

EEOC Publishes Further Guidance for COVID-19 Pandemic Preparedness in Workplace

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Holland & Knight Alert

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Highlights

- The U.S. Equal Employment Opportunity Commission (EEOC) previously published pandemic guidance originally issued during the H1N1 influenza pandemic in 2009. The EEOC updated this guidance in March 2020 and then again on April 9, 2020, and April 17, 2020. The updated guidance addresses the applicability of the Americans with Disability Act (ADA) to the novel coronavirus (COVID-19).
- This Holland & Knight alert addresses some of the key updates within the EEOC's most recent guidance issued this month.

Following the outbreak of the novel coronavirus (COVID-19), the U.S. Equal Employment Opportunity Commission (EEOC) updated their published guidance for handling pandemics within the scope of Title I and Title V of the Americans with Disabilities Act (ADA). The EEOC previously published this guidance to address the H1N1 influenza pandemic in 2009. The updated guidance has, to date, occurred in three waves with the first in mid-March 2020, then April 9, 2020, and most recently on April 17, 2020. The recent updated guidance discusses the COVID-19 pandemic and lawful employer responses in the workplace under the ADA.

The new April 2020 guidance primarily focuses on the following employer concerns related to the COVID-19 pandemic: 1) hiring practices; 2) reasonable accommodations under the ADA; 3) confidentiality of medical information; 4) harassment based on race and national origin; and 5) return to work considerations. Holland & Knight addressed the March 2020 guidance in a [previous alert](#).

The COVID-19 Pandemic Constitutes a Direct Threat Under the ADA

The ADA generally prohibits employers from discriminating against applicants or employees on the basis of disability. However, the ADA allows employers to exclude individuals from the workplace if they pose a "direct threat" to the health or safety of the workplace. A direct threat is defined as someone who poses a "substantial risk" to the health or safety of other employees in the workplace that cannot be mitigated or eliminated by reasonable accommodation. The EEOC has affirmatively declared that COVID-19 meets the definition of a direct threat. This Holland & Knight alert provides questions and answers that will assist employers in ensuring that they comply with the ADA's direct threat standard and other applicable federal statutes.

The Centers for Disease Control and Prevention (CDC) Has Declared that Individuals Over Age 65 or Who Are Pregnant Are at Higher Risk from COVID-19. May an Employer Postpone a Start Date or Withdraw a Job Offer for Either of Those Two At-Risk Categories?

No. Postponing a start date or withdrawing a job offer in this scenario would constitute an illegal form of age or pregnancy discrimination. Employers may require those same employees to work from home in order to reduce risk of exposure but cannot deny employment based on the same.

If a Job Cannot Be Performed Through Telework, What Reasonable Accommodations Are Available to Employers to Protect Employees Who Are at Higher Risk from COVID-19 Because of Preexisting Conditions?

As a threshold matter, employers do not need to accommodate employees if such accommodation would cause an undue hardship on the employer. If an employee requests minimal contact with others (and cannot telework because of the nature of the job), accommodations could include changes to the work environment (such as one-way aisles, using plexiglass, tables or other barriers to ensure physical distancing between customers and co-workers, and other accommodations that reduce chances of contact and exposure).

The EEOC stresses that flexibility by employers and employees is important when discerning appropriate and effective accommodations. The employer may consider temporary job restructuring, temporarily transferring employees to different positions, or modifying a work or shift schedule. Employees are not entitled to the accommodation of their choice.

What Constitutes an "Undue Hardship" as Related to COVID-19?

Prior to COVID-19, most accommodation requests did not constitute an undue hardship because of an employer's large overall budget and resources. However, the sudden loss of some or all of an employer's income stream because of the pandemic is a relevant consideration. This does not mean that an employer can reject any accommodation request that costs money. An employer must weigh the cost of an accommodation against its current budget in light of the pandemic. If an employer rejects an accommodation request because of financial considerations, the employer must be prepared to substantiate the undue hardship that the rejected accommodation would have placed on the employer.

If an Employee Is Teleworking and Requests an Accommodation, May an Employer Still Request Information to Determine if the Condition Is a Qualifying Disability and Engage in the Normal Interactive Process?

Yes. An employee's absence from the physical workplace does not preclude employers from requesting necessary documentation or information under the ADA. An employer is still permitted to engage in the interactive process and discern whether the alleged disability qualifies for an accommodation under the ADA.

If an Employer Decides to Forgo the Interactive Process and Grant a Temporary Accommodation, Are Employers Permitted to Identify an End Date for the Temporary Accommodation?

Yes. COVID-19 may push some employers to forgo the interactive process and grant a temporary accommodation request. Many accommodations are based on temporary government restrictions and guidance. As government restrictions and guidance changes, so may accommodation requests. Employers are permitted to forgo the interactive process and devise end dates for temporary accommodations to suit changing circumstances based on public health directives. It is important to note that if an employee requests an extension of a temporary accommodation, the employer must consider the extension request.

What Obligations Does an Employer Have with Respect to Employee Medical Information?

The ADA requires that all medical information about employees be maintained separately from the personnel file in order to limit access to this confidential information. COVID-19 medical information may be stored with existing medical files. Any medical information employers create within the scope of measures to control the spread of COVID-19, such as employee temperature checks, must be maintained as confidential medical information.

What Tools Are Available to Employers to Combat Racial and National Origin Harassment That May

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Arise from COVID-19?

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.

The EEOC has practical anti-harassment tools available:

- [Anti-harassment policy tips](#) for small businesses
- [Checklists for employers](#) who want to reduce and address harassment in the workplace
- [Chart of risk factors](#) that lead to harassment and appropriate responses

If a Workforce Returns to the Workplace as Restrictions Are Lifted, How Should Employers Handle Accommodation Requests When it Involves Personal Protective Equipment (PPE) or Other Measures Designed to Protect the Workforce?

Many employers are now requiring employees to wear PPE (such as gloves and face masks) to control exposure to COVID-19. If an employee requests an accommodation to such measures (such as non-latex gloves because of an allergy), the employer should discuss the request and provide the modification or an alternative accommodation that addresses the employee's concerns (assuming that the accommodation is not an undue hardship).

Next Steps

Employers should remain diligent with protecting their workplace. It is recommended that employers continue to monitor the EEOC website for further guidance on potential ADA implications. For more information or assistance on this topic, please contact the authors or other members of Holland & Knight's [Labor, Employment and Benefits Group](#).

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

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