

Blog Post

# Declaration of COVID-19 as a Pandemic Changes Rules for Employers

March 12, 2020

The World Health Organization (WHO) on March 11, 2020 finally acknowledged that the Coronavirus (COVID-19) outbreak is a pandemic. That designation changes the rules for employers.

The standard for justifying disability-related inquiries and medical examinations under the Americans with Disabilities Act (ADA) is now easier to meet, based on the Equal Employment Opportunity Commission's (EEOC) [Guidance for Pandemic Preparedness](#) from 2009. That guidance addresses some – but not all — of the current dilemmas faced by employers.

During a pandemic, it is acceptable to ask an employee who reports he/she is feeling ill or who calls out sick if the employee is experiencing symptoms of the pandemic illness—in this case, coughing, fever, sore throat, shortness of breath.

But can the employer ask other employees who do not complain of illness if they are experiencing symptoms?

It depends, according to the EEOC. Those are disability-related inquiries barred by the ADA, unless either job-related and consistent with business necessity, or unless based on a direct threat. Direct threat is the key in a pandemic: whether COVID-19 rises to the level of a direct threat depends on the

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severity of the illness. The EEOC guidance states that “the assessment by the CDC and WHO health authorities provide the objective evidence needed for a disability-related inquiry or medical examination.”

WHO Director General, Tedros Adhanom Ghebreyesus, in declaring the pandemic said, “[t]here are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives. Thousands more are fighting for their lives in hospitals. In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher.”

As of March 12, 2020, 28 states have declared a state of emergency, and more are likely to do so in the coming days.

Those statistics would suggest COVID-19 has risen to the level of a direct threat.

Employers should assess each situation based on the latest information from the Center for Disease Control (CDC) and their state and local health authorities.

Meantime, employers can and should continue to send home employees who show symptoms of COVID-19. Given the seriousness of the pandemic, particularly in those geographic areas where there has been sustained community transmission, displaying such symptoms would be serious enough to pose a direct threat.

Sick employees should be told to call their healthcare provider and explain their symptoms; to minimize the spread of COVID-19, they should not just show up at the provider’s office for testing or treatment. If the employee has tested positive, health authorities will direct the next steps.

Employers remain entitled to ask employees why they have been absent from work and when they

expect to return, even if they suspect it was for a medical reason. Employers may continue to require a doctor's note before allowing employees to return to work consistent with their policies; however the CDC and OSHA are appealing to employers not to do so, as healthcare provider offices and medical facilities may be overwhelmed and unable to respond timely.

Because healthcare professions may be too busy during a pandemic to provide them, employers may want to set up a process allowing a doctor to simply certify by email or otherwise that the employee does not have COVID-19 and may return to work.

Remember that a sick employee's medical information must remain confidential with limited exceptions: "(1) supervisor[s] and manager[s] may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers, in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes. 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b)."

But should the sick worker's colleagues be notified that they have been exposed to someone experiencing the symptoms of COVID-19? What, if anything, do you tell them? What if one or more of them has an underlying health condition that makes them vulnerable? What is an employer to do?

There is a tension between the employer's duty to provide a safe workplace under the "general duty" clause of the Occupational Safety and Health Act (OSHA) and the duty to protect the privacy of the ill employee. Employers are going to have to balance

those concerns by relying on recommendations from the CDC, WHO, state and local health authorities and common sense.

If an employee goes home sick with COVID-19 symptoms, many employers are choosing to close the workspace and send home those who worked in proximity to the ill worker for 14 days or until the ill employee has tested negative. That is the safest bet, particularly if there are other employees who have underlying vulnerabilities that make them particularly susceptible – e.g., heart disease, lung disease, suppressed immune system or other chronic medical conditions. But how would an employer know, short of asking?

According to the EEOC guidance, an employer cannot ask asymptomatic employees to disclose whether they have a condition that could make them particularly vulnerable to COVID-19 or to undergo a medical exam with one exception: “If employers have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza, then employers can ask asymptomatic employees about their vulnerabilities.”

Based on the WHO President’s remarks and the rapid spread of COVID-19, that standard appears to have been met.

Indeed, given the aggressive spread of COVID-19, at least in those areas where there has been sustained community transmission, employers could arguably even take its employees’ temperatures to determine whether they have a fever.

If employees have been traveling during a pandemic, employers need not wait until they show symptoms to inquire about exposure; those are not disability-related inquiries.

Where possible, employers should encourage remote working arrangements as an infection control strategy, particularly for employees with underlying health conditions. Accordingly, a telecommuting policy should be promulgated. Employers also should continue to require standard preventative measures such as regular hand-washing, and remind employees to use proper coughing and sneezing etiquette.

Where employees need to take time off due to either exposure to COVID-19 or the contracting of the illness, be mindful of wage and hour requirements prior to making any deductions from the pay of exempt employees. Also, refer to any state or local requirements regarding the use of paid time off.

If you do not have employees with occupational exposures to COVID-19, you should think twice before requiring or allowing employees to wear personal protective equipment such as masks, as certain OSHA regulations would still apply:

- Require the Use of Dust Mask/N-95: Despite its look, a dust mask is a respirator under OSHA in addition to N-95 masks. Therefore, if an employer wants to require employees to wear dust masks to protect employees from flu/COVID-19, then employers must have a written respiratory protection program that includes fit-testing, training, and medical exams. See 29 CFR 1910.134.
- Permit Voluntary Use of Dust Mask: If an employer wants to permit employees to voluntarily use dust masks, then the only requirement is that an employer must present the employee with Appendix D.
- Permit Voluntary Use of Non-Dust Mask Respirator: If an employer wants to permit employees to voluntarily use non-dust mask respirators, then employers must present the employee with Appendix D and an abbreviated written respiratory program, make sure an employee receives medical clearance to wear the

respirator, and offer training on cleaning and maintaining the respirator.

Please note that, as of March 11, 2020, the CDC discourages the use of masks by well persons. However, employers who have workers with occupational exposures to COVID-19, such as healthcare, airline, death care, and solid waste and wastewater management, are required under OSHA's Personal Protective Equipment standards to limit employees' exposure to occupational hazards by providing personal protective equipment like respirators, safety goggles, and gloves. Additionally, covered employers are required record COVID-19 as a recordable illness on employer's OSHA 300 log if the person was infected on the job.

Employers should continue to encourage employees to get a flu vaccine every year. However, even in a pandemic, the EEOC says that employers cannot require it. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. Employees who claim a sincerely held religious belief precludes them from taking the flu vaccine also may be entitled to an accommodation, in certain circumstances.

Akerman continues to follow COVID-19 developments as they impact the workplace.

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