

EEOC sets ADA reopening and accommodation rules

The EEOC has issued [guidance](#) under the Americans with Disabilities Act (ADA) for accommodating disabled workers during the COVID-19 pandemic. These include rules for reopening and bringing workers back to office settings as well as hiring and accommodating new workers. Employers will come across individuals who don't want to return from telework or layoffs over fear they will become infected. Some may raise new or preexisting disabilities as reasons for more leave or continued telework. Even new hires may accept offers and then request reasonable accommodations like telework or alternative assignments. That's where the [EEOC guidance](#) comes in.

How to use the EEOC guidance

The guidance defers on many details to the Centers for Disease Control and Prevention (CDC). The pandemic is ongoing and knowledge of how the novel coronavirus, SARS-CoV-2, spreads is constantly changing. Employers must stay up-to-date. The best approach is to familiarize yourself with the EEOC guidance and frequently review the [CDC website](#) on COVID-19 for updates. Pay particular attention to the [evolving list](#) of pre-existing conditions that signal a risk of serious complications or even death. These conditions, some of which are not automatically considered disabilities under the ADA in non-pandemic times, may be covered now.

EEOC and screening for COVID-19

Before reopening or to reduce the risk of becoming a COVID-19 hot spot of infections, employers should set screening rules. Follow the rules set by local or state governments. Most of these defer to CDC reopening and screening rules. The EEOC has worked with the CDC to address questions that come up when disabled applicants and workers are screened. Here are some of the most common problems and their solution:

Symptom screening

The EEOC says that employers may ask workers about symptoms they may be experiencing that could indicate COVID-19 infection. They may do so each time the employee comes into the workplace. Employers should consult the latest research and information from the CDC when creating the question list. Symptoms of COVID-19 now include fever, body ache, dry cough, fatigue, chills, headache, sore throat, loss of appetite, and loss of smell or taste in addition to nausea, vomiting and diarrhea. Recently, congestion and runny nose were added to the list, too.

Temperature screenings

Generally, taking an employee's temperature is not allowed under the ADA - it is a medical examination. However, the EEOC guidance says that during the pandemic, employers may temperature screen all employees since a fever is a listed symptom. They may also choose to send anyone home who exhibits symptoms. Doing so, as long as the rule is uniformly applied, does not violate the ADA. Sending everyone home may necessitate changes to leave policies, given how common many symptoms are. In addition, temperature screenings take

time and may mean workers in close proximity to one another. Consider having employees report symptoms online or by phone and using temperature scanners at the entrance to speed the process.

Covid-19 testing

Some employers want to test returning or new employees before they start work to ensure they aren't infectious. The EEOC says employers may do so because it would be "job-related and consistent with business necessity." They could pose a direct threat to co-workers and customers or clients. Note, however, that the EEOC says antibody tests as a precondition to returning or starting work are *not*



Returning to work after a positive test

The EEOC says that employers can require workers who tested positive to take a second test to confirm they have recovered. However, it also defers to CDC guidance. And as of July 21, the CDC has modified its recommendations on re-testing. It no longer says retesting is essential, in part because nationally testing is backlogged. Instead, it says workers who tested positive and have "mild" illness may return to work when:

- At least 10 days have passed since first symptoms; and
- At least 24 hours have passed since their last fever without the use of fever-reducing medicine; and
- Symptoms like cough or shortness of breath have improved.

Hiring during the pandemic

Employers may screen new hires for active COVID-19 symptoms and perform a COVID-19 virus test. If the new hire has symptoms or tests positive, the EEOC says delaying their start date doesn't violate the ADA. But what if you have a need for the worker to start immediately. Can you withdraw the offer based on the positive test or symptoms? The EEOC says yes. The individual cannot safely enter the workplace and poses a potential threat to others.

More guidance on high-risk workers

The CDC has provided extensive guidance on who is most at risk for serious COVID-19 complications or death. In addition to being over age 65, a number of very common pre-existing conditions predisposes workers to serious complications. These were recently revised and are grouped into two risk categories.

Increased risk of severe illness. People of any age with one of the following conditions are at increased risk of **severe illness** from COVID-19:

- Cancer;
- Chronic kidney disease;
- Chronic obstructive pulmonary disease;
- Weakened immune system from organ transplant;
- Obesity with a BMI of 30 or more;
- Serious heart conditions like heart failure, coronary artery disease or cardiomyopathies;
- Sickle cell disease; and
- Type 2 diabetes.

Might be at an increased risk of severe illness. People of any age with one of the following conditions *might be* at increased risk of **severe illness** from COVID-19:

- Moderate to severe asthma;

- Cerebrovascular disease;
- Cystic fibrosis;
- High blood pressure;
- Weakened immune system from blood or marrow transplant, immune deficiencies, HIV, use of corticosteroids on immune weakening medications;
- Dementia;
- Liver disease;
- Pregnancy;
- Pulmonary fibrosis;
- Smoking;
- Thalassemia; and
- Type 1 diabetes.

The EEOC says that employers cannot reject an applicant or refuse to allow that applicant to start work based on potential complications. It did not clarify, however, whether that's also the case for those with conditions not typically considered ADA disabilities. For example, could an employer refuse to let a worker start because he smokes? In other words, it did not state whether a smoker is protected from disability discrimination based on smoking.

The EEOC did, however, conclude that employers are free to offer disabled individuals telework or delay a start date. If the applicant or returning employee agreed, there's no ADA violation.

Reasonable accommodation for high-risk employees

Many individuals whose preexisting conditions put them at higher risk from COVID-19 *may* be entitled to reasonable accommodations. For now, the EEOC seems disposed to presuming having a listed preexisting condition entitled the individual to ADA protection. The exception may be smoking status or possibly obesity. Employers should, however, consult counsel before denying a request from those with a high BMI or who smoke. That can include an opportunity to telework, time off or on-site modifications to reduce exposure risk.

The CDC, to whom the EEOC defers, has a long list of possible workplace modifications that reduce spread. These, in essence, would serve as reasonable accommodations. You can access many of the [CDC recommendations here](#).

Some employees may request reasonable accommodations even though they do not have a listed preexisting condition. They may claim extreme anxiety, post-traumatic stress disorder, obsessive-compulsive or panic attacks as the basis for the request. The EEOC says that employers should handle the request as they would any other. Begin the interactive accommodations process while determining whether the employee's condition qualifies as an ADA disability. You should also reassure the employee that you have followed all local, state and CDC guidelines for a safe workplace. Employers may want to have provide contact information for the employee assistance program but should *not* specifically recommend that to the uncomfortable worker. Instead, make the information available to all.

There's one reason for an accommodation request that the EEOC guidance rejects outright. It cites the example of a worker who wants to continue telework because his household includes vulnerable individuals. The EEOC says that "an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure."