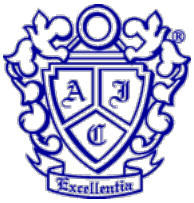
GEORGE MASON AMERICAN INN OF COURT



COVID-19 Factors in Employment Law

November 17, 2020

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A Mix of Old and New

- During the pandemic, employers have been striving to comply both with preexisting laws in play with respect to COVID-19 and with new, COVID-specific laws and regulations enacted in recent months.
- During this presentation, we will consider:
  - Preexisting obligations under the Americans with Disabilities Act (ADA) and other anti-discrimination laws
  - New obligations under the CARES Act, Families First Caronavirus Response Act (FFCRA), and Virginia gubernatorial orders and regulations
  - Means by which employers may address concerns about employees' return to work
  - Potential liability factors for employers

Preexisting Law

The Americans with Disabilities Act

- The ADA prohibits discrimination on the basis of disability in employment.
- The law requires an employer to provide reasonable accommodations to employees and job applicants with a disability, unless doing so would cause significant difficulty or expense for the employer.
- The ADA applies to employers with 15 or more employees.

Who is covered under the ADA?

- A person has a “disability” for purposes of the ADA if the person:
  - (A) has a physical or mental impairment that substantially limits one or more major life activities;
  - (B) has a history or record of such an impairment; or
  - (C) is perceived by others to have such an impairment
- “Major life activities” include include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, **breathing**, learning, reading, **concentrating**, **thinking**, **communicating**, and **working**.
- A mental health condition can qualify as a disability, and the Equal Employment Opportunity Commission has specifically identified anxiety disorder, obsessive compulsive disorder, and post-traumatic stress disorder as being particularly relevant in the COVID context.

Who is not covered under the ADA?

- An employee with generalized, undiagnosed anxiety or general “nervousness” about returning to the workplace probably does not have a condition serious enough to rise to the level of a “disability” for ADA purposes.
- Also, the ADA does not cover employees who do not themselves have a disability.
  - This is so even if the employee cares for or lives in a household with someone who has a qualifying disability or has an ADA-qualifying disability.
  - NOTE: Such employees may, however, qualify for protection under the Family and Medical Leave Act or the various COVID-specific regulations discussed elsewhere in this presentation.

Penalties for Violating the ADA

- Private Suits
- Suits by the Attorney General
- Costs of Violations
  - Injunctions
  - Monetary damages
  - Punitive damages

Age Discrimination

- The federal Age Discrimination in Employment Act prohibits discrimination on the basis of age for employees over the age of 40.
- The Virginia Human Rights act prohibits discrimination on the basis of age generally.
- Employers should be wary of either giving preferential treatment that might be perceived as being unrelated to safety to older workers just because they may be more susceptible to COVID.
- Employers should also be wary of discriminating against older employers in order to dodge the enhanced leave or accommodations they might have to offer due to the higher susceptibility to COVID.

Employer Do's and Don'ts

- Do's – General Safety
  - Provide Personal Protective Equipment (PPE) such as masks, gloves, gowns, etc.
  - Limit the number of people in closed spaces
  - Install protective shields/panels
  - Establish physical distancing policies and spread workstations six feet apart
  - Encourage telework
  - Require employees to wipe down surfaces after using

- Don'ts – Self-Directed Targeting
  - Single out individual employees for screening, temperature checks, etc.
  - Exclude an employee on the sole basis that the employee has a disability or is of an age that could possibly lead to more severe COVID-19 complications.

COVID-Specific Legislation

Families First Caronavirus Response Act (FFCRA)

- Effective April 1, 2020 through December 31, 2020.
- Applies to certain public employers and private employers with fewer than 500 employees.
- Contains two key provisions:
  - Emergency Paid Sick Leave Act (EPSLA)
  - Emergency Family and Medical Leave Expansion Act (EFMLEA)

Emergency Paid Sick Leave Act (EPSLA)

- Employees can receive sick leave if they are unable to work (or telework) as a result of any of these 6 reasons:
  - **Quarantine/Isolation Order**
  - **Told By Health Care Provider To Quarantine**
  - **COVID-19 Symptoms And Awaiting Diagnosis**
  - **Caring For Someone**
  - **Childcare**
  - **Other Similar Condition**
- Employers may be eligible for tax credits due to their grant of FFCRA Leave under the terms of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

Emergency Paid Sick Leave Act (EPSLA) (con'd)

- The employer must provide **2 weeks of PAID sick leave**, up to the applicable capped amount.
  - When sick leave is taken to care for oneself, the full rate of pay up to:
    - Daily cap: $511
    - Aggregate cap: $5,110
  - When sick leave is taken to care for another, 2/3ds the full rate of pay up to:
    - Daily cap: $200
    - Aggregate cap: $2,000
- Small businesses may qualify for an exemption from the childcare provisions of the FFCRA if they can show that providing the requested leave "would jeopardize the viability of the business."

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- Applies to any employee who has been employed by a covered employer for 30 calendar days.
- The employer must provide **12 weeks of family leave** if the eligible employee's child cannot attend school or obtain childcare due to COVID-19 (the **first 10 days** are **UNPAID, the rest is PAID**), at **two-thirds of the employee's regular rate of pay**, up to the applicable capped amount.
- Small businesses may qualify for an exemption from the EFMLEA if they can show that providing the requested leave "would jeopardize the viability of the business."
- An employee may qualify for both FFCRA sick leave and EFMLEA.

Changes to Unemployment Regulations

- Effective March 15, 2020, Gov. Northam made the following **Virginia-specific changes**:
  - One-week waiting period is waived
  - Weekly job search requirement suspended
- **Federal Pandemic Unemployment Compensation (FPUC):** Effective March 29, 2020 through July 31, 2020, beneficiaries received an additional $600
- **Pandemic Emergency Unemployment Compensation (PEUC)**: provides for up to an additional 13 weeks of regular/traditional unemployment insurance benefits to those who have exhausted their eligibility
- **Pandemic Unemployment Assistance (PUA):** allows otherwise ineligible individuals to receive unemployment benefits, e.g. those who are self-employed or an independent contractor, gig economy worker, clergy, as well as those working for religious organizations and other workers (including non-profit entities and those who are unemployed as a direct result of COVID-19)

The Return to Work

The Emergency Temporary Standard

- The Virginia Safety and Health Codes Board (VSHCB) adopted **16VAC25-220**, Emergency Temporary Standard, Infectious Disease Prevention: SARS-CoV-2 Virus that Causes COVID-19 (ETS), which took immediate effect on July 27, 2020.
- The ETS essentially makes recommendations of CDC and OSHA mandatory and imposes new obligations on Virginia employers, including:
  - Conduct a hazard assessment of each job task (or group of job tasks) in the employer's workplace;
  - Employee training requirements;
  - Prepare an infectious disease preparedness response plan (and conduct additional training once it is established); and
  - A prohibition on retaliation against employees who exercise certain rights provided under the ETS.
- The ETS will expire six months from the effective date, but the VSHCB will be considering the adoption of a permanent replacement standard.
- Virginia Department of Labor and Industry (DOLI) has been authorized to enforce the ETS through civil penalties and potential business closures.

Mandatory Requirements for All Employers

- All employers must implement safety measures that are largely consistent with CDC and OSHA guidance.
- 16VAC25-220-40 states that “employers in all exposure levels shall ensure compliance with the requirements in this section to protect employees from workplace exposure to the SARS-CoV-2 virus that causes the COVID-19 disease.”
- Safety requirements include:
  - Exposure risk assessment and determination
  - Screening and notification requirements
  - Employee access to exposure and medical records
  - Procedures governing return to work
  - Social distancing, restricted or controlled access to common areas, and PPE
  - Other exposure controls
- The ETS also prohibits an employer from discriminating against any employee who exercises their rights under the standard. 16VAC25-220-90.

Additional Requirements for Medium, High, & Very High Risk Levels

- Stricter requirements are imposed on employers with medium, high, and very high risk settings. 16VAC25-220-50 and 16VAC25-220-60.
- The additional requirements include:
  - Certified Hazard Assessment
  - Personal Protective Equipment.
  - Infectious Disease Preparedness and Response Plan. 16VAC25-220-70.
  - Mandatory Training - employers must provide training to all employees regardless of the individual employee's risk classification. 16VAC25-220-80.

COVID-19 Liability Waiver

- Pre-injury waivers of liability are prohibited by public policy and thus unenforceable in Virginia.
- The Supreme Court of Virginia has upheld public policy voiding pre-injury waivers stating that "provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited universally." *Hiett v. Lake Barcroft Cmty. Ass'n*, 244 Va. 191, 194-95, (1992).
- BUT under Virginia law, an individual's assumption of the risk of injury from a known danger can operate as a liability waiver. To assume a risk, an individual must:
  - fully appreciate the nature and extent of the risk; and
  - voluntarily incur the risk.
- Consider use in different contexts (employee v. non-employee).

Mandatory Vaccines

- The EEOC has advised that flu vaccinations may not be mandated for all employees.
- EEOC guidance clarifies that employers covered by the ADA and Title VII of Civil Rights Act 1964 may not compel employees who have a disability preventing them from taking the vaccine or gives notice of a sincerely held religious belief.
- The COVID-19 pandemic meets the ADA's "direct threat standard," which means that the exemption may not apply to a vaccination program.
- Legal commentary suggests that employers may be able to require a COVID-19 vaccination when it becomes available provided that the requirement is job-related and there are adequate exemptions in place.

Employer Liability

HB 798 and *Bowman* Claims

- *Bowman* protected employees from being fired in three situations
  - The employer violated a policy that allows the employee to exercise a statutory right
  - The employee was a member of a class that was specifically entitled to legal protections from a clear public policy outlined in a statute and the employer violated the public policy
  - The employee was fired because they refused to commit a crime

Whistleblower Statutes

- The recently passed HB798 expands on the *Bowman* protections
- Employees receive protection for:
  - Reporting violations or suspected violations of law,
  - Being asked to participate in or participating in a law-enforcement hearing
  - Refusing to engage in a criminal act
  - Refusing to follow an order to violate the law.
- It prevents retaliatory action, including: firing, acts of discipline, making threats, discrimination, etc.

HB 798

A. An employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee:

1. Or a person acting on behalf of the employee in good faith reports a violation or suspected violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official;

2. Is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry;

3. Refuses to engage in a criminal act that would subject the employee to criminal liability;

4. Refuses an employer's order to perform an action that the employee believes, which belief has an objective basis in fact, violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or

5. Provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

Whistleblower Statutes (cont'd)

- 16VAC25-60-110 also protects employees from being discharged for making a complaint about work safety or health conditions or refusing to work because of a reasonable fear of injury or death
  - The VOSH Emergency Temporary Standard (16VAC25-220) specifically includes this protection for COVID-19

16VAC25-60-110

Employee whistleblower activities, protected by § 40.1-51.2:1 of the Code of Virginia, include:

1. Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

2. Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

3. Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

4. Cooperating with or providing information to the commissioner during a worksite inspection; or

5. Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

Amazon Whistleblower Case

- Synopsis: an Amazon employee alleged he was fired for reporting a manager for not following safety protocols established for COVID-19
- New Jersey case filed October 12, 2020
- New Jersey Governor Murphy signed an executive order directing warehouse businesses to require individuals to maintain six feet or more distance and require workers to wear masks according to CDC guidelines
- Amazon instructed employees that the protocols were to be strictly enforced, with potential punishment for those who did not comply

Amazon Whistleblower Case (cont'd)

- Plaintiff David Bailey claims that a manager, Kristopher Lauderdale, repeatedly failed to follow the protocols by either not wearing a mask, not wearing a mask properly, or standing less than 6 feet from other individuals
- When other employees reported Lauderdale's violations, they were written up or suspended for other reasons
- Bailey filed a complaint with HR about Lauderdale's refusal to stand less than 6 feet from other employees
- Bailey was then suspended and, a few days later, fired

Amazon Whistleblower Case (cont'd)

- New Jersey's whistleblower law protects employees against retaliatory action for:
  - Disclosing an activity, policy, or practice that the employee reasonably believes is in violation of a law, or a rule or regulation issued under the law

    N.J.S.A. §§34:19 - 1-34:19-8

COVID-19 Liability Shield

- Legislation was proposed that would limit businesses' liability to workers and customers who contract COVID-19
  - H.B. 5074 and S.B. 5067
- Both the Senate and House of Delegates failed to put their bills on their calendar for a vote prior to the end of the legislative year

Questions?

Americans with Disabilities Act Considerations

- **DEFINITIONS FROM THE ADA**

"(5) Employer
(A) In general
The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person."
42 U.S.C.A. § 12111

"(1) Disability
The term "disability" means, with respect to an individual--
(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment (as described in paragraph (3))." (see below)
42 U.S.C.A. § 12102

"(3) Regarded as having such an impairment
For purposes of paragraph (1)(C):
(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

42 U.S.C.A. § 12102

"To be protected by the ADA, one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered."

Introduction to the ADA, *https://www.ada.gov/ada_intro.htm*

"If you have a disability and are qualified to do a job, the ADA protects you from job discrimination on the basis of your disability. Under the ADA, you have a disability if you have a physical or mental impairment that substantially limits a major life activity. The ADA also protects you if you have a history of such a disability, or if an employer believes that you have such a disability, even if you don't.

To be protected under the ADA, you must have, have a record of, or be regarded as having a substantial, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.

If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the essential functions of the job with or without reasonable accommodation. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job."

