UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

MARTIN J. WALSH, Secretary of Labor, United States Department of Labor, Plaintiff, v. COMMUNITY HEALTH CENTER OF RICHMOND, INC., a corporation and HENRY THOMPSON, individually and as corporate officer, Defendants.	Civil Action No. 1:21-cv-03094

COMPLAINT

Plaintiff, Martin J. Walsh, Secretary of Labor, United States Department of Labor (the "Secretary"), brings this action for an order for all appropriate relief pursuant to the provisions of section 11(c) of the Occupational Safety and Health Act of 1970, as amended, ("the Act"), 29 U.S.C. 651 *et seq*., seeking to enforce the provisions of section 11(c) of the Act, 29 U.S.C. § 660(c).

Defendants Community Health Center of Richmond, Inc., ("CHCR") and its Chief Executive Officer, Henry Thompson, violated section 11(c) of the Act when they suspended, and ultimately terminated employee Qiana Nuñez ("Complainant") because she engaged in protected activity related to potential exposure to the SARS-CoV-2 virus ("COVID-19"). In particular, Complainant was suspended and then terminated because she reported a hazardous work condition to Defendants—the potential exposure to COVID-19 at an in-person staff meeting—and subsequent refusal to attend the in-person staff meeting due to her reasonable apprehension that attendance at the meeting could lead to contraction of COVD-19 and the range of serious injury or death associated with contraction of COVID-19.

JURISDICTION AND VENUE

1. The Secretary brings this action pursuant to the authority granted to him by section 11(c)(2) of the Act, 29 U.S.C. § 660(c)(2).

2. This Court has jurisdiction over this action pursuant to section 11(c)(2) of the Act, 29 U.S.C. § 660(c)(2).

3. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 29 U.S.C. § 660(c)(2) and 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this claim occurred within the judicial district.

DEFENDANT AND INTERESTED PARTY

4. Defendant CHCR is a not-for-profit corporation organized under the laws of the State of New York and at all times material has been an employer that provides services to individuals in New York City.

5. Defendant CHCR maintains its principal location for the regular transaction of business at 439 Port Richmond Avenue, Staten Island, New York 10302.

6. Defendant CHCR is now and has been at all times material, a "person" as defined in section 3(4) of the Act, 29 U.S.C. § 652(4).

7. Defendant CHCR is now and at all times material has been an "employer" engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).

8. Defendant Henry Thompson, who regularly does business at 439 Port Richmond Avenue, Staten Island, Island New York 10302, is now and at all times material has been the Chief Executive Officer of Defendant CHCR with, among other things, the authority to hire, fire and to take disciplinary actions against employees of Defendant CHCR.

9. Defendant Henry Thompson is now and been at all times material, a "person" as defined in section 3(4) of the Act, 29 U.S.C. § 652(4).

10. Complainant Qiana Nunez worked as an Executive Office Manager for Defendant CHCR primarily performing services for or behalf of Defendant Henry Thompson before Defendants terminated her from her employment on April 3, 2020, in the midst of the COVID-19 pandemic. Ms. Nuñez suffers from epilepsy, Graves' disease, high blood pressure, and heart conditions.

11. Up until the time that Defendants terminated her, Ms. Nuñez was an employee who was employed by an employer as defined by sections 3(5) and 3(6) of the Act, 29 U.S.C. §§ 652(5)-(6).

FACTUAL ALLEGATIONS

CHCR's business and Ms. Nuñez's responsibilities

12. CHCR operates three health centers in Staten Island, New York providing medical and dental care to its patients.

13. One of CHCR's health centers is located at 235 Port Richmond Avenue on Staten Island.

14. The 235 Port Richmond Avenue medical facility location ("Medical Facility") alone sees between 150 to 220 patients each day on average.

15. Defendant Thompson has served as CHCR's CEO since November 2009.

16. Defendant Thompson hired Ms. Nuñez as Executive Office Manager at CHCR's administrative offices at 439 Port Richmond Avenue ("Administrative Offices") to begin work on May 5, 2014.

17. Initially, Ms. Nuñez earned a starting salary of $50,000 from CHCR.

18. Since her hire, Ms. Nuñez reported directly to Defendant Thompson, who served as her direct supervisor.

19. In her position as Executive Office Manager, Ms. Nuñez was expected to work independently to maintain and manage Defendant Thompson's meeting schedules, calendar, itinerary and day-to-day activities of administration.

20. Among Ms. Nuñez's responsibilities was the scheduling of monthly executive leadership meetings, which were held in a conference room in the Administrative Offices.

21. The executive leadership meetings frequently lasted 1.5 hours or more.

22. Ms. Nuñez held her position as Executive Office Manager from May 5, 2014 until Defendants fired her on April 3, 2020.

23. Ms. Nuñez received regular pay raises during her employment with CHCR and was earning a $62,000 salary at the time of her termination.

The Outbreak of the COVID-19 Pandemic

24. On January 21, 2020, the Centers for Disease Control and Prevention announced the first known case of COVID-19 in the United States.

25. On January 30, 2020, the World Health Organization declared the COVID-19 outbreak a public health emergency of international concern, which is WHO's highest level of alarm.

26. The next day, on January 31, 2020, the United States Department of Health and Human Services declared a public health emergency covering the entire United States.

27. On March 1, 2020, New York City recorded its first confirmed case of COVID-19.

28. New York State Governor Andrew Cuomo declared a Disaster Emergency in the State of New York just three days later on March 7, 2020.

29. The WHO declared the COVID-19 outbreak a pandemic on March 11, 2020.

30. On March 13, 2020, the President formally declared the pandemic a national emergency.

31. On March 13, 2020, the mayor of the City of New York issued a State of Emergency.

32. On March 16, 2020, Governor Cuomo issued an executive order, which among other things, directed state government to allow non-essential personnel to work from home and restricted non-essential state government workers from going into work.

Ms. Nuñez reports unsafe conditions and refuses to attend a face-to-face meeting.

33. CHCR had a monthly executive leadership meeting scheduled for March 17, 2020 at 12:30 pm ("the meeting").

34. The scheduled meeting was to be held in-person in a second-floor conference room at the Administrative Offices ("the conference room)."

35. The meeting was to include 10-12 in-person attendees, including members of CHCR's clinical staff who provided direct services to CHCR's patients.

36. The conference room's dimensions are approximately 13 feet, 6 inches wide by 18 feet long.

37. The conference room has no windows to the outside of the building.

38. The conference room has only one air supply vent.

39. Attendees of the executive leadership meetings sit at a table that is 4 feet wide and 12 feet long.

40. Face coverings were not provided for the meeting and attendees did not wear any.

41. The conference room was also used for storage further constricting the space where individuals could sit and further limiting the ability to social distance.

42. Prior to coming into work on March 17, 2020, Ms. Nuñez had, among other things, heard about Governor Cuomo's March 16 executive order on COVID-19 directing non-essential government employees to stay home.

43. Knowing that there was an in-person executive leadership meeting planned for March 17, Ms. Nuñez was concerned that she and her colleagues could be exposed to COVID-19 at the meeting.

44. Ms. Nuñez was concerned that COVID-19 could have a particularly serious impact on her health and safety because or her preexisting conditions.

45. Ms. Nuñez reasonably believed exposure to COVID-19 could lead to death or other serious injury.

46. At or about 9:24 am on March 17, 2020, Ms. Nuñez sent a text message to Defendant Thompson stating: "Good Morning. Are we canceling the leadership meeting or holding it via conference call?"

47. By 10:02 am, Ms. Nuñez had not received a response from Defendant Thompson to the question posed in her text.

48. At or about 10:02 am, with the in-person meeting less than 2.5 hours away, Ms. Nuñez sent a follow-up email to Defendant Thompson stating she would set the meeting as a conference call.

49. There was insufficient time to have OSHA conduct an inspection.

50. Ms. Nuñez subsequently sent an email to the executive leadership meeting's attendees stating the meeting would be held by teleconference rather than in-person.

51. Soon after Ms. Nuñez rescheduled the meeting to a teleconference, Defendant Thompson called Ms. Nuñez to tell her to re-set the meeting as an in-person meeting (the "telephone call").

52. Per Defendant Thompson's instructions on the telephone call, Ms. Nuñez re-set the executive leadership meeting as an in-person meeting. She followed up with individual meeting participants to confirm the in-person nature of the meeting.

53. Ms. Nuñez told Defendant Thompson she was concerned about attending the in-person executive leadership meeting given the ongoing COVID-19 pandemic.

54. Ms. Nunez told Defendant Thompson she believed the conference room was poorly ventilated and that there was no space for appropriate social distancing.

