

# COVID-19 questions and answers for U.S. employers:

## Employment issues

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**Please note:** For the most up-to-date information and resources, visit the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). The CDC should be your primary source for emergency preparedness and response to the coronavirus.

The below information is designed to guide businesses to known, credible online resources covering the coronavirus and does not constitute medical advice.

Employers with offices outside the U.S. should review their statutory obligations for reporting suspected cases and paid time off policies with employment counsel to ensure compliance with local and national legislation.

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## *Employment issues*

### **Vaccination status of employees**

#### **Are we permitted to ask employees if they are fully vaccinated?**

Yes, but be sure you have a business reason for doing so and the inquiry is job related. You can ask employees whether they are vaccinated but you should not ask employees why they were *not* vaccinated as that inquiry could elicit medical information protected by the ADA.

For employees answering “no,” you can ask the employee, “Do you plan to get the vaccine when it is available to you?” If the answer to that question is “yes,” you can ask “When do you plan to get the vaccine? Within the next 30 days? 31-60 days? Within 90 days?” to get an idea as to when an employee may be fully vaccinated. You will need to maintain information related to your employees’ vaccination status as confidential and on a “need to know” basis.

Employers should check state and local laws as well. While there is currently no prohibition on an employer asking whether or not an employee is vaccinated, or whether they plan to get vaccinated, some states and localities require employers to determine the vaccination status of their employees. So far, only one state (Montana) prohibits discrimination on the basis of COVID-19 vaccination status. It is noteworthy that Montana’s law does not prohibit an employer from asking employees their vaccination status, but limits what an employer may do with that information if it does collect it. Certainly, employers in Montana choosing to elicit this information should proceed with caution.

#### **Can we ask employees for proof of the COVID-19 vaccination or do we have to rely on them to truthfully self-identify?**

You can require employees to provide proof of the COVID-19 vaccination but should caution employees not to provide any medical information as part of the proof.

Employers may choose to use any one or more of the following to confirm vaccination status:

- COVID-19 vaccination record card (issued by the Department of Health and Human Services Centers for Disease Control & Prevention or WHO Yellow Card), which includes name of person vaccinated, type of vaccine provided and date last dose administered
- A photo of a vaccination record card as a separate document
- A photo of the employee's vaccination record card from a cell phone or other electronic device
- Documentation of COVID-19 vaccination from a healthcare provider
- Digital record that includes a QR code that when scanned by a SMART Health Card reader displays to the reader the individual's name, date of birth, vaccine dates and vaccine type.

Keep in mind that there are already resources circulating which explain how to make a counterfeit CDC card, and others that offer such cards for a fee. It is tough for employers to police this. One option to help reduce fraud is to require that employees provide an attestation of their vaccine status. First, the attestation is not a document created by a healthcare provider and is less likely to trigger medical record retention requirements. The attestation also provides an employer with the ability to remind employees that attesting to incorrect information, or knowingly providing false information, will lead to discipline. An employer could also opt to require proof of the vaccine along with an attestation to hopefully reduce fraud.

Once again, check state and local laws to ensure compliance with any privacy laws.

### **Can we ask job applicants about their vaccination status and for proof of the vaccination?**

Generally, yes, but review applicable state or local laws. Employers can ask job applicants about their vaccination status if there is a business reason for doing so and the inquiry is job related. If the employer has mandated the vaccination, this should be included on the job posting as a condition of employment (subject to accommodation for a valid religious objection or medical reason).

### **On religious declinations, how do you handle when you only receive blanket statements or Bible verses?**

The accommodation process is an interactive process. The employee needs to explain how the religious belief is contrary to the vaccine mandate. If you doubt the sincerity of

the asserted religious belief or have objective facts for suspecting the request for religious accommodation is not genuinely related to a religious belief, you can request additional information that may help better assess the request. Note that the EEOC recommends that employers should presume that the request for a religious accommodation is sincere in the absence of an objective basis for questioning the religious nature or sincerity of the asserted religious belief, practice or tenet.

