job-related and consistent with business necessity.[9] A medical inquiry or examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition;[10] or (2) an employee will pose a direct threat due to a medical condition.[11] Four factors are considered in determining, based on an objective standard, whether an employee poses a direct threat:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that potential harm will occur; and

(4) the imminence of the potential harm.[12]

If a likelihood of potential harm is remote—for example, if the employee has no direct contact with others in his or her job—then there may not be sufficient objective evidence of a direct threat to justify a medical inquiry. Further, objective evidence concerning the severity of the illness should come from assessments by public health officials.[13] If public health officials determine that a virus is "severe," it could pose a direct threat.[14] "Direct threat" is an affirmative defense for which the employer bears the burden of proof at trial.[15]

In making this assessment, employers should look not only to the latest CDC assessments, but also to state or local public authorities, as public health recommendations differ based on location.[16] In other words, what may be permissible in a city or town where COVID-19 is rapidly spreading may not be permissible in one where it is not spreading at all.[17]

The designation of "severity" changes not only by location, but also over time. The following websites should assist businesses track the on-going assessments of public health officials:

- CDC's COVID-19 Situation Summary: https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html
- WHO's COVID-19 Situation Reports: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports
- HHS's COVID-19 Updates: https://www.hhs.gov/about/news/coronavirus/index.html
- State Departments of Health as applicable, such as:
  - California: https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx
  - New York: https://www.health.ny.gov/diseases/communicable/coronavirus/
- Local Departments of Health as applicable, such as:
  - Los Angeles, CA: http://www.publichealth.lacounty.gov/media/Coronavirus/
  - San Francisco, CA: https://www.sfdph.org/dph/alerts/coronavirus.asp

- New York City, NY: https://www1.nyc.gov/site/doh/health/health-topics/coronavirus.page

Valuable information and directives also may come directly from executive leadership, including from press conferences. On March 15, 2020, Governor Gavin Newsom directed that Californians aged 65 and older or with chronic disease remain isolated at home, effective immediately.[18] Although Governor Newsom stopped short of issuing an executive order mandating compliance with this directive, he stated at a press conference that he is "confident these guidelines will be well received and will be appropriately enforced. If something is not being (done), we will do what we need to do."[19] Governor Newsom also has issued an executive order enhancing the state and local governments' ability to respond to the pandemic.[20] It states that all California residents are to "heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures."[21] Moreover, it orders California's Health and Human Services Agency and the Office of Emergency Services to prepare to commandeer property as necessary to quarantine, isolate, or treat individuals affected by COVID-19.[22] Similarly, on March 16, 2020, Governor Andrew Cuomo advised "that only services and businesses that are essential stay open after 8 p.m."[23] The Governor added that although "[t]his is not mandatory," the government "strongly advise[d]" compliance.[24] On the same day, New York City Mayor Bill de Blasio announced that bars and restaurants in the city would be closed indefinitely (except for certain, limited services).[25]

Court decisions involving other infectious diseases may provide useful guidance in navigating many of today's challenges arising from COVID-19:

- In connection with **a policy requiring employees to submit general diagnoses after three-day absences so as to curb the spread of communicable disease to employees and others**, a plaintiff employee sued her employer, the New York State Department of Correctional Services (DOCS), alleging that the policy violated her ADA rights.[26] Although the court agreed that a general policy requiring medical examination or inquiry—rather than on a person-by-person basis—is not categorically prohibited by the ADA, courts must conduct a "vital" assessment of whether the general policy actually contributes to the business necessity and whether the employer has met its burden to show it has reasons consistent with the business necessity for defining the class in the way that it has.[27] While a business necessity may include that the workplace is safe, the employer needs to show that the examination or inquiry was "no broader or more intrusive than necessary" and a "reasonably effective method of achieving the employer's goal."[28] Courts have held repeatedly that in this context the business necessity standard is, as the Ninth Circuit put it, "quite high."[29] In this particular case, even though the trial court took special note that DOCS is employing or harboring approximately 100,000 individuals, and even though the parties did not dispute that limiting the spread of communicable disease to such a population is a valid business necessity, the court still granted summary judgment for the plaintiff in part because DOCS failed to demonstrate the policy had or would have any effect on the spread of communicable disease.[30] This case is a stark reminder that policies put in place must have a nexus to the harm it purports to address – here, it must be reasonably targeted to preventing the spread of the virus.

