

Participant Materials





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**U.S. Equal Employment Opportunity Commission
New York District Office**

Getting Workplace Accommodations Right: Disability, Pregnancy, and Religious Accommodations

June 21, 2023

9:00 am – 12:15 pm ET

AGENDA

- | Time | Presentation |
|-------------|---|
| 8:30 am | Virtual Environment Opens |
| 9:00 am | Opening Remarks
Timothy Riera, Acting District Director, EEOC New York District Office |
| 9:05 am | Accommodations under the Americans with Disabilities Act (ADA)
Cara Chomski, Trial Attorney, EEOC New York District Office
Alison Bitterly, Trial Attorney, EEOC Boston Area Office
The session provides practical guidance on the ADA's requirements, and how to navigate through engaging in the interactive process and avoid common pitfalls. |
| 10:05 am | Accommodations under the Pregnant Workers Fairness Act (PWFA) and Title VII
Carol Miaskoff, Legal Counsel, EEOC Office of Legal Counsel
The federal Pregnant Workers Fairness Act is effective June 27, 2023. What does this new law require? What are some lessons learned with respect to employees who have caregiving responsibilities at home? This session answers these questions and more. |
| 11:05 am | Break |
| 11:10 am | Religious Accommodations under Title VII
Lynn Davenport, Assistant Legal Counsel, EEOC Office of Legal Counsel
This session discusses recent updates on the EEOC guidance on reasonable accommodations bases on religion and provides practical tips on employers' responsibilities for handling religious accommodations requests and avoiding discrimination. |

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12:10 pm **Closing Remarks**

Timothy Riera, Acting District Director, EEOC New York District Office

12:15 pm **Adjourn**

REGISTRATION FEE: \$175.00 per person

ENROLL HERE: [New York Virtual Workshop](#)

CREDITS:

HRCI – This program has been submitted to the HR Certification Institute for review.

SHRM – submitted for approval.

CLE – Approved for 3 hours – NY State Unified Courts CLE Accredited Provider.

This workshop has been approved for Federal Counselor or Investigator Refresher credits (3 hours).

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Bios for New York June 21 Workshop

Alison Bitterly is a Trial Attorney with the EEOC's New York District Office, based in the Boston Field Office. Ms. Bitterly has been with the EEOC since September 2022. Before then, Ms. Bitterly worked in private practice, where she gained experience in civil rights litigation and prisoners' rights work. Since arriving at the EEOC Ms. Bitterly has worked on cases involving the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), and Title VII of the Civil Rights Act. Ms. Bitterly received her J.D. from Fordham University School of Law in 2016 and her undergraduate degree from Georgetown University in 2011.

Cara Chomski has been a Trial Attorney with the New York District Office of the U.S. Equal Employment Opportunity Commission since 2021. Prior to joining the Commission, Ms. Chomski worked as an Assistant Attorney General in the Litigation Bureau of the New York State Office of the Attorney General. Ms. Chomski's practice focused on public policy class actions, employment litigation, and administrative law. Ms. Chomski received her J.D. from the University of Chicago Law School and her undergraduate degree from Carleton College.

Lynn Davenport is the Assistant Legal Counsel of the Title VII and Compensation Division at the Equal Employment Opportunity Commission. As Assistant Legal Counsel, she supervises the team of attorneys who work on the Commission's policymaking activities under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Pregnant Workers Fairness Act, including the drafting of regulations and guidance. Ms. Davenport graduated from Harvard University and the University of Virginia School of Law.

Carol R. Miaskoff was appointed Legal Counsel of the Equal Employment Opportunity Commission on June 24, 2021, by Chair Charlotte A. Burrows. As the agency's Legal Counsel, she manages the development and drafting of the Commission's regulations and guidance under the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act. She also serves as in-house counsel to the Chair and oversees the agency's Freedom of Information Act program. Ms. Miaskoff graduated from Harvard University and the George Washington University Law School, with high honors. In the community, Ms. Miaskoff has been active in the Montgomery County, MD, Mental Health Advisory Committee, and a guest lecturer at a Georgetown University undergraduate class on Women and the Law.



Welcome

Getting Workplace Accommodations Right: Disability, Pregnancy, and Religious Accommodations

US EEOC New York District Office



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1



Accommodations under the Americans with Disabilities Act (ADA)

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2

The Americans with Disabilities Act: Basics

- ▶ Under the ADA, an employer must provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless providing a reasonable accommodation would cause undue hardship.

What is a Disability? 29 C.F.R. § 1630.2

- ▶ **(g) Definition of “disability”**—(1) *In general.* Disability means, with respect to an individual—
 - ▶ **(i)** A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - ▶ **(ii)** A record of such an impairment; or
 - ▶ **(iii)** Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”

A physical or mental impairment . . .

- ▶ (h) **Physical or mental impairment** means—
- ▶ (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
- ▶ (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

. . . that substantially limits . . .

- ▶ (i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. **“Substantially limits” is not meant to be a demanding standard.**
- ▶ (ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. **An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.** Nonetheless, not every impairment will constitute a disability within the meaning of this section.

... one or more major life activities.

- ▶ **(i) Major life activities**—(1) *In general*. Major life activities include, but are not limited to:
 - ▶ **(i)** Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
 - ▶ **(ii)** The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

Major life activity is to be construed broadly.

Reasonable Accommodations

- ▶ Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.
- ▶ Accommodations vary depending upon the needs of the individual applicant or employee.
- ▶ Not all people with disabilities (or even all people with the same disability) will require the same accommodation.

What is NOT a reasonable accommodation?

- ▶ Removing or altering a job's **essential functions**.
- ▶ Lowering production or performance standards.
- ▶ Excusing violations of conduct rules necessary for the operation of the business. (E.g., theft, destruction of property, violence, etc.—even if a disability caused the misconduct.)

What is an essential function?

- ▶ **Factors include:**
 1. Employer's judgment
 2. Written job descriptions
 3. Time spent on the job performing the function
 4. Consequences of not requiring CP to perform the function.
 5. Mention of the function in any collective bargaining agreement.
 6. Work experience of past employees in the job.
 7. Work experience of current employees in the job.

The Interactive Process

- ▶ Once an employee requests a reasonable accommodation (and no request is necessary if the employee's disability is obvious) the employer and employee should:
 - discuss the employee's needs and
 - identify the appropriate reasonable accommodation.

Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

The interactive process is collaborative, iterative, and ongoing.

- ▶ "Interactive process" is a formal way of saying that you and the employee or applicant should talk about the request for a reasonable accommodation, especially where the need for the accommodation might not be obvious.
- ▶ Documentation can be part of the interactive process, but it's not the entire interactive process. Employers still need to ask the person about their limitations and needs.

A reasonable accommodation has to be effective.

- ▶ An effective accommodation removes the workplace barrier in issue.
- ▶ An effective accommodation:
 1. Must enable the individual to perform the essential functions of a position (can remove a marginal function).
 2. Doesn't have to be the employee's preferred accommodation. (E.g., transcripts upon request & availability of an ASL interpreter, not contemporaneous live captioning.)

If two accommodations will both effectively accommodate the employee's disability, the employer can choose the less expensive or burdensome accommodation as long as it is effective.

Common reasonable accommodations include:

1. Modifying work schedules or supervisory methods.
2. Altering how and when job duties are performed.
3. Removing and/or substituting marginal functions.
4. Moving to different office space.
5. Providing telework options.
6. Assistive technology.
7. Providing materials in alternative formats.
8. Ergonomic equipment.
9. Reassignment to a different job.

What is undue hardship?

- ▶ "Undue hardship" means **significant** difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.
- ▶ Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly **extensive, substantial, or disruptive**, or those that would **fundamentally alter** the nature or operation of the business.
- ▶ *Undue hardship is a high standard.*

Medical Documentation

- ▶ An employer is entitled only to documentation sufficient to establish that the employee's impairment is a disability and that explains why an accommodation is needed.
- ▶ A request for an employee's entire medical record, for example, would be inappropriate, as it likely would include information about conditions other than the employee's disability at issue.
- ▶ The medical evidence must relate the employee's condition to the performance of job duties involved.

Confidentiality

- ▶ Information obtained in connection with the reasonable accommodation process must be kept confidential.
 - The existence of the request, details of the request, whether the request has been approved, and information about functional limitations must remain confidential.
 - **All medical information** obtained in connection with the request for accommodation must be kept confidential, and must be kept in files separate from the individual's personnel file.
- ▶ Employer may disclose medical information to supervisors who need to know about the necessary restrictions on the work or duty of the employee and the necessary accommodation.
 - E.g., lifting restrictions.

Common Pitfalls

- ▶ A front-desk agent at a small luxury hotel injures her back and requests that the hotel allow her to sit at a chair or stool during her shift. The hotel's policy is that front desk agents must stand when attending to guests because the hotel advertises (and believes its business depends on) attentive, engaging customer service. Standing for long periods of time is listed as an essential qualification on the employee's job description.
- ▶ Rather than granting the employee's requested accommodation, the hotel offers to transfer the employee to one of two seated positions: a night security guard or a daytime administrative accounting clerk. Did the hotel violate the ADA?

Common Pitfalls (2):

- ▶ An employee with diabetes requests to take breaks in order to check her blood sugar, take medication, and eat. The employee submits a note from her nurse practitioner stating that she has diabetes and requires breaks on an “as-needed basis” to manage her condition.
- ▶ The employer requests that the employee provide a note from her endocrinologist identifying how many breaks the employee needs, how often the employee needs a break, and for diagnostic testing substantiating that the employee is, in fact, diabetic.
- ▶ Without a note from her physician, the employer will not process the employee’s accommodation request. The employer says that it needs additional specificity in order to plan workflows and ensure coverage and safety.
- ▶ What’s wrong with the employer’s request?

Common Pitfalls (3)

- ▶ A probationary employee working at a call center for a large employer suffers from an anxiety disorder and can no longer take customer calls without exacerbating his symptoms.
- ▶ The probationary employee requests to transfer to a different position within the company that doesn’t require talking to customers on the phone. In the alternative, the employee proposes that the company create an administrative position for him at the call center.
- ▶ What should the company do?

Hot Topics Related to ADA Accommodations

- ▶ ADA Accommodations and COVID-19
- ▶ Accommodations for Mental Health Related Disabilities
- ▶ ADA Accommodations and Artificial Intelligence

ADA Accommodations and COVID-19

- ▶ On [May 15, 2023](#), the EEOC updated its technical assistance document on what you should know about COVID-19 and the ADA
- ▶ With the end of the COVID-19 Public Health Emergency on [May 11, 2023](#), can employers now terminate reasonable accommodations that were provided due to pandemic-related circumstances?
 - No. The Public Health Emergency does not relate to the ADA, but rather issues involving health care coverage and access to treatment.

ADA Accommodations and COVID-19

- ▶ Follow same procedure as with any request for a reasonable accommodation
- ▶ Accommodations may be temporary
- ▶ Common accommodations for COVID-19-related disabilities:
 - Remote work
 - In-office accommodations:
 - Changes to the environment
 - Job restructuring or transfers

ADA Accommodations and COVID-19

- ▶ Employer Obligations Related to Home Offices
 - To what extent do employers need to pay for and provide things for an employee's home office in connection with a reasonable accommodation?
 - Likely required to provide technology or electronics to the extent provided in the office itself
 - Less likely employer needs to provide a furniture if did not previously provide the employee with that type of accommodation in the office
 - If it's something that would have been provided in the office, likely required; if not, likely not required
 - Courts have not addressed this issue yet

ADA Accommodations and COVID-19

- ▶ Is an employee entitled to an accommodation under the ADA in order to avoid exposing a high-risk family member to COVID-19?
 - No. While the ADA prohibits *discrimination* based on association with an individual (such as a family member) with a disability, that protection is limited to disparate treatment or harassment – NOT requests for reasonable accommodation.

ADA Accommodations and COVID-19: Return to the Workplace

- ▶ Return to the Workplace: *Is attendance at the workplace an essential function of the job?*
 - Employers may require employees to return to the workplace, with the caveat that working remotely may be a reasonable accommodation for employees with disabilities
 - Now that more employers are seeking to bring their employees back into the office, we are seeing frequent use by employers of the argument that remote work cannot serve as a reasonable accommodation because the employee working remotely interferes with an “essential function” of the employee’s job

ADA Accommodations and COVID-19: Return to the Workplace

▶ *Essential Function - Continued*

- Will depend on the nature of the job whether attendance in-person, as opposed to remote work, is an essential function of the job.
 - Ex: Grocery store clerk who needs to restock shelves needs to be there in-person. EEOC agrees that presence at that employee at the workplace is an essential function.
- What about other jobs where it's less obvious?
 - Employers have argued that "teamwork", "comradery", "mentoring", "morale" are essential functions to a job and therefore require presence in the workplace.
 - If business functioned during COVID-19 when everyone was remote, hard to make this argument.
 - EEOC has not agreed with this argument.

ADA Accommodations and COVID-19: Return to the Workplace

- ▶ Can employers ask employees to place requests for reasonable accommodations *before* the official return to the office?
 - Yes, and may start the interactive process. May help employees address requests in a timely manner, although not required. Employer must still consider if employee does not make request until a later time.
- ▶ As government restrictions are lifted and employers return to the workplace, what steps can employers take to screen employees for COVID-19?
 - Disability-related inquiries and medical exams to screen employees are permissible when they are "job-related and consistent with business necessity."

ADA Accommodations and COVID-19: Return to the Workplace

- ▶ What if an accommodation won't be needed until there's a return to the office? Can employers just ignore a request until then?
 - No, not necessarily.
 - May give higher priority to requests that are needed while working remotely, but employer should still engage in interactive process before return to office as may already be able to acquire all the information needed to make decision, and make arrangements for the accommodation in advance.

ADA Accommodations and COVID-19: Vaccine Requirements

- ▶ The ADA does not *prevent* an employer from requiring employees be vaccinated against COVID-19, as long as there are exceptions for requests for reasonable accommodations.
 - As with other requests for reasonable accommodation related to COVID, the end of the Public Health Emergency does not impact this issue.
- ▶ Examples of reasonable accommodations in the vaccine requirement context:
 - Employee with disability wearing a face mask or working at a social distance
 - Modifying employee's shift
 - Permitting remote work
 - Finding the employee a reassignment

COVID-19 or Long COVID as an Actual Disability

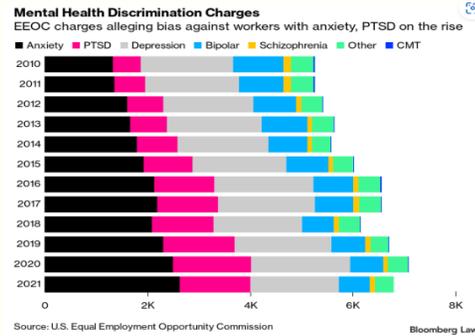
- ▶ **Can COVID-19 or Long COVID alone meet the ADA's definition of an actual disability?**
 - A person with COVID-19 or Long COVID has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that "substantially limits one or more major life activities."
 - The limitations from COVID-19 or Long COVID do not necessarily have to last any particular length of time to be substantially limiting and need not be long-term.
 - While definition of disability is construed broadly in favor of expansive coverage, it is a **case-by-case basis**.

ADA Accommodations and COVID-19

- ▶ **Long COVID Accommodations**
 - Types of reasonable accommodations to address various symptoms of Long COVID vary depending on factors such as symptoms, job duties, and design of the workplace.
 - **Examples of Long COVID accommodations:**
 - Quiet workspace, use of noise-cancelling headphones, white noise devices, or uninterrupted worktime to address brain fog;
 - Alternative lighting and reducing glare to address headaches;
 - Rest breaks to address joint pain or shortness of breath;
 - Flexible schedule or remote work to address fatigue

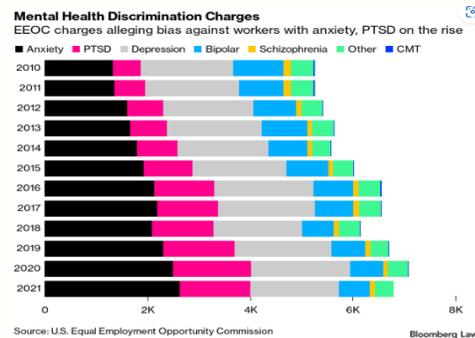
Accommodations for Mental Health Related Disabilities

- ▶ The ADA covers mental disabilities in addition to physical disabilities. This includes requiring employers to provide reasonable accommodations for mental disabilities absent a showing of undue hardship.
 - Examples of mental health illnesses or disorders that may be disabilities under the ADA: anxiety disorders, OCD, PTSD, depression, ADHD, substance abuse disorders, bipolar disorder, schizophrenia



Accommodations for Mental Health Related Disabilities

- ▶ Mental health discrimination claims accounted for about 30% of ADA charges filed with the EEOC in 2021, an increase from about 20% reported in 2010, according to EEOC statistics released last year.
- ▶ Anxiety and PTSD in particular have seen an increase in charges over this time period.



Accommodations for Mental Health Related Disabilities

▶ Connection to COVID-19

- COVID-19 may have exacerbated some employees' preexisting mental health conditions.
- As with any accommodation request, employers may ask questions to determine if the underlying health condition is a disability and work with the employee to make a reasonable accommodation.

ADA Accommodations and Artificial Intelligence

▶ AI often comes up in the context of the ADA in the **hiring process**.

- Applicants are entitled to reasonable accommodations during the hiring process.
- Employers using AI in hiring need to make it very clear during hiring process that they can request an accommodation; cannot bury it.
- If an applicant makes a request for reasonable accommodation during hiring/screening process, the AI needs to be able to handle it.

ADA Accommodations and Artificial Intelligence

- ▶ AI may also work as a form of reasonable accommodation.
 - Evolving technology may aid disabled employees but need to be careful.
 - But result of using AI needs to be useful. If it requires too much review, or harms quality of work, may not be a reasonable accommodation.

EEOC Resources

- ▶ <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>
- ▶ Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (pre-ADAAA, but still very good):
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>
- ▶ List of EEOC Disability-Related Technical Assistance Documents (links):
<https://www.eeoc.gov/eeoc-disability-related-resources/list-eeoc-disability-related-technical-assistance-documents>

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- ▶ EEOC Technical Assistance Document on COVID-19 and the ADA dated May 15, 2023: <http://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- ▶ EEOC Technical Assistance Document on the ADA and Artificial Intelligence dated May 12, 2022: <http://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>



Questions?



Thank You!

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41

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**Title VII
Religious Accommodations**

Lynn Davenport, Assistant Legal Counsel
Office of Legal Counsel - Title VII & Compensation Division

June 21, 2023

42



Title VII of the Civil Rights Act of 1964

Federal civil rights law that forbids discrimination in the workplace on the basis of race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation) and national origin.

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43

What must an employer accommodate under Title VII?

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44



Title VII's Accommodation Requirement

Title VII requires covered employers to provide job modifications, called reasonable accommodations, for an employee's religious observance, practice, or belief unless doing so would cause undue hardship.

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45



Scope of Title VII's Accommodation Obligation

- Failure to accommodate claims are disparate treatment claims under Section 703(a). *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015).
- Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion"
- Thus, an employer is obligated to accommodate an employee's religious belief with respect to all terms, conditions, or privileges of employment (unless doing so would pose an undue hardship).

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46



EEOC Amicus Brief

**Billings v. State of New York, No. 22-2010 (2d Cir.), amicus
brief filed Jan. 4, 2023**

- Plaintiff, a Muslim who wears a hijab, was made to remove her hijab in front of a male supervisor, in violation of her religious practice
- District Court granted Defendant's FRCP 12(b)(6) motion to dismiss, finding that Plaintiff failed to show the failure to accommodate was "materially adverse"
- EEOC says: "materially adverse" standard reads additional element into cause of action that conflicts with Title VII's text and purpose

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47



Pop Quiz: Terms & Conditions

1. BIG Company recruits classes of employees and, after each class has been trained at its headquarters, assigns employees to a store. BIG Company learns that a new employee, Ruth, is Jewish, and places her in a store in a predominately Jewish neighborhood in hopes that Ruth will "connect better with clientele."
2. Yummy, a high-end restaurant chain, has a company-wide policy prohibiting the display of any tattoos. Maia has a religiously symbolic tattoo on her chin and lip, which she is forbidden from covering.
3. Bob wants to start an employee resource group (ERG) focused on his religion, Rastafarianism. Bob's employer has permitted ERGs focused on Christianity, Islam, and Hinduism, but denies Bob's application, stating that Rastafarianism is too small of a religion to merit an ERG.

