

SUMMARY OF UPDATED PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT¹

I. RELEVANT ADA REQUIREMENTS AND STANDARDS DURING A PANDEMIC

The ADA is relevant to pandemic preparation in at least three major ways. First, the ADA **regulates employer's disability-related inquiries and medical examinations** for all applicants and employees, including those that do not have ADA disabilities. Second, the ADA **prohibits covered employers from excluding individuals with disabilities from the workplace** for health or safety reasons unless they pose a **"direct threat."** Third, the ADA **requires reasonable accommodations** for individuals with disabilities (absent undue hardship) **during a pandemic.**²

A **"direct threat"** is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

II. ADA-COMPLIANT EMPLOYER ACTIONS

A. DURING AN INFLUENZA PANDEMIC

- 1) An ADA-covered employer **MAY** send employees home if they display influenza-like symptoms during a pandemic.

The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. **An**

¹ Originally issued 9-Oct-09; last revised 21-Mar-20.

² **On March 11, 2020, the coronavirus disease (COVID-19) was also declared a pandemic.**

employer can send home an employee with COVID-19 or symptoms associated with it.

- 2) During a pandemic, ADA covered employers MAY ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19.

Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

- 3) During a pandemic, an ADA-covered employer MAY take its employees' temperatures to determine whether they have a fever.

As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

- 4) An employer MAY ask questions about exposure to pandemic influenza when an employee returns from travel during a pandemic and does not have to wait until the employee develops influenza symptoms to inquire.

These are not considered disability-related inquiries. **Employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.**

- 5) During a pandemic, an ADA-covered employer **MAY NOT** 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.

Making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA. 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

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

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.

- 6) Employers **MAY** encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic.

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.

- 7) During a pandemic, an employer **MAY** require its employees to adopt infection-control practices, such as regular hand washing, at the workplace.

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

- 8) During a pandemic, an employer **MAY** require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection.

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.

- 9) An employer covered by the ADA and Title VII of the Civil Rights Act of 1964 **MAY NOT** compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic.

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).

An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).⁴

- 10) During a pandemic, an employer **MUST** continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.

An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.⁵

- 11) During a pandemic, an employer **MAY** ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason.

⁴ As of the date this document is being issued, there is no vaccine available for COVID-19.

⁵ The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

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.

B. HIRING DURING THE COVID-19 PANDEMIC

12) If an employer is hiring, it MAY screen applicants for symptoms of COVID-19.

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 allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

13) An employer MAY take an applicant's temperature as part of a post-offer, pre-employment medical exam.

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.

14) An employer MAY delay the start date of an applicant who has COVID-19 or symptoms associated with it.

An individual who has COVID-19 or symptoms associated with it should not be in the workplace.⁶

The ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.

15) An employer MAY withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it.

⁶ CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C. AFTER A PANDEMIC

- 16) An ADA-covered employer **MAY** require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work.

Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.⁷

For further information or should you have questions, contact your [Thompson & Horton](#) attorney. If you do not have a Thompson & Horton attorney with whom you currently work, please contact [Chris Gilbert](#) in Houston, [Holly McIntush](#) in Austin, or [Dianna Bowen](#) in Dallas/Fort Worth and they will put you in contact with the most appropriate T&H team member to assist you.

⁷ Doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.