### **Mitigation with masks**

**The state in which we operate has lifted the face mask mandate. Can we still require our employees to wear a face mask?**

Because of the Delta variant and its greatly increased transmission rate, including to vaccinated individuals, the CDC is recommending everyone wear a mask while indoors in public places. Since state laws may vary, employers are encouraged to follow state and local guidance. Even in the absence of a legal obligation under state or local law, employers can require face coverings as company policy when there is a legitimate business reason, such as the health and safety of employees. Further, OSHA recommends that employers provide face coverings to employees at no cost. OSHA most recently updated its [guidance](#) on Aug. 13, 2021 and suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated. Employers with state OSHA plans should ensure they remain compliant with any applicable standards.

### **Self-screening and health screening forms**

**Are we permitted to ask employees to self-screen for COVID-19 symptoms?**

Yes. Employees can proactively monitor their symptoms daily to help prevent the potential spread of the virus. Employees can be asked to voluntarily check their temperature daily for fever of 100.4°F (38°C) or greater, and other symptoms of COVID-19 identified by the [CDC](#), which include chills, cough, shortness of breath or difficulty breathing, and sore throat, and secondary symptoms of congestion or runny nose, muscle or body aches, headache, fatigue, nausea or vomiting, diarrhea, and new loss of taste or smell, and stay home if they experience any of these symptoms. Request they notify HR if they have COVID-19 related symptoms and recommend employees

complete the [CDC self-checker](#) which will walk them through symptoms and recent exposure to the virus and provide guidance. They should also contact their healthcare or telemedicine provider. Consider how employees will be paid if they stay home; some states may mandate paid leave (e.g., California, New York).

**Can we use a self-attestation form to monitor employees' and visitors' symptoms when coming into the workplace during a national pandemic like COVID-19?**

Yes. During a pandemic, ADA-covered employers may ask employees if they are experiencing symptoms of the pandemic virus, the EEOC says in its guidance. For COVID-19 these include fever, chills, cough, shortness of breath or difficulty breathing, and sore throat. CDC recognizes secondary symptoms for COVID-19 of congestion or runny nose, muscle or body aches, headache, fatigue, nausea or vomiting, diarrhea, and new loss of taste or smell.

The CDC now identifies screening or health checks as an optional strategy for employers to try to reduce the spread of COVID-19 in the workplace. Some states and localities may require screening.

Here are some considerations for forms:

- Employers should check with outside counsel when developing content for visitor screening.
- Provide advanced notice where possible if screening visitors, vendors and contractors and inform them of measures to maintain confidentiality.
- Information about employee illness must be maintained as a confidential medical record in compliance with the ADA, outside of the personnel file.
- **Do not ask** about symptoms that are unrelated to COVID-19, which are protected under ADA.
- Symptoms related to COVID-19 may also be indicative of other health conditions the employee might usually experience (e.g., seasonal allergies); adding language referencing "new" or "unexpected" symptoms might help the employee differentiate.
- The CDC may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace.
- SHRM provides a sample form for visitors.

## **Temperature checking and fever screening**

### **Are we permitted to fever screen our employees?**

Yes, but subject to some guardrails and best practices.

A fever screen is a form of medical examination that creates issues under the Americans with Disabilities Act (ADA). Typically, medical examinations need to be job-related and consistent with business necessity. For example, the employer should have a reasonable, objectively based belief that the employee's ability to perform essential job functions will be impaired by a medical condition, or that the employee will pose a direct threat to self or others due to a medical condition.

That means that, under normal circumstances, widespread fever screening of employees who objectively appear asymptomatic would be prohibited. But these are not normal circumstances, and in 2009 the Equal Employment Opportunity Commission (EEOC) carved out a limited exception for fever screening during a pandemic, an exception equally relevant today. In fact, the EEOC has updated its guidance for the coronavirus pandemic. Further, there continue to be some states and localities with orders requiring temperature screening in certain circumstances. Learn more [here](#).

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

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 or COVID-19, do not have a fever.