- In connection with **a policy requiring employees to complete a health screen confirming immunity to certain communicable diseases so as to curb their spread to employees and clients**, a plaintiff employee sued for violation of her ADA rights.[31]

The court granted the defendant employer summary judgment, reasoning that the screen was job-related and consistent with medical necessity.[32] The undisputed evidence showed the purposes of the screen were to ensure employees who might come in contact with clients had immunity (by vaccination) to communicable diseases—as recommended by the CDC—to promote employee and patient safety by decreasing the risk of communicable disease exposure and transmission.[33] Importantly, the court found that there was nexus between the health screening and the stated purpose: the health screen for immunity to certain diseases would reveal whether they posed a risk of spreading those diseases.[34]

- In connection with **a termination out of fear the employee may have contracted swine flu**, an employee sued his employer for violation of his ADA rights. In April 2009, panic over the swine-flu pandemic was at its height, and Mexico was at its epicenter.[35] Little was known about swine flu at that time, and medical authorities feared the worst. Swine flu was declared a public-health emergency, and there was widespread concern about the possibility of a deadly pandemic.[36] At the height of this public hysteria, an employee visited Mexico and was terminated upon his return because the employer feared the employee had contracted swine flu.[37] Plaintiff alleged that he was discriminated against based on fear of a perceived medical condition: infection with the swine flu.[38] The defendant asserted an ultimately-successful affirmative defense: because the ADA does not cover "transitory and minor" illnesses like the seasonal flu, and because the swine flu turned out to be, in fact, no more serious than the seasonal flu, the plaintiff had no ADA claim to assert.[39] The plaintiff argued that the court should consider how serious the swine-flu was perceived to be at the time of the termination, rather than how serious it actually was.[40] In rejecting that argument, the court issued a reminder that impairments are evaluated on an objective basis, and that from an objective standpoint—based on swine flu's mortality and hospitalization profile compared to that of the seasonal flu—the swine flu was "transitory and minor."[41] This case is an important reminder that courts will likely look at objective evidence, such as mortality and hospitalization profiles of COVID-19, including as compared to the seasonal flu, and *not* on how the public is perceiving or reacting to the spreading illness.

- In connection with **a termination out of fear an employee may contract the Ebola virus on an upcoming personal trip**, the employee sued for violation of her ADA rights.[42] The employee, a massage therapist, had planned a personal trip to Ghana and alleged her employer terminated her out of concern she would become infected with Ebola and in turn infect clients and fellow employees.[43] The employer successfully argued that no ADA discrimination claim lied where the termination is not as a result of a present medical condition, that is, where it perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct.[44]

2) <u>May we take employees' temperatures to determine whether they have a fever?</u>

On March 18, 2020, the EEOC advised that "[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature."[45]

Measuring an employee's body temperature is typically considered a medical examination, and the ADA prohibits medical examinations unless they are job-related and consistent with business

necessity.[46] A medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition;[47] or (2) an employee will pose a direct threat due to a medical condition.[48]

As noted above, four factors are considered in determining, based on an objective standard, whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.[49] As a result, whether a pandemic virus rises to the level of a direct threat depends on the severity of the illness, as assessed by public health officials.[50] If public health officials determine that virus is "severe," it could pose a direct threat.[51] Similarly, if the likelihood of potential harm is remote—for example, if the employee has no direct contact with others in his or her job—then there may not be sufficient objective evidence of a direct threat justifying a medical examination.

As noted above, in determining "severity," employers should look to the latest assessments and directives from the CDC and state and local public authorities. The websites linked on page 3 should assist businesses track that information. Any examinations should be considered in view of OSHA's General Duty Clause, which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."[52]

3) May we ask why employees called in sick?