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48



Defining “Religion”

“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”

42 U.S.C. § 2000e(j)

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49



Scope of Protection For Religious Beliefs

A religious belief, observation, or practice is protected even if it:

- Is not espoused by any traditional, organized religions
- Has few or no other adherents
- Is not espoused by, recognized by, or conflicts with religious teachings by the group with which the employee affiliates
- Seems illogical, unreasonable, or incorrect
- Concerns the absence of belief, observation, or practice (e.g., atheism)
- Concerns moral or ethical beliefs, so long as it is sincerely held with the strength of traditional religious views

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50



Scope of Protection For Religious Beliefs

“Religion” does not include purely social, political, or economic philosophies, as well as mere personal preferences.

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51



Two Prong Analysis For Religious Beliefs

Two prong inquiry:

1. Is the belief religious in nature?
2. Is the belief sincerely held?

Both questions start (and usually end) with the presumption of “yes.”

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52



**Example:
Religious
Belief vs.
Non-
Religious
Belief**

Plaintiff requested an exemption from her employer's COVID-19 vaccine requirement because she objected to putting anything in her body derived from aborted fetal cells. The employer granted Plaintiff an exemption on the condition that she undergo COVID testing twice weekly. Plaintiff objected to and requested an exemption from biweekly testing, stating the tests were degrading, caused her anxiety, and could introduce harmful substances.

- Vaccination request: sincerely-held religious belief
- Testing request: might be sincerely-held, but not a religious belief

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53



**Pop Quiz:
Religious
Beliefs,
Observances,
and Practices**

1. Ginger has been a member of Heaven's House, a congregation comprised of approximately 50 members, since 2007. Heaven's House preaches that the Sabbath is observed on Tuesdays and adherents should not work during the Sabbath. Ginger has not previously observed this tenet; however, she wants to deepen her faith and begin observing the Sabbath on Tuesdays.
2. Tim and Jim have both filed requests with their employer to use an empty office space for meditation. Tim, who is not affiliated with any religion, meditates for 11 minutes every day at 11:11 am, a time he considers sacred, to seek connection with the divine. Jim, who also is not affiliated with any religion, meditates for 10 minutes every day because he has read several studies about the benefits of meditation.

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54



**Pop Quiz:
Religious
Beliefs,
Observances,
and Practices**

3. Multicorp has instituted a new security system that scans employees' palms. Damien believes that using this palm-scanning system will brand him with the "Mark of the Beast," as discussed in the biblical Book of Revelation, and refuses to use the new technology.
4. Fran, a Baptist, learned about the Sikh practice of wearing a small sheathed kirpan as a symbol of religious commitment to defend truth and moral values, and adopted the practice. The leadership of Fran's church states that wearing a kirpan is not a part of their religious belief system.

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55



**Common Issues in
Religious
Accommodation Cases**

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56



What is an accommodation?

An adjustment to the work environment or exception from a particular requirement that will allow the employee to comply with his or her religious belief, practice, or observance.

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57



Did the employee provide notice of the conflict between religion and work?

- No “magic words” required
- Was there enough information to make the employer aware that there is a conflict between a work rule/requirement and the employee’s religion?
- An employer is not required to discuss the request before making a determination, but it can be a really good idea

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58



What must the employee provide?

- Generally, nothing beyond the employee's credible word
- However, if an employer needs more information to understand or assess the request, the employee should cooperate with any request for reasonable information

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59



What can the employer ask for?

- No specific limitations or allowances -- very fact specific
- Usually, a written statement *from the employee* is acceptable
- Seeking statements from clergy or other third parties is not prohibited, but such statements about the content of the employee's belief may have no or limited utility because the focus is on whether the employee's belief is religious in nature and sincerely held, not what other adherents believe or agree with
- **WARNING:** too much inquiry could be evidence of harassment

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60



Case Study

Friend v. Astrazeneca Pharms. LP, No. SAG-22-03308, 2023 U.S. Dist. LEXIS 83749, 2023 WL 3390820 (D. Md. May 11, 2023)

- Plaintiff alleges Defendant denied his request for an exemption to Defendant's COVID-19 vaccine mandate and terminated his employment in violation of Title VII
- District Court granted Defendant's FRCP 12(b)(6) motion to dismiss
- In response to the prompt "[d]escribe the basis of the sincerely held religious belief that requires accommodation," Plaintiff wrote, "As a Free citizen of the USA, I am granted Freedom of Religion under my 1st Amendment Rights. Disclosure of the extent of my Religious practice is not employer privileged information. My conscious mind allows for rational decision making and practicing of my own beliefs"
- Held: Because Plaintiff failed to inform Defendant about any religious beliefs, Defendant cannot have failed to accommodate them

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61



Case Study

EEOC v. Center One, LLC, No. 2:19-CV-01242-CCW, 2022 U.S. Dist. LEXIS 148694, 2022 WL 3577911 (W.D. Pa. Aug. 19, 2022), appeal filed, No. 22-2943 (3d Cir. Oct. 25, 2022)

- Defendant demanded that Charging Party supply verification from his congregation on "official letterhead," which Charging Party was unable to do
- Realizing he could not comply with Defendant's verification requirement and would soon be terminated for accruing attendance points because of his religious observation of high holy days, Charging Party resigned
- District Court granted Defendant's summary judgment motion, holding, inter alia, that the request for verification was reasonable and defendant was justified in continuing to assess attendance points until Charging Party provided the requested verification

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62



When is an accommodation “reasonable”?

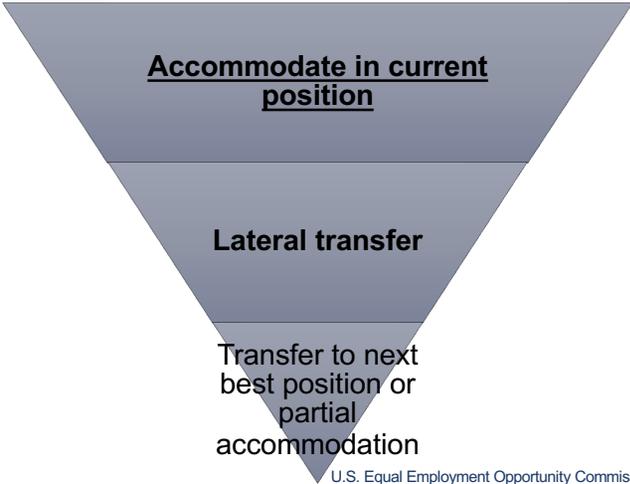
An accommodation is reasonable when it completely eliminates the conflict between the employee’s religious belief and the employer’s rule/policy.

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63



Hierarchy of Accommodations



Accommodate in current position

Lateral transfer

Transfer to next best position or partial accommodation

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64



Who chooses the accommodation?

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not required to provide the accommodation preferred by the employee – the employer can select the best accommodation for its business.

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65



**Pop Quiz:
Reasonable
Accommodation**

Paulette is a Seventh Day Adventist who observes the Sabbath from sundown on Friday through sundown on Saturday. Not only does Paulette's religion prohibit her from working on the Sabbath, it prohibits her from encouraging others to work. Paulette works on a rotating schedule that would require her to work one Saturday every two months. Paulette's employer is okay with Paulette swapping her Saturday shifts, but refuses to take any steps to facilitate the swap. Has Paulette's employer offered her a reasonable accommodation?

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66



What is undue hardship?

- Not defined by Title VII
- Employer bears burden of proof
- Right now: anything that imposes more than a *de minimis* cost on the operation of the employer's business is an undue hardship
- But . . .

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67



Groff v. DeJoy, ___ U.S. ___ (2023)

Groff v. DeJoy, 35 F.4th 162 (3d Cir. 2022), cert. granted, 143 S. Ct. 646 (U.S. Jan. 13, 2023) (No. 22-174)

- Plaintiff alleged that employer (USPS) failed to accommodate his religious practice of refraining from work on Sunday, the Sabbath
- District Court: Summary judgment for USPS
- Appellate Court: Affirmed – undue hardship to excuse Groff from every Sunday

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68



**Groff v.
DeJoy, ___
U.S. ____
(2023)**

Issues presented in Petition for A Writ of Certiorari:

1. Whether the Supreme Court should overturn *Hardison's* more-than-de-minimis-cost test for denying a religious accommodation under Title VII.
2. Whether the employer can establish undue hardship by only showing that the requested accommodation burdens coworkers, rather than the employer's business itself.

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69



**Promising
Practices –
Employers**

- Inform employees and applicants that the employer will make reasonable efforts to accommodate religious practices, observances, and beliefs
- Train managers and supervisors on how to recognize religious accommodation requests
- Consider developing internal procedures for processing religious accommodation requests
- Individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate
- Confer fully and promptly with the requestor to the extent needed to share any necessary information about the requestor's religious needs and any accommodation options
- Consider offering alternative methods of accommodation on a trial or temporary basis while a permanent accommodation is being explored, keeping the requestor apprised of the status of the employer's efforts to implement a permanent accommodation

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70



Promising Practices – Employees

- Advise a manager or supervisor of the nature of the conflict between your religious needs and a work rule
- Provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious observance, practice, or belief

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71

Common Accommodation Scenarios

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72



Schedule Conflicts

Common accommodations:

- Flexible arrival and departure times
- Floating or optional holidays
- Flexible work breaks
- Use of lunch time in exchange for early departure
- Other means to enable employee to make up time
- Voluntary shift swaps
- Excusal from rotating shifts

Case Study: *EEOC v. Quest Diagnostics, Inc.*, No. 3:20-cv-02939 (N.D. Tex. Consent Decree Entered Feb. 4, 2022) – Sabbath observer’s accommodation revoked after 10 years

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73



Garb & Grooming

Common accommodation:

- Modification of or exception to dress/grooming/appearance policy

Case studies:

- *EEOC v. Greyhound Lines, Inc.*, No. 1:19-cv-01651 (D. Md. Consent Decree Entered Nov. 22, 2021) – accommodation that works for one Muslim worker may not work for another
- *EEOC v. Wellpath, LLC*, No. 5:20-cv-1092 (W.D. Tex. Consent Decree Entered Jan. 31, 2022) – denied accommodation to wear scrub skirt in correctional facility

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74



PPE

Common accommodations:

- Alternative PPE (e.g., loose fitting PAPR)
- Modification of or exception to PPE policy
- Lateral transfer

Note: If an accommodation would result in the employer violating a federal law or regulation, such as an OSHA standard, then the accommodation would pose an undue hardship.

Case Study: *EEOC v. Global Medical Response, Inc.*, No. 1:22-CV-02544 (D. Colo. Filed Sept. 29, 2022) – EMTs and paramedics with beards required to wear tight-fitting respirators

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75



Prayer

Common accommodations:

- Modify work schedule and/or break policy to permit time for prayer (e.g., flexible work breaks)
- Provide quiet area for employee prayer (e.g., unoccupied office)

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76



Expression & Proselytization

- Expression includes displaying religious icons or messages, listening to religious music, engaging in public prayer, and proselytizing
- An employer must accommodate religious expression, unless it threatens to constitute or actually constitutes harassment or poses an undue hardship.
- **Case study:** *EEOC v. v. Arthur J. Gallagher & Co.*, No. 1:20-cv-3421 (D. Colo. Consent Decree Entered Dec. 3, 2021) – employee terminated, in part, for religious expression

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77



Employer-Imposed Belief System

Common accommodations:

- Excusing employer from religious services or program
- Modifying workplace rules/requirements that would otherwise subject employee to a specific belief system

Case studies:

- *EEOC v. Aurora Pro Services*, No. 1:22-cv-00490 (M.D.N.C. Filed June 27, 2022) – viral video of employer firing employees who refuse to participate in daily Christian prayer meetings
- *EEOC v. United Airlines Inc.*, No. 20-cv-9110 (D.N.J. Consent Decree Entered Nov. 8, 2022) – Buddhist employee in treatment for alcohol dependency required to go to AA instead of Buddhism-based peer support group
- *EEOC v. United Health Programs of America, Inc.*, No. 14-cv-3673 (E.D.N.Y.) - Onionhead case

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78



EEOC Lawsuits (FY2023)

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79



Lawsuits Filed in FY2023

- *EEOC v. Suncakes, LLC, d/b/a IHOP*, No. 3:23-cv-00274 (W.D.N.C. Filed May 9, 2023)
 - CP, who observes the Sabbath on Sunday, was initially provided a scheduling accommodation. Accommodation was rescinded by a new general manager.
- *EEOC v. Houchens Food Group, Inc. d/b/a Hometown IGA*, No. 6:22-cv-00235 (E.D. Ky. Filed Dec. 27, 2022)
 - Defendant refused to hire CP because of his dreadlocks, which CP wears for religious reasons.

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80



**Lawsuits
Filed in
FY2023**

- *EEOC v. Triple Canopy, Inc.*, No. 1:23-cv-1500 (D.D.C. Filed May 25, 2023)
 - Defendant refused to grant Charging Party, who does not belong to a formal religious denomination but holds the belief that he, as a Christian man, must wear a beard, an accommodation for its clean-shaven grooming standard because Charging Party was unable to provide additional substantiation of his beliefs or a supporting statement from a certified or documented religious leader.
- *EEOC v. Global Medical Response, Inc.*, No. 1:22-CV-02544 (D. Colo. Filed Sept. 29, 2022)
 - Defendant has a “no facial hair” policy for EMTs and paramedics related to their wearing of respirators. A class of applicants and employees were denied accommodation to wear facial hair due to religious beliefs and/or medical conditions.

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81



**Lawsuits
Filed in
FY2023**

- *EEOC v. Mercy Health St. Mary’s*, No. 1:23-cv-00435 (W.D. Mich. Filed Apr. 28, 2023)
 - Defendant rescinded job offer to an applicant who requested an exemption from its flu vaccine requirement.
- *EEOC v. Children’s Healthcare of Atlanta*, No. 1:22-CV-4953 (N.D. Ga. Filed Dec. 15, 2022)
 - CP, a hospital maintenance employee with extremely limited interaction with the public or staff, was denied an exemption to Defendant’s flu vaccination requirement and was fired. CP received exemptions during the two previous years.

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82



83

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Retaliation

- Section 704(a) of Title VII prohibits retaliation because an individual has engaged in protected activity.
- Protected activity consists of opposing a practice the employee reasonably believes is unlawful under Title VII or by filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.
- EEOC takes the position that requesting a religious accommodation in good faith constitutes protected activity.

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This slide has a dark blue vertical bar on the left containing the EEOC logo and the word "Retaliation" in white. The main content area is white with a blue border on the left. It contains three bullet points. The footer "U.S. Equal Employment Opportunity Commission" is in blue at the bottom right.

84



85

Workshop Credits



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The U.S. EEOC is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP® or SHRM-SCP® recertification activities.



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EEOC Training Institute

86



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Mental Health Conditions: Resources for Job Seekers, Employees, and Employers

About one in five adults in the U.S. experienced a mental health issue in 2020. There are many different types of mental health conditions, including depression, anxiety, and post-traumatic stress disorder (PTSD).

In addition, a number of substance use disorders also are considered mental health conditions. These include alcohol use disorder and opioid use disorder. About one in eight American adults had a substance use disorder in 2020.

People with mental health conditions may face discrimination in the workplace due to stigma or misunderstandings about mental health disorders. If you have a mental health condition, you may be protected against **discrimination** and **harassment** at work related to your condition, you have workplace confidentiality rights, and you may have a legal right to get reasonable **accommodations** that can help you perform and keep your job.

Employment Anti-Discrimination

Laws

Title I of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act of 1973 (Section 501) are the federal laws that **protect people with disabilities, including mental health disabilities, from discrimination at work** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities>). Employment actions taken against an individual who has a mental health condition or substance use disorder may violate these antidiscrimination laws.

In fiscal year 2021, the EEOC received about 8,400 charges from individuals alleging **employment discrimination due to a mental health condition** (<https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights>) or substance use disorder.

Mental Health Conditions Can Be Disabilities

The **Americans with Disabilities Act** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>) explains who is protected from employment discrimination as an individual with a **disability** (<https://www.eeoc.gov/disability-discrimination>). Because major depressive disorder, PTSD, bipolar disorder, and schizophrenia substantially limit brain function, individuals with these disorders will, in virtually all cases, be determined to have an ADA disability. Other mental health conditions may also be considered a disability.

Prior Illegal Use of Drugs

The ADA and Section 501 protect an individual who:

- Has successfully completed a drug rehabilitation program;
- Is taking prescribed Medication Assisted Treatment (MAT) to address an opioid or other substance use disorder; or
- An employer mistakenly believes is engaging in current illegal use of drugs.

The ADA and Section 501 do not protect individuals who are currently engaging in the illegal use of drugs. In addition, employers may hold people who currently use drugs illegally and individuals with alcohol use disorder to the same performance standards as other employees.

Reasonable Accommodations

The law also requires **an employer to provide a reasonable accommodation (<https://www.eeoc.gov/laws/guidance/small-employers-and-reasonable-accommodation>)** to an employee or job applicant with a disability if they need it to perform an important job function, unless doing so would cause significant difficulty or expense for the employer.

What to Do If You Think You Have Been Subjected to Discrimination

If you think an employer has unlawfully discriminated against you, you may file a charge of discrimination with the EEOC or with the **state or local Fair Employment Practice Agency in your area (<https://www.eeoc.gov/field-office>)**. Because there are strict time limits for filing a discrimination charge to protect your rights, you should contact us as soon as possible. Our services are free, and you do not need a lawyer to file a complaint.

- **How to file a charge of discrimination against a private or state/local government employer (<https://www.eeoc.gov/how-file-charge-employment-discrimination>)** or call 1-800-669-4000, 1-800-669-6820 (TTY

for Deaf/Hard of Hearing callers only), 1-844-234-5122 (ASL Video Phone for Deaf/Hard of Hearing callers only).

- **How to file a complaint against a Federal agency**
(<https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process>).

Time Limits

For claims against private or state and local government employers, employees or applicants have 180 days from the date of alleged discrimination to file a charge. The deadline is extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. Federal applicants and employees have 45 days from the date of alleged discrimination to contact an EEO counselor at their federal agency.

Technical Assistance

- **Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights** (<https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights>)
- **The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work**
(<https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work>)
- **Use of Codeine, Oxycodone, and Other Opioids: Information for Employees** (<https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees>)
- **How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed**
(<https://www.eeoc.gov/laws/guidance/how-health-care-providers-can->

[help-current-and-former-patients-who-have-used-opioids](#)

- **[EEOC Efforts for Veterans with Disabilities](#)**
 [\(https://www.eeoc.gov/laws/guidance/eeoc-efforts-veterans-disabilities\)](https://www.eeoc.gov/laws/guidance/eeoc-efforts-veterans-disabilities)
- **[Understanding Your Employment Rights Under the Americans with Disabilities Act: A Guide for Veterans](#)**
 [\(https://www.eeoc.gov/laws/guidance/understanding-your-employment-rights-under-americans-disabilities-act-guide-veterans\)](https://www.eeoc.gov/laws/guidance/understanding-your-employment-rights-under-americans-disabilities-act-guide-veterans)
- **[Veterans and the Americans with Disabilities Act: A Guide for Employers](#)**
 [\(https://www.eeoc.gov/laws/guidance/veterans-and-americans-disabilities-act-guide-employers\)](https://www.eeoc.gov/laws/guidance/veterans-and-americans-disabilities-act-guide-employers)
- **[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)** **[\(https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws\)](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws)**
- **[Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008](#)**
 [\(https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008\)](https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008)
- Handouts (PDF): Disabilities & Your Job Rights. **[English](#)**
 [\(https://www.eeoc.gov/sites/default/files/migrated_files/youth/downloads/disability.pdf\)](https://www.eeoc.gov/sites/default/files/migrated_files/youth/downloads/disability.pdf) | **[Spanish](#)**
 [\(https://www.eeoc.gov/sites/default/files/migrated_files/youth/downloads/disability.spanish.pdf\)](https://www.eeoc.gov/sites/default/files/migrated_files/youth/downloads/disability.spanish.pdf)

Enforcement Guidance

- **[Enforcement Guidance on the ADA and Psychiatric Disabilities](#)**
 [\(https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities\)](https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities)

- **Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA**
(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>)
- **Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations**
(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>)

EEOC Resources

Select List of Resolved Cases Involving Mental Health Conditions Under the ADA (as of May 2022) (<https://www.eeoc.gov/select-list-resolved-cases-involving-mental-health-conditions-under-ada-may-2022>)

Other Federal Resources

Mentalhealth.gov (<https://www.Mentalhealth.gov>)

Substance Abuse and Mental Health Services Administration (SAMHSA)
(<http://www.samhsa.gov/find-help/disorders>)

Job Accommodation Network (JAN) (<https://askjan.org/>)



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Tips for Workers: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence

Download this document as a PDF file.

