



COVID19

Resource & Recovery

Employer Rights in Screening Employees for COVID-19 and Protecting Other Employees and the Public

Compiled with assistance from Constangy, Brooks, Smith & Prophete, LLP

For more information on this topic, the EEOC has provided guidance here:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

May an employer take the body temperature of employees during the COVID-19 pandemic?

Because the CDC and state 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.

May employers administer a COVID-19 test before permitting employees to enter the workplace?

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 steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance 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, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; 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.

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?

During a pandemic, employers may ask 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. The Americans with Disabilities Act does not prevent the request of this information during a pandemic, but **employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.**



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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? (continued)

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.

An employer **may not** provide the name of an individual with COVID-19 to other employees. An employer **may** reach out to employees that have come into contact with a confirmed COVID-19 case to inform them of their potential exposure, however the employers should take caution in releasing any information that may indirectly identify the sick individual. Remind employees that discrimination or harassment against individuals that are suspected to have tested positive for, or been exposed to, coronavirus is strictly prohibited. An employee's name may be disclosed to a public health agency.

If an employee has a confirmed case of COVID-19 it is considered a recordable illness by OSHA, and employers are responsible for recording cases on OSHA Form 300 if the case is work related. A COVID-19 case is considered "work related" when:

1. There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
2. The evidence was reasonably available to the employer. Examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Can employers require employees to stay home if they have symptoms of COVID-19?

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

When employees return to work, can employers require doctors' notes certifying that they may return?

Yes. However, employers should keep in mind that medical professionals are already overwhelmed during this crisis. Employers should consider alternative options, such as emails, phone calls, or messaging apps, to confirm an employee's fitness for returning to work.



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When employees return to work, can employers require doctors' notes certifying that they may return? (continued)

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

If an employer is hiring, what are the rules for screening for COVID-19? When can I ask to take a potential employee's temperature, and can I delay their start date if they're sick?

Yes. An employer may screen job applicants for symptoms of COVID-19 *after* making a conditional job offer, as long as the employer does so for all entering employees in the same type of job.

If the employee with the conditional job offer has COVID-19 symptoms they should not be in the workplace. Based on current CDC guidance, because this individual cannot safely enter the workplace, the employer may withdraw the job offer or move the start date.

If an employee gets sick while teleworking from home, what are my responsibilities as an employer?

OSHA requires that confirmed COVID-19 cases or other recordable illnesses or injuries are recorded by employers even when employees are teleworking.

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