COVID-19 Employer FAQs

The information below is based on the EEOC and DOL 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 screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples, or may the employer 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.

6) **If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?**

Yes. However, the employer must maintain the confidentiality of this information in a medical file. An employer may store all confidential 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.

7) **May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? 4/23/20**

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.

8) **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.

In addition, based on Governor Beshear’s Executive Order banning out-of-state travel, unless an employee leaves the state under one of the exemptions, the employee must quarantine at home for 14 days upon return. The exemptions include:

- When required by employment;
- To obtain groceries, medicine or other necessary supplies;
- To obtain care by a licensed healthcare provider;
- To provide care for the elderly, minors, dependents, person with disabilities, or other vulnerable persons or
- When required by court order.

9) **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.

10) If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee’s needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance; or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

See also the Job Accommodation Network (JAN) website for types of accommodations, as well as JAN’s materials specific to COVID-19.

11) If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)?

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions (e.g., anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder) may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

12) 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.

The DOL also stated in the April 1 Regulations, that the definition of telework is that it is no less work than if it were performed at an employer’s worksite. As a result, employees who are teleworking for COVID-19 reasons must always record -and be compensated for- all hours actually worked, including overtime, in accordance with the FLSA.

13) 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.

14) 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.

15) 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.

16) 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.

- 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.

17) 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.

18) 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 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.

19) What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?

The FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. For more information on the FFCRA employment provisions, see the Families First Coronavirus Response Act is Now Law article on the KLC COVID-19 Resources Page.

20) 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.

21) 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.

22) 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. On April 9, 2020, the governor issued Executive Order 2020-277 which created a presumption of occupational exposure to COVID-19 for first responders that contract the illness. First responders would be eligible for TTD payments from day one, instead of the normal eighth day. The city or carrier will still be able to rebut this presumption of compensability if facts indicate the exposure did not occur on the job.
On April 15, 2020, the Department of Worker’s Claims released non-binding guidance on the governor’s order. Paragraphs (3) and (4) of the order indicate TTD payments would be subject to offset by leave under the Families First Coronavirus Relief Act and/or unemployment benefits. Cities should report any illness to their carrier and work with their city attorney to determine the best policy for compensation if a first responder becomes ill.

23) 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.

24) What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

The Select Task Force on the Study of Harassment in the Workplace provided detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; and creating an organizational culture in which harassment is not tolerated:

- report;
- checklists for employers who want to reduce and address harassment in the workplace; and,
- chart of risk factors that lead to harassment and appropriate responses.

25) Under EEOC laws, what waiver responsibilities apply when an employer is conducting layoffs?

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC’s technical assistance document on severance agreements.

More information on layoffs can be found on the KLC website.

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