55. Ms. Nuñez also told Defendant Thompson she felt it was particularly unsafe to hold the in-person meeting given that members of the clinical staff would be in attendance.

56. Defendant Thompson understood Ms. Nuñez was concerned about transmission of COVID-19 at the in-person executive leadership meeting.

57. Ms. Nuñez told Defendant Thompson she did not want to attend the meeting in-person due to the risk of COVID-19 transmission.

58. Ms. Nuñez did not attend the meeting due to her reasonable concern for contracting COVID-19 at the meeting.

59. Defendant Thompson did not provide Ms. Nuñez alternative work she could perform instead of attending the in-person meeting and did not tell her to call into the meeting.

60. During the executive leadership meeting Ms. Nunez performed other work-related tasks at her desk.

Defendants' Abrupt and Unlawful Retaliation against Ms. Nuñez

61. On March 19, 2020, two days after the executive leadership meeting, Ms. Nuñez was called into Senior Director of Finance and Benefit Administration Williar Hodges's Office where Ms. Hodges told her she was suspended and handed Ms. Nuñez a letter further informing her that she was suspended.

62. This suspension letter stated Ms. Nuñez was suspended as of March 19, 2020 for alleged "insubordination, confrontational and disruptive behavior, and refusal to participate in the Community Health Center of Richmond's (CHCR) leadership team meeting on Tuesday, March 17, 2020[.]"

63. Defendant Thompson made the decision to suspend Ms. Nuñez.

64. At no time during the telephone call or prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez she was being disrespectful.

65. At no time during the telephone call or prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez she was being insubordinate.

66. At no time during the telephone call or prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez she was being confrontational.

67. At no time during the telephone call and prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez she was being abrasive.

68. At no time during the telephone call or prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez she was being unprofessional.

69. At no time during the telephone call or prior to the meeting with Ms. Hodges did Defendant Thompson or any other representative of Defendants tell Ms. Nuñez her behavior was disruptive.

70. Other than during the one telephone call, Defendant Thompson and Ms. Nuñez did not discuss the March 17, 2020 executive leadership meeting again.

71. On or about April 9, 2020, Ms. Nuñez received a letter by mail, dated April 9, 2020, informing her that Defendants terminated her effective April 3, 2020.

72. The April 9, 2020 termination letter provided no reason as to why Defendants terminated Ms. Nuñez other than a statement that CHCR was "exercising our employer right to terminate your at-will employment[.]"

73. Defendant Thompson made the decision to terminate Ms. Nuñez.

74. At no point prior to the March 19, 2020 suspension did Defendants ever take disciplinary action against Ms. Nuñez.

Ms. Nuñez Files a Complaint with OSHA

75. On or about May 7, 2020, Ms. Nuñez timely filed a complaint with the Occupational Safety and Health Administration ("OSHA") under section 11(c)(2) of the Act, 29 U.S.C. § 660(c)(2), alleging that Defendants suspended and then terminated her for making a good faith health and safety complaint regarding unsafe conditions at the March 17, 2020 executive leadership meeting related to potential COVID-19 exposure, and her associated refusal to attend the meeting in-person.

76. OSHA investigated Ms. Nuñez's complaint and determined that Defendants violated Section 11(c)(1) of the Act, 29 U.S.C. § 660(c)(1) when it suspended and then terminated Ms. Nuñez because she engaged in the protected activities of making a good faith health and safety complaint to Defendants Thompson and CHCR and for refusing to attend the in-person meeting.

DEFENDANTS' VIOLATIONS OF THE ACT

77. The Secretary incorporates by reference paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. The activities described in paragraphs 43 and 53-56 constitute the filing of a complaint under the Act and the exercise of rights protected by the Act.

79. The activities described in paragraphs 43-60 constitute a justified work refusal, which is a separate exercise of a right protected by the Act.

80. Defendants suspended Ms. Nuñez because she exercised rights and engaged in activities protected by the Act, in violation of section 11(c) of the Act, 29 U.S.C. § 660(c)(1).

81. Defendants terminated Ms. Nuñez because she exercised rights and engaged in activities protected by the Act, in violation of section 11(c) of the Act, 29 U.S.C. § 660(c)(1).

82. To date, Defendants have failed to reinstate Ms. Nuñez and to compensate her for lost wages and other damages suffered as a result of the company's unlawful actions, in continued violation of section 11(c)(1) of the Act, 29 U.S.C. § 660(c)(1).

RELIEF SOUGHT

By the acts described in paragraphs 33 through 82, Defendants discharged or discriminated against Ms. Nuñez, because of her exercise of rights under, or related to, the Act. Defendant did engage in conduct in violation of Section 11(c) of the Act, 29 U.S.C. § 660(c).

WHEREFORE, cause having been shown, Plaintiff prays for judgment:

(a) Permanently enjoining and restraining Defendants, their officers, agents, servants, employees and those persons in active concert or participation with them, from violating the provisions of section 11(c)(1) of the Act, 29 U.S.C. § 660(c);

(b) Ordering Defendants to pay damages to Ms. Nuñez for all past and future lost wages and benefits that resulted from her termination, and prejudgment and post-judgment interest thereon, as authorized by section 11(c) of the Act;

(c) Ordering Defendants to provide appropriate front pay (also known as economic reinstatement) to Ms. Nuñez, in lieu of reinstatement to her previous position;

(d) Ordering Defendants to expunge from all personnel and company records references to the circumstances giving rise to Defendants' unlawful suspension and termination of Ms. Nuñez;

(e) Ordering Defendants to provide compensation to reimburse Ms. Nuñez for any costs, expenses, and/or other pecuniary losses she incurred as a result of Defendants' unlawful discriminatory actions;

(f) Ordering Defendants to provide compensation for non-pecuniary losses, including emotional pain and distress;

(g) Ordering Defendants to pay additional compensation to Complainant as exemplary or punitive damages in an amount to be determined at trial;

(h) Ordering the posting of a notice for employees stating that Defendants will not in any manner discriminate against any employee for engaging in activities protected by Section 11(c) of the Act, 29 U.S.C. § 660(c);

(i) Awarding Plaintiff for all costs incurred in this action; and

(j) Ordering such and further relief as may be necessary and appropriate.

DATED: June 1, 2021
New York, New York

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Certificate of Service

I certify that on June 1, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and further certify that I have e-mailed the foregoing to:

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U.S. Equal Employment Opportunity Commission

Federal Laws Protect You Against Employment Discrimination During the COVID-19 Pandemic

Federal laws protect you against employment discrimination. This Fact Sheet explains how these laws provide **rights** that can help protect you at work during the COVID-19 pandemic. They are especially important if you are **being harassed**, if you are **"high-risk" and need extra protection from getting sick**, if your employer is **not allowing you to work**, or if you **need a modification of your employer's COVID-19 safety requirements**. These laws protect you from retaliation for asserting your (or your coworkers') rights to be free from discrimination.

I Am Being Harassed

The COVID-19 pandemic has resulted in an increase in some types of **harassment**. Antidiscrimination laws protect you from being harassed at work because of your national origin; race; color; religion; older age (age 40 and older); sex (including pregnancy, sexual orientation, and gender identity); genetic information; or disability. For example, being harassed at work because you are Asian American can violate the law. If you tell your employer that someone is harassing you at work for any of these reasons, your employer needs to find out if the harassment is occurring and, if so, take steps to stop it.

I Am High Risk and I Need Extra Protection From Getting Sick

If you have a medical condition that makes you "high risk," or a mental health condition that makes it difficult to come to work, you may be able to work from home as a "reasonable accommodation." However, to be eligible you must be able to do your regular job from home and your medical condition must be a "disability" under the Americans with Disabilities Act. **Many medical conditions can be ADA "disabilities" even if they are not permanent or severe.** You might also be able to work from home if you are pregnant, if your employer is letting other people work from home.

If you need an accommodation, you should ask your employer for one. If you can't do your job from home, you might be able to get a different accommodation, such as protective equipment or scheduling changes.

I Am Not Being Allowed to Work

An employer can't stop you from working altogether, even during the pandemic, just because you are older, pregnant, have a disability, or you take care of someone with a disability. Your employer can make you stay home if you have COVID-19 and are currently infectious. Your employer can also make you stay home if you have a disability that makes you vulnerable, but only if coming to work would create a **significant** risk of **substantial** harm to your health that can't be reduced through reasonable accommodation. And, even if you can't come to work because of a disability, you might be able to work from home as a reasonable accommodation. Again, you should talk with your employer if you need a reasonable accommodation. You and your employer may find it helpful to consult the Job Accommodation Network for types of accommodations, at **https://askjan.org/ (https://askjan.org/)** .

