

# COVID-19: What employers need to know to stay out of trouble

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MAY 12, 2021

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## Disclaimer

- *The information in the written materials and oral presentation is for general informational purposes only and is not to be construed as legal advice.*

# What we will cover today

- 1. EEOC implications during a pandemic
  - Key tenets from the ADA that employers must consider
    - Disability-related inquiries and medical examinations
    - Reasonable accommodation/undue hardship
    - Direct threat
  - Can you have a mandatory vaccination policy?
  - Can you require face coverings?
  - Are COVID-related screenings medical records?
- 2. COVID-related bills from the 2021 Arkansas legislative session affecting employers
- 3. Fun Pop Quiz

## Key principles at issue under the Americans with Disabilities Act

- ADA regulates employers' **disability-related inquiries and medical examinations** for all applicants and employees, including those who do not have disabilities.
- ADA requires **reasonable accommodations** for individuals with disabilities (absent undue hardship) during a pandemic.
- ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "**direct threat**" (i.e. a significant risk of substantial harm even with reasonable accommodation).

## Disability-related inquiries and medical exams

- The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances.

## Disability-related inquires and med exams (cont.)

- **Before a conditional offer of employment:** **Prohibited.**
- **After a conditional offer of employment, but before an individual begins working –** **Allowed if** all entering employees in the same job category are subject to the same inquiries and examinations.
- **During employment:** **Prohibited unless** they are job-related and consistent with business necessity, i.e., when employer has reasonable belief, based on objective evidence, that
  1. An employee's ability to perform essential job functions will be **impaired** by a medical condition; or
  2. An employee will pose a **direct threat** due to a medical condition.

## Do not make a “disability-related” inquiry in the name of COVID

- An inquiry is "**disability-related**" if it is likely to elicit information about a disability.
  - For example, asking an individual if his immune system is compromised is a disability-related inquiry because a compromised immune system can be closely associated with conditions such as cancer, Lupus, and Type 1 diabetes.
  - Asking someone if they have a disability that prevents them from getting the vaccine is likely prohibited.
    - Caveat: If you have a mandatory vaccine policy, then an employee may be required to tell HR what their disability is that prevents them from getting the vaccine, though the same result can be reached with a physician certification that is not overly invasive.

## Are COVID screenings “medical examinations”?

- Is taking an employee’s temperature a medication examination?
- A "**medical examination**" is a procedure or test that seeks information about an individual’s physical or mental impairments or health. Determined by factors such as
  - use of medical equipment;
  - invasive;
  - designed to reveal the existence of a physical or mental impairment; and
  - given or interpreted by a medical professional.

Thus, taking an employee’s temperature is a “medical examination.”

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## Is COVID a “direct threat” that lets you take the employee’s temperature?

- A "**direct threat**" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

## COVID is 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.
- CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued significant and widespread precautions to slow the spread, as have state and local authorities.
- 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. (EEOC)

## COVID is a “direct threat” (cont.)

- So, yes, you can take employee’s temperature. (Good thing since we’ve been doing it since March 2020.)

## How much employee health info can you request?

- **During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?**
- 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.
  - If pandemic influenza is like seasonal influenza, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the virus poses a direct threat.
- Thus, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. (EEOC)

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## Do not forget to treat COVID-related info on employees as separate, confidential medical records

- Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

## EEOC and some FAQs

- The EEOC has published a great deal of guidance on these issues before COVID, and has since updated it to reflect COVID-specific issues.

## FAQ: Can you ask an employee specifics about a medical condition that might put them at risk?

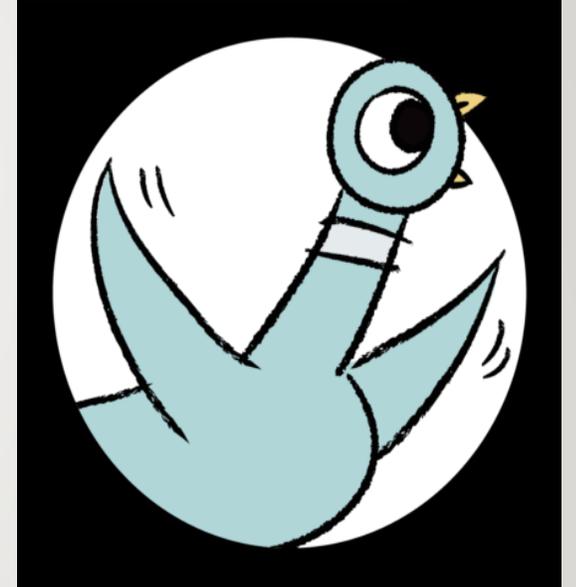
- During a pandemic, may an employer ask employees *who do not have symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?
- In general, no. However, employers may have sufficient objective information from public 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.” [EEOC]
- Tip – **Proceed with caution** – ask yes or no Qs. Do not require disclosure or details about the condition of the employee.

## FAQ: Can you have a mandatory vaccination policy?

- **May an employer compel all of its employees to get the COVID vaccine?**
- Only with exceptions:
  - An employee may have an **ADA disability** for which the influenza vaccine is contraindicated. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). You may need to require the employee to continue wearing PPE or reassign.
  - Under Title VII, once an employer receives notice that an employee's sincerely held **religious belief, practice, or observance** prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the employer's business, a lower standard than ADA).

## What about FACE MASKS!!!???

- A face mask (and other PPE) can be required but is subject to the same exceptions for certain disabilities and religious beliefs.
- If exceptions apply, then reasonable accommodation is required – if it can be done without posing an undue hardship on the employer or a direct threat to the employee, clients, or others.



