

The EEOC Supplements Its Guidance on the Application of Disability Discrimination Laws to COVID-19 Issues

The COVID-19 pandemic has placed employers in a difficult position when it comes to complying with the Americans with Disabilities Act (ADA) and the Rehabilitation Act. New protocols for maintaining workplace safety necessitate inquiries about employees' health that present privacy pitfalls. Moreover, widespread teleworking early in the pandemic has created new questions about reasonable accommodations as workplaces have reopened. On September 8, 2020, the Equal Employment Opportunity Commission (EEOC) supplemented its existing FAQs to provide additional guidance on some of these issues. The full guidance, including the recent additions, is available [here](#). The most notable points from the September 8 additional guidance are summarized below.

Health-Related Inquiries

The recent guidance expresses general support for asking employees COVID-related health questions, so long as the questions pertain directly to the safety of the workplace, are non-discriminatory, and protect privacy to the extent possible. The guidance provides the following examples of permissible subjects for employers to ask employees about:

- For employees who will be physically entering the workplace, whether they have been diagnosed with COVID-19, have had symptoms, or been tested.
- Personal travel to destinations identified by governmental authorities as requiring quarantine upon return.
- The symptoms of employees who call in sick or report feeling ill as part of workplace screening.
- Why an employee has been absent from work.

The guidance also identifies limits on permissible questions. These are designed to either protect privacy or restrict the questions to those pertaining to safety at the workplace. Specifically:

- Employers may not ask teleworking employees questions about COVID testing or symptoms, since teleworking employees pose no safety risk to others at the workplace.
- If an employer wishes to ask questions to only one employee, there must be objective evidence that the employee might have the disease.
- While employers may ask employees whether they have had close contact with anybody who has been diagnosed with COVID-19 or has experienced symptoms, the question may not be specifically about employees' family members.

Finally, the guidance clarifies that employers may bar employees who refuse to comply with screening procedures. However, employers should request the reason for the refusal and, if warranted, engage in the normal accommodation process.

Confidentiality of Information About Employees

The recent guidance confirms that ADA confidentiality does not prevent an employee from disclosing a co-worker's COVID-19 symptoms to a supervisor. It also confirms that if an employee is teleworking because he or she has COVID-19 symptoms, the employer may inform other staff that the employee is teleworking without saying why. The same applies to employees on leave for a COVID-related reason.

Reasonable Accommodations

The period of mandatory telework for some or all employees presented several novel questions about accommodations.

First, the EEOC guidance confirms that an accommodation that had been granted for an employee at the worksite is not necessarily required when the employee is teleworking. Some accommodations that were necessary at the workplace are not necessary to accommodate the employee's disability at home. Some accommodations that were reasonable at the workplace would be unduly burdensome to implement at home. Each inquiry depends on the circumstances.

Second, the guidance addresses requests for teleworking accommodations following the return of employees to the workplace. The guidance confirms that an employer who grants telework to employees to slow or stop the spread of COVID-19 does not necessarily need to grant continued telework as an accommodation once the workplace reopens. The fact that an employee performed telework during the pandemic is relevant, but not determinative, information when the employer is considering a renewed request for telework as a reasonable accommodation. As always, an employee's request for an accommodation will depend on the individual circumstances.

Further, the fact that an employer may have excused performance of an employee's essential function while remote work was necessary does not mean that the employer must continue to excuse that function when employees return to the workplace. The employer is under no obligation to permanently alter the job's essential functions.

Generally, the guidance reiterates that this telework experience did not change the basic considerations for accommodation requests, but that it can inform the analysis. Employers should continue to evaluate each accommodation request carefully, engage in an interactive process with employees who request accommodations, and seek advice from legal counsel when necessary.

If you have any questions about this information memo, please contact [Peter H. Wiltenburg](#), any [attorney](#) in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.



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