I Need a Modification of My Employer's COVID-19 Safety Requirements

If you need a modification to your employer's safety requirements or equipment because of a medical condition or a religious belief, practice, or observance, you might be able to get a reasonable accommodation. For example, you might be able

to get a different mask as a reasonable accommodation. Or, if you did not take a COVID-19 vaccine because of your disability or religious belief, practice, or observance, you might be able to get an exception to your employer's vaccination requirement, and instead ask to use masks, social distancing, schedule changes, or reassignment to stay safe at work.

Find Out More

For more information about your rights, visit the Equal Employment Opportunity Commission (EEOC) website at **www.eeoc.gov (https://www.eeoc.gov/)** , or call 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

U.S. Equal Employment Opportunity Commission

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

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at **www.eeoc.gov/coronavirus (https://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 (https://www.eeoc.gov/disability-discrimination)** .
- 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html)** ."

- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act)** [**PDF version (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)**]) ("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 (https://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 (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB)** 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 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1) , 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.2)** because **an individual with the virus will pose a direct threat (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1)** 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** 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 (https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2)** 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 (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html) 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 (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html)** 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6)** .

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 (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html)** .

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 (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** 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 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q9)** . 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html) .

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 applicant who 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 (http://www.askjan.org/)*** *. JAN's materials specific to COVID-19 are at* ***https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)*** *.*

D.1. If a job may only be performed at the workplace, are there reasonable accommodations (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general) for individuals with disabilities, absent undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-

guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue) , 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 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17)** 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/index.html)** 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 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q20)** . The employer **may discuss (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** 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 (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17)** to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. **Possible questions (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.2)** 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 (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue)**," 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 (https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf) " or "essential critical workers (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html) " 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 (https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19)** , or other prohibited bases.

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

- Anti-harassment **policy tips (https://www.eeoc.gov/employers/small-business/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 (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** ;
  - **checklists (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** for employers who want to reduce and address harassment in the workplace; and
  - **chart (https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies)** 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#E.2)** 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 (https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-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 (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html)** 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 (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) 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 (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.6)** to help decide if

the individual has a disability and if there is a reasonable accommodation, barring **undue hardship (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D)** , that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) 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) (https://www.ecfr.gov/cgi-bin/text-idx?SID=28cadc4b7b37847fd37f41f8574b5921&mc=true&node=pt29.4.1630&rgn=div5#se29.4.1630_12)** (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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1) 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 (http://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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.8)** . 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 (https://www.cdc.gov/coronavirus/2019-ncov/community/high-risk-workers.html?deliveryName=USCDC_2067-DM29601)** 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.5)** 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 (https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace)** .

H. Age

H.1. The CDC has explained (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) 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 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1)** 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**

(https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities) for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html) ? *(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 (https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law)** .

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.

K. Vaccinations

*The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also **Section J, EEO rights relating to pregnancy**).*

*This section was originally issued on Dec. 16, 2020, and was clarified and supplemented on May 28, 2021. The May 2021 updates are consistent in substance with the original technical assistance and also address new subjects. (See, e.g., discussion of vaccine incentives under the ADA (starting at K.16) and under GINA (starting at K.18)). On May 13, 2021, the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) issued updated guidance for fully vaccinated individuals, exempting them from masking requirements "**except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html)**." The EEOC is considering the impact of this CDC guidance on EEOC's COVID-19 technical assistance provided to date.*

*The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of three COVID-19 vaccines. These three vaccines were granted Emergency Use Authorizations (EUA) by the FDA. It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach. Individuals seeking more information about the legal implications of EUA or the FDA approach to vaccines can visit the **FDA's EUA page (https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained)**. The EEOC's jurisdiction is limited to the federal EEO laws as noted above.*

Indeed, other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the Safer Federal Workforce Task Force for additional guidance on agency operations during the COVID-19 pandemic.

The EEOC questions and answers provided here only set forth applicable EEO legal standards, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

The technical assistance on vaccinations below was written to help employees and employers better understand how federal workplace discrimination laws apply during the COVID-19 pandemic caused by the SARS-CoV-2 virus and its variants. The technical assistance here is based on and consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance. Analysis of how it applies in any specific instance should be conducted on an individualized basis.

COVID–19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? *(5/28/21)*

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below**. These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? *(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated without violating the EEO laws, especially the ADA and GINA? *(5/28/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines, as discussed in **K.16 – K. 21**. As of May 2021, the federal government is providing vaccines at no cost to everyone ages 12 and older.

There are many resources available to employees seeking more information about how to get vaccinated:

- The federal government's online **vaccines.gov (https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **https://www.vacunas.gov (https://www.vacunas.gov)** for Spanish). Individuals also can text their zip code to "GETVAX" (438829) – or "VACUNA" (822862) for Spanish – to find three vaccination locations near them.
- CDC's website offers a link to a listing of **local health departments (https://www.cdc.gov/publichealthgateway/healthdirectories/index.html)**, which can provide more information about local vaccination efforts.
- In addition, the CDC offers **background information for employers about workplace vaccination programs (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html)**. The CDC provides a complete communication "tool kit" for employers to use with their workforce to educate people about getting the COVID-19 vaccine. (Although originally written for essential workers, it is useful for all workers.) *See* **CDC's Essential Workers COVID-19 Toolkit (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717640568)**. Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance or to ensure nondiscrimination for an employee who is pregnant.
- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no or limited English and find it difficult to make an appointment for a vaccine over the phone. The CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.
- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources available in their community serving vaccination sites and offer time-off for vaccination, particularly if transportation is not readily available outside regular work hours.

General

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? *(5/28/21)*

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(12/16/20, updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r) (https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml)** . This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as:

whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(12/16/20, updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know **how to recognize an accommodation request from an employee with a disability (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website (https://www.askjan.org)** as a resource for different types of accommodations. JAN's materials about COVID-19 are available at **https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)** . Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources (https://www.osha.gov/SLTC/covid-19/)** . Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations (https://www.cdc.gov/coronavirus/2019-ncov/)** when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42)** or **to retaliate against an employee for requesting an accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19)** .

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process?
(12/16/20, updated 5/28/21)

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)** is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination"

under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5**.) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? *(12/16/20, updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 – 17**.) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Under the ADA, is it a "disability-related inquiry" for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? *(12/16/20, updated 5/28/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*12/16/20*, *updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(12/16/20, updated 5/28/21)*

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees 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 such modifications are 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**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as "family medical history") and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? *(12/16/20, updated 5/28/21)*

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee's genetic information, such as asking about the employee's family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC's Pre-vaccination Checklist (https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a doctor, pharmacy, health agency, or another health care provider in the community? *(12/16/20, updated 5/28/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a doctor, pharmacy, or other third party is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their

own from a pharmacy, public health department, or other health care provider in the community? *(5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? *(5/28/21)*

Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? *(5/28/21)*

Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19

vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent? *(5/28/21)*

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? *(5/28/21)*

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY PAYNE **v.** **WOODS SERVICES, INC., WOODS SERVICES MEDICAL PRACTICE GROUP, LLC, ABRAHAM KAMARA, and JOHN DOES 1-5 AND 6-10**	**CIVIL ACTION** **NO. 20-4651**

MEMORANDUM RE MOTION TO DISMISS

Baylson, J. **February 16, 2021**

I. Introduction

Plaintiff Anthony Payne brings this case against his employer after having been fired for refusing to return to work. At the time, Payne was under instructions to remain in quarantine after testing positive for COVID-19. Defendants filed the present Motion to Dismiss, seeking dismissal of Payne's Complaint in its entirety. For the reasons that follow, Defendants' Motion will be granted in part, and denied in part.

II. Facts and Procedural History

Based on the allegations in Plaintiff Anthony Payne's First Amended Complaint (ECF 5, Compl.) which this Court must accept as true for purposes of Defendants' Motion to Dismiss, the relevant facts are as follows. Defendants Woods Services, Inc. and Woods Services Medical Practice Group, LLC are "corporation[s] providing integrated health care services and advocacy for children and adults with disabilities." Compl. ¶ 6–7. Abraham Kamara was employed as a Residential Director by Woods Services. Compl. ¶ 9. John Does 1-5 and 6-10 "are individuals and/or entities who, on the basis of their direct acts or on the basis of respondeat superior, are

answerable to the plaintiff in this matter." Compl. ¶ 10. Plaintiff Anthony Payne was employed as a Residential Counselor by Defendants at their Langhore, PA facility. Compl. ¶ 11.

