

# HR COMPLIANCE BULLETIN



## EEOC Adds FAQs Addressing Retaliation to COVID-19 Guidance

On Nov. 17, 2021, the Equal Employment Opportunity Commission (EEOC) issued additional answers to frequently asked questions ([FAQs](#)) about how employers should comply with Title VII of the federal Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA) and other federal fair employment laws while also observing all applicable emergency workplace safety guidelines during the coronavirus pandemic.

The new FAQs address focus on how federal fair employment laws protect employees and applicants against retaliation for engaging in protected activity. This may include a variety of actions, such as filing a discrimination claim, reporting harassment to a supervisor or requesting an accommodation. They were added to the FAQs that the EEOC initially issued on March 18, 2020, and then updated several times. The last major update to this guidance was made on Oct. 25, 2021. The EEOC also made minor updates to some of the Q&As on Oct. 13, 2021.

This Compliance Bulletin contains the EEOC's updated FAQs in full. The newly added FAQs about religious exemptions to employer vaccine mandates begin on **page 32** of this document.

### Action Steps

All employers should follow the most current guidelines and suggestions for maintaining workplace safety, as issued by the [Centers for Disease Control and Prevention](#) (CDC) and any applicable state or local health agencies. Employers with 15 or more employees should also become familiar with and follow the guidance provided in the EEOC's FAQs about ADA compliance. These and all smaller employers should ensure that they comply with state and local anti-discrimination laws as well.

Provided to you by [The Uhl Agency](#)

### Highlights

#### Title VII/ADA Rules Do Not Prevent Safety Measures

Employers must follow all applicable rules under federal fair employment laws while also observing emergency guidelines issued by federal, state and local health authorities during the COVID-19 pandemic.

#### New Guidance on Retaliation

Among other things, the EEOC's new FAQs clarify that:

- Unlawful retaliation includes any employer action in response to protected activity that could deter a reasonable person from engaging in protected activity; and
- Retaliation protections apply even if the EEOC ultimately determines an underlying claim has no merit, as long as an individual's protected activity was based on a reasonable, good faith belief that the law was violated.





## A. Disability-Related Inquiries and Medical Exams

### **A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as 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.

### **A.2. (Added April 9, 2020): When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as [examples](#), or may it ask about any symptoms identified by public health authorities as associated with COVID-19?**

As public health authorities and doctors learn more about COVID-19, they 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. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

### **A.3. When may an ADA-covered employer take employees' body temperature during the COVID-19 pandemic?**

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

### **A.4. May employers require employees to stay home if they have COVID-19 symptoms?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

### **A.5. When employees return to work, may an employer require doctors' notes certifying their fitness for duty?**

Yes. These inquiries are permitted under the ADA either because they would not be disability-related or would be justified under the ADA standards for disability-related inquiries. As a practical matter, however, 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. For example, employers could rely on local clinics to provide a form, stamp or e-mail to certify that an individual does not have the pandemic virus.

### **A.6. (Added April 23, 2020; Updated Sept. 8, 2020): May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?**

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the