**Because the CDC and state/local health authorities have acknowledged community spread of the coronavirus and issued attendant precautions since March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.**

**So, if an employer is inclined to conduct fever screens, what are the guardrails?**

- The pandemic must be widespread in the community, as assessed by state or local health authorities or the CDC. The EEOC says this requirement has been met.
- Perform the screening in a nondiscriminatory manner – don't single out employees by race, sex, etc. for the fever screening.
- Tell the employees that the screening is intended to determine only whether the employee has coronavirus symptoms (and, in fact, that should be the only reason for the testing).
- Have the screens conducted by medical professionals, if available in the workplace. If they're not, utilize management or supervisors to conduct the screening and ensure they're trained on how to do it (training videos are available online). Have the screeners wear a mask and gloves if coming in contact with the employee.
- Conduct the screening with as much privacy as reasonably possible and not within view of other employees.
- Have employees maintain social distancing (6 feet apart), while waiting to be screened, to avoid exposure to those who are sick.
- Be as noninvasive as reasonably possible. There are a variety of temperature-gauging devices available that are far less intrusive than an oral thermometer. Consider infrared no-touch thermometers, disposable strips or Tempa DOTs, which allows self-screening.
- Treat the results as appropriately confidential. Where warranted, employers may be permitted to share relevant evidence with public health officials as part of the community's pandemic risk mitigation efforts led by those officials. But don't keep the information in the employee's personnel file, for example. The EEOC allows a log for results, as long as it is confidentially maintained.
- If the employees are in a collective bargaining unit, ensure nothing in the bargaining agreement prohibits the screening.
- Finally, remember that an employee might be infected with the coronavirus and not have an elevated temperature. A negative screening result does not guarantee the employee is not infected.

The Occupational Safety and Health Administration (OSHA) has issued [guidance on returning to the workplace](#) on measures to ensure the safety of their employees during this pandemic. That guidance is worth reviewing.

## **What should we consider when determining whether to do temperature screening in the workplace?**

There are a few things to keep in mind when determine whether to do temperature screenings in the workplace:

- According to the CDC, up to 40% of those who have the disease are asymptomatic or pre-symptomatic and therefore fever screening may not capture a large portion of those who may be contagious.
- Employees with a temperature of 100.4 F, or other COVID-19 related symptoms, should be sent home with pay, if possible, to reduce any legal risk.
- Taking employee temperatures daily, and on each shift, can be costly, particularly if a third-party vendor is used.
- Temperature screening can be performed in several ways; (a) the employee can check their temperature before coming to work, or (b) the employer can screen for fever at the work site manually or via a thermal scanner. Either method is acceptable and should be based on the specific organization's situation and budget. The goal is to have sick people stay home.
- Consider whether you will record the screening results, and if so, how. There is no requirement to maintain a record. However, if one is used, it must be confidentially maintained. The EEOC permits a log. Employers may choose to only record abnormal findings.
- Consider what action you will take if employees refuse to have their temperature taken and review with outside counsel.
- If temperature screenings are intermittently used, employees may be confused about messaging on the value and safety.

During periods of widespread and/or sustained transmission, employers could consider health checks (e.g., temperature and respiratory symptoms) for employees and visitors. Employers could consider using temperature screening during periods of workplace or community spread and communicate the rationale to employees.

## **What health screenings are permitted for new hires during the pandemic?**

- An employer may take an applicant's temperature as part of a post-offer, pre-employment medical examination.
- An employer may screen applicants for symptoms of COVID-19 after making a conditional job offer.
- An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it.



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

### **What should we consider if our employees are asked to complete a health screening at a customer or vendor site?**

First, keep in mind that there may be a state or local order requiring health or temperature screenings in certain circumstances. Remind your employees to confirm prior to the visit whether a health screening will be performed, and if so what type, as well as how information will be saved and protected. Recommend employees self-screen, including taking their temperature, prior to visiting an external site, and to arrange a virtual visit if they have symptoms related to the virus. Develop a plan should the employee refuse a screening.