On April 1, 2020, six patients at the Langhorne facility, all of whom Plaintiff had worked with directly, tested positive for COVID-19. Compl. ¶ 14–15. Plaintiff discussed this exposure with his doctor who advised him to get tested and quarantine for fourteen days. Compl. ¶ 16. Plaintiff notified Defendants of his doctor's advice. Compl. ¶ 17. On April 6, 2020, Plaintiff was tested for COVID-19 at work, and the following day a nurse notified Plaintiff that he had tested positive. Compl. ¶ 18–19. The nurse directed Plaintiff to quarantine for fourteen days. Compl. ¶ 19. Six days later, on April 13, 2020, Kamara told Plaintiff he had been cleared and should return to work. Compl. ¶ 20. Plaintiff responded that he could not return to work because he had not completed his quarantine. Compl. ¶ 21. Kamara responded that if he did not return, his absence would be considered a "call-out," and Plaintiff again reiterated the advice of the nurse and referenced guidance from the Centers for Disease Control. Compl. ¶ 22–23. The following day, Plaintiff did not return to work and Kamara fired him. Compl. ¶ 24–25.

Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). Compl. ¶ 4. The EEOC issued a "right to sue" notice on September 29, 2020. Id. On September 22, 2020, Plaintiff filed this lawsuit. See ECF 1. His Amended Complaint alleges thirteen counts against Defendants:

1. **Count I**: Interference in violation of the Family and Medical Leave Act ("FMLA");

2. **Count II**: Retaliation in violation of the FMLA;

3. **Count III**: Interference in violation of the Families First Coronavirus Response Act ("FFCRA");

4. **Count IV**: Retaliation in violation of the FFCRA;

5. **Count V**: Retaliation in violation of the Pennsylvania Whistleblower Law ("PWL");

6. **Count VI**: Discrimination in violation of the Americans with Disabilities Act ("ADA");

7. **Count VII**: Discrimination based on Perception of Disability in violation of the ADA;

8. **Count VIII**: Retaliation in violation of the ADA;

9. **Count IX**: Disability Discrimination in violation of the Pennsylvania Human Relations Act ("PHRA");

10. **Count X**: Discrimination based on Perception of Disability in violation of the PHRA;

11. **Count XI**: Retaliation in violation of the PHRA;

12. **Count XII**: Aiding and Abetting as to Defendant Kamara in violation of the PHRA; and

13. **Count XIII**: Request for Equitable Relief.[1]

On November 25, 2020, Defendants filed the present Motion to Dismiss seeking to dismiss Plaintiff's Complaint in its entirety with prejudice. ECF 9, Def. Mot. Plaintiff responded on December 14, 2020. ECF 10, Opp'n. Defendants filed a Reply on December 22, 2020. ECF 11, Reply. Plaintiff filed a Motion for Leave to File a Sur-Reply on December 23, 2020. ECF 12.

III. Legal Standard

Dismissal under Rule 12(b)(6) is appropriate when a plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662 (2009) (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Factual allegations must be "enough to raise a right to relief above the speculative level," and a "complaint

[1] The Court notes that this is not a claim for a relief but is a request for various equitable remedies. It is not addressed in Defendants' Motion and the Court will not address it here.

may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

"The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft, 556 U.S. at 678; see also Bell Atl. Corp., 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). It is the defendant's burden to show that a complaint fails to state a claim. Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005).

IV. Discussion

a. FMLA

Plaintiff brings an interference and a retaliation claim under the FMLA. To succeed on an FMLA interference claim, a plaintiff must establish that:

> (1) he or she was an eligible employee under the FMLA; (2) the defendant was an employer subject to the FMLA's requirements; (3) the plaintiff was entitled to FMLA leave; (4) the plaintiff gave notice to the defendant of his or her intention to take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled under the FMLA.

Capps v. Mondelez Global, LLC, 847 F.3d 144, 155 (3d Cir. 2017) (quotation omitted). Under the first prong of this test, to demonstrate that one is an eligible employee, a plaintiff must show that he was entitled to leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of [his] position." 29 U.S.C. § 2612(a)(1)(D). In this context, a "serious health condition" is defined as "an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health

care provider as defined in § 825.115." 29 C.F.R. § 825.113(a). "A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave." 29 C.F.R. § 825.113(c) (emphasis added).

"To prevail on a retaliation claim under the FMLA, the plaintiff must prove that (1) [he] invoked [his] right to FMLA-qualifying leave, (2) [he] suffered an adverse employment decision, and (3) the adverse action was causally related to [his] invocation of rights." Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 301–302 (3d Cir. 2012). In Isley v. Aker Phila. Shipyard, Inc., Judge McHugh noted that "[w]hether entitlement to FMLA leave is actually an element of a retaliation claim appears to be an open question of law." 275 F. Supp. 3d 620, 634 (E.D. Pa. 2017).

When "giving notice of the need for FMLA leave," an employee must "state a qualifying reason for the needed leave." 29 C.F.R. § 825.301. Such notice must "allow the employer to determine whether the leave qualifies under the Act." Id. "In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying." Id. An employer may require the employee to provide a certification issued by a health care provider. 29 U.S.C. § 2613(a).

Defendants argue that Plaintiff's failure to allege a serious health condition is fatal to both his interference and retaliation claims under the FMLA. Plaintiff argues that Defendants were required to provide Plaintiff notice of the deficiency in his request for leave, and allow him an opportunity to cure that deficiency. He argues that their failure to do so makes it inappropriate to dismiss his claims at this stage.

In Hansler v. Lehigh Valley Hosp. Network, 798 F.3d 149 (3d Cir. 2015), the Third Circuit discussed the process for allowing an employee to cure a certification from a health care provider when the submitted certification "is vague, ambiguous, or non-responsive (or incomplete[])." Id. at 155. The District Court had denied the plaintiff's claims of interference and retaliation under the FMLA, finding that the certification provided by the plaintiff was not vague, but actually demonstrated that the plaintiff was not eligible for leave. Id. at 154. The Third Circuit reversed and held that the plaintiff was entitled to "cure" her certification. Id. In doing so, the Court noted that the plaintiff had "allege[d] she attempted to invoke her right to leave, she was not advised of deficiencies in her medical certification, she was not provided a cure period, and she was fired a few weeks later as a result of her leave request." Id. at 159. The Third Circuit found these allegations were sufficient to find that the plaintiff "might be able to show that [the defendant] had a retaliatory motive and that the stated reason for termination was pretextual." Id. The circumstances in Hansler were slightly different than in this case, as Defendants note, because the Court was considering the ambiguity of a health care provider's certification. However, the Third Circuit relied on the implementing regulations of the FMLA and noted that they "govern how employers are to respond to perceived deficiencies in employee notices generally, and in medical certifications in particular." Id. at 153 (emphasis added). Thus, based on the FMLA regulations, the reasoning in Hansler applies here even though there was no request for a medical certification, only a request from Plaintiff for leave.

Following the reasoning in Hansler, the Court finds that dismissal of Plaintiff's FMLA interference and retaliation claims at this stage would be improper. As in Hansler, Plaintiff has alleged a request for leave. Defendants did not provide an explanation of any deficiencies in Plaintiff's request, or allow an opportunity to cure any such deficiencies, as the FMLA regulations

require. Plaintiff was fired the day after his request. Therefore, Plaintiff has adequately pled his claims of interference and retaliation under the FMLA, and the Motion to Dismiss will be denied with respect to Counts I and II.

b. FFCRA

The FFCRA includes both the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA"). See Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020) ("FFCRA"). The ESPLA requires covered employers to provide paid sick leave to employees who meet one of the following conditions:

> (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
>
> (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
>
> (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
>
> (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
>
> (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
>
> (6) The employee is experiencing any other 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.

FFCRA § 5102. However, there is an exception for "an employee who is a health care provider or an emergency responder." Id. The FFCRA specifies that "health care provider" has the same definition as in the FMLA. FFCRA § 5110 (citing 29 U.S.C. § 2611). The FMLA defines "health care provider" as: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine

or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611.

The FFCRA also includes a provision which allows the Secretary of Labor to issue regulations "to exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out." FFCRA § 5111. Pursuant to this portion of the law, the Department of Labor issued a Final Rule in April 2020 which defines "health care provider" for the purposes of the FFCRA as follows:

> anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions,

85 Fed. Reg. 19,326, 19,351 (§ 826.25) (Apr. 6, 2020) ("April Rule").

On August 3, 2020, Judge Oetken of the Southern District of New York struck down this definition in a challenge brought by the State of New York under the Administrative Procedure Act, finding that it was not consistent with the FFCRA. See New York v. United States Dep't of Labor, 477 F. Supp. 3d 1, 15 (S.D.N.Y. 2020). Thereafter, the Department of Labor revised the definition of health care provider, and the new Rule took effect on September 16, 2020. See 29 C.F.R. § 826.30 ("September Rule").

