

COVID-19 Employer FAQs

The information below is based on the EEOC, CDC 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 viral (see question 8) below regarding antibody testing) 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) CDC said in its [Interim Guidelines](#) that antibody test results “should not be used to make decisions about returning persons to the workplace.” In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? (6/17/20)**

No. An antibody test constitutes a medical examination under the ADA. In light of CDC’s [Interim Guidelines](#) that antibody test results “should not be used to make decisions about returning persons to the workplace,” an antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are [permissible under the ADA](#).

The EEOC continues to closely monitor CDC’s recommendations, and could update this discussion in response to changes in CDC’s recommendations.

- 9) What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? (6/11/20)**

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a [disability](#) and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee’s request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is [available under Title VII](#).

- 10) 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.

Note: Kentucky's travel ban as outlined in the Governor's Order No. 2020-266 is currently in litigation. However, CDC and health department recommendations regarding travel should still be followed.

11) 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.

12) The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? (6/11/20)

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

13) 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.

14) 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.

15) 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.

16) 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.

17) 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.

18) 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.

19) 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.

20) 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.

21) 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.

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

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.

23) My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required? (5/12/20)

In order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a healthcare provider in order for the employee to use paid sick leave for COVID-related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

More information and documentation requirements for EPSLA and EFMLEA can be found on the KLC article [Families First Coronavirus Response Act is Now Law](#) and is also updated as changes occur and more information is released.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's [documentation requirements](#) are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

24) My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take EPSLA and EFMLEA to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements? (5/12/20)

You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's rule applying the FFCRA and as outlines on the KLC article [Families First Coronavirus Response Act is Now Law](#). While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increase the likelihood that any decision denying leave based on that information is a prohibited act. The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying EPSLA or EFMLEA to care for a child whose school is closed for a COVID-related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

25) I took paid sick leave and am now taking expanded family and medical leave to care for my children whose school is closed for a COVID-related reason. After completing distance

learning, the children’s school closed for summer vacation. May I take paid sick leave or expanded family and medical leave to care for my children because their school is closed for summer vacation? (5/12/20)

No. EPSLA and EFMLEA are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his or her child’s care provider during the summer—a camp or other programs in which the employee’s child is enrolled—is closed or unavailable for a COVID-related reason.

26) 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.

27) What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the [medical conditions](#) that CDC says may put her at higher risk for severe illness from COVID-19? (5/5/20)

An employee – or a third party, such as an employee’s doctor – must [let the employer know](#) that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term “reasonable accommodation” or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may [ask questions or seek medical documentation](#) to help decide if the individual has a disability and if there is a reasonable accommodation, barring [undue hardship](#), that can be provided.

28) The CDC identifies a number of medical conditions that might place individuals at [“higher risk for severe illness”](#) if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? (5/7/20)

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee’s health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at “higher risk for severe illness” if he gets COVID-19. Under the ADA, such action is not allowed unless

the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under [29 C.F.R. section 1630.2\(r\)](#). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

29) What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? (5/5/20)

[Accommodations](#) may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

30) Due to the pandemic, may an employer exclude an employee from the workplace involuntarily [due to pregnancy](#)? (6/11/20)

No. Sex discrimination under Title VII of the Civil Rights Act, as well as the Kentucky Pregnant Workers' Act, includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

31) Is there a right to accommodation based on pregnancy during the pandemic? (6/11/20)

There are two federal employment discrimination laws that may trigger [accommodation for employees based on pregnancy](#).

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

In addition, the Kentucky Pregnant Workers' Act contains similar provisions against discrimination.

32) 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.

33) As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? (6/11/20)

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact – if they wish – to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the [interactive process](#). An employer may choose to

include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 [CDC guidance](#) that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

34) Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? (6/11/20)

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

35) 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.

36) 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.

37) 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.

38) 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/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

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://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.dol.gov/coronavirus>

<https://www.dol.gov/agencies/whd/flsa/pandemic>

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

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

<https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>