Your Employment Rights as an Individual with a Disability,
https://www.eeoc.gov/laws/guidance/your-employment-rights-individual-disability

- **COVID-SPECIFIC CONSIDERATIONS**

"G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation 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 wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*
An employee—or a third party, such as an employee's doctor—must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided."

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (September 2020)*

"During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

Example C: An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed.

All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

Example D: A manager in a marketing firm has a hearing disability. A sign language interpreter facilitates her communication with other employees at the office during meetings and trainings. Before the pandemic, the employer decided to provide video phone equipment and video relay software for her at home to use for emergency business consultations. (Video relay services allow deaf and hearing impaired individuals to communicate by telephone through a sign language interpreter by placing a video relay call.[(37)]) During an influenza pandemic, this manager also is part of the employer's emergency response team. When she works from home during the pandemic, she uses the video relay services to participate in daily management and staff conference calls necessary to keep the firm operational."

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, *https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act*

“D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.”

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an

employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations."

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated. For example, 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."

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, *https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (September 2020)*

- **ENFORCEMENT**

"Subpart E – Enforcement
§ 36.501 Private suits.
(a) *General*. Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security. Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.
(b) *Injunctive relief*. In the case of violations of § 36.304, § §36.308, 36.310(b), 36.401, 36.402, 36.403, and 36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.

§ 36.502 Investigations and compliance reviews.
(a) The Attorney General shall investigate alleged violations of the Act or this part.
(b) Any individual who believes that he or she or a specific class of persons has been subjected to discrimination prohibited by the Act or this part may request the Department to institute an investigation.
(c) Where the Attorney General has reason to believe that there may be a violation of this part, he or she may initiate a compliance review.

§ 36.503 Suit by the Attorney General.
Following a compliance review or investigation under § 36.502, or at any other time in his or her discretion, the Attorney General may commence a civil action in any appropriate United States district court if the Attorney General has reasonable cause to believe that –
(a) Any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or
(b) Any person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.

§ 36.504 Relief.
(a) Authority of court. In a civil action under § 36.503, the court –
(1) May grant any equitable relief that such court considers to be appropriate, including, to the extent required by the Act or this part –
(i) Granting temporary, preliminary, or permanent relief;
(ii) Providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and
(iii) Making facilities readily accessible to and usable by individuals with disabilities;
(2) May award other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and
(3) May, to vindicate the public interest, assess a civil penalty against the entity in an amount
(i) Not exceeding $50,000 for a first violation occurring before September 29, 1999, and not exceeding $55,000 for a first violation occurring on or after September 29, 1999, and before April 28, 2014, and not exceeding $75,000 for a first violation occurring on or after April 28, 2014, except that, for civil penalties assessed after August 1, 2016, for a first violation occurring after November 2, 2015, the civil penalty shall not exceed the applicable amount set forth in 28 CFR 85.5.
(ii) Not exceeding $100,000 for any subsequent violation occurring before September 29, 1999, and not exceeding $110,000 for any subsequent violation occurring on or after September 29, 1999, and before April 28, 2014, and not exceeding $150,000 for any subsequent violation occurring on or after April 28, 2014, except that, for civil penalties assessed after August 1, 2016, for any subsequent violation occurring after November 2, 2015, the civil penalty shall not exceed the applicable amount set forth in 28 CFR 85.5.
(b) Single violation. For purposes of paragraph (a) (3) of this section, in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.
(c) Punitive damages. For purposes of paragraph (a)(2) of this section, the terms "monetary damages" and "such other relief" do not include punitive damages.

(d) Judicial consideration. In a civil action under § 36.503, the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this part by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique" needs of a particular individual with a disability.

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Sep. 8, 2020

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus.*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's disability page.
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "General Business Frequently Asked Questions."
- The EEOC has provided guidance (a publication entitled Pandemic Preparedness in the Workplace and the Americans With Disabilities Act [PDF version]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.
- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at www.eeoc.gov/coronavirus. The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic publication includes a separate section that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity.

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20;*

adapted from Pandemic Preparedness Question 8)

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes.

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information.

Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicantwho has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at https://askjan.org/topics/COVID-19.cfm.

D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure.

Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, 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.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment policy tips for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
  - report;
  - checklists for employers who want to reduce and address harassment in the workplace; and
  - chart of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the 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. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's technical assistance document on severance agreements.

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted information on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation 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 wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk

for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

H. Age

H.1. The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

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Age Discrimination And Covid-19: What Are The Rights Of Older Employees?

Tom Spiggle Senior Contributor ⓘ
Careers
I'm an employment lawyer who writes about your workplace rights.

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The United States continues to move forward with the reopening process, despite the increasing number of coronavirus infections and deaths. Many Americans continue to express their displeasure and resistance to calls for social distancing and mask wearing.

employer will want to identify its employees that are at high risk for coronavirus infection or severe complications.

Even with the best of intentions, an employer's concern for its employees could still lead to unlawful discrimination. Once such example applies to employers discriminating against their older workers.

Older Adults Are at Higher Risk

The Centers for Disease Control and Prevention (CDC) has identified several groups of individuals that are at higher risk for severe complications as a result of a coronavirus infection. One of these groups includes older adults.

The CDC states that the risk for a severe illness from the coronavirus goes up with age, with 80% of reported coronavirus deaths being adults over the age of 65.

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Given these grim statistics, an employer might make decisions that single out the older employees. This could include a range of motivations from wanting to protect older workers to viewing them as more expensive employees and using the coronavirus as an excuse to get rid of them.

For example, an employer might make the following changes to its business

worker's job duties.

- Furloughing only older workers and allowing younger workers to continue working.
- Only mandating that older employees wear personal protective equipment, such as face shields or face masks.
- Firing older workers due to the belief that they will be more expensive to keep on as employees due to potentially higher insurance or paid time off costs.

This type of unfair behavior, regardless of an employer's motivations, might constitute illegal discrimination under the Age Discrimination in Employment Act of 1967.

The Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA prohibits covered employers from discriminating against employees on the basis of age. However, these protections only apply to employees 40 years of age and older.

Age discrimination is forbidden in basically all aspects of employment, including hiring, harassment, firing, compensation, job duties and benefits (with help from the Older Workers Benefit Protection Act of 1990).

Even if an employer has a policy that applies to employees of any age, that policy could still violate the ADEA if it negatively affects employees 40 years of age or older and is not based on a reasonable factor other than age.

Like many other federal antidiscrimination laws, the ADEA doesn't apply to all employers. Rather, it covers state, local and federal government

For instance, Virginia's recently updated Human Rights Act bars all forms of age discrimination among employers with 15 or more employees. But if the age discrimination results in a firing, then the Virginia state law applies to employers with more than five but less than 20 employees.

Washington, D.C. does even better with its D.C. Human Rights Act. This law bans employers of any size from engaging in any form of age discrimination.

One of the more notable features of the ADEA is that it allows employers to treat older workers better than younger workers. An employer may discriminate against a younger worker, even if the younger worker is more than 40 years of age.

The ADEA does not allow retaliation of individuals who exercise a right under the ADEA, oppose a discriminatory practice or participate in a discrimination proceeding.

There are some exceptions to the ADEA's protections. An employer can treat an employee who is at least 40 years old differently in some of the following situations:

- Age is a bona fide occupational qualification and the employer can show that the age restriction is necessary to carry out the requirements of a particular position.
- Certain executives or "high policymakers" can be forced to retire at the age of 65, but only if they will receive retirement benefits that provide a minimal level of compensation.

Enforcement of the ADEA

Employees who find themselves the victim of age discrimination can file a

discrimination. Federal employees need to act more quickly, as they only have 45 days to contact their EEO Counselor.

Should an employee take successful legal action under the ADEA, they may be able to recover:

- Lost wages
- Liquidated damages (equal to the amount of lost wages and usually only granted in situations where the age discrimination was intentional)
- Attorney's fees and court costs
- Other appropriate legal or equitable relief, such as reinstatement or a promotion

The ADEA and the Americans with Disabilities Act of 1990 (ADA)

One of the rights not present in the ADEA is the right to reasonable accommodations because of age. But given how many older workers tend to have medical conditions, it's possible that an older worker can ask for an accommodation if they have an ADA recognized disability.

The end result may be an older worker with a reasonable accommodation. But this benefit will come from the employee's disability, not his or her age.

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April 15, 2020

The Emergency Paid Sick Leave Act – A Comprehensive Overview

James Bobbitt, III, William Cary, Natalie Sanders

Brooks Pierce

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law. The FFCRA contains two key provisions for employers – the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both EFMLEA and EPSLA provide paid leave to employees for reasons related to COVID-19. On April 1, 2020, the U.S. Department of Labor (DOL) issued temporary regulations bolstering and clarifying these provisions of the FFCRA. Corrections to these regulations were later published on April 10, 2020. The DOL continues to publish guidance on its website concerning the FFCRA.

This article provides a comprehensive overview of the EPSLA for employers. A companion article discussing EFMLEA is available on our website here.

Effective Date:

The effective date of the FFCRA is April 1, 2020. EPSLA benefits are not retroactive, and an employer cannot deny an employee leave under EPSLA even if the employer provided paid leave to an employee for reasons related to COVID-19 prior to April 1, 2020. Leave benefits under the EPSLA expire on Dec. 31, 2020.

Covered Employers:

EPSLA covers certain public employers and all private employers with fewer than 500 employees. Only employees working in the United States (including the District of Columbia and U.S. territories) are counted in determining whether an employer is covered under EPSLA. Additionally, the following individuals must be counted:

- Employees on leave;

- Temporary employees jointly employed by another employer; and
- Day laborers supplied by a temporary agency.

Independent contractors need not be counted.

Related corporations will need to assess whether their shared employees render them joint or integrated employers under the Fair Labor Standards Act (FLSA). A corporation (including its separate establishments or divisions) is considered a single employer. Two corporations are separate employers unless they are joint employers under the FLSA with respect to employees. The DOL has issued regulations explaining this test in detail here. Links to more explanatory materials are available here. If two entities are joint employers, all of their common employees are counted as part of the employee population. Joint employment status is a fact-based inquiry that is not determined by an individual's tax treatment. In general, two or more entities are separate employers for purposes of EPSLA unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA).

Small Business Exemption:

Employers with fewer than 50 employees may be exempt from providing child care-related leave under EPSLA if doing so "would jeopardize the viability of the business as an ongoing concern." This requires an authorized officer of the business to make a determination that:

- Providing the requested leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee requesting leave under the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses must document their determination to elect the small business exemption and retain supporting records in their files for four years. However, small businesses are not required to provide this documentation to the DOL.

Small businesses are not exempted from providing EPSLA leave for other COVID-19-related reasons.

Eligible Employees:

All employees (including part-time employees) are eligible for EPSLA benefits regardless of how long they have been employed with their employer.

Employers may exclude an employee who is a "health care provider" or an "emergency responder" from taking EPSLA leave. The definition of "health care provider" is expansive and includes anyone employed at any doctor's office, hospital, health care center, clinic, nursing facility, retirement facility, nursing home, home health care provider, lab, pharmacy and other similar types of facilities or employers. This definition applies to any type of facility (permanent or temporary) where medical services are provided and includes people employed by entities that contract with these types of employers to provide services or maintenance to them. This definition also includes any individual employed by any entity that provides medical services, produces medical products or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

The definition of "emergency responder" is similarly expansive and includes any employee necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institutional personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health officials, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, including individuals who work for such facilities.

Benefits Provided:

EPSLA requires employers to provide paid leave to employees who are unable to work or telework for any of the following six reasons related to COVID-19.

> **(1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.** A federal, state, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders issued by a federal, state, or local government authority that cause an employee to be unable to work or telework even though their employer has work that they could perform but for the order. However, an employee is not entitled to EPSLA leave if their employer does not have work for them to perform due to a shelter-in-place or stay-at-home order.
>
> **(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19**. A "health care provider" is limited to a licensed

doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification under the FMLA.

(3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Symptoms of COVID-19 include fever, dry cough, shortness of breath, and any other symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC).

(4) The employee is caring for an individual who is subject to an order as described in 1 or 2 above. Employees may only take this leave if providing care prevents them from working or teleworking. Additionally, this leave may only be taken to care for an individual who genuinely needs the employee's care, such as an immediate family member or someone who regularly resides in the employee's home. An employee may also take paid sick leave to care for someone if their relationship creates an expectation that they would care for the person in a quarantine or self-quarantine situation, and that individual depends on the employee for care during the quarantine or self-quarantine. An employee may not take paid sick leave to care for someone with whom they have no relationship. Nor can they take paid sick leave to care for someone who does not expect or depend on the employee's care during his or her quarantine or self-quarantine.

(5) The employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19-related reasons. This is the same reason that an employee would be eligible for EFMLEA leave. "Son or daughter" is defined as an employee's own biological, adopted, or foster child, stepchild, legal ward, or any child for which they are standing in loco parentis (have day-to-day responsibilities to care for or financially support). This includes adult children (18 years of age or older) who have a mental or physical disability and cannot care for themselves due to their disability.

(6) The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. The U.S. Department of Health and Human Services (HHS) has not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. If HHS does identify any such condition, DOL will issue guidance explaining when an employee may take paid sick leave on the basis of a "substantially similar condition."

Importantly, EPSLA benefits are in addition to any other employer-provided leave benefits.