On March 18, 2020, the EEOC advised that "[d]uring a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat."[53]

However, it may not always be proper for an employer to make such medical inquiries. Generally, the ADA allows employers to ask employees if they are experiencing flu-like symptoms, such as fever.[54] During a "severe" pandemic according to public health officials, additional inquiry to the employee may be justified by a reasonable belief on objective evidence that *that particular* employee will a direct threat to safety—thus making the inquiry job-related and consistent with business necessity.[55] If a likelihood of potential harm is remote—for example, if the employee has no direct contact with others in his or her job—then there may not be sufficient objective evidence of a direct threat justifying a medical inquiry. As described above, the bar for establishing business necessity is "quite high,"[56] and would likely include consideration of whether the medical inquiry had any actual effect on the spread of a communicable disease.[57] And to determine whether an ADA claim lies in the first place, courts look to the *actual* severity of the relevant illness compared to the seasonal flu (for example, by looking at and comparing mortality and hospitalization profiles to determine whether the relevant illness more than "transitory and minor" and thus potentially covered by the ADA)[58] and whether the employer perceived a present illness, rather than a future one due to the employee's voluntary conduct.[59] As noted above, in determining "severity," employers should look to the latest assessments and directives from the CDC and state and local public authorities. The websites linked on page 3 should assist businesses track that information.

Employers also should bear in mind their requirement to furnish to each worker "employment and a place of employment" which are "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[60]

4) May we require that an employee who went on sick leave as a result of COVID-19 provide a doctor's note certifying fitness to return to work?

The ADA allows employers to require a doctor's note certifying fitness to return to work after going on leave as a result of COVID-19.[61] However, there is no obligation to do so, and doing so may not be advisable; as the EEOC notes, amid and soon after a pandemic, medical professionals may be too busy to generate such documentation.[62] Employers should consider alternatives such as remote-work arrangements, including for a set period of time after self-reported readiness to come back to work, or more informal certification that the employee does not have COVID-19.[63] Moreover, the ADA requires that medical information as contained in a doctor's note must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.[64]

5) May we ask about medical conditions known to make employees more vulnerable to COVID-19?

Generally, the ADA prohibits employers from asking an employee without symptoms medical questions. During a "severe" pandemic according to public health officials, such an inquiry to the employee may be justified by a reasonable belief based on objective evidence that *that particular* employee will a direct threat to safety—thus making the inquiry job-related and consistent with business necessity.[65]

If a likelihood of potential harm is remote—for example, if the employee has no direct contact with others in his or her job—then there may not be sufficient objective evidence of a direct threat justifying a medical inquiry. As described above, the bar for establishing business necessity is "quite high,"[66] and would likely include consideration of whether the medical inquiry had any actual effect on the spread of a communicable disease.[67] And to determine whether an ADA claim lies in the first place, courts look to the *actual* severity of the relevant illness compared to the seasonal flu (for example, by looking at and comparing mortality and hospitalization profiles to determine whether the relevant illness more than "transitory and minor" thus potentially covered by the ADA)[68] and whether the employer perceived a present illness, rather than a future one due to the employee's voluntary conduct.[69]

As noted above, in determining "severity," employers should look to the latest assessments and directives from the CDC and state and local public authorities. The websites linked on page 3 should assist businesses track that information.

Employers may prepare for a pandemic by making inquiries—such as in a survey—to identify potential absenteeism, so long as questions about the non-medical reasons and medical reasons are asked in the conjunctive, and the employee is required only to answer "yes" or "no" to the entire question. As an example, the EEOC has provided an ADA-Complaint Pre-Pandemic Employee Survey:

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

  Answer: YES_____ , NO_____

Above all, employers should consider the interplay between their duty to provide a safe working environment[70] and the direct threat an employee may pose to himself/herself or others in light of COVID-19 and the severity of that threat,[71] and proceed accordingly.

6) One of our employees is confirmed to have COVID-19. How much information should we circulate to those possibly exposed?

If an employee is confirmed to have COVID-19, employers promptly should inform other employees of their possible exposure, that is, those with whom that employee was in close contact.[72] An employer should learn from the employee confirmed to have COVID-19 with whom he or she has been working closely over the prior two weeks, and send home both the employee confirmed to have COVID-19 and those with whom he or she had been closely working. The EEOC has advised that at this time, the ADA does not prohibit employers from requiring employees to stay home if they have symptoms of COVID-19.[73]

Employers must be careful not to disclose medical information gained by any medical inquiry or examination by the employer—for example, by identifying an employee with COVID-19 by name. Courts repeatedly have held that an employee's medical information learned through an employers' inquiry or required examination, when disclosed, may give rise to liability pursuant to the ADA.[74] Employers may then be subject to compensatory and punitive damages, including for emotional distress suffered from improper disclosure under the ADA.[75]

In addition to liability for violating ADA rules, employers who disclose medical information may be subject to state tort liability. California's Confidentiality of Medical Information Act (CMIA) provides that "no employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees" absent permission or certain limited exceptions, such as judicially-compelled disclosure.[76] Violation of that law may result in liability for compensatory damages, punitive damages not to exceed three thousand dollars, attorneys' fees not to exceed one thousand dollars, and litigation costs.[77]

7) What do we do with health information we've learned about an employee?

