



EEOC UPDATES ITS GUIDANCE ON PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT

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On March 19, 2020, the EEOC updated its 2009 guidance on pandemic-related issues under the Americans with Disabilities Act (“ADA”) to specifically address the COVID-19 pandemic. The full release can be found here: https://www.eeoc.gov/facts/pandemic_flu.html. Updates related to COVID-19 are in bold in the EEOC’s guidance. Here are what we consider to be the key takeaways:

- ***EEOC Declares that the COVID-19 Pandemic Meets the Direct Threat Standard*** - If an individual with a disability poses a “direct threat” despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. “Direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” In yesterday’s update, the EEOC reiterated that individual decisions about whether an employee poses a direct threat should be based on objective, factual evidence. But the EEOC also found that “a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time,” and therefore declared that, as of March 2020, the COVID-19 pandemic meets the direct threat standard.
- ***New COVID-19 Questions in the Q&A*** – Starting at question 16 in the updated guidance, the EEOC added the following COVID-19 questions and answers:

16. If an employer is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

17. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

18. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.

19. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

We are here to discuss any specific concerns or questions you might have. So if we can help in any way, call or email Laura Goodson or me.

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