



Maine Credit Union League

New Guidance Issued for Workplace Compliance with the ADA During COVID-19

The COVID-19 pandemic has delivered substantial changes to every facet of our workforce. Because credit unions are continuing to operate during these uncertain times, our institutions must ensure they are complying with federal antidiscrimination laws. To assist, the U.S. Equal Employment Opportunity Commission (EEOC) has updated its [guidance](#) to help credit unions and other employers navigate the impact of COVID-19 in the workplace. The new guidance also addresses concerns about testing employees for COVID-19 before they enter the workplace.

Direct Threat

Because the COVID-19 pandemic meets the definition of a “**direct threat**,” an individual with a disability may not be protected by the nondiscrimination provisions of the Americans with Disabilities Act (ADA) under certain circumstances. To help identify these circumstances, the EEOC has outlined four factors:

1. The duration of the risk
2. The nature and severity of the potential harm
3. The likelihood that potential harm will occur
4. The imminence of the potential harm

Symptoms

According to the guidelines, an ADA-covered employer may send employees home if they display COVID-19 symptoms because the virus is serious enough to pose a direct threat.

ADA-covered employers may ask employees who report that they are feeling ill or call in sick questions about their symptoms to determine if they may have COVID-19. These symptoms might include **fever, chills, cough, shortness of breath or sore throat**. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

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.

Lastly, an employer is always entitled to know why an employee has not reported for work. Asking why an individual did not report to work is not a disability-related inquiry.

Testing

An employer may administer a **COVID-19 test** before permitting employees to enter (or re-enter) the workplace. Consistent with the ADA standard, employers should ensure 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 the CDC or other public health authorities.

Employee Travel

If an employee **traveled during the pandemic**, an employer is permitted to ask about the employee's travel—even if the travel was personal—whether the employee is exhibiting symptoms or not. 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

"High Risk" Employees

Even during a pandemic, an ADA-covered employer may not ask employees who do not have influenza symptoms to disclose whether they have an **underlying medical condition** that could make them vulnerable for the virus, as outlined by the CDC. If an employee voluntarily discloses that he/she has a specific medical condition or disability that puts him/her at increased risk, the employer must keep this information confidential. The employer may ask him/her to describe the type of assistance he/she thinks will be needed (e.g. telework or leave for a medical appointment).

Telework

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

Reasonable Work Accommodations

An employer's ADA responsibilities to individuals with disabilities continue during a pandemic. Only when an employer can demonstrate that a person with a disability poses a **direct threat**, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities. If an employee with a disability needs the same **reasonable accommodation** at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship.

Infection Control

During the pandemic, requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

An employer may also require employees to wear **personal protective equipment (PPE)** during the pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Because there is no vaccine available for COVID-19, there are currently no requirements that mandate employees take a vaccine.

Hiring During COVID-19

An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all employees entering in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether the applicant has a disability or not.

An employer is permitted to take an **applicant's temperature** as part of a post-offer, pre-employment medical exam. An employer may also **delay the start date** of an applicant who has COVID-19 or symptoms associated with it because CDC guidance states an individual who has COVID-19 or symptoms associated with it should not be in the workplace. In this same vein, an employer may **withdraw a job offer** when it needs the applicant to start immediately, but the individual has COVID-19 or related symptoms.

Pandemic Related Harassment

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.

It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

Post Pandemic

Employers are permitted to require those employees who have been away from the workplace during the pandemic to provide a **doctor's note** to certify their fitness to return to work. Keep in mind, health care professionals will be busy during and immediately following the pandemic and may have difficulties providing timely certifications.

Additional Information

For additional technical assistance or to view a list of commonly asked questions and answers concerning the COVID-19 pandemic and adherence to workplace discrimination laws, visit EEOC's [website](#).

This article should not be construed as legal advice. Please contact your lawyer if you have any questions.