The ADA requires employers to keep confidential any medical information they learn about any employee through inquiry or in a request for accommodation or sick leave.[78] All such information must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.[79] EEOC guidance goes one step further and advises employers to keep confidential any medical information they learn about any employee, even if the employee provided that information voluntarily.[80] However, courts have repeatedly held that voluntarily-disclosed information is not protected by the ADA because the statute covers information gathered through medical inquiry or examination,[81] and at least one court has expressly rejected the EEOC's broader reading of privacy as "not consistent with the plain language of the statute . . . ."[82]

Separate and apart from the ADA rules, HHS has stated in a Bulletin concerning COVID-19 that in general, "the protections of the [HIPAA] Privacy Rule are not set aside during an emergency."[83] Thus, even for most permissible disclosures, a covered entity or business associate must make reasonable efforts to limit the information disclosed to "the minimum necessary" to accomplish the purpose.[84] Such entities and associates must also continue to implement reasonable safeguards to protect patient information, including pursuant to the HIPAA Security Rule.[85]

However, HHS has also provided conditions where sanctions and penalties against certain hospitals and health care providers for non-compliance with enumerated HIPAA privacy provisions would be waived. Effective immediately, penalties will not be imposed "for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth" during the nationwide COVID-19 emergency.[86] Health care providers may use non-public facing audio or video communication products, such as Skype for Business or Zoom for Healthcare, to provide telehealth services—even in the course of treating medical conditions unrelated to COVID-19.[87] Providers should enable all available encryption and privacy modes when using such applications.[88] Health care providers are also encouraged, but not required, to notify patients that such third-party applications may introduce privacy risks.[89]

Effective March 15, 2020, HHS is waiving sanctions and penalties against certain hospitals nationwide that do not comply with the following HIPAA Privacy Rule provisions:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care.[90]
- the requirement to honor a request to opt out of the facility directory.[91]
- the requirement to distribute a notice of privacy practices.[92]
- the patient's right to request privacy restrictions.[93]
- the patient's right to request confidential communications.[94]

Importantly, this waiver has limited application, and applies only (1) in the emergency area identified in the public health emergency declaration; (2) to hospitals that have instituted a disaster protocol; and (3) for up to 72 hours from the time the hospital implements its disaster protocol.[95] When the President's declaration of a national emergency or the Secretary of HHS's declaration of a public health emergency terminates, any such hospitals must then comply with all the requirements of the Privacy Rule for any patient still under its care, even if 72 hours have not elapsed since implementation of its disaster protocol.[96]

Employers should note that if it learns an employee's health information from a disclosure by a HIPAA-covered entity or a business associate of such an entity (for example, a disclosure by virtue of an Explanation of Benefits in a health plan), then the HIPAA Privacy Rule may also apply to regulate the use, disclosure, and protections required for that health information.[97]

As noted above, in addition to liability under the ADA or HIPAA rules, employers who disclose medical information may be subject to state tort liability. California's Confidentiality of Medical Information Act (CMIA) provides that "no employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees" absent permission or certain limited exceptions, such as judicially-compelled disclosure.[98] Violation of that law may result in liability for compensatory damages, punitive damages not to exceed three thousand dollars, attorneys' fees not to exceed one thousand dollars, and litigation costs.[99]

8) <u>We are a business that interfaces directly with customers. How do we protect our customers and employees from potential exposure without improperly invading customers' privacy?</u>

Businesses that rely on direct-customer interface may be subject to tort liability for exposing patrons to dangerous pathogens. Notably, businesses may find themselves in court for exposing customers to viruses, even absent infection. For example, in 2018, a restaurant food handler tested positive for Hepatitis-A, potentially exposing patrons by consuming food or drink from that restaurant over a ten-day period.[100] A class of patron plaintiffs who were exposed to—but not infected by—Hepatitis A brought claims against the restaurant for breach of warranties and negligence to recover damages for physical injury and economic loss.[101] A federal court granted approval of settlement of that class action for an aggregate class fund of $246,000.[102]

