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COVID-19 IN THE WORKPLACE

AN EMPLOYER'S GUIDE TO
RESPONDING TO THE PANDEMIC
WITHOUT VIOLATING FEDERAL
ANTIDISCRIMINATION LAWS

(CDC/Alissa Eckert, MSMI/Dan Higgins, MAMS)

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EXECUTIVE SUMMARY

The COVID-19 pandemic has raised many questions for employers, who are suddenly faced with the prospect of taking unprecedented steps to protect employees from being exposed to the virus. Some of these steps—including conducting health checks on employees, excluding sick employees from the workplace, and taking steps to protect employees who are at higher risk of severe illness—implicate the Americans with Disabilities Act (“ADA”) and other federal antidiscrimination laws enforced by the U.S. Equal Employment Opportunity Commission (“EEOC”). These laws apply to most employers with at least 15 (or, in the case of age discrimination, 20) employees¹ and limit a covered employer’s right to require employees to take medical tests,² ask employees medical questions,³ and exclude employees from the workplace based on disability, age, or pregnancy.⁴

The EEOC takes the position that the laws enforced by the EEOC “do not interfere with or prevent employers from following the guidelines and suggestions made by the [Centers for Disease Control and Prevention (“CDC”)] or state/local public health authorities about steps employers should take regarding COVID-19.”⁵ It has elaborated on this position by providing specific guidance to employers about how antidiscrimination laws apply during the pandemic.⁶ This article outlines how the EEOC’s guidance applies to employers who are (1) implementing a program to identify employees who may have COVID-19 and prevent them from infecting others in the workplace and (2) responding to employees who may be particularly susceptible to serious illness if infected by COVID-19. It also points employers to relevant public health guidelines that impact how the steps endorsed by the EEOC can be implemented.

Based on current public health guidelines, a covered employer may take the following steps in response to the pandemic:

1. Screening Employees for COVID-19 Symptoms and Exposure

Employers may screen employees who are entering the workplace for COVID-19 symptoms or exposure (including travel-related exposure) and may exclude an employee from the workplace if public health guidelines direct that the employee should self-isolate.⁷ Covered employers must take care to maintain the confidentiality of employees’ medical information but may inform appropriate employees that they may have been in contact with a coworker with COVID-19 without naming the coworker.⁸ Employers with employees absent from work because of COVID-19 should also familiarize themselves with the paid-leave requirements of the Families First Coronavirus Response Act.⁹

2. Protecting Vulnerable Employees

A covered employer must provide a reasonable accommodation to an employee who requires it because of a disability that puts the employee at increased risk of serious illness from COVID-19 if the accommodation does not impose an undue hardship on the employer.¹⁰ A covered employer should also provide the same work-related adjustments to a pregnant worker that it provides to non-pregnant workers whose ability to work is similarly affected

by COVID-19.¹¹ An employee is not entitled to an accommodation because the employee's age puts the employee at increased risk from COVID-19, but the Age Discrimination in Employment Act does not prevent employers from providing accommodations to older employees that they do not provide to younger employees.¹² Similarly, although an employee is not entitled to a reasonable accommodation because the employee has a family member at increased risk of serious illness from COVID-19, employers are free to provide flexibility to such employees as long as they do so in a non-discriminatory fashion.¹³ A covered employer should not, however, question an employee about whether the employee has a condition on the CDC's list of conditions that increase the risk of severe illness from COVID-19 or exclude an employee from the workplace—even for the employee's own protection—solely because the employee has such a condition, is an older adult, or is pregnant.¹⁴

The steps an employer may take in response to COVID-19 are likely to change as new public health guidelines are issued, and an employer must stay up to date on new guidance from the EEOC, the CDC, the Department of Labor, and local health authorities.¹⁵

DISCUSSION

Extensive community spread of COVID-19 means that routine working conditions suddenly present new dangers.¹⁶ The CDC’s [Interim Guidance for Businesses and Employers Responding to Coronavirus Disease](#) recommends (among other things) that employers “[c]onsider conducting daily in-person or virtual health checks (e.g., symptom and/or temperature screening) of employees before they enter the facility” and “[a]ctively encourage sick employees to stay home.”¹⁷ It also suggests that employers “[c]onsider offering vulnerable workers duties that minimize their contact with customers and other employees (e.g., restocking shelves rather than working as a cashier), if the worker agrees to this.”¹⁸

When considering these and other measures, an employer must be mindful of federal antidiscrimination laws. The ADA, for example, applies to most employers with at least 15 employees¹⁹ and prohibits them from asking employees disability-related questions or conducting medical exams on employees unless doing so is “job-related and consistent with business necessity.”²⁰ A covered employer must ensure that any medical tests and questions that it uses to determine whether an employee may have COVID-19 meet this standard.

