

## ¶46,703 EEOC points to earlier guidance and relevant questions given Coronavirus outbreak — AGENCY GUIDANCE, (Mar. 6, 2020)

The EEOC has posted a notice detailing what employers should know about the ADA, the Rehabilitation Act, and the current coronavirus. The federal agency [advised](#) that ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the [guidelines and suggestions made by the CDC](#) about steps employers should be taking.

**EEOC guidance.** In October 2009, the EEOC issued [guidance](#) that the Commission said, consistent with the CDC's workplace protections and rules, can help employers implement strategies to navigate the impact of coronavirus in the workplace. The EEOC guidance identifies relevant established ADA and Rehabilitation Act principles and answers questions frequently asked about the workplace during coronavirus-like events. The EEOC pointed to four particular questions; below, we answer them based on the guidance.

**Requesting information when an employee calls in sick.** In one FAQ, the guidance addresses how much information an employer may request from an employee who calls in sick, in order to protect the rest of its workforce during a coronavirus-like event. Here the EEOC explained that ADA-covered employers may ask these employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Notably, all information about employee illness must be maintained as a confidential medical record in compliance with the ADA.

Where pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related, the EEOC observed. But where "pandemic influenza 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," the guidance states.

**Taking employee temperatures.** In another FAQ, the guidance discusses when an ADA-covered employer may take employees' body temperatures during a coronavirus-like event. The EEOC noted here that in general, measuring an employee's body temperature is a medical examination. However, where pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or where pandemic influenza becomes widespread in the community—as

determined by state or local health authorities or the CDC—then employers may measure their employees' body temperature. "However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever," the guidance cautions.

**Requiring employees to stay home.** The guidance also addresses whether the ADA permits employers to require employees to stay home when they have symptoms of the coronavirus. Yes, they can, according to the EEOC. "The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace," the guidance notes. When the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus, advising workers with symptoms of coronavirus is not a disability-related action. Further, the ADA would permit this action where the illness is serious enough to pose a direct threat.

**Return-to-work certification.** In a final question underscored by the EEOC, the guidance discusses whether under the ADA, when employees return to work, employers may require doctors' notes certifying their fitness for duty. Yes, according to the guidance. The ADA permits these inquiries "either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees," the EEOC said.

However, the EEOC also cautioned that as a practical matter, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. "Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus," the guidance states.

**Source:** Written by [Pamela Wolf, J.D.](#)

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