(<https://www.eeoc.gov/sites/default/files/2022-07/ADA%20and%20AI%20Worker%20Tip%20Sheet.pdf>)

Many businesses use technology to make decisions about hiring, promotions, and firing workers. That technology can make it harder for people with disabilities to get or do well at a job.

The Americans with Disabilities Act (ADA) protects applicants and workers with disabilities from discrimination. Because of the ADA, an employer may have to give applicants or workers with disabilities a reasonable accommodation so they can apply for or do the job.

It is important to know that the ADA has specific definitions of “employer”

“employee” “disability” and “reasonable accommodation.” You can learn more about the law at **[the EEOC's Disability Discrimination page](https://www.eeoc.gov/disability-discrimination)** (<https://www.eeoc.gov/disability-discrimination>) and from **[The ADA: Your Employment Rights as an Individual with a Disability](https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability)** (<https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability>).

The format of the employment test can screen out people with disabilities.

Some employers screen employees and applicants using computer programs. The requirements of the program may screen out people with disabilities. For example:

- A job application requires a timed math test using a keyboard. Angela has severe arthritis and cannot type quickly. Typing quickly is not necessary for the job. Angela will fail the test if she takes it without a reasonable accommodation. The reasonable accommodation could be speaking the answers or having more time for the test.
- Amir is seeking a promotion. The promotion process includes a memory test. The test is a computerized game using visual memory. Amir is blind and cannot score well on the test, which will damage Amir's chances for the promotion. Amir's memory is good enough to do the job. If Amir receives a reasonable accommodation, such as a different type of memory test, the promotion process will more accurately judge Amir's abilities.

If your disability makes it hard or impossible for you to take the computerized test for a job, here are some things you can do:

1. Reach out to the employer's human resources department. Explain that you

- are trying to take the test. Explain why the format is hard for you to use.
2. You may have to describe your disability. The employer may ask for proof or additional information. Learn what the employer can ask and how your privacy is protected at **[The ADA: Your Employment Rights as an Individual With a Disability](https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability)** (<https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability>).
 3. Ask to be evaluated in a way that shows your ability to do the job. You can use the legal words and ask for a “reasonable accommodation,” but you do not have to.
 4. If the employer says no:
 - You can tell the employer about the **[EEOC’s Q&A on the ADA and Algorithms](https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence)** (<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>).
 - You can reach out to the **[EEOC](https://www.eeoc.gov/contact-eeoc)** (<https://www.eeoc.gov/contact-eeoc>). The EEOC can help you decide on next steps.

The scoring of the test can screen out people with disabilities.

Some employers use technology to score applications or tests. The technology relies on algorithms. Algorithms are what the computer is programmed to look for. How the algorithm is set up may screen out people with disabilities. For example:

- An employer uses a chatbot to interview workers for a cashier job. The chatbot asks the applicant, “Can you stand for three hours straight?” The chatbot stops the interview if the answer is, “No.” Omar, who uses a wheelchair, answers, “No.” The chatbot ends the session. Omar could do the cashier job if he could sit at the cash register.

- An employer uses a computer program to test “problem-solving ability” based on speech patterns for a promotion. Sasha meets the requirements for the promotion. Sasha stutters so their speech patterns do not match what the computer program expects. Sasha scores poorly on the test and is not promoted.

If you think you are being screened out of a job because of your disability, here are some things you can do:

1. If you can, before you take a test, ask the employer what skills it is testing for.
2. If you are qualified for the job and you do not pass the test or hear back from the employer, reach out to the employer’s human resources department. Ask what skills the test was looking for. Explain that your disability may have made you score lower on the test.
3. You may have to describe your disability. The employer may ask for proof or additional information. Learn what the employer can ask and how your privacy is protected at **[The ADA: Your Employment Rights as an Individual With a Disability \(https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability\)](https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability)**.
4. Ask to be evaluated in a way that shows your ability to do the job. It may help to use the legal words and ask for a “reasonable accommodation,” but you do not have to.
5. If the employer says no:
 - You can tell the employer about the **[EEOC’s Q&A on the ADA and Algorithms \(https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence\)](https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence)**.
 - You can reach out to the **[EEOC \(https://www.eeoc.gov/contact-eeoc\)](https://www.eeoc.gov/contact-eeoc)**. The EEOC can help you decide on next steps.

The ADA prohibits retaliation.

An employer is not allowed to retaliate against you for complaining about discrimination, asking for a reasonable accommodation, or talking to the EEOC. If you think an employer retaliated against you, you can reach out to the EEOC.

How to reach the EEOC

You can call the EEOC on our toll-free number, at: 1-800-669-4000. You can reach us using a TTY line at: 1-800-669-6820 or you can use our ASL Video Phone at: 1-844-234-5122.

You also can reach us by email at: [**info@eeoc.gov**](mailto:info@eeoc.gov)



What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

INTRODUCTION

Technical Assistance Questions and Answers - Updated on May 15, 2023.

- All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus (<https://www.eeoc.gov/coronavirus>).
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's [disability page \(https://www.eeoc.gov/eeoc-disability-related-resources\)](https://www.eeoc.gov/eeoc-disability-related-resources).

- The EEO laws, including Title I of the ADA and the Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following current guidance and suggestions made by CDC or state/local public health authorities about steps employers should take regarding COVID-19.
- This publication addresses a wide range of COVID-19 issues arising under the federal EEO laws. This includes disability-related inquiries and medical examinations, **confidentiality**, **reasonable accommodation based on disability**, **harassment**, and **vaccinations** (including reasonable accommodation based on disability or **religious beliefs**). It also addresses how the **definition of disability** may apply to COVID-19 and **Long COVID** (<https://www.hhs.gov/ash/osm/innovationx/human-centered-design/longcovid/index.html>).
- This publication remains relevant even with the end of the COVID-19 Public Health Emergency on May 11, 2023. The emergency declaration dealt with issues involving health care and access to treatment. The end of the declaration does not change the requirements of the federal equal employment opportunity laws discussed in this publication. See **D.20**.
- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act** (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>) [**PDF version** (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)] ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.
- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at www.eeoc.gov/coronavirus (<https://www.eeoc.gov/coronavirus>). The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic

publication includes a **separate section** (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB>) that answers common employer questions about what to do after a pandemic has been declared.

- **Find COVID-19 Guidance for Your Community** (<https://www.covid.gov>): This website provides information on a wide range of COVID-related topics, including treatments, testing, specific considerations for those who are immunocompromised, and a variety of information concerning long COVID (including the possibility of joining a research study). This information is also available by telephone (1-800-232-0233) or TTY (1-888-720-7489).

A. Disability-Related Inquiries and Medical Exams

The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee.

*Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. For more information on the timing of disability-related inquiries and medical examinations for applicants, see **Section C.***

*Under the ADA (which is applicable to the Federal sector through the Rehabilitation Act of 1973), once an employee begins work, any disability-related inquiries or medical exams must be "job-related and consistent with business necessity." One way inquiries and medical examinations meet this "business necessity" standard is if they are necessary to determine whether a specific employee has a medical condition that would pose a "direct threat" to health or safety (a significant risk of substantial harm to self or others that cannot be addressed with reasonable accommodation). For more information on reasonable accommodation, see **Section D.** Where met, the "business necessity" standard allows for consideration of whether a person may have COVID-19, and thus might pose a "direct threat." For information on disability-related questions and COVID-19 vaccinations, see **K.7.- K.9.***

CDC has updated its guidance (<https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance.html>) over the course of the pandemic and may continue to do so as the pandemic evolves and as CDC acquires more information about the virus and different variants. The ADA “business necessity” standard requires that employers utilize the most current medical and public health information to determine what inquiries/medical examinations are appropriate.

A.1. If an employee calls in sick, how much information may an employer request from the employee in order to protect the rest of its workforce and others (e.g., customers) from infection with COVID-19? (Updated 5/15/23)

If an employee calls in sick, an employer may ask whether the employee has COVID-19 or **common symptoms of COVID-19 as identified by CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>). If the employee has COVID-19 or symptoms of the disease, the employer may follow any **CDC-recommended period of isolation** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html>) with respect to when an employee may return to the workplace or otherwise work in close proximity to others. See A.4., which also addresses following a CDC-recommended period of isolation. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. Where can employers obtain current information on symptoms associated with COVID-19? (Updated 5/15/23)

The list of symptoms commonly associated with the disease may change as public health authorities and doctors learn more and as different variants emerge . Employers should rely on CDC for guidance on symptoms currently associated with the disease. These sources may guide employers when choosing questions to ask employees. See also **A.8.**, addressing the ability of an employer to ask employees if they have been diagnosed with or tested for COVID-19.

A.3. When may an ADA-covered employer take the body temperature of employees in an effort to screen for COVID-19? (Updated 5/15/23)

Measuring an employee's body temperature is a medical examination. See A.6. for a discussion of the type of assessment an employer must do to justify requiring a medical examination (or requiring employees to answer disability-related questions) under the ADA’s “business necessity” standard. Employers may wish to

consult **CDC guidance** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>) or guidance from other public health authorities to determine if an elevated temperature is a possible indication of infection. If it is, then taking the temperature of employees will meet the ADA standard.

A.4. Does the ADA allow employers to require employees to stay home if they have COVID-19 or symptoms of COVID-19? (Updated 5/15/23)

Employers should consult current CDC guidance to clarify when and for how long it recommends **someone with COVID-19, or symptoms of COVID-19 should stay home** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>). The ADA does not prevent employers from following CDC advice. See also A.1., which addresses the information an employer may request when an employee calls in sick.

A.5. When an employee returns to the workplace after being out with COVID-19, does the ADA allow employers to require a note from a qualified medical professional explaining that it is safe for the employee to return (i.e., no risk of transmission) and that the employee is able to perform the job duties? (Updated 7/12/22)

Yes. Alternatively, employers may follow **CDC guidance** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>) to determine whether it is safe to allow an employee to return to the workplace without confirmation from a medical professional.

When an employee returns to the workplace after being out with COVID-19, the ADA allows an employer to require confirmation from a qualified medical professional explaining that the individual is able to safely return. Such a request is permitted under the ADA. First, because COVID-19 is not always a disability, a request for confirmation may not be a disability-related inquiry. Alternatively, if the request is considered a **disability-related inquiry**, it would be justified under the ADA standard requiring that such employee inquiries be job-related and consistent with business necessity. Here, the request meets the “business necessity” standard because it is related to the possibility of transmission and/or related to an employer’s objective concern about the employee’s ability to resume working. For example, an employer may require confirmation from a medical professional addressing whether an employee may resume specific job duties requiring physical exertion.

As a practical matter, employers may wish to consider other ways to determine the safety of allowing an employee to return to work if doctors and other healthcare professionals are unable to provide such documentation either in a timely manner or at all. This might include reliance on local clinics to provide a form, a stamp, or an e-mail to confirm that an individual is no longer infectious and is able to resume working.

A.6. Under the ADA, may an employer, as a mandatory screening measure, administer a COVID-19 viral test (a test to detect the presence of the COVID-19 virus) when evaluating an employee’s initial or continued presence in the workplace? *(Updated 7/12/22)*

Yes, if the employer can show it is job-related and consistent with business necessity.

A COVID-19 **viral test** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html>) is a medical examination within the meaning of the ADA. Therefore, if an employer implements screening protocols that include COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be “job-related and consistent with business necessity.” Employer use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the “business necessity” standard when it is consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing. Be aware that CDC and other public health authorities periodically update and revise their recommendations about COVID-19 testing, and FDA may revise its guidance or emergency use authorizations, based on new information and changing conditions.

A **positive** viral test result means that the test detected SARS-CoV-2, the virus that causes COVID-19, at the time of testing, and that the individual most likely has a current infection and may be able to transmit the virus to others. A **negative** test result means the test did not detect SARS-CoV-2 at the time of testing. However, a negative test does not mean the employee does not have any virus, or will not later get the virus. It means only that the virus causing SARS-CoV-2 was not detected by the test.

If an employer seeks to implement screening testing for employees such testing must meet the “business necessity” standard based on relevant facts. Possible considerations in making the “business necessity” assessment may include the

level of community transmission (<https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>), the **vaccination status of employees (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>)**, the accuracy and speed of processing for different types of COVID-19 viral tests, the **degree to which breakthrough (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>) infections are possible for employees who are “up to date” on vaccinations (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>)**, **the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant (<https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html>)**, what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and the potential impact on operations if an employee enters the workplace with COVID-19. In making these assessments, employers should check the latest **CDC guidance (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>)** (and any other relevant sources) to determine whether **screening testing is appropriate (<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html>)** for these employees.

Note: Question A.6. and A.8. address screening of employees generally. See Question A.9. regarding decisions to test only individual employees.

A.7. Under the ADA, may an employer require antibody testing before permitting employees to re-enter the workplace? (Updated 7/12/22)

No. An antibody test, as a medical examination under the ADA, must be job-related and consistent with business necessity. As of July 2022, CDC **guidance (<https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests.html>)** explains that antibody testing may not show whether an employee has a current infection, nor establish that an employee is immune to infection; as a result, it should not be used to determine whether an employee may enter the workplace. Based on this CDC guidance, at this time such testing does not meet the ADA’s “business necessity” standard for medical examinations or inquiries for employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. An **antibody test (**

tests.html) is different from a **test to determine if someone has evidence of infection with SARS-CoV-2 or has COVID-19 (i.e., a viral test)** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html>).

The EEOC addresses COVID-19 viral screening tests in **A.6.**

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(Updated 5/15/23)*

Yes. Employers may ask all employees who will be physically entering the workplace (or otherwise working in close proximity with others, such as clients) if they have COVID-19 or **common symptoms associated with COVID-19 as identified by CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>). Employers also may ask if these employees have been tested for COVID-19 (and if so, ask about the result). An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace if consistent with **CDC-recommended isolation protocols** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html>).

See also A.2.

A.9. May a manager require that a particular employee have a temperature reading or undergo COVID-19 viral testing, as opposed to imposing these medical examinations on all employees? *(Updated 5/15/23)*

Whether an employer wishes to require a particular employee, or all employees, to have a temperature reading or to undergo COVID-19 viral testing, the ADA requires that the employer meet the “**business necessity**” standard because these are medical examinations. Therefore, it is important for the employer to consider why it wishes to require a medical examination. The ADA does not prevent employers from following recommendations by **CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html>) regarding whether, when, and for whom testing (or other **medical** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html>) screening) is appropriate, because following CDC recommendations will meet the ADA “business necessity” standard. For a discussion of screening testing for employees generally, see **A.6.** For a discussion of taking temperature as a screening mechanism, see **A.3.** Employers should not engage in unlawful disparate treatment based on protected characteristics in deciding who is subject to medical examinations.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? (Updated 5/15/23)

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. For example, GINA prohibits employers from asking employees to provide their family members' medical examination results, including COVID-19 test results. GINA, however, does not prohibit an employer from asking employees whether they have had contact with "anyone" diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking about an employee's contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19. Employers should not engage in unlawful disparate treatment based on protected characteristics in deciding who is asked about possible exposure to persons with COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take the employee's temperature or refuses to answer questions about whether the employee has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? (Updated 5/15/23)

An employer may ask employees if they have COVID-19, **common symptoms of COVID-19 as identified by CDC (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>)**, or have been tested for COVID-19 (and if so, ask about the result). See **A.1.** and **A.8.** An employer also may take an employee's temperature or require a COVID-19 viral test as long as these medical examinations meet the ADA's "**business necessity**" standard. See **A.3.**, **A.6.**, and **A.9.** If an employee refuses to cooperate by answering these questions or taking these medical examinations, an employer may take whatever action it deems appropriate, consistent with its applicable policies or procedures (e.g., barring an employee from physical presence in the workplace or otherwise working closely with others).

To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. For example, the employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread

such personal medical information throughout the workplace. The employer may reassure the employee that the ADA prohibits disclosure of employee medical information with limited exceptions. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question **G.7**.

A.12. May an employer request information from an employee who reports feeling ill while on the job with symptoms associated with COVID-19, in order to protect the rest of its workforce and others (e.g., customers) with COVID-19?

(Updated 5/15/23)

Yes. If an employee who works on-site (or otherwise works in close proximity to others), reports feeling ill while on the job, an employer may ask whether the employee has COVID-19 or **common symptoms of COVID-19 as identified by CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>). If the employee has COVID-19 or symptoms of the disease, the employer may follow any **CDC-recommended period of isolation** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html>) with respect to when an employee may return to the workplace or otherwise work in close proximity to others. See A.4., which also addresses following a CDC-recommended period of isolation. Employers must maintain all information about an employee's illness as a confidential medical record in compliance with the ADA.

A.13. May an employer ask an employee why the employee has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

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

A.14. When an employee returns from travel during the COVID-19 pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(Updated 5/15/23)*

No. Questions about where a person traveled would not be disability-related inquiries. Employers may wish to consult current CDC guidance regarding **domestic** (<https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>) or **international** (<https://www.cdc.gov/coronavirus/2019-ncov/travelers/international-travel-during-covid19.html>) travel for

recommendations on what precautions, if any, are advisable after returning from certain destinations. If an employer wishes to require a medical examination (e.g., requiring a COVID-19 viral test), it must meet the ADA's "business necessity" standard. See [A.6.](#) and [A.9.](#)

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(Updated 5/15/23)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this **confidential information** (<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q9>). An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that the employee has the disease or suspects so, or the employer's notes or other documentation from questioning an employee about symptoms. Similarly, information about an employee having Long COVID must also be treated as confidential. For information on confidentiality and COVID-19 vaccinations, see [K.4.](#)

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes (<https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html>).

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? (4/9/20)

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows it must be reported but is worried about violating ADA confidentiality. What should the manager do? (9/8/20; adapted from 3/27/20 Webinar Question 5)

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited

from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? (9/8/20; adapted from 3/27/20 Webinar Question 6)

No. ADA confidentiality does not prevent this employee from communicating to the employee's supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform the supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? (9/8/20; adapted from 3/27/20 Webinar Question 7)

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because the employee has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? (9/8/20; adapted from 3/27/20 Webinar Question 9)

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? (Updated 5/15/23)

Yes. An 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. This ADA rule applies whether or not the applicant has a disability.

In addition, if an employer screens **everyone** for COVID-19 (i.e., screens all applicants, employees, contractors, and visitors because anyone potentially might have COVID-19) before permitting entry to the worksite, then an applicant in the pre-offer stage who needs to be in the workplace as part of the application process (e.g., for a job interview) may likewise be screened for COVID-19. It is also permissible to screen a subset of applicants pre-offer if they fall into a specific category of individuals (including employees and others) that are subject to COVID-19 screening. For example, if everyone entering a particular building on campus must undergo COVID-19 screening, an employer also may subject an applicant entering this building to the same screening, even though such screening is not

routinely done *when entering other buildings*. But note, an employer should not use this COVID-19 screening as an opportunity, pre-offer, to also ask applicants disability-related questions and/or to conduct medical examinations that may only be done post-offer. For information on the ADA rules governing such inquiries and examination, see **Section A**.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? (3/18/20)

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? (3/18/20)

Yes. According to CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs an applicant to start working immediately, whether at the worksite or in the physical presence of others outside of the worksite, because the individual has tested positive for the virus that causes COVID-19, has symptoms of COVID-19, or has been exposed recently to someone with COVID-19? (Updated 7/12/22)

An employer should consult and follow current **CDC guidance** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>) that explains when and how it would be safe for an individual who currently has COVID-19, symptoms of COVID-19, or has been exposed recently to someone with COVID-19, to end **isolation or quarantine** (<https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>) and thus safely enter a workplace or otherwise work in the physical presence of others. An employer who follows current CDC guidance addressing the individual's situation may withdraw the job offer if (1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, **and** (3) the job requires such proximity to others, whether at the workplace or elsewhere. Given that for some individuals there may only be a short period of time required for isolation or quarantine, employers may be able to adjust a start date or permit telework (if job duties can be performed remotely).