The ADA also prohibits a covered employer from excluding an employee from the workplace because of a disability unless the employee poses a direct threat to the employee’s own health or the health of others in the workplace that cannot be managed by providing reasonable accommodation to the employee.²¹ Since the EEOC has not ruled out the possibility that having COVID-19 could be a disability under the ADA,²² an employer should not exclude an employee from the workplace—either because the employer is concerned that the employee may infect others with COVID-19 or because the employer is concerned that a preexisting disability puts the employee at greater risk from COVID-19—unless the employee’s presence in the workplace constitutes a direct threat to health.²³ An employer must also be sure that any policy about who may be present in the workplace complies with Title VII of the Civil Rights Act, which prohibits most employers with at least 15 employees from taking adverse employment action based on an employee’s pregnancy,²⁴ and the Age Discrimination in Employment Act, which prohibits most employers with at least 20 employees from taking adverse employment action because an employee is over the age of 40.²⁵

Antidiscrimination laws also prescribe certain actions that covered employers must take in response to the pandemic, such as providing reasonable accommodations for disabled employees who require them because they are at increased risk of serious illness from COVID-19²⁶ and allowing pregnant workers the same work-related adjustments provided to non-pregnant workers whose ability to work is similarly impacted by COVID-19.²⁷

The EEOC has issued guidance to assist employers in responding to the pandemic without violating antidiscrimination laws.²⁸ Since the “starting point” of the EEOC’s analysis is that “the laws enforced by the EEOC do not hinder employers from following the COVID-19 guidance from the [CDC] and from state or local public health authorities,” the EEOC’s position is based on rapidly evolving public health guidelines.²⁹ The steps that an employer may take in response to COVID-19 are, therefore, likely to change as public-health guidelines change, and it is critical for an employer to stay abreast of the most recent guidance from the [EEOC](#), the [CDC](#), and the

[Department of Labor](#) and modify its workplace policies accordingly.³⁰ Based on current public-health guidelines, there are a number of steps that an employer can (and in some cases must) take when implementing a program to identify potentially infected employees and prevent them from infecting others in the workplace and when responding to employees who are at increased risk from COVID-19.

I. IMPLEMENTING A PROGRAM TO IDENTIFY POTENTIALLY INFECTED EMPLOYEES AND PREVENT THEM FROM INFECTING OTHERS IN THE WORKPLACE

1. An employer may take steps recommended by the CDC and local health authorities to identify employees who are entering the workplace and may have COVID-19, symptoms of COVID-19, or exposure to COVID-19.

The EEOC has concluded that, based on current pronouncements by the CDC and other health authorities, it is “job-related and consistent with business necessity” for employers to take steps to protect their workforces by determining whether employees entering the workplace have symptoms of COVID-19.³¹ Employers must take care, however, to implement screening in a uniform and non-discriminatory fashion and avoid singling out a specific employee for screening unless the employer has “a reasonable belief based on objective evidence”—such as the employee reporting to work with a persistent, hacking cough—that the employee might have COVID-19.³² Since the justification for screening employees for COVID-19 is maintaining the safety of the workplace, employers should also avoid testing or making inquiries of employees who will not be physically present at the workplace.³³

The following tools are available to a covered employer who wishes to identify employees who may have COVID-19 without violating federal antidiscrimination laws:

a. An employer may require employees who are entering the workplace to take a COVID-19 test to determine if they have active infections.³⁴ Covered employers who choose to administer COVID-19 tests must ensure that the tests used are accurate and reliable, because it is not consistent with business necessity to exclude employees from the workplace based on an unreliable test.³⁵ [Information regarding COVID-19 testing](#) is available from the U.S. Food and Drug Administration.³⁶

A covered employer may *not*, however, administer COVID-19 antibody tests to employees.³⁷ These tests look for antibodies that show that a person has been infected in the past and may have some degree of protection from future infection.³⁸ It is not yet known whether and to what extent a person with a positive antibody test is protected from future infection, and the CDC has concluded that antibody tests “should not be used to make decisions about returning persons to the workplace.”³⁹ Because of this guidance from the CDC, it is not “job related and consistent with business necessity” to perform antibody tests on employees, and these tests are not allowed under the ADA.⁴⁰

