



07.07.20

EEOC Issues New FAQs about COVID-19 and the ADA

Background

Since the outbreak of COVID-19 earlier in 2020, one major concern for employers has been how to balance the safety of all their employees with the requirements of Equal Employment Opportunity (EEO) laws including the Americans with Disabilities Act (ADA). To help employers through this challenging and unique situation, the Equal Employment Opportunity Commission (EEOC) has issued a series of FAQs specifically related to COVID-19 and EEO compliance.

You can find the full text of the EEOC's newest FAQs [here](#) and read our summary below.

Summary

On Thursday, June 11, and Wednesday, June 17, 2020, the EEOC issued its newest FAQs related to COVID-19 and EEO compliance. Here is a summary of the EEOC's most recent guidance:

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- **Antibody Testing:** Based on the [CDC's Interim Guidelines](#), antibody test results “should not be used to make decisions about returning persons to the workplace.” That means that, among other things, you cannot require antibody testing before permitting employees to reenter the workplace. Based on CDC guidance, an antibody test does not meet the ADA's definition of “job related and consistent with business necessity” standard for medical examinations. By contrast, viral tests that determine if someone has an active case of COVID-19 are permitted by the ADA.
- **ADA Protections for Employee's Family Members:** The ADA only extends workplace protections based on an employee's disability-related needs, not based on the disability of a family member. That means that you are not required under the ADA to provide accommodation to an employee just because their family member is at increased risk from COVID-19. Of course, you are free to offer such accommodations at your discretion.
- **COVID-19 Screening Accommodations:** You should generally treat requests for an accommodation related to COVID-19 screening (i.e., an alternative method of screening) as you would any other request for a reasonable accommodation by a disabled individual. If the requested accommodation is easy to provide and inexpensive, you can make it available to any employee upon request. Similarly, if a religious accommodation related to COVID-19 screening is requested, you should determine whether it is something you can offer.
- **Age-Based Discrimination:** Though employees age 65 and older are at increased risk from COVID-19, you cannot exclude these employees from the workplace based on their age. Employees over the age of 65 are not automatically eligible for an accommodation based on their age, but you are free to offer them work accommodations.
- **Pregnancy-Based Discrimination:** Similarly, pregnant employees cannot be excluded from the workplace based on their pregnancy. These employees may have a right to request a reasonable accommodation under the ADA, Title VII, and the Massachusetts Pregnant Workers Fairness Act (for our Massachusetts employers).
- **Accommodations for Caregivers of School-Age Children:** You are free to provide workplace accommodations or flexibility to employees who are caregivers of school-age children, but you must offer those accommodations equally to all employees regardless of sex and all other EEO-protected characteristics.
- **Pandemic-Related Harassment:** Be on the alert for any workplace harassment surrounding COVID-19, especially against employees who are (or are perceived to be) Chinese or of Asian national origin. These incidents have increased sharply since the outbreak of COVID-19. Make sure managers are trained in advance to recognize, investigate, and address this type of harassment, whether it comes from employees, customers, vendors, or anyone else with access to the workplace. This includes harassing behavior against on-site employees and those teleworking due to the



pandemic. You may wish to send out a reminder to all employees of your organization's anti-harassment and anti-discrimination policies and the consequences of violating them.

- **Inviting Employees to Request a Work Accommodation:** As a best practice, you should provide information to all employees about how to request a work accommodation under the ADA or another EEO law. Send this notice in advance of having all employees return to the workplace to give them an opportunity to ask questions. If there is a different point of contact for different types of accommodation requests, make that clear to all employees.

Employer Next Steps

- Review the EEOC's most recent guidance and follow these guidelines as you plan to bring employees back into the workplace.
- If you are a Full-Service or Virtual HR client and would like our assistance with updating your return-to-work and EEO policies, please email us at covid19@hrknowledge.com.

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