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EEOC Issues New Guidance Expanding Symptoms Screening

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As a result of the COVID-19 outbreak, the EEOC has modified its position regarding certain questions that can be asked and actions that can be taken by employers, without running afoul of the Americans with Disabilities Act. In the guidance issued last week, the EEOC established direction for employers concerning workplace rules and safety during pandemics. Notably, the EEOC announced that taking temperatures of employees, an action recommended by the Oakland County Executive Order issued on March 24, 2020, for employees still working in person (see Butzel Long Client Alert), could now be included as a means of symptom screening consistent with the ADA.

Some of the more common questions and answers in the EEOC guidance include:

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever [and conversely, some people with a fever may not have COVID-19].

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- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

- 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. This ADA rule applies whether or not the applicant has a disability.

- 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, as noted above, employers should be aware that some people with COVID-19 do not have a fever.

- 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.

- 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.

Overall, employers are reminded to continue to follow best employment practices, including being consistent in how employees are treated, enforcing rules, policies and practices consistently, and guarding against treating, or allowing others to treat, any employee based on stereotypical thinking, such as treating those of any particular national origin or descent differently.

If you have any questions regarding the content of the Alert, please contact a Butzel Long labor and employment attorney for assistance.

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Click [here](#) for an electronic copy of the EEOC's pandemic guidance as it relates to the Americans with Disabilities Act.

Rebecca Davies

313.225.7028

davies@butzel.com

Jim Rosenfeld

313.225.7062

rosenfeld@butzel.com