

Practical Answers to Real-World COVID-19 Workplace Questions (Part Two)

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Workplace issues stemming from the novel coronavirus and COVID-19 abound, and many of our clients continue to seek practical and timely answers and solutions. To help you navigate the practical and workplace compliance-related impact of this unprecedented and ever-evolving national crisis, we have created a “frequently asked questions” series to tackle some of the myriad COVID-19-related questions employers have received, and continue to field, from applicants and employees. For more information and guidance, please read [part one](#) of our series.

Earlier this week, the U.S. Equal Employment Opportunity Commission (EEOC) published updated [guidance](#) that helps to clarify what questions employers can lawfully ask about the health of their applicants and employees, and when. The compliance issues that the EEOC is addressing arise primarily under the federal Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, which place strict restrictions on an employer’s ability to require an applicant or employee to undergo a medical examination or to disclose disability-related medical information.

Importantly, the EEOC makes clear at the outset of its guidance that employers can and should follow COVID-19-related guidelines from public health authorities such as the Centers for Disease Control and Prevention (CDC) and the World Health Organization. It also reminds employers about a [pandemic preparedness publication](#) the agency issued in October 2009 in response to the global outbreak of the H1N1 influenza virus, which it says can prove useful to employers in managing their COVID-19 response as well.

Q: Can Employers Measure the Body Temperature of Applicants or Employees?

A: In its new guidance document, the EEOC appears to recognize that ordinary rules about disability-related inquiries and medical examinations have to be flexible enough to respond to global pandemics like COVID-19. For example, **although measuring an individual's body temperature is considered a "medical examination"** subject to the ADA's strict rules, the EEOC defers to the CDC's guidance, making clear that **to the extent that taking an individual's temperature may help detect potential infection and minimize community spread of COVID-19, it is permissible.**

Even still, employers should exercise caution so as to avoid potential claims that they "regarded" an otherwise healthy employee as disabled, which could give rise to legal liability under the ADA.

Q: What Questions May I Ask My Employee Who Has Called in Sick?

A: As to what questions an employer may ask of an employee who calls in sick, the EEOC says:

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.

At the same time, the guidance reminds employers that "all information about employee illness" **should be kept strictly confidential** as required by the ADA. That means the information must be kept separate from other personnel records and access to it must be limited to only those with a legitimate need to know, such as a manager or supervisor for purposes of making workplace adjustments while the employee is away or when he or she returns.

Q: Can I Make an Employee Who Was Out With Suspected or Confirmed COVID-19 Take a Fitness-for-Duty Exam?

A: The EEOC makes clear that employers may require previously ill workers to pass a fitness-for-duty exam or otherwise provide medical documentation confirming that it is safe for them to return to work without running afoul of the ADA, recognizing as a practical matter:

[D]octors 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.**

That is especially important for employers in high-incidence areas or remote locations where employees may have less immediate access to hospitals and physicians managing COVID-19 cases.

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