While taking steps to ensure their employees do not expose customers, businesses also may be negotiating the risk that customers may expose the virus to each other or to workers. Such considerations must still be evaluated in view of applicable privacy laws. In California, individuals have a private right of action for invasion of privacy, and security policies that invade that policy must be reasonable given the circumstances.[103]

For example, when the San Francisco 49ers implemented a full-body pat-down inspection policy for all ticket holders prior to entering a stadium to attend games, plaintiff ticket holders filed suit against the team, claiming that the policy violates their state constitutional right to privacy.[104] The Superior Court sustained a demurrer, and the Court of Appeal affirmed. The California Supreme Court reversed. It ruled that although the 49ers had a substantial interest in protecting the safety of their patrons, security measures that substantially threaten a privacy right must be reviewed for reasonableness under the circumstances and remanded the case so that a reasonableness inquiry could be conducted.[105] Notably, in so holding, the California Supreme Court expressly rejected the proposition that ticket holders had no reasonable expectation of privacy because they could have just walked away, no questions asked.[106] The reasonableness analysis is an objective one, founded on broadly and widely-based norms, and depending on the surrounding context; "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy."[107]

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These are only some of the myriad privacy issues potentially posed by the spread of the novel coronavirus. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

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[1] *EEOC*, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Oct. 9, 2009), https://www.eeoc.gov/facts/pandemic_flu.html#13; EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* (July 26, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html; EEOC, *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

[2] Office for Civil Rights, U.S. Department of Health and Human Services, *Bulletin: HIPAA Privacy and Novel Coronavirus* (Feb. 2020), https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf; U.S. Dept. of Health & Human Servs., *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency* (Mar. 17, 2020), https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html; U.S. Dept. of Health & Human Servs., *COVID-19 & HIPAA Bulletin, Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency* (Mar. 2020), https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf.

[3] *See* CDC, *Keeping the Workplace Safe* (Mar. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf; CDC, *Interim Guidance for Businesses and Employers* (Feb. 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

[4] *Pandemic Preparedness*, *supra* note 1; *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, *supra* note 1.

[5] *Id.*

[6] *See, e.g.*, *Lopez v. Hollisco Owners' Corp.*, 147 F. Supp. 3d 71, 78-79 (E.D.N.Y. 2015), aff'd, 669 F. App'x 590 (2d Cir. 2016).

[7] *Pandemic Preparedness*, *supra* note 1.

[8] 29 USC 654(a)(1).

[9] 42 U.S.C. § 12112(d)(4).

[10] *Id.*; *see also Hustvet v. Allina Health Sys.*, 910 F.3d 399, 407-408 (8th Cir. 2018) (holding that an employer-hospital requiring an employee to undergo a health screen for rubella did not violate the ADA because the employee would come into contact with patients, and therefore the screening was "job-related, consistent with business necessity, and no more intrusive than necessary").

[11] 42 U.S.C. § 12113(a); *see also Enforcement Guidance*, *supra* note 1; *EEOC v. McLeod Health, Inc.*, 914 F.3d 876, 880–81 (4th Cir. 2019) ("for an employer-ordered medical exam to be job-related and consistent with business necessity, the employer must reasonably believe, based on objective evidence, that either (a) the employee's ability to perform an essential job function is impaired by a medical condition, or (b) the employee can perform all the essential functions of the job, but because of his or her medical condition, doing so will pose a "direct threat" to his or her own safety or the safety of others").

[12] 29 C.F.R. § 1630.2(r); *see also Lovejoy–Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001).

[13] *Pandemic Preparedness*, *supra* note 1.

[14] *Id.*

[15] *See, e.g.*, *Henningsen v. City of Blue Earth*, 184 F. Supp. 3d 710, 720 (D. Minn. 2016); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007).

[16] *Pandemic Preparedness*, *supra* note 1.

[17] *See, e.g.*, Christina Maxouris & Steve, *A State-by-State Breakdown of US Coronavirus Cases*, CNN (Mar. 15, 2020), https://www.cnn.com/2020/03/03/health/us-coronavirus-cases-state-by-state/index.html; *Pandemic Preparedness*, *supra* note 1.

