

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT

BEFORE A PANDEMIC

Q: Before an influenza pandemic occurs, may an ADA-covered employer ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza?

A: No. An inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability.¹ The ADA does not permit such an inquiry in the absence of objective evidence that pandemic symptoms will cause a direct threat. Such evidence is completely absent before a pandemic occurs.

Q: Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

A: Yes. Employers may make inquiries that are not disability-related. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of “yes” or “no” to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

DURING AN INFLUENZA PANDEMIC

Q: May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

A: Yes. The Center for Disease Control (CDC) states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally,

¹ Inquiries and Exams, *supra* note 11, at § B.1, “General Principles.”

the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

Q: During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

A: ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

Q: During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

A: Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever.

Q: When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

A: No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Q: During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

A: No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical

examinations of employees *without* symptoms is prohibited by the ADA.² However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.³

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

Q: May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

A: Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.⁴

² Asking employees if they are immuno-compromised or have a chronic condition is a disability-related inquiry subject to the ADA's restrictions. When pandemic influenza symptoms only resemble those of seasonal influenza, they do not provide an objective basis for a "reasonable belief" that employees will face a direct threat if they become ill. Therefore, they do not justify disability-related inquiries or medical examinations.

³ See also Ctrs. For Disease Control, *supra* note 5, at 7. ADA-covered employers may receive requests for reasonable accommodation from individuals with disabilities that place them at risk of influenza complications.

⁴ Telework (i.e., working from an alternative location) is an example of "social distancing," which public health authorities may require in the event of a pandemic. "Social distancing" reduces physical contact between people to minimize disease transmission by, for example, avoiding hand-shakes and keeping a distance from others in public places. Other social distancing practices that may be implemented during a pandemic include: "closing schools; canceling public gatherings; planning for liberal work leave policies; . . . voluntary isolation of [pandemic infection] cases; and voluntary quarantine of household contacts." Ctrs. for Disease Control & Prevention, Pandemic Influenza Mitigation, <http://flu.gov/professional/community/mitigation.html> (last visited Sept. 22, 2009). Employees with disabilities may request telework as a reasonable accommodation, even if the employer does not have a policy allowing it. See Equal Employment Opportunity Comm'n, Work at Home/Telework as a Reasonable Accommodation (Oct 27, 2005), <http://www.eeoc.gov/facts/telework.html>.

In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

Q: During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

A: Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

Q: During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

A: Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Q: During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

A: 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.

Example: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.

This Q&A was developed by The U.S. Equal Employment Opportunity Commission: http://www.eeoc.gov/facts/pandemic_flu.html