

HOW TO HANDLE COVID-19 CONCERNS AT THE WORKPLACE

The EEOC has provided elaboration on how employers can navigate between compliance with the Equal Employment Opportunity laws and COVID-19 protocols issued through myriad government orders. The following represents the EEOC's response to certain of the most commonly posed questions from employers concerning their obligations solely under laws enforced by the EEOC (as opposed to, for example, laws enforced by the DOL such as FLSA), recognizing that this guidance may change over the course of time as the COVID-19 landscape evolves.

Question: The EEOC has explained in its updated 2020 EEOC Pandemic publication that at the present time, the COVID-19 pandemic permits an employer to take the temperature of employees who are coming into the workplace. Is there anything else an employer could do at the current time to determine if employees physically coming into the workplace have COVID-19 or symptoms associated with the disease?

Answer: As of March 27, 2020, employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath. An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to health or safety. For those employees who are teleworking, however, they are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask these questions.

Question: What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature, or refuses to answer questions about whether he has COVID-19, or symptoms associated with COVID-19, or has been tested for COVID-19?

Answer: Under the circumstances existing as of March 27, 2020, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19, as well as the ability to bar this employee's presence if he refuses to have his temperature taken. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace.

Question: May a manager ask only one employee -- as opposed to asking all employees -- questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken?

Answer: If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee. For example, if an employer notices that an employee has a persistent, hacking cough, it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19. The reason these types of questions are permissible now is because this type of cough is one of the symptoms associated with COVID-19. On the other hand, if an employer notices that an employee seems distracted, then that would be an insufficient basis to ask whether the employee has COVID-19.

Question: May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?

Answer: From a public health perspective, only asking an employee about his contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19. A better question from a public health and workforce management perspective is whether an individual has had contact with anyone who the employee knows has been

diagnosed with COVID-19, or who may have symptoms associated with the disease. From EEOC's perspective, this general question is more sound. The Genetic Information Nondiscrimination Act prohibits employers from asking employees medical questions about family members.

Question: Suppose a manager learns and confirms that an employee has CO-VID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do?

Answer: The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, here, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee -- unnamed -- has symptoms of COVID-19, or a diagnosis, or is it the identity of that employee? The answer is that exactly who in the organization needs to know the identity of the employee will really depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

Certainly, a designated representative of the employer may interview the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee. However, this does not require disclosing the employee's name. For small employers, of course, co-workers might be able to figure out who the employee is, but employers are still in that situation prohibited from confirming or revealing the employee's identity. Also remember that all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. And in fact, employers may want to plan what supervisors and managers should do if this situation arises and determine in advance who will be responsible for receiving information and taking next steps.

* * * * *

If you need any assistance in understanding or addressing these issues, please contact the [Garfunkel Wild attorney](#) with whom you regularly work, or contact us at info@garfunkelwild.com.

Contact Information:

111 Great Neck Road Great Neck, NY 11021 516.393.2200	411 Hackensack Avenue Hackensack, NJ 07601 201.883.1030	350 Bedford Street Stamford, CT 06901 203.316.0483	677 Broadway Albany, NY 12207 518.242.7582
---	---	--	--

If you would like to receive Legal Alert mailings from Garfunkel Wild, P.C. electronically in the future, or if you would like to be removed from the mailing list, please contact us at info@garfunkelwild.com. This material is intended as informational only and the content should not be construed as legal advice. Readers should not act upon information in this material without first seeking professional advice. This material may be considered Attorney Advertising under certain rules of professional conduct. © 2020 Garfunkel Wild, P.C.