The parties dispute which definition of "health care provider" applies, and as a result, whether Plaintiff is excluded from bringing claims under the ESPLA. Defendants argue that the definition in the April Rule applies because it was in effect at the time Plaintiff was fired. They

argue that Plaintiff falls within this definition and is therefore exempt from the ESPLA. In the alternative, Defendants argue that Plaintiff also meets the definition in the September Rule. Plaintiff argues that the Court must apply the definition in the FFCRA because the April Rule was invalidated, and the September Rule was not in place at the time of his firing and is not retroactive.

The Court agrees that the definition of "health care provider" in the FFCRA is the appropriate definition to apply here. Judge Oetken provided a detailed analysis of why the definition in the April Rule was "unambiguously forclose[d]" by the text of the FFCRA. New York, 477 F. Supp. 3d at 13. In doing so, the Court explained that the definition in the April Rule "hinges entirely on the identity of the employer" and "includes employees whose roles bear no nexus whatsoever to the provision of healthcare services, except the identity of their employers, and who are not even arguably necessary or relevant to the healthcare system's vitality." Id. at 14–15. The Department of Labor conceded that even "an English professor, librarian, or cafeteria manager at a university with a medical school would all be 'health care providers' under the Rule." Id. at 14.

That the April Rule was in place at the time of Plaintiff's firing is irrelevant when the Rule itself was not lawfully promulgated. The Court further agrees that because the September Rule was not yet in effect at the time of Plaintiff's firing, and it does not have a retroactive application, the definition in the FFCRA itself is the one that the Court should apply. That definition includes: "(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611. "Any other person capable of providing health care services" includes only specific professions such as podiatrists, dentists, and nurse practitioners. 29 C.F.R. § 825.125. As a "Residential Counselor," Plaintiff

does not meet this definition. He is not a "health care provider" and therefore is not exempt from the provisions of the FFCRA. The Motion to Dismiss Counts III and IV will be denied.

c. PWL

The PWL provides that:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste by a public body or an instance of waste by any other employer as defined in this act.

43 P.S. § 1423. Defendants make three arguments regarding Plaintiff's claim under the PWL: (1) that they are not a "public body," (2) that Plaintiff has not adequately pled wrongdoing, and (3) that Plaintiff has not adequately pled waste.

The PWL definition of "public body" includes "[a]ny other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body." 43 P.S. § 1422. Defendants argue that they are not a "public body" and therefore not subject to the PWL. They argue that receiving Medicare and Medicaid payments is not sufficient for an organization to meet the definition of "public body." Plaintiff argues that whether Defendants are a public body is an issue of fact which they should be permitted to explore through discovery regarding Defendants' funding sources. Plaintiff notes that his Complaint does not include reference to Medicare and Medicaid funding, but if there is evidence that Defendants receive Medicare and Medicaid funding, it would support a finding that Defendants are a public body.

On this subject, Plaintiff's Complaint includes the following allegation:

> As entities funded by the Commonwealth of Pennsylvania and/or its subdivisions, Defendants WSI and WSMP (collectively, the "Woods Defendants") are "public bodies" such that their employees are protected by the PWL. See Riggio v. Burns, 711 A.2d 497, 500 (Pa. Super. 1998) (en banc) (receipt of government funds made hospital a "public body" under the PA Whistleblower Law).

Compl. ¶ 8. The Court need not resolve whether receipt of Medicare and Medicaid payments is sufficient to consider Defendants a "public body," because Plaintiff has not alleged as much. Plaintiff has only alleged the legal conclusion that Defendants are a "public body" and provided no further supporting facts. See Westawski v. Merck & Co., No. 14-3239, 2015 WL 463949, at *11 (E.D. Pa. Feb. 4, 2015) (Beetlestone, J.) (dismissing claim where complaint merely stated, "Defendant [] qualifies as a 'public employer' for purposes of the Pennsylvania Whistleblower Act because Defendant receives a substantial amount of public funds, both state and federal"). Therefore, Plaintiff's Count V will be dismissed without prejudice. As Plaintiff's claim fails on the issue of whether he properly alleged that Defendants are a "public body," the Court need not address Defendants' arguments regarding wrongdoing and waste.

d. ADA

i. Disability Discrimination

"To establish a prima facie case of discrimination, a plaintiff must show (1) that he is disabled within the meaning of the ADA, (2) that he is otherwise qualified for the job, with or without reasonable accommodations, and (3) that he was subjected to an adverse employment decision as a result of discrimination." Sulima v. Tobyhanna Army Depot, 602 F.3d 177, 185 (3d Cir. 2010). An individual is disabled if he has "(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." 42 U.S.C. § 12102(1). Plaintiff's Complaint includes Counts alleging "disability discrimination" and "perception of

disability" discrimination, but because the present Motion and Response discuss all three definitions of disability, the Court will do so as well.

In 2008, Congress amended the ADA and "expanded the statute's non-exhaustive list of 'major life activities' and declared that the definition of disability shall be construed in favor of broad coverage of individuals under [the] Act, to the maximum extent permitted by the terms of [the] Act." Mills v. Temple Univ., 869 F. Supp. 2d 609, 620 (E.D. Pa. 2012) (Yohn, J.) (quotation omitted). A "record of" claim of discrimination requires a plaintiff to prove that he has a "history of, or had been misclassified as having, an impairment that substantially limited a major life activity." Eshelman v. Agere Sys., 554 F.3d 426, 437 (3d Cir. 2009) (quotation omitted).

"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 [the ADA] 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." 42 U.S.C. § 12102(3)(A). "To adequately plead that an employer 'regarded' an employee as having a qualifying disability, the plaintiff must allege (1) that the employer believed that a wholly unimpaired plaintiff had an impairment that substantially limited at least one major life activity, or (2) that the employer believed an employee's actual impairment to limit major life activities when it in fact did not." Kurylo v. Parkhouse Nursing & Rehab. Ctr., L.P., No. 17-4, 2017 WL 1208065, at *5 (E.D. Pa. April 3, 2017) (O'Neill, J.).

The prohibition against "regarded as" discrimination does "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. § 12102(3)(B). Because it is a defense, "it is the [defendant's] burden to demonstrate that the impairment would be both transitory and minor."

Cook v. City of Phila., 94 F. Supp. 3d 640, 645 n.4 (E.D. Pa. 2015) (Kearney, J.). In Cook, the Court explained that it was inappropriate to grant a Motion to Dismiss when there was "nothing on the face of the complaint to indicate that [the plaintiff's] 'regarded as' disability [was] 'transitory and minor.'" Id.

Defendants argue that Plaintiff has not alleged that his COVID-19 diagnosis limited any major life activities, that he had a history of disability, or that he had any limitation that went beyond being transitory and minor. Plaintiff argues that when Congress amended the ADA, it made clear that the definition of disability should be interpreted broadly. Based on the expanded interpretation of disability he argues that he meets all three definitions of disability, especially at this early stage. Plaintiff argues that whether his disability is "transitory and minor" is a defense and cannot be proven on the facts alleged in the Complaint.

On this subject, Plaintiff has alleged that:

> As a result of his COVID-19 diagnosis, Plaintiff was disabled within the meaning of the ADA and/or PHRA.
>
> In the alternative, Plaintiff was perceived as disabled by the defendants and/or the defendants held perceptions of, or regarding, Plaintiff's disability and/or his continued utility as an employee.

Compl. ¶ 26–27. These allegations are "[t]hreadbare recitals of the elements of [the] cause of action and need not be accepted as true for purposes of this Motion. Ashcroft, 556 U.S. at 678. Plaintiff has not alleged any facts regarding his symptoms or impairments as a result of his COVID-19 diagnosis, and has not alleged what "major life activity" or activities he was unable to perform as a result. While Plaintiff is correct that, given the lack of details regarding his disability in the Complaint, the Court could not determine whether his diagnosis is transitory and minor, he has not sufficiently alleged facts supporting the conclusion that he was "regarded as" disabled. Plaintiff has not alleged any facts related to his employer perceiving him as disabled. If anything,

the facts in the Complaint suggest that his employer did not consider him to be disabled, as they requested that he return to work. Therefore, Count VI and VII will be dismissed without prejudice.

ii. Retaliation

"To establish a prima facie case of retaliation under the ADA, a plaintiff must show: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). "[U]nlike a general ADA discrimination claim, an ADA retaliation claim does not require that the plaintiff demonstrate a disability within the meaning of the ADA, but only that the plaintiff ha[d] a reasonable, good faith belief that he was entitled to request the reasonable accommodation he requested." Sulima, 602 F.3d at 188 (quotation omitted). "Protected activity" under the ADA "includes retaliation against an employee for requesting an accommodation." Id. at 188–89.

