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COVID-19 and Discrimination: Takeaways for Employers Regarding the EEOC's Updated Guidance

The U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance, [What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws](#), on September 8, 2020, to create a comprehensive guide for both employers and employees addressing common questions related to COVID-19 and federal employment laws. The update incorporated information from other agency resources, modified two existing questions and answers, and added eighteen additional questions and answers to the EEOC's guidance. Key takeaways for employers include the following provisions.

COVID-19 Testing and Inquiries

- 1. Employers May Administer COVID-19 Tests to All Employees:** Employers may administer COVID-19 tests to *all* employees before initially permitting employees to enter the workplace and/or periodically to determine if their presence poses a direct threat to others. Employers should ensure that testing is accurate and reliable and should periodically review information from public health authorities regarding what may or may not be considered safe and accurate testing. Additionally, employers should still require employees to observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19. [updated A.6.].
- 2. Employers May Ask COVID-19 Questions of All Employees Entering the Workplace:** Employers may ask all employees who will be *physically entering* the workplace if they have been tested for COVID-19, have COVID-19, or have symptoms associated with COVID-19. However, employers are generally not permitted to ask these questions to employees who are teleworking and are not physically interacting with coworkers or others (e.g., customers). Employers may exclude from the workplace employees with symptoms of COVID-19 or who have COVID-19, as their presence poses a direct threat to the health or safety of others. [A.8.].
- 3. Employers May Ask Individual Employees COVID-19 Questions or Require Testing Only if There Is a Reasonable Belief Individual Has COVID-19:** Employers may only require individual employees (as opposed to all employees) to undergo testing or answer questions designed to determine whether the employee has COVID-19 if the employer possesses a reasonable belief based on objective evidence that the employee might be infected with COVID-19 (e.g., the employee is displaying COVID-19 symptoms). Accordingly, it is important for employers to consider the reasons for taking these actions regarding individual employees. [A.9.].
- 4. Employers May Not Ask Employees Entering Workplace if They Have Family Members With COVID-19 or Symptoms of COVID-19:** The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. However, GINA does not prohibit employers from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with COVID-19. [A.10.].
- 5. Employers May Bar From the Workplace Employees Who Refuse to Take COVID-19 Tests or Answer Questions:** The ADA permits employers to bar employees from physically entering a workplace if they refuse to have their temperature taken or answer questions regarding whether they have COVID-19, have symptoms of COVID-19, or have been tested for COVID-19. However, employers must follow the usual accommodation process if an employee requests reasonable accommodation with respect to COVID-19 screening. [A.11.].
- 6. Employers May Ask Employees Who Are Sick, Absent From Work, or Who Travel Questions About COVID-19:** Employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening

for COVID-19. [A.12]. Additionally, employers may always ask employees why they are absent from work as it is not a disability-related inquiry. [A.13]. Similarly, employers may also ask employees questions about where they traveled (as these are not disability-related inquiries). If the CDC or other public health officials recommend that people who visit specified locations remain at home for a certain period of time, employers may ask employees whether they are returning from these locations (even if the travel was personal). [A.14.].

Confidentiality of Medical Information

- 1. Managers Should Report Employees Who Have COVID-19 or Symptoms of COVID-19, But Employers Should Protect These Employees' Identities:** The ADA requires employers to keep all medical information about employees confidential, including medical information about COVID-19. Managers should report to the appropriate employer officials (designated in advance) any employees who have COVID-19 or who are experiencing symptoms of COVID-19 so the employer may take action consistent with public health authorities' guidance and notify other potentially affected employees. Employers should make every effort to limit the number of people who know the name of the employee, but the circumstances will vary depending on each workplace. An employer's designated representative may interview the employee to determine with whom the employee may have had contact so that it can notify those individuals without revealing the employee's identity. This may be done by using, for example, a generic descriptor like "someone at this location" or "someone on the fourth floor" has COVID-19. Employers are prohibited from confirming or revealing an employee's identity and employer officials must maintain the confidentiality of this information. [B.5.].
- 2. Employees Who Enter Workplace May Report Other Employees in the Same Workplace Experiencing Symptoms of COVID-19:** The ADA's confidentiality requirements do not prevent employees who enter a workplace from communicating to managers about coworkers in the same workplace who are experiencing symptoms associated with COVID-19. Upon learning this information, managers should contact the appropriate employer officials to report this information and discuss next steps. [B.6.].
- 3. Employers May Not Inform Employees That an Individual Is Teleworking or On Leave Because They Have COVID-19:** Employers may inform employees that an individual is teleworking without saying why, if employees need to know how to contact the employee and the employee is working. If the employee is on leave (rather than teleworking) because of COVID-19, symptoms associated with COVID-19, or any other medical condition, then employers may not disclose the reason for the leave and may only disclose that the individual is on leave. [B.7.].
- 4. Employers Must Keep Employees' Medical Information Confidential While Teleworking:** The ADA requires that medical information (including information regarding COVID-19) be kept confidential and stored separately from regular personnel files. Employers should attempt to follow their existing confidentiality protocols while working remotely, but to the extent this is not feasible, employers must safeguard this information to the greatest extent possible until it can be properly stored pursuant to its confidentiality protocols. The EEOC recommends that paper notepads, laptops, and other devices should not be left where others can access the protected information, and that documentation must not be stored electronically where others can access it. [B.8.].

