

ADA and COVID-19

- **Americans with Disabilities Act Considerations:**
 - **Medical Questions**
 - **Medical Examinations**
 - **Stereotyping**
 - **Adverse actions against employees with a disability**
 - **Direct threat of infected employee**
- Is C-19 a disability – “regarded as” or “actual”?**



EEOC Guidance - Pandemics

- **EEOC Guidance** ADA still applies, but does not “interfere or prevent” employers from following the suggestions of the CDC

- **EEOC relies on guidance from 2009:**

Addressed Swine Flu/H1N1

Specifically, addressed pandemic planning before, during, and when it “appears imminent.”

https://www.eeoc.gov/facts/pandemic_flu.html#q16



EEOC Guidance – ADA Disability Related Inquiries

Disability Related Inquiries Include:

– Medical examinations

- Q. temperatures? A. depends

– Test: Questions likely to elicit disability information



EEOC Guidance – ADA Disability Related Inquiries

Is a Temperature Test a Medical Examination Under the ADA?

- ADA does not define “medical examination.”
- EEOC defines “medical examination” as a “procedure or test that seeks information about an individual’s physical or mental impairments or health.”

The Centers for Disease Control and Prevention [defines a fever](#) as 100.4°F/38°C or higher.



EEOC Guidance – ADA Disability Related Inquiries

During employment

- Inability to perform essential job functions**
- Pose a direct threat**

Focus – direct threat:

- “Significant risk” of “substantial harm” to the health and safety of employee/others**
 - Which cannot be eliminated by a reasonable accommodation**
- Disability Leave or Injury Leave**



EEOC Guidance – ADA Disability Related Inquiries

The 2009 EEOC Guidance Focuses on:

- **Severity of the illness**
 - **Similar to seasonal influenza or H1N1 influenza**
 - **not a direct threat**
- **Current advice from CDC and local officials**
- **Appropriate for location**



EEOC Guidance – Disability Related Inquiries