- b. An employer may take employees’ body temperatures before they enter the workplace to determine whether they have a fever.**⁴¹ Taking an employee’s body temperature is a medical examination that must meet the ADA’s “job-related and consistent with business necessity” standard.⁴² During a normal flu season, this standard is not met, and a covered employer may not take employees’ temperatures.⁴³ Taking employees’ temperatures is currently permissible, however, “[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.”⁴⁴ The EEOC and other federal agencies caution, however, that “some people with COVID-19 do not have a fever.”⁴⁵

The CDC’s [Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 \(COVID-19\)](#) provides information about how to conduct temperature checks “safely and respectfully.”⁴⁶

- c. An employer may ask employees who are entering the workplace whether they have COVID-19, have been tested for COVID-19, or are experiencing symptoms of COVID-19.**⁴⁷ Because the list of possible symptoms of COVID-19 is evolving, a covered employer should “rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.”⁴⁸ The [symptoms](#) that the CDC currently associates with COVID-19 include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea.⁴⁹
- d. An employer may ask employees who are entering the workplace whether they have had contact with anyone with COVID-19 or symptoms of COVID-19.**⁵⁰ The Genetic Information Nondiscrimination Act prohibits most employers with at least 15 employees from asking employees medical questions about family members,⁵¹ so covered employers should avoid asking employees whether they have family members with COVID-19 or symptoms of COVID-19.⁵² An employer may, however, ask employees more broadly about contact with any person with known or possible COVID-19.⁵³
- e. An employer may monitor employees’ personal travel.**⁵⁴ “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.”⁵⁵ An employer may also “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.”⁵⁶

2. An employer may exclude an employee from the workplace if public-health guidelines suggest that the employee’s presence is a direct threat to others.

The next question for a covered employer that implements a screening process is what to do if an employee refuses to be screened or the screening reveals that an employee has COVID-19, symptoms of COVID-19, or exposure to COVID-19. Here, too, the EEOC has provided guidance.

a. An employer may exclude an employee from the workplace who has COVID-19, displays symptoms of COVID-19, or refuses to be screened for COVID-19.

As of March 27, 2020, the EEOC had not reached a conclusion about whether having COVID-19 “is or could be a disability under the ADA.”⁵⁷ If it is, a covered employer can only exclude an employee with COVID-19 from the workplace if doing so is “job-related and consistent with business necessity.”⁵⁸ The EEOC has determined that, under the current circumstances of the COVID-19 pandemic, an employee who is present at the workplace with COVID-19 poses a direct threat to the health and safety of other people.⁵⁹ An employee who tests positive for COVID-19, has symptoms of COVID-19, or refuses to be screened may, therefore, be excluded from the workplace.⁶⁰

i. An employer may consult CDC guidance regarding when an employee can safely return to work.

Although the EEOC has not specifically addressed how long a person with COVID-19, COVID-19 symptoms, or exposure to COVID-19 may be excluded from the workplace, it encourages employers to follow “the most current information [from the CDC and public health authorities] on maintaining workplace safety.”⁶¹ The Occupational Safety and Health Administration, too, recommends that employers “[f]ollow CDC guidance for discontinuing self-isolation and returning to work after illness, or discontinuing self-quarantine and monitoring after exposure.”⁶²

The CDC’s [Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 \(COVID-19\)](#) directs that an employee with a known or suspected case of COVID-19 should not return to work “until the criteria to discontinue home isolation are met, in consultation with healthcare providers.”⁶³ The CDC currently recommends a symptom-based approach, under which most people with COVID-19 symptoms who are not hospitalized can discontinue isolation once 10 days have passed since the onset of symptoms, 24 hours have passed since the resolution of fever without the use of fever-reducing medications, and other symptoms improve.⁶⁴ “A limited number” of people who have severe illness or are immunocompromised, however, may remain infectious for up to 20 days after the onset of symptoms.⁶⁵ The CDC directs that someone who tests positive for COVID-19 but has no symptoms should isolate for at least 10 days after the first positive test.⁶⁶ These guidelines have been evolving rapidly as the

CDC learns more about how long a person with COVID-19 remains infectious, and employers should take particular care to consult the most recent guidance from the CDC.

ii. An employer may require a doctor’s certification before an employee returns to work.

An employer may require an employee to provide a doctor’s certification that the employee is fit for duty before the employee returns to work without violating the ADA.⁶⁷ The EEOC anticipates, however, that “doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation” and notes that “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.”⁶⁸

b. An employer may exclude an employee from the workplace because the employee has been exposed to someone with COVID-19 or is subject to a self-quarantine directive from health authorities because of travel.

