

Hiring in the Time of COVID

Best Practices for Employer Re-Opening Plans

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The Equal Employment Opportunity Commission (EEOC) updated its guidance to allow for screening of potential job applicants for COVID-19 symptoms. As employers plan for re-opening or hiring, reviewing the EEOC's guidance will help employers identify and avoid traps for the unwary.

Screening for COVID-19 Symptoms

Under ordinary conditions, employers may require job applicants to answer medical inquiries, participate in medical examinations or produce fitness-for-duty certificates after a conditional job offer has been tendered, provided the inquiry is job-related and consistent with business necessity. As a practical matter, employers should clearly indicate in a written conditional job offer that the offer is based on the individual's cooperation and satisfactory results of the medical inquiries and examinations.

When employers use medical inquiries or examinations as part of the hiring process, the Americans with Disabilities Act (ADA) requires them to treat all entering employees in the same job category consistently. To ensure that employers administer medical inquiries and examinations in a nondiscriminatory fashion, employers should consider distributing the same COVID-19 screening survey to applicants who receive a conditional job offer. Such a survey should ask employees to self-certify whether they have had COVID-19 symptoms (including fever, chills, cough, shortness of breath or sore throat) in the last three days without medications. The survey can also ask whether the applicant is subject to a shelter-in-place order from a physician. Employers should take care to treat the medical records as confidential and file them separately from personnel files.

Currently, requiring an employee or applicant who has received a conditional offer of employment to submit to a temperature check is an appropriate medical inquiry, but this advice will likely change over time. Employers should also avoid inquiring as to whether the employee or applicant who has received a conditional offer of employment has medical conditions that make him/her vulnerable to COVID-19. Unless the individual has COVID-19 symptoms, the EEOC advises such questions are impermissible.

Inquiries into Family Medical Histories

The Genetic Information Nondiscrimination Act (GINA) ordinarily prevents employers from inquiring about family genetic information, except in special circumstances. While screening applicants, employers should avoid questions regarding an applicant's family medical history, including their family members' vulnerability to contracting COVID-19 and whether they have presented any symptoms. For the avoidance of doubt, GINA does not prevent an employer from lawfully collecting documentation to substantiate a request for sick time, family medical leave or an accommodation under the ADA.

A more cautious approach would be to ask whether the individual lives with or was within six feet of anyone who has COVID-19 symptoms in the last 14 days. Employers should also take advantage of GINA's safe harbor for inadvertently



receiving family medical history information or copy the specific language prescribed by those rules in any survey or authorization form. Finally, to the extent employers rely on medical examinations, they should instruct any health care provider not to collect genetic information, including family medical history, as part of a medical examination.

Reliable and Accurate Testing

The EEOC advises employers to consult the U.S. Food and Drug Administration's (FDA) list of approved tests and select tests that are reliable and accurate. While medical inquiries and examinations are critical to reducing the incidents of COVID-19 in the workplace, employers should remain mindful that some individuals that carry COVID-19 may be asymptomatic, and tests may generate false-positives or false-negatives.

Employers should similarly be wary of serology or antibody testing that determines when an individual may be immune from COVID-19. Although the EEOC has not commented on such testing, the FDA has concluded that an antibody test is a poor diagnostic tool because it detects an immune system's response to COVID-19 but not the presence or absence of the virus itself.

Rescinding or Modifying Employment Offer

The EEOC cautions against unilateral action if an employee has COVID-19 or correlated symptoms. The EEOC advises that employers should first discuss potential reasonable accommodations, including telecommuting, that may not cause an undue hardship.

Nonetheless, the EEOC advises that employers may delay the start of employment. In these situations, employers should not allow an individual to begin work for at least 14 days and only on the condition that the individual has been symptom-free without the need for medication for three days. Should an employer need the individual to start immediately, the EEOC also permits an employer to withdraw the job offer.

Individuals at High Risk

The EEOC cautions employers not to exclude individuals or delay the start date of employment simply because the individual is at a higher risk for contracting COVID-19 or developing complications. When these individuals are not experiencing COVID-19 symptoms, employers will first need to establish that a direct threat exists to the employee or others that cannot be eliminated or reduced through reasonable accommodations. Such an exercise requires careful considerations of the best objective medical evidence, the job's essential functions, the severity and duration of the risks, and the likelihood of harm. Employers considering such decisions should consult with an attorney of their choice to assess the risks presented by the particular situation.

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