

## The EEOC Updates Its Guidance for Employers Once Again

### Related Practices

COVID-19 Task Force

### By Peabody & Arnold on September 25, 2020

On September 8, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued [updated guidance](#) to address various questions and concerns regarding employment-related issues during the ongoing pandemic including permissible medical inquiries when an employee enters the workplace, the confidentiality of medical information, and the provision of certain reasonable accommodations.

### Medical Inquiries and Examinations – Returning to the Workplace

As discussed in our earlier posts entitled [The EEOC’s Updated Guidance for Employers](#) and [Important Takeaways from the EEOC’s Webinar on COVID-19 and Anti-Discrimination Laws](#), the Americans with Disabilities Act (“ADA”) imposes restrictions on when and how much medical information an employer can obtain from any applicant or employee. In its most recent guidance, the EEOC provided further insight for employers making pandemic-related medical inquiries. Some key take-aways:

- Employers may test employees physically entering the workplace for COVID-19. Employers must ensure that any test administered is considered accurate and reliable. The EEOC recommends reviewing information from the Food and Drug Administration, Centers for Disease Control and Prevention (“CDC”), and other public health authorities.
- Employers may screen employees by asking if they have COVID-19, have symptoms associated with COVID-19, or have been tested for COVID-19.
- Although employers may exclude employees with COVID-19 or COVID-19 symptoms from the workplace, employers generally cannot ask these questions of employees who are teleworking and are not required to be physically present in the workplace.
- Employers can exclude employees who refuse to comply with COVID-19 screenings or examinations, such as having their temperatures taken, from physically being in the workplace. The EEOC advises employers to try to work with employees by communicating with them, explaining why these measures are in place, and reassuring them that the information will be kept confidential.
- If an employer wishes to ask only one particular employee (and not employees more generally) to answer COVID-19 screening questions, or to undergo testing, the employer must have a reasonable belief based on objective evidence that the employee might have COVID-19. For example, often objective evidence will be a display of COVID-19 symptoms.
- Under the Genetic Information Nondiscrimination Act (“GINA”), employers cannot ask employees medical questions about employees’ family members. However, this does not prohibit employers from asking employees if they have had contact with *anyone* diagnosed with or who has symptoms of COVID-19.

### Maintaining the Confidentiality of Medical Information

The EEOC also updated its guidance for maintaining the confidentiality of employee medical information collected during the pandemic. For example, although the information that an employee has symptoms or a diagnosis of COVID-19 is considered medical information, the ADA does not prohibit managers from

reporting this information internally to the appropriate employer officials in order to take actions consistent with the guidance from the CDC and/or local public health authorities. Ultimately, how many and which officials within the employer's business that should be designated as needing to know the identity of an employee with symptoms or a diagnosis of COVID-19 will depend on the specific employer and nature of the business involved. In any event, all employer officials should be directed to keep such medical information confidential, and all employers should make every effort to limit the number of people who know the identity of an employee who has symptoms or a diagnosis of COVID-19.

The following guidelines are helpful for employers responding to specific employment scenarios:

- For smaller employers, even if an employee's coworkers might be able to figure out the identity of an employee with symptoms or a diagnosis of COVID-19, the employer still must not confirm or reveal the identity of the employee.
- An employee who observes a coworker with COVID-19 symptoms in his/her same workplace may inform a supervisor. The supervisor is then permitted to contact the appropriate employer officials about this information and discuss the necessary next steps.
- If staff needs to contact an employee who is on leave or who is working but is not present in the workplace due to having symptoms or a diagnosis of COVID-19, then the employer should only disclose to staff members that the employee is on leave or is teleworking without revealing why.
- Employers should adhere to their existing confidentiality protocols, to the extent possible, when obtaining medical information while working remotely. If this is not possible, the medical information must be safeguarded to the greatest extent possible, which includes ensuring that paper and electronic files are not accessible to others.

### **Providing Reasonable Accommodations**

As most employers well know, providing reasonable accommodations and engaging in the interactive process can be challenging and complex, and even more so under current circumstances. The EEOC's most recent update provides the following additional insights for employers responding to certain requests for accommodations in light of the COVID-19 pandemic:

- Employers are not automatically required to provide telework accommodations to employees simply because at some point during the COVID-19 pandemic such remote work was allowed. If there is no disability-related limitation necessitating telework as an accommodation, the employer can deny the request. If there is a disability-related limitation, but the employer can effectively address the need with another reasonable accommodation at the workplace, then the employer can choose that alternative accommodation.
- Employers are not required to excuse employees from performing essential functions of their positions. This remains true even if the employer may have temporarily excused performance of one or more essential functions of a position during the pandemic.
- Employers, as always, must continue to consider requests for accommodations on a case-by-case basis and engage in an interactive dialogue with employees. The reasonableness of a requested accommodation, including continued telework, is a highly fact-intensive determination that will involve consideration of a number of factors, including whether an employee has been able to, on a temporary basis, perform the essential functions of his/her position during the pandemic.

### **Further Information**

We will continue to monitor publications from the EEOC. This post provides only a summary of the key information from the EEOC's most recently updated guidance and it is not a substitute for legal advice. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information about navigating through anti-discrimination laws during the COVID-19 pandemic.