C.5. May an employer postpone the start date or withdraw a job offer because of the employer’s concern that the individual is older, pregnant, or has an underlying medical condition that puts the individual at increased risk from COVID-19? (Updated 7/12/22)

No. An employer’s concern for an applicant’s well-being -- an intent to protect them from what it perceives as a risk of illness from COVID-19 -- does not excuse an action that is otherwise unlawful discrimination. The fact that **CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) has noted that older adults, people with certain medical conditions, or pregnant and recently pregnant people may be at greater risk of severe illness from COVID-19 does not justify unilaterally postponing the start date or withdrawing a job offer. Therefore, an employer may not discriminate based on age (40 or older) or pregnancy and related conditions. If an underlying medical condition is a disability, an employer must determine whether the individual’s disability poses a “direct threat” by starting work immediately and, if so, whether reasonable accommodation can be provided to sufficiently lessen or eliminate any risks without causing an undue hardship. For more information on assessing direct threat and reasonable accommodation in this situation, see **G.4.** and **G.5.** For more information on potential issues regarding discrimination based on age or pregnancy, see Sections **H** and **J.**

D. Disability and Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations,

www.askjan.org (<http://www.askjan.org/>). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm> (<https://askjan.org/topics/COVID-19.cfm>).

For more information on reasonable accommodation issues that may arise when employees return to the workplace, see **Section G**. For more information on reasonable accommodation and pregnancy-related disabilities, see **Section J**. For more information on reasonable accommodation and COVID-19 vaccinations, see **K.1., K.2., K.5., K.6., and K.11.**

D.1. If a job may only be performed at the workplace, are there reasonable accommodations (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general>) for individuals with disabilities, absent undue hardship (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue>), that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)

There may be reasonable accommodations that **could offer protection to an individual whose disability puts that person at greater risk from COVID-19** (<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17>) and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per **CDC guidance** (<https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>) or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work

schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may the employee now be entitled to a reasonable accommodation (absent undue hardship)? (4/9/20)

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist the employee and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation if needed.

D.3. In a workplace where employees are required to telework due to the COVID-19 pandemic, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until the employee returns to the workplace when mandatory telework ends? (Updated 5/15/23)

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? (4/9/20)

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of

the pandemic may need a different type of accommodation than what the employee **uses in the workplace** (<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q20>). The employer **may discuss** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? (4/17/20)

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? (4/17/20)

Yes, if it is not obvious or already known, an employer may ask questions or request **medical documentation** (<https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17>) to determine whether the employee's disability necessitates an accommodation, either the one the employee requested or any other. **Possible questions** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of the employee's position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, may an employer provide a temporary accommodation? (Updated 5/15/23)

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the

"interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, changes in government restrictions may affect the need for accommodations. Changes in how an employer conducts the interactive process may be necessary to suit changing circumstances based on current public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the temporary accommodation (for example, a specific date such as "May 30"). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a disability that puts the employee at greater risk during this pandemic. This **could also apply** to employees who have disabilities exacerbated by the pandemic.

If an employee requests an extension of a temporary accommodation, the employer must consider it. The employer may take into account current circumstances, including the employee's current disability-related needs and any applicable government restrictions or public health directives).

D.8. May an employer invite employees to ask for reasonable accommodations they may need in the future in advance of a return to the workplace? (Updated 5/15/23)

Yes. Employers may inform the entire workforce that employees with disabilities may request accommodations in advance that they believe they may need when returning to the workplace either part-time or full-time. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process"—the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? (4/17/20)

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "**undue hardship** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue>)," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. May an employer consider circumstances related to the COVID-19 pandemic when determining if a requested accommodation poses "significant difficulty" (and therefore would be an undue hardship)? *(Updated 5/15/23)*

An employer may consider whether current circumstances related to the COVID-19 pandemic create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship due to circumstances related to the pandemic, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. May an employer consider circumstances related to the COVID-19 pandemic when determining if a requested accommodation poses "significant expense" (and therefore would be an undue hardship)? *(Updated 5/15/23)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). Current pandemic conditions make it less likely that they would be the foundation for finding "significant expense," although an employer may consider any pandemic-related circumstances that could be relevant at the time the employer is making an undue hardship assessment. But, consideration of any relevant pandemic-related reasons does not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account any constraints created by this pandemic. Even under pandemic-related circumstances, there may

be many **no-cost or very low-cost accommodations** (<https://askjan.org/blogs/jan/2022/9/don-t-break-the-bank-low-cost-accommodations-do-exist.cfm>) that effectively meet the employee's disability-related needs.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as “critical infrastructure workers” or “essential critical workers” by the CDC? (4/23/20)

Yes. These **CDC designations** (https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf), or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? (6/11/20)

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom the employee is associated.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? (9/8/20; adapted from 3/27/20 Webinar Question 20)

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation

could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? (9/8/20; adapted from 3/27/20 Webinar Question 21)

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more

essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews the request for telework as a reasonable accommodation. Can the employer again refuse the request? (9/8/20; adapted from 3/27/20 Webinar Question 22)

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(Updated 7/12/22)*

Yes. Some of the issues initially created by the pandemic that delayed engaging in an interactive process and/or providing reasonable accommodation may no longer exist. But, as the pandemic continues to evolve and new issues arise, it is possible that an employer may face new challenges that interfere with responding expeditiously to a request for accommodation. Similarly, reopening a workplace may bring a higher number of requests for reasonable accommodation. In all these situations, an employer must show specific pandemic-related circumstances justified the delay in providing a reasonable accommodation to which the employee was legally entitled. To the extent that evolving circumstances created by the pandemic cause a justifiable delay in the interactive process—thereby delaying a decision on a request—employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(Updated 7/12/22)*

Situations created by the current COVID-19 pandemic may constitute an “extenuating circumstance”—something beyond a federal agency’s control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

Some of the issues initially created by the pandemic that delayed engaging in an interactive process and/or providing reasonable accommodation may no longer exist. But, as the pandemic continues to evolve and new issues arise, it is possible that an agency may face new challenges that interfere with responding to a request for accommodation within an agency’s timeline. Similarly, reopening a workplace may bring a higher number of requests for reasonable accommodation. In all these situations, an agency must show specific pandemic-related circumstances that constitute an “extenuating circumstance.” To the extent that there is an extenuating circumstance, agencies and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.19. What are examples of reasonable accommodations that may assist employees with Long COVID? (5/15/23)

The possible types of reasonable accommodations to address various symptoms of Long COVID vary, depending on a number of factors, including the nature of the symptoms, the job duties, and the design of the workplace. Some common reasonable accommodations include: a quiet workspace, use of noise cancelling or white noise devices, and uninterrupted worktime 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 “marginal functions” that involve physical exertion to address shortness of breath. The Job Accommodation Network has information on a variety of **possible reasonable accommodations to address specific symptoms of Long COVID (<https://askjan.org/disabilities/Long-Covid.cfm>)**.

D.20. As a result of the end of the COVID-19 Public Health Emergency on May 11, 2023, may employers automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances? (5/15/23)

No. This emergency declaration dealt with issues involving health care coverage and access to treatment. It did not address the ADA and Rehabilitation Act requirements regarding provision of reasonable accommodation. Therefore, the end of this Public Health Emergency declaration does not automatically provide grounds to terminate reasonable accommodations that continue to be needed to address on-going pandemic-related circumstances (e.g., **continued high risk to individuals with certain disabilities if they contract COVID-19 (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>)**). However, an employer may evaluate accommodations granted during the public health emergency and, in consultation with the employee, assess whether there continues to be a need for reasonable accommodation based on individualized circumstances. Consistent with the ADA’s “business necessity” standard, this evaluation may include a request for documentation that addresses why there may be an ongoing need for accommodation and whether alternative accommodations might meet those needs.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic?

(4/9/20)

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** (<https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19>), or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment **policy tips** (<https://www.eeoc.gov/employers/small-business/harassment-policy-tips>) for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
 - **report** (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319);
 - **checklists** (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319) for employers who want to reduce and address harassment in the workplace; and
 - **chart** (<https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies>) of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against employees in connection with the pandemic?

(Updated 5/15/23)

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex (including sexual orientation, gender identity, and pregnancy), religion, age (40 or over), disability, or genetic information. 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 want to provide illustrations of pandemic-related harassment for supervisors, managers, and all other employees to help them 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 illustration might show a supervisor or coworker violating Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination. (See E.3. for an additional example of pandemic-related harassment.) Finally, an employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be **instructed** to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment

to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? (6/11/20)

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? (4/9/20)

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's **[technical assistance document on severance agreements \(https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements\)](https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements)**.

F.2. What are additional EEO considerations in planning furloughs or layoffs? (9/8/20; adapted from 3/27/20 Webinar Question 13)

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to the Workplace

G.1. As government restrictions are imposed, lifted, or modified during the course of the pandemic, how will employers know what steps they can take consistent with the ADA to screen employees for the virus that causes COVID-19 when entering the workplace? (Updated 5/15/23)

The ADA permits employers to make disability-related inquiries and conduct medical exams to screen employees for COVID-19 when entering the workplace if such screening is “job-related and consistent with business necessity.” For more information on disability-related inquiries and medical examinations, see **Section A**. For information on reasonable accommodation requests related to screening protocols, see **G.7**.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires workers to wear personal protective equipment and engage in other infection control practices. Some employees ask for accommodations due to a disability or a sincerely held religious belief, practice, or observance that affects the ability to wear personal protective equipment and/or engage in other infection control practices. How should an employer respond? *(Updated 7/12/22)*

In most instances, federal EEO laws permit an employer to require employees to wear personal protective equipment (PPE) (for example, **masks** (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>) and/or gloves) and observe other infection control practices (for example, regular hand washing or physical distancing protocols). Some employers may need to comply with regulations issued by the Occupational Safety and Health Administration (OSHA) that require the use of PPE. OSHA regulations do not prohibit the use of reasonable accommodations under the EEO laws as long as those accommodations do not violate OSHA requirements. Employers also may follow current CDC guidance about who should wear **masks** (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>).

Regardless of the reason an employer requires PPE (or other infection control measures), when an employee with a disability needs a reasonable accommodation under the ADA to comply with an employer’s requirement to wear PPE (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or when an employee requires a religious accommodation under Title VII (such as modified or alternative equipment due to religious attire or grooming practices), the employer should discuss the request and provide accommodation (either what is requested by the employee or an

alternative that is effective in meeting the employee’s needs) if it does not cause an undue hardship on the operation of the employer’s business under the ADA or Title VII. For general information on reasonable accommodation under the ADA, see **Section D**.

G.3. What does an employee need to do in order to request reasonable accommodation from an employer because the employee has one of the medical conditions (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that CDC says may put a person at higher risk for severe illness from COVID-19? (Updated 7/12/22)

An employee—or a third party, such as an employee’s doctor—must **let the employer know** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) that the employee needs a change for a reason related to a medical condition. Individuals may request accommodation orally or in writing. While the employee (or third party) does not need to use the term “reasonable accommodation” or reference the ADA, the employee may do so.

The employee or the employee’s representative should communicate that the employee has a medical condition necessitating a change to meet a medical need. After receiving a request, the employer may **ask questions or seek medical documentation** to help decide if the individual has a disability—not all medical conditions meet the ADA’s definition of “disability”—and if there is a reasonable accommodation, barring **undue hardship**, that can be provided. For additional information on reasonable accommodation under the ADA, see **Section D**. For information on pregnancy-related disabilities covered under the ADA, see **J.2**. For general information on reasonable accommodation requests related to a sincerely held religious belief, practice, or observance, see **K.12**.

G.4. CDC identifies a number of medical conditions (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that are more likely to cause people to get severely ill if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that the employee’s health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? (Updated 7/12/22)

The ADA does not mandate that the employer take action in this situation if the employee has not requested reasonable accommodation. Also, an employer's duty to provide reasonable accommodation applies only if an employee has an actual disability or a record of a disability, as defined in the ADA; this means not every individual with one of the medical conditions that might place them at higher risk of COVID-19 complications will automatically satisfy these ADA definitions of **disability**.

Assuming the employee has a "disability" as discussed above, if the employer is concerned that the health of an employee with a disability may be jeopardized upon returning to the workplace, the ADA generally does not allow the employer to exclude the employee—or take any other adverse action—because the employee has a disability that CDC identifies as potentially placing the employee at higher risk for severe illness if the employee gets COVID-19. Under the ADA, such an adverse action is not allowed unless the employee's disability poses a "direct threat" to the employee's health or safety that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense for the employer, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to the employee's own health or safety, or that of others in the workplace under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the disability being identified in CDC's guidance; the determination must be 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. Thus, an employer analyzing a potential direct threat 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. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and the employee's particular job duties. A determination of direct threat also would include whether the employee is **up to date on vaccinations (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>)** and the likelihood that an individual may be exposed to the virus at the worksite. Measures that an employer may be taking in

general to protect all workers, such as mandatory physical distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a "significant risk of substantial harm" to the employee's own health or safety, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or sufficiently reduce the risk so that it would be safe for the employee to return to the workplace, while still permitting the employee to perform the essential functions of the job.

An employer's consideration of a possible reasonable accommodation should involve an interactive process with the employee. If there are no accommodations in an employee's current position that sufficiently reduce or eliminate direct threat in the workplace, then an employer must consider accommodations such as telework, leave, or—as a last resort—reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework).

An employer may only bar an employee from working based on the direct threat analysis if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to the employee's own health or safety that cannot be reduced or eliminated by reasonable accommodation. For general information on reasonable accommodation under the ADA (i.e., where an individual's request for reasonable accommodation has nothing to do with potential direct threat concerns), see **Section D**.

G.5. What are examples of reasonable accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self or others? *(Updated 7/12/22)*

Reasonable accommodations that may eliminate (or reduce to an acceptable level) a direct threat to self or others may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to, or require from, employees returning to its workplace. Reasonable accommodations also may include additional or enhanced protective measures, such as High Efficiency Particulate Air (HEPA) filtration systems/units or other enhanced air filtration measures, erecting a barrier that provides separation between an employee with a disability and coworkers/the public, or increasing the

space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include telework, modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting), or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more physical distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org (<http://www.askjan.org/>)) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible. For general information on reasonable accommodation under the ADA, see **Section D**.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(Updated 7/12/22)*

Yes. The ADA, the Rehabilitation Act, and Title VII of the Civil Rights Act do not prohibit employers from making information available in advance to **all** employees about whom to contact—if they wish—to request reasonable accommodation that they may need for a disability or a sincerely held religious belief, practice or observance upon return to the workplace. Once requests are received, the employer may begin the interactive process. An employer may choose to include in such a notice all medical conditions identified in **CDC guidance** (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about whom 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 which may qualify as disabilities.

Alternatively, an employer may send a general notice explaining that the employer is willing to consider employee requests for reasonable accommodation for employees with a disability or a sincerely held religious belief, practice, or

observance, or to consider flexibility on an individualized basis for employees not eligible for reasonable accommodation (e.g., employees who request flexibility due to age). The employer should specify if the point of contact is different depending on whether the request is based on disability, sincerely held religious beliefs, pregnancy, age, or child-care responsibilities.

Either approach is consistent with the Age Discrimination in Employment Act (ADEA), the ADA, the Rehabilitation Act, and Title VII.

Regardless of the approach, employers should ensure that those employees who receive, review, or process these requests are sufficiently trained in how to handle them in accordance with the federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a disability or a sincerely held religious belief, observance, or practice; or a request related to pregnancy. For additional information on reasonable accommodation under the ADA/Rehabilitation Act, see **Section D**.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? (6/11/20)

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if a disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a **disability** and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is **available under Title VII (<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>)**.

H. Age

H.1. CDC has explained (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that the risk for severe illness with COVID-19 increases with age, with older adults at the highest risk. Do older adults have protections under the federal employment discrimination laws? (Updated 7/12/22)

Yes. The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from excluding an individual involuntarily from the workplace based on being older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19. For more information on postponing a start date or withdrawing a job offer due to older age, see **C.5**.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for workers due to age. However, employers are free to provide flexibility to older workers; the ADEA does not prohibit this, even if it results in younger workers being treated less favorably based on age in comparison.

Older workers also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable **accommodation for their disability**.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? (9/8/20; adapted from 3/27/20 Webinar Question 12)

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

*For additional information about pandemic-related caregiver discrimination under the laws enforced by the EEOC, see the EEOC's technical assistance document, **The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment***

Discrimination Laws. (<https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>)

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? (3/14/22)

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have **caregiving responsibilities** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>) for children.

I.2. How might unlawful caregiver discrimination related to the COVID-19 pandemic arise under the laws enforced by the EEOC? (3/14/22)

Caregiver discrimination violates the laws enforced by the EEOC if it is based on an applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, national origin, disability, age (40 or older), or another **characteristic covered by federal employment discrimination laws** (<https://www.eeoc.gov/discrimination-type>). Caregiver discrimination also is unlawful if it is based on the caregiver's association with an individual with a disability, or on the race, ethnicity, or other protected characteristic of the individual receiving care.

Caregiver discrimination related to the pandemic may arise in a variety of ways. For instance, under Title VII, employers may not discriminate against employees with pandemic-related caregiving responsibilities based on their sex, including gender stereotypes associated with caregiving responsibilities or roles. For example, employers may not decline to assign female employees with caregiving responsibilities demanding or high-profile projects that increase employees' advancement potential but require significant overtime or travel. Likewise, employers may not reassign such projects to other employees based on assumptions that female caregivers cannot, should not, or would not want to work extra hours or be away from their families if a family member is infected with or exposed to COVID-19. Employers also may not deny male employees permission to telework or to adjust their schedules to enable them to perform pandemic-related

caregiving obligations, such as caring for young children or parents, while granting such requests when made by similarly situated female employees.

Title VII also prohibits employers from discriminating against employees with pandemic-related caregiving duties based on their race or national origin. For example, employers may not require more burdensome processes for employees of a certain race or national origin who are requesting schedule changes or leave related to COVID-19 caregiving. Employers also may not deny such requests more frequently, or penalize employees for requesting or receiving schedule changes or leave for caregiving purposes, based on employees' race or national origin.

Discrimination based on citizenship or immigration status against workers with caregiving responsibilities also can be unlawful under a law enforced by the **Department of Justice (<https://www.justice.gov/crt/immigrant-and-employee-rights-section>)**.

Under the ADA, employers may not discriminate against workers based on stereotypes or assumptions about workers' caregiving responsibilities for an individual with a disability, such as a child, spouse, or parent with a disability. For example, if an applicant is the primary caregiver of an individual with a disability who is at higher risk of complications from COVID-19, an employer may not refuse to hire the applicant out of fear that the care recipient will increase the employer's healthcare costs. If the applicant is hired, the employer may not refuse to allow the care recipient to be added as a dependent on the employer's health insurance because of that individual's disability. An employer also may not refuse to promote employees with caregiving responsibilities for an individual with a disability based on the assumption that they will take a significant amount of leave for caregiving purposes.

I.3. Are these legal protections available only to workers caring for children, or are they also available to workers with other caregiving obligations? (3/14/22)

This response includes hyperlinks to non-governmental sources. The EEOC includes these resources solely for informational purposes. The EEOC does not endorse these resources or the entities responsible for them, and it does not vouch for the accuracy of the information provided by referencing the non-governmental sources in this response.

Employers may not discriminate against applicants or employees with caregiving responsibilities based on characteristics protected by the laws enforced by the

EEOC, including caregivers' sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, association with an individual with a disability, or genetic information (including family medical history). These protections are available to workers with any type of caregiving responsibilities, including care for children, spouses, partners, relatives, individuals with disabilities, or others.

