

## EEOC Updates COVID-19 Technical Assistance

Article By:

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On May 11, the US Department of Health and Human Services ended its COVID-19 federal public health emergency declaration. Days later, the US Equal Employment Opportunity Commission (EEOC) followed up by updating its COVID-19 technical assistance, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Law.”

EEOC Chair Charlotte Burrows described the update as “the capstone to our comprehensive resource of questions and answers on COVID-19 and the anti-discrimination laws enforced by the EEO.” Burrows added, “The end of the public health emergency is an important milestone, and this will help employees and employers understand how the Americans with Disabilities Act, the Rehabilitation Act, and other federal laws continue to protect our nation’s workforce from employment discrimination. The EEOC remains committed to vigorous enforcement of these laws.”

[The EEOC’s update](#) discusses an array of topics. Among them:

### Disability-Related Inquiries

If an employee calls in sick, the employer may request information to protect the rest of the workforce and others, such as customers, from COVID-19 infection. The employer may ask whether the employee has COVID-19 or the virus’s common symptoms, as identified by the Centers for Disease Control and Prevention (CDC). If so, the employer may follow any CDC-recommended isolation period to determine when the employee may return to the workplace or work in close proximity to others.

Employers may ask all employees set to enter the workplace or work in close proximity to others, whether they have COVID-19 or its symptoms. Employers also may ask whether those employees have been tested for COVID-19 and for the test result. Employers may exclude from the workplace workers with COVID-19, or its common symptoms, if done in keeping with the CDC’s recommended isolation protocols.

Employers may require employees to have a temperature reading or to undergo COVID-19 viral testing if doing so meets the Americans with Disabilities Act’s (ADA) “business necessity” standard for medical examinations. The ADA does not preclude employers from following CDC recommendations regarding whether, when, and for whom testing or other medical screening is

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appropriate. However, employers should not discriminate based on protected characteristics when deciding who must get tested.

Employers may not ask employees whether they have family members who have COVID-19 or its symptoms. Doing so runs afoul of the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from asking employees medical questions about their family members. However, GINA does not prohibit employers from asking employees whether they have had contact with “anyone” diagnosed with COVID-19 or who may have symptoms associated with the disease.

If an employee reports feeling ill with COVID-19 symptoms while at work, the employer may ask whether the employee has COVID-19 or its symptoms. If the answer is “yes,” the employer may follow any CDC-recommended period of isolation when deciding when the employee may return to the workplace or otherwise work in close proximity to others.

If an employee refuses to cooperate in the employer’s permissible COVID-19-related inquiry, the employer may take whatever action it deems appropriate, consistent with its applicable policies or procedures, such as barring the employee from entering the workplace or working closely with others.

## **Disability and Reasonable Accommodation**

The end of the public health emergency does not mean that employers may automatically terminate pandemic-related reasonable accommodations. But employers may evaluate those accommodations and, in consultation with the employee, assess whether the employee still needs them. In keeping with the ADA’s “business necessity” standard, employers may request documentation that addresses why the employee still needs to be accommodated and whether alternative accommodations would suffice.

The ADA’s three-part disability definition applies to Long COVID the same as it applies to other medical conditions. Thus, a person with Long COVID has an ADA “disability” if the condition substantially limits the person’s major life activity. Some examples:

- Someone who experiences virus-related, intermittent, multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, could be substantially limited in neurological and brain function, concentrating, and/or thinking.
- Someone who receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months, may be substantially limited in respiratory function and possibly major life activities involving exertion, such as walking.
- Someone who experiences protracted, virus-related heart palpitations, chest pain, shortness of breath, and related symptoms may be substantially limited in cardiovascular and circulatory function.
- And, someone who experiences COVID-19-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently, may be substantially limited in gastrointestinal function.

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Someone with Long COVID may also have an ADA disability if they have a “record of” a disability, “a history of, or have been misclassified as having” an impairment that substantially limits one or more major life activities.

The EEOC’s update identifies several examples of possible reasonable accommodations for employees with Long COVID:

- A quiet workspace;
- Use of noise cancelling devices;
- An uninterrupted work time to address brain fog;
- Alternative lighting and reducing glare to address headaches;
- Rest breaks to address joint pain or shortness of breath;
- A flexible schedule or telework to address fatigue; and
- Removal of a job’s marginal functions that involve physical exertion to address shortness of breath.

An individual may be “regarded as” an individual with a disability if the employer subjects him or her to adverse action – such as termination, job rejection, or harassment – because the employer (1) mistakenly believes the person has a Long COVID or other impairment; or (2) accurately perceives that the employee is impaired but the impairment is transitory – lasting or expected to last for six months or less – and minor.

## **Remaining Alert for COVID-Related Harassment of Applicants and Employees Who Continue to Take Workplace COVID-19 Precautions**

Employers should (1) remind employees, managers, and supervisors that it is unlawful to harass or otherwise discriminate against coworkers based on protected characteristics, including disability; and (2) advise supervisors and managers that they must watch, stop, and report harassment and other discrimination. Additionally, employers should consider providing examples of pandemic-related harassment to the workforce to help everyone understand what actions may violate the EEO laws. For example, one illustration might show a supervisor or coworker violating the ADA/Rehabilitation Act by harassing an employee with a disability-related need to wear a mask or take other COVID-19 precautions. Another example might show a supervisor or coworker violating Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination. Moreover, an employer should make clear that it will immediately review alleged harassment and discrimination and take appropriate action.

## **COVID-19 Vaccinations**

An employee who declines to get vaccinated due to an ADA-covered disability or a sincerely held religious belief, practice, or observance may be entitled to a reasonable accommodation. For example, an unvaccinated employee entering the workplace might wear a face mask, work at a social

distance from coworkers and others, work a modified shift, get periodic tests for COVID-19 (provided that the testing is consistent with the ADA “business necessity” standard for medical examinations), be given the opportunity to telework, or accept a reassignment. Employees who choose not to be vaccinated because of pregnancy may be entitled, under Title VII, to adjustments to keep working if the employer makes modifications or exceptions for other employees. Those modifications may be the same as the accommodations made for an employee based on disability or religion.

As with any employment policy, employers that mandate vaccinations may face allegations that the requirement has a disparate impact on protected employees. Thus, employers should remember that because some demographic groups may face barriers to obtaining a COVID-19 vaccination, employees in those groups may be more likely to be negatively impacted by a vaccination requirement.

Of course, it also would be unlawful for employers to apply a vaccination requirement to employees in a way that treats them differently based on protected characteristics.

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National Law Review, Volume XIII, Number 138

Source URL: <https://natlawreview.com/article/eeoc-updates-covid-19-technical-assistance>