"FMLA leave is not a reasonable accommodation." Rutt v. City of Reading, No. 13-4559, 2014 WL 5390428, at *4 (E.D. Pa. Oct. 21, 2014) (Stengel, J.). However, "the ADA can complement FMLA leave. The ADA may require employers to make reasonable accommodations to employees returning from FMLA leave." Id. at *5 (quoting 29 C.F.R. § 825.702(d)). In Rutt, the plaintiff "allege[d] that she requested a light duty assignment." Id. "According to the complaint, defendants denied her requests without engaging in the interactive process." Id. The Court found that these allegations were sufficient to allege a failure to consider a reasonable accommodation.

Defendants argue that Plaintiff has not adequately alleged protected activity because he alleges the same facts to support his FMLA and ADA claims. Plaintiff argues that Defendants

"failed to engage in any interactive process as required when an employee puts an employer on notice of a medical condition that may require accommodation." Opp'n 23.

Here, Plaintiff has not alleged any facts which allow the Court to find that he made a request for a reasonable accommodation separate from his request for FMLA leave. He alleges the exact same facts in support of both claims. There is only one "request" alleged and that is to finish the remainder of his quarantine. There is nothing in his Complaint to suggest that his ADA request was a complement to his FMLA request. Plaintiff was not entitled to engage in an "iterative process" with his employer, because he did not actually request an accommodation. Therefore, Count VIII will be dismissed without prejudice.

e. PHRA

i. Disability Discrimination and Retaliation

Many Courts have stated that "[t]he PHRA [was] basically the same as the ADA in relevant respects." Rinehimer v. Cemcolift, 292 F.3d 375, 382 (3d Cir. 2002) (quotation omitted). However, after the ADA was amended, "[t]he majority of courts in the Eastern District of Pennsylvania have concluded that because the Pennsylvania legislature has not enacted a similar amendment to the PHRA, the disability prong of discrimination analysis under the PHRA should be analyzed in the same manner as pre-ADAAA claims." Gardner v. SEPTA, 410 F. Supp. 3d 723, 734 n. 5 (E.D. Pa. 2019) (Kenney, J.).

Under the original, more stringent definition, "[a] nonpermanent or temporary condition cannot be a substantial impairment under the ADA." Sulima, 602 F.3d at 185. As explained above, Plaintiff has not alleged any facts regarding the seriousness of his disability. Further, if he cannot meet the definition of disability under the modified, broader definition in the ADA, he cannot meet the stricter definition under the PHRA. Therefore, Counts IX and X will be dismissed

without prejudice. The amendments to the ADA are not relevant to Plaintiff's retaliation claim. Plaintiff's PHRA retaliation claim is coextensive with his ADA retaliation claim and therefore Count XI will be dismissed without prejudice for the reasons explained above.

ii. Aiding and Abetting

Under the PHRA, it is unlawful

> [f]or any person, employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

"Although the PHRA permits claims against individuals for aiding or abetting an unlawful discriminatory practice, see 43 Pa. Stat. Ann. § 955(e), individual employees cannot be held liable if the employer is not liable for a discriminatory practice." Deans v. Kennedy House, Inc., 998 F. Supp. 2d 393, 414 n.20 (E.D. Pa. 2014) (Robreno, J).

As explained above, Plaintiff has not alleged sufficient facts to proceed with his discrimination and retaliation claims under the PHRA. Therefore, he has not alleged an underlying violation of the PHRA as required for his aiding and abetting claim to proceed. Count XII will also be dismissed without prejudice.

V. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss will be granted in part, and denied in part. In addition, Plaintiff's Motion for Leave to File a Sur-Reply will be granted. An appropriate Order follows.

Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA will update this guidance over time to reflect developments in science, best practices, and standards.

Guidance posted **January 29, 2021**

Summary of changes **June 10, 2021**

- Focus protections on unvaccinated and otherwise at-risk workers
- Encourage COVID-19 vaccination
- Add links to guidance with the most up-to-date content

On this Page

Executive Summary

This guidance is intended to help employers and workers not covered by the Occupational Safety and Health Administration's (OSHA's) COVID-19 Emergency Temporary Standard (ETS) to identify COVID-19 exposure risks to workers who are unvaccinated or otherwise at-risk, and to help them take appropriate steps to prevent exposure and infection. *See* Text Box: Who Are At-Risk Workers?

CDC's Interim Public Health Recommendations for Fully Vaccinated People explain that under most circumstances, fully vaccinated people need not take all the precautions that unvaccinated people should take. For example, CDC advises that most fully vaccinated people can resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance. People are considered fully vaccinated for COVID-19 two weeks or more after they have completed their final dose of a COVID-19 vaccine authorized by the U.S. Food and Drug Administration in the United States. However, CDC suggests that people who are fully vaccinated but still at-risk due to immunocompromising conditions should discuss the need for additional protections with their healthcare providers. CDC continues to recommend precautions for workers in certain transportation settings.

Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. This guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces).[1]

This guidance contains recommendations as well as descriptions of mandatory safety and health standards, the latter of which are clearly labeled throughout as "**mandatory OSHA standards**." The recommendations are advisory in nature and informational in content, and are intended to assist employers in providing a safe and healthful workplace free from recognizedhazards that are causing or likely to cause death or serious physical harm.

Who Are "At-Risk Workers"?

Some conditions, such as a prior transplant, as well as prolonged use of corticosteroids or other immune-weakening medications, may affect workers' ability to have a full immune response to vaccination. See the CDC's page describing Vaccines for People with Underlying Medical Conditions, and further definition of People with Certain Medical Conditions. Under the Americans with Disabilities Act (ADA), workers with disabilities may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

COVID-19 and Prevention

COVID-19 is a highly infectious disease that is spread from person to person, including through aerosol transmission of particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 is highly transmissible and can be spread by people who have no symptoms. Particles containing the virus can travel more than 6 feet, especially indoors and in dry conditions (relative humidity below 40%), and can be spread by individuals who do not know they are infected.

Vaccines authorized by the U.S. Food and Drug Administration in the United States are highly effective at protecting most fully vaccinated people against symptomatic and severe COVID-19, and OSHA encourages employers to take steps to make it easier for workers to get vaccinated. However, for workers who are unvaccinated or who are otherwise at-risk, OSHA recommends implementing multiple layers of controls. Key controls to help protect unvaccinated or otherwise at-risk workers include separating from the workplace all infected people, all people experiencing COVID symptoms, and any unvaccinated people who have had a close contact with someone with COVID-19, implementing physical distancing, maintaining ventilation systems, and properly using face coverings or personal protective equipment (PPE) when appropriate.

Finally, OSHA provides employers with specific guidance for environments at a higher risk for exposure to or spread of COVID-19, primarily workplaces where unvaccinated or otherwise at-risk workers are more likely to be in prolonged, close contact with other workers or the public.

Purpose

OSHA provides this guidance for employers as recommendations to use in protecting unvaccinated or otherwise at-risk workers. Employers and workers should use this guidance to determine any appropriate control measures to implement.

While this guidance addresses many workplaces, many healthcare workplace settings will be covered by the **mandatory OSHA COVID-19 Emergency Temporary Standard**. Pursuant to the Occupational Safety and Health Act (the OSH Act or the Act), employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of existing **mandatory OSHA standards**, the latter of which are clearly labeled throughout. The recommendations are advisory in nature and informational in content, and are intended to assist employers in recognizing and abating hazards likely to cause death or serious physical harm as part of their obligation to provide a safe and healthful workplace.

About COVID-19

COVID-19 is a highly infectious disease that is spread from person to person, including through aerosol transmission ofparticles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 is less commonly transmitted when people touch a contaminated object and then touch their eyes, nose or mouth. The virus that causes COVID-19 is highly transmissible and can be spread by people who have no symptoms and who do not know they are infected. Particles containing the virus can travel more than 6 feet, especially indoors and in dry conditions with relative humidity below 40%. The CDC estimates that over fifty percent of the spread of the virus is from individuals with no symptoms at the time of spread.

More information on COVID-19 is available from the Centers for Disease Control and Prevention.

What Workers Need To Know about COVID-19 Protections in the Workplace

COVID-19 spreads mainly among unvaccinated people who are in close contact with one another especially in poorly ventilated spaces.