State or local laws may provide additional protections for workers with caregiving responsibilities. Employees with caregiving responsibilities also may have rights under other laws, including the **Family and Medical Leave Act** (<https://www.dol.gov/agencies/whd/fmla>) or similar **state** (<https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>) or local laws.

I.4. Should employers and employees be aware of any other pandemic-related caregiver discrimination issues? (3/14/22)

Yes. In this What You Should Know document, the EEOC addresses several different types of potential pandemic-related caregiver discrimination. For example:

- **A.10** addresses employer inquiries about family members with COVID-19 or related symptoms.
- **C.5** addresses employer-imposed start date postponements or offer withdrawals for pregnant applicants.
- **D.13** addresses whether employees are entitled to accommodations to avoid exposing family members at high risk of complications from COVID-19.
- **J.1** and **J.2** address excluding employees from the workplace based on pregnancy and accommodating pregnancy.
- **K.2** addresses pregnancy accommodation requests related to vaccination.
- **K.3** addresses employer encouragement of vaccination of family members.
- **K.13** addresses decisions not to be vaccinated due to pregnancy.
- **K.18** addresses GINA and incentives for non-employer-provided family member vaccinations or employer requests for documentation of family member vaccinations.

- **K.20** addresses GINA and incentives for employer-provided family member vaccinations.
- **K.21** addresses GINA and family member vaccinations without incentives.

For general information about caregiver discrimination and federal employment discrimination laws, see the EEOC's **[policy guidance \(https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities\)](https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities)**, associated **[fact sheet](https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities)**, and **[best practices \(https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities\)](https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities)** document.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy.

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html#anchor_161496684697? (6/11/20)

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough. For more information on postponing a start date or withdrawing a job offer due to pregnancy, see **C.5**.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? (6/11/20)

There are **[two federal employment discrimination laws \(https://www.eeoc.gov/pregnancy-discrimination\)](https://www.eeoc.gov/pregnancy-discrimination)** that may trigger **[accommodation for employees based on pregnancy \(https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law\)](https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law)**.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII. For information on pregnancy and COVID-19 vaccination, see **K.13**.

K. Vaccinations – Overview, ADA, Title VII, and GINA

Note: Court decisions upholding or rejecting federal vaccination requirements do not affect any statements made in this publication regarding employer and employee rights and responsibilities under the equal employment opportunity laws with respect to employers that require COVID-19 vaccinations.

*The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also **Section J, EEO rights relating to pregnancy** and **Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements.**)*

*This section was originally issued on December 16, 2020, and was updated on October 25, 2021, July 12, 2022, and 5/15/23. Note that the Centers for Disease Control and Prevention (CDC) has **issued guidance (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>)** for vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of COVID-19 vaccines. On

August 23, 2021, the FDA approved the Biologics License Application for the Pfizer-BioNTech COVID-19 vaccine for use in individuals 16 years of age and older.

Previously, the FDA granted Emergency Use Authorizations (EUAs) for the two other vaccines—one made by Moderna and the other by Janssen/Johnson & Johnson—authorizing them for use in the United States for individuals 18 years of age and older. The Pfizer-BioNTech vaccine is authorized under an EUA for individuals 12 years of age and older and for the administration of a **third dose** (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>) in certain immunocompromised individuals. For the current status of vaccines authorized or approved by the FDA, please visit:

<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html> (<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>)

Also of note, on July 6, 2021, the U.S. Department of Justice's Office of Legal Counsel issued a Memorandum Opinion concluding that section 564 of the Federal Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an EUA.

Other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the website of the **Safer Federal Workforce Task Force** (<https://www.saferfederalworkforce.gov/>) for the latest guidance on federal agency operations during the COVID-19 pandemic.

This technical assistance on vaccinations was written to help employees and employers better understand how federal laws related to workplace discrimination apply during the COVID-19 pandemic. The EEOC questions and answers provided here set forth applicable EEO legal standards consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

COVID-19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees to be vaccinated against COVID-19? *(Updated 7/12/22)*

The federal EEO laws do not prevent an employer from requiring all employees to be vaccinated against COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below**. (See also **Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements**). If there is such an employer requirement, the EEO laws do not prevent employers from requiring documentation or other confirmation that employees are **up to date** (**<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>**) on their vaccinations (**see K.9.**), but the EEO laws may require employers to make exceptions to a vaccination requirement for some employees.

The ADA and Title VII require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (**see K.6.**) or for religion (**see K.12.**).

As with any employment policy, employers that have a vaccination requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act [40+]). Employers should keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccination, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy?

(Updated 5/15/23)

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19 (provided testing is consistent with the ADA "business necessity" standard for medical examinations; see **A.6.**), be given the opportunity to telework, or finally, 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. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated against COVID-19 without violating the EEO laws, especially the ADA and GINA? *(Updated 10/13/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Employers also may work with local public health authorities, medical providers, or pharmacies to make vaccinations available for unvaccinated workers in the workplace. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccinations, as discussed in K.16 - K.21. The federal government is providing COVID-19 vaccines at no cost to everyone 5 years of age and older.

There are many resources available to employees seeking more information about how to get vaccinated against COVID-19:

- The federal government's online **vaccines.gov** (<https://www.vaccines.gov/>) site can identify vaccination sites anywhere in the country (or <https://www.vacunass.gov/> for Spanish).

Individuals also can text their ZIP code to “GETVAX” (438829)–or “VACUNA” (822862) for Spanish–to find three vaccination locations near them.

- Employees with disabilities (or employees’ family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The HHS/Administration for Community Living has launched the Disability Information and Assistance Line (DIAL) to assist individuals with disabilities in obtaining such help. DIAL can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing DIAL@n4a.org.
- CDC’s website offers a link to a listing of **local health departments** (<https://www.cdc.gov/publichealthgateway/healthdirectories/index.html>), which can provide more information about local vaccination efforts.
- In addition, CDC provides a complete communication “tool kit” for employers to use with their workforce to educate people about getting a COVID-19 vaccine. Although originally written for essential workers and employers, it is useful for all workers and employers. See **Workplace Vaccination Program | CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>).
- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no English or have limited English proficiency and find it difficult to make an appointment for a vaccination over the phone. CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.
- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources serving vaccination sites available in their community and offer paid time-off for vaccination, particularly if transportation is not readily available outside regular work hours.
- Employers should provide the contact information of a management representative for employees who need to request a reasonable

accommodation for a disability or religious belief, practice, or observance, or to ensure nondiscrimination for an employee who is pregnant.

The ADA and COVID-19 Vaccinations

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? (Updated 7/12/22)

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information. Although the EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

An employer may share confidential medical information, such as confirmation of employee vaccinations (or COVID-19 test results), with employees who need it to perform their job duties. However, such employees also must keep the information confidential. Some possible scenarios include:

- An administrative employee assigned to perform recordkeeping of employees' documentation of vaccination may receive needed access to the information for this purpose but must keep this information confidential.
- An employee assigned to permit building entry only by employees who are in compliance with a work restriction, such as COVID-19 vaccinations, testing, and/or masking, should only receive a list of the individuals who may (or may not) enter, but not any confidential medical information about why they are on (or not on) the list.
- An employee tasked to ensure compliance with a testing requirement for employees would need to review testing documentation submitted by those employees but must keep that testing information confidential.

Mandatory Employer Vaccination Programs

K.5. May an employer require an employee to comply with a COVID-19 vaccination requirement applicable to all employees entering the workplace if that employee has sought an exemption based on disability? (Updated 7/12/22)

Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee. An employer does not have to show that a qualification standard in general (i.e., as applied to all employees) meets the “business necessity” standard. Under the ADA it must satisfy this standard only as applied to an employee who informs the employer that a disability prevents compliance. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others while performing their job. A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r)** (<https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml>). This determination can be broken down into two steps: determining if there is a “significant risk of substantial harm” and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (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 determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee’s health care provider, with the employee’s consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are

wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(Updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that the employee needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation.”

Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know **how to recognize an accommodation request from an employee with a disability** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify **workplace accommodation options** that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website** (<https://www.askjan.org>) as a resource for different types of accommodations. JAN's materials about COVID-19 are available at <https://askjan.org/topics/COVID-19.cfm> (<https://askjan.org/topics/COVID-19.cfm>).

Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources** (<https://www.osha.gov/SLTC/covid-19/>). Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform the employee's current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations** (<https://www.cdc.gov/coronavirus/2019-ncov/>) when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42>) or **to retaliate against an employee for requesting an accommodation** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19>).

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA’s restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? (Updated 5/28/21)

Yes. The ADA’s restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer’s agent** (<https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2>) is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual’s physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual’s disability). The act of administering the vaccine is not a “medical examination” under the ADA because it does not seek information about the employee’s physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be “job related and consistent with business necessity” when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee’s own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5.**) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19

vaccine *without* needing to satisfy the “job-related and consistent with business necessity” standard? *(Updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee’s decision to answer the questions must be voluntary. (See also Questions **K.16 – 17.**) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Does the ADA prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19 vaccination? *(Updated 10/13/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccination, the employer is not asking the employee a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA’s rules about making such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential, as discussed in K.4.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a

continuing concern that the employee faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? (5/28/21)

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to employees who communicate that they are unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (Updated 5/28/21)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests. For more information on requests for religious accommodations related to COVID-19 vaccination requirements, see **Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements.**

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.2.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(Updated 10/13/21)*

CDC recommends (<https://emergency.cdc.gov/han/2021/han00453.asp>) COVID-19 vaccinations for everyone aged 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or planning to become pregnant in the future. Despite these recommendations, some pregnant employees may seek job adjustments or may request exemption from a COVID-19 vaccination requirement.

If an employee seeks an exemption from a vaccination requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII.**

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as “family medical history”) and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? (Updated 5/28/21)

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee’s genetic information, such as asking about the employee’s family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC’s Pre-vaccination Checklist (<https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf>)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee’s genetic information to make employment decisions or the acquisition

or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a health care provider *that is not affiliated with their employer* (such as from the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a health care provider unaffiliated with the employer, such as the employee’s personal physician or other health care provider, a pharmacy, or a public health department, is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee’s *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Does the ADA limit the value of the incentive employers may offer to employees for receiving a COVID-19 vaccination from a health care provider *that is not affiliated with their employer* (such as the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 5/15/23)*

No. If the health care provider administering a COVID-19 vaccine *is not the employer or its agent* the ADA does not limit the incentives (which includes both rewards and penalties) an employer may offer to encourage employees to receive a COVID-19 vaccination, or to provide confirmation of vaccination. This is because the ADA’s rules about when disability-related inquiries may be asked and medical examinations required only apply when it is the employer or its agent asking the questions or requiring the medical exam. See K.9. By contrast, if an employer offers

an incentive to employees to voluntarily receive a vaccination *administered by the employer or its agent*, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive. See K.17. Even if an employer requires employees to receive vaccination or provide confirmation of vaccination, as long as it is not required to be administered by the employer or its agent, the ADA does not limit the value of incentives offered, whether rewards or penalties.

As noted in K 4., the employer is required to keep vaccination information confidential under the ADA.

K.17. Under the ADA, are there limits on the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination administered by the employer or its agent? *(Updated 10/13/21)*

Yes. When the employer or its agent administers a COVID-19 vaccine, the value of the incentive (which includes both rewards and penalties) may not be so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information to their employers or their agents. As explained in K.16., however, this incentive limit does not apply if an employer offers an incentive to encourage employees to be voluntarily vaccinated by a health care provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Does GINA limit the value of the incentive employers may offer employees if employees or their family members get a COVID-19 vaccination from a health care provider *that is not affiliated with the employer* (such as the employee's personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. GINA does not limit the incentives an employer may offer to employees to encourage them or their family members to get a COVID-19 vaccine or provide confirmation of vaccination if the health care provider administering the vaccine is not the employer or its agent. If an employer asks an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA

because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as “family medical history” under GINA), nor is it any other form of genetic information. GINA’s restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent?

(5/28/21)

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee’s *family member* getting vaccinated by the employer or its agent? (5/28/21)

No. Under GINA’s Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member’s receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer’s receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee’s family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee’s family member an opportunity to be vaccinated *without* offering the employee an incentive?

(5/28/21)

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about the family member's medical conditions. If these requirements are met, GINA permits the collection of genetic information.

L. Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on religion. This includes a right for job applicants and employees to request an exception, called a religious or reasonable accommodation, from an employer requirement that conflicts with their sincerely held religious beliefs, practices, or observances. If an employer shows that it cannot reasonably accommodate an employee's religious beliefs, practices, or observances without undue hardship on its operations, the employer is not required to grant the accommodation. See generally **Section 12: Religious Discrimination** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452); EEOC **Guidelines on Discrimination Because of Religion** (<https://www.govinfo.gov/content/pkg/CFR-2016-title29-vol4/xml/CFR-2016-title29-vol4-part1605.xml>). Although other laws, such as the Religious Freedom Restoration Act, also may protect religious freedom in some circumstances, this technical assistance only describes employment rights and obligations under Title VII.

L.1. Do employees who have a religious objection to receiving a COVID-19 vaccination need to tell their employer? If so, is there specific language that must be used under Title VII? (3/1/22)

Employees must tell their employer if they are requesting an exception to a COVID-19 vaccination requirement because of a conflict between that requirement and their sincerely held religious beliefs, practices, or observances. Under Title VII, this is called a request for a “religious accommodation” or a “reasonable accommodation.”

When making the request, employees do not need to use any “magic words,” such as “religious accommodation” or “Title VII.” However, they need to explain the conflict and the religious basis for it.

The same principles apply if employees have a religious conflict with getting a particular vaccine and wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to them. See Introduction to Section K, above.

As a best practice, an employer should provide employees and applicants with information about whom to contact and the proper procedures for requesting a religious accommodation.

*As an example, here is how **EEOC designed its own form for its own workplace** (<https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf>). Although the EEOC’s internal forms typically are not made public, it is included here given the extraordinary circumstances facing employers and employees due to the COVID-19 pandemic. (Note: Individuals not employed by the EEOC should not submit this form to the EEOC to request a religious accommodation.)*

L.2. Does an employer have to accept an employee’s assertion of a religious objection to a COVID-19 vaccination at face value? May the employer ask for additional information? (3/1/22)

Generally, under Title VII, an employer should proceed on the assumption that a request for religious accommodation is based on sincerely held religious beliefs, practices, or observances. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. An employee who fails to cooperate with an employer’s reasonable requests for verification of the sincerity or religious nature of a professed belief, practice, or observance risks losing any subsequent claim that the employer improperly denied an accommodation. See generally **Section 12-**

IV.A.2: Religious Discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_79076346735821610749860135).

The **definition of “religion” (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_9593682596821610748647076)** under Title VII protects both traditional and nontraditional religious beliefs, practices, or observances, including those that may be unfamiliar to employers. While the employer should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs, practices, or observances, employees may be asked to explain the religious nature of their belief, practice, or observance and should not assume that the employer already knows or understands it.

Title VII does not protect social, political, or economic views or personal preferences. Thus, objections to a COVID-19 vaccination requirement that are purely based on social, political, or economic views or personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs, practices, or observances under Title VII. However, overlap between a religious and political view does not place it outside the scope of Title VII’s religious protections, as long as the view is part of a comprehensive religious belief system and is not simply an isolated teaching. See generally **Section 12-I.A.1: Religious Discrimination (definition of religion) (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref18)**; see also discussion of “sincerity” below.

The **sincerity (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_9546543277761610748655186)** of an employee’s stated religious beliefs, practices, or observances is usually not in dispute. The employee’s sincerity in holding a religious belief is “largely a matter of individual credibility.” **Section 12-I.A.2: Religious Discrimination (credibility and sincerity) (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref42)**. Factors that—either alone or in combination—might undermine an employee’s credibility include: whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance); whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons; whether the timing of the request renders it suspect (for example, it follows an earlier request by the employee for the same benefit for secular reasons); and

whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The employer **may ask for an explanation**

([https://www.eeoc.gov/laws/guidance/section-12-religious-](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_79076346735821610749860135)

discrimination#h_79076346735821610749860135) of how the employee's religious beliefs, practices, or observances conflict with the employer's COVID-19 vaccination requirement. Although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs—or degree of adherence—may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held. An employer should not assume that an employee is insincere simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion, or because the employee adheres to some common practices but not others. No one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

If an employee's objection to a COVID-19 vaccination requirement is not religious in nature, or is not sincerely held, Title VII does not require the employer to provide an exception to the vaccination requirement as a religious accommodation.

L.3. How does an employer show that it would be an “undue hardship” to accommodate an employee’s request for religious accommodation? (3/1/22)

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodations for unvaccinated employees, see K.2, K.6, and K.12, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances without imposing an undue hardship.

If an employer demonstrates that it is unable to reasonably accommodate an employee's religious belief, practice, or observance without an “undue hardship” on its operations, then Title VII does not require the employer to provide the accommodation. 42 U.S.C. § 2000e(j). The Supreme Court has held that requiring an employer to bear more than a “de minimis,” or a minimal, cost to accommodate an employee's religious belief is an undue hardship. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's

business—including, in this instance, the risk of the spread of COVID-19 to other employees or to the public.

Courts have found Title VII undue hardship where, for example, the religious accommodation would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. For a more detailed discussion, see **Section 12-IV.B: Religious Discrimination (discussing undue hardship) (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_12929403436951610749878556)**..

An employer will need to assess undue hardship by considering the particular facts of each situation and will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer cannot rely on speculative or hypothetical hardship when faced with an employee's religious objection but, rather, should rely on objective information. Certain common and relevant considerations during the COVID-19 pandemic include, for example, whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation, i.e., the cumulative cost or burden on the employer. See K.12 for additional considerations relevant to the undue hardship analysis.

L.4. If an employer grants some employees a religious accommodation from a COVID-19 vaccination requirement because of sincerely held religious beliefs, practices, or observances, does it have to grant all such requests? (3/1/22)

No. The determination of whether a particular proposed accommodation imposes an undue hardship on the conduct of the employer's business depends on its specific factual context. When an employer is assessing whether exempting employees from getting a vaccination would impair workplace safety, it may consider, for example, the type of workplace, the nature of the employees' duties, the location in which the employees must or can perform their duties, the number of employees who are fully vaccinated, how many employees and nonemployees physically enter the workplace, and the number of employees who will in fact need a particular accommodation. A mere assumption that many more employees might seek a religious accommodation—or the same accommodation—to the vaccination

requirement in the future is not evidence of undue hardship, but the employer may consider the cumulative cost or burden of granting accommodations to other employees.

L.5. Must an employer provide the religious accommodation preferred by an employee if there are other possible accommodations that also are effective in eliminating the religious conflict and do not cause an undue hardship under Title VII? (3/1/22)

If there is more than one reasonable accommodation that would resolve the conflict between the vaccination requirement and the sincerely held religious belief, practice, or observance without causing an undue hardship under Title VII, the employer may choose which accommodation to offer. If more than one accommodation would be effective in eliminating the religious conflict, the employer should consider the employee's preference but is not obligated to provide the reasonable accommodation preferred by the employee. However, an employer's proposed accommodation will not be "reasonable" if the accommodation requires the employee to accept a reduction in pay or some other loss of a benefit or privilege of employment (for example, if unpaid leave is the employer's proposed accommodation) and there is a reasonable alternative accommodation that does not require that and would not impose undue hardship on the employer's business. See **Section 12-IV.A.3: Religious Discrimination (reasonable accommodation)** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_25500674536391610749867844). If the employer denies the employee's proposed accommodation, the employer should explain to the employee why the preferred accommodation is not being granted.

An employer should consider all possible alternatives to determine whether exempting an employee from a vaccination requirement would impose an undue hardship. See, e.g., K.2. Employers may rely on **CDC recommendations** (<https://www.cdc.gov/coronavirus/2019-ncov/>) when deciding whether an effective accommodation is available that would not pose an undue hardship.

L.6. If an employer grants a religious accommodation to an employee, can the employer later reconsider it? (3/1/22)

The obligation to provide religious accommodations absent undue hardship is a continuing obligation that allows for changing circumstances. Employees' sincerely held religious beliefs, practices, or observances may evolve or change over time and

may result in requests for additional or different religious accommodations. Similarly, an employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances. Employers must consider whether there are alternative accommodations that would not impose an undue hardship. As a best practice, an employer should discuss with the employee any concerns it has about continuing a religious accommodation before revoking it.