[18] Gavin Newsom (@GavinNewsom), Twitter (Mar. 15, 2020, 2:56 PM), https://twitter.com/GavinNewsom/status/1239309428903391232?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed&ref_url=https%3A%2F%2Fwww.ktvu.com%2Fnews%2Fcalifornia-gov-newsom-calls-for-home-isolation-for-all-seniors-bars-to-close-restaurants-to-limit-capacity.

[19] Tony Bizjak, et. al., *Gov. Newsom Asks California Bars to Close, Tells Older Residents to Isolate Due to Coronavirus*, Sacramento Bee (Mar. 15, 2020), https://www.sacbee.com/news/coronavirus/article241212146.html.

[20] Office of Governor Gavin Newsom, *Governor Newsom Issues New Executive Order Further Enhancing State and Local Government's Ability to Respond to COVID-19 Pandemic* (Mar. 12, 2020), https://www.gov.ca.gov/2020/03/12/governor-newsom-issues-new-executive-order-further-enhancing-state-and-local-governments-ability-to-respond-to-covid-19-pandemic/.

[21] Cal. Exec. Order No. 25-20 (Mar. 12, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf.

[22] *Id.*

[23] *NY Non-Essential Businesses 'Strongly Advised' to Close after 8 p.m., Cuomo Says*, PIX11 (Mar. 16, 2020), https://www.pix11.com/news/coronavirus/new-yorkers-strongly-advised-to-stay-home-after-8-p-m-cuomo.

[24] *Id.*

[25] Anna Gronewold & Ryan Hutchins, *New York, New Jersey, Connecticut Closing Bars, Restaurants Indefinitely Starting Monday Night*, POLITICO (Mar. 16, 2020), https://www.politico.com/states/new-york/albany/story/2020/03/16/new-york-new-jersey-connecticut-closing-bars-restaurants-indefinitely-starting-monday-night-1267159.

[26] *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88 (2d Cir. 2003).

[27] *Id.* at 100-01.

[28] *Id.* at 98.

[29] *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001).

[30] *Fountain v. New York Dept. of Correction Servs.*, No. 99-CV-389, 2005 WL 1502146 at *2 (N.D.N.Y. Jun. 23, 2005).

[31] *Hustvet* at 399.

[32] *Id.* at 408.

[33] *Id.* at 408-09.

[34] *Id.* at 409.

[35] *Valdez v. Minnesota Quarries, Inc.*, No. 12–CV–0801, 2012 WL 6112846, at *3 (D. Minn. Dec. 10, 2012).

[36] *Id.*

[37] *Id.*

[38] *Id.* at *2.

[39] *Id.* at *3.

[40] *Id.*

[41] *Id.*

[42] *EEOC v. STME, LLC*, 309 F. Supp. 3d 1207 (M.D. Fla. 2018).

[43] *Id.* at 1209-10.

[44] *Id.* at 1213.

[45] *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, *supra* note 1.

[46] *Pandemic Preparedness*, *supra* note 1.

[47] *Hustvet* at 406-07.

[48] 42 U.S.C. § 12113(a).

[49] 29 C.F.R. § 1630.2(r); *see also Lovejoy–Wilson* at 220.

[50] *Pandemic Preparedness*, *supra* note 1.

[51] *Id.*

[52] 29 USC 654(a)(1).

[53] *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, *supra* note 1.

[54] *Pandemic Preparedness*, *supra* note 1.

[55] *Enforcement Guidance*, *supra* note 1 ("[q]uestions that are permitted include … asking an employee who is sneezing or coughing whether s/he has a cold or allergies").

[56] *Cripe* at 890.

[57] *Fountain* at *2.

[58] *Valdez* at *3.

[59] *Cripe* at 890.

[60] 29 USC 654(a)(1).

[61] *Pandemic Preparedness, supra* note 1; *see also Lopez v. Hollisco Owners' Corp.*, 147 F. Supp. 3d 71, 78-79 (E.D.N.Y. 2015), aff'd, 669 F. App'x 590 (2d Cir. 2016) (holding that an employer did not violate the ADA when it requested its former employee, a porter at defendant's residential building, provide a doctor's note "medically clearing him for work after plaintiff himself reported that he might have Hepatitis B or C," because ensuring that he did not pose a health risk to residents was a "business necessity for purposes of the ADA.").