Vaccination is the key in a multi-layered approach to protect workers. Learn about and take advantage of opportunities that your employer may provide to take time off to get vaccinated. Vaccines authorized by the U.S. Food and Drug Administration are highly effective at protecting vaccinated people against symptomatic and severe COVID-19 illness.According to the CDC, a growing body of evidence suggests that fully vaccinated people are less likely to have symptomatic infection or transmit the virus to others. See CDC's Guidance for Fully Vaccinated People.

If you are unvaccinated or otherwise at-risk (e.g., because of a prior transplant or other medical condition), you should follow recommended precautions and policies at your workplace. Many employers have established COVID-19 prevention programs that include a number of important steps to keep unvaccinated and otherwise at-risk workers safe. These COVID-19 prevention programs include measures such as telework and flexible schedules, enhanced cleaning programs with a focus on high-touch surfaces, engineering controls (e.g., ventilation), administrative policies (e.g., vaccination policies), personal protective equipment (PPE), face coverings, and physical distancing. Ask your employer about plans in your workplace. In addition, employees with disabilities who are at-risk may request reasonable accommodation under the ADA.

Even if your employer does not have a COVID-19 prevention program, if you are unvaccinated or otherwise at-risk, you can help protect yourself by following the steps listed below:

- Identify opportunities to get vaccinated. Ask your employer about opportunities for paid leave, if necessary, to get vaccinated and recover from any side effects.
- Properly wear a face covering over your nose and mouth. Face coverings are simple barriers worn over the face, nose and chin. They work to help prevent your respiratory droplets or large particles from reaching others.

If they are of high enough quality, they also provide a measure of protection to the people wearing them. CDC provides general guidance on masks. If you are working outdoors you may opt not to wear face coverings in many circumstances; however, you should be supported in safely continuing face covering use if you choose, especially if you work closely with other people.

- Stay far enough away from other people so that you are not breathing in particles produced by them – generally at least 6 feet (about 2 arm lengths), although this approach by itself is not a guarantee that you will avoid infection, especially in enclosed or poorly ventilated spaces. Ask your employer about possible telework and flexible schedule options at your workplace, and take advantage of such policies if possible. Perform work tasks, hold meetings, and take breaks outdoors when possible.
- Participate in any training offered by your employer/building manager to learn how rooms are ventilated effectively and notify the building manager if you see vents that are clogged, dirty, or blocked by furniture or equipment.
- Practice good personal hygiene and wash your hands often. Always cover your mouth and nose with a tissue, or the inside of your elbow, when you cough or sneeze, and do not spit. Monitor your health daily and be alert for COVID-19 symptoms (e.g., fever, cough, or shortness of breath). See CDC's Personal & Social Activities Guidance for Unvaccinated People.

COVID-19 vaccines are highly effective at keeping you from getting COVID-19. If you are not yet fully vaccinated, or are otherwise at risk, optimum protection is provided by using multiple layers of other interventions that prevent exposure and infection.

The Roles of Employers and Workers in Responding to COVID-19

Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.

CDC's Interim Public Health Recommendations for Fully Vaccinated People are directed at individuals and explains that fully vaccinated people can resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance. See CDC's Exceptions to COVID-19 Recommended Precautions for Fully Vaccinated People.

Except for workplace settings covered by OSHA's ETS and mask requirements for public transportation, most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated. Employers should still take steps to protect unvaccinated or otherwise at-risk workers in their workplaces, or well-defined portions of workplaces. [2]

Employers should engage with workers and their representatives to determine how to implement multi-layered interventions to protect unvaccinated or otherwise at-risk workers and mitigate the spread of COVID-19, including:

1. ***Grant paid time off for employees to get vaccinated***. The Department of Labor and OSHA, as well as other federal agencies, are working diligently to ensure access to COVID-19 vaccinations. CDC provides information on the benefits and safety of vaccinations. Businesses with fewer than 500 employees may be eligible for tax credits under the American Rescue Plan if they provide paid time off for employees who decide to receive the vaccine and to recover from any potential side effects from the vaccine.
2. ***Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work*** to prevent or reduce the risk of transmission of the virus that causes COVID-19. Ensure that absence policies are non-punitive. Eliminate or revise policies that encourage workers to come to work sick or when unvaccinated workers have been exposed to COVID-19. Businesses with fewer than 500 employees

may be eligible for refundable tax credits under the American Rescue Plan if they provide paid time off for sick and family leave to their employees due to COVID-19 related reasons. The ARP tax credits are available to eligible employers that pay sick and family leave for qualified leave from April 1, 2021, through September 30, 2021. More information is available from the IRS.

3. ***Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.*** A key way to protect unvaccinated or otherwise at-risk workers is to physically distance them from other unvaccinated or otherwise at-risk people (workers or customers) – generally at least 6 feet of distance is recommended, although this is not a guarantee of safety, especially in enclosed or poorly ventilated spaces.

   Employers could also limit the number of unvaccinated or otherwise at-risk workers in one place at any given time, for example by implementing flexible worksites (e.g., telework); implementing flexible work hours (e.g., rotate or stagger shifts to limit the number of such workers in the workplace at the same time); delivering services remotely (e.g., phone, video, or web); or implementing flexible meeting and travel options, all for such workers.

   At fixed workstations where unvaccinated or otherwise at-risk workers are not able to remain at least 6 feet away from other people, transparent shields or other solid barriers (e.g., fire resistant plastic sheeting or flexible strip curtains) can separate these workers from other people. Barriers should block face-to-face pathways between individuals in order to prevent direct transmission of respiratory droplets, and any openings should be placed at the bottom and made as small as possible. The posture (sitting or standing) of users and the safety of the work environment should be considered when designing and installing barriers, as should the need for enhanced ventilation.

4. ***Provide unvaccinated and otherwise at-risk workers with face coverings or surgical masks, unless their work task requires a respirator or other PPE.*** Such workers should wear a face covering that covers the nose and mouth to contain the wearer's respiratory droplets and help protect others and potentially themselves. Face coverings should be made of at least two layers of a tightly woven breathable fabric, such as cotton, and should not have exhalation valves or vents. They should fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face. CDC provides general guidance on masks.

   Employers should provide face coverings to unvaccinated and otherwise at-risk workers at no cost. Under federal anti-discrimination laws, employers may need to provide reasonable accommodation for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability or who need a religious accommodation under Title VII. In workplaces with employees who are deaf or hard of hearing, employers should consider acquiring masks with clear coverings over the mouth for unvaccinated and otherwise at-risk workers to facilitate lip-reading.

   Unless otherwise provided by federal, state, or local requirements, unvaccinated workers who are outdoors may opt not to wear face coverings unless they are at-risk, for example, if they are immunocompromised. Regardless, all workers should be supported in continuing face covering use if they choose, especially in order to safely work closely with other people.

   When an employer determines that PPE is necessary to protect unvaccinated and otherwise at-risk workers, the employer must provide PPE in accordance with **relevant mandatory OSHA standards** and should consider providing PPE in accordance with other industry-specific guidance. Respirators, if necessary, must be provided and used in compliance with 29 CFR 1910.134 (e.g., medical determination, fit testing, training on its correct use), including certain provisions for voluntary use when workers supply their own respirators, and other PPE must be provided and used in accordance with the applicable standards in 29 CFR 1910, Subpart I (e.g., 1910.132 and 133). There are times when PPE is not called for by OSHA standards or other industry-specific guidance, but some workers may have a legal right to PPE as a reasonable accommodation under the ADA. Employers are encouraged to proactively inform employees who have a legal right to PPE as a

reasonable accommodation for their disability about how to make such a request. Other workers may want to use PPE if they are still concerned about their personal safety (e.g., if a family member is at higher-risk for severe illness, they may want to wear a face shield in addition to a face covering as an added layer of protection). Encourage and support voluntary use of PPE in these circumstances and ensure the equipment is adequate to protect the worker.

For operations where the face covering can become wet and soiled, provide unvaccinated and otherwise at-risk workers with replacements daily or more frequently, as needed. Face shields may be provided for use with face coverings to protect them from getting wet and soiled, but they do not provide protection by themselves. See CDC's Guide to Masks.

Employers with workers in a setting where face coverings may increase the risk of heat-related illness indoors or outdoors or cause safety concerns due to introduction of a hazard (for instance, straps getting caught in machinery) may wish to consult with an occupational safety and health professional to help determine the appropriate face covering/respirator use for their setting.