M. Retaliation and Interference

*The **[anti-retaliation protections \(https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues\)](https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues)** discussed here only apply to the exercise of rights under the federal equal employment opportunity (EEO) laws. Information about similar protections under other federal workplace laws, such as the **[Family and Medical Leave Act \(https://www.dol.gov/agencies/whd/fmla\)](https://www.dol.gov/agencies/whd/fmla)** or the **[Occupational Safety and Health Act \(https://www.osha.gov/workers\)](https://www.osha.gov/workers)**, is available from the U.S. Department of Labor. Information about similar protections under the Immigration and Nationality Act's anti-discrimination provision, which prohibits some types of workplace discrimination based on citizenship status, immigration status, or national origin, and **[protects against retaliation for asserting those rights \(http://www.justice.gov/crt/types-discrimination\)](http://www.justice.gov/crt/types-discrimination)**, is available from the Civil Rights Division of the U.S. Department of Justice.*

M.1. Do job applicants and employees (including former employees) have protections from retaliation for exercising equal employment opportunity (EEO) rights in connection with COVID-19? (11/17/21)

Yes. Job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the federal **[EEO laws \(https://www.eeoc.gov/statutes/laws-enforced-eeoc\)](https://www.eeoc.gov/statutes/laws-enforced-eeoc)**. The EEO laws prohibit workplace discrimination based on race, color, sex (including pregnancy, sexual orientation, and gender identity), national origin, religion, age (40 or over), disability, or genetic information. Speaking out about or exercising rights related to workplace discrimination is called “protected activity.”

Protected activity can take many forms. For example, an employee complaining to a supervisor about coworker harassment based on race or national origin is protected activity. Witnesses to discrimination who seek to assist individuals affected by discrimination are also protected. Engaging in protected activity, however, does not shield an employee from discipline, discharge, or other employer actions taken for reasons unrelated to the protected activity.

M.2. What are some examples of employee activities that are protected from employer retaliation? (11/17/21)

- **Filing a charge, complaint, or lawsuit, regardless of whether the underlying discrimination allegation is successful or timely.** For example, employers may not retaliate against employees who file charges with the EEOC alleging that their supervisor unlawfully disclosed confidential medical information (such as a COVID-19 diagnosis), even if the EEOC later decides there is no merit to the underlying charges. Moreover, a supervisor may not give a false negative job reference to punish a former employee for making an EEO complaint, or refuse to hire an applicant because of the applicant's EEO complaint against a prior employer.
- **Reporting alleged EEO violations to a supervisor or answering questions during an employer investigation of the alleged harassment.** For example, an Asian American employee who tells a manager or human resources official that a coworker made abusive comments accusing Asian people of spreading COVID-19 is protected from retaliation for reporting the harassment. Workplace discrimination laws also prohibit retaliation against employees for reporting harassing workplace comments about their religious reasons for not being vaccinated. Similarly, workplace discrimination laws prohibit retaliation against an employee for reporting sexually harassing comments made during a work video conference meeting.
- **Resisting harassment, intervening to protect coworkers from harassment, or refusing to follow orders that would result in discrimination.** For example, workplace discrimination laws protect a supervisor who refuses to carry out management's instruction not to hire certain applicants based on the sex-based presumption that they might use parental leave or have childcare needs, or to steer them to particular types of jobs.

- **Requesting accommodation of a disability (potentially including a pregnancy-related medical condition) or a religious belief, practice, or observance regardless of whether the request is granted or denied.** For example, the EEO laws prohibit an employer from retaliating against an employee for requesting continued telework as a disability accommodation after a workplace reopens. Similarly, requesting religious accommodation, such as modified protective gear that can be worn with religious garb, is protected activity. Requests for accommodation are protected activity even if the individual is not legally entitled to accommodation, such as where the employee's medical condition is not ultimately deemed a disability under the ADA, or where accommodation would pose an undue hardship.

M.3. Who is protected from retaliation? (11/17/21)

Retaliation protections apply to current employees, whether they are full-time, part-time, probationary, seasonal, or temporary. Retaliation protections also apply to job applicants and to former employees (such as when an employer provides a job reference). In addition, these protections apply regardless of an applicant's or employee's citizenship or work authorization status.

M.4. When do retaliation protections apply? (11/17/21)

Participating in an EEO complaint process is protected from retaliation under all circumstances.

Other acts by a current, prospective, or former employee to oppose discrimination are protected as long as the employee is acting on a reasonable good faith belief that something in the workplace may violate **EEO laws** (<https://www.eeoc.gov/statutes/laws-enforced-eeoc>), and expresses those beliefs in a reasonable manner. An employee is still protected from retaliation for making a complaint about workplace discrimination even if the employee does not use legal terminology to describe the situation.

M.5. When is an employer action based on an employee's EEO activity serious enough to be unlawful retaliation? (11/17/21)

Retaliation includes any employer action in response to EEO activity that could deter a reasonable person from engaging in protected EEO activity. Depending on the facts, this might include actions such as denial of promotion or job benefits, non-hire, suspension, discharge, work-related threats, warnings, negative or

lowered evaluations, or transfers to less desirable work or work locations. Retaliation could also include an action that has no tangible effect on employment, or even an action that takes place only outside of work, if it might deter a reasonable person from exercising EEO rights. The fact that an individual is not actually deterred from opposing discrimination or participating in an EEO complaint-related process or activity does not preclude an employer's action from being considered retaliatory.

However, depending on the specific situation, retaliation likely would not include a petty slight, minor annoyance, or a trivial punishment.

M.6. Does this mean that an employer can never take action against someone who has engaged in EEO activity? (11/17/21)

No. Engaging in protected EEO activity does not prevent discipline of an employee for legitimate reasons. Employers are permitted to act based on *non-retaliatory and non-discriminatory* reasons that would otherwise result in discipline. For example, if an employee performs poorly, has low productivity, or engages in misconduct, an employer may respond as it normally would, even if the employee has engaged in protected activity. Similarly, an employer may take non-retaliatory, non-discriminatory action to enforce COVID-19 health and safety protocols, even if such actions follow EEO activity (e.g., an accommodation request).

M.7. Does the law provide any additional protections to safeguard ADA rights? (11/17/21)

Yes. The ADA prohibits not only retaliation for protected EEO activity, but also “interference” with an individual’s exercise of ADA rights. Under the ADA, employers may not coerce, intimidate, threaten, or otherwise interfere with the exercise of ADA rights by job applicants or current or former employees. For instance, it is unlawful for an employer to use threats to discourage someone from asking for a reasonable accommodation. It is also unlawful for an employer to pressure an employee not to file a disability discrimination complaint. The ADA also prohibits employers from interfering with employees helping others to exercise their ADA rights.

The employer’s actions may still violate the ADA’s interference provision even if an employer does not actually carry out a threat, and even if the employee is not deterred from exercising ADA rights.

N. COVID-19 and the Definition of “Disability” Under the ADA/Rehabilitation Act

Employees and employers alike have asked when COVID-19 is a “disability” under Title I of the ADA, which includes reasonable accommodation and nondiscrimination requirements in the employment context. These questions and answers clarify circumstances in which COVID-19 may or may not cause effects sufficient to meet the definition of “actual” or “record of” a disability for various purposes under Title I, as well as section 501 of the Rehabilitation Act, both of which are enforced by the EEOC. Other topics covered in this section include Long COVID as a disability and other disabilities arising from conditions that were caused or worsened by COVID-19. This section also addresses the ADA’s “regarded as” definition of disability with respect to COVID-19.

*On July 26, 2021, the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) issued **“Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557”** (<https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html>) (DOJ/HHS Guidance). More recently, **HHS issued a report** (<https://www.hhs.gov/sites/default/files/healthplus-long-covid-report.pdf>) addressing various aspects of living with Long COVID. **CDC uses the terms “Long COVID (https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/)_”** or “post-COVID conditions” to describe **new, returning, or ongoing health problems present four or more weeks after being infected with the virus that causes COVID-19 (https://www.covid.gov/longcovid/definitions)**. Others have referred to “long-haul COVID,” “post-acute COVID-19,” “long-term effects of COVID,” or “chronic COVID.” Whether called COVID, Long COVID, or any other name, the ADA’s three-part definition of disability applies to COVID-related conditions in the same way it applies to any other medical condition.*

The DOJ/HHS Guidance focuses solely on Long COVID in the context of Titles II and III of the ADA, Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Patient Protection and Affordable Care Act. These EEOC questions and answers focus more broadly on COVID-19 and do so in the context of Title I of the ADA and section 501 of the Rehabilitation Act, which cover employment. This discussion does not pertain to other contexts, such as eligibility determinations for federal benefit programs.

N.1. How does the ADA define disability, and how does the definition apply to COVID-19 and Long COVID? (Updated 5/15/23)

The ADA's three-part definition of disability applies to COVID-19 and Long COVID in the same way it applies to any other medical condition. A person can be an individual with a "disability" for purposes of the ADA in one of three ways:

- **"Actual" Disability:** The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function);
- **"Record of" a Disability:** The person has a history or "record of" an actual disability (such as cancer that is in remission); or
- **"Regarded as" an Individual with a Disability:** The person is subject to an adverse action because of an individual's impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity, unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

The definition of disability is construed broadly in favor of expansive coverage, to the maximum extent permitted by the law. Nonetheless, not every impairment will constitute a disability under the ADA. The ADA uses a case-by-case approach to determine if an applicant or employee meets any one of the three above definitions of "disability."

COVID-19, Long COVID, and the ADA

"Actual" Disability

N.2.

When is COVID-19 or Long COVID an actual disability under the ADA? (Updated 5/15/23)

Applying the ADA rules stated in **N.1.** and depending on the specific facts involved in an individual employee's condition, a person with COVID-19 or Long COVID has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that "substantially limits one or more major life activities." An individualized assessment is necessary to determine whether the effects of a person's COVID-19 or Long COVID substantially limit a major life activity.

This will always be a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances.

A person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability within the meaning of the ADA. However, depending on the specific facts involved in a particular employee's medical condition, an individual with COVID-19 might have an actual disability, as illustrated below.

Physical or Mental Impairment: Under the ADA, a physical impairment includes any physiological disorder or condition affecting one or more body systems. A mental impairment includes any mental or psychological disorder. COVID-19 and Long COVID are physiological conditions affecting one or more body systems. As a result, they are each a "physical or mental impairment" under the ADA.

Major Life Activities: "Major life activities" include both major bodily functions, such as respiratory, lung, or heart function, and major activities in which someone engages, such as walking or concentrating. COVID-19 or Long COVID may affect major bodily functions, such as functions of the immune system, special sense organs (such as for smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions, or the operation of an individual organ. In some instances, COVID-19 or Long COVID also may affect other major life activities, such as caring for oneself, eating, walking, breathing, concentrating, thinking, or interacting with others. An impairment need only substantially limit one major bodily function or other major life activity to be substantially limiting. However, limitations in more than one major life activity may combine to meet the standard.

Substantially Limiting: "Substantially limits" is construed broadly and should not demand extensive analysis. COVID-19 or Long COVID need not prevent, or significantly or severely restrict, a person from performing a major life activity to be considered substantially limiting under Title I of the ADA.

The limitations from COVID-19 or Long COVID do not necessarily have to last any particular length of time to be substantially limiting. They also need not be long-term. For example, in discussing a hypothetical physical impairment resulting in a 20-pound lifting restriction that lasts or is expected to last several months, the EEOC has said that such an impairment is substantially limiting. App. to 29 C.F.R. §

1630.2(j)(1)(ix). By contrast, “[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.” Id.

Mitigating Measures: Whether COVID-19 or Long COVID substantially limit a major life activity is determined based on how limited the individual would have been without the benefit of any mitigating measures—i.e., any medical treatment received or other step used to lessen or prevent symptoms or other negative effects of an impairment. At the same time, in determining whether COVID-19 or Long COVID substantially limits a major life activity, any negative side effects of a mitigating measure are taken into account.

Some examples of mitigating measures for COVID-19 include medication or medical devices or treatments, such as antiviral drugs, supplemental oxygen, inhaled steroids and other asthma-related medicines, breathing exercises and respiratory therapy, physical or occupational therapy, or other steps to address complications of COVID-19. Examples of mitigating measures for Long COVID include medication or treatment, respiratory therapy, physical therapy, and mental health therapy.

Episodic Conditions: Even if the symptoms related to COVID-19 or Long COVID come and go, COVID-19 or Long COVID is an actual disability if it substantially limits a major life activity when active.

N.3. Is COVID-19 always an actual disability under the ADA? (12/14/21)

No. Determining whether a specific employee’s COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically. See **29 C.F.R. § 1630.2**

(<https://www.law.cornell.edu/cfr/text/29/1630.2>) for further information on the ADA’s requirements relating to individualized assessment.

N.4. What are some examples of ways in which an individual with COVID-19 might or might not be substantially limited in a major life activity? How can Long COVID substantially limit a major life activity? (Updated 5/15/23)

As noted above, while COVID-19 may substantially limit a major life activity in some circumstances, someone infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to the common cold or flu that resolve in a matter of weeks—with no other consequences—will not be substantially limited in a major life activity for purposes of the ADA.

Based on an individualized assessment in each instance, examples of fact patterns include:

Examples of Individuals with an Impairment that Substantially Limits a Major Life Activity:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee’s doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities.
- An individual diagnosed with COVID-19 who initially 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, is substantially limited in respiratory function, and possibly major life activities involving exertion, such as walking.
- An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months. The individual is substantially limited in cardiovascular function and circulatory function, among others.
- An individual diagnosed with “**Long COVID** (<https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>? **CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flong-term-effects.html**),” who experiences COVID-19-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently, is substantially limited in gastrointestinal function, among other major life activities, and therefore has an actual disability under the ADA.

Examples of Individuals with an Impairment that Does Not Substantially Limit a Major Life Activity:

- An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and

therefore does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness.

- An individual who is infected with the virus causing COVID-19 but is asymptomatic—that is, does not experience any symptoms or effects—is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is the case even though this person is still subject to CDC guidance for isolation during the period of infectiousness.

As noted above, even if the symptoms of COVID-19 occur intermittently, they will be deemed to substantially limit a major life activity if they are substantially limiting when active, based on an individualized assessment.

For information on possible services and supports for individuals with Long COVID, see the **report (<https://www.covid.gov/assets/files/Services-and-Supports-for-Longer-Term-Impacts-of-COVID-19-08012022.pdf>)** issued by the U.S. Dept. of Health and Human Services.

“Record of” Disability

N.5. Can a person who has or had COVID-19 or Long COVID be an individual with a “record of” a disability? (Updated 5/15/23)

Yes, depending on the facts. A person who has or had COVID-19 or Long COVID can be an individual with a “record of” a disability if the person has “a history of, or has been misclassified as having,” **29 C.F.R. § 1630.2(k)(2)**

(<https://www.law.cornell.edu/cfr/text/29/1630.2>), an impairment that substantially limits one or more major life activities, based on an individualized assessment.

“Regarded As” Disability

N.6. Can a person be “regarded as” an individual with a disability if the person has COVID-19 or Long COVID, or the person’s employer mistakenly believes the person has COVID-19 or Long COVID? (Updated 5/15/23)

Yes, depending on the facts. A person is “regarded as” an individual with a disability if the person is subjected to an adverse action (e.g., being fired, not hired, or

harassed) because the person has an impairment, such as COVID-19 or Long COVID, or the employer mistakenly believes the person has such an impairment, unless the actual or perceived impairment is objectively both transitory (lasting or expected to last six months or less) and minor. For this definition of disability, whether the actual or perceived impairment substantially limits or is perceived to substantially limit a major life activity is irrelevant.

N.7. What are some examples of an employer regarding a person with COVID-19 as an individual with a disability? (12/14/21)

The situations in which an employer might “regard” an applicant or employee with COVID-19 as an individual with a disability are varied. Some examples include:

- An employer would regard an employee as having a disability if the employer fires the individual because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months. The employer could not show that the impairment was both transitory and minor.
- An employer would regard an employee as having a disability if the employer fires the individual for having COVID-19, and the COVID-19, although lasting or expected to last less than six months, caused non-minor symptoms. In these circumstances, the employer could not show that the impairment was both transitory and minor.

N.8. If an employer regards a person as having a disability, for example by taking an adverse action because the person has COVID-19 that is not both transitory and minor, does that automatically mean the employer has discriminated for purposes of the ADA? (12/14/21)

No. It is possible that an employer may not have engaged in unlawful discrimination under the ADA even if the employer took an adverse action based on an impairment. For example, an individual still needs to be qualified for the job held or desired. Additionally, in some instances, an employer may have a defense to an action taken on the basis of the impairment. For example, the ADA’s “direct threat” defense could permit an employer to require an employee with COVID-19 or its symptoms to refrain from physically entering the workplace during the CDC-recommended period of isolation, due to the significant risk of substantial harm to the health of others. See **WYSK Question A.8**. Of course, an employer risks violating the ADA if it relies on myths, fears, or stereotypes about a condition to disallow the

employee's return to work once the employee is no longer infectious and, therefore, medically able to return without posing a direct threat to others.

Other Conditions Caused or Worsened by COVID-19 and the ADA

N.9. Can a condition caused or worsened by COVID-19 be a disability under the ADA? (12/14/21)

Yes. In some cases, regardless of whether an individual's initial case of COVID-19 itself constitutes an actual disability, an individual's COVID-19 may end up causing impairments that are themselves disabilities under the ADA. For example:

- An individual who had COVID-19 develops heart inflammation. This inflammation itself may be an impairment that substantially limits a major bodily function, such as the circulatory function, or other major life activity, such as lifting.
- During the course of COVID-19, an individual suffers an acute ischemic stroke. Due to the stroke, the individual may be substantially limited in neurological and brain (or cerebrovascular) function.
- After an individual's COVID-19 resolves, the individual develops diabetes attributed to the COVID-19. This individual should easily be found to be substantially limited in the major life activity of endocrine function. See **[Diabetes in the Workplace and the ADA](https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada)** (<https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada>) for more information.

In some cases, an individual's COVID-19 may also worsen the individual's pre-existing condition that was not previously substantially limiting, making that impairment now substantially limiting. For example:

- An individual initially has a heart condition that is not substantially limiting. The individual is infected with COVID-19. The COVID-19 worsens the person's heart condition so that the condition now substantially limits the person's circulatory function.

Definition of Disability and Requests for Reasonable Accommodation

N.10. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

(12/14/21)

Yes. Individuals must meet either the “actual” or “record of” definitions of disability to be eligible for a reasonable accommodation. Individuals who only meet the “regarded as” definition are not entitled to receive reasonable accommodation.

Of course, coverage under the “actual” or “record of” definitions does not, alone, entitle a person to a reasonable accommodation. Individuals are not entitled to an accommodation unless their disability requires it, and an employer is not obligated to provide an accommodation that would pose an undue hardship. See **WYSK Section D**, and **Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>) for more information.

N.11. When an employee requests a reasonable accommodation related to COVID-19 or Long COVID under the ADA, may the employer request supporting medical documentation before granting the request? (Updated 5/15/23)

Yes. As with employment accommodation requests under the ADA for any other potential disability, when the disability or need for accommodation is not obvious or already known, an employer may ask the employee to provide reasonable documentation about disability and/or need for reasonable accommodation. Often, the only information needed will be the individual’s diagnosis and any restrictions or limitations. The employer also may ask about whether alternative accommodations would be effective in meeting the disability-related needs of the individual. See WYSK Questions D.5. and D.6. for more information.

The employer may either ask the employee to obtain the requested information or request that the employee sign a limited release allowing the employer to contact the employee’s health care provider directly. If the employee does not cooperate in providing the requested reasonable supporting medical information, the employer can lawfully deny the accommodation request.

