

Employment Rights and Obligations During COVID-19

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What laws are enforced by the EEOC?

- ▶ **Americans with Disabilities Act (ADA) and the Rehabilitation Act.**
 - These Acts provide for reasonable accommodation and non-discrimination based on disability, and establish rules about employer medical examinations and inquiries, and confidentiality of medical information.
- ▶ **Title I of the ADA applies to private employers with 15 or more employees, and to state and local government employers, employment agencies, and labor unions.**
- ▶ **Section 501 of the Rehabilitation Act applies all the same nondiscrimination standards of Title I of the ADA to federal agencies.**

What additional laws are enforced by the EEOC?

- ▶ **Title VII of the Civil Rights Act (Title VII)**
 - Prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy
- ▶ **Age Discrimination in Employment Act (ADEA)**
 - Prohibits discrimination based on age, 40 or older
- ▶ **Genetic Information Nondiscrimination Act (GINA)**
 - Prohibits discrimination based on genetic information

Other EEO laws

- ▶ Other federal laws, as well as state or local laws, may provide employees with additional protections.
- ▶ EEO laws continue to apply during the time of the COVID-19 pandemic.
- ▶ However, these laws do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.

Information about EEO laws and COVID-19

- ▶ Everything EEOC has issued related to COVID-19 can be found at <https://www.eeoc.gov/coronavirus>, including:
 - What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (last updated 9/8/20)
 - Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (ADA) (issued in 2009 during H1N1; updated in 2020 to add COVID-19 information)
 - “Ask the EEOC” COVID-19 recorded webinar (03/27/20)

EEO laws and COVID-19

- ▶ This presentation highlights selected key points from the EEOC's COVID-19 technical assistance materials.
- ▶ Remember that other federal laws, as well as state or local laws, may provide additional protections. This presentation is limited to the federal EEO laws.
- ▶ Managers and supervisors should consult their own employer's policies and procedures.

Employee screening and the ADA

- ▶ ADA places restrictions on disability-related inquiries and medical exams by employers
 - Pre-offer – No
 - Post-offer, before start date – Yes, if applied to everyone in same job category
- ▶ Current Employees:
 - Only if “job related and consistent with business necessity”
 - Employer has reasonable belief, based on objective evidence, employee will pose a “direct threat” to health/safety of themselves or others due to medical condition (significant risk of substantial harm)

Employee screening and COVID-19

- ▶ Currently, someone entering workplace with COVID-19 poses a “direct threat” to health of others as defined under the ADA (significant risk of substantial harm).
- ▶ ADA allows the employer (if it chooses) to screen all employees for COVID-19 if physically entering worksite.
 - Take temperatures
 - Ask about symptoms
 - Ask if exposed to anyone who has COVID-19
 - Administer viral test for current COVID-19 infection (but anti-body testing not permitted)

Employee screening best practices

- ▶ Employers may instruct employees to stay home or send them home if they have COVID-19 or symptoms.
- ▶ May exclude employees from workplace if they refuse to undergo screening measures, but:
 - to gain cooperation, employers may wish to ask reasons for refusal, remind about confidentiality
 - address accommodation requests related to screening measures

CDC high risk persons and age

- ▶ Employer cannot automatically exclude from workplace those who do not currently have COVID-19, even if at higher risk for severe illness if they contract COVID-19.
- ▶ Older age – Age Discrimination in Employment Act (ADEA) prohibits adverse employment decisions based on individual's older age (40 or above); permits favorable treatment based on older age, but has no accommodation requirement.

CDC high risk persons and pregnancy

- ▶ Employer cannot automatically exclude from workplace those who do not currently have COVID-19, even if at higher risk for severe illness if they contract COVID-19.
- ▶ Pregnancy Discrimination Act (PDA) prohibits employment decisions based on pregnancy, and in some cases may require providing pregnant employees with the accommodations provided to non-pregnant employees who are similar in their ability/inability to work.

CDC high risk persons and disabilities

- ▶ ADA can require accommodation of pregnancy-related disabilities absent undue hardship (but pregnancy itself is not an ADA disability)
- ▶ **Underlying Disabilities (as defined under the ADA) – ADA accommodation absent undue hardship.**
- ▶ Note: to exclude involuntarily, employer would have to analyze & show that employee poses “direct threat to self,” a high standard to meet, and even then, exclusion only allowed if no accommodation possible.