5. ***Educate and train workers on your COVID-19 policies and procedures using accessible formats and in language they understand.*** Train managers on how to implement COVID-19 policies. Communicate supportive workplace policies clearly, frequently, and via multiple methods to promote a safe and healthy workplace. Communications should be in plain language that unvaccinated and otherwise at-risk workers understand (including non-English languages, and American Sign Language or other accessible communication methods, if applicable) and in a manner accessible to individuals with disabilities. Training should be directed at employees, contractors, and any other individuals on site, as appropriate, and should include:
   A. Basic facts about COVID-19, including how it is spread and the importance of physical distancing (including remote work), ventilation, vaccination, use of face coverings, and hand hygiene.
   B. Workplace policies and procedures implemented to protect workers from COVID-19 hazards.

   For basic facts, see About COVID-19 and What Workers Need to Know About COVID-19, above and see more on vaccinations, improving ventilation, physical distancing (including remote work), PPE, and face coverings, respectively, elsewhere in this document. Some means of tracking which workers have received this information, and when, could be utilized, by the employer, as appropriate.

   In addition, ensure that workers understand their rights to a safe and healthful work environment, whom to contact with questions or concerns about workplace safety and health, and their right to raise workplace safety and health concerns free from retaliation. This information should also be provided in a language that workers understand. (See Implementing Protections from Retaliation, below.) Ensure supervisors are familiar with workplace flexibilities and other human resources policies and procedures.

6. ***Suggest that unvaccinated customers, visitors, or guests wear face coverings***, especially in public-facing workplaces such as retail establishments, if there are unvaccinated or otherwise at-risk workers in the workplace who are likely to interact with these customers, visitors, or guests. This could include posting a notice or otherwise suggesting unvaccinated people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings.

7. ***Maintain Ventilation Systems.*** The virus that causes COVID-19 spreads between people more readily indoors than outdoors. Improving ventilation is a key engineering control that can be used as part of a layered strategy to reduce the concentration of viral particles in indoor air and the risk of virus transmission to unvaccinated workers in particular. Some measures to improve ventilation are discussed in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace. These recommendations are based on ASHRAE Guidance for Building Operations During the COVID-19 Pandemic.

Adequate ventilation will protect all people in a closed space. Key measures include ensuring the HVAC system(s) is operating in accordance with the manufacturer's instructions and design specifications, conducting all regularly scheduled inspections and maintenance procedures, maximizing the amount of outside air supplied, installing air filters with a Minimum Efficiency Reporting Value (MERV) 13 or higher where feasible, maximizing natural ventilation in buildings without HVAC systems by opening windows or doors, when conditions allow (if that does not pose a safety risk), and considering the use of portable air cleaners with High Efficiency Particulate Air (HEPA) filters in spaces with high occupancy or limited ventilation.

8. ***Perform routine cleaning and disinfection***. If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations. Follow requirements in **mandatory OSHA standards** 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

9. ***Record and report COVID-19 infections and deaths:*** Under **mandatory OSHA rules in 29 CFR 1904**, employers are responsible for recording work-related cases of COVID-19 illness on OSHA's Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers must follow the requirements in 29 CFR 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA. More information is available on OSHA's website. Employers should also report outbreaks to health departments as required and support their contact tracing efforts.

   In addition, employers should be aware that Section 11(c) of the Act prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer. In addition, **mandatory OSHA standard** 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related illness.

   Note on recording adverse reactions to vaccines: DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not want to give any suggestion of discouraging workers from receiving COVID-19 vaccination or to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. OSHA will reevaluate the agency's position at that time to determine the best course of action moving forward. Individuals may choose to submit adverse reactions to the federal Vaccine Adverse Event Reporting System.

10. ***Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards:*** Section 11(c) of the OSH Act prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. Examples of violations of Section 11(c) could include discriminating against employees for raising a reasonable concern about infection control related to COVID-19 to the employer, the employer's agent, other employees, a government agency, or to the public, such as through print, online, social, or any other media; or against an employee for voluntarily providing and safely wearing their own PPE, such as a respirator, face shield, gloves, or surgical mask.

    In addition to notifying workers of their rights to a safe and healthful work environment, ensure that workers know whom to contact with questions or concerns about workplace safety and health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities (see educating and training workers about COVID-19 policies and procedures, above); also consider using a hotline or other method for workers to voice concerns anonymously.

11. ***Follow other applicable mandatory OSHA standards:*** All of OSHA's standards that apply to protecting workers from infection remain in place. These **mandatory OSHA standards** include: requirements for PPE (29

CFR 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens: (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020). Many healthcare workplaces will be covered by the **mandatory OSHA COVID-19 Emergency Temporary Standard**. More information on that standard is available on the OSHA website at [link]. Where the ETS does not apply, employers are required under the General Duty Clause, Section 5(a)(1) of the OSH Act, to provide a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm .

Appendix: Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers

Employers should take additional steps to mitigate the spread of COVID-19 for unvaccinated and otherwise at-risk workers in workplaces where there is heightened risk due to the following types of factors:

- **Close contact**– where unvaccinated or otherwise at-risk workers are working close to one another, for example, on production or assembly lines. Such workers may also be near one another at other times, such as when clocking in or out, during breaks, or in locker/changing rooms.
- **Duration of contact** – where unvaccinated or otherwise at-risk workers often have prolonged closeness to coworkers (e.g., for 8–12 hours per shift). Continued contact with potentially infectious individuals increases the risk of SARS-CoV-2 transmission.
- **Type of contact** – unvaccinated or otherwise at-risk workers who may be exposed to the infectious virus through respiratory droplets in the air—for example, when unvaccinated or otherwise at-risk workers in a manufacturing or factory setting who have the virus cough or sneeze. It is also possible that exposure could occur from contact with contaminated surfaces or objects, such as tools, workstations, or break room tables. Shared spaces such as break rooms, locker rooms, and entrances/exits to the facility may contribute to their risk.
- **Other distinctive factors that may increase risk among these unvaccinated or otherwise at-risk workers include:**
  - A common practice at some workplaces of sharing employer-provided transportation such as ride-share vans or shuttle vehicles;
  - Frequent contact with other unvaccinated or otherwise at-risk individuals in community settings in areas where there is elevated community transmission; and
  - Communal housing or living quarters onboard vessels with other unvaccinated or otherwise at-risk individuals.

In these types of higher-risk workplaces – which include manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing – this Appendix provides best practices to protect unvaccinated or otherwise at-risk workers. Please note that these recommendations are *in addition to* those in the general precautions described above, including isolation of infected or possibly infected workers, and other precautions.

In all higher-risk workplaces where there are unvaccinated or otherwise at-risk workers:

- Stagger break times in these generally high-population workplaces, or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks. Unvaccinated or otherwise at-risk workers should maintain at least 6 feet of distance from others at all times, including on breaks.
- Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk in parking areas, locker rooms, and near time clocks.
- Provide visual cues (e.g., floor markings, signs) as a reminder to maintain physical distancing.

- Implement strategies (tailored to your workplace) to improve ventilation that protects workers as outlined in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace.

In workplaces (or well-defined work areas) with processing or assembly lines where there are unvaccinated or otherwise at-risk workers:

- Working on food processing or assembly lines can result in virus exposure because these workplaces have often been designed for a number of workers to stand next to or across from each other to maximize productivity. Proper spacing of unvaccinated or otherwise at-risk workers (or if not possible, appropriate use of barriers) can help reduce the risks for such workers.

In retail workplaces (or well-defined work areas within retail) where there are unvaccinated or otherwise at-risk workers:

- Suggest masks for unvaccinated (or unknown-status) customers and other visitors.
- Consider means for physical distancing from other people who are not known to be fully vaccinated. If distancing is not possible, consider the use of barriers between work stations used by unvaccinated or otherwise at-risk workers and the locations customers will stand, with pass-through openings at the bottom, if possible.
- Move the electronic payment terminal/credit card reader farther away from any unvaccinated or otherwise at-risk workers in order to increase the distance between customers and such workers, if possible.
- Shift primary stocking activities of unvaccinated or otherwise at-risk workers to off-peak or after hours when possible to reduce contact between unvaccinated or otherwise at-risk workers and customers.

Unvaccinated and otherwise at-risk workers are also at risk when traveling to and from work in employer-provided buses and vans.

- Notify unvaccinated and otherwise at-risk workers of this risk and, to the extent feasible, help them limit the number of such workers in one vehicle.
- Make sure all unvaccinated and otherwise at-risk workers sharing a vehicle are wearing appropriate face coverings.

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[1] CDC recommends that fully vaccinated people should nonetheless:

- watch out for symptoms of COVID-19, especially if they have been around someone who is sick. If they have symptoms of COVID-19, they should get tested and stay home and away from others.
- monitor for symptoms of COVID-19 for 14 days following an exposure.

[2] Schools should continue to follow applicable CDC guidance.

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