### **Employee was exposed to someone suspected to have coronavirus**

#### **If an employee notifies us they were exposed to an individual suspected of the coronavirus, what do we need to do to make sure we protect our other employees?**

People who are fully vaccinated do not need to quarantine after contact with someone who has COVID-19 unless they have symptoms. However, fully vaccinated people should get tested three to five days after their exposure, even if they don't have symptoms and wear a mask indoors in public for 14 days following exposure or until their test result is negative. Click [here](#) to learn more from the CDC.

If the employee is not fully vaccinated, the employer should request the exposed employee work from home, [per CDC guidance](#), and monitor daily for [symptoms](#) of fever, cough shortness of breath or difficulty breathing, as well as the secondary symptoms. Have the employee complete the CDC [Coronavirus Self-Checker](#) if they develop symptoms and follow the guidance, including contacting a healthcare or telemedicine provider. The employer should have the exposed employee identify people in the workplace they were in close contact with since the first date of their exposure while this information is still fresh. Close contact is defined as:

- Within 6 feet for [15 minutes](#) or more over a 24-hour period.
- Having someone who is sick with COVID-19 at home.
- Having direct physical contact.
- Sharing eating or drinking utensils.

- Exposure to respiratory secretions (such as a sneeze or cough).

If the exposed employee is suspected of or diagnosed with the infection, the employer should notify the people in close contact of their potential exposure without sharing the employee's information, and if they are not vaccinated, have them stay home and [quarantine](#)<sup>\*</sup>, and monitor their symptoms. The CDC advises that persons who were not in close contact with the individual who is suspected of or positive for the infection do not need to be notified. If symptoms develop, the employee and others should complete the [Coronavirus Self-Checker](#) and follow the guidance.

Anyone who has symptoms of COVID-19, including vaccinated individuals, should quarantine at home and get tested. In asymptomatic secondary exposure (people who have been in contact with people who are also asymptomatic but have been possibly exposed), the CDC is recommending that people within 6 feet of these secondary exposures in the workplace also be notified, begin monitoring their health twice a day for fever, cough and shortness of breath or difficulty breathing, as well as secondary symptoms and if symptoms develop, they should complete the CDC [Coronavirus Self-Checker](#) and follow the guidance. More information about general preparedness for businesses is available here: [CDC Interim Guidance for Businesses and Employers](#).

The CDC has updated its [guidance](#) for vaccinated persons. If someone is vaccinated and has been exposed to someone with suspected or confirmed COVID-19, they do not need to quarantine or get tested unless showing symptoms (though a few exceptions exist).

*\* The CDC [defers](#) to local health departments and state laws for the final decision regarding quarantine duration based on local infection prevalence.*

## **Employee shows symptoms on the job**

### **If we have an employee on-site showing fever and flu-like symptoms, what steps should we take?**

Employers should follow the [CDC's advice](#) related to ill employees.

The [CDC recommends](#) that employees who appear to have *acute* respiratory illness symptoms, such as cough, shortness of breath or difficulty breathing, lost of taste or smell, etc., upon arrival to work or who become sick during the day, should be separated from other employees and sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if

no tissue is available) and wear a face covering or face mask. Employers should have disposable face masks available for these purposes.

Individuals should follow CDC recommended steps at home which include:

- Track for symptoms by completing the CDC [Coronavirus Self-Checker](#) and follow the guidance including seeking medical care.
- Stay home, except to seek medical care, and consider COVID-19.
- Isolate from others in the home and avoid sharing personal household items.
- If sick, wear a face covering or face mask at home or in public to better protect others.
- Cover coughs and sneezes and wash hands frequently.
- Clean high touch surfaces daily.

Lockton is recommending the use of telemedicine providers for those who are not seriously ill, as those providers can also evaluate patients and manage care virtually. Providers will ask individuals to monitor their symptoms, self-isolate, and may order testing if indicated based on the patient's symptoms. Testing may or may not be ordered for those with mild illness, in which case the provider will follow the CDC symptom-based guidance (refer to the question on a positive COVID-19 situation for details). This will be at provider discretion.

