

Summary of EEOC's March 27, 2020 Webinar

On March 27, 2020, the Equal Employment Opportunity Commission (“EEOC”) prerecorded a webinar regarding questions concerning COVID-19 and the Americans with Disability Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), Title VII of the Civil Rights Act (“Title VII”), and the Genetic Information Nondiscrimination Act (“GINA”). The webinar consisted of the panelists answering the 22 most common questions that the EEOC fielded from the public. The EEOC provided that the information included in the webinar was based on March 27, 2020, and it could change as the pandemic lingers. After reviewing the prerecorded webinar, we have provided a condensed version of the EEOC’s questions and answers below:

1. What can an employer currently do if an onsite employee has COVID-19 or symptoms of it?
 - a. Request the employee to have his temperature taken;
 - b. Ask the employee if he has COVID-19;
 - c. Ask the employee if he has symptoms of COVID-19; and
 - d. Ask the employee if he has been tested for COVID-19.

The employer can exclude the employee from the worksite if he/she has COVID-19 or symptoms of it. See Question 5 below.

2. Can an employer ask similar questions for employees that are working remotely?
 - a. No.
3. What if an onsite employee refuses to allow his temperature to be taken or refuses to answer questions on whether he has COVID-19, has symptoms of it, or has been tested for it?
 - a. If the employee refuses to do the foregoing, the ADA allows an employer to exclude an employee from being onsite.
4. What can be done to encourage employee cooperation to allow his temperature to be taken or answer questions related to COVID-19?
 - a. The employer may ask for the employee’s reasoning in refusing to allow his temperature to be taken or answer questions related to COVID-19. In response, the employer may be able to reassure the employee that the reasoning for the foregoing is for safety purposes and that any personal medical information cannot be broadly disclosed due to ADA’s prohibition.
5. If an employee has COVID-19 or symptoms of it, can the employer exclude such employee from the workplace?
 - a. Yes, an employer may exclude such an employee because “their presence would impose a direct threat to health or safety.”
6. What are the symptoms of COVID-19?
 - a. The EEOC provided that the following are symptoms of COVID-19:
 - i. Cough;

- ii. Sore throat;
 - iii. Fever;
 - iv. Chills; and
 - v. Shortness of breath.
- 7. What if a manager or supervisor wants to ask only one employee to have his or her temperature taken or ask whether the one employee has COVID-19, symptoms of it, or has been tested for it?
 - a. The EEOC provided that the ADA mandates that the employer must “have a reasonable belief based on objective evidence” that this person might have COVID-19 or symptoms of it. As such, it is important that the employer can articulate the reasoning why it wants to undertake such actions for only one employee.
- 8. May an employer ask an onsite employee whether he or she has family members with COVID-19 or symptoms with it?
 - a. The EEOC recommended, in lieu of such question, that an employer broadly ask if the employee has been in contact with someone who has been diagnosed with COVID-19 or someone who has symptoms of it. Furthermore, the EEOC pointed out that GINA prohibits employers from asking those questions about family members.
- 9. How does a manager or supervisor react if he or she finds out an employee has COVID-19 or symptoms of it without violating ADA confidentiality?
 - a. Even though information on whether an employee has COVID-19 or symptoms of it does not pertain to a disability, the ADA mandates that the employer should keep that medical information confidential. However, even though the foregoing is medical information, the manager or supervisor is not prohibited from reporting to the appropriate in-house officials so said officials can take appropriate action. The EEOC cautioned that the employer should limit who the information is shared with and even recommended having a representative designated to deal with such information.
- 10. Is there an ADA confidentiality violation if an employee reports to a supervisor that a co-worker has COVID-19 or symptoms of it?
 - a. No. The employee should report the information to the supervisor so that the supervisor can report it to the appropriate management officials to undergo the proper procedures and steps.
- 11. How do managers and supervisors keep medical information confidential while remote working?
 - a. If managers or supervisors receive medical information while working remotely and can abide by existing confidentiality policies, they must do so. They also must safeguard the information to the greatest extent possible until it can be properly

stored. They can use code or initials and keep note pads (laptops or other electronic devices or electronic storage) maintained so others cannot see the information.

