Employers Must Consider the ADA and Other Disability Laws When Confronted With a Pandemic

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- Coronavirus News
- Labor & Employment
- All Federal

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In light of the World Health Organization’s (WHO) declaration this week that COVID-19 qualifies as a pandemic, it is more important than ever for employers to prepare and understand the various laws at issue. The Equal Employment Opportunity Commission (EEOC) issued Guidelines in 2009 (“2009 Guidelines”) that were designed to help employers deal with H1N1. These Guidelines address how employers can deal with the realities of a pandemic while complying with the requirements of the Americans with Disabilities Act (ADA). Significantly, the EEOC recently indicated that its 2009 Guidelines remain relevant today in connection with the current pandemic.

The 2009 Guidelines include a discussion regarding disability-related inquiries, permissible medical examinations, “direct threat” issues and reasonable accommodation obligations. The Guidelines also include a helpful Q&A section. The Guidelines address the following:

1. **May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?**

Yes. The CDC (Center for Disease Control) states that 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 or the [coronavirus]. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

2. **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?**

ADA-covered 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 pandemic influenza is like seasonal influenza or [coronavirus], these inquiries are not disability-related. If 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.

3. **During a pandemic, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?**

Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the [coronavirus], or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.

4. **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. These would not be disability-related inquiries. 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.

5. **During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?**

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the
spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

6. May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.

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.

7. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

8. During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed
for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

9. **During a pandemic, 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.

**Example:** During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor’s inquiry is not a disability-related inquiry under the ADA.

10. **May an ADA-covered 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 influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, 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.

**CONCLUSION**

While the EEOC’s 2009 Guidelines shed some light on ADA issues raised during a pandemic, it is by no means exhaustive and does not address unique state and local law issues that may exist. Employers are encouraged to discuss these issues with legal counsel.

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