Accommodations & Medical Inquiries – COVID-19
The Americans with Disabilities Act – the Basics

The ADA is relevant to pandemic preparations in three major ways.

First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.

Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat".

Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

QUESTION: What is a "direct threat" under the ADA and why is it relevant to COVID-19?

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

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

This background on the ADA guides the answers to many of the questions about providing accommodations and asking medical questions during the COVID-19 pandemic.

QUESTION: Can an employer ask about employee COVID-19 symptoms?

ANSWER: Yes. An employer has a right to make reasonable inquiries about an employee's medical condition under the ADA if it is job related and consistent with business necessity. A few weeks ago asking about COVID-19 would not have been allowed. But the EEOC's "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" guidance put together during the 2009 HINI flu pandemic specifically contemplates such inquiries in the event public health officials declare a pandemic. A

threat assessment "by the CDC or public health authorities" provides "objective evidence needed for a disability-related inquiry or medical examination." 29 CFR § 1630(2)(B). At this point, the public health authorities' warnings and declarations provide a clear objective basis for making reasonable inquiries concerning employee health and requiring the reporting of an actual or presumptive diagnosis of coronavirus. This includes asking about symptoms of COVID-19 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.

QUESTION: Can an employer ask about exposure to a person infected with COVID--19?

ANSWER: Generally, yes, employers can ask employees if they believe they have been exposed to COVID-19 as exposure is not a medical condition. Having such information could trigger discrimination or retaliation claims later and may require certain disclosures to the workforce. Employers who choose to collect such information must ensure that the information is kept secure, confidential and limited to personnel with a need to know.

QUESTION: When an employee returns from travel, particularly to an affected area, does the employer have to wait until the employee develops flu-like symptoms before asking questions about exposure to a flu such as COVID-19 during the trip?

ANSWER: No, as these questions would not be considered disability related.

QUESTION: May employers require employees who have traveled to an affected area as defined by the CDC to "self-quarantine"?

ANSWER: Yes. As a general rule, employers can require that employees who have traveled to an affected area to self-quarantine for a period of at least 14 days before returning to work.

QUESTION: Can an employer take employee temperatures?

ANSWER: In normal times, no, this would be an overly broad medical exam prohibited by the ADA. Medical exams of current employees are only allowed if (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The EEOC H1N1 pandemic guidance suggested the direct threat trigger for temperature checks was possible if a pandemic virus is widespread in the community. Relying on federal, state, and local public health authorities for making this determination is critical. Available information suggests individuals may be infected without showing symptoms, so a temperature check likely is not the best way to protect your workforce.

QUESTION: Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?

ANSWER: 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.

QUESTION: When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

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

QUESTION: Must an employer provide protective gear as a reasonable accommodation?

ANSWER: Any request for a reasonable accommodation is fact dependent and must be done on an individualized basis. If the employee has no disability, then the employer would not need to provide such protective gear under the ADA. The nature of the business may require such protective gear irrespective of the ADA under applicable OSHA requirements. Think health care facilities/home care agencies.

If the employee has an underlying disability, then protective gear could be a reasonable accommodation for that individual to protect against the virus in the workplace. Further, if the situation becomes so dire that the individual with a disability is advised by a medical professional not to leave the house because of COVID-19 -- leave as a reasonable accommodation could be required.

QUESTION: Can employers require employees to maintain infectious control practices such as regular handwashing?

ANSWER: Yes. The CDC recommends that employees:

- wash their hands with soap and water for at least 20 seconds especially after blowing their nose, coughing or sneezing, going to the bathroom and before eating or preparing food;
- avoid touching their eyes, nose and mouth with unwashed hands;
- staying home when sick; and

- covering their cough or sneeze with a tissue and throwing the tissue in the trash.

QUESTION: May an employer ask an employee why he/she has been absent from work if the employer suspects it was for a medical reason?

ANSWER: Yes. Employers are entitled to know why employees have not reported for work. Further, asking an individual why an individual did not report to work is not a disability related.

QUESTION: Can employers ask employees if they have a pre-existing health condition that would make them susceptible (or more susceptible) to COVID-19?

ANSWER: No. The ADA generally prohibits employers from asking employees questions about their pre-existing health conditions.

Best Practices

1. Train managers on how to identify ADA and related medical inquiry issues.
2. Review insurance policies to determine if there is coverage for claims based upon. the ADA, and analogous state and local statutes.
3. Make sure that HR is involved in all accommodation and related issues.
4. Err on the side of safety and health.
5. Communicate with employees regularly in connection with accommodation issues.
6. Determine whether an employee is “essential”.
7. Develop contingency staffing plans.
8. Manage client/customer expectations, particularly in terms of staffing.
9. Maintain confidentiality of employee health information.
10. Update ADA and related policies.

Note: This article is not intended to provide legal advice as to any specific matter.