**Should employees who have a fever and flu-like symptoms be sent to the employer's on-site clinic or to an outside healthcare provider? What if it's an occupational health clinic?**

The CDC recommends that employees who appear to have acute respiratory illness symptoms (such as cough or shortness of breath) upon arrival at work or who become sick during the day should be separated from other employees and sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available). In light of this guidance, it may not be advisable to have the employee report to the on-site clinic, out of concern for infecting staff and other employees. Instead, use telemedicine providers whenever possible.

Generally, Lockton does not advise that employers treat ill employees as having a workers' compensation-covered illness. Instead, employers should follow the CDC's advice related to ill employees.

## **Confirmed coronavirus case in workplace**

**If we identify a confirmed case of the coronavirus in our workplace, what do we need to make sure we do to protect our other employees? Is OSHA the best place to consult to help decide whether to close an office, move to remote work, etc.?**

Yes, Lockton recommends looking to [OSHA](#) and the [CDC](#) for guidance on protecting employees.

Please refer to the [CDC website](#) for the latest recommendations for those who have been fully vaccinated.

The employer should notify the employee(s) in close contact of their exposure to the coronavirus in the workplace without sharing patient information. Close contact is defined as within 6 feet for more than 15 minutes, having direct physical contact with the person, or exposure to respiratory secretions (such as a cough). Additionally, the employer should request the exposed employee(s) work from home for 14 days from their exposure, per CDC guidance, and monitor for symptoms of fever, cough, shortness of breath or difficulty breathing, and other symptoms of chills, repeated shaking with chills, muscle or body aches, headache, sore throat, nausea or vomiting, diarrhea, and new loss of taste or smell. If symptoms develop, the employee should complete the [CDC Coronavirus Self-Checker](#) and follow the recommendations and if suspected of or positive the virus, follow symptom-based guidance on discontinuation of home isolation

The provider who cares for a patient diagnosed with the virus has a responsibility to report the case to the public health department. The employer may choose to report to public health officials, consistent with applicable law. Lockton recommends the employer refer to their local and state health departments for specific concerns of suspected or actual exposures: [CDC state and territorial health department websites](#).

In terms of employee risk, Lockton recommends employers educate their employees, as needed, based on the CDC's risk assessment guidance for next steps: [CDC Interim U.S. Guidance for Risk Assessment and Public Health Management](#).

The local public health department will provide guidance and mandated reporting requirements, or notifications based on risk exposure to other people and businesses. If exposure concerns remain outside these guidelines, the employee(s) are advised to contact their public health department or their primary care clinic for next steps.

- Testing production has increased as more tests receive FDA emergency use authorization (EUA), however availability may be impacted by demand in areas of

high community spread, and some may be allocated to individuals in high risk groups.

- To limit exposure to other high-risk populations, it's recommended employee(s) use telemedicine, when possible, for those who are not seriously ill.
- Symptomatic employees or other people with exposure should complete the CDC [Coronavirus Self-Checker](#) and follow the guidance. Individuals who don't have internet access should call their healthcare provider for treatment guidance.
- Community, non-healthcare facilities should follow [updated guidelines](#) provided by the CDC for cleaning and disinfecting.

### **Return to work and doctor's notes, etc.**

**We've heard a lot about not requiring a doctor's note to allow an employee to return to work, because (for example) public health officials are encouraging individuals to avoid seeing a doctor in person unless they are manifesting severe symptoms. How do we know the employee isn't still contagious? Is there a recommendation for a substitute to a doctor's note?**

Lockton does not advise asking for a doctor's note to *verify an illness for purposes of an absence*. Likewise, the CDC advises that employers should not require sick employees to provide a COVID-19 test result or a doctor's note to validate an illness, qualify for sick leave, or to return to work. However, if someone has been ill for an extended period, then, at least at this time, Lockton *does* advise requiring a doctor's note that states the employee is *cleared to return to work*. In these cases, employers should be flexible in the format of the note. For instance, employers should consider accepting emailed notes from doctors as well as notes from doctors practicing telemedicine, if they offer this service (check with your telemedicine provider). If an employee has a doctor's note that states they can return to work 14 days after all symptoms subside, then that can be used for purposes of timing an employee's return to work.