Amount/Length of Paid Leave:

Full-time employees (employees who are normally scheduled to work 40 hours or more per week) are entitled to 80 hours of paid leave under EPSLA. All other employees are considered part-time and entitled to something less than 80 hours of pay based on the number of hours they would normally work over a two-week period. If normal hours are unknown, or if an employee's schedule varies, the employer may use a six-month average to calculate their average daily hours. For recently hired employees, employers should use the amount of hours agreed to between the employer and employee at the time of hiring. The amount of leave entitlement each week is the number of hours the employee would have worked, but for the leave.

Amount of Leave Pay:

Each hour of sick leave pay is the average "regular rate" for the employee during the six months prior to the date on which the leave is taken. If the employee has been employed less than six months, then the average is for the entire period of employment. "Regular rate" includes the amounts the employer included in calculating the employee's overtime rate (*e.g.*, performance and attendance bonuses, tips, commissions, and piece rates). That rate is applied to the number of hours the employee would have worked (including anticipated overtime) during the period of the leave. For example, if an employee is normally scheduled for 50 hours during a week, then paid leave for that week would be 50 hours. However, this does not change the maximum hours of leave for a full-time employee, which remains 80 hours. Therefore, an employee who normally works 50 hours per week would be entitled to 50 hours in their first week of benefits, but only 30 hours in their second week because the employee would hit the 80-hour cap during the second week of sick pay. While overtime hours are included for this purpose, each hour of leave is paid at the "average regular rate" (*i.e.*, if more than 40 hours of leave fall in one week, the hours over 40 do not need to be at an additional time and a half – all the hours are at the same rate).

The rate at which an employee is paid for EPSLA leave and the maximum amounts an employee is entitled to receive vary depending on the reason the leave is taken.

	Reason	**Rate**	**Maximum**
1	Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19	Regular rate of pay	$511/day with an aggregate max of $5,110
2	Employee has been advised by a health provider to self-quarantine due to concerns related to COVID-19	Regular rate of pay	$511/day with an aggregate max of $5,110

3	Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis	Regular rate of pay	$511/day with an aggregate max of $5,110
4	Employee is caring for an individual who is under quarantine, isolation or self-quarantine as described in 1 and 2 above	2/3 of regular rate of pay	$200/day with an aggregate max of $2,000
5	Employee is caring for a child whose school or daycare has closed (or regular paid childcare provider is unavailable) due to COVID-19	2/3 of regular rate of pay	$200/day with an aggregate max of $2,000
6	Employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor	2/3 of regular rate of pay	$200/day with an aggregate max of $2,000

Interaction with FMLA and Coordination with Other Employer-Provided Leave:

EPSLA leave is in addition to any other benefit the employer provides, and eligible employees are entitled to leave under EPSLA regardless of how much leave the employee has previously taken under the FMLA even if the reason for taking the leave might also have qualified under the FMLA. The employer may not require the employee to use some other leave (*e.g.*, PTO) prior to or concurrently with EPSLA leave. Employers may permit employees receiving 2/3 of their regular rate of pay to supplement their EPSLA benefits using preexisting employer-provided paid leave (but the employer tax benefit applies only to the portion paid under EPSLA).

Intermittent Leave:

EPSLA leave may be taken intermittently provided that an employer and employee mutually agree to an intermittent leave arrangement. To prevent the spread of COVID-19, the DOL has prohibited the use of intermittent leave by an employee who is unable to telework and who is taking EPSLA leave for reasons that indicate they may be infected or exposed to COVID-19.

Employee Documentation Needed for Leave:

An employee is required to provide the employer documentation containing the following information prior to taking EPSLA leave:

1. The employee's name;

2. The date(s) for which leave is requested;

3. A qualifying reason for the leave; and

4. An oral or written statement that the employee is unable to work because of the qualified reason for leave.

Additionally, the following documentation must be provided depending on the reason EPSLA leave is taken:

- If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, an employee must provide the employer with the name of the government entity that issued the quarantine or isolation order;

- If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, an employee must additionally provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19;

- If the employee is caring for an individual who is under quarantine, isolation or self-quarantine, an employee must provide:

1. The name of the government entity that issued the quarantine or isolation order to which the individual is subject; or

2. The name of the health care provider who advised the individual to self-quarantine due to concerns related to COVID-19; or

- If the employee is caring for a child whose school or daycare has closed (or regular paid childcare provider is unavailable) due to COVID-19, an employee must provide:

1. The name of the child being cared for;

2. The name of the school, place of care, or child care provider that has closed or become unavailable;

3. A representation that no other suitable person will be caring for the child during the period for which the employee takes EPSLA leave; and

4. With regard to a child who is over the age of 14, a statement describing the special circumstances that require the employee to provide care for the child during daylight hours.

Notice Requirements to Employees:

All covered employers (including small businesses claiming the hardship exemption) are required to conspicuously post the FFCRA workplace poster published by DOL on their premises. Alternatively, recognizing that many employees are currently teleworking, the DOL has permitted employers to meet the notice requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. The notice must be distributed to all current employees and all subsequently-hired employees.

Return to Work Following EPSLA Leave:

Upon returning from EPSLA leave, an employee generally has a right to be restored to the same or an equivalent position. Notwithstanding, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave.

Recordkeeping:

Employers are required to retain all employee documentation related to EPSLA leave for four years, regardless of whether leave was granted or denied. If an employer elects the small business exemption, the determination made by its authorized officer (discussed above) should be documented in its records and retained for four years. Additionally, in order to claim tax credits from the IRS (for information on employer tax credits under the FFCRA, please see this client alert), employers are advised to maintain the following records for four years:

- Documentation to show how the employer determined the amount of EPSLA benefits paid to employees who are eligible for leave, including records of work, telework, and the amount of leave taken;
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and
- Other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Implications of Furloughs and Closures:

Furloughed employees, or employees whose worksites have been closed even for a short period of time, are not entitled to leave under the EPSLA during the furlough or closure, although they may be entitled to unemployment benefits. This is true even if the employer closed pursuant to a federal, state, or local directive. If an employer closes while an employee is taking EPSLA leave, the employer must only pay for leave used before closing. A reduction of an employee's hours due to lack of work does not constitute a qualifying reason for leave under the EPSLA.

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VIRGINIA COVID-19 WORKPLACE SAFETY RULES

Background

- Virginia was the first state to issue mandatory workplace safety standards to prevent and mitigate the spread of COVID-19
- On July 15, 2020, the Virginia Safety and Health Codes Board (VSHCB) approved the emergency plan and adopted § 16 VAC 25-220, Emergency Temporary Standard, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19 (ETS)
- The ETS took immediate effect on July 27, 2020 and will remain in effect until the earlier of six months from its effective date, expiration of the Governor's State of Emergency, or adoption of a permanent standard
- The ETS is designed to supplement and enhance existing Virginia Occupational Safety and Health ("VOSH") laws, rules, and regulations that may apply to the prevention and control of COVID-19 in the workplace
- During the six-month period, the VSHCB will be considering the adoption of a permanent standard to replace the ETS. A sixty-day written public comment period and one or more public hearings will be held on the proposed permanent standard.

Affected Employers

- The ETS applies to all employers subject to the jurisdiction of the Virginia Occupational Safety and Health (VOSH)
- Includes virtually all private employers in Virginia, as well as non-federal public employers
- Private and public institutions of higher education are deemed to be in compliance if they have re-opening plans certified by the State Council of Higher Education in Virginia and are acting in compliance with those plans as long as those plans provide equivalent or greater levels of employee protection than the ETS

The Emergency Temporary Standard

The ETS essentially makes many recommendations of CDC and OSHA mandatory, in addition to imposing new obligations on Virginia employers, including:

- A requirement to conduct a hazard assessment of each job task (or group of job tasks) in the employer's workplace;
- Employee training requirements;
- For many employers, a requirement to prepare an infectious disease preparedness response plan (and to conduct additional training once it is established); and
- A prohibition on retaliation against employees who exercise certain rights provided under the ETS.

Interaction with CDC Guidelines

- Employers that comply with recommendations contained in CDC guidelines that provide equivalent or greater protection than provided by a provision in the ETS will be considered to be in compliance with the standard
- Compliance with recommendations will be considered evidence of good faith in any enforcement proceeding related to the ETS

Enforcement

- Virginia Department of Labor and Industry (DOLI) has been authorized to enforce the ETS through civil penalties and potential business closures
- Failure to comply with the ETS can result in fines as high as $130,463 per each "repeat" or "willful" violation
- The VOSH Program will be conducting compliance inspections under the ETS
- Virginia DOLI has posted guidance for employers and employees
- The final published version of the ETS can be found here

Safety Requirements for All Employers

All employers must implement certain safety measures that are largely consistent with CDC and OSHA guidance, including the following:

- Inform and encourage employees to self-monitor for COVID-19 symptoms;
- Implement procedures for employees to report COVID-19 symptoms, and prohibit employees or other persons known or suspected to be infected with the virus from coming to work until cleared under return-to-work protocols;
- Adopt flexible sick leave policies to the extent feasible and permitted by law and ensure that employees are aware of them;
- Discuss with contractors and contractor employees the importance of individuals with known or suspected COVID-19 remaining out of the workplace until cleared to return;
- Develop systems to receive reports of positive COVID-19 test results from employees and contractors, and notify i) others in the workplace who may have been exposed, or who were present at the workplace, within 24 hours of discovery of potential exposure; ii) the facility owner, within 24 hours of discovery of potential exposure; and iii) the Virginia Department of Health within 24 hours of the discovery of a positive case, and within 24 hours after learning that 3 or more employees at the same worksite tested positive in a 14-day period. All notifications must preserve the confidentiality of the infected person;
- Establish return-to-work protocols for employees known or suspected to have COVID-19, based on either a "time-based" approach (i.e., 72 hours after resolution of fever without use of fever-reducing medications; improvement in respiratory symptoms; and at least 10 days since onset of symptoms), or a "test-based" approach (i.e., resolution of

fever without fever-reducing medications; improvement of respiratory symptoms; and two negative COVID-19 test results at least 24 hours apart, with the cost of testing paid by the employer);

- Ensure that employees observe physical distancing (e.g., by using signage/visual markers, limiting occupancy or access to common areas); and
- Ensure ready availability of cleaning and disinfecting supplies (e.g., soap/water, hand sanitizer, etc.) and that common or shared work spaces, frequently touched surfaces, and shared equipment are regularly cleaned.
- The ETS also requires prescreening or surveying of employees for COVID-19 symptoms before the start of each shift where the employer has job tasks at the worksite classified at medium, high, or very high risk. The ETS does not specify the form that prescreening or surveying should take.
- The ETS provides a medical exception to the face covering requirement and indicates that religious exemptions may be available in some circumstances. For employees in high and very high risk settings. the ETS contains additional requirements regarding PPE, as well as requirements concerning air-handling systems, enhanced training, medical monitoring, and psychological and behavioral supports for employees.

Screening and Notification Requirements

- Employers must not permit employees or other persons known or suspected to be infected with SARS-CoV-2 virus to report to or remain at the work site or engage in work at a customer or client location until cleared for return to work.
- To the extent permitted by law, employers must provide a system to receive reports of positive SARS-CoV-2 tests from employees, subcontractors, contract employees, and temporary employees who have been at the work site within the past 14 days.
- Employers must notify employees of possible workplace exposure within 24 hours of learning of the exposure to a known case, while maintaining the confidentiality of the identity of the infected person in accordance with the Americans with Disabilities Act. In the same time frame, employers must also notify any other employers whose employees were exposed, as well as the building/facility owner, and the Virginia Department of Health.
- If three or more employees present at the place of employment test positive for the virus within a 14-day period, employers must notify DOLI within 24 hours.
- Employers must provide information to employees on self-monitoring for COVID-19 symptoms and encourage them to do so and must develop and implement policies and procedures for employees to report COVID-19 symptoms.

Procedures Governing the Return to Work

- **Infected Employees.** Employers must develop and implement procedures for infected employees to return to work. These procedures may follow a symptom-based approach or a test-based approach.

- A symptom-based approach excludes symptomatic employees known or suspected to have the virus from returning until three days post-recovery and ten days after symptoms first appeared. Recovery is defined as "resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms."
- A test-based approach excludes employees known or suspected to have the virus from returning until (i) the employee's fever has resolved without the use of medication, (ii) the employee's respiratory symptoms (e.g., cough, shortness of breath) have improved, and (iii) the employee has had two consecutive negative results, more than 24 hours apart, from an FDA-authorized test for the virus. The employee may not be required to pay for such testing if it is performed for purposes of return to work determinations.

- **Asymptomatic Employees Who Test Positive for the Virus.** Employers must also develop procedures governing the return to work of employees who are asymptomatic but who are known to be infected with the virus. These procedures may follow a time-based or test-based strategy.
  - A time-based strategy allows an employee to return to work after ten days have elapsed since their first positive COVID-19 diagnostic test. If the employee develops symptoms after their first positive test, the test-based or symptom-based strategies above must be used.
  - A test-based strategy allows an employee to return to work after they receive two consecutive negative results, more than 24 hours apart, from an FDA authorized test for the virus.
- **Antibody Tests.** Antibody (serology) test results cannot be used to make decisions about returning employees to work who were previously classified as known or suspected to be infected with the SARS-CoV-2 virus.

Other Exposure Controls

- Employers must enforce physical distancing on work premises. Employers should implement signage and other visual cues and decrease worksite density by limiting or restricting access to shared spaces, and comply with occupancy limits in application public health emergency or executive orders.
- Common areas must be closed or controlled, such as through restricted access and reconfiguring work spaces where employees congregate. When closure is not feasible, controlled access may be provided in compliance with the following requirements:
  - The entrances to these areas must clearly state the occupancy limit and sanitation and physical distancing requirements.
  - The employer must enforce the occupancy limit of these areas.
  - If employees are not required to disinfect the immediate area in which they were just located, the employer must provide for cleaning at daily regular intervals.