## Bottom line....

- In short, you can mandate that employees get the COVID vaccine (or the flu vaccine, etc.) or wear a mask – as long as you make exceptions for **disabilities** for which it is contraindicated and for **religious beliefs**.
- Tip – Do not get into a debate with employees about whether their religious beliefs are “sincerely held,” no matter how nontraditional.

## FAQ: Can you require a RTW certification?

- **May an employer require employees who have been away from work during a pandemic to provide a doctor's note certifying fitness to return to work?**
- 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 health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.

## Who gets the vaccines and in what order?

- **Was it legal for states to exclude individuals with disabilities from the early phases of COVID-19 vaccinations?**
- “A covered entity may not assign a lower priority to individuals with disabilities, such as individuals with a developmental disability, for a vaccine, based on social stigma or stereotypes about disability, or assessment of quality of life or judgments about an individual’s relative worth based on a disability.” (U.S. HHS, Office for Civil Rights)
- What do you think???

## Are vaccination incentives legal?

- **Employers in Arkansas and across the country have offered incentives, from paid time off to cash bonuses, to encourage workers to receive a vaccine. Is this legal?**
- EEOC seems likely to follow previous guidance for wellness incentives in employer health plans, i.e., they must be “voluntary.”
- In 2016, the EEOC issued rules that said participation was generally considered voluntary if the incentive was less than 30% of the cost of self-only coverage.
- In 2019 a court struck down the rule. The EEOC then proposed a rule that would allow only “de minis” incentives, but then withdrew it as the Biden Administration came into office.
- In April 2021, the EEOC said guidance specific to vaccine incentives will be out soon.

## Helpful Sources

- **EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**, updated March 21, 2020 at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- **Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA**, October 17, 2002 at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#:~:text=requests%20reasonable%20accommodation%3F-,Yes.,her%20disability%20and%20functional%20limitations.&text=The%20employer%20is%20entitled%20to,he%20needs%20a%20reasonable%20accommodation>

## COVID-related bills from 2021 Session

- **Act 559 (HB 1487) Business immunity**
  - Provides persons or businesses, including nonprofits, **immunity from liability if someone transacts COVID** on their premises or during an activity managed by the person or business. The immunity does not apply to “willful, reckless, or intentional misconduct.” It is presumed you are not doing that if you are substantially complying with state and federal health directives or attempting in good faith to do so.

## COVID-related bills from 2021 Session (cont.)

- **Act 353 (HB 1488) – Workers Compensation**
  - Taking care of business
    - Requiring an employee to perform work within the normal course and scope of the employee's job, with knowledge that exposure to COVID-19 or SARS-CoV-2 or any of its mutations is possible, likely, or certain is not intentional conduct that would remove employer from protections of Workers Comp.

## COVID-related bills – worker comp (cont.)

- Taking care of employees (sort of)
- Employees who contract COVID may file claims retroactive to March 11, 2020, and until May 1, 2023.
- Provides coverage to employees for illness or injury sustained as a result of the coronavirus 2019 (COVID-19) outbreak, but with a gray area:
  - “Compensation shall not be payable for any contagious or infectious disease unless contracted in the course of employment in or immediate connection with a hospital or sanitorium in which persons suffering from that disease are cared for or treated.” ICFs? Other IDD settings?

## COVID-related bills from 2021 Session (cont.)

- **Act 977** (HB 1547)
  - The state, a state agency or entity, a political subdivision of the state, or a state or local official shall not mandate or require an individual to receive a vaccine or immunization for COVID-19.
  - Prohibits incentives that “coerce” an employee to get the vaccine.
  - Permits “positive incentives.”
  - Does not apply to private employers.

## COVID-related bills from 2021 Session (cont.)

- **Act 153** (HB 1212)
  - Allows AEDC to **disregard unemployment insurance claims** from April 1, 2020-June 30, 2020 (base period) due to public emergency (COVID). Specifically, unemployment claims may be noncharged to the separate account of each employer in the base period.

## COVID-related bills from 2021 Session (cont.)

- **Act 401** (SB 254)
  - State regulatory bodies shall not hold businesses liable for the behavior of their patrons during the COVID pandemic that violate public health orders.

## COVID-related bills from 2021 Session (cont.)

- **Act 311 (HB 1061)** by Rep. Julie Mayberry - The “**No Patient Left Alone Act.**”
  - This requires all healthcare providers to allow visitation from designated family or friends even during COVID except under certain exceptions particularly applicable to ICFs, SNFs, and Hospitals.

## Fun Pop Quiz

- **Q1: Best DD Provider has a mandatory mask policy, but since many of its employees have been vaccinated, Best is letting them go without masks in small groups at break, lunch, etc. if all in the group agree. One employee is complaining to HR that the other employees are verbally harassing her because she is not vaccinated and wants them to wear their masks on breaks. What should you do?**
  - A. Make her wear a mask.
  - B. Tell the other employees to convince her to get the vaccine.
  - C. Tell the other employees to stop verbally harassing her and just glare at her until she caves under pressure.
  - D. None of the above.

## Pop Quiz (cont.)

**Q2: The state mandates on masking, social distancing, and screening are gone. Can we go back to “normal”?**

- A. Yes, as of March 30, 2021, the light is green.
- B. No.
- C. Only if you are willing to risk losing your tort immunity.

## Pop Quiz (cont.)

- **Q3: The CDC and the states remove all COVID-related restrictions and advisories, but occasional outbreaks occur. Your county has no cases, but a neighboring county has an outbreak. You can:**
  - A. Wait on the CDC or state to issue guidance.
  - B. Issue your own mask mandate.
  - C. A or B either one.