Due to the increase in COVID-19 cases and the similarities with the fall influenza, it is recommended that anyone who has acute symptoms be evaluated by a telemedicine provider. Most primary care providers now offer telemedicine visits and virtually all health plans and employers have engaged telemedicine providers for their employees.

Employers should remain flexible and consider the CDC's guidance regarding symptom-based discontinuation of home isolation listed below.

Employers should also encourage all employees who have symptoms and think or know they have COVID-19 to stay home and not come to work until the following has been met:

- At least 10 days since symptoms first appeared AND
- At least 24 hours with no fever (100.4 F or greater using an oral thermometer) without the use of fever-reducing or other symptom-altering medicines (e.g., Tylenol or cough suppressants) AND
- Symptoms have improved.

### **Are there options to reduce the length of quarantine to return to work faster?**

For employees who are not fully vaccinated, reducing the length of quarantine may make it easier for people to quarantine by reducing the time they cannot work. Local public health authorities make the final decisions about how long quarantine should last, and therefore employees need to follow the recommendations of your local public health department if they need to quarantine. Three options they will consider include stopping quarantine:

- On day 14 without testing.
- On day 10 without testing and if no symptoms.
- On day seven after receiving a negative test result (test must occur on day five or later).

After stopping quarantine, employees should:

- Watch for symptoms until 14 days after exposure.
- Immediately self-isolate and contact the local public health authority or healthcare provider if symptoms appear.
- Wear a mask, stay at least 6 feet from others, wash their hands, avoid crowds, and take other steps to prevent the spread of COVID-19.

### **When an employee has a confirmed coronavirus case and has been in home isolation, is there guidance related to symptoms for letting that employee return to the workplace?**

The CDC has [guidance](#) for when those infected with the virus can end isolation and can be around others. The guidance depends on different factors for different situations. A healthcare provider should determine when the employee may return to the workplace.

*\*The CDC guidance is based on studies that showed the majority of patients did not have virus which could infect cells and replicate after 10 days. Those with more serious illness or who are immunosuppressed may require longer isolation than 10 days. CDC states there is justification to rely on a symptom-based strategy rather than a test-based strategy for ending isolation for positive patients.*

### **Can someone be re-infected with COVID-19?**

The short answer is yes. The CDC cites evidence that re-infection in the first three months is not likely but can still occur. Even individuals that have been fully vaccinated have had “breakthrough infections” due to the COVID-19 variants. For this reason, the CDC has recommended everyone wear masks in public spaces.

### **Notifying employees of possible exposure**

**Is it a HIPAA violation if we tell public health officials an employee of ours has been tested for or diagnosed with the coronavirus? Can we tell other employees they might have been exposed?**

Most employers (unless they are healthcare providers) are not regulated by HIPAA directly, although their health plans *are* subject to HIPAA. If you learn of a coronavirus diagnosis through a claim submitted to your health plan, the HIPAA privacy rules will apply. However, those rules have exceptions allowing protected health information (PHI) to be disclosed without a patient’s authorization, including in the following cases:

- As necessary to treat the patient, or to treat a different patient.
- *To a public health authority who is authorized by law to collect or receive the information.*
- To *anyone*, as necessary, to prevent or lessen a serious and imminent threat to the health and safety of a person or the public, to the extent state law allows the disclosure.

When making a disclosure, disclose only the minimum necessary information. For instance, it may be permitted to say, “An employee with whom you may have come into contact has tested positive for COVID-19.” However, it may be unnecessary to say, “John Smith, who works in the Human Resources department, tested positive for COVID-19 on Tuesday and is being treated at Downtown Memorial Hospital.”