The EEOC has not specifically addressed whether a covered employer may bar an employee from the workplace because the employee has been exposed to someone with COVID-19 or has returned from travel. To the extent that the ADA applies to these exclusions,⁶⁹ they appear to fall within the EEOC’s general guidance that “the laws enforced by the EEOC do not hinder employees from following the COVID-19 guidance from the [CDC] and from state or local public health authorities.”⁷⁰

i. Self-Isolation After to Exposure to Someone with COVID-19

For employees who have “been in close contact with someone who has COVID-19,” current CDC guidelines call for self-isolation for 14 days after the last exposure.⁷¹ Close contact includes being within 6 feet of someone with COVID-19 for at least 15 minutes, providing home care to someone with COVID-19, having direct physical contact with someone with COVID-19, sharing eating or drinking utensils with someone with COVID-19, or having someone with COVID-19 sneeze, cough, or otherwise get respiratory droplets on you.⁷² Employers should also be aware of state and local isolation requirements. The Arkansas Department of Health, for example, “requires a person exposed to COVID-19 to complete a 14-day quarantine period, even though they may have a negative test result during the quarantine period.”⁷³

ii. Self-Isolation After Travel

The CDC does not currently have any directives in place related to domestic travel, but it directs a [14-day self-quarantine after international travel](#) or travel on [cruise ships](#).⁷⁴ Some states also impose quarantine requirements on travelers from certain domestic locations.⁷⁵ In Arkansas, the Department of Health makes its

[COVID-19 directives, orders, and health guidance](#), including directives related to travel, available on its website. There are no Arkansas-specific travel directives in place at the time of this article.

c. Employers should familiarize themselves with the paid-leave provisions of the Families First Coronavirus Response Act.

Employers with employees absent from work due to COVID-19 should familiarize themselves with the Families First Coronavirus Response Act, which applies to employers with fewer than 500 employees and provides defined amounts of paid sick leave and expanded family medical leave to many employees who are absent from work for specified reasons related to COVID-19, including because they are experiencing COVID-19 symptoms and are seeking a medical diagnosis, have been advised by a health care provider to self-quarantine related to COVID-19, or are caring for a person subject to quarantine.⁷⁶ A full discussion of the Act is outside the scope of this article, but employers can consult the Department of Labor's [Fact Sheet](#) for more information about the Act's leave requirements.⁷⁷

3. A covered employer must maintain the confidentiality of employees' medical information.

Covered employers must maintain the confidentiality of medical information that they learn when screening employees for COVID-19 symptoms, including any log of employees' temperatures and any information about symptoms an employee may be experiencing.⁷⁸ This includes restricting access to the information and maintaining it in a file separate from the employee's general personnel file.⁷⁹

The identity of any employee who has COVID-19 or symptoms of COVID-19 must be treated as confidential, and an employer "should make every effort to limit the number of people who get to know the name of the employee."⁸⁰ A designated representative of the employer may interview the employee with COVID-19 or symptoms of COVID-19 to identify other people in the workplace who may have had contact with the employee.⁸¹ Those people may be notified of their potential exposure, but the name of the employee should not be disclosed.⁸² If an employee takes leave or begins teleworking because the employee has COVID-19 or symptoms of COVID-19, the employer may inform other staff with a need to know that the employee is on leave or is teleworking but may not disclose the reason.⁸³

II. RESPONDING TO EMPLOYEES WHO MAY BE PARTICULARLY SUSCEPTIBLE TO SERIOUS ILLNESS IF INFECTED BY COVID-19

In addition to taking steps to prevent the spread of COVID-19 at work, employers are faced with decisions about how to respond to employees who may be particularly vulnerable to COVID-19 or have vulnerable family members. These decisions implicate covered employers' duty to provide reasonable accommodations to disabled employees who request them but avoid discriminating against employees due to disability, age, or pregnancy.

1. Responding to Employee Requests for Accommodations

- a. A covered employer must provide a reasonable accommodation to an employee who needs it because of a disability that puts the employee at higher risk for severe illness from COVID-19 if the accommodation does not impose an undue hardship on the employer's business.**

The ADA's reasonable-accommodation requirement applies to an employee who has a disability that puts the employee at higher risk from COVID-19.⁸⁴ An employer must, therefore, provide a reasonable accommodation to an employee who needs one because of a "disability"—defined as "a physical or mental impairment that substantially limits one or more major life activities"—that places the employee at higher risk from COVID-19 unless the accommodation imposes an undue hardship on the employer's business.⁸⁵ Reasonable accommodations to address increased risk from COVID-19 could include telework, physical measures to prevent infection, or a changed shift.⁸⁶

