

Coronavirus Declared a Pandemic - What Are the ADA Implications?

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On March 11, 2020, the Director of the World Health Organization (“WHO”) confirmed, “We have . . . made the assessment that COVID-19 can be characterized as a pandemic.” The WHO had previously been reluctant to implement the “pandemic” moniker, concerned it could “cause unreasonable fear.” This label provides helpful guidance, though, to employers regarding what questions they should and, more importantly, should not ask their employees.

For example, some employers are contemplating testing the temperatures of their employees to quickly identify preliminary signs of COVID-19 in their workplace. The legality of this practice depends on the specifics of each work environment and implicates the Americans with Disabilities Act (“ADA”).

In general, the ADA seeks to protect employees with both known and unknown disabilities from employers’ probing inquiries, prohibiting employers from asking disability-related questions or conducting medical examinations unless they are job-related and consistent with business necessity. To qualify for this exception, the employer must have utilized objective evidence to formulate a reasonable belief that: (1) a medical condition impairs an employee’s ability to perform the essential functions of his job; or (2) the employee poses a direct threat, because of his medical condition, to himself or his coworkers.

Temperature measurement would likely be considered a medical examination, so an employer seeking to test its employees’ temperatures must first find a direct threat. 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.” Four factors are considered: (1) duration of risk; (2) nature and severity of potential harm; (3) likelihood that harm will occur; and (4) imminence of potential harm.

The WHO’s pandemic classification may be objective evidence that forms the reasonable suspicion of a direct threat, but employers must also gauge the extent to which COVID-19 fulfills the four factors in relation to their particular workforce. The more evidence of risk and harm, the more likely COVID-19 poses a direct threat, and the more likely a medical examination is appropriate.

Application of this ADA exception is nuanced and requires customized evaluation of the facts and circumstances. Before conducting any medical testing, contact a Workplace Law attorney to assist in this evaluation.

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