



CRISIS PRACTICE

# Coronavirus

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## COVID-19: Permissible And Impermissible Procedures For When Employees Return To The Workplace

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As states begin contemplating ways to ease shelter in place restrictions and how to facilitate employees returning to work, employers are faced with developing and implementing new policies and procedures to effectively reintegrate their workforces while also doing what they can to safeguard the workplace against the threat of COVID-19. This client alert addresses the Equal Employment Opportunity Commission's ("EEOC") guidance on the types of permissible and impermissible questions and procedures employers can ask and implement as employees return to work. As additional guidance is issued by the EEOC and other departments, King & Spalding's labor and employment practice stands ready and able to help clients implement best practices for bringing employees back to work.

***If an employee reports feeling ill at work or calls in sick, may the employer ask the employee about their symptoms to determine if they have or may have COVID-19?***

Yes, 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.

***May employers implement a procedure whereby they question all employees who will be physically entering the workplace if they have COVID-19, symptoms associated with COVID-19, or if they have been tested for COVID-19?***

Yes, ADA-covered employers may ask employees who are physically entering a workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include cough, sore throat, fever, chills, and shortness of breath. An employer may exclude those with COVID-19, or



symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to the health or safety of the workplace. For those employees who are teleworking, they are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask these questions.

***When screening employees entering the workplace, may an employer only ask employees about the COVID-19 symptoms identified above, or may it ask about any symptoms identified by public health authorities as associated with COVID-19?***

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.

***May employers implement a procedure whereby they measure employees' body temperature before employees enter the workplace?***

Yes, employers may measure all employees' body temperatures before they enter the workplace. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements. If the employer requires all employees to have a daily temperature check before entering the workplace, the employer may keep a log of the results so long as the information is maintained as confidential as required by the ADA.

***What may an employer do if an employee refuses to permit the employer to take his temperature, or refuses to answer questions about whether he has COVID-19, or symptoms associated with COVID-19, or has been tested for COVID-19?***

Under current circumstances, the EEOC has said that an employer may bar an employee from being physically present in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19. Moreover, an employer may bar an employee's presence if he refuses to have his temperature taken. 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. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace which, as addressed below, is not permissible.

***May an employer ask only one employee, as opposed to asking all employees, questions designed to determine if the particular employee has COVID-19, or require that this employee alone have his temperature taken?***

If an employer wishes to ask only a particular employee to answer such questions, or to have his temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have COVID-19. It, therefore, is important for the employer to consider why it wishes to take these actions with respect to a particular employee. For example, if an employer notices that an employee has a persistent, hacking cough, it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if he has or might have COVID-19. The reason these types of questions are permissible now is because this type of cough is one of the symptoms associated with COVID-19. On the other hand, if an employer notices that an employee seems distracted, then that would be an insufficient basis to ask whether the employee has COVID-19.



***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?***

From a public health perspective, only asking an employee about his contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19. A better question from a public health and workforce management perspective is whether an individual has had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease. The EEOC has said this general question is sounder, as the Genetic Information Nondiscrimination Act prohibits employers from asking employees medical questions about family members.

***If a manager learns that an employee has COVID-19 or its symptoms and knows she must report it but is worried about violating ADA confidentiality, what should she do?***

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. That said, 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.

***If a manager learns that an employee has COVID-19 or its symptoms what information should be reported: is it the fact that an unnamed employee has symptoms of COVID-19, or a diagnosis, or is it the identity of that employee?***

Exactly who in an 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 symptomatic employee. A designated representative of the employer may interview the symptomatic 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 encountered the employee. However, this does not require disclosing the symptomatic employee's name to those persons with whom the employee has had contact. For small employers, co-workers might be able to figure out who the employee is, but employers are still prohibited from confirming or revealing the symptomatic employee's identity. Also remember that 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.

***If an employee who must report to the workplace knows that a co-worker who reports to the same workplace has symptoms associated with COVID-19, does ADA confidentiality prevent the first employee from disclosing the co-worker's symptoms to a supervisor?***

No, ADA confidentiality does not prevent this employee from communicating to his supervisor about a co-worker's symptoms.

***If 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?***

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 of this information without saying why the employee is teleworking 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 the employer cannot disclose the reason for the leave, just the fact that the individual is on leave.



***If an employer is concerned that telling employees that “someone at this location” or “someone on the fourth floor” has COVID-19 may not provide enough information to allow people to know if they should take further steps to protect themselves or others, may the employer tell the workforce the name of the employee with COVID-19?***

No, the ADA does not permit such a broad disclosure of the medical condition of a specific employee. Additionally, the CDC does not recommend this broad disclosure. The CDC specifically advises employers to maintain confidentiality of people with confirmed COVID-19.

***Where must employers store employee medical information related to COVID-19?***

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.

***After an employee returns from travel, must an employer wait for the employee to exhibit COVID-19 symptoms before questioning the employee about their exposure to COVID-19 during their trip?***

No, when an employee returns from travel during a pandemic, the employer need not wait until the employee develops COVID-19 symptoms to ask questions about exposure to COVID-19 during said trip. These would not be disability-related inquiries. Additionally, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.

***May employers ask employees returning to work who do not have COVID-19 symptoms to disclose whether they have a medical condition which would make them especially vulnerable to COVID-19 complications?***

No, employers may not ask employees who do not have COVID-19 symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to COVID-19 complications. However, if an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him at increased risk of complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed. If however, COVID-19 reaches the level of constituting a direct threat, which in certain areas may be the case, employers may make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of complications.

***May employers adopt and enforce infection-control practices and procedures, such as regular handwashing requirements?***

Yes, an employer may require its employees to adopt infection-control practices, such as regular hand washing, respiratory etiquette, and proper tissue usage and disposal. These types of practices do not implicate the ADA.

***May employers require employees returning to the workplace to wear personal protective equipment (e.g., face masks, gloves, or gowns)?***

Yes, an employer may require employees to wear personal protective equipment when returning to the workplace. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves) the employer should provide these, absent undue hardship.

***When a vaccine is developed to treat COVID-19, may employers require all employees to be vaccinated before entering the workplace?***



No, an employer likely cannot compel all of its employees to take an eventual vaccine. Employees may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him or her from taking the vaccine. Additionally, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

***May an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?***

Yes, employers may ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason. Asking why an individual did not report to work is not a disability-related inquiry.

***Can employers require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?***

Yes, employers can require employees who have been away from the workplace during the COVID-19 pandemic to provide a doctor's note certifying fitness to return to work. Such inquiries are permitted under the ADA either because they would not be disability-related or, if COVID-19 is truly severe (which is likely the case), they would be justified under the ADA's direct threat 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 this pandemic to provide fitness-for-duty documentation.

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