

COVID-19 and the American With Disabilities Act

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PRACTICES Labor and Employment, Employment Litigation

The Americans with Disabilities Act (“ADA”) dictates when covered employers facing the threat of a pandemic can inquire into an employee’s potential exposure or request an employee to submit to medical examinations. In 2009, the Equal Employment Opportunity Commission (“EEOC”) released [guidance](#) for employers regarding ADA compliance during a pandemic. The EEOC recently released a [news alert](#) reminding employers to reference this guidance in responding to the growing COVID-19 pandemic. The EEOC’s guidance indicates that the key to complying with the ADA during the COVID-19 pandemic will be remaining up to date with the latest risk assessments from local, state, or federal health officials, and making any employment decisions accordingly.

The ADA prohibits disability-related inquiries or medical examinations except in certain circumstances (i.e., the inquiries or examinations are job-related and consistent with an employer’s business necessity). Employers generally may make disability-related inquiries or require medical examinations if the employer has a reasonable belief (i.e., based on objective evidence) that an employee will pose a direct threat due to a medical condition. The EEOC’s guidance indicates that employers should rely on the latest CDC and state or local public health assessments in determining whether a pandemic rises to the level of a direct threat. The [current CDC risk assessment](#) has classified COVID-19 as a pandemic. In addition, the CDC’s assessment of risk of serious illness is higher for older adults or people with serious chronic medical conditions. The EEOC’s guidance states that, in order to comply with the ADA, employers are expected “to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location.”

The EEOC’s guidance provides the following specific examples regarding disability-related inquiries and medical examinations for ADA-covered employers:

- **Asking sick employees about COVID-19 symptoms.** Employers may ask employees who report feeling ill or call in sick whether the employee is experiencing influenza-like symptoms. Information obtained about an employee’s illness should remain confidential as required by the ADA (i.e., any such information must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record).
- **Thermometer testing.** Measuring employees’ body temperatures is generally considered a medical examination. Employers may measure employees’ body temperatures if the pandemic becomes widespread in the community as assessed by state or local health authorities or the CDC.
- **When can an employer ask an employee who recently travelled about potential exposure?** If an employee recently travelled during a pandemic, an employer does not have to wait until the employee develops symptoms to inquire about the employee’s exposure in a pandemic. Such questions are not considered disability-related inquiries. Provided that the CDC or state or local public health officials have recommended that people who traveled to certain locations remain at home for several days until it is clear they do not have symptoms, an employer may ask employees whether they have returned from these locations, even if the travel was personal.

- **Disclosing pre-existing medical conditions.** Employers cannot require employees who do not have influenza-like symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to COVID-19 complications. If an employee voluntarily discloses such information, the employer may ask the employee to describe the type of assistance the employee thinks will be needed. It is only when—according to the assessment of local, state, or federal public health officials—a pandemic becomes severe or serious that an employer may make disability-related inquiries or require medical examinations of asymptomatic employees in order to identify those at higher risk of complications.
- **Inquiries into employee's absence.** An employer may ask an employee who does not report to work during a pandemic why he or she has been absent. An employer is always entitled to know why an employee has not reported for work, and this is not considered a disability-related inquiry.

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