

## COVID-19 Employer FAQs

**The information below is based on the EEOC guidance and is not intended to provide legal advice and should not be used as a substitute for legal guidance. Consult your city attorney for advice concerning specific situations.**

**1) During the COVID-19 outbreak, how much information may an employer request from an employee who calls in sick to protect the rest of its employees?**

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If COVID-19 is like seasonal influenza, these inquiries are not disability-related. However, if the COVID-19 becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of COVID-19 poses a direct threat. Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The Centers for Disease Control and prevention (CDC) and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

**2) Does the ADA allow employers to require employees to stay home if they have COVID-19 symptoms?**

Yes. Employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza. Additionally, the action would be permitted under the ADA if the illness was serious enough to pose a direct threat. Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.

**3) May an employer send home or require staying home an asymptomatic employee who has been in close contact with someone with COVID-19 (i.e. family, friend)?**

Yes, if the asymptomatic employee fits within certain categories (<https://www.cdc.gov/COVID-19/2019-ncov/php/risk-assessment.html>) established by the CDC's guidance (updated on March 7, 2020), which categorizes employees based on (a) symptoms (i.e., symptomatic or asymptomatic) and (b) risk (i.e., high, medium, low, or no identifiable, which takes into account both (1) travel destinations and (2) level and type of contact with symptomatic individuals). Under the CDC guidance, employees who are asymptomatic may be excluded from the workplace, if they:

- have close contact with;
- sat on an aircraft within 6 feet (two airline seats) of; or

- live in the same household as, are an intimate partner of, or are caring for at home, while consistently using recommended precautions [see (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-home-care.html>) and (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-prevent-spread.html>) for home care and home isolation precautions], for a symptomatic individual with “laboratory-confirmed COVID-19.”

**4) During a pandemic, such as with COVID-19, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?**

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. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

However, employers should be aware that some people with COVID-19, do not have a fever.

**5) When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?**

No. These 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 several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Similarly, with respect to the current COVID-19 pandemic, 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.

**6) During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?**

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract

pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

**7) May an employer encourage telework as an infection-control strategy?**

Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.

In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

**8) May an employer require use of his or her vacation time and/or other paid time off for absences?**

Yes, subject to the provisions of the Families First Coronavirus Response Act, which provides paid Emergency FMLA and Emergency Paid Sick Leave effective April 1, 2020. If that is exhausted or if it does not apply, the employer's current vacation time, paid time off (PTO), and other applicable policies will apply.

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**9) May an employer create a policy to excuse or not count absences related to COVID-19, whether for actual illness or quarantine period? May the employer pay for such absences without requiring the use of accumulated paid time off?**

Yes. Pursuant to the Families First Coronavirus Response Act effective April 1, 2020, employees may be eligible for Emergency Family and Medical Leave or Emergency Paid Sick Leave as provided by the Act. Employers should determine any deviation from their normal policies, including how and when it will apply. Employers should ensure that any such policy is consistently applied. KLC Legal has a sample policy.

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**10) May an employer require an exempt employee to use paid time off in less than full-day increments?**

Yes, subject to the provisions of the Families First Coronavirus Response Act effective April 1, 2020, which provides paid Emergency FMLA and Emergency Paid Sick Leave. Outside of the Families First Coronavirus Response Act, if the employer's policy allows it, and the exempt employee's overall salary/pay is not docked. However, pay can be taken from the PTO category in less than full-day increments.

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**11) May an employer dock an employee's pay for time spent away from work due to COVID-19 if he or she has exhausted all accumulated paid time off?**

These absences will be subject to the provisions of the Families First Coronavirus Response Act effective April 1, 2020, which provides paid Emergency FMLA and Emergency Paid Sick Leave. If that is exhausted, yes, employers may dock a nonexempt employee's pay. For exempt employees, it depends on whether the absence is initiated by the employer or by the employee.

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- If the absence is initiated by the employee (including for his or her own illness or that of someone for whom he or she is caring), the employer may dock the exempt employee for full-day absences only.
- If the absence is initiated by the employer (i.e., the employee must stay home for a mandatory quarantine period, even though he or she is asymptomatic and willing to come to work), the employer may dock the exempt employee only for full seven-day absences that coincide with the employer's pay week.