The CDC's list of [medical conditions that increase the risk of severe illness from COVID-19](#) has evolved significantly since the pandemic began and currently includes cancer, chronic kidney disease, chronic obstructive pulmonary disease, immunocompromised state from solid organ transplant, obesity, serious heart conditions (such as heart failure, coronary artery disease, or cardiomyopathies), sickle cell disease, and type 2 diabetes mellitus.⁸⁷ The CDC has also listed a number of conditions, including moderate to severe asthma, that might increase the risk for severe illness from COVID-19.⁸⁸ If an employee has one of these conditions (or another condition that puts the employee at increased risk from COVID-19) and it substantially limits one or more major life activities, an employer may be required to provide a reasonable accommodation to reduce the risk that the employee will be exposed to COVID-19.⁸⁹

A full discussion of reasonable accommodation under the ADA is outside the scope of this article, but the EEOC provides [Disability Accommodations Tips](#) for small businesses.⁹⁰ The EEOC has also provided answers to questions employers may have about [COVID-19 related accommodations requests](#) and recommends the [Job Accommodation Network](#) as an additional resource for employers responding to a COVID-19-related request for reasonable accommodation.⁹¹

- b. A covered employer should provide pregnant workers the same work-related adjustments that it provides to non-pregnant workers whose ability to work is similarly affected by COVID-19.**

Although pregnancy itself is not a disability under the ADA, a pregnancy-related medical condition may qualify as a disability that requires reasonable accommodation.⁹² In addition, Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act, requires employers to treat pregnant workers the same as non-pregnant workers “similar in their ability or inability to work.”⁹³ The CDC currently believes that pregnant people might be at an increased risk for severe illness from COVID-19, and an employer should not deny a pregnant worker “a needed adjustment” that it provides to other employees who have an increased risk of severe illness from COVID-19.⁹⁴

- c. An employer is not required to provide a reasonable accommodation to a non-disabled employee whose age puts the employee at increased risk but may provide special accommodations to older employees that it does not provide to younger employees.**

The Age Discrimination in Employment Act does not have a reasonable-accommodation provision, and an employer is not required to provide telework or other accommodation to a non-disabled employee who is at higher risk of serious illness from COVID-19 based solely on age.⁹⁵ The Act does not, however, prohibit employers from favoring older workers over younger ones, so an employer may provide telework or other accommodations to older workers without providing them to younger workers.⁹⁶

- d. An employer is not required to provide a reasonable accommodation to an employee with a family member with a disability that puts the family member at higher risk for severe illness from COVID-19 but may do so on a non-discriminatory basis.**

An employee is not entitled to a reasonable accommodation because the employee has a family member who is at increased risk for severe illness from COVID-19.⁹⁷ Employees are free to provide flexibility to such employees—such as by permitting them to telework—but should be careful not to treat employees differently based on protected characteristics.⁹⁸ An employer should not, for example, provide female employees more flexibility than their male counterparts “because of a gender-based assumption about who may have caretaking responsibilities for children.”⁹⁹

2. Employees Who Do Not Request Accommodation but May Be at Increased Risk

- a. A covered employer should not bar employees from the workplace because of their age, because they are pregnant, or because they have a medical condition that might put them at higher risk of severe illness from COVID-19.**

Under the ADA, a covered employer may not “exclude[e] 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).”¹⁰⁰ The EEOC has concluded that an employee’s presence in the workplace does not pose a “direct threat” to the employee’s safety simply because the employee has a condition that increases the risk of severe illness if the employee gets COVID-19.¹⁰¹ A covered employer should not, therefore, exclude an employee from the workplace simply because the employer knows that the employee has a condition that puts the employee at higher risk from COVID-19.

Instead, before excluding an employee from the workplace because of a disability that puts the employee at higher risk from COVID-19, a covered employer must conduct “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.”¹⁰² The individualized inquiry must 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.¹⁰³ Relevant factors include “the severity of the pandemic in a particular area,” “the employee’s own health (for example, is the employee’s disability well-controlled),” the employee’s “particular job duties,” “the likelihood that an individual will be exposed to the virus at the worksite,” measures that the employer is taking to reduce the likelihood that employees will contract COVID-19, such as mandatory social distancing, and additional reasonable accommodations that can be made for the disabled employee.¹⁰⁴ Although the EEOC has not ruled out the possibility that the “direct threat” standard could be met for certain employees, its discussion of the “high standard” suggests that employers should exercise great caution before instructing employees not to come to work because they are at increased risk of COVID-19 complications.¹⁰⁵

Similarly, the Age Discrimination in Employment Act prohibits most employers with at least 20 employees from involuntarily excluding employees from the workplace because their age puts them at increased risk from COVID-19,¹⁰⁶ and Title VII of the Civil Rights Act prohibits most employers with at least 15 employees from involuntarily excluding pregnant employees from the workplace because they may be at higher risk from COVID-19.¹⁰⁷

b. A covered employer should not ask employees whether they have one of the conditions that the CDC has listed as putting a person at higher risk of severe illness from COVID-19.

