



# EEOC Offers Guidance To Employers Preparing To Reopen Their Workplaces

Insights

4.29.20

The Equal Employment Opportunity Commission (EEOC) has provided additional guidance for employers restarting and ramping up their businesses. The EEOC first published guidance for employers in March clarifying employer rights and obligations during a pandemic. The updated guidance, “What You Should Know About the ADA, The Rehabilitation Act, and COVID-19,” addresses likely restart issues relating to testing, confidentiality of medical information, reasonable accommodations, and pandemic-related harassment.

## Symptoms And Testing

The updated version of the guidance covers some of the more frequently asked questions from employers on COVID-19 symptoms and workplace testing procedures.

### ***What Symptoms Can Employers Ask About?***

The EEOC updated its guidance to confirm that it is lawful to ask employees about all symptoms identified by public health authorities associated with COVID-19. The CDC previously identified three symptoms for COVID-19: fever, cough, and shortness of breath or difficulty breathing. This list has been expanded to include:

- Sore throat
- New loss of taste or smell
- Headache
- Chills
- Repeated shaking with chills
- Muscle pain

### ***Testing Employees For COVID-19***

You may now test employees prior to entering the workplace without violating the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The ADA requires any mandatory medical test of employees be “job related and consistent with business necessity.” The EEOC has determined that an employee with COVID-19 poses a direct threat to the health of others.

For this reason, employers are permitted to test employees along with requiring employees to

observe infection control practices (e.g. social distancing, regular hand washing, and other measures) in the workplace to prevent transmission of COVID-19.

### ***COVID-19 Testing Is Now Available — But Are Employers Ready?***

Many questions remain for employers who want to test their employees. If you are considering testing your employees, either for diagnostic purposes or to identify antibodies, you need to consider the following:

- Are accurate tests available?
  - The EEOC cautions employers to ensure that tests are accurate and reliable. You should review [guidance from the FDA](#), as well as the CDC and other public health authorities, to understand what may or may not be considered safe and accurate testing.
  - Many commercially available antibody tests present the danger for faulty tests. One danger of a faulty test is that people will mistakenly conclude that they are immune or are no longer spreading the virus.
  - The EEOC states: “Employers may wish to consider the incidence of false-positives of false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus currently present; a negative test does not mean the employee will not acquire the virus later.”
- Who is going to test your employees?
  - Ideally, a nurse or medical professional will conduct testing. Third-party vendors may be an available, but costly, method. While third-party vendors may be a good option to ensure compliance with testing guidelines, it is unlikely enough vendors exist to offer this service.
  - If you choose to administer tests without using a third-party vendor, whoever tests employees will need proper personal protective equipment, training on using personal protective equipment, and training on blood borne pathogens if there will be possible exposure to bodily fluids.
- Are there certification or waiver requirements?
  - Depending on the type of test used, there may be requirements that the test only be performed by properly certified laboratories. Likewise, while there may be circumstances in which the requirement to use a certified laboratory can be excused, this could necessitate obtaining an appropriate waiver or other prior approval.

If testing is not a feasible option for your business, you may still take the other measures identified by the EEOC to ensure a safe workplace:

- Ask employees if they are experiencing symptoms of COVID-19;
- Measure employees’ body temperature; and
- Tell employees who become ill with symptoms of COVID-19 to stay home (or leave work).

Finally, depending on the circumstances, you need to decide whether any time employees spend waiting to be tested and being tested should be compensated.

### **Confidentiality Of Medical Information**

While you are now permitted to ask employees about all symptoms of COVID-19 identified by the CDC, measure their temperatures, and test employees for COVID-19, you must comply with ADA confidentiality requirements. The ADA requires you to store employee medical information separately from employee personnel files. You may store COVID-19 related medical information in existing medical files.

Additionally, you may share the names of employees with a public health agency when they learn the employee has COVID-19. Temporary staffing agencies are permitted to notify the employer and disclose the name of an employee who has COVID-19 so that the employer can determine if the employee had contact with anyone in the workplace.

### **Additional ADA Considerations For Returning To And Restarting Work**

The updated guidance also contained some additional points all employers will want to review.

#### ***Hiring And Onboarding***

The EEOC added additional guidance to clarify that you may not unilaterally postpone the start date or withdraw a job offer from an individual who is 65 or older, or pregnant, merely because they are at greater risk for COVID-19. However, you may allow them to telework or discuss whether the individuals would prefer to postpone their start date.

#### ***Reasonable Accommodation Requests During Restart***

If the restart of your operations will require employees to start wearing personal protective gear, such as masks and gloves, and engage in infection control practices, some employees may request reasonable accommodations due to a need for modified protective gear. This may include disability related accommodations under the ADA (e.g. non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheel chairs), or a religious accommodation under Title VII (e.g. modified equipment due to religious garb). You should discuss the requests and provide modifications or an alternative if feasible and not an undue hardship.

As employees return to work, you may also receive pandemic-related reasonable accommodations requests from employees whose disabilities put them at greater risk for COVID-19. You should follow ADA obligations and engage in the interactive process to determine pandemic-related reasonable accommodations. In its latest guidance, the EEOC permits employers to provide temporary accommodations for pandemic-related requests and start the interactive process with an employee prior to re-opening your workplace.

Based on the economic impact caused by the COVID-19 pandemic, the EEOC recognizes that an accommodation that would not have posed an undue hardship prior to the pandemic may pose one

now. Therefore, you may consider your specific and current circumstances to determine whether an accommodation would create a “significant difficulty” or “significant expense.” The EEOC cautions that these considerations do not permit you to reject any accommodation that costs money, but that you must weigh the cost of the accommodation against its current budget while taking into account constraints created by this pandemic. Denials of accommodation on the basis of significant difficulty or expense are likely to be challenged in litigation.

### ***Pandemic-Related Harassment***

The EEOC’s updated guidance provides that there are several steps you should take to address possible harassment and discrimination against coworkers when they re-open. The EEOC reminds employers that it is against federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. You should immediately review any allegations of harassment or discrimination and take appropriate action.

### **What Should Employers Do?**

The latest COVID-19 update from the EEOC provides additional clarity for employers restarting or ramping-up their workplace. This pandemic creates a dynamic, ever-evolving set of unique circumstances for almost every employer and type of business. Developing and implementing an effective restart plan will require careful review of the known and possible legal obligations relative to your specific situation and should be discussed with your employment law counsel.

As you begin the process of reopening, you should familiarize yourself with our alert: [5 Steps To Reopen Your Workplace, According To CDC’s Latest Guidance](#). You should also keep handy our [4-Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens](#) in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

### **Conclusion**

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips’ Alert System](#) to get the most up-to-date information. For further information, contact the authors, your Fisher Phillips attorney, or any member of [our Post-Pandemic Strategy Group Roster](#).

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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