



### **"Epidemic" Versus "Pandemic": A Distinction With A Difference**

On March 11, 2020, the World Health Organization (WHO) officially declared the outbreak of the coronavirus (COVID-19) a global pandemic. Previously, the organization considered the coronavirus outbreak an expanding epidemic, but not a pandemic.

An epidemic is an outbreak of disease that occurs suddenly in numbers significantly greater than normal and spreads within a defined geographic scope. A pandemic is characterized as an epidemic that has reached global proportions. Importantly, the term pandemic describes the magnitude of the spread of a disease, not its severity.

Since the early 1900s there have been four previous pandemic outbreaks, all involving different strains of the influenza virus. Before COVID-19, the most recent influenza outbreak to be declared a pandemic was the H1N1 strain in 2009.

Notably, WHO's classification of the disease as a pandemic has **not** yet altered its response to the disease or its public guidance, much of which is covered in our previous [update](#), [webinar](#), and employer preparedness [checklist](#). While much of the public guidance remains the same, the fact that the coronavirus has now reached pandemic levels does alter the legal landscape for U.S. employers.

## EEOC "Pandemic Preparedness In The Workplace" Guidance Is Now In Play

As a result of WHO declaring the coronavirus a pandemic, the EEOC's "[Pandemic Preparedness In The Workplace And The Americans With Disabilities Act Guidance](#)" (Guidance) is now in play.

The EEOC's Guidance addresses several of the most frequently asked questions from employers related to the coronavirus. These questions include inquiries about travel restrictions, remote working, and employee or health screening. Although the EEOC's Guidance was originally developed in response to the H1N1 pandemic and specifically addresses "pandemic influenza," there is no reason to believe the Guidance provided by the EEOC would not be fully applicable to the current situation. Accordingly, we have summarized the key components of the EEOC's Guidance below.

**Guidance on Travel Restrictions:** Due to the global nature of a pandemic, employers may have more flexibility to restrict employees from returning to the workplace after travel and in inquiring about their personal travel plans. The Guidance indicates that during a pandemic an employer *need not wait for an employee to develop symptoms before inquiring about where an employee may have traveled, even for personal travel*. Rather, per the Guidance, an employer may inquire if the employee has traveled to any location where post-travel self-quarantine has been recommended by the WHO, CDC, or state or local public health officials. Employers may also restrict asymptomatic employees who have visited such locations from returning to the workplace until after the recommended self-quarantine period.

**Guidance on Absenteeism Surveys:** Included in the EEOC's Guidance is *an ADA-compliant survey that can be given to employees to anticipate absenteeism due to a pandemic*. The example survey poses the following question, which should be helpful to employers in planning:

- In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:
  - If schools or day care centers were closed, you would need to care for a child
  - If other services were unavailable, you would need to care for other dependents
  - If public transport were sporadic or unavailable, you would be unable to travel to work
  - If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune

systems due to cancer, HIV, history of organ transplant, or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65)

To remain ADA-compliant, the Guidance indicates the inquiry must be structured in a way that allows the employee to respond with a single yes or no answer, without having to specify which condition might apply.

**Guidance on Remote Working:** The EEOC's Guidance reiterates that during a pandemic, employers should require employees who exhibit symptoms to leave the workplace. Additionally, employers *can encourage remote work for all employees* (where practical) as a general form of social distancing. Employers also must be prepared for remote working requests as an accommodation for employees whose specific health conditions put them at greater risk. *Employers need to take into account any existing accommodations when considering remote working as an additional accommodation during the outbreak.* If an employee with a disability needs a similar reasonable accommodation that was provided at the workplace to perform their job at a remote worksite, absent undue hardship, the employer may be required to continue to provide the accommodation for the off-site location. For example, if the employer was providing an employee with a special seating arrangement or workstation as an accommodation prior to the pandemic, and the employee requests remote work or is required to work remotely, a similar accommodation may be required. Further, in the case of an employee with H-1B status who is required or chooses to work remotely, and for whom the remote work location has not been provided for in the H-1B petition, additional steps may be required by both the employer and employee to allow the H-1B employee to work remotely.

**Guidance on Health Inquiries and Screenings:** During a pandemic, *employers may make specific inquiries regarding relevant symptoms that might otherwise be considered impermissible. Employers also may have more flexibility to implement health screening measures (such as taking employees' temperatures).* Such actions likely will not be found to have violated the ADA during a pandemic in a situation where allowing symptomatic employees to remain in the workplace would pose a "direct threat" to others. Employers should note that "direct threat" is legal term of art under the ADA. Whether the coronavirus presents a "direct threat" depends on the severity of the illness and whether employers have a reasonable objective belief that the outbreak has become widespread in the community as assessed by state or local health authorities or the CDC. Meaning, this is a fact-specific inquiry and *employers should be aware that the additional flexibility for employer inquiries and screenings does not automatically exist merely due to the declaration of a pandemic.* In addition, the disclosure of protected health information to certain employers may be permitted under the Health Information Portability and Accountability Act in the public emergency exception to the law. This too is a fact-based analysis for which legal guidance should be obtained. Finally, the information employers receive about an employee's health must still be treated as confidential medical information per the ADA and relevant privacy laws, and all such inquiries and screenings always must be implemented in a reasonable, nondiscriminatory manner. For example, employers may not select only employees of a certain national origin for testing or screening.

**Guidance on Personal Protective Equipment:** The Guidance also clarifies that *during a pandemic, an employer may require employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of a pandemic infection.* However, the Guidance also provides that 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. *Requiring the use of any personal protective equipment may trigger additional obligations and liability-risks under OSHA and state and local health and safety laws.* We recommend anyone considering such requirements consult counsel.

## **A Final Point on Remaining Flexible**

The EEOC Guidance does not, of course, provide answers to all employer questions related to the coronavirus. However, it does provide welcomed guidance in a sea of changing conditions. U.S. employers are encouraged to review the Guidance, consult with counsel, and remain flexible as the coronavirus pandemic continues to evolve.

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