N.12. May an employer voluntarily provide accommodations requested by an applicant or employee due to COVID-19 or Long COVID, even if not required to do so under the ADA? (Updated 5/15/23)

Yes. Employers may choose to provide accommodations beyond what the ADA mandates. Of course, employers must provide a reasonable accommodation under

the ADA, absent undue hardship, if the applicant or employee meets the definition of disability, requires an accommodation for the disability, and is qualified for the job with the accommodation. Accommodations might consist of schedule changes, physical modifications to the workplace, telework, or special or modified equipment. See, e.g., **WYSK Section D** or U.S. Department of Labor Blog, **Workers with Long COVID-19: You May Be Entitled to Workplace Accommodations** (<https://blog.dol.gov/2021/07/06/workers-with-long-covid-19-may-be-entitled-to-accommodations>) for more information.

Applicability of Definition of Disability

N.13. If an employer subjected an applicant or employee to an adverse action, and the applicant or employee is covered under any one of the three ADA definitions of disability, does that mean the employer violated the ADA?

(12/14/21)

No. Having a disability, alone, does not mean an individual was subjected to an unlawful employment action under the ADA.

For example, the fact that an applicant or employee has a current disability, or a record of disability, does not mean that an employer violated the ADA by not providing an individual with a reasonable accommodation. As discussed in **Section D.**, there are several considerations in making reasonable accommodation determinations, including the employee's need for the accommodation due to a disability and whether there is an accommodation that does not pose an undue hardship to the employer.

Similarly, the fact that an employer regarded an applicant or employee as an individual with a disability does not necessarily mean that the employer engaged in unlawful discrimination. For example, the ADA does not require an employer to hire anyone who is not qualified for the job. Moreover, in some instances, an employer may have a defense to an employment action taken based on an actual impairment, such as where the individual poses a **direct threat** to the health or safety of themselves or others in the workplace.

N.14. Do any ADA protections apply to applicants or employees who do not meet an ADA definition of disability? *(12/14/21)*

Yes. The ADA's requirements about disability-related inquiries and medical exams, **medical confidentiality, retaliation, and interference** apply to all applicants and

employees, regardless of whether they have an ADA disability. By contrast, an individual must have a “disability” to challenge employment decisions based on disability, denial of reasonable accommodation (see **N.10**), or disability-based harassment.

Table of Contents

Introduction

A. Disability-Related Inquiries and Medical Exams

B. Confidentiality of Medical Information

C. Hiring and Onboarding

D. Disability and Reasonable Accommodation

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

F. Furloughs and Layoffs

G. Return to Work

H. Age

I. Caregivers/Family Responsibilities

J. Pregnancy

K. Vaccinations – Overview, ADA, Title VII, and GINA

L. Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements

M. Retaliation and Interference

N. COVID-19 and the Definition of “Disability” Under the ADA/Rehabilitation Act (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#N>)



U.S. Equal Employment Opportunity Commission

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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Concise Display The ADA and AI: Applicants and Employees

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General Topics: Disability, Essential Functions, Hiring, Monitoring, Reasonable Accommodation, Screen Out, Technology

Summary: This technical assistance document discusses how existing ADA requirements may apply to the use of artificial intelligence (AI) in employment-related decision making and offers promising practices for employers to help with ADA compliance when using AI decision making tools.

Citation: ADA, 29 CFR Part 1630 & app.

Document Applicant: Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

Previous Revision: No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias. However, the use of these tools may disadvantage job applicants and employees with disabilities. When this occurs, employers may risk violating federal Equal Employment Opportunity (“EEO”) laws that protect individuals with disabilities.

The Questions and Answers in this document explain how employers’ use of software that relies on algorithmic decision-making may violate existing requirements under Title I of the Americans with Disabilities Act (“ADA”). This technical assistance also provides practical tips to employers on how to comply with the ADA, and to job applicants and employees who think that their rights may have been violated.

The Equal Employment Opportunity Commission (“EEOC” or “the

Commission”) enforces, and provides leadership and guidance on, the federal EEO laws prohibiting employment discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (over 40) and genetic information. This publication is part of an ongoing effort by the EEOC to educate employers, employees, and other stakeholders about the application of EEO laws when employers use employment software and applications, some of which incorporate algorithmic decision-making.

Background

As a starting point, this section explains the meaning of three, central terms used in this document—software, algorithms, and artificial intelligence (“AI”) — and how, when used in a workplace, they relate to each other.

- **Software:** Broadly, “**software (<https://www.access-board.gov/ict/#E103-definitions>)**” refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function. “**Application software (<https://www.access-board.gov/ict/#E103-definitions>)**” (also known as an “application” or “app”) is a type of software designed to perform or to help the user perform a specific task or tasks. The United States Access Board is the source of these definitions.

There are many different types of software and applications used in employment, including: automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.

- **Algorithms:** Generally, an “algorithm” is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and

employees. Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

- **Artificial Intelligence (“AI”)**: Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. In the **National Artificial Intelligence Initiative Act of 2020 at section 5002(3)** (**<https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210>**), Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.” In the employment context, using AI has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making employment decisions. AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, ***Towards a Standard for Identifying and Managing Bias in Artificial Intelligence*** (**<https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf>**).

Employers may rely on different types of software that incorporate algorithmic decision-making at a number of stages of the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test. Each of these types

of software may include AI.

ADA Basics

1. What is the ADA and how does it define “disability”?

The ADA is a federal civil rights law. Title I of the ADA prohibits employers, employment agencies, labor organizations, and joint labor-management committees with 15 or more employees from discriminating on the basis of disability. Other parts of the ADA, not discussed here, ensure that people with disabilities have full access to public and private services and facilities.

The ADA has a very specific definition of a current “disability.” A physical or mental impairment meets the ADA’s definition of a current “disability” if it would, when left untreated, “substantially limit” one or more “major life activities.” Major life activities include, for example, seeing, reaching, communicating, speaking, concentrating, or the operation of major bodily functions, such as brain or neurological functions. (There are two other definitions of “disability” that are not the subject of this discussion. For more information on the definition of “disability” under the ADA, see **EEOC’s Questions and Answers on the ADA Amendments Act** (<https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008>).)

A condition does not need to be permanent or severe, or cause a high degree of functional limitation, to be “substantially limiting.” It may qualify as substantially limiting, for example, by making activities more difficult, painful, or time-consuming to perform as compared to the way that most people perform them. In addition, if the symptoms of the condition come and go, the condition still will qualify as a disability if it substantially limits a major life activity when active. Many common and ordinary medical conditions will qualify.

2. How could an employer’s use of algorithmic decision-making tools

violate the ADA?

The most common ways that an employer's use of algorithmic decision-making tools could violate the ADA are:

- The employer does not provide a **“reasonable accommodation”** that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm. (See **Questions 4–7** below.)
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally **“screens out”** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation. “Screen out” occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. A disability could have this effect by, for example, reducing the accuracy of the assessment, creating special circumstances that have not been taken into account, or preventing the individual from participating in the assessment altogether. (See **Questions 8–12** below.)
- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on **disability-related inquiries and medical examinations**. (See **Question 13** below.)

An employer's use of an algorithmic decision-making tool may be unlawful for one of the above reasons, or for several such reasons.

3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an

outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.

Algorithmic Decision-Making Tools and Reasonable Accommodation

4. What is a reasonable accommodation?

A reasonable accommodation is a change in the way things are done that helps a job applicant or employee with a disability apply for a job, do a job, or enjoy equal benefits and privileges of employment. Examples of reasonable accommodations may include specialized equipment, alternative tests or testing formats, permission to work in a quiet setting, and exceptions to workplace policies. These are just examples—almost any change can be a reasonable accommodation—although an employer never has to lower production or performance standards or eliminate an essential job function as a reasonable accommodation.

5. May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a reasonable accommodation. Doing so is a “**promising practice**” to avoid violating the ADA.

6. When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?

If an applicant or employee tells the employer that a medical condition may make it difficult to take a test, or that it may cause an assessment result that is less acceptable to the employer, the applicant or employee has requested a reasonable accommodation. To request an accommodation, it is not necessary to mention the ADA or use the phrase “reasonable accommodation.”

Under the ADA, employers need to respond promptly to requests for reasonable accommodation. If it is not obvious or already known whether the requesting applicant or employee has an ADA disability and needs a reasonable accommodation because of it, the employer may request supporting medical documentation. When the documentation shows that a disability might make a test more difficult to take or that it might reduce the accuracy of an assessment, the employer must provide an alternative testing format or a more accurate assessment of the applicant’s or employee’s skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called “undue hardship”).

For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant’s knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant’s knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of

the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology. Employers must give individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant's or employee's personnel file.

7. Is an employer responsible for providing reasonable accommodations related to the use of algorithmic decision-making tools, even if the software or application is developed or administered by another entity?

In many cases, yes. As explained in **Question 3** above, an employer may be held responsible for the actions of other entities, such as software vendors, that the employer has authorized to act on its behalf. For example, if an employer were to contract with a software vendor to administer and score on its behalf a pre-employment test, the employer likely would be held responsible for actions that the vendor performed—or did not perform—on its behalf. Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities

8. When is an individual “screened out” because of a disability, and when

is screen out potentially unlawful?

Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required. **[1] Questions 9 and 10** explain the meaning of “screen out” and **Question 11** provides examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

9. Could algorithmic decision-making tools screen out an individual because of a disability? What are some examples?

Yes, an algorithmic decision-making tool could screen out an individual because of a disability if the disability causes that individual to receive a lower score or an assessment result that is less acceptable to the employer, and the individual loses a job opportunity as a result.

An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their “conversation” with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

Another kind of screen out may occur if a person’s disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants’ speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant’s speech impediment resulted in a

low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.

10. Some algorithmic decision-making tools may say that they are “bias-free.” If a particular tool makes this claim, does that mean that the tool will not screen out individuals with disabilities?

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be “bias-free,” it typically means that they have taken steps to prevent a type of discrimination known as “adverse impact” or “disparate impact” discrimination under Title VII, based on race, sex, national origin, color, or religion. This type of Title VII discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.^[2]

To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference.

The steps taken to avoid that kind of Title VII discrimination are typically distinct from the steps needed to address the problem of disability bias.^[3] If an employer or vendor were to try to reduce disability bias in the way described above, doing so would not mean that the algorithmic decision-making tool could never screen out an individual with a disability. Each disability is unique. An individual may fare poorly on an assessment because of a disability, and be screened out as a result, regardless of how well other individuals with disabilities fare on the assessment. Therefore, to avoid screen out, employers may need to take different steps beyond the steps taken to address other forms of discrimination. (See **Question 12.**)

11. Screen out because of a disability is unlawful if the individual who is screened out is able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. If an individual is screened out by an algorithmic decision-making tool, is it still possible that the individual is able to perform the essential functions of the job?

In some cases, yes. For example, some employers rely on “gamified” tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.

Even an algorithmic decision-making tool that has been “validated” for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been “validated”^[4] means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

An algorithmic decision-making tool also may sometimes screen out individuals with disabilities who could do the job because the tool does not take into account the possibility that such individuals are entitled to reasonable accommodations on the job. Algorithmic decision-making tools are often designed to predict whether applicants can do a job under typical working conditions. But people with disabilities do not always work under typical conditions if they are entitled to on-the-job reasonable

accommodations.

For example, some pre-employment personality tests are designed to look for candidates who are similar to the employer's most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder (“PTSD”) might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual's PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA. Some individuals who may test poorly in certain areas due to a medical condition may not even need a reasonable accommodation to perform a job successfully.

12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

First, if an employer is deciding whether to rely on an algorithmic decision-making tool developed by a software vendor, it may want to ask the vendor whether the tool was developed with individuals with disabilities in mind. Some possible inquiries about the development of the tool that an employer might consider include, but are not limited to:

- If the tool requires applicants or employees to engage a user interface, did the vendor make the interface accessible to as many individuals with disabilities as possible?
- Are the materials presented to job applicants or employees in alternative

formats? If so, which formats? Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?

- Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?

If an employer is developing its own algorithmic decision-making tool, it could reduce the chances of unintentional screen out by taking the same considerations into account during its development process. Depending on the type of tool in question, reliance on experts on various types of disabilities throughout the development process may be effective. For example, if an employer is developing pre-employment tests that measure personality, cognitive, or neurocognitive traits, it may be helpful to employ psychologists, including neurocognitive psychologists, throughout the development process in order to spot ways in which the test may screen out people with autism or cognitive, intellectual, or mental health-related disabilities.

Second, regardless of whether the employer or another entity is developing an algorithmic decision-making tool, the employer may be able to take additional steps during implementation and deployment to reduce the chances that the tool will screen out someone because of a disability, either intentionally or unintentionally. Such steps include:

- clearly indicating that reasonable accommodations, including alternative formats and alternative tests, are available to people with disabilities;
- providing clear instructions for requesting reasonable accommodations; and
- in advance of the assessment, providing all job applicants and employees who are undergoing assessment by the algorithmic decision-making tool with as much information about the tool as possible, including information about which traits or characteristics the tool is designed to measure, the

methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results or cause screen out.

Taking these steps will provide individuals with disabilities an opportunity to decide whether a reasonable accommodation may be necessary. For example, suppose that an employer uses an algorithm to evaluate its employees' productivity, and the algorithm takes into account the employee's average number of keystrokes per minute. If the employer does not inform its employees that it is using this algorithm, an employee who is blind or has a visual impairment and who uses voice recognition software instead of a keyboard may be rated poorly and lose out on a promotion or other job opportunity as a result. If the employer informs its employees that they will be assessed partly on the basis of keyboard usage, however, that same employee would know to request an alternative means of measuring productivity—perhaps one that takes into account the use of voice recognition software rather than keystrokes—as a reasonable accommodation.

Another way for employers to avoid ADA discrimination when using algorithmic decision-making tools is to try to ensure that no one is screened out unless they are unable to do the job, even when provided with reasonable accommodations. A promising practice is to only develop and select tools that measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation. For example, an employer who is hiring cashiers might want to ensure that the chatbot software it is using does not reject applicants who are unable to stand for long periods. Otherwise, a chatbot might reject an applicant who uses a wheelchair and may be entitled to a lowered cash register as a reasonable accommodation.

As a further measure, employers may wish to avoid using algorithmic decision-making tools that do not directly measure necessary abilities and qualifications for performing a job, but instead make inferences about those abilities and qualifications based on characteristics that are correlated with them. For example, if an open position requires the ability to write reports, the employer

may wish to avoid algorithmic decision-making tools that rate this ability by measuring the similarity between an applicant's personality and the typical personality for currently successful report writers. By doing so, the employer lessens the likelihood of rejecting someone who is good at writing reports, but whose personality, because of a disability, is uncommon among successful report writers.

Algorithmic Decision-Making Tools and Disability-Related Inquiries and Medical Examinations

13. How could an employer's use of algorithmic decision-making tools violate ADA restrictions on disability-related inquiries and medical examinations?

An employer might violate the ADA if it uses an algorithmic decision-making tool that poses "disability-related inquiries" or seeks information that qualifies as a "medical examination" before giving the candidate a conditional offer of employment.^[5] This type of violation may occur even if the individual does not have a disability.

An assessment includes "disability-related inquiries" if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with a disability. It qualifies as a "medical examination" if it seeks information about an individual's physical or mental impairments or health.

An algorithmic decision-making tool that could be used to identify an applicant's medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are "disability-

related inquiries or medical examinations,” however. For example, a personality test is not posing “disability-related inquiries” because it asks whether the individual is “described by friends as being ‘generally optimistic,’” even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

Note, however, that even if a request for health-related information does not violate the ADA’s restrictions on disability-related inquiries and medical examinations, it still might violate other parts of the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder (“MDD”) answers those questions negatively and loses an employment opportunity as a result, the test may “screen out” the applicant because of MDD. As explained in **Questions 8–11** above, such screen out may be unlawful if the individual who is screened out can perform the essential functions of the job, with or without reasonable accommodation.

Once employment has begun, disability-related inquiries may be made and medical examinations may be required only if they are legally justified under the ADA.

For more information on disability-related inquiries and medical examinations, see ***Pre-Employment Inquiries and Medical Questions & Examinations*** (<https://www.eeoc.gov/pre-employment-inquiries-and-medical-questions-examinations>), and ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>).

Promising Practices for Employers

14. What can employers do to comply with the ADA when using algorithmic decision-making tools?

- As discussed in **Questions 4–7** above, employers must provide reasonable

accommodations when legally required. Promising practices that may help employers to meet this requirement include:

- Training staff to recognize and process requests for reasonable accommodation as quickly as possible, including requests to retake a test in an alternative format, or to be assessed in an alternative way, after the individual has already received poor results.
- Training staff to develop or obtain alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation because of a disability.
- If the algorithmic decision-making tool is administered by an entity with authority to act on the employer's behalf, such as a testing company, asking the entity to forward all requests for accommodation promptly to be processed by the employer in accordance with ADA requirements. Alternatively, the employer could seek to enter into an agreement with the third party requiring it to provide reasonable accommodations on the employer's behalf, in accordance with the employer's obligations under the ADA.
- Employers should minimize the chances that algorithmic decision-making tools will disadvantage individuals with disabilities, either intentionally or unintentionally. Promising practices include:
 - Using algorithmic decision-making tools that have been designed to be accessible to individuals with as many different kinds of disabilities as possible, thereby minimizing the chances that individuals with different kinds of disabilities will be unfairly disadvantaged in the assessments. User testing is a promising practice.
 - Informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities, and providing clear and accessible instructions for requesting such accommodations.
 - Describing, in plain language and in accessible formats, the traits that

the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.

- Employers may also seek to minimize the chances that algorithmic decision-making tools will assign poor ratings to individuals who are able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. Promising practices include:
 - Ensuring that the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation.
 - Ensuring that necessary abilities or qualifications are measured directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.
- Before purchasing an algorithmic decision-making tool, an employer should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual’s physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation. (The ADA permits an employer to request reasonable medical documentation in support of a request for reasonable accommodation that is received prior to a conditional offer of employment, when necessary, if the requested accommodation is needed to help the individual complete the job application process.)

Promising Practices for Job Applicants and Employees Who Are Being Assessed by Algorithmic Decision-Making Tools

15. What should I do to ensure that I am being assessed fairly by

algorithmic decision-making tools?

If you have a medical condition that you think might qualify as an ADA disability and that could negatively affect the results of an evaluation performed by algorithmic decision-making tools, you may want to begin by asking for details about the employer's use of such tools to determine if it might pose any problems related to your disability. If so, you may want to ask for a reasonable accommodation that allows you to compete on equal footing with other applicants or employees.

For example, if an employer's hiring process includes a test, you may wish to ask for an accessible format or an alternative test that measures your ability to do the job in a way that is not affected by your disability. To request a reasonable accommodation, you need to notify an employer representative or official (for example, someone in Human Resources) or, if the employer is contracting with a software vendor, the vendor's representative or the employer, that you have a medical condition, and that you need something changed because of the medical condition to ensure that your abilities are evaluated accurately.

Note that if your disability and need for accommodation are not obvious or already known, you may be asked to submit some medical documentation in support of your request for accommodation. To find out more about asking for reasonable accommodations, see *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, available at

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>
(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

If you only discover that an algorithmic decision-making tool poses a problem due to your disability after the evaluation process is underway, you should notify the employer or software vendor as soon as you are aware of the problem and ask to be evaluated in a way that accurately reflects your ability to do the job, with a reasonable accommodation if one is legally required.

If you have already received a poor rating generated by an employer's use of an algorithmic decision-making tool, you should think about whether your health condition might have prevented you from achieving a higher rating. For example, might a disability have negatively affected the results of an assessment, or made it impossible for you to complete an assessment? If so, you could contact the employer or software vendor immediately, explain the disability-related problem, and ask to be reassessed using a different format or test, or to explain how you could perform at a high level despite your performance on the test.

16. What do I do if I think my rights have been violated?

If you believe that your employment-related ADA rights may have been violated, the EEOC can help you decide what to do next. For example, if the employer or software vendor refuses to consider your request for a reasonable accommodation to take or re-take a test, and if you think that you would be able to do the job with a reasonable accommodation, you might consider filing a charge of discrimination with the EEOC. A discrimination charge is an applicant's or employee's statement alleging that an employer engaged in employment discrimination and asking the EEOC to help find a remedy under the EEO laws.

If you **[file a charge of discrimination \(https://www.eeoc.gov/how-file-charge-employment-discrimination\)](https://www.eeoc.gov/how-file-charge-employment-discrimination)**, the EEOC will conduct an investigation. Mediation, which is an informal and confidential way for people to resolve disputes with the help of a neutral mediator, may also be available. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. It is unlawful for an employer to retaliate against you for contacting the EEOC or filing a charge.

