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EEOC Updates COVID-19 Guidance

On April 24, 2020, the Equal Employment Opportunity Commission (EEOC) issued updated and comprehensive guidance to address several workplace inquiries spawned by the COVID-19 pandemic and its relationship to various employment laws: the ADA, the Rehabilitation Act, Title VII, the ADEA, and GINA. Some of the most significant topics include the following – in summary fashion:

Disability-Related Inquiries and Medical Exams

- Employers may ask employees if they are experiencing COVID-19 symptoms (e.g., fever, chills, cough, shortness of breath, sore throat).
- Employers can rely on public health authorities (e.g., CDC, medical sources) for guidance on additional symptoms associated with COVID-19.
- Employers may monitor an employee's body temperature. The EEOC, however, emphasizes that some individuals with COVID-19 do not have a fever. Therefore, understand that taking temperatures may have limited objective value.
- Employers may require employees with COVID-19 symptoms to leave the workplace and stay home.
- Employers may require employees returning to work to bring medical fitness-for-duty certification. However, the EEOC cautioned healthcare providers may be too busy at the present time to provide such documentation to employees.
- Employers may administer a test to detect the COVID-19 virus before permitting employees to enter the workplace. Such tests (which should be vetted by applicable public health guidance) must be accurate and reliable. Employers must be cognizant of false positives and false negatives associated with any such test. The EEOC also stressed a negative test does not mean the employee will not acquire the COVID-19 virus at a later time.
- Employers should still require that employees observe infection control practices (e.g., social distancing, regular hand

washing, etc.)

Confidentiality of Medical Information

- Employee medical information must remain confidential. Employers may store all COVID-19-related medical information in existing medical files. Such information includes an employee statement that he/she has COVID-19 or suspects he/she has it. It also includes employer notes taken from questioning the employee.
- A log of daily temperature checks contains confidential medical information and must be secured.
- An employer may disclose the identity of an employee with COVID-19 to a public health agency.
- A temporary staff agency/contractor may disclose the identity of a worker with COVID-19 to the employer where the worker was placed.

Hiring and Onboarding

- After making a conditional job offer, an employer may screen applicants for COVID-19 symptoms – if it does so for all applicants in the same type of job.
- After making a conditional job offer, an employer may take an applicant's temperature.
- An employer may delay the start date for a new hire who has COVID-19 or COVID-19-related symptoms.
- An employer may withdraw a job offer when it needs the applicant, who has COVID-19 or COVID-19-related symptoms, to start work immediately.
- An employer cannot postpone the start date or withdraw a job offer because the applicant has a higher risk from COVID-19 (e.g., 65+ years-old, pregnant). The employer can explore telework or discuss whether they would like to postpone their start date.

Reasonable Accommodation

- There may be reasonable accommodations that should be explored with an individual (whose disability places him/her at greater risk from COVID-19) who requests a job or workplace adjustment to eliminate possible exposure.
- An employer should explore a reasonable accommodation with an employee with a preexisting mental condition (e.g., anxiety disorder, obsessive-compulsive disorder, PTSD) that has been exacerbated by the COVID-19 pandemic. That employee may have more difficulty handling the disruption to daily life due to the COVID-19 pandemic. The interactive process can include the receipt of medical documentation.
- An employee receiving a reasonable accommodation at the workplace may need a different type of accommodation when teleworking.
- During a pandemic, where time is a premium or there is an increased urgency to provide a requested accommodation, employers may skip or shorten the interactive process and grant a reasonable accommodation request on a temporary, interim, or trial basis – pending receipt of medical documentation.
- Employers may ask employees with disabilities (currently teleworking) if they will need reasonable accommodations when they return to the workplace.
- An employer may consider whether current circumstances (generated by the pandemic) pose an “undue hardship” in acquiring or providing certain accommodations – based on the particular facts involved.
- The EEOC recognizes most accommodations do not pose a significant expense when viewed against an employer’s overall budget and resources. However, during a pandemic, the sudden loss of some or all of the employer’s income stream or the amount of discretionary funds available are relevant considerations when assessing the “undue hardship” defense.
- Employees classified as “critical” or “essential” workers by the CDC are still protected under all applicable employment laws, including the ADA and the Rehabilitation Act.

Pandemic-Related Harassment

- The fear of COVID-19 should not be misdirected against individuals because of a statutory protected status under Title VII (e.g., national origin, race, etc.)
- Employers should re-educate employees and supervisors (watch for, stop, report) about federal EEO laws.

Return To Work

- Employers may make disability-related inquiries, and conduct medical exams (if job-related and consistent with business necessity) when necessary to exclude employees with a medical condition that would pose a “direct threat” to the health and safety of him or herself or others. This exercise may include taking temperatures, asking questions about COVID-19 symptoms, or requiring self-reporting.
- Employers may require employees to wear protective gear (e.g., face masks, gloves) and observe infection control practices (e.g., regular hand washing, social distancing.)
- When an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, modified face masks for interpreters, special gowns for wheelchair users), or an employee needs a religious accommodation (e.g., modified equipment due to religious garb), the employer should engage in the interactive process with the employee.

This updated EEOC guidance is a valuable resource (among others) for employers to utilize when addressing the impact of this ever-changing, always challenging COVID-19 crisis on the workplace. Beyond question, employers must brace themselves for the “next normal.”

For more information concerning the EEOC’s updated guidance related to COVID-19 or responding to requests for reasonable accommodations, please feel free to reach out to [Jeff Shoskin](#), [Catherine Burgett](#), or any member of the [Labor & Employment](#) practice group. Also, stay tuned for future webinars in Frost Brown Todd’s continuing *After COVID* series designed to help employers

navigate returning to work in a post-pandemic environment.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are prepared to answer your questions on a wide range of legal topics and provide practical guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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