

# Employee Benefit ■ Plan Review

## Equal Employment Opportunity Commission Offers New COVID-19 Workplace Guidance Following End of Public Health Emergency

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May 11, 2023 marked the end of the COVID-19 Public Health Emergency. In response, the Equal Employment Opportunity Commission (EEOC) recently updated its prior technical assistance concerning a wide range of issues arising under the federal equal employment opportunity (EEO) laws. Most notably, the EEOC reminded employers and employees alike that the COVID-19 Public Health Emergency declaration concerned healthcare issues and access to treatment. The end of this declaration does not effectively terminate employers' obligations to comply with federal equal opportunity laws. Therefore, the EEOC's prior technical guidance on COVID-19 issues in the workplace and the convergence with established Americans with Disabilities Act (ADA) principles are still relevant today.

In its most recent updates to prior publications, the EEOC issued relevant guidance of interest to employers who continue to address issues relating to COVID-19, discussed below.

### DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMS

- *COVID-19 Questions:* If an employee calls in sick or falls ill while on the job,

an employer may still ask whether the employee has COVID-19 or common symptoms of COVID-19 (as identified by the CDC). If an employee has COVID-19 or related symptoms, the EEOC recommends that employers consult the CDC guidelines regarding mandatory periods of isolation before making a determination as to when an employee may return to the workplace or work in close proximity to others.

- *Temperature Taking:* Taking an employee's body temperature is still considered a medical examination; therefore, under the ADA, temperature checks and related mandatory screening measures may be taken IF the employer can show that the measures are job-related and consistent with business necessity. Employers should continue to consult CDC guidance or guidance from other public health authorities to determine if an elevated body temperature is a possible indication of infection. If it is, then taking employees' temperatures will meet the ADA business necessity standard. If an employee refuses to have their temperature taken or undergo other related screenings, employers may wish to inquire about the reasons for the refusal and assess whether

compliance can be encouraged, whether the employee has concerns that can be redressed, or whether an accommodation is being requested.

- *Timing of Screening:* Employers may also screen job applicants for symptoms of COVID-19 after making a conditional job offer so long as the employer does so for all entering employees in the same type of job.

### CONFIDENTIALITY OF MEDICAL INFORMATION

- *Medical File:* The ADA requires that all medical information about an employee, including temperature check results and disclosures of contraction of the virus, be included in a medical file.
- *Distinction from Personnel File:* The employee's medical file must be separate from the employee's personnel file. The separate medical file preserves the confidentiality of an employee's medical information by further limiting access to the file.

### DISABILITY AND REASONABLE ACCOMMODATION

- *Continuing Accommodations:* The end of the COVID-19 Public Health Emergency does not entitle employers to automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances, provided the accommodations are still needed based upon an individualized assessment of the employee. However, consistent with the ADA's business necessity standard, employers may request additional information from the employee or the employee's provider that

explains why there may be an ongoing need for accommodation and whether alternative accommodations might meet those needs.

- *Phased (Not Delayed) Interactive Process:* If an employee is required to telework due to COVID-19, an employer should not postpone the discussion of an employee's request for accommodation when the employee returns to the workplace. Employers may initiate the interactive process early, but they may also prioritize accommodations that are needed first while teleworking.
- *Revising Accommodation Analysis:* When considering whether a requested accommodation poses significant expense, the employer may consider circumstances related to the COVID-19 pandemic; however, this does not mean that an employer may reject any accommodation that costs money. Instead, the employer must weigh the cost of an accommodation against its current budget while taking into account any constraints created by the pandemic.
- *Long COVID = Potential Disability:* An employee with Long COVID may qualify as disabled and be eligible for reasonable accommodations if the employee's symptoms are a physical or mental impairment that substantially limits one or more major life activities. Employers should continue to engage in the interactive process and work to accommodate employees with Long COVID. Like in other ADA cases, an employer may ask the employee to provide reasonable documentation about the disability or need for accommodation where the disability is not obvious or already known.
- *Vaccination Issues Remain:* If an employee did not get

vaccinated due to a disability, religious belief, or pregnancy, the employee may be entitled to a reasonable accommodation provided that the accommodation does not pose an undue burden on the operation of the employer's business. Reasonable accommodations could be: requiring an employee to wear a face mask, working at a social distance from coworkers or non-employees, working a modified shift, getting periodic COVID-19 tests, teleworking, or reassignment.

### INCENTIVES FOR COVID-19 VACCINATIONS

- The ADA does NOT limit the value of the incentive employers offer to employees who receive a COVID-19 vaccination from a healthcare provider that is not affiliated with their employer. ADA rules about when disability-related inquiries may be asked and medical examinations required only apply when it is the employer asking the questions or requiring the medical examination. By contrast, if the employer offers an incentive to employees who voluntarily receive a vaccination administered by the employer or its agent, the ADA's rules on disability-related inquiries apply, and the value of the incentive may not be so substantial as to be coercive.

### CONCLUSION

As demonstrated by the EEOC's recent guidance, employers' obligations under the ADA and other EEO laws are still very much alive in this post-pandemic world. Employers should review their accommodation and hiring policies to ensure that the policies comply with the EEOC's recent technical guidance.

Employers should also continue to stay up to date on the CDC guidelines for COVID-19-related employment issues and ensure that

their HR professionals are familiar with the most recent guidelines. Accommodation requests for remote work remain frequent. 🌐

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