    - Hand sanitizer and hand washing facilities, where feasible, must be available to employees in these areas.
- Employers must ensure compliance with personal protective equipment standards applicable to the industry when the nature of the employee's work area does not allow for physical distancing.
- Employers must disinfect work areas accessed by known or suspected infected persons before other employees have access to the area.
- All common spaces must be disinfected, at a minimum, at the end of each shift. This includes frequently touched surfaces and doors.
- Employers must provide disinfectant products designated by the Environmental Protection Agency for use against COVID-19.
- Employers must ensure flexibility of sick leave policies, to the extent reasonably possible, and ensure employees are aware of these policies.

Additional Requirements for Medium, High, and Very High Risk Levels

Workplace Assessment and Job Categorization

The ETS requires employers to determine the exposure risk level for each job task that their employees perform and tailor their COVID-19 protections based on the exposure risk level. The required protections range from mandatory personal protective equipment, engineering controls, and mandatory training.

Employers should use the following criteria to determine risk exposure levels:

- **Very High** exposure risks are those with high potential for employee exposure to known or suspected sources of the virus. *For purposes of the VOSH regulations, a person is "suspected" to be infected if the person has signs or symptoms of COVID-19 but has not tested positive for SARS-CoV-2, and no alternative diagnosis has been made.*
    - Examples: jobs with a high potential for employee exposure inside six feet to known or suspected sources of the SARS-CoV-2 virus during the performance of specific medical (e.g., aerosol generating procedures), postmortem, or laboratory procedures with specimens from an individual.
- **High** exposure risks are those with high potential for employee exposure, with employees less than six feet from known or suspected sources of the virus or persons known or suspected to be infected with the virus. Employees in this category are often healthcare service providers who have significant contact with others.
    - Examples: hospital workers, first responders, medical transport providers, mortuary services workers, medical and dental staff, non-medical support staff, long-term care facility staff, and home healthcare workers.
- **Medium** exposure risks are those that require more than minimal occupational contact of less than six feet from other employees, other persons, or the general public who may be infected, but who are not known or suspected to be infected. Employees in this category work in a range of settings, including: retail stores, restaurants, grocery stores,

commercial transportation, as well as employees who perform work on customer premises and in gyms, manufacturing settings, and indoor and outdoor construction settings.

    - Examples: waiters, grocery store workers, agricultural workers, construction workers, domestic service workers, hairdressers, fitness instructors, workers in poultry and meat processing facilities, manufacturing workers, and healthcare workers in settings without known or suspected sources of SARS-CoV-2.

- **Lower** exposure risks are those not classified at medium or higher risk levels. These positions do not require contact inside six feet with persons known or suspected to be infected. Employees in this category have minimal contact with others, including the general public. Employers can convert otherwise medium or higher risk positions to lower risk positions by implementing certain engineering, administrative, and work practice controls, such as installation of physical barriers, telework, staggering shifts to allow physical distancing, remote deliveries, mandating use of face coverings, and mandatory physical distancing. *For purposes of the VOSH regulations, "physical distancing" means staying at least 6 feet apart from others, or separation by a permanent, solid, floor to ceiling wall.*

    - Example: office building setting

Determining exposure risk levels includes consideration of:

- the job tasks being undertaken
- the work environment (e.g., indoors or outdoors)
- the ability to practice physical distancing
- the types of hazards encountered
- the amount of contact with contaminated surfaces
- the presence of an individual known or suspected to be infected with the virus

Certified Hazard Assessment

For medium, high or very high risk job tasks, the employer must create a written certification of the hazard assessment

- VOSH has posted a sample hazard assessment certification form that can be used to satisfy this requirement. (Although the regulations refer to assessment of job tasks or groups of job tasks, VOSH's sample form suggests that an employer can alternatively classify individual employees or job categories.)
- The hazard assessment does **not** need to be submitted to VOSH but should be retained in the employer's records.

Personal Protective Equipment

The requirements for employee face coverings and personal protective equipment (PPE) depend on the assigned hazard level. Specifically:

- Face coverings are generally required in any setting (including lower-risk settings) whenever an employee has even brief contact with others inside of 6 feet;
- In medium risk settings, employers must also both require and provide face coverings to employees with customer-facing jobs or whose job tasks do not permit physical distancing, unless greater protection (such a medical-grade mask) is indicated by the employer's hazard assessment; and
- For medium, high, and very high risk settings, employers must conduct a PPE assessment, with employee involvement, and select and have each employee use properly-fitting PPE appropriate to the hazard level, including respirators where indicated.

Mandatory Training

Any employer with medium, high, and very high risk job tasks must provide COVID-19 related training to *all employees at the workplace* regardless of the individual employee's risk classification and must prepare a written certification that the training has been performed. A sample training certification form is available here.

The mandatory training must cover:

1. The ETS requirements;
2. Other CDC or Virginia guidance the employer is complying with in lieu of the ETS (if any);
3. Characteristics and methods of transmission of the virus;
4. Signs and symptoms of COVID-19;
5. Risk factors for severe COVID-19;
6. Ability of pre-symptomatic and asymptomatic persons to transmit the virus;
7. Safe and healthy work practices (such as physical distancing, disinfection procedures);
8. PPE (when required, how to use); and
9. The anti-discrimination provision of ETS.

Employers with only **lower** risk job tasks must provide oral or written information to employees on items 1, 3, 4, 6, 7, and 9 from the above list. A sample lower-risk training information sheet that can be provided to employees is available here

Infectious Disease Preparedness and Response Plan

The ETS requires all employers with hazard or job tasks classified as "very high," and "high," and employers with hazards or job tasks classified as "medium" with 11 or more employees, to develop and implement a written infectious disease preparedness and response plan.

- Employers must identify an individual "knowledgeable in infection control principles and practices" as they apply to the workplace who will be responsible for plan administration

- In addition to covering the safety measures discussed above, the plan must address the following subjects:
    - Persons at particularly high risk of COVID-19 (e.g., those who have traveled to locations with "ongoing transmission," and healthcare employees with unprotected exposures to persons known or suspected to be infected);
    - Employees who work at jobs for other employers with different hazard levels;
    - Individual risk factors due to underlying conditions, to the extent permitted by law;
    - Controls needed to address the foregoing risks; and
    - Contingency plans for issues that may arise during an outbreak, such as increased absenteeism and interrupted supply chains.

A template plan is available here.

Anti-Discrimination and Retaliation Protection

The ETS prohibits an employer from discriminating against any employee who exercises their rights under the standard. Employers must not discriminate, in any way, against an employee who voluntarily wears their own PPE if that equipment does not create a serious hazard for the employee or other employees. Additionally, discrimination is prohibited against employees who raise concerns about the safety of their workplace.

What Employers Should Do Now

To comply with the ETS, Virginia employers should:

- conduct a workplace assessment to determine the hazards present with respect to COVID-19, what physical barriers can and should be installed, and what PPE is necessary for employees and third parties entering the workplace;
- categorize workers into very high, high, medium, and lower risk positions to determine which health and safety standards are applicable to the workplace;
- complete a written certification verifying that a hazard assessment has been completed;
- create and publish policies and procedures concerning (i) the reporting of COVID-19 symptoms, (ii) the exclusion of employees with known or suspected COVID-19 from the workplace, and (iii) the specific methods for returning infected or exposed employees to work at the proper time;
- for those employers with employees in the very high, high, or medium risk categories, create an infectious disease preparedness and response plan; and
- design a training plan and train employees on COVID-19 preparedness and response.

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

This guidance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

****UPDATED IN RESPONSE TO COVID-19 PANDEMIC – March 21, 2020***

***NOTE ABOUT 2020 UPDATES: The EEOC is updating this 2009 publication to address its application to coronavirus disease 2019 (COVID-19). Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. This update retains the principles from the 2009 document but incorporates new information to respond to current employer questions. For readers' ease the COVID-19 updates are all in bold and marked by an asterisk.**

I. INTRODUCTORY INFORMATION

A. PURPOSE

This technical assistance document provides information about Titles I and V of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act and pandemic planning in the workplace.[(1)] ***This document was originally issued in 2009, during the spread of H1N1 virus, and has been re-issued on March 19, 2020, to incorporate updates regarding the COVID-19 pandemic.** It identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning such as:

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce when an influenza pandemic appears imminent?
- When may an ADA-covered employer take the body temperature of employees during a pandemic?
- Does the ADA allow employers to require employees to stay home if they have symptoms of the pandemic influenza virus?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

In one instance, to provide a complete answer, this document provides information about religious accommodation and Title VII of the Civil Rights Act of 1964.

B. BACKGROUND INFORMATION ABOUT PANDEMIC INFLUENZA AND OTHER

PANDEMICS

A "pandemic" is a global "epidemic."[2] The world has seen **four** influenza pandemics in the last century. The deadly "Spanish Flu" of 1918 was followed by the milder "Asian" and "Hong Kong" flus of the 1950s and 1960s. While the SARS outbreak in 2003 was considered a pandemic "scare," [3] the H1N1 outbreak in 2009 rose to the level of a pandemic.[4]

***On March 11, 2020, the coronavirus disease (COVID-19) was also declared a pandemic.**

The U.S. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), and the World Health Organization (WHO) are the definitive sources of information about pandemics. The WHO decides when to declare a pandemic.[5] Pandemic planning and pandemic preparedness include everything from global and national public health strategies to an individual employer's plan about how to continue operations.[6]

***The new information added to this EEOC technical assistance document in 2020 about COVID-19 focuses on implementing these strategies in a manner that is consistent with the ADA and with current CDC and state/local guidance for keeping workplaces safe during the COVID-19 pandemic. This document recognizes that guidance from public health authorities will change as the COVID-19 situation evolves.**

II. RELEVANT ADA REQUIREMENTS AND STANDARDS

The ADA, which protects applicants and employees from disability discrimination, is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.[7] Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation).[8] Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.[9]

This section summarizes these ADA provisions. The subsequent sections answer frequently asked questions about how they apply during an influenza pandemic. The answers are based on existing EEOC guidance regarding disability-related inquiries and medical examinations, direct threat, and reasonable accommodation.[10]

A. DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances, as set forth below.[11]

1. Definitions: Disability-Related Inquiries and Medical Examinations

An inquiry is **"disability-related"** if it is likely to elicit information about a disability.[12] For

example, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS.[13] By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.

A **"medical examination"** is a procedure or test that seeks information about an individual's physical or mental impairments or health.[14] Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.

2. ADA Standards for Disability-Related Inquiries and Medical Examinations

The ADA regulates disability-related inquiries and medical examinations in the following ways:

- **Before a conditional offer of employment:** The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made.[15]
- **After a conditional offer of employment, but before an individual begins working:** The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations.[16]
- ***NOTE: New questions 16-19 below address specific questions about hiring during the COVID-19 pandemic.***
- **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:
  - An employee's ability to perform essential job functions will be impaired by a medical condition; or
  - An employee will pose a direct threat due to a medical condition.[17]

This reasonable belief "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination."[18]

All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept **confidential**.[19] Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.

B. DIRECT THREAT

A **"direct threat"** is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[(20)] If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities.[(21)] The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.[(22)]

DIRECT THREAT AND PANDEMIC INFLUENZA, COVID-19, AND OTHER PUBLIC HEALTH EMERGENCIES

Direct threat is an important ADA concept during an influenza pandemic.

Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

***Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their**

assessment of the spread and severity of COVID-19, that could affect whether a direct

threat still exists.

C. REASONABLE ACCOMMODATION

A **"reasonable accommodation"** is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[(23)]

An accommodation poses an **"undue hardship"** if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.[(24)] If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.[(25)]

Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities.[(26)]

III. ADA-COMPLIANT EMPLOYER PRACTICES FOR PANDEMIC PREPAREDNESS

The following Questions and Answers are designed to help employers plan how to manage their workforce in an ADA-compliant manner before and during a pandemic.

A. BEFORE A PANDEMIC

HHS advises employers to begin their pandemic planning by identifying a "pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning."[(27)] This team should include staff with expertise in all equal employment opportunity laws.[(28)] Employees with disabilities should be included in planning discussions, and employer communications concerning pandemic preparedness should be accessible to employees with disabilities.

When employers begin their pandemic planning, a common ADA-related question is whether they may survey the workforce to identify employees who may be more susceptible to complications from pandemic influenza than most people.

1. **Before an influenza pandemic occurs, may an ADA-covered employer ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza?**

No. An inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability.[(29)] The ADA does not permit such an inquiry in the absence of objective

evidence that pandemic symptoms will cause a direct threat. Such evidence is completely absent before a pandemic occurs.

2. Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

Yes. Employers may make inquiries that are not disability-related. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of "yes" or "no" to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

Below is a sample ADA-compliant survey that can be given to employees to anticipate absenteeism.

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES_____ , NO_____

3. May an employer require *new entering employees* to have a post-offer medical examination to determine their general health status?

Yes, if all entering employees in the same job category are required to undergo the medical

examination[(30)], and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

Example A: An employer in the international shipping industry implements its pandemic plan when the WHO and the CDC confirm that a pandemic may be imminent because a new influenza virus is infecting people in multiple regions, but not yet in North America. Much of the employer's international business is in the affected regions. The employer announces that, effective immediately, its post-offer medical examinations for all entering international pilots and flight crew will include procedures to identify medical conditions that the CDC associates with an increased risk of complications from influenza. Because the employer gives these medical examinations post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

4. May an employer rescind a job offer made to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts her at increased risk of complications from influenza?