Reasonable Accommodations for COVID-19

- 1. Employees May Request Accommodations Prior to Reopening:** Employers may inform their workforce that employees with disabilities may request in advance accommodations they believe they may

need when the workplace reopens. If an employee does not request accommodation in advance (and instead requests it later), the employer must consider the request whenever it is received. Once an employer receives a request for accommodation, it must begin the interactive process by discussing with the employee whether the impairment is a disability and the reasons the accommodation is needed. [Updated D.8.].

2. **Reasonable Accommodations for Teleworking Employees:** If an employer requires some or all of its employees to telework because of COVID-19, and a teleworking employee makes a request for accommodation, the employer and employee should engage in the interactive process by discussing what the employee needs and why, and whether the same accommodation the employee already receives or a different accommodation could suffice in the home setting. Additionally, an employer's undue hardship considerations might be different when evaluating a request for accommodation when teleworking compared to working in the workplace (e.g., the period of telework may be temporary or of unknown duration, there may be constraints on the normal availability of items, or on the ability of an employer to conduct a necessary assessment). In practice, employers should be creative and flexible regarding what can be done when an employee requests an accommodation for teleworking at home, and providing interim accommodations might be appropriate. [D.14.].
3. **Telework as a Reasonable Accommodation After a Workplace Reopens:** Assuming that an employer permitted employees to telework, once an employer reopens its workplace and recalls employees to the worksite, it does not *automatically* have to grant telework as a reasonable accommodation to every employee with a disability who requests it. Rather, any time an employee requests an accommodation, an employer is entitled to understand the disability-related limitation that necessitates an accommodation and, if there is no limitation requiring telework, the employer does not have to provide it as an accommodation. Additionally, if an employer permits telework to employees because of COVID-19 and chooses to excuse an employee from performing one or more of their essential functions, then a request after the workplace reopens to continue teleworking does not have to be granted if it requires continuing to excuse the employee from performing the essential function. The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. [D.15.].
4. **Telework as a Reasonable Accommodation After a Workplace Reopens for Employees Who Previously Requested Telework as an Accommodation:** Assuming that prior to the COVID-19 pandemic an employee with a disability had requested telework as a reasonable accommodation, had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely, the temporary telework experience could be relevant to considering the renewed accommodation request. For example, the teleworking period could have served as a trial period showing whether or not the employee could satisfactorily perform all the essential functions of their job while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, employers should engage in a flexible, cooperative, interactive process with the employee going forward. [D.16.].

Takeaways

The COVID-19 pandemic has disrupted employers' normal operations in virtually every way, but it is important for employers to stay abreast of the EEOC's guidance regarding employment laws during this challenging time. The EEOC's recent update clarified that an employer may conduct COVID-19 screening tests and inquiries to *all* employees returning to a workplace, but an employer must have a reasonable belief that an employee has COVID-19 or symptoms associated with COVID-19 if it wishes to test or make inquiries to an individual

employee. Additionally, employers must keep confidential all medical information about employees to the extent possible, including medical information relating to COVID-19. Finally, if an employee requests a reasonable accommodation, employers must engage in the interactive process by discussing with the employee what they need and the reasons why the accommodation is needed.

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