

Publications

Managing Disability and Accommodation Issues in the Age of the Coronavirus Pandemic

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Coronavirus (COVID-19) is an upper respiratory tract disease first identified in Wuhan, China in December 2019. According to the World Health Organization (www.who.int), as of March 12, 2020, there are at least 124,518 confirmed cases of COVID-19 (and over 4,607 deaths) in 118 countries or territories. The Centers for Disease Control (www.cdc.gov) report 938 cases of COVID-19 (29 deaths) spanning 38 states and the District of Columbia, with the highest number of cases in California, New York, and Washington. The number of cases changes daily, as does government officials' responses to and public anxiety over what the WHO has now labeled a pandemic.

The last pandemic was the H1N1 outbreak in 2009. At that time, the U.S. Equal Employment Opportunity Commission (EEOC) issued "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." The Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and comparable state laws protect applicants and employees from disability discrimination. These laws are relevant to pandemic preparation and response because they: (1) regulate employers' disability-related inquiries and medical examinations for applicants and employees, including those who do not have ADA disabilities; (2) prohibit employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat"; and (3) require reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic. The EEOC's guidance provides responses to typical employer questions on the interaction between protections against disability discrimination and workplace health and safety.

The EEOC has directed that its 2009 guidance applies to COVID-19. The questions and answers below are based on that guidance and focus on the fact that COVID-19 is now a pandemic. Note, however, that the guidance does not have the force of law.

May an employer send employees home if they display COVID-19-like symptoms?

Yes. The CDC states that employees who become ill with symptoms of COVID-19 at work should leave the workplace. Advising such workers to go home is not a disability-related action. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

How much information may an employer request from employees who report feeling ill at work or who call in sick?

Employers may ask if they are experiencing symptoms related to COVID-19, such as fever, cough, and difficulty breathing. Employers must maintain all information about employee illness as a confidential medical record. Given the severity of COVID-19, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that COVID-19 poses a direct threat.

May an employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring an employee's body temperature is a medical examination. Given the severity and widespread nature of COVID-19, employers may measure employees' body temperature. Employers should inform employees that they are doing so to determine symptoms, not impairment or medical condition. However, there are several practical considerations to consider, including: some people with COVID-19 may not have a fever; employees need to be paid for their time undergoing a temperature test; and the test may be a subject of mandatory bargaining in a union environment.

When an employee returns from travel, must an employer wait until the employee develops COVID-19 symptoms to ask questions about exposure during the trip?

No. These would not be disability-related inquiries. Because the CDC and public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have COVID-19 symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

What should an employer do if it receives information that an employee, who does not otherwise have COVID-19 symptoms, has a medical condition that the CDC says could make that employee especially vulnerable to complications from COVID-19?

Given statements by public health officials concerning the severity of the COVID-19 pandemic, the employer may have sufficient objective information to reasonably conclude that employee will face a direct threat if they contract COVID-19. The employer should consider reasonable options for accommodating that employee and should engage with the employee to identify what those options may be. Of course, the employer must keep this information confidential.

May an employer encourage employees to telework as an infection-control strategy?

Yes. In addition, employees with disabilities that put them at high risk for complications from COVID-19 may request telework as a reasonable accommodation to reduce their chances of infection.

May an employer require its employees to adopt infection-control practices at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

May an employer require its employees to wear personal protective equipment (face masks, gloves, or gowns) designed to reduce the transmission of infection?

Yes. An employer may require employees to wear personal protective equipment. However, where an employee with a disability needs a related reasonable accommodation (non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to COVID-19, barring undue hardship?

Yes. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him or her from employment or employment-related activities. If an employee with a disability needs the same reasonable accommodation at a telework site that he or she had at the workplace, the employer should provide that accommodation, absent undue hardship.

May an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

May an employer require employees who have been away from the workplace provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, because the COVID-19 pandemic is truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. However, note that doctors and other health care professionals may be too busy during and immediately after the pandemic to provide fitness-for-duty documentation. The CDC recommends that employers should not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work.

Conclusion

The EEOC recognizes that, "[while] public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information." Thus, employers should continue to monitor public health advisories for information relating to COVID-19. Contact your Vorys lawyer if you have questions about COVID-19 and accommodations or other disability-related issues in your workplace.

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VORYS COVID-19 TASK FORCE:

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.