No, unless the applicant would pose a direct threat within the meaning of the ADA. 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 finding must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk. Before concluding that an individual poses a direct threat, the employer must determine whether a reasonable accommodation could reduce the risk below the direct threat level.

Example B: The same international shipping employer offers a financial position at its U.S. headquarters to Steve. This position does not involve regular contact with flight crew or travel to the affected WHO region. Steve's post-offer medical examination (which is the same examination given to all U.S. headquarters employees) reveals that Steve has a compromised immune system due to recent cancer treatments. Given the fact that the position does not involve regular contact with flight crew or travel, and that the influenza virus has not spread to North America, Steve would not face a significant risk of contracting the virus at work and does not pose a "direct threat" to himself or others in this position. Under the ADA, it would be discriminatory to rescind Steve's job offer based on the possibility of an influenza pandemic.

B. DURING AN INFLUENZA PANDEMIC

The following questions and answers discuss employer actions when the WHO and the CDC report an influenza pandemic.

5. May an ADA-covered employer send employees home if they display influenza-like

symptoms during a pandemic?

Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. ***Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.**

6. **During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?**

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

***Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.**

7. **During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?**

Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

However, employers should be aware that some people with influenza, including the 2009 H1N1 virus ***or COVID-19**, do not have a fever.

***Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.**

8. **When an employee returns from travel during a pandemic, must an employer wait until**

the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.[(31)]

***Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.**

9. During a pandemic, may an ADA-covered employer ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA.[(32)] However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.[(33)]

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk *(e.g.* vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza.[(34)] Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

10. May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.[(35)]

In addition, employees with disabilities that put them at high risk for complications of

pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

11. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

12. During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).[(36)]

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. ***As of the date this document is being issued, there is no vaccine available for COVID-19.**

14. During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site

that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

Example C: An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed.

All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

Example D: A manager in a marketing firm has a hearing disability. A sign language interpreter facilitates her communication with other employees at the office during meetings and trainings. Before the pandemic, the employer decided to provide video phone equipment and video relay software for her at home to use for emergency business consultations. (Video relay services allow deaf and hearing impaired individuals to communicate by telephone through a sign language interpreter by placing a video relay call.[(37)]) During an influenza pandemic, this manager also is part of the employer's emergency response team. When she works from home during the pandemic, she uses the video relay services to participate in daily management and staff conference calls necessary to keep the firm operational.

***The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.**

15. During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

Example E: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.

*HIRING DURING THE COVID-19 PANDEMIC

***16. If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

***Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.**

***17. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

***Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.**

***18. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

***Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.**

***CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.**

***19. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

***Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.**

C. AFTER A PANDEMIC

20. May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local

clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

IV. EEOC AND RELATED RESOURCES

Employers are encouraged to consult the following EEOC publications for further information about the Americans with Disabilities Act, as well as other agency materials regarding COVID-19.

- **Disability-Related Inquiries and Medical Examinations**:
  - *Disability-Related Inquiries & Medical Examinations of Employees Under the ADA* (2000) at https://www.eeoc.gov/policy/docs/guidance-inquiries.html;
  - *Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures* (2001) at https://www.eeoc.gov/facts/evacuation.html;
  - Enforcement Guidance: *Preemployment Disability-Related Questions & Medical Examinations* (1995) at https://www.eeoc.gov/policy/docs/preemp.html.
- **Reasonable Accommodation and Undue Hardship**: Enforcement Guidance: *Reasonable Accommodation and Undue Hardship under the ADA* (as revised 2002) at https://www.eeoc.gov/policy/docs/accommodation.html.
- **Telework as a Reasonable Accommodation**: *Work at Home/Telework as a Reasonable Accommodation* (2003) at https://www.eeoc.gov/facts/telework.html.
- **Centers for Disease Prevention and Control: www.cdc.gov**
  - **CDC Guidance for Employers and Workplaces on COVID-19: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html**
- **U.S. Department of Labor**
  - **Occupational Safety and Health Administration https://www.osha.gov/**

    "Preparing Workplaces for COVID-19," https://www.osha.gov/Publications/OSHA3990.pdf
  - **Wage and Hour Division**

    "COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act" https://www.dol.gov/agencies/whd/fmla/pandemic

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Endnotes

1. 42 U.S.C. §§ 12111–12117, 12201–12213. EEOC is revising its ADA regulations to comply with the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, which was effective on January 1, 2009. 74 Fed.Reg. 48,431 (Sept. 23, 2009). While the Amendments expand ADA coverage, they do not change the ADA requirements concerning disability-related inquiries and medical examinations; the requirement of reasonable accommodation barring undue hardship; or the analysis of direct threat.

2. An "epidemic" is an outbreak of disease that occurs suddenly in numbers significantly greater than normal,

but which spreads only within communities, states, or a limited number of countries. http://www.flu.gov/glossary/#E. Such an outbreak usually occurs when a pathogen mutates, allowing it to evade the human immune system. http://www.flu.gov/individualfamily/about/index.html.

3. U.S. Dep't of Health & Human Servs., Pandemics and Pandemic Scares of the 20th Century, http://www.hhs.gov/nvpo/pandemics/flu3.htm (last visited Sept. 22, 2009). The most severe influenza pandemic in the last century was the Spanish Flu Pandemic of 1918-1919, which killed 675,000 people in the United States and 50 million people worldwide at the end of World War I. The Spanish Flu targeted young, healthy adults and was often fatal within a few days. This virus caused the immune system to attack the respiratory system, which explains why young adults with vigorous immune systems were especially vulnerable. David M. Morens & Jeffery K. Taubenberger, *1918 Influenza: The Mother of all Pandemics*, 12 Emerging Infections Diseases 15 (2006), http://www.cdc.gov/ncidod/EID/vol12no01/05-0979.htm.

4. *World facing global A(H1N1) flu pandemic, announces UN health agency*, UN News Service, June 11, 2009, http://www.un.org/apps/news/story.asp?NewsID=31106&Cr=h1n1&Cr1 (also noting that H1N1 tends to infect people under 25 years old, with approximately two percent of cases resulting in severe or life-threatening symptoms).

5. The WHO defines the following specific pandemic phases worldwide:

- **Phase 1**: No new influenza virus subtypes have been detected in humans. An influenza virus subtype that has caused human infection may be present in animals. If present in animals, the risk of human disease is considered to be low.
- **Phase 2**. No new influenza virus subtypes have been detected in humans. However, a circulating animal influenza virus subtype poses a substantial risk of human disease.
- **Phase 3**. Human infection with a new subtype, but no human-to-human spread, or at most rare instances of spread to a close contact.
- **Phase 4**. Small cluster(s) with limited human-to-human transmission but spread is highly localized, suggesting that the virus is not well adapted to humans.
- **Phase 5**. Larger cluster(s) but human-to-human spread of the virus still localized, suggesting that the virus is becoming increasingly better adapted to humans, but may not yet be fully transmissible (substantial pandemic risk).
- **Phase 6**. Pandemic phase: increased and sustained transmission in general population.

6. *See* Ctrs. for Disease Control & Prevention, Guidance for Businesses and Employers to Plan and Respond to the 2009-2010 Influenza Season (2009), http://www.pandemicflu.gov/professional/business/guidance.pdf; Ctrs. for Disease Control & Prevention, Resources for Businesses and Employers – COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html.

7. 42 U.S.C. § 12112(d)(4)(A); *Conroy v. New York State Dep't of Corr. Servs*., 333 F.3d 88, 94-95 (2d Cir. 2003); *Fredenburg v. Contra Costa County Dep't of Health Servs*., 172 F. 3d 1176, 1182 (9th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc*., 124 F.3d 1221, 1229 (10th Cir. 1997)*; see also* Equal Employment Opportunity Comm'n, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations § B.1 (1995), https://www.eeoc.gov/policy/docs/preemp.html.

8. 42 U.S.C. §§ 12111(3), (8); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

9. 42 U.S.C. § 12112(b)(5); *see also* § 12111(3); 29 C.F.R. § 1630.2(r).

10. These ADA standards apply to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

11. 42 U.S.C. § 12112(d). Equal Employment Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, § B of "General Principles" (2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4 [hereinafter Inquiries and Exams].

12. Inquiries and Exams, *supra* note 11, at § B.1 of "General Principles." *See also Conroy*, 333 F.3d at 95-96 (citing ADA and relevant EEOC guidance and holding that an employer's request for a "general diagnosis" from employees returning from sick leave absence is a disability-related inquiry regulated by the ADA because it "tend[ed] to reveal a disability").

13. *See* Am. Cancer Soc'y, Should Cancer Patients Get a Flu Shot? (Oct. 17, 2008), http://www.cancer.org/docroot/ETO/content/ETO_1_2x_Should_Cancer_Patients_Get_A_Flu_Shot.asp (noting that "[i]t is common for people during cancer treatment to have weakened immune systems"); *see also* Ctrs. for Disease Control & Prevention, Basic AIDS/HIV Information (Sept. 3, 2008), http://www.cdc.gov/hiv/topics/basic/ (reporting that "HIV . . . attacks the immune system . . .[and] [h]aving AIDS means that the virus has weakened the immune system").

14. Inquiries and Exams, *supra* note 11, at § B.2 of "General Principles."

15. 42 U.S.C. § 12112(d)(2)(A).

16. 42 U.S.C. § 12112(d)(3)(A); *see also* 29 C.F.R. § 1630.14(b).

17. Inquiries and Exams, *supra* note 11, at § A.5 of "Job-Related and Consistent with Business Necessity;" *see also Conroy*,333 F.3d at 97.

18. *See* Inquiries and Exams*, supra* note 11, at § A.5 of "Job-Related and Consistent with Business Necessity."

19. Medical information on employees or applicants is confidential with the following exceptions: (1)supervisor[s] and managers may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes. 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b).

20. 29 C.F.R. § 1630.2(r).

21. *Id.*; 29 C.F.R. pt. 1630 app. § 1630.2(r).

22. *Id.*

23. 29 C.F.R. pt. 1630 app. § 1630.2(o); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 416 (2002) (citing the Appendix).

24. 42 U.S.C. § 12111(10); *see also* 29 C.F.R. § 1630.2(p) (including factors to consider when determining undue hardship); 29 C.F.R. pt. 1630 app. § 1630.2(p) (providing a more detailed analysis and examples of where a requested reasonable accommodation would pose an undue hardship).

25. 42 U.S.C. § 12112(b)(5)(A); *see also* Equal Employment Opportunity Comm'n, Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (2002), https://www.eeoc.gov/policy/docs/accommodation.html#undue [hereinafter Reasonable Accommodation Guidance].

26. 42 U.S.C. § 12112(b)(5)(A).

27. *See* U.S. Dep't of Health and Human Servs., Business Pandemic Influenza Planning Checklist: Item 1.1, http://www.pandemicflu.gov/professional/business/businesschecklist.html (last visited Sept. 22, 2009).

28. *See* Job Accommodation Network,Considering the Needs of Employees with Disabilities During a Pandemic Flu Outbreak (2009), http://www.jan.wvu.edu/media/employmentpandemicflufact.doc (the Job Accommodation Network is a service of the U.S Department of Labor's Office of Disability Employment Policy).

29. Inquiries and Exams, *supra* note 11, at § B.1, "General Principles."

30. 42 U.S.C. § 12112(d)(3).

31. *See infra* Q & A 16 for a discussion of when an employer may require a medical release as a condition of returning to work.

32. Asking employees if they are immuno-compromised or have a chronic condition is a disability-related inquiry subject to the ADA's restrictions. When pandemic influenza symptoms only resemble those of seasonal influenza, they do not provide an objective basis for a "reasonable belief" that employees will face a direct threat if they become ill. Therefore, they do not justify disability-related inquiries or medical examinations.

33. *See also* Ctrs. for Disease Control, *supra* note 5, at 7. ADA-covered employers may receive requests for reasonable accommodation from individuals with disabilities that place them at risk of influenza complications.

34. *Id.* at 10–11.

35. Telework (i.e., working from an alternative location) is an example of "social distancing," which public health authorities may require in the event of a pandemic. "Social distancing" reduces physical contact between people to minimize disease transmission by, for example, avoiding hand-shakes and keeping a distance from others in public places. Other social distancing practices that may be implemented during a pandemic include: "closing schools; canceling public gatherings; planning for liberal work leave policies; . . . voluntary isolation of [pandemic infection] cases; and voluntary quarantine of household contacts." Ctrs. for

Disease Control & Prevention, Pandemic Influenza Mitigation, http://flu.gov/professional/community/mitigation.html (last visited Sept. 22, 2009). Employees with disabilities may request telework as a reasonable accommodation, even if the employer does not have a policy allowing it. *See* Equal Employment Opportunity Comm'n, Work at Home/Telework as a Reasonable Accommodation (Oct 27, 2005), https://www.eeoc.gov/facts/telework.html.

36. Equal Employment Opportunity Comm'n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), https://www.eeoc.gov/policy/docs/religion.pdf.

37. For general information about video relay service, see Fed. Commc'ns Comm'n, Video Relay Services (Oct. 21, 2008), http://www.fcc.gov/cgb/consumerfacts/videorelay.html.

Arnold & Porter

September 22, 2020

Virginia Companies Must Know The Limits Of COVID-19 Liability Waivers

Hospitality Law360, Personal Injury & Medical Malpractice Law360, Public Policy Law360, Retail & E-Commerce Law360

By Ian S. Hoffman

Many Virginia businesses have reopened, in spite of the COVID-19 pandemic. Prudent businesses may require clients and customers to sign COVID-19 liability waivers — that is, agreements to prospectively waive any claims against such businesses for any COVID-19-related injuries.