12. If an employee is remotely working because they have COVID-19 or symptoms of it, can the employer inform his or her coworkers that the employee is remotely working without stating the reason?
 - a. Yes, because other onsite coworkers might need to contact the employee and know that the employee is still working, just remotely. There is no need to inform the coworkers of the reasoning for the remote working. The same would apply for an employee taking leave because of COVID-19 or having symptoms of it.

13. If an employer is concerned that providing vague information, such as “an employee at this location” or “an employee on the main floor” was diagnosed with COVID-19, is not sufficient to inform employees so they can take safety precautions, may the employer disclose the name of the employee diagnosed with COVID-19?
 - a. No, the EEOC provided that the ADA prohibits such a broad disclosure and the CDC does not recommend such disclosure.

14. Is an employer permitted by the ADA to notify public health authorities if they are informed an employee was diagnosed with COVID-19?
 - a. Yes, because COVID-19 currently poses a “direct threat” to both those that have contracted it and those who come in contact with individuals with COVID-19. Under the ADA, a “direct threat” means: “the individual’s medical condition poses a significant risk of substantial harm to himself or others.” The appendix to the ADA regulations prescribes that the ADA does not preempt state, county, or local laws designed to protect the public health from COVID-19, which is currently a direct threat.

15. May an employer prohibit an employee who is 65 years or older from entering the workplace if they do not have COVID-19 or symptoms of it because the CDC identified such individuals as having a higher risk if they contract COVID-19?
 - a. No. The ADEA prohibits employment discrimination against employees aged 40 years and older. If the reason for an employment decision is for older age, the ADEA would not permit an employer to exclude older employees from the place of employment, force them to work remotely, or be involuntarily placed on leave.

16. Does the ADEA mandate that an employer grant a request to work remotely from an employee that is 65 years or older because the CDC states that such individuals are at a higher risk?
 - a. No. The ADEA does not have a reasonable accommodation provision similar to the ADA’s provision. However, the EEOC noted that if an employer is allowing younger employees to remotely work, the employer must make sure that they are not treating the employees 40 years and older differently because of their age.

17. Can an employer lay off or furlough a pregnant employee who does not have COVID-19 or symptoms of it since the CDC provides that such employees are at a higher risk?
 - a. No. Title VII protects pregnant employees. Such employment decisions based on pregnancy are employment decisions based on sex, so a decision to lay off or furlough employees should not be due to pregnancy.

18. Does an employer have to grant a request to remotely work from a pregnant employee because she is at a higher risk if she contracts COVID-19?
 - a. Title VII, as amended by the Pregnancy Discrimination Act, states that a “woman affected by pregnancy shall be treated the same for all employment related purposes as other related persons not so affected but similar in their ability or inability to work.” As such, a pregnant employee should not be denied a necessary work alternative that other employees are provided if they are similar in their ability or inability to work. The EEOC noted that a medical condition related to pregnancy may be a disability as defined under the ADA and trigger a right for a reasonable accommodation. However, pregnancy itself is not a disability.

19. Can an employer exclude employees based on national origin or tolerate a hostile work environment based on religion or national origin due to concerns that such employees may transmit the disease to others?
 - a. No. Title VII prohibits all employment actions based on national origin, even if linked or related to COVID-19 transmission. The EEOC recommended employers remind employees of workplace harassment and discrimination policies based on an employee’s national origin/religion.

20. Is COVID-19 a disability under the ADA?
 - a. At this time, the EEOC is unclear whether COVID-19 is or could be a disability as defined under the ADA. However, even if it is or could be a disability, an employer may prohibit an employee from entering the workplace if such employee has COVID-19 because COVID-19 is a direct threat.