The “direct threat” standard also determines whether a covered employer may ask employees if they have a preexisting condition that increases the risk of complications or severe illness from COVID-19.¹⁰⁸ The EEOC does not believe that the direct-threat standard is currently met based solely on the fact that an employee has a condition that the CDC has listed as putting a person at higher risk of severe illness from COVID-19, and covered employers should avoid asking about such conditions by, for example, sending employees a questionnaire asking them to indicate whether they have a condition on the CDC’s list.¹⁰⁹ An employer may, however, send a general notice to all employees explaining the process for requesting a reasonable accommodation.¹¹⁰ “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.”¹¹¹

¹ 42 U.S.C. §§ 12111(2), 12111(5), 2000e(b), 2000ff(2)(B)(i); 29 U.S.C. § 630(b).

² 42 U.S.C. § 12112(d).

³ *Id.*

⁴ *Id.*; 42 U.S.C. § 2000e(k), e-2(a); 29 U.S.C. § 623(a).

⁵ U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter *What You Should Know About COVID-19*].

⁶ *What You Should Know About COVID-19*, *supra* note 5; U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (updated March 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter *Pandemic Preparedness*]; U.S. Equal Employment Opportunity Commission, *Transcript of March 27, 2020 Outreach Webinar*, <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar> [hereinafter *March 27 Webinar*].

⁷ *What You Should Know About COVID-19*, *supra* note 5, at A; *Pandemic Preparedness*, *supra* note 6, at B.8.

⁸ *What You Should Know About COVID-19*, *supra* note 5, at B.

⁹ U.S. Department of Labor, *Families First Coronavirus Response Act: Employee Paid Leave Rights* (current through July 28, 2020), <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave>.

¹⁰ *What You Should Know About COVID-19*, *supra* note 5 at D.

¹¹ U.S. Equal Employment Opportunity Commission, Fact Sheet: Pregnancy Discrimination, EEOC-NVTA-0000-11 (Jan. 15, 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination>.

¹² U.S. Equal Employment Opportunity Commission, Fact Sheet: Age Discrimination, EEOC-NVTA-0000-1 (Jan. 1, 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination>.

¹³ *What You Should Know About COVID-19*, *supra* note 5, at D.13.

¹⁴ *Id.* at G.4.

¹⁵ See *What You Should Know About COVID-19*, *supra* note 5 (“Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.”)

¹⁶ See Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*, at p. 17 (OSHA 3990-03 2020), <https://www.osha.gov/Publications/OSHA3990.pdf> (noting that the General Duty Clause,

Section 5(a)(1) of the Occupational Safety and Health (ASH) Act of 1970, 29 U.S.C. § 654(a)(1), which requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm,” may be implicated by COVID-19 pandemic).

¹⁷ Centers for Disease Control and Prevention, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, May 2020, “Prevent and Reduce Transmission Among Employees,” <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [hereinafter *Interim Guidance*]. The CDC and OSHA have also issued guidance tailored to specific types of employers. The CDC’s collection of “Worker Safety and Support” resources is available at <https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/index.html>. OSHA’s “Guidance on Preparing Workplaces for COVID-19” is available at <https://www.osha.gov/Publications/OSHA3990.pdf>.

¹⁸ *Id.*

¹⁹ The Americans with Disabilities Act applies to businesses “engaged in an industry affecting commerce who ha[ve] 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 12111(2), (5).

²⁰ 42 U.S.C. § 12113.

²¹ 42 U.S.C. § 12112(a),(b); 42 U.S.C. § 12113(a), (b).

²² *March 27 Webinar*, *supra* note 6, at ¶ 33.

²³ 42 U.S.C. § 12112(a),(b); 42 U.S.C. § 12113(a), (b).

²⁴ Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, applies to businesses “engaged in an industry affecting commerce who ha[ve] 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b).

²⁵ The Age Discrimination in Employment Act applies to employers “engaged in an industry affecting commerce who ha[ve] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]” 29 U.S.C. § 630(b).

²⁶ *See* 42 U.S.C. §12112(b)(5) (requiring covered employers to provide reasonable accommodations to disabled employees unless doing so imposed an undue hardship on the employer).

²⁷ *See* 42 U.S.C. § 2000e(k) (“[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes. . . as other persons not so affected but similar in their ability or inability to work.”).

