

EEOC Issues Guidance on Pandemic Preparedness and ADA Compliance

By Mark D. Nelson and Stephanie Dodge Gournis

The Equal Employment Opportunity Commission (EEOC) recently issued an updated Technical Assistance Document (TAD) to provide employers guidance in balancing their pandemic preparedness plans with their obligations under the Americans with Disabilities Act (ADA). The TAD, entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, provides useful information regarding ADA-compliant employer actions prior to, during and following an influenza pandemic.

The EEOC guidance notes that ADA's disability discrimination protections extend to pandemic preparation in several ways: 1) regulation of employers' disability-related inquiries and medical examinations; 2) restrictions on excluding employees with disabilities from work for health or safety reasons unless they pose a "direct threat;" and 3) reasonable accommodation for individuals with disabilities.

Pandemic Planning

Citing recommendations by the U.S. Department of Health and Human Services, the TAD emphasizes the importance of pandemic planning and recommends employer appointment of a "pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning." The EEOC suggests that the team include staff with expertise in equal employment opportunity and that employees with disabilities be involved in planning discussions.

Other key points relating to pre-pandemic planning include:

- > Pre-pandemic, an employer may not ask an employee to disclose a compromised immune system or a chronic health condition, or ask a question that is likely to elicit a response that discloses the existence of a disability.
- > An employer may, however, survey employees as to whether they would be unable to come to work during a pandemic, provided the survey does not single out employees who may be unable to report because they are in a high-risk category for serious complications from a pandemic virus.

Reasonable Accommodations

Employer obligations to provide reasonable accommodations to qualified individuals with disabilities continue during an influenza pandemic, absent undue hardship. An employee with a disability that puts the employee at a high risk of complication from pandemic influenza may request telework (work from an alternate location) or temporary reassignment as a reasonable accommodation, and in many cases employers should provide such accommodation. An employer may not exclude an employee from employment or employment-related activities, however, unless the employer can show that the person poses a direct threat of harm to himself or others.

According to the EEOC, whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. The TAD recognizes that public health recommendations and assessment of pandemic severity may change during a crisis and vary by state. Employers are encouraged to rely on the latest CDC and public health assessments in assessing their accommodation obligations under the ADA.

Medical Inquiries and Examinations During a Pandemic

An employer may require newly hired employees to submit to post-offer medical examinations as long as all entering employees in the same job category have the same examinations and information gathered is maintained in confidential medical records. Employers face stricter requirements in obtaining information from current employees.

Generally, an employer may not ask an asymptomatic employee whether he or she has a medical condition that could make the employee especially vulnerable to influenza complication. If the CDC or appropriate public health authorities determine that a particular influenza pandemic is significantly more severe than the seasonal flu or 2009 spring/summer H1N1 influenza, the employer may have greater latitude to ask questions to determine whether employees pose a direct threat to their health or the health of others.

Employers may make inquiries that are not disability related; that is, questions should be “designed to identify potential non-medical reasons for an absence during a pandemic on an equal footing with medical reasons.” Such questions should be structured so employees can give “yes” or “no” answers without disclosing medical conditions that apply to the particular individual.

An employer may ask employees who are absent from work whether they are suffering from influenza and the questions should focus on whether an employee is experiencing flu-like symptoms. An employer may also send employees home who report or display influenza-like symptoms.

Other employer rights and responsibilities during an influenza pandemic include:

- > Employers may require employees to utilize infection control measures such as regular hand washing and use of personal protective equipments (*e.g.* masks, gloves and gowns).
- > An employer may encourage employees to telework as an infection control strategy.

- > If the CDC or appropriate public health authority determines that pandemic influenza is widespread in the community, employers may measure employees' body temperatures. Otherwise, requiring employees to submit to temperature readings would be considered medical examinations which can only be done if job-related and consistent with business necessity – a demanding standard.
- > An employer may require mandatory flu vaccines **except** for: 1) employees who have ADA disabilities that prevent or contraindicate vaccination; and 2) employees whose sincerely held religious beliefs, practices or observance prevent vaccination (unless the employer can establish undue hardship if the employee is not vaccinated). On this issue, however, the EEOC recommends that “ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” Unionized employers must consider contract restrictions and/or bargaining obligations before implementing mandatory flu vaccines.
- > An employer may require employees who have been away from work during a pandemic provide doctor notes certifying fitness to return to duty.
- > Employers must coordinate this guidance from the EEOC with their FMLA obligations and policies to ensure that all their legal obligations are met.

The Technical Assistance Document does not break new ground, but it does highlight the EEOC's perspective on employer compliance with the Americans with Disabilities Act while managing pandemic preparedness.

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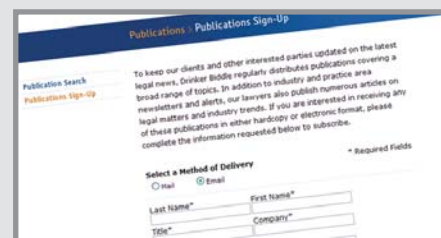
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