Legal Update Article

# EEOC Continues to Allow Certain COVID-19 Protocols in Its Latest Revised COVID-19 Guidance

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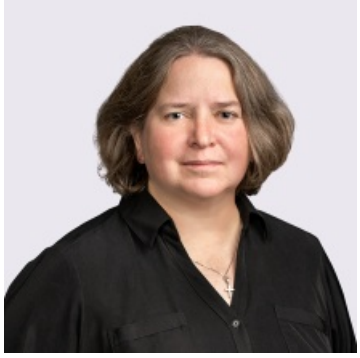
## Meet the Authors

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The Equal Employment Opportunity Commission (EEOC) has updated its COVID-19 technical assistance, ***What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws***, in response to the end of the COVID-19 Public Health Emergency Declaration, appearing to give employers permission to continue many of their COVID-19 practices and protocols.

While the agency reminds employers that medical exams and inquiries must be job-related and consistent with business necessity, according to the EEOC, "the 'business necessity' standard allows for consideration of whether a person may have COVID-19, and thus might pose a 'direct threat.'" As a result, the EEOC continues to allow employers to follow the Centers for Disease Control and Prevention (CDC) guidance, but it warns:

> Guidance from medical and public health authorities may be relevant to making certain legal determinations under one or more EEO laws (e.g., "direct threat" under the ADA). Because changes in such guidance may impact the legal assessments made under Title I of the ADA and other EEO laws … the EEOC recommends that employers … routinely check for guidance updates from CDC, FDA, and other medical and public health authorities.

## Highlights

Points raised by the EEOC in the updated guidance include:

1. "The ADA does not prevent employers from following CDC advice." (A.4)
2. If an employee calls in sick or reports feeling sick at work, an employer may ask whether the employee has COVID-19 or common symptoms of COVID-19 as identified in CDC guidance. (A.1, A.12)
3. Employers may still ask all employees entering the worksite or working in close proximity to others if they have COVID-19 or COVID-19 symptoms and if they have been COVID-19 tested, and, if so, the results. (A.8)
4. If an employee has COVID-19 or COVID-19 symptoms, employers may follow CDC recommended isolation guidance. (A.4)
5. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. (A.1)
6. Measuring an employee's body temperature or requiring an employee to undergo COVID-19 viral testing are medical examinations. Requiring medical examinations and making disability-related questions must meet the "business necessity" standard. It is important for the employer to consider why it wishes to require a medical examination. (A.3, A.9)
7. The ADA does not prevent employers from following CDC recommendations regarding whether, when, and for whom testing or other medical screening is appropriate. According to the EEOC, following CDC recommendations will meet the

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ADA "business necessity" standard. (A.9)

8. An employer may ask employees coming into the worksite whether they have had contact with "anyone" diagnosed with COVID-19 or who may have symptoms associated with the disease. But asking only about an employee's contact with family members would create a Genetic Information Nondiscrimination Act issue and would limit unnecessarily the information obtained about an employee's potential exposure to COVID-19. (A.10)
9. Employers can ask employees about domestic or international travel, as these are not disability-related inquiries. If the employer wants to require testing of individuals who have traveled, however, it must meet the business necessity standard. (A.14)
10. According to the EEOC, the possible types of reasonable accommodations to address "Long COVID" depend on a number of factors, including the nature of the symptoms, the job duties, and the design of the workplace. The EEOC provided the following examples of possible accommodations: a quiet workspace, use of noise cancelling or white noise devices, and uninterrupted worktime to address brain fog; alternative lighting and reducing glare to address headaches; rest breaks to address joint pain or shortness of breath; a flexible schedule or telework to address fatigue; and removal of "marginal functions" that involve physical exertion to address shortness of breath. The Job Accommodation Network has information on a variety of possible accommodations. (D.17)
11. The end of the Public Health Emergency declaration does not automatically provide grounds to terminate reasonable accommodations that may continue to be needed to address ongoing circumstances (e.g., continued high risk to individuals with certain disabilities if they contract COVID-19 as discussed in CDC guidance). However, employers may engage in the interactive process to determine if, on an individualized basis, accommodations are still necessary and whether alternative accommodations might meet those needs. (D.20)
12. The EEOC reminds employers that harassing an employee with a disability-related need to wear a mask or take other COVID-19 precautions or harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination may violate equal employment opportunity laws.

## Employers' Next Steps

The EEOC's updated guidance allows, but does not require, employers to continue some of the COVID-19 protocols that were in place during the pandemic. It remains to be seen how much deference courts will give to the EEOC's informal guidance. As the EEOC recognizes, its guidance is subject to change based on changing circumstances and guidance from the CDC and other public health authorities.

COVID-19 litigation is expected to continue due to the strong and divergent views on the issues. Employers should carefully think through their practices to determine what makes sense for their workforce under the current circumstances.

Employers should reach out to the Jackson Lewis attorney with whom they regularly work to discuss their current COVID-19 practices and the changes in federal and state COVID-19 law and guidance.