²⁸ *What You Should Know About COVID-19*, *supra* note 5; *Pandemic Preparedness*, *supra* note 6; *March 27 Webinar*, *supra* note 6.

²⁹ *March 27 Webinar*, *supra* note 6, at ¶ 4.

³⁰ *What You Should Know About COVID-19*, *supra* note 5 (“Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.”).

³¹ *What You Should Know About COVID-19*, *supra* note 5, at A.6.

³² *March 27 Webinar*, *supra* note 6, at ¶ 15.

³³ *Id.* at ¶ 12.

³⁴ *What You Should Know About COVID-19*, *supra* note 5, at A.6.

³⁵ *Id.*

³⁶ *What You Should Know About COVID-19*, *supra* note 5, at A.7; U.S. Food & Drug Administration, *FAQs on Testing for SARS-CoV-2* (current through July 27, 2020), <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-testing-sars-cov-2>.

³⁷ *What You Should Know About COVID-19*, *supra* note 5, at A.7.

³⁸ Centers for Disease Control and Prevention, *Test for Past Infection* (updated June 30,2020), <https://www.cdc.gov/coronavirus/2019-ncov/testing/serology-overview.html>.

³⁹ Centers for Disease Control and Prevention, *Interim Guidelines for COVID-19 Antibody Testing* (updated May 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>.

⁴⁰ *What You Should Know About COVID-19*, *supra* note 5, at A.7.

⁴¹ *Id.* at A.3.

⁴² *Id.*

⁴³ *Pandemic Preparedness*, *supra* note 6, at III.B.7.

⁴⁴ *Id.*

⁴⁵ *What You Should Know About COVID-19*, *supra* note 5, at A.3; see U.S. Food & Drug Administration, *Non-contact Temperature Assessment Devices During the COVID-19 Pandemic* (current through June 19, 2020), <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/non-contact-temperature-assessment-devices-during-covid-19-pandemic> (“Some studies suggest that temperature measurements alone may miss more than half of infected people.”).

⁴⁶ *Interim Guidance*, *supra* note 17; see also Centers for Disease Control and Prevention, *General Business Frequently Asked Questions*, “Should we be screening employees for COVID-19 symptoms (such as temperature checks)? What is the best way to do that?” (updated July 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>.

⁴⁷ *What You Should Know About COVID-19*, *supra* note 5, at A.1; *March 27 Webinar*, *supra* note 6, at ¶ 12.

²⁴ *Id.* at A.2.

⁴⁹ Centers for Disease Control and Prevention, *Symptoms of Coronavirus* (updated May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

⁵⁰ *March 27 Webinar*, *supra* note 6, at ¶ 11.

⁵¹ 42 U.S.C. §§ 2000e(b), ff(2)(B).

⁵² *Id.* at ¶ 16.

⁵³ *Id.* at ¶ 11.

⁵⁴ *Pandemic Preparedness*, *supra* note 6, at III.B.8.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *March 27 Webinar*, *supra* note 6, at ¶¶ 32-33.

⁵⁸ 42 U.S.C. § 12113.

⁵⁹ *What You Should Know About COVID-19*, *supra* note 5, at A.6.

⁶⁰ *March 27 Webinar*, *supra* note 6, at ¶¶ 12-14.

⁶¹ *Pandemic Preparedness*, *supra* note 6, at III.B.18.

⁶² Occupational Safety and Health Administration, *Guidance on Returning to Work* at p. 8 (OSHA 4045-06 2020), <https://www.osha.gov/Publications/OSHA4045.pdf>.

⁶³ *Interim Guidance*, *supra* note 17.

⁶⁴ Centers for Disease Control and Prevention, *Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings*, *Interim Guidance* (updated July 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html> [hereinafter *Discontinuation of Isolation*]; see also Centers for Disease Control and Prevention, *When You Can be Around Others After You Had or Likely Had COVID-19* (updated July 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> [hereinafter *When You Can be Around Others*].

⁶⁵ *Discontinuation of Isolation*, *supra* note 64.

⁶⁶ *Id.*; see also *When You Can be Around Others*, *supra* note 64.

⁶⁷ *What You Should Know About COVID-19*, *supra* note 5, at A.5.

⁶⁸ *Id.*

⁶⁹ The ADA prohibits employers from “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” 42 U.S.C. § 12112(b). If the EEOC determines that having COVID-19 is a disability, this provision could be implicated where an employer excludes an employee from the workplace because the employee’s family member has COVID-19. The EEOC has opined that an employee’s personal travel is not “disability related” under the ADA. *Pandemic Preparedness*, *supra* note 6, at III(B)(8).

