

Risk Control

HIRING PRACTICES DURING THE COVID19 PANDEMIC

Guidance from the EEOC

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing various federal laws that prohibit discrimination in employment, including the Americans with Disabilities Act (ADA), and the Rehabilitation Act.

The Centers for Disease Control and Prevention (CDC) as well as state and local agencies have issued instructions on how to protect workers during the pandemic. Local governors have closed down nonessential businesses, as well as schools and other institutions. However, as New York and the nation begin to develop ways to reopen the economy, hiring and rehiring will begin. The EEOC recently posted guidance documents concerning different anticipated scenarios.

A. **Hiring During the Covid-19 Pandemic**

- If an employer is hiring, may it screen applicants for symptoms of COVID-19?
Yes. 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.
- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
Yes. 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.
- May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?
Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- May an employer 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, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

B. Rehiring After a Pandemic

May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. 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. Employers should be willing to accept other types of proof in lieu of a doctor's note if the health care environment is too chaotic at the time.

To read the full text of the EEOC's guidance documents, and other related information, visit their website at: https://www.eeoc.gov/facts/pandemic_flu.html.

We are in unprecedented times because of the pandemic. Please speak with your human resources officer and/or legal counsel before creating testing procedures, asking for medical documentation or other making employment-related decisions.