Inviting advance requests for accommodation

- ▶ Employer is free to provide information to entire workforce about who to contact to request accommodation (disability) or flexibility/modifications (other risk groups).
- ▶ Employer also may invite advance requests even before workplace reopens from those employees who may choose to make early request.
- ▶ If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

Confidentiality and the ADA

- ▶ With limited exceptions, ADA requires employers to keep confidential any medical information they learn about any applicant or employee.
- ▶ Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.
- ▶ Duty includes keeping medical records separate from personnel files.

Confidentiality and COVID-19

- ▶ Restricts who employers can inform of an employee's COVID-19 diagnosis or symptoms:
 - May inform official(s) designated to handle response
 - May inform public health authorities
 - If informing other employees or customers, cannot disclose employee's name and instead need to use a generic description (e.g., "Somebody who works on 4th floor was diagnosed with COVID-19.")
- ▶ Requires employers to keep confidential any medical information about temperature, symptoms, or testing log/documentation.

Reasonable accommodation under the ADA

- ▶ Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.
- ▶ If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense.

Reasonable accommodation requests

- ▶ An employer has the discretion to choose among effective accommodations.
- ▶ Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship.
- ▶ In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, www.askjan.org.
- ▶ JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

Reasonable accommodation and COVID-19

- ▶ Employee may be entitled to accommodation for disability that places employee at higher risk from COVID-19, or for a disability that is exacerbated by pandemic situation.
- ▶ Those designated “essential” or “critical” workers still retain ADA rights, and therefore may be entitled to accommodation for disability.

Reasonable accommodation requests

- ▶ ADA duty to accommodate generally only applies if employee makes request and has a disability.
- ▶ Employee is not entitled to an ADA accommodation based on employee living with or being otherwise associated with another person with a disability.
- ▶ **Note:** EEOC has not addressed if COVID-19 may render someone an “individual with a disability” under the ADA.

Reasonable accommodation assessments

- ▶ Accommodations to allow individuals to be in the workplace.
- ▶ Accommodations for those who cannot be in the workplace.
- ▶ Employer need not eliminate an essential function of job as accommodation or provide accommodation that would pose undue hardship (significant difficulty or expense based on employer's resources).

Reasonable accommodation and telework

▶ Telework:

- If employer recalls employee to work, request for continued telework as disability accommodation need not be granted unless ADA requirements met.
- Employer can restore essential functions if they were temporarily altered due to mandatory telework.
- Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace re-opens.

Reasonable accommodation: interactive process

- ▶ Employer should engage in interactive process with employee who requests an accommodation.
- ▶ Employer may request medical documentation if disability or need for accommodation not obvious or already known, but consider flexible options given difficulty of obtaining records right now.
- ▶ Employer has the discretion to choose among effective accommodations.

Workplace infection control requirements

- ▶ An employer may have policies requiring employees to wear face masks or adhere to other infection control practices.
- ▶ Employer may need to accommodate employees who need modification or can't comply due to:
 - A disability (ADA) or
 - A religious belief or practice (Title VII),
 - subject to undue hardship test under each statute.

Harassment and COVID-19

- ▶ Harassment related to COVID-19 based on national origin, race, or any other protected EEO characteristic is prohibited.
- ▶ Managers should be alert to harassment involving COVID-19, including its origins, against those who are or are perceived to be of Chinese or other Asian national origin.
- ▶ Harassment may occur whether employees are in the workplace, teleworking, or on leave, including via emails, phone calls, platforms for video or chat communication.

Harassment best practices

- ▶ Managers should know their obligations if harassment is reported or observed.
- ▶ Employers should remind workforce that harassment is prohibited, and that it can result in disciplinary consequences.

ADA and COVID-19 vaccinations

- ▶ The vaccination itself is not a medical exam.
- ▶ Pre-vaccination medical screening questions are likely to elicit information about disability.
- ▶ If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health provider, the employer may want to warn the employee not to provide any medical information as part of the proffer in order to avoid implicating the ADA.
- ▶ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

ADA and mandatory vaccinations

- ▶ Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirements should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration.
- ▶ Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship.

Title VII and mandatory vaccinations

- ▶ Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an undue hardship under Title VII.

GINA (Title VII) and vaccines

- ▶ Title VII of the Genetic Information Nondiscriminatory Act (GINA).
- ▶ Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title VII of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute.
- ▶ Pre-vaccination medical questions are likely to elicit information about disability...and may elicit information about genetic information, such as questions regarding the immune systems of family members.

GINA (Title VII), religion, and vaccines

- ▶ Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an undue hardship under Title VII.

Thank you!

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