⁷⁰ *March 27 Webinar*, *supra* note 6, at ¶ 4.

⁷¹ Centers for Disease Control and Prevention, *Quarantine If You Might Be Sick* (updated July 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>; Centers for Disease Control and Prevention, *General Business Frequently Asked Questions*, “If employees have been exposed but are not showing symptoms, should I allow them to work?” (updated July 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>.

⁷² Centers for Disease Control and Prevention, *Quarantine If You Might Be Sick* (updated July 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>.

⁷³ Arkansas Department of Health, *ALERT: Quarantine required after exposure to COVID-19 even with negative test* (May 22, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/quarantine_covid_notice.pdf.

⁷⁴ Centers for Disease Control and Prevention, *Returning from International Travel* (updated May 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>; Centers for Disease Control and Prevention, *Travelers Returning from Cruise Ship and River Cruise Voyages* (updated June 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/returning-cruise-voyages.html>.

⁷⁵ See, e.g., New York Dep't of Health, *Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel* (June 24, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/06/interimguidance_traveladvisory.pdf

⁷⁶ U.S. Department of Labor, *Families First Coronavirus Response Act: Employee Paid Leave Rights* (last visited July 28, 2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

⁷⁷ *Id.*

⁷⁸ *What You Should Know About COVID-19*, *supra* note 5, at B.1 & B.2.

⁷⁹ *Id.*

⁸⁰ *March 27 Webinar*, *supra* note 6, at ¶¶ 17-18.

⁸¹ *Id.* at ¶ 19.

⁸² *Id.*

⁸³ *Id.* at ¶ 21.

⁸⁴ *What You Should Know About COVID-19*, *supra* note 5, at D.

⁸⁵ 42 U.S.C. §§ 12102(1), 12112(a), (b)(5)(A).

⁸⁶ *What You Should Know About COVID-19*, *supra* note 5, at D.1; see also U.S. Equal Employment Opportunity Commission, *Work at Home/Telework as a Reasonable Accommodation* (issued February 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>.

⁸⁷ Centers for Disease Control and Prevention, *Who Is At Increased Risk for Severe Illness? People with Certain Medical Conditions* (updated July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

⁸⁸ *Id.*

⁸⁹ *What You Should Know About COVID-19*, *supra* note 5, at D.1; 42 U.S.C. §§ 12102(1), 12112(a), (b)(5)(A) (defining “disability”).

⁹⁰ U.S. Equal Employment Opportunity Commission, *Disability Accommodations Tips* (last visited July 28, 2020), <https://www.eeoc.gov/employers/small-business/disability-accommodations-tips>.

⁹¹ *What You Should Know About COVID-19*, *supra* note 5, at D; see Job Accommodation Network, *The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19* (last visited July 28, 2020), <https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>.

⁹² U.S. Equal Employment Opportunity Commission, *Fact Sheet: Pregnancy Discrimination*, EEOC-NVTA-0000-11 (Jan. 15, 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination>.

⁹³ 42 U.S.C. § 2000e(k).

⁹⁴ *March 27 Webinar*, *supra* note 6, at ¶ 29.

⁹⁵ *Id.* at ¶ 28.

⁹⁶ See U.S. Equal Employment Opportunity Commission, *Fact Sheet: Age Discrimination*, EEOC-NVTA-0000-1 (Jan. 15, 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination> (“The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.”).

⁹⁷ *What You Should Know About COVID-19*, *supra* note 5, at D.13.

⁹⁸ *Id.*

⁹⁹ *Id.* at I.1.

¹⁰⁰ *Pandemic Preparedness*, *supra* note 6, at II.

¹⁰¹ *What You Should Know About COVID-19*, *supra* note 5, at G.4.

¹⁰² *Id.*

¹⁰³ *Id.*; see also 29 C.F.R. § 1630.2(r) (defining “direct threat”).

¹⁰⁴ *What You Should Know About COVID-19*, *supra* note 5, at G.4.

¹⁰⁵ *Id.*

¹⁰⁶ 29 U.S.C. § 630(b); *What You Should Know About COVID-19*, *supra* note 5, at H.1.

¹⁰⁷ 42 U.S.C. § 2000e(b); *What You Should Know About COVID-19*, *supra* note 5, at J.1.

¹⁰⁸ *See id.* at G.1 (“The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that poses a direct threat to health or safety.”).

¹⁰⁹ *See id.* at G.4 (explaining that, under current public health guidance, the direct-threat standard is not met solely because an employee has a condition that the CDC has identified as carrying a higher risk of severe illness).

¹¹⁰ *Id.* at G.6.

¹¹¹ *Id.*