However, Virginia businesses — and their lawyers — can only take limited comfort in such waivers, because they are likely unenforceable. Virginia is one of only three states that categorically refuse to enforce preinjury liability waivers.

Thus, even if an injured party previously agreed to release a business from any and all claims based on negligence, the business can still be held liable for negligence. This means that, as a practical matter, Virginia businesses operating during the COVID-19 pandemic must still exercise all reasonable care in attempting to provide their clients and customers with a safe and healthy environment.

Nevertheless, Virginia businesses should not abandon all attempts to minimizing their COVID-19 liability through client or customer agreements. While liability waivers may not provide an absolute defense, other language in the agreement can be used as evidence that the injured party assumed the risk of a COVID-19-related injury — and assumption of risk is a valid defense under Virginia law.

Accordingly, agreements that fully disclose the risks of COVID-19 can and do serve a function. They just cannot be relied upon to fully absolve a business from all potential COVID-19 liability.

Preinjury Liability Waivers Under Virginia Law

Virginia's aversion to preinjury liability wavers dates back to at least the 1890s, and a case involving a railroad accident. In Johnson Administratrix v. Richmond & Danville Railroad Company,[1] a railroad company hired James Johnson to remove a granite bluff that was on the railroad company's right of way.

The railroad agreed with Johnson that, when its trains passed the bluff, they would slow to 6 miles per hour, and also agreed that the railroad company would "in no way be held responsible for any injuries to, or death of, any of the members of [Johnson's] firm, or of any of its agents and employees, sustained from said work, should such death or injury occur from any cause whatsoever."

One day, a train approached the work site at 25 mph. At the same time, one of Johnson's men was approaching the tracks with a heavy wheelbarrow, and headed downhill. Johnson ran toward the man, "with the train right behind him," warning of the oncoming train, but the man could not stop until the wheelbarrow reached the tracks.

Just as Johnson reached the man, the train struck the wheelbarrow, which slammed into Johnson, who died the next day. Johnson's estate sued the railroad company.

At trial, the jury entered a verdict in favor of the railroad, based on the contractual liability waiver. The Virginia Supreme Court reversed, holding that the waiver was void as a matter of public policy.

The court noted that the waiver purported to exempt the railroad from liability "even for the consequences of the company's own negligence ... and consequently precludes a recovery by the plaintiff, whether the company was negligent or not." The court found this was against public policy:

> It would be strange, indeed, if such a doctrine could be maintained. To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void.[2]

The Virginia Supreme Court thus reversed and remanded the case for a new trial.[3]

Just over 100 years later, the Virginia Supreme Court reaffirmed Johnson in a case involving a tragic triathlon injury. In *Hiett v. Lake Barcroft Community Association*,[4] a community association in Falls Church organized a triathlon to take place in and around Lake Barcroft.

A homeowner in the area asked Robert Hiett to join her as part of a team of teachers. Hiett agreed, and signed a liability waiver, which provided that he would "release and forever discharge any and all rights and claims for damages which I may have or m[a]y hereafter accrue to me against the organizers ... for any and all injuries suffered by me in said event."

At the start of the swimming event, Hiett "waded into Lake Barcroft to a point where the water reached his thighs, dove into the water, and struck his head on either the lake bottom or an object beneath the water surface." Hiett was paralyzed, and later filed suit alleging a failure to ensure the lake was reasonably safe, to advise participants of the risk of injury and to provide training on how to avoid such injuries.

The circuit court held that, absent fraud or misrepresentation, the liability waiver should be enforced. The Virginia Supreme Court reversed, explaining that:

> The case law in this Commonwealth over the past one hundred years has not altered the holding in Johnson ... [in which] this Court found that such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally."[5]

The court distinguished cases that had upheld certain liability waivers in the intervening years on the ground that they addressed waivers of property damage, not personal injury, or indemnification with third parties.[6]

Because those cases "have not modified or altered the holding in Johnson," which pertained to waivers of liability for personal injuries, the court concluded that "the pre-injury release provision signed by Hiett is prohibited by public policy and, thus, it is void."[7] The court thus remanded the case back to the circuit court, presumably for a trial on the merits of Hiett's claims.[8]

Hiett and Johnson remain good law today; state and federal courts in Virginia continue to hold that preinjury liability waivers for personal injuries are unenforceable.[9] The rationale behind this policy is twofold.

First, if enforced, such waivers could encourage parties not to exercise ordinary care, and instead rely upon the liability waiver to protect them from any lapses in care that result in personal injuries to others.[10] Second, if such waivers were enforced, "a party suffering personal injury [would be] barred from seeking a recovery from the tortfeasor, likely depriving the injured party of all possibility of recovery."[11]

Virginia is in the extreme minority of states on this issue. Most states allow liability waivers for ordinary negligence, while refusing to enforce waivers for gross negligence, or intentional or reckless conduct.[12] However, only Virginia and two other states — Montana and Louisiana — categorically refuse to enforce liability waivers for all personal injuries.[13] Indeed, Virginia's stance "is contrary to the Restatement Second of Torts, and is contrary to the great weight of American tort law."[14]

Nevertheless, the Virginia Supreme Court could reconsider its aversion to personal injury liability waivers in light of the unprecedented nature of the COVID-19 pandemic. For example, if a wave of COVID-19 personal injury lawsuits are filed, or if it becomes clear that the threat of COVID-19-related liability threatens serious harm to Virginia businesses or the economy, the court may start weighing the public policy concerns differently. At present, however, the court's 130-year history of refusing to enforce preinjury liability waivers continues.[15]

Assumption of Risk

While liability waivers are generally unenforceable, Virginia businesses can still include other language in their client or customer agreements to help establish that the injured party assumed the risk, which is a valid defense under Virginia law.

In Virginia, "a person's voluntary assumption of the risk of injury from a known danger operates as a complete bar to recovery for a defendant's alleged negligence in causing that injury."[16] To prevail on an assumption of the risk defense, the defendant must show that the plaintiff (1) fully appreciated the nature and extent of the risk, and (2) voluntarily incurred the risk.[17]

The focus of this inquiry is on "the risk alleged to have caused the injury, not merely the risks inherent in the activity,"[18] and hinges on whether the plaintiff subjectively assumed the risk, rather than whether a reasonable person would have assumed the risk.[19]

Accordingly, even where an agreement's liability waiver is deemed unenforceable, the language of the agreement may nevertheless be admissible to prove an assumption of the risk defense. This interaction between liability waivers and assumption of risk is well illustrated by *Manchanda v. Hays WorldWide*,[20] a case involving a tragic scuba diving accident.

A husband and wife enrolled in a scuba training course with a dive center in Alexandria, and signed an agreement with the dive center that included liability waiver language, as well as language stating that the divers understood that scuba diving was "physically strenuous" and could result in "heart attack, panic, hyperventilation, [and] drowning," and that the divers "expressly assume the risk of said injuries."

The course culminated in a series of open water dives. In the third group dive, the instructor and the husband lost sight of the wife. A search commenced and, over an hour later, the wife was found laying unconscious 57 feet below the surface. She died in the helicopter on the way to the hospital. Her estate filed a wrongful death suit against the dive center.

At summary judgment, the district court held that, under Johnson and Hiett, the liability waiver was void, but that it could serve as "evidence of the risks [the diver] knew before participating in the dive," and thus aid in determining whether the diver

assumed the risk.[21] Nevertheless, the court rejected the dive center's argument that the agreement was conclusive evidence the diver had assumed the risk, reasoning that to do so would conflict with Virginia's policy of not enforcing liability waivers.[22]

The court also observed that the relevant inquiry was not whether the diver assumed the risk of scuba diving in general, but whether she "fully appreciated the risk of diving in conditions allegedly made more dangerous by Defendants' negligence."[23] The court denied the dive center's summary judgment motion and ordered the parties to submit proposed redactions to the agreements, to redact those portions deemed void.[24]

With respect to COVID-19 liability, Virginia businesses should include language in their agreements sufficient to demonstrate that their customers or clients "fully appreciated the nature and extent of the risk" of contracting the COVID-19 virus.

Such disclosures should include an understanding of the risks of infection; the contagious nature of COVID-19; how infection and transmission can occur; the fact that safety precautions cannot guarantee no risk of contracting COVID-19; the symptoms that COVID-19 can cause, and the fact that such symptoms may be worse for those with various underlying medical conditions; and the fact that monitoring and maintaining social distance may be difficult, especially in the event the activity involves young children.

The agreement should also include language that discloses heightened risks from a failure of other individuals not following proper COVID-19 protocols, such as maintaining proper social distancing and proper hygiene measures. Finally, the agreement should state that the individual recognizes that the COVID-19 protocols being employed by the business — as designed and as implemented — may be insufficient to prevent the individual from contracting COVID-19 and suffering any related injuries, and that the individual nevertheless assumes all of these risks.

Virginia's steadfast refusal to enforce preinjury liability waivers does not mean that Virginia businesses have no ability to reduce the risk of COVID-19-related litigation. Rather, those businesses can include language in their client and customer agreements to help bolster an assumption of the risk defense — and should include language that identifies the risks of being exposed to COVID-19, how such exposure could occur and the physical risks of such exposure.

See *Johnson Adm'x v. Richmond & Danville R.R. Co.*, 89 Va. 975, 11 S.E. 829 (1890).

Id. at 978.

Id. at 980.

See *Hiett v. Lake Barcroft Cmty. Assoc.*, 244 Va. 191 (1992).

Id. at 194.

Virginia courts do enforce waivers for property damage claims, as well as indemnification claims that shift liability between the defendant and a third party. See *Nido v. Ocean Owners' Council*, 237 Va. 664 (1989) (court upholding waiver for property damage in condominium agreement); *Estes Exp. Lines Inc. v. Chopper Exp. Inc.*, 273 Va. 358, 366, 641 S.E.2d 476, 480 (2007) (upholding indemnification provision and distinguishing Johnson and Hiett because, "unlike pre-injury release provisions, indemnity provisions do not bar or even diminish an injured party's ability to recover from a tortfeasor").

Heitt, 244 Va. at 196.

The Supreme Court affirmed the circuit court's dismissal of the claims against the fellow teacher, holding that she had no duty to warn Hiett of the condition of the lake bottom. Heitt, 244 Va. at 196-197.

See, e.g., *Aldridge v. Atl. Rural Exposition*, No. LS-2226-4, 2005 WL 1388406, at *5 (Va. Cir. Ct. June 13, 2005); *Manchanda v. Hays Worldwide LLC*, 142 F. Supp. 3d 465, 474 (E.D. Va. 2015); *Utica Mut. Ins. Co. v. Atl. Found. Inc.*, No. 2:06-cv-487, 2007 WL 190682 at *4 (E.D. Va. Jan. 18, 2007). Note, however, that Virginia law does allow certain types of preinjury waivers with respect to horseback riding under the Virginia Equine Activity Liability Act. See Va Code §3.2-6202.

See *Estes Exp. Lines Inc. v. Chopper Exp. Inc.*, 273 Va. 358, 365–66 (2007) ("the released party's motivation to exercise ordinary care to prevent harm to the releasing party may be diminished because the possibility of legal liability is removed").

Id.; see also Johnson, 86 Va. at 978 (upholding preinjury waivers "would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct. ... Public policy forbids it").

See, e.g., Restatement (Second) of Contracts §195 (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"); Peter N. Swisher et al., Virginia Practice Series, Tort and Personal Injury Law § 3:52 (2009) ("Swisher") ("American courts" generally hold waivers unenforceable when "(1) the defendant acts intentionally, or with wanton and willful negligence toward the plaintiff; and (2) the transaction is contrary to the public interest and therefore contrary to state public policy"). See also Colleen K. Sanson, Avoiding Effect of Recreational Activity Liability Release, 154 Am. Jur. Proof of Facts 3d 89 (July 2020) (observing that "it would impair public policy to enforce an agreement that would remove an obligation to conform to even a minimal standard of care," and identifying many states that follow this principle).

See Mont. Stat. § 28-2-702; La. Civ. Code art. 2004.

Swisher, § 3:52. Virginia is also one of only a handful of states that continue to recognize the absolute defense of contributory negligence. See *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 699, 69 A.3d 1149, 1161 (2013) (noting that only "four states — Alabama, Maryland, North Carolina, and Virginia — and the District of Columbia continue to apply contributory negligence in its traditional guise"). Thus, Virginia maintains the ostensibly pro-plaintiff policy that preinjury liability waivers are void, and also the ostensibly pro-defendant defense of contributory negligence — and both such policies place Virginia in the minority of states.

Lawyers advising Virginia businesses may be tempted to include preinjury liability waivers to scare off potential lawsuits, even if the waiver itself may be unenforceable. But doing so could raise ethical issues. Rule 8.4 of the Virginia Rules of Professional Conduct (like ABA Model 8.4) provides that a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." The Virginia State Bar has opined that this rule prohibits a lawyer from issuing a subpoena to an out-of-state individual "knowing that such subpoena is not enforceable, unless the subject of the subpoena has agreed to accept service." Virginia LEO 1495 (Nov. 5, 1992). Further, at least one court has interpreted this ethics opinion as "suggest{ing} that a lawyer should not present to laypersons documents known to be unenforceable," including preinjury liability waivers. *McConnell v. Omni Hotels Mgmt. Corp.*, No. 5:16-CV-064, 2017 WL 5177616, at 1 (W.D. Va. July 11, 2017). Thus, Virginia lawyers should think carefully before advising their clients to include preinjury liability waivers, lest their advice be considered deceitful or fraudulent.

