



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

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EEOC Releases Updates to COVID-19 Technical Assistance Questions and Answers

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On September 8, 2020, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance to harmonize and expand upon information provided in other forums. The EEOC updated its publication entitled, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” which addresses common COVID-19 issues faced by employers in a question-and-answer format. While many of the changes simply expanded upon the EEOC’s previous guidance, the new guidance also (1) reminds employers that temperature-testing data, medical and other confidential information held by supervisors must be maintained in separate, restricted-access files; (2) states that remote work and other accommodations implemented in response to the pandemic need not be permanent accommodations; and (3) stresses that inquiries focusing on family membership (as opposed to household membership) could violate the Genetic Information Nondiscrimination Act (GINA).

Managers, supervisors and Human Resources professionals may wish to take a moment to familiarize themselves with the EEOC’s published guidance, outlined below.

Disability-Related Inquiries and Medical Exams

- Employers may ask employees physically entering the workplace if they have COVID-19, have COVID-19 symptoms, or have been tested for COVID-19. Employers may exclude from the workplace employees with COVID-19 or COVID-19 symptoms because their presence would be a direct threat to the health and safety of others.
- If an employer has a reasonable belief based on objective evidence, an employer may ask particular individuals questions about COVID-19 symptoms or exposure (as opposed to asking all employees these “screener” questions).
- While employers may ask employees whether an employee has been in close physical contact with an individual diagnosed with or having symptoms of COVID-19, an employer may not ask an employee physically entering the workplace whether he or she has family members who have COVID-19 or symptoms associated with COVID-19.
- An employer may bar any employee from entering the workplace if the employee refuses to have his or her temperature taken or refuses to answer questions about COVID-19 symptoms, testing or exposure. Note, however, that an employee refusing to disclose information or submit to a test for disability or religious reasons may be entitled to a reasonable accommodation for the screening, and the accommodation process should be followed.
- Employers may ask employees who work on-site questions about their symptoms if they report feeling ill or call in sick.
- Employers may ask employees why they have been absent from work.
- Employers may ask employees where they have traveled, even if such travel was for personal reasons.

Confidentiality of Medical Information

- A manager may report to an appropriate employer official that an employee has symptoms of or a diagnosis of COVID-19 without violating ADA confidentiality. However, employers should limit the number of people who are aware of the employee's identity. The ADA permits a designated representative to interview the employee for purposes of contact tracing.
- ADA confidentiality does not prevent an employee from communicating a co-worker's COVID-19 symptoms to his or her supervisor.
- When an employer allows an employee to telework or take leave because he or she has COVID-19 or symptoms of COVID-19, the employer not reveal the reason why the employer granted leave or assigned the employee to telework.
- The ADA requires that medical information be kept confidential, even while employees are teleworking. An employer should follow its existing confidentiality protocols while an employee is working remotely. Supervisors and managers who become aware of confidential medical information of those they supervise must safeguard the information and restrict access to it. The employer must safeguard the information to the greatest extent possible until it can be properly stored.

Reasonable Accommodation

- Employers may invite employees with disabilities to ask for reasonable accommodations that they may need in the future when they are permitted to return to the workplace and, if such advance requests are received, employers may begin the interactive process.
- If a teleworking employee requests the same reasonable accommodations that the employer provides such employee in the physical workplace, the employer and employee should discuss the employee's needs and whether the same or a different accommodation could suffice in the home setting. According to the EEOC, the analysis for undue hardship may be different when evaluating a request for accommodation in a home versus in the workplace. Under the current circumstances, employers and employees both need to be creative and flexible about what can be done if an employee needs a reasonable accommodation for telework.
- If an employer grants telework to employees for the purpose of slowing the spread of COVID-19, the employer does not need to automatically grant telework as a reasonable accommodation to every employee with a disability who requests to continue that arrangement when the employer re-opens, specifically when there is no disability-related limitation that requires teleworking. Even if there is a disability-related limitation, teleworking does not need to be granted if the limitation can be effectively addressed at the workplace. Further, if an employer excused some of the essential job functions during telework, the employer does not need to continue to excuse the essential job functions for disability accommodations.
- If an employee with a disability had requested telework as a reasonable accommodation prior to the COVID-19 pandemic, but the employer denied the request because of concerns that the employee would not be able to perform the essential functions remotely, assuming all requirements for such a reasonable accommodation are satisfied, the temporary telework experience may be relevant in considering a renewed request to telework as a reasonable accommodation. The period of providing telework during COVID-19 could serve as a trial period to show whether or not the employee could satisfactorily perform all essential functions while working remotely. However, as with all accommodation requests, the employee and the employer should engage in the interactive process.
- The COVID-19 pandemic may result in excusable delays to the interactive process.
- The COVID-19 pandemic may constitute an "extenuating circumstance" that may justify exceeding the normal timeline that federal agencies have adopted in their internal reasonable accommodation procedures.

The EEOC's updated Q&As raise several takeaways for employers. First, employers may wish to review their current COVID-19 testing and screening policies and protocols to ensure compliance with the EEOC's Q&As. Second, employers may wish to ensure they have proper policies and procedures in place to safeguard employees' confidential medical information in accordance with the EEOC's Q&As. Lastly, employers may wish to evaluate their reasonable accommodation policies and telework arrangements for compliance with the EEOC's Q&As.

While the information contained in this material provides a general overview of the law, each employer will likely face unique business- and employment-related challenges and issues as they relate to these changes. When responding to employee inquiries or considering changes to business operations as a

result of the coronavirus, employers may want to seek competent legal counsel to ensure compliance with the law.

Read more legal updates, blog posts, and speaking engagements related to this area on [Robinson+Cole's Coronavirus Response Team](#) page and feel free to contact any member of our team with questions.

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