

NEWS & INSIGHTS

Employer preparedness for COVID-19 and compliance with the Americans with Disabilities Act (ADA)

INSIGHTSLEGAL UPDATE

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The below information is current as of the publication date listed. Because COVID-19 response measures on all fronts are continually evolving, clients should stay alert to new developments and consult with counsel on any critical questions.

The COVID-19 (coronavirus) pandemic has many employers concerned about how to protect their employees while

maintaining compliance with the Americans with Disabilities Act (ADA). In response to the 2009 H1N1 virus (swine flu), the Equal Employment Opportunity Commission (EEOC) issued [Pandemic Preparedness Guidelines](#) to assist employers in navigating their obligations under the ADA. Due to the recent spread of COVID-19, the EEOC released a [statement](#) reiterating its prior pandemic guidance and encouraging employers to follow [guidance](#) from the Centers for Disease Control and Prevention (CDC).

Which rules apply?

The ADA is relevant to pandemic preparation in that it:

- Regulates employers' disability-related inquiries and medical examinations for applicants and employees, including those without ADA disabilities
- Prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat"
- Requires reasonable accommodations for individuals with disabilities, absent undue hardship, during a pandemic

Whether a pandemic, such as COVID-19, rises to the level of a "direct threat" depends on the severity of the illness. A finding of "direct threat" must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence such as objective information from the CDC or state or local health authorities. The EEOC thus encourages employers to rely on the latest CDC and state or local public health assessments.

What employers need to know

When the CDC declares an active pandemic, as is currently the case, employers are given some latitude under the ADA. The EEOC and CDC are consistent in allowing employers to send employees home where they display flu-like symptoms, and inquire as to whether employees are experiencing flu-like symptoms, such as fever or chills and a cough or sore throat, so long as information responsive to the inquiry is kept confidential. In addition, where an employee returns from travel during a pandemic, employers must follow CDC guidelines regarding specified locations of travel and appropriately instruct employees to remain home for a period of time without symptoms.

Employers cannot require employees to disclose whether they are immunocompromised or otherwise have a chronic health condition rendering them more susceptible to illness. However, employers may carefully structure inquiries to identify employees who may be more likely to be unavailable for work in the event of a pandemic by configuring questions to identify non-medical reasons for absence. Examples of such inquiries involve asking employees whether, in the event of a pandemic, they would be unable to come to work because of school, daycare and public transportation closures.

Should an employee request to work remotely due to an immunocompromised status of themselves or member of

their household, such requests should be granted to the extent they would not constitute an undue burden on the employer. This not only accommodates the employee, but also protects the remaining workforce from illness and could ultimately prevent potentially crippling financial circumstances for the employer.

Lastly, all employers, regardless of industry, should strongly encourage (and be appropriately equipped for) infection control practices such as regular and thorough handwashing, disinfecting of frequently touched surfaces, avoidance of close contact with anyone who might be sick, coughing/sneezing into the arm, and proper tissue disposal. These policies do not implicate or violate the ADA.

Saxton & Stump attorney [Rick Hackman](#) is available to further discuss how to manage employee-related COVID-19 concerns and how our [Labor and Employment Group](#) can help you develop appropriate pandemic preparedness policies.

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