As a rule, we urge you to treat any employee health information as sensitive, even in health emergencies such as this one. State privacy laws might also come into play here, and though many of them also have public health exceptions, you'll want to exercise caution just as you would in the normal course of action. We encourage you to consult with your legal counsel on such matters.

**How does HIPAA impact the way employers handle employees with suspected or confirmed cases of the coronavirus? Should we get a basic confidentiality agreement from those who are informed that they may have been exposed to COVID-19?**

An individual's health information is confidential and should not be shared with employees. Employers must understand that according to guidance from the CDC's NIOSH, if an employee is confirmed to have the coronavirus, employers must maintain confidentiality, as required by the ADA. Employers should follow CDC guidelines for notification of fellow employees with possible exposure to the coronavirus in the workplace, without sharing patient information. We would not recommend the pursuit of a signed release of information for the specific employee. Additionally, forms may contain highly sensitive information. Any lost or misplaced forms would constitute a breach, requiring notification of affected individuals. An exception to this is for healthcare workers.

Healthcare providers must notify the public health department of any positive COVID-19 case. Employers should contact their local public health department. For contact information, visit [CDC state and territorial health department websites](#).

Additionally, employers should remind employees to self-monitor for symptoms of fever, cough or shortness of breath. Public health contacts can be found at [CDC state & territorial health department websites](#).

Patient and employee confidentiality:

- Under HIPAA, employees' health status is considered their private PHI and cannot be shared.
- If there is significant concern due to exposure or symptoms, employees should reach out to their telemedicine primary care team for next steps and/or to be referred to local public health departments for testing.

In asymptomatic secondary exposure (people who have been in contact with people who are also asymptomatic but have been possibly exposed), the CDC is recommending that people within 6 feet of these secondary exposures in the workplace also be notified



and begin monitoring their health twice a day for fever, cough and shortness of breath. More information about general preparedness for businesses can be found in the CDC's [guidance for businesses and employers](#).

**If an employee believes they have been exposed to others who have tested positive for the coronavirus, can an employer require that an employee disclose that to us confidentially?**

Employers may require that an employee disclose health information with respect to whether the employee poses a direct threat to the health or safety of himself/herself or others, per the ADA. While an employee may allege that they are "regarded as" having a disability, or the employee claims that they are being discriminated against for "association" with a person diagnosed with the coronavirus, the direct threat defense would likely be applicable.

**What is the best process for self-disclosure if someone contracts the virus? We are concerned about HIPAA issues, but we need a way for people to report to us.**

We recommend designating an HR representative that employees can contact to report the diagnosis. HIPAA imposes obligations of *covered entities* to effectively safeguard protected health information (PHI), whereas an employer acting in its capacity as an employer is generally not subject to HIPAA.

Employers should inform employees that possible exposure has occurred in the workplace without disclosing any specific identifying information about the employee who tested positive.

**If an employee calls in sick and we suspect it may be due to the coronavirus, but the employee didn't mention it, what information may we ask for from the employee?**

EEOC guidance allows ADA-covered employers to ask employees who report feeling ill at work, or who call in sick, if they are experiencing symptoms associated with the coronavirus, including fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

## **Disability-based discrimination**

### **Do ADA rules apply to the coronavirus, given that it is a transitory or temporary condition?**

Yes, the ADA applies even though the coronavirus is likely considered a transitory condition. The ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA-defined disabilities. Further, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

In addition to the ADA limiting an employer's ability to ask disability-related questions and conduct medical examinations, the ADA could also come into play because an employee with the coronavirus could be *perceived* as having a disability. In this circumstance, the employer is liable under the ADA for employment actions taken based on an employee's contraction of the virus or *perceived* contraction.

The EEOC recommends employers follow [CDC guidelines](#) regarding excluding employees from the workplace. This will protect an employer from a claim by the employee that they were excluded based on a disability or because they were perceived to be disabled, even if that was not the case.

These [guidelines](#) from the EEOC are instructive.

