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# COVID-19: Anti-Discrimination

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## ADA AND THE REHABILITATION ACT

The ADA and the Rehabilitation Act, including the requirement for reasonable accommodation and rules about medical inquiries and examinations, continue to apply. Employers continue to have a duty to prevent stigma and discrimination in the workplace. However, these laws do not prevent or interfere with employers' ability to take steps to prevent workplace exposure to COVID-19.

### Direct Threat

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances. During a pandemic, however, if an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities. The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

Whether COVID-19 rises to the level of a direct threat depends on the severity of the illness. An assessment by the CDC or state or local health authorities that COVID-19 is significantly more severe than, for example, seasonal influenza, could mean it poses a direct threat. The assessment by the CDC or public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination.

### Frequently Asked Questions

(Also see EEOC's Pandemic Preparedness in the workplace and the ADA)

#### **May an employer send employees home if they have influenza-like symptoms during a pandemic?**

Yes. Employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such

workers to go home is not a disability-related action if the illness is akin to seasonal influenza. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

**During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?**

Employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If COVID-19 is like seasonal influenza, these inquiries are not disability-related. If COVID-19 becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

**When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?**

No, because this is not a disability-related inquiry. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

**May an employer encourage employees to work remotely as an infection-control strategy?**

Yes. In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

**May an employer require its employees to adopt infection-control practices, such as regular hand-washing, and wear personal protective equipment, such as face masks, gloves or gowns, at the workplace?**

Yes. These requirements do not implicate the ADA. However, if employers require protective equipment, employees with disabilities who need a reasonable accommodation (e.g., non-latex gloves), must be provided these, absent undue hardship.

**May an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?**

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

**May an employer require employees who have been away from the**

**workplace during a pandemic to provide a doctor's note certifying fitness to return to work?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

**Title VII**

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against its employees based on race, color, religion, sex and national origin. State anti-discrimination laws may include additional protected classes.

During the COVID-19 pandemic, anti-discrimination laws continue to apply. Employers cannot treat those employees who may be from parts of the world where COVID-19 is prevalent (e.g., those of Asian, Iranian, Italian descent), or any other race/national origin differently, due to fears about the virus.

For example, an employer cannot compel all employees to take the influenza vaccine regardless of their medical conditions or religious beliefs. Under Title VII, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA). Under the ADA, 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. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense).

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