If you would like to begin the process of filing a charge, go to our Online Public Portal at **<https://publicportal.eeoc.gov>** (**<https://publicportal.eeoc.gov>**), visit your local EEOC office (see **<https://www.eeoc.gov/field-office>**)

(<https://www.eeoc.gov/field-office>) for contact information), or contact us by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

For general information, visit the EEOC's website (<https://www.eeoc.gov> (<https://www.eeoc.gov/>)).

This information is not new policy; rather, this document applies principles already established in the ADA's statutory and regulatory provisions as well as previously issued guidance. The contents of this publication do not have the force and effect of law and are not meant to bind the public in any way. This publication is intended only to provide clarity to the public regarding existing requirements under the law. As with any charge of discrimination filed with the EEOC, the Commission will evaluate alleged ADA violations involving the use of software, algorithms, and artificial intelligence based on all of the facts and circumstances of the particular matter and applicable legal principles.

[1] To establish a screen out claim, the individual alleging discrimination must show that the challenged selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities. See 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a). To establish a defense, the employer must demonstrate that the challenged application of the criterion is “job related and consistent with business necessity,” as that term is understood under the ADA, and that “such performance cannot be accomplished by reasonable accommodation.” 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. §§ 1630.10(a), 1630.15(b); 29 C.F.R. pt. 1630 app. §§ 1630.10, 1630.15 (b) and (c). A different defense to a claim that a selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities is available when the challenged selection criterion is safety-based. See 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

[2] 42 U.S.C. § 2000e-2(a)(2), (k).

[3] When applying the tool to current employees or other subjects, there will generally be no way to know who has a disability and who does not.

[4] When employers or vendors claims that a tool designed to help employers decide which job applicants to hire has been “validated,” or that such a tool is a “valid predictor” of job performance, they may mean that there is evidence that the tool measures a trait or characteristic that is important for the job, and that the evidence meets the standards articulated in the Uniform Guidelines on Employee Selection Procedures (“UGESP”), 29 C.F.R. §§ 1607.5–9. UGESP articulates standards for compliance with certain requirements under Title VII. UGESP does not apply to disability discrimination. 29 C.F.R. pt. 1630 app. § 1630.10 (a) (“The Uniform Guidelines on Employee Selection Procedures . . . do not apply to the Rehabilitation Act and are similarly inapplicable to this part.”).

[5] Note, however, that the ADA permits employers to request reasonable medical documentation in support of a request for reasonable accommodation, when necessary. This may be done prior to a conditional offer of employment if the request is for a reasonable accommodation that is needed to help the individual complete the job application process.



U.S. Equal Employment Opportunity Commission

What You Should Know About the Pregnant Workers Fairness Act

1. What is the Pregnant Workers Fairness Act?

The **Pregnant Workers Fairness Act (PWFA)** (<https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page=1626>) is a new law that requires **covered employers** to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

The PWFA applies only to accommodations. **Existing laws** (<https://www.eeoc.gov/pregnancy-discrimination>) that the EEOC enforces make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions.

The PWFA does not replace federal, state, or local laws that are **more protective** of workers affected by pregnancy, childbirth, or related medical conditions. More than 30 **states** (<https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections>) and cities have laws that provide accommodations for pregnant workers.

2. **When does the PWFA go into effect, and will the public have input on any regulations?**

The PWFA goes into effect on June 27, 2023. The EEOC is required to issue regulations to carry out the law. The EEOC will issue a proposed version of the PWFA regulations so the public can give their input and offer comments before the regulations become final.

3. **Is the EEOC accepting charges under the PWFA?**

The EEOC will start accepting charges under the PWFA on June 27, 2023. For the PWFA to apply, the situation complained about in the charge must have happened on June 27, 2023, or later. A pregnant worker who needs an accommodation before June 27th may, however, have a right to receive an accommodation under another federal or state law.

In some situations, workers affected by pregnancy, childbirth, or a related medical condition may be able to get an accommodation under **Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act (ADA)**. Therefore, until June 27, 2023, the EEOC will continue to accept and process Title VII and/or ADA charges involving a lack of accommodation regarding pregnancy, childbirth, or related medical conditions.

After June 27, 2023, the EEOC will analyze charges regarding accommodations for workers affected by pregnancy, childbirth, or related medical conditions under the PWFA (if the violation occurred after June 27, 2023) and, where applicable, under the ADA and/or Title VII.

4. **Who does the PWFA protect?**

The PWFA protects employees and applicants of “covered employers” who have known limitations related to pregnancy, childbirth, or related medical conditions.

”Covered employers” include private and public sector employers with at least 15 employees, Congress, Federal agencies, employment agencies, and labor organizations.

5. **What are some examples of reasonable accommodations for pregnant workers?**

“Reasonable accommodations” are changes to the work environment or the way things are usually done at work.

The **[House Committee on Education and Labor Report on the PWFA \(https://www.congress.gov/congressional-report/117th-congress/house-report/27/1?overview=closed\)](https://www.congress.gov/congressional-report/117th-congress/house-report/27/1?overview=closed)** provides several examples of possible reasonable accommodations including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy. Employers are required to provide reasonable accommodations unless they would cause an “undue hardship” on the employer’s operations. An “undue hardship” is significant difficulty or expense for the employer.

6. **What else does the PWFA prohibit?**

Covered employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable

accommodation;

- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

7. What other federal laws may apply to pregnant workers?

Other laws that apply to workers affected by pregnancy, childbirth, or related medical conditions, include:

- Title VII (enforced by the EEOC), which:
 - Protects an employee from discrimination based on **pregnancy** (<https://www.eeoc.gov/pregnancy-discrimination>), childbirth, or related medical conditions; and
 - Requires covered employers to treat a worker affected by pregnancy, childbirth, or related medical conditions the same as other workers similar in their ability or inability to work;
- The ADA (enforced by the EEOC), which:
 - Protects an employee from discrimination based on **disability** (<https://www.eeoc.gov/eeoc-disability-related-resources>); and
 - Requires covered employers to provide reasonable accommodations to a person with a disability if the reasonable accommodation would not cause an undue hardship for the employer.
 - While pregnancy is not a disability under the ADA, some pregnancy-related conditions **may be disabilities**

(<https://www.eeoc.gov/laws/guidance/questions-and-answers-about-eeocs-enforcement-guidance-pregnancy-discrimination-and#q17>) under the law.

- The **Family and Medical Leave Act of 1993** (**(<https://www.dol.gov/agencies/whd/fmla>)**) (enforced by the U.S. Department of Labor), which provides covered employees with unpaid, job-protected leave for certain family and medical reasons; and
- The **PUMP Act** (**(<https://www.dol.gov/agencies/whd/nursing-mothers>)**) (Providing Urgent Maternal Protections for Nursing Mothers Act) (enforced by the U.S. Department of Labor), which broadens workplace protections for employees to express breast milk at work.

PWFA Infographic

THE PREGNANT WORKERS FAIRNESS ACT (PWFA)

Prepare for this new law before it goes into effect on June 27, 2023.

WHAT IS IT?

The PWFA requires covered employers to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer



72%



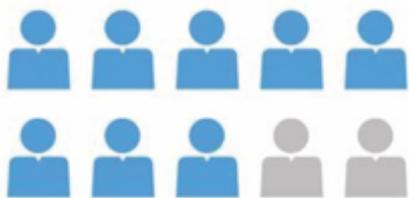
of working women will become pregnant while employed at some time in their lives.

SOURCE: US Census Bureau, Maternity Leave and Employment Patterns: 1961-2008, 2011

will cause the employer an "undue hardship."

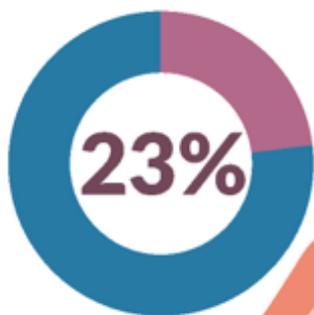


8 IN 10



first-time pregnant women work until their final month of pregnancy.

SOURCE: U.S. Congress, Pregnant Workers Fairness Act, 2021, www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf



of moms have thought about leaving a job due to a lack of reasonable accommodation or fear of discrimination from an employer during pregnancy, according to one survey.

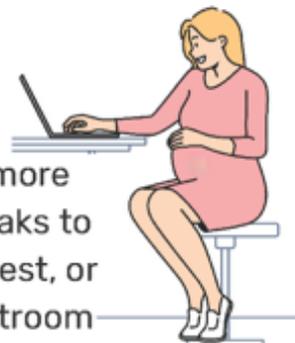
SOURCE: Bipartisan Policy Center: Morning Consult Poll, February 11, 2022

TIP FOR EMPLOYERS:

Train supervisors about the PWFA so they are ready when they get reasonable accommodation requests.

Examples of reasonable accommodations that may be available to workers:

- Offering additional, longer, or more flexible breaks to eat, drink, rest, or use the restroom



- Changing a work schedule, such as having shorter hours, part-time work, or a later start time



- Changing food or drink policies to allow a worker to have a water bottle or food



- Providing leave for medical appointments or to recover from childbirth





Learn more at [EEOC.gov](https://www.eeoc.gov)



[Download PWFA infographic \(PDF\)](https://www.eeoc.gov/sites/default/files/2023-05/PWFA%20Infographic-1_508%20FINAL.pdf)
 [\(https://www.eeoc.gov/sites/default/files/2023-05/PWFA%20Infographic-1_508%20FINAL.pdf\)](https://www.eeoc.gov/sites/default/files/2023-05/PWFA%20Infographic-1_508%20FINAL.pdf)

PWFA Poster



PREGNANT WORKERS FAIRNESS ACT (PWFA)

WHAT IS PWFA?

The Pregnant Workers Fairness Act (PWFA) is a federal law that, starting June 27, 2023, requires covered employers to provide "reasonable accommodations" to a qualified worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." An undue hardship is defined as causing significant difficulty or expense.

"Reasonable accommodations" are changes to the work environment or the way things are usually done at work.

WHAT ARE SOME POSSIBLE ACCOMMODATIONS FOR PREGNANT WORKERS?

- Being able to sit or drink water
- Receiving closer parking
- Having flexible hours
- Receiving appropriately sized uniforms and safety apparel
- Receiving additional break time to use the bathroom, eat, and rest
- Taking leave or time off to recover from childbirth
- Being excused from strenuous activities and/or exposure to chemicals not safe for pregnancy



WHAT OTHER FEDERAL EMPLOYMENT LAWS MAY APPLY TO PREGNANT WORKERS?

Other laws that apply to workers affected by pregnancy, childbirth, or related medical conditions, include:

- [Title VII](#) which prohibits employment discrimination based on sex, pregnancy, or other protected categories (enforced by the U.S. Equal Employment Opportunity Commission (EEOC))
- [The ADA](#) which prohibits employment discrimination based on disability (enforced by the EEOC)
- [The Family and Medical Leave Act](#) which provides unpaid leave for certain workers for pregnancy and to bond with a new child (enforced by the U.S. Department of Labor)
- [The PUMP Act](#) which provides nursing mothers a time and private place to pump at work (enforced by the U.S. Department of Labor)



Learn more at www.EEOC.gov/Pregnancy-Discrimination.

[Download PWFA Poster \(PDF\)](#)

https://www.eeoc.gov/sites/default/files/2023-05/PWFA%20%28Healthcare%20Poster%29-11_508%20FINAL.pdf





U.S. Equal Employment Opportunity Commission

What You Should Know: Workplace Religious Accommodation

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number: EEOC-NVTA-0000-20

Concise Display Name: What You Should Know: Workplace Religious Accommodation

Issue Date: 03-06-2014

General Topics: Religion

Summary: This document provides information about workplace religious accommodation under Title VII.

Citation: Title VII, 29 CFR Part 1605

Document Applicant: Employees, Employers, Applicants, HR Practitioners

Previous No

Revision:

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

1. Are employers required to accommodate the religious beliefs and practices of applicants and employees?

Yes. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion. This includes refusing to accommodate an employee's sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship (more than a minimal burden on operation of the business). A religious practice may be sincerely held by an individual even if newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion.

2. What does Title VII mean by "religion"?

Title VII defines "religion" very broadly. It includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism. It also includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.

Some practices are religious for one person, but not religious for another person, such as not working on Saturday or on Sunday. One person may not work on Saturday for religious reasons; another person may not work on Saturday for family reasons. Under Title VII, a practice is religious if the employee's reason for the practice is religious.

Social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII.

3. What are some common religious accommodations sought in the workplace?

Applicants and employees may obtain exceptions to rules or policies in order to follow their religious beliefs or practices. Remember that employers may grant these accommodations for religious reasons but still refuse to grant them for secular reasons. Examples of common religious accommodations include:

- an employee needs an exception to the company's dress and grooming code for a religious practice, e.g., Pentecostal Christian woman who **does not wear pants** (<https://www.eeoc.gov/newsroom/brinks-pay-30000-peoria-area-woman-failure-accommodate-religious-beliefs-0>) or short skirts; a Muslim woman who wears a **religious headscarf** (<https://www.eeoc.gov/newsroom/alamo-car-rental-guilty-religious-bias-federal-court-rules-eeoc-lawsuit>) (hijab); or a Jewish man who wears a **skullcap (yarmulke)** (<https://www.eeoc.gov/reports/fy-2005-annual-report-operations-and-accomplishments-office-general-counsel#Blockbuster>).

The EEOC has developed a **technical assistance document** (<https://www.eeoc.gov/publications/religious-garb-and-grooming-workplace-rights-and-responsibilities>) "Religious Garb and Grooming in the Workplace: Rights and Responsibilities" along with a **fact sheet** (<https://www.eeoc.gov/publications/fact-sheet-religious-garb-and-grooming-workplace-rights-and-responsibilities>) explaining these issues due to the frequency of their occurrence.

- a **Catholic employee** (http://www.eeoc.gov/policy/docs/religion.html#example_3) needs a schedule change so that he can attend church services on Good Friday;
- an **atheist needs to be excused** (http://www.eeoc.gov/policy/docs/religion.html#_ftnref13) from the religious invocation offered at the beginning of staff meetings;
- a Christian pharmacy employee needs to be excused from **filling birth control prescriptions** (http://www.eeoc.gov/policy/docs/religion.html#_ftnref175), or a Jehovah's Witness seeks to change job tasks at a factory so that he will not

have to work on **producing war weapons** (<https://www.eeoc.gov/newsroom/dresser-rand-settles-eeoc-religious-discrimination-lawsuit>);

- an adherent to Native American spiritual beliefs needs unpaid leave to attend a ritual ceremony, or a Muslim employee needs a break schedule that will permit **daily prayers at prescribed times** (<https://www.eeoc.gov/newsroom/eeoc-and-electrolux-reach-voluntary-resolution-class-religious-accommodation-case-0>);
- an employee needs accommodation of a religious belief that **working on his Sabbath** (<https://www.eeoc.gov/newsroom/eeoc-resolves-religious-bias-suit-seventh-day-adventist-fired-over-observing-sabbath-0>) is prohibited.

4. How does an employer determine if a religious accommodation imposes more than a minimal burden on operation of the business (or an "undue hardship")?

Examples of burdens on business that are more than minimal (or an "undue hardship") include: violating a seniority system; causing a lack of necessary staffing; jeopardizing security or health; or costing the employer more than a minimal amount.

If a schedule change would impose an undue hardship, the employer must allow co-workers to voluntarily substitute or swap shifts to accommodate the employee's religious belief or practice. If an employee cannot be accommodated in his current position, transfer to a vacant position may be possible.

Infrequent payment of overtime to employees who substitute shifts is not considered an undue hardship. Customer preference or co-worker disgruntlement does not justify denying a religious accommodation.

It is advisable for employers to make a case-by-case determination of any requested religious accommodations, and to train managers accordingly.

5. What other protections might apply, and where can I get more information?

Title VII also prohibits disparate treatment, job segregation, or harassment based on religious belief or practice (or lack thereof), as well as retaliation for the exercise of EEO rights.

EEOC publications on religious discrimination and accommodation are available on our **[website. \(https://www.eeoc.gov/religious-discrimination\)](https://www.eeoc.gov/religious-discrimination)**



www.eeoc.gov

EEOC Resources

General Contact Information

1-800-669-4000

1-800-669-6820 (TTY for Deaf/Hard of Hearing callers only)

1-844-234-5122 (ASL Video Phone for Deaf/Hard of Hearing callers only)

info@eeoc.gov (include your city, state and zip code in your message)

EEOC Public Portal: <https://www.eeoc.gov/eeoc-public-portal>

Workers and Charging Parties can use the Public Portal to submit an inquiry; schedule an appointment; file a charge of employment discrimination; or to check on the status of an existing EEOC charge.

Time Limits for Filing A Charge

<https://www.eeoc.gov/time-limits-filing-charge>

Filing a Charge of Discrimination with EEOC

<https://www.eeoc.gov/filing-charge-discrimination>

What Workers Can Expect After You File A Charge

<https://www.eeoc.gov/what-you-can-expect-after-you-file-charge>

What Employers Can Expect After a Charge is Filed

<https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed>

Prohibited Employment Policies/Practices

<https://www.eeoc.gov/prohibited-employment-policiespractices>

What Employers are Covered under EEOC Laws?

<https://www.eeoc.gov/coverage>

Who is Protected from Employment Discrimination?

<https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination>

Employee Rights & Responsibilities under EEO Laws

<https://www.eeoc.gov/employees>

Employer Rights & Responsibilities under EEO Laws

<https://www.eeoc.gov/employers>

Harassment web page

<https://www.eeoc.gov/harassment>

Sexual Harassment

<https://www.eeoc.gov/sexual-harassment>

Harassment Policy Tips

<https://www.eeoc.gov/employers/small-business/harassment-policy-tips>

Disability Discrimination web page

<https://www.eeoc.gov/disability-discrimination#resources>

Fact Sheet: Disability Discrimination

<https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination>

Your Employment Rights as an Individual with a Disability

<https://www.eeoc.gov/fact-sheet/ada-your-employment-rights-individual-disability>

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

<https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights>

The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work

<https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work>

Disability Accommodation Tips (Small Business Resource Center)

<https://www.eeoc.gov/employers/small-business/disability-accommodations-tips>

Job Accommodation Network (JAN)

<https://askjan.org/>

Religious Discrimination

<https://www.eeoc.gov/religious-discrimination>

Religious Discrimination, Compliance Manual Section 12 (New! 01/15/21)

<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

Questions and Answers: Religious Discrimination in the Workplace

<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>

Caveat: "As a result of the Supreme Court's decision in Our Lady of Guadalupe School v. Morrissey-Berru, we are currently working on updating this webpage."

Religious Accommodations Tips (Small Business Resource Center)

<https://www.eeoc.gov/employers/small-business/religious-accommodations-tips>

Best Practices for Eradicating Religious Discrimination in the Workplace

<https://www.eeoc.gov/laws/guidance/best-practices-eradicating-religious-discrimination-workplace>

Coronavirus and COVID-19

<https://www.eeoc.gov/coronavirus>

Federal Laws Protect You Against Employment Discrimination During the COVID-19 Pandemic

<https://www.eeoc.gov/federal-laws-protect-you-against-employment-discrimination-during-covid-19-pandemic>

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- Section L. Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates

Sign up for EEOC Webinar Announcements, News & Updates

<https://public.govdelivery.com/accounts/USEEOC/subscriber/new>

EEOC Publications

<https://www.eeoc.gov/eeoc-publications>

EEOC's No-Cost Outreach Programs to the General Public

<https://www.eeoc.gov/no-cost-outreach-programs>

EEOC Training Institute: Fee-based, Formal EEO Training (webinars, onsite training)

<https://eeotraining.eeoc.gov/>

Find the Outreach & Education Coordinator for your area at <https://www.eeoc.gov/eeoc-outreach-program-coordinators> to:

- Schedule a No-Cost Educational Presentation to the General Public (worker and employer groups)
- Obtain No-Cost EEO Technical Assistance – Employer Reps Only

Discuss Options & Obtain a Cost Estimate for In-depth EEO Training to Your Employees

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>