

HOW TO HANDLE CONFIDENTIALITY ISSUES RELATING TO COVID-19

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.

Scenario: An employee who must report to the workplace knows that a co-worker who reports to the same workplace has symptoms associated with COVID-19. Does Americans with Disabilities Act ("ADA") confidentiality prevent the first employee from disclosing the co-worker's symptoms to a supervisor? The answer is no; ADA confidentiality does not prevent this employee from communicating to his supervisor about a co-worker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a co-worker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

Scenario: An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? The answer: yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure of this information without saying why the employee is teleworking is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then of course too an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

Scenario: Employers may be concerned that telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19 may not provide sufficient information to allow people to know if they should take further steps to protect themselves or others. Therefore, can employers tell the workforce the name of the employee with COVID-19? The answer: no. The ADA does not permit such a broad disclosure of the medical condition of a specific employee. More importantly, this broad disclosure is not recommended by the CDC. The CDC specifically advises employers to maintain confidentiality of people with confirmed COVID-19.

Scenario: Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can see them. Similarly, documentation must not be stored electronically where others would have access. And in fact, a manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

Question: Does the ADA permit employers to notify public health authorities if the employer learns an employee has COVID-19? The answer is yes. The ADA permits this notification to public health authorities because, as the EEOC explained in its updated Pandemic publication, COVID-19 at this time poses a direct threat both to individuals with the disease and those with they come into contact. By direct threat, the ADA means that an individual's medical condition -- in this case, COVID-19 -- poses a significant risk of substantial harm to himself or others.

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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.

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