ADA Considerations for Employers in the Age of the Coronavirus

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The COVID-19 pandemic has placed enormous strain on employers tasked with maintaining the viability of their businesses while also complying with their legal obligations to employees under the increasingly complex employment law framework. While COVID-19 implicates a variety of potential employment-related legal issues, the Americans with Disability Act ("ADA") is amongst the most prominent. To that end, what follows is a brief overview of the primary legal issues for employers to consider with regard to COVID-19 and the ADA.

A. COVID-19: Is the Illness a Disability as defined by the ADA?

Definition of "Disability" under the ADA: To determine whether the COVID-19 disease constitutes a disability under the ADA, employers should begin with the ADA's definition of "disability." The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C. § 12102(1). An impairment "that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12103(4)(A). Impairments of limited duration are not considered disabilities under the ADA.

An individual diagnosed with COVID-19 may be deemed to have a disability under the ADA if the condition substantially impairs one or more life activities of the individual, such as the individual's ability to work. See 42 U.S.C. § 12102(a). An individual who has recovered from COVID-19 an no longer suffers any symptoms may nonetheless be deemed to have a "a record of such an impairment" or "regarded as having" such an impairment, thereby satisfying the ADA's second or third definitions of disability, respectively. If an

employee suffering from or regarded as having COVID-19 satisfies any of these definitions, the ADA protects the employee from discrimination on the basis of disability so long as the employee is qualified to perform the essential functions of their position, with or without reasonable accommodation.

B. What Medical Information Can Employers Request?

Medical Examinations and Inquiries Under the ADA: In general, an employer ***may not*** require a medical examination of an applicant or make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability. After an employer has extended an offer of employment, and before the applicant's employment has commenced, an employer may require a medical examination or inquiry and condition the offer of employment on the results of the medical examination or inquiry, provided that all new employees in the same job category are subjected to the same required medical examination or inquiry regardless of disabilities.

The Equal Employment Opportunity Commission ("EEOC"), the federal agency tasked with enforcing the ADA, recently published new guidance regarding medical examinations and inquiries in the context of the COVID-19 pandemic. Specifically, the EEOC has taken the position that "[a]n employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job."[1]

Examinations and Inquiries of Current Employees: During the course of employment, the ADA prohibits medical examinations or inquiries into whether an employee has a disability, or the nature of such disability, unless the examination or inquiry is job related and consistent with business necessity. To satisfy the "job related and consistent with business necessity" standard, the employer must have a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential functions of the

[1] EEOC, "What You Should Know About the ADA, the Rehabilitation Act, and COVID-19," updated on March 18, 2020, *available at* https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

job will be impaired by a medical condition; or (2) an employee will pose a "direct threat" due to a medical condition. A "direct threat" means 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. Factors to be considered in determining whether an individual poses a direct threat include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The EEOC has concluded that the COVID-19 pandemic satisfies this standard.[2]

Examples of Permissible Inquiries Related to COVID-19: The EEOC has also taken the position that "[d]uring a pandemic, ADA-covered employers may ask . . . employees if they are experiencing symptoms of the pandemic virus."[3] With respect to the COVID-19 virus, the EEOC has issued guidance indicating that an employer may inquire whether employees have symptoms such as a fever, chills, cough, shortness of breath, or sore throat.[4] The EEOC guidance also makes clear that employers may require employees to have their temperature taken because of the prevalence of fever as a symptom of COVID-19.[5]

C. Actions Employers May Take with Respect to Employees With Symptoms of COVID-19 under the ADA.

The EEOC has made clear that the ADA does not prohibit employers from requiring an employee exhibiting symptoms associated with COVID-19 to take a leave of absence or work from home. Specifically, the United States Centers for Disease Control and Prevention has expressly stated that employees who become ill with symptoms of COVID-19 should leave the workplace and the EEOC has opined that "the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.[6]

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[2] EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," updated March 21, 2020, *available at* https://www.eeoc.gov/facts/pandemic_flu.html
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

Likewise, the EEOC has concluded that when an employer needs an applicant to start immediately, but the individual has COVID-19 or symptoms of it, the employer may withdraw a job offer without violating the ADA because the individual cannot safely enter the workplace based on CDC guidance.[7] Similarly, an employer may delay the start date of an applicant who has been diagnosed with COVID-19 or has symptoms associated with the virus.

D. Reasonable Accommodations for COVID-19 Under the ADA.

The ADA requires covered employers to provide employees and job applicants who are disabled with reasonable accommodations, *i.e.*, a change in the work environment that allows a disabled individual to perform the essential functions of the position. The EEOC has previously indicated that encouraging or requiring employees to work remotely or "telework" is an effective infection-control strategy that may be considered a reasonable accommodation under the ADA depending on the circumstances.[8] Similarly, while an employer may require employees to adopt infection-control practices, such as regular hand washing or wearing personal protective equipment (e.g., surgical masks, gloves) to reduce transmission, an employer may still be obligated to provide disabled individuals with modified equipment such as gowns designed for individuals in a wheelchair or non-latex gloves for an individual with an allergy.[9]

As employers and employees have increasingly discovered, the COVID-19 virus and disease are presenting an entirely new set of challenges to the workplace that implicate federal, state and local employment laws and regulations. The foregoing discussion highlights only a few of the key legal issues under the ADA likely to confront employers as the COVID-19 pandemic continues to unfold. Employers should also be mindful of their requirements under the Family & Medical Leave Act, the Families First

[7] *Id.*
[8] *Id.*
[9] *Id.*

Coronavirus Response Act (which expands coverage under the FMLA), and state laws and local ordinances imposing further obligations beyond those required under federal law.

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