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## EEOC Updates COVID-19 Guidance to Employers

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The Equal Employment Opportunity Commission has expanded its guidance entitled “**What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Law.**” The revised guidance provides additional questions and answers about topics like the confidentiality of medical information, inquiries about employee symptoms, and providing reasonable accommodations. The following questions were added on April 9, 2020 (quoted verbatim):

### A. Disability-Related Inquiries and Medical Exams

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19? (4/9/20)

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

### B. Confidentiality of Medical Information

**B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee’s temperature or the employee’s self-identification as having this disease, or must the employer create a new medical file system solely for this information? (4/9/20)**

The ADA requires that all medical information about a particular employee be stored separately from the employee’s personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee’s statement that he has the disease or suspects he has the disease, or the employer’s notes or other documentation from questioning an employee about symptoms.



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**B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? (4/9/20)**

Yes. The employer needs to maintain the confidentiality of this information.

**B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? (4/9/20)**

Yes.

**B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? (4/9/20)**

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

## C. Hiring and Onboarding

**C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? (4/9/20)**

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

## D. Reasonable Accommodation

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](http://www.askjan.org). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

**D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)**

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the

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circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

**D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? (4/9/20)**

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

**D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? (4/9/20)**

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

**D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? (4/9/20)**

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

**E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics**

**E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? (4/9/20)**

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

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- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
  - report;
  - checklists for employers who want to reduce and address harassment in the workplace; and,
  - chart of risk factors that lead to harassment and appropriate responses.

## F. Furloughs and Layoffs

### F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? (4/9/20)

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

Additionally, the EEOC recently posted the **transcript of a webinar** that it conducted in March about COVID-19. During the webinar, the EEOC provided guidance on various topics, including teleworking requests, furlough or lay off decisions, and employee temperature testing.

The EEOC, the Department of Labor, and other state and federal agencies continue to issue guidance to assist employers in responding to the COVID-19 pandemic. If you have any questions about this new guidance, please contact your Constangy attorney.

*Please be aware that substantial changes in the governmental guidance and even in the underlying laws are occurring on almost a daily basis, which will impact the analysis of the legal issues related to COVID-19. It is critical that you check the Resource Center often for the most recent information and stay in continual contact with your Constangy attorney.*

For more information, check out our **Resource Center** for FAQs and updates about the coronavirus.

# LEGAL BULLETIN

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