See *Thurmond v. Prince William Prof'l Baseball Club Inc.*, 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003).

Manchanda, 142 F. Supp. 3d 465, 473 (E.D. Va. 2015).

Id.

See *Amusement Slides Corp. v. Lehmann*, 217 Va. 818 (1977).

Manchanda, 142 F. Supp. 3d 465.

Id. at 474.

Id. at 474-475.

Id. at 473.

Id. at 467; 477.

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244 Va. 191
Supreme Court of Virginia.

Robert David HIETT
v.
LAKE BARCROFT COMMUNITY ASSOCIATION, INC., et al.

Record No. 911395.
|
June 5, 1992.

Synopsis

Person injured in sporting event brought action against owner of lake in which he was injured and person who encouraged him to participate in the event. The Circuit Court, Fairfax County, Thomas J. Middleton, J., dismissed individual and granted motion to strike evidence, and participant appealed. The Supreme Court, Keenan, J., held that: (1) preinjury release signed by participant was void as against public policy, and (2) individual who recruited plaintiff to participate did not have common-law duty to warn him of dangerous condition of uneven lake bottom.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***192** ****894** Bernard S. Cohen, Alexandria (Sandra M. Rohrstaff, Cohen, Dunn & Sinclair, on brief), for appellant.

Joseph D. Roberts, Merrifield (Slenker, Brandt, Jennings & Johnston, on brief), for appellees.

***191** Present: All the Justices.

Opinion

KEENAN, Justice.

The primary issue in this appeal is whether a pre-injury release from liability for negligence is void as being against public policy.

Robert D. Hiett sustained an injury which rendered him a quadriplegic while participating in the "Teflon Man Triathlon" (the triathlon) sponsored by the Lake Barcroft ****895** Community Association, Inc. (LABARCA). The injury occurred at the start of the swimming event when Hiett waded into Lake Barcroft to a point where the water reached his thighs, dove into the water, and struck his head on either the lake bottom or an object beneath the water surface.

Thomas M. Penland, Jr., a resident of Lake Barcroft, organized and directed the triathlon. He drafted the entry form which all participants were required to sign. The first sentence of the form provided:

> In consideration of this entry being accept[ed] to participate in the Lake Barcroft Teflon Man Triathlon I hereby, for myself, my heirs, and executors waive, release and forever discharge any and all rights and claims for damages which I may have or ***193** m[a]y hereafter accrue to me against the organizers and sponsors and their representatives, successors, and assigns, for any and all injuries suffered by me in said event.

Evelyn Novins, a homeowner in the Lake Barcroft subdivision, asked Hiett to participate in the swimming portion of the triathlon. She and Hiett were both teachers at a school for learning-disabled children. Novins invited Hiett to participate as a member of one of two teams of fellow teachers she was organizing. During a break between classes, Novins presented Hiett with the entry form and he signed it.

Hiett alleged in his third amended motion for judgment that LABARCA, Penland, and Novins had failed to ensure that the lake was reasonably safe, properly supervise the swimming event, advise the participants of the risk of injury, and train them how to avoid such injuries. Hiett also alleged that Penland and Novins were agents of LABARCA and that Novins's failure to direct his attention to the release clause in the entry form constituted constructive fraud and misrepresentation.

In a preliminary ruling, the trial court held that, absent fraud, misrepresentation, duress, illiteracy, or the denial of an opportunity to read the form, the entry form was a valid contract and that the pre-injury release language in the contract released the defendants from liability for negligence. The trial court also ruled that such a release was prohibited as a matter of public policy only when it was included: (1) in a common carrier's contract of carriage; (2) in the contract of a public utility under a duty to furnish telephone service; or

(3) as a condition of employment set forth in an employment contract.

Pursuant to an agreement between the parties, the trial court conducted an evidentiary hearing in which it determined that there was sufficient evidence to present to a jury on the issue of constructive fraud and misrepresentation. Additionally, the trial court ruled that as a matter of law Novins was not an agent of LABARCA, and it dismissed her from the case.

The remaining parties proceeded to trial solely on the issue whether there was constructive fraud and misrepresentation by the defendants such as would invalidate the waiver-release language in the entry form. After Hiett had rested his case, the trial court granted the defendants' motion to strike the evidence. This appeal followed.

***194** Hiett first argues that the trial court erred in ruling that the pre-injury release provision in the entry form did not violate public policy. He contends that since the decision of this Court in *Johnson's Adm'x v. Richmond and Danville R.R. Co.,* 86 Va. 975, 11 S.E. 829 (1890), the law in Virginia has been settled that an agreement entered into prior to any injury, releasing a tortfeasor from liability for negligence resulting in personal injury, is void because it violates public policy. Hiett asserts that the later cases of this Court have addressed only the release of liability from property damage or indemnification against liability to third parties. Thus, he contends that the holding in *Johnson* remains unchanged. In response, LABARCA and Novins argue that the decisions of this Court since *Johnson* have established ****896** that pre-injury release agreements such as the one before us do not violate public policy. We disagree with LABARCA and Novins.

The case law in this Commonwealth over the past one hundred years has not altered the holding in *Johnson.* In *Johnson,* this Court addressed the validity of a pre-injury release of liability for future negligent acts. There, the decedent was a member of a firm of quarry workers which had entered into an agreement with a railroad company to remove a granite bluff located on the company's right of way. The agreement specified that the railroad would not be liable for any injuries or death sustained by any members of the firm, or its employees, occurring from any cause whatsoever.

The decedent was killed while attempting to warn one of his employees of a fast-approaching train. The evidence showed that the train was moving at a speed of not less than 25 miles per hour, notwithstanding the railroad company's agreement that all trains would pass by the work site at speeds not exceeding six miles per hour.

In holding that the release language was invalid because it violated public policy, this Court stated:

> [T]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct ... can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void.

***195** 86 Va. at 978, 11 S.E. at 829. This Court emphasized that its holding was not based on the fact that the railroad company was a common carrier. Rather, this Court found that such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally." 86 Va. at 978, 11 S.E. at 830.

As noted by Hiett, the cases following *Johnson* have not eroded this principle. Instead, this Court's decisions after *Johnson* have been limited to upholding the right to contract for the release of liability for property damage, as well as indemnification from liability to third parties for such damage.

In *C. & O. Ry. Co. v. Telephone Co.,* 216 Va. 858, 224 S.E.2d 317 (1976), this Court upheld a provision in an agreement entered into by the parties to allow the telephone company to place underground cables under a certain railway overpass. In the agreement, the telephone company agreed to release the C & O Railway Company from any damage to the wire line crossing and appurtenances. In upholding this property damage stipulation, this Court found that public policy considerations were not implicated. 216 Va. at 865–66, 224 S.E.2d at 322.

This Court upheld another property damage release provision in *Nido v. Ocean Owners' Council,* 237 Va. 664, 378 S.E.2d 837 (1989). There, a condominium unit owner filed suit against the owners' council of the condominium for property damage to his unit resulting from a defect in the common area of the condominium. This Court held that, under the applicable condominium by-laws, each unit owner had voluntarily waived his right to bring an action against the owners' council for such property damage. 237 Va. at 667, 378 S.E.2d at 838.[1]

Other cases decided by this Court since *Johnson* have upheld provisions for indemnification against future property damage claims. In none of these cases, however, did the Court address the issue whether an indemnification provision would be valid against a claim for personal injury.

In *Richardson–Wayland v. VEPCO,* 219 Va. 198, 247 S.E.2d 465 (1978), the disputed claim involved property damage only, although ****897** the contract provided that VEPCO would be indemnified against both property damage and personal injury claims. This ***196** Court held that the provision for indemnification against property damage did not violate public policy. In so holding, this Court emphasized the fact that the contract was not between VEPCO and a consumer but, rather, that it was a contract made by VEPCO with a private company for certain repairs to its premises. 219 Va. at 202–03, 247 S.E.2d at 468.

This Court also addressed an indemnification clause covering liability for both personal injury and property damage in *Appalachian Power Co. v. Sanders,* 232 Va. 189, 349 S.E.2d 101 (1986). However, this Court was not required to rule on the validity of the clause with respect to a claim for personal injury, based on its holding that the party asserting indemnification was not guilty of actionable negligence. 232 Va. at 196, 349 S.E.2d at 106.

Finally, in *Kitchin v. Gary Steel Corp.,* 196 Va. 259, 83 S.E.2d 348 (1954), this Court found that an indemnification agreement between a prime contractor and its subcontractor was not predicated on negligence. For this reason, this Court held that there was no merit in the subcontractor's claim that the agreement violated public policy as set forth in *Johnson.* 196 Va. at 265, 83 S.E.2d at 351.

We agree with Hiett that the above cases have not modified or altered the holding in *Johnson.* Therefore, we conclude here, based on *Johnson,* that the pre-injury release provision signed by Hiett is prohibited by public policy and, thus, it is void. *Johnson,* 86 Va. at 978, 11 S.E. at 829.

Since we have held that the pre-injury release agreement signed by Hiett is void, the issue whether Novins acted as LABARCA's agent in procuring Hiett's signature will not be before the trial court in the retrial of this case. Nevertheless, Hiett argues that, irrespective of any agency relationship, Novins had a common law duty to warn Hiett of the dangerous condition of the uneven lake bottom. We disagree.

The record before us shows that Lake Barcroft is owned by Barcroft Beach, Incorporated, and it is operated and controlled by Barcroft Lake Management Association, Incorporated. Further, it is undisputed that the individual landowners in the Lake Barcroft subdivision have no ownership interest in the Lake. Since Novins had no ownership interest in or control over the operation of Lake Barcroft, she had no duty to warn Hiett of any dangerous condition therein. *See Busch v. Gaglio,* 207 Va. 343, 348, 150 S.E.2d 110, 114 (1966). Therefore, Hiett's assertion that Novins had a duty to warn him of the condition of the lake bottom, fails as a matter of ***197** law, and we conclude that the trial court did not err in dismissing Novins from the case.

Accordingly, we will affirm in part and reverse in part the judgment of the trial court, and we will remand this case for further proceedings consistent with the principles expressed in this opinion.[2]

Affirmed in part, reversed in part, and remanded.

All Citations

244 Va. 191, 418 S.E.2d 894

Footnotes

1 Although the by-law at issue attempted to release the owners' council for injury to both persons and property, the issue before the Court involved only the property damage portion of the clause.

2 Based on our decision here, we do not reach the questions raised by the remaining assignments of error.

Bill Text: VA HB798 | 2020 | Regular Session | Prefiled
Virginia House Bill 798 ***(Prior Session Legislation)***

NOTE: There are more recent revisions of this legislation. Read Latest Draft

Bill Title: Employment; prohibited retaliatory action.

Spectrum: Partisan Bill (Democrat 6-0)

Status: *(Passed)* 2020-04-11 - Governor: Acts of Assembly Chapter text (CHAP1136) [HB798 Detail]

Download: Virginia-2020-HB798-Prefiled.html

20103743D

HOUSE BILL NO. 798
Offered January 8, 2020
Prefiled January 7, 2020

A BILL to amend the Code of Virginia by adding a section numbered 40.1-27.3, relating to the protection of employees from retaliatory actions by their employer.

Patron-- Delaney

Committee Referral Pending

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 40.1-27.3 as follows:

§40.1-27.3. Retaliatory action against employee prohibited.

A. An employer shall not discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee:

1. Or a person acting on behalf of the employee in good faith reports a violation or suspected violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official;

2. Is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry;

3. Refuses to engage in a criminal act that would subject the employee to criminal liability;

4. Refuses an employer's order to perform an action that the employee believes, which belief has an objective basis in fact, violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or

5. Provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

B. This section does not:

1. Authorize an employee to make a disclosure of data otherwise protected by law;

2. Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or

3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

C. A person who alleges a violation of this section may bring a civil action in a court of competent jurisdiction within one year of the employer's prohibited retaliatory action. The court may order as a remedy to the employee (i) an injunction to restrain continued violation of this section, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest thereon. The court may award to the prevailing party reasonable attorney fees and costs.