Please note that because the coronavirus outbreak has been declared a pandemic, employers may have more flexibility relating to testing and questioning their employees regarding the virus and its symptoms.

### **Can an employer tell employees over 60 or in high-risk groups to go home and not allow them to work, or will we be infringing upon the protected class with perceived age discrimination?**

The ADA prohibits employers from discriminating against employees based on disability; however, the ADA allows employers to exclude individuals from the workplace if, according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient information to reasonably conclude that employees will face a direct threat to others or themselves if they contracted the disease. Only in these limited circumstances may ADA-covered employers make

disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.

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 complications, the employer must keep this information confidential. If employees ask the whereabouts of an employee who is out of the work site because they are a high-risk member, the employer should share the minimum information (i.e. teleworking) while maintaining confidentiality about the employee's health status. Employers should not assume that all disabilities increase the risk of COVID-19 complications, as many disabilities do not increase this risk (for example, vision or mobility disabilities).

Employers are encouraged to follow their interactive process to determine what reasonable accommodations can be made, including telework, leaves of absence, and so on.

**We are going to offer limited time pay for our employees who are in high-risk groups to stay home for their protection. Can we send them to a local health clinic to be evaluated and obtain a note confirming they are in a high-risk group and qualify for the benefit?**

These employees should be directed to obtain a note from their own healthcare provider (HCP) or telemedicine provider that confirms they qualify for the benefit. Most individuals in high-risk groups are likely under the care of an HCP. Employees may have privacy concerns if sent to a local clinic, or there could be potential risks to an employer designating a clinic to send employees to (e.g., exposure to COVID-19 at the clinic).

## **Navigating remote workers**

### **Form I-9**

Beginning May 1, 2020, employers must use a new version of [Form I-9](#) for Employment Verification Eligibility, which is required for new hires and reverifications. The existing form expired last year and the Department of Homeland Security (DHS) had temporarily extended its validity.

The form is virtually unchanged from the older version, except for [minor technical updates](#) to the instructions.

At this time, many employers are developing flexible working arrangements, including work-from-home options, as part of their communicable disease preparedness plans and working through coronavirus. One area of concern with remote workforces is navigating the requirement for employers or their authorized representatives to review original documents in completing Section 2 of the Form I-9.

### **DHS Form I-9 flexibility ends Aug. 31, 2021**

On March 20, 2020, the Department of Homeland Security (DHS) made an important announcement at a time when many employers were developing flexible working arrangements.

DHS advised that as a result of the coronavirus employers hiring remote employees would **not** be required to review the employee's identity and employment authorization documents in the *employee's physical presence* – giving employers an option to avoid designating an *authorized representative*.

On [March 31, 2021](#), the DHS advised that the Form I-9 flexibility policy would expire May 31, 2021; however, on [May 26, 2021](#), U.S. Immigration and Customs Enforcement advised that the flexibilities in rules related to Form I-9 compliance that the DHS initially granted in March 2020 would be extended until Aug. 31, 2021, due to the continued precautions related to COVID-19. This current extension includes guidance for employees hired on or after June 1, 2021, and who work exclusively in a remote setting due to COVID-19-related precautions. Those employees are temporarily exempt from the physical inspection requirements associated with the Form I-9 until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier. Employers should continue to monitor the [DHS](#) and [ICE's Workforce Enforcement](#) announcements for further extensions or confirmation of the resumption of normal operations.

### **If an employee has kids at home because most schools are closed, does this mean we have to pay them and they don't have to work?**

If the employee is able to telework, they do not qualify for the paid leave. Employees who work for employers who voluntarily provide Emergency Paid Sick Leave and/or Paid Family and Medical Leave under the American Rescue Plan Act of 2021 may qualify for paid leave in this situation. Similarly, there may be a state law affording the employee paid leave (e.g., California).

**Who determines if an employee can work remotely? Could an employee say he isn't able to, even if the employer allows it?**

If the employer declined to provide the leave because it believes the employee could work remotely, the employer might need to prove its position later.