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EEOC Updates Guidance on COVID-19 and the ADA

Background

Since the outbreak of COVID-19 earlier in 2020, a major concern for employers has been how to balance the health and safety of 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 entitled [What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#).

Summary

As the COVID-19 pandemic has continued into 2020, the EEOC has issued routine updates to their FAQs. Most recently, they issued a series of updates on September 8, including new FAQs and edits to existing guidance. See below for a summary of the newest EEOC guidance including the FAQ number where the information can be found.

Disability-Related Inquiries and Medical Exams

- **A.6:** Employers may administer a COVID-19 test in order to evaluate an employee's return

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or continued presence in the workplace, as long as the tests are considered accurate and reliable.

- **A.8:** Employers may ask employees who will be physically entering the workplace if they have COVID-19, have related symptoms, or have been tested for COVID-19. Employees may be excluded from the workplace if they have been diagnosed or have symptoms of COVID-19 but should be allowed to telework if their role permits.
- **A.9:** In some cases, an employer may ask only one employee if they have a COVID-19 diagnosis or symptoms, rather than asking all employees, but they must have a valid, evidence-based reason for singling that employee out.
- **A.10:** An employer **MAY NOT** ask an employee if they have family members with a COVID-19 diagnosis or symptoms. The Genetic Information Nondiscrimination Act (GINA) bars employers from asking health questions about an employee's family. However, GINA does not prohibit an employer from asking employees if they have had contact with anyone diagnosed with, or who may have systems associated with, COVID-19.
- **A.11:** During the pandemic, an employer may exclude an employee from the workplace if they refuse to have their temperature taken or answer questions about whether they have a COVID-19 diagnosis or symptoms. If the employee has a specific concern about sharing this information, they may be granted a reasonable accommodation in regard to screening.
- **A.12:** During the pandemic, employers may ask an on-site employee who calls out sick or reports feeling ill if they have a COVID-19 diagnosis or symptoms.
- **A.13:** Employers may still ask an employee why they have been absent from work. This is not considered a disability-related inquiry.
- **A.14:** Employers may ask employees questions about any personal travel plans and enforce state guidelines regarding self-quarantining or undergoing testing. They do not need to wait for an employee to show COVID symptoms to make this inquiry.

Confidentiality of Medical Information

- **B.5:** If an employer learns that an employee has been diagnosed with COVID-19 or has related symptoms, they are obligated to inform other employees whom the sick individual was in contact with **WITHOUT** identifying the employee or sharing their personal medical information. The ADA does not interfere with contact tracing if it is handled appropriately.
- **B.6:** The ADA does not prevent employees from disclosing a coworker's COVID-19 diagnosis or symptoms to the employee's own supervisor when the employees report to the same supervisor. From there, the situation should be handled as described above.
- **B.7:** If an employee is teleworking due to a COVID-19 diagnosis or symptoms, the employer may inform the employee's coworkers that they are teleworking **WITHOUT** sharing why.
- **B.8:** Supervisors or managers who are teleworking are still responsible for safeguarding

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their employees' confidential medical information per ADA regulations. If they are unable to follow company confidentiality policies while remote, they should protect the information to the greatest extent possible until the information can be properly stored.

Reasonable Accommodation

- **D.8:** Employers may (and probably should) invite employees to request accommodations for their disabilities in advance of returning to the workplace. That will allow time for the required “interactive process” (the employer-employee discussion about the impairment and the accommodation) before employees are required to return.
- **D.14:** Under the ADA, employees who are required to telework may still request reasonable accommodations for their disabilities just like on-site employees, and their request should be evaluated in context. Employers should try to be creative and flexible in these situations to find a workable solution.
- **D.15 / 16:** Just because an employer has allowed their employees to telework during the COVID-19 pandemic does **NOT** mean that they have to automatically offer telework as a reasonable accommodation when the workplace is reopened. Requests to telework may be evaluated on an individual basis just like before. This also applies to employees who were refused the right to telework as a reasonable accommodation before the pandemic but were permitted to telework due to the pandemic. Their ongoing ability to telework should be evaluated on an individual basis.
- **D.17 / 18:** The COVID-19 pandemic has resulted in many operational disruptions that may lead to delays in the interactive process for determining reasonable accommodations. Employers should evaluate these requests as quickly as possible under the circumstances. For Federal agencies with an established timeline for their interactive process, the pandemic may constitute an “extenuating circumstance” allowing them to exceed that timeline.

Furloughs and Layoffs

- **F.2:** Employers who are planning furloughs or layoffs due to COVID-19 must ensure that employees are not being treated differently on the basis of race, color, religion, national origin, sex, age, disability, protected genetic information, or any other protected EEO class.

Age

- **H.2:** Employers may **NOT** discriminate against employees on the basis of age when offering flexibilities or accommodations to their employees. Older employees should be provided the same flexibilities and opportunities as anyone else.

Employer Next Steps

- Employers should review the EEOC's [most recent guidance](#) and apply these guidelines as they continue dealing with the COVID-19 pandemic.
- 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](#).

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