[62] *Pandemic Preparedness*, *supra* note 1.

[63] *Id.*; *but c.f.* Washington Dept. of Health, Workplace and Employer Resources & Recommendation (Mar. 10, 2020), https://www.doh.wa.gov/Coronavirus/Workplace ("Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare providers may be extremely busy and not able to provide such documentation in a timely way.").

[64] 42 U.S.C.A. § 12112(3)(b).

[65] *Pandemic Preparedness*, *supra* note 1.

[66] *Cripe* at 890.

[67] *Fountain* at *2.

[68] *Valdez* at *3.

[69] *STME* at 12113.

[70] 29 USC 654(a)(1).

[71] *Pandemic Preparedness*, *supra* note 1

[72] *Interim Guidance*, *supra* note 3.

[73] *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, *supra* note 1.

[74] *See, e.g.*, *Shoun v. Best Formed Plastic, Inc.*, 28 F. Supp. 3d 786, 790 (N.D. Ind. 2014) (holding employee sufficiently stated a claim for disclosure of his confidential information under the ADA when another employee disseminated his name and injury); *see also EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1046–1047 (10th Cir. 2011) ("Disclosure of confidential information obtained through an authorized medical or inquiry would constitute a violation of § 102(d) and could give rise to a claim under the ADA.").

[75] *See, e.g.*, *E.E.O.C. v. Ford Motor Credit Co.*, 531 F. Supp. 2d 930 (M.D. Tenn. 2008) (holding that compensatory damages were available an employee under the ADA, including for emotional distress for shame, embarrassment, and depression as a result of the disclosure of his HIV-positive status to his coworkers); *see also* 42 U.S.C. § 1981(a).

[76] Cal. Civ. Code § 56.20(c).

[77] *Id.* at § 56.35.

[78] 42 U.S.C. § 12112(4)(c); *see also* EEOC, *Facts about the Americans with Disabilities Act* (Jan. 15, 1997), https://eeoc.gov/eeoc/publications/fs-ada.cfm.

[79] 42 U.S.C.A. § 12112(4)(c).

[80] *Pandemic Preparedness*, *supra* note 1.

[81] *See, e.g.*, *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1046–1047 (10th Cir. 2011); *Cash v. Smith*, 231 F.3d 1301, 1307 (11th Cir. 2000) ("[i]n this case, the disclosure that [plaintiff] complains of was not the result of an examination ordered by [defendant], but of a voluntary disclosure that [plaintiff] made to [defendant's employee]"); *see also EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044, 1052 (7th Cir. 2012); *Taylor v. City of Shreveport*, 798 F.3d 276, 288 (5th Cir. 2015).

[82] *C.R. England* at 1046–1047.

[83] *Bulletin*, *supra* note 2.

[84] 45 CFR §§ 164.502(b), 164.514(d).

[85] *Bulletin*, *supra* note 2.

[86] U.S. Dept. of Health & Human Servs., *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency* (Mar. 17, 2020), https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See* 45 CFR 164.510(b).

[91] *See* 45 CFR 164.510(a).

[92] *See* 45 CFR 164.520.

[93] *See* 45 CFR 164.522(a).

[94] *See* 45 CFR 164.522(b).

[95] U.S. Dept. of Health & Human Servs., *COVID-19 & HIPAA BulletinLimited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency* (Mar. 2020), https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf.

[96] *Id.*

[97] *Bulletin, supra* note 2.

[98] Cal. Civ. Code § 56.20(c).

[99] *Id.* at § 56.35.

[100] *McClain v. Morning Star, LLC*, No. 3:18-cv-00419, 2018 WL 6528477, at *1 (W.D.N.C. Dec. 12, 2018).

[101] *Id.* at *3; Charlotte Hardee's: Hep-A Class Settlement, https://charlottehepa.com/.

[102] *McClain* at *3; Charlotte Hardee's, *supra* notes 100-01.

[103] *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992, 998 (2009).

[104] *Id.*

[105] *Id.* at 1000.

[106] *Id.* at 1001.

[107] *Cty. of Los Angeles v. Los Angeles Cty. Emp. Relations Com.*, 56 Cal.4th 905, 927 (2013).