21. What ADA obligations does an employer have if an employee states that he or she has a disability that puts him or her at a greater risk for severe illness if he contracts COVID-19 and asks for an accommodation?
 - a. An employer may confirm that the employee has a disability and whether an accommodation is necessary because the disability puts the employee at a greater risk. Further, there could be circumstances where a disability is exacerbated by the current circumstance and needs an accommodation. As such, an employer can also confirm that the employee has the disability and why an accommodation is necessary and whether it would meet the employee’s needs. In either case, the employer can consider whether the accommodation would cause undue hardship (significant expense or significant cost for the employer).

- b. It should be noted that the EEOC stated that employers may have difficulty confirming a disability through a health care provider (a doctor), and as such, the employer can confirm a disability by health/insurance records or a prescription. Even if the employer is waiting for such documentation, it may consider temporarily providing the accommodation due to the gravity of the situation.
- 22. What ADA obligations does an employer have to provide a reasonable accommodation if an employee states that he lives in the household with an individual who has a disability that puts them at a greater risk of severe illness if he contracts COVID-19?
 - a. An employer does not have ADA obligations because the employee is not the one that has the disability in this situation. However, the EEOC noted that the employer should evaluate whether it is treating such an employee differently than employees with a similar need before evaluating and responding to the request.
- 23. What should employers and employees keep in mind about the interactive process due to the COVID-19 situation?
 - a. The employer and employee should use the interactive process to discuss an accommodation request so that the employer has sufficient information to respond to the request. The EEOC also noted that employers may need to act promptly because wavering puts those with such a disability at a higher risk. Due to the gravity of the situation, the employer could even provide accommodations on a temporary basis. Further, the EEOC provided that both employers and employees should be adaptable and imaginative and understand that an accommodation may not be perfect, but it may meet the employee's needs temporarily.
- 24. If an employee is remotely working due to COVID-19, is an employer required to provide such an employee with the same reasonable accommodations provided at the workplace?
 - a. The employer and employee should discuss what the employee needs and why and whether the same or a different accommodation is needed in the home. The EEOC noted that some employees may already have certain equipment at home that may enable them to work and they might not need similar accommodations as in the workplace. Furthermore, the undue hardship considerations are different for accommodations at home. Both the employer and employee should recognize that some equipment may not be available at this time or there is not ample time needed to consider the request. Thus, again, the EEOC noted that the employer and employee should be adaptive and imaginative and provide an interim accommodation while discussing the matter or waiting for confirmation.
- 25. Once the crisis is averted and employees are no longer remotely working, does an employer have to automatically grant remote work as an accommodation to every employee with a disability who wants to continue working at home?
 - a. No. Once an employee provides a reasonable accommodation request, the employer is entitled to comprehend the "disability-related limitation." If there is no such

limitation that requires remote work, the employer does not need to grant the accommodation. If there is such a limitation, but the employer can address the limitation onsite, then the employer can have the employee work onsite. If the employer is currently allowing remote work and is excusing essential functions, then after the crisis subsides, a request to continue remotely working should not be granted if the employer would have to excuse the employee from conducting an essential function. Solely because the employer temporarily excused an employee's performance of essential functions during the pandemic, does not mean the employer permanently changes the position's essential functions or that remote work is an appropriate accommodation. Furthermore, the EEOC expressly provided that the ADA does not prevent the employer from restoring all essential functions after the pandemic subsides. Thus, the employer should evaluate any renewed reasonable accommodation requests under the ADA general rules.

26. If prior to the COVID-19 pandemic, an employer denies an employee's accommodation request to work remotely because it was concerned the employee would not be able to perform the essential functions but the employee worked remotely during the pandemic and afterward, the employee renewed the request for remote work – can the employer again refuse the request?
- a. Assuming the request for a reasonable accommodation meets all appropriate criteria, the temporary remote work would be relevant in considering the renewed request for remote work. Such prior remote work could serve as a trial on whether or not the essential functions were being performed during the COVID-19 pandemic.

Lastly, the EEOC stated that all individuals should continue checking the EEOC website for updates regarding the COVID-19 pandemic.

If you have any questions regarding the foregoing or another aspect of COVID-19 issues, please do not hesitate to contact Davis & Campbell LLC at (309) 673-1681. We at Davis & Campbell are here to assist businesses, no matter the size, during these uncharted and trying times.