

# The EEOC Provides Updated Technical Assistance to Employers for Recent Federal Changes to COVID-19 Order

By Audrey H. Shinn

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May 11, 2023 marked the end of the two federal COVID-19 Emergency Orders. On May 15, 2023, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued key updates to its COVID-19 technical assistance, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” that address the recent end of the COVID-19 Public Health Emergency Orders and provide guidance for employers.

The end of the federal COVID-19 Emergency Orders does not alter employers’ legal obligations under the Americans with Disabilities Act (“ADA”), the Rehabilitation Act of 1973, and other federal equal employment opportunity laws. Therefore, employers should review their existing policies to ensure continued compliance with workplace COVID-19 and anti-discrimination laws.

## 1. COVID-Related Screening Procedures:

Employers may ask all employees entering the workplace about COVID-19 symptoms and testing, as long as they meet the ADA’s “business necessity” standard for medical examinations and disability assessments. The EEOC reiterates that employers may follow the Centers for Disease Control’s (“CDC”) current COVID guidance about screening procedures and medical requirements in order to satisfy the ADA’s “business necessity” standard.

For example, employers who wish to use temperature checks should consult the most up-to-date CDC guidance to determine if temperature screening is a valid indicator of COVID infection. Additionally, employers may ask whether an employee who calls in sick has COVID-19 or common symptoms of COVID-19, as identified by the CDC. If the employee has COVID-19 or symptoms of the disease, the employer may follow any CDC-recommended period of isolation with respect to when an employee may return to the workplace. Under the Genetic Information Nondiscrimination Act, however, employers cannot ask an employee coming to work whether any of their family members have COVID-19. Instead, employers can inquire about an employee’s contact with anyone diagnosed with or showing symptoms of COVID-19.

As a reminder, employers must not engage in unlawful disparate treatment based on protected characteristics when conducting screenings or other types of medical examinations related to COVID. Employees must also continue to treat all information about employee illness as confidential medical records under the ADA.

## 2. COVID-Related Reasonable Accommodations:

Employers should not automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances. Instead, employers should evaluate reasonable accommodations granted during the public health emergency and, in consultation with the employee, assess ongoing accommodation needs based on individual circumstances. Consistent with the ADA’s “business necessity” standard, employers may request documentation that addresses why there may be an ongoing need for accommodation and whether alternative accommodations might meet those needs.

For example, employees who cannot be vaccinated due to a disability (covered by the ADA) or sincerely held religious belief (covered by Title VII) may be entitled to reasonable accommodations that do not pose undue hardship. Accommodations can include wearing a face mask, social distancing from co-workers, modified schedules, regular COVID-19 testing (in compliance with ADA standards), telework, or reassignment. Pregnant employees may also require adjustments similar to accommodations

provided for disabilities or religion under Title VII.

### **3. Long COVID and Reasonable Accommodations:**

The EEOC's updated guidance provides that the ADA's three-part definition of a disability can also apply to those employees suffering from what is known as "long" COVID. Reasonable accommodations for Long COVID symptoms may vary depending on the specific symptoms, job duties, and workplace design. Examples of reasonable accommodations for long COVID include providing a quiet workspace, noise-canceling or white noise devices, adjusted lighting, rest breaks, flexible schedules or telework options, and removing physically exerting tasks.

### **4. Harassment and Discrimination Prevention:**

Employers should remind employees that discrimination or harassment based on protected characteristics is strictly prohibited by federal equal employment opportunity ("EEO") laws. The EEOC recommends that employers provide examples of pandemic-related harassment to help employees and supervisors understand what actions violate EEO laws. For example, anti-harassment training materials might show a supervisor or coworker violating the ADA/Rehabilitation Act by harassing an employee with a disability-related need to wear a mask or to take other COVID precautions.

Finally, different state and local regulations may have continued COVID requirements for employers. Employers navigating the changing landscape of COVID-related employment issues can reach out to a Vedder Price attorney for assistance.

If you have any questions, please reach out to **Audrey H. Shinn** at [ashinn@vedderprice.com](mailto:ashinn@vedderprice.com) or the Vedder Price lawyer(s) you normally work with.

[vedderprice.com](https://vedderprice.com)