However, employers should consider the impact that docking an employee's salary will have on whether the employee will voluntarily stay home when they feel sick.

### **12) When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**

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 healthcare 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 email to certify that an individual does not have the pandemic virus.

### **13) Is COVID-19 an FMLA-covered serious health condition?**

Not necessarily. If COVID-19 does not satisfy the regulatory definition of a "serious health condition," employers should not count the absence against the employee's 12 weeks of FMLA leave. An example of a situation in which the leave may not be FMLA-qualifying is when an employee is required by the employer to stay home but is asymptomatic. However, it may include the flu where complications arise that create a "serious health condition" as defined by FMLA.

The regulatory definition sections that most likely apply in the COVID-19 context (assuming a mild case) are the following:

- More than three calendar (not work) days of incapacity plus two treatments by a healthcare provider (the first of which must occur within seven days of the first day of incapacity and the second within 30 days of the first day of incapacity)
- More than three calendar (not work) days of incapacity plus one treatment by a healthcare provider (which must occur within seven days of the first incapacity) plus continuing treatment (including prescription medication) under the supervision of a healthcare provider

Because some individuals will not seek healthcare treatment unless they need urgent medical attention or they are at a higher risk for complications from COVID-19, some cases of COVID-19 will not qualify as a serious health condition simply because the employees will not have visited a doctor/healthcare provider for any treatment.

Employers must also consider the provisions of the [Families First Coronavirus Response Act](#) effective April 1, 2020, which provides paid Emergency FMLA for an individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow an employee, who is

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unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

Employers should also evaluate any applicable leave policies within their handbooks to ensure they do not contain different or additional requirements or provisions.

**14) Is an employer's knowledge that an employee has COVID-19, subject to HIPAA's privacy restrictions?**

Not usually, unless the employer acquired the information in its role as the administrator of the health insurance plan. Because most employers will learn of a COVID-19 diagnosis from the employee or his or her family, the Health Insurance Portability and Accountability Act (HIPAA) usually will not be implicated.

However, the CDC has said employers should follow the ADA's confidentiality requirements, which significantly limit the disclosure of information. Employers can communicate to non-exposed employees that there has been a COVID-19 diagnosis, without sharing additional identifying information.

**15) May an employee refuse to come to work due to fear of becoming infected with COVID-19?**

Possibly. Employees may be protected from retaliation under the Occupational Safety and Health Act (OSH Act) in certain circumstances when they refuse to perform work as directed. Specifically, an employee may refuse an assignment that involves "a risk of death or serious physical harm" if the following conditions apply: (1) the employee has "asked the employer to eliminate the danger and the employer failed to do so"; (2) the employee "refused to work in 'good faith'" (a genuine belief that "an imminent danger exists"); (3) "[a] reasonable person would agree that there is real danger of death or serious injury"; and (4) "[t]here isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection."

While each situation is different, and a generalized fear of contracting COVID-19 is not likely to justify a work refusal in most cases, employers may want to conduct a thorough review of the facts before any disciplinary action is taken against an employee who refuses to perform his or her job for fear of exposure to COVID-19.

**16) Is COVID-19 covered by workers' compensation?**

Workers' compensation laws require an employee to prove that he or she contracted the illness in the course and scope of employment and that the illness is caused by a hazard recognized as peculiar to a particular employment.

**17) Are there any OSHA requirements that must be followed if any employee is diagnosed with COVID-19?**

Employers must ensure that the infected employee stays away from the workplace. OSHA may cite an employer under the general duty clause if the employer allows or directs a known infected employee to come to work and expose other employees to the risk of infection. The Occupational Safety and Health Administration (OSHA) recently published [Guidance on Preparing Workplaces for COVID-19](#), outlining steps employers can take to help protect their workforce.

**For more information on these as well as other questions, check out these resources, which are updated with the latest developments:**

[https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>

[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

<https://chfs.ky.gov/agencies/dph/pages/covid19.aspx>

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-law-enforcement.html>

<https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html>

[https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cdc-in-action.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fpreparing-communities.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cdc-in-action.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fpreparing-communities.html)

<https://www.dol.gov/coronavirus>

<https://www.klc.org/News/8903/covid-19-resources-page>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>