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What The New HB798 Whistleblowing Law Means For Virginia Workers

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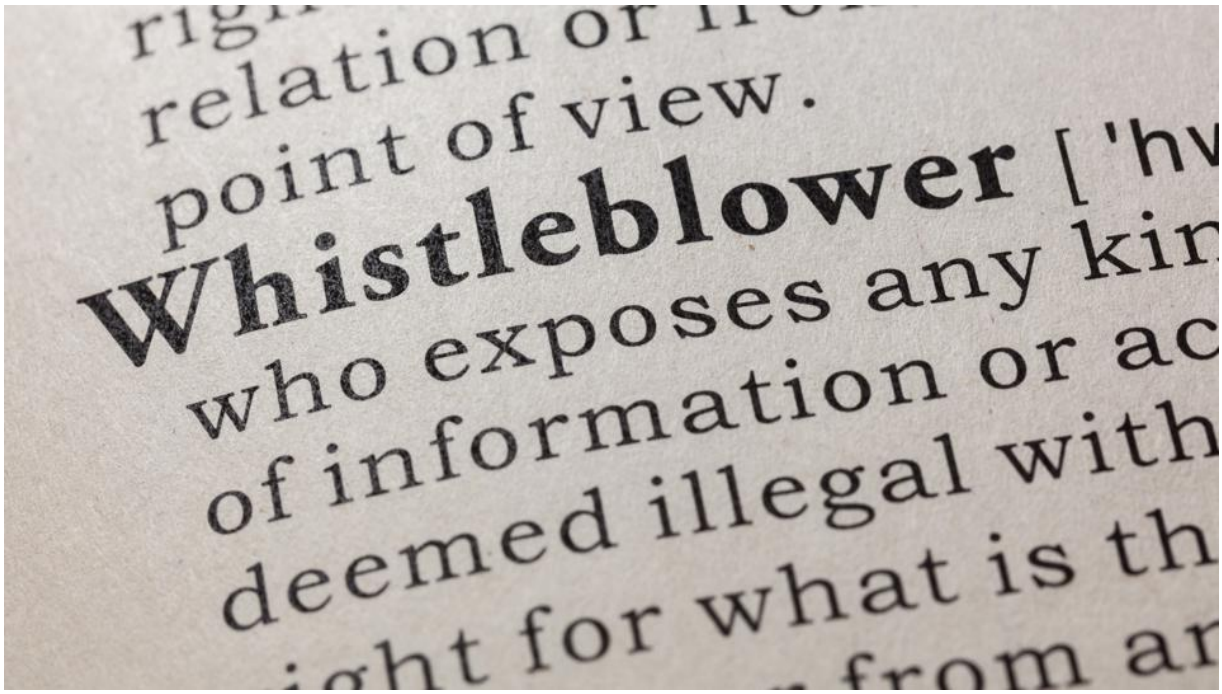

BY FENG YU

Employers in Virginia need to think a little bit harder before engaging in illegal activity.

On April 11, 2020, Virginia Governor Ralph Northam signed into law HB798, which dramatically broadens the extent of whistleblower protections for workers in Virginia. To best explain how this new law does this, let's take a look at the Virginia whistleblowing landscape before HB798.

The *Bowman* Standard

Like most other states, Virginia follows the employment at-will doctrine. This means that subject to a few exceptions, either the employer or employee may terminate the working relationship at any time and without cause. In other words, the employer can fire an employee for any reason or no reason at all, without notice. Likewise, the employee can quit without notice or reason.

One major exception exists when there's an employment contract that has special provisions setting out how the employment relationship must end. The other major exception is when the firing goes against public policy.

The Virginia Supreme Court case from 1985, *Bowman v. State Bank of Keysville,* was the first major Virginia case to start carving out public policy exceptions to the at-will employment doctrine.

In *Bowman*, two bank employees owned shares of their bank's stock and their superiors wanted them to vote in favor of their bank's merger. If they refused, they would lose their jobs, or at the very least, suffer "a definite adverse effect on [their jobs]."

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Together, the two employees held 11 shares (out of a total of 3,000 shares outstanding) and initially voted in favor of the merger. The merger passed by a vote of 2008 to 992. But then the two employees had a change of heart and wrote a joint letter to their bank's president essentially blowing the whistle on what happened.

They stated that their votes were void because they had been improperly obtained due to coercion. Because the merger required a 2/3 majority vote to pass, once the two employees rescinded their votes, the merger failed.

The two bank employees were soon fired and they brought suit for wrongful discharge. Despite being at-will employees, the plaintiffs argued that what happened to them should be an exception to the at-will employment doctrine. The Supreme Court of Virginia agreed and concluded that it is a violation of public policy for an employer to punish an employee for exercising his or her rights as a shareholder.

While the two bank employees were successful in *Bowman*, the case was largely limited to wrongful discharge claims when a violation of public policy occurs. A few later cases expanded on the public policy exception to Virginia's employment at-will doctrine. But for the most part, there are only three situations where a termination can be wrongful if there is a violation of public policy:

- The employer violated a policy that allows the employee to exercise a statutory right.
- The employee was a member of a class that was specifically entitled to legal protections from a clear public policy outlined in a statute and the employer violated that public policy.
- The employee was fired because they refused to commit a crime.

These are pretty limited protections, for at least two reasons. First, a whistleblower could only take legal action if the employer fired them. Second, these exceptions largely focus on public policy violations as to Virginia law only. After more than three decades, HB798 represents a massive shift in protecting Virginia whistleblowers.

Virginia's New Whistleblowing Law: HB798

HB798 is a law designed to protect whistleblowing employees from retaliation from their employers. HB798 prohibits employers from taking any retaliatory action against the employee, including:

- Firing
- Acts of discipline
- Making threats
- Discrimination
- Any other retaliatory action that goes to the employee's compensation, terms, conditions, privileges or work location.

HB798 goes into effect on July 1, 2020 and protects a Virginia employee who:

- Acts in good faith to report any violation of state or federal law to a supervisor or government official, including a law enforcement officer. This protection also applies if the employee has someone act on their behalf to report the wrongdoing.
- Participates in a government investigation, hearing or inquiry at the request of a government official or law enforcement officer.
- Refuses to commit a criminal act that would get the employee into legal trouble.
- Refuses to commit any activity that would violate a state or federal law and the employee notifies the employer they are refusing to engage in that activity for that reason.

Provides information or testifies before any government body or official as a part of an investigation, hearing or inquiry into the employer's alleged wrongdoing.

There is no whistleblowing protection if the whistleblowing employee:

- Reveals information or data protected by law or privilege.
- Making a statement that is known to be false or made in reckless disregard to the truth.
- Discloses information in violation of state or federal law, including information that would compromise the confidentiality of someone else's legally protected communications.

What makes HB798 even more powerful is its enforcement provision. HB798 allows an aggrieved employee the right to obtain the following remedies:

- An injunction to stop any employer action that violates HB798.
- Reinstatement of the employee to his or her prior position.
- Recovery of lost wages, benefits and other forms of compensation, with interest.
- Reasonable attorneys' fees and costs.

Another notable feature of HB798 is that employees do not have to go through an administrative process, such as filing a complaint with a government agency. Instead, they can go directly to court and sue the employer.

HB798 also allows employees to bring suit in "a court of competent jurisdiction." This means the employee can bring the lawsuit in Virginia state court. This can be an important strategic decision because federal courts tend to be more pro-defendant that Virginia state courts.

The Bottom Line

HB798 may not be as protective as some whistleblowing laws in other states. But compared to the *Bowman* standard, this law represents a monumental shift in favor of employees and provides substantive protections for employees who step forward and blow the whistle on their employers. A copy of HB798 (which is relatively short as far as laws go) is available in Zuckerman Law's article on HB798.

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Tom Spiggle

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After clerking for a judge and working as a federal prosecutor, I wanted to spend more quality time with my kids so in 2009 I started the Spiggle Law Firm. We focus on...

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Virginia Administrative Code
Title 16. Labor and Employment
Agency 25. Safety and Health Codes Board
Chapter 60. Administrative Regulation for the Virginia Occupational Safety and Health Program

16VAC25-60-110. Whistleblower Discrimination; Discharge or Retaliation; Remedy for Retaliation.

A. In carrying out his duties under § 40.1-51.2:2 of the Code of Virginia, the commissioner shall consider case law, regulations, and formal policies of federal OSHA. An employee's engagement in activities protected by Title 40.1 does not automatically render him immune from discharge or discipline for legitimate reasons. Termination or other disciplinary action may be taken for a combination of reasons, involving both discriminatory and nondiscriminatory motivations. In such a case, a violation of § 40.1-51.2:1 of the Code of Virginia has occurred if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity.

Employee whistleblower activities, protected by § 40.1-51.2:1 of the Code of Virginia, include:

1. Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

2. Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

3. Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;

4. Cooperating with or providing information to the commissioner during a worksite inspection; or

5. Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

Discharge or discipline of an employee who has refused to complete an assigned task because of a reasonable fear of injury or death will be considered retaliatory only if the employee has sought abatement of the hazard from the employer and the statutory procedures for securing abatement would not have provided timely protection. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, an abatement of the dangerous condition.

Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations shall not be regarded as retaliatory action prohibited by § 40.1-51.2:1 of the Code of Virginia.

B. A complaint pursuant to § 40.1-51.2:2 of the Code of Virginia may be filed by the employee himself or anyone authorized to act in his behalf.

The investigation of the commissioner shall include an opportunity for the employer to furnish the commissioner with any information relevant to the complaint.

An attempt by an employee to withdraw a previously filed complaint shall not automatically terminate the investigation of the commissioner. Although a voluntary and uncoerced request from the employee that his complaint be withdrawn shall receive due consideration, it shall be the decision of the commissioner whether further action is necessary to enforce the statute.

The filing of a retaliation complaint with the commissioner shall not preclude the pursuit of a remedy through other channels. Where appropriate, the commissioner may postpone his investigation or defer to the outcome of other proceedings.

C. Subsection A of § 40.1-51.2:2 of the Code of Virginia provides that the commissioner shall bring an action in circuit court when it is determined that a violation of § 40.1-51.2:1 of the Code of Virginia has occurred and a voluntary agreement could not be obtained. Subsection A of § 40.1-51.2:2 further provides that the court "shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief." The court's authority to restrain violations and order appropriate relief includes the ability to issue penalties or fines to the employer that would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to subsections G, H, I, and J of § 40.1-49.4 of the Code of Virginia.

Statutory Authority
§§ 40.1-6 and 40.1-22 of the Code of Virginia.

Historical Notes
Derived from VR425-02-95 § 2.10, eff. July 1, 1994; amended, Volume 34, Issue 06, eff. December 15, 2017.

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Amazon Hit With Whistleblower Suit Over COVID-19 Protocols

By **Bill Wichert**

Law360 (October 13, 2020, 5:22 PM EDT) -- Amazon has been slapped with a whistleblower suit in New Jersey federal court by a former employee alleging he was canned in retaliation for reporting that a shift manager at a Garden State facility flouted safety protocols aimed at curbing the spread of the novel coronavirus.

David J. Bailey, who was tasked with enforcing such measures as an Amazon.com Inc. learning ambassador, said he was fired in August soon after complaining that Kristopher Lauderdale refused to keep at least a 6-foot distance from other workers, according to the complaint filed Monday asserting a violation of New Jersey's Conscientious Employee Protection Act.

While working for the e-commerce giant and following his termination, Bailey said he realized that the company operated its business "unlawfully on a sustained and continued basis with regard to enforcing safety laws/regulations surrounding the COVID-19 pandemic."

"Plaintiff also discovered that Lauderdale had been reported several times by several employees for violations of said laws/regulations but HR either ignored or refused to pass the complaints on to upper management," the complaint said.

Bailey was hired as a learning ambassador in June 2019 for the company's Bellmawr, New Jersey, facility, where he "assisted floor managers, trained new associates, ensured that existing associates maintained quality standards, and enforced Amazon protocols," according to the complaint.

Those job responsibilities extended this year to enforcing safety measures related to the COVID-19 pandemic, the complaint said.

New Jersey Gov. Phil Murphy on April 8 signed an executive order directing that manufacturing and warehousing businesses "'require individuals to maintain six feet or more distance between them wherever possible' and 'require workers and visitors to wear cloth face coverings, in accordance with [U.S. Centers for Disease Control and Prevention] recommendations ... [and] gloves, while on the premises,'" the complaint noted.

In accordance with such regulations, Amazon instituted safety protocols for its workers, including requiring employees to wear masks and maintain a distance of at least six feet while working at company facilities, the complaint said.

The company instructed Bailey that "these protocols were to be strictly enforced and that violators would be subjected to suspension or even termination," the complaint said.

As part of his enforcement, Bailey said he saw Lauderdale repeatedly violate the state regulations and company safety protocols by wearing a mask incorrectly or not at all and not maintaining a distance of at least six feet from other employees.

Bailey also noticed that when another learning ambassador or employee reported Lauderdale for such violations, the worker "would be written up and/or suspended by defendants' management for bogus reasons," the complaint said. Bailey said he himself told Lauderdale about his violations multiple

times "to no avail."

Given the importance of Amazon employees' safety and health amid the outbreak, Bailey said what he was experiencing was "highly disturbing."

"COVID-19 related deaths and infections were continuing to rise unabated at this time, and plaintiff was dismayed by defendants' managements' failure to properly enforce Governor Murphy's emergency mandates and HR's clear condonement of disciplining, suspending or terminating any employee who attempted to report Lauderdale or his aforesaid violations/illegal conduct," according to the complaint.

In early August, Bailey saw Lauderdale and another manager standing and talking within two or three feet of each other, the complaint said. When Bailey told them they were not following mandated social distancing guidelines, "Lauderdale ignored plaintiff and visibly rolled his eyes," the complaint said.

Soon after, Bailey noticed that Lauderdale and the other manager "were now talking within just a foot of each other and tauntingly watching plaintiff," the complaint said. Bailey indicated his frustration and walked away from Lauderdale, according to the complaint.

Bailey said he then filed a report with the company's on-site human resources department about Lauderdale's refusal to stay at least six feet away from other employees.

"Instead of properly investigating and/or addressing plaintiff's complaints of defendants' managements' violations of state and/or federal regulations/laws, plaintiff was placed on suspension for purportedly 'threatening' Lauderdale, and then abruptly terminated just a few days later on or about August 15, 2020," according to the complaint.

Counsel for Bailey and Amazon representatives did not immediately respond to requests for comment Tuesday.

Bailey is represented by Ari R. Karpf of Karpf Karpf & Cerutti PC.

Counsel information for Amazon was not immediately available.

The case is David J. Bailey v. Amazon.com Inc. et al., case number 1:20-cv-14306, in the U.S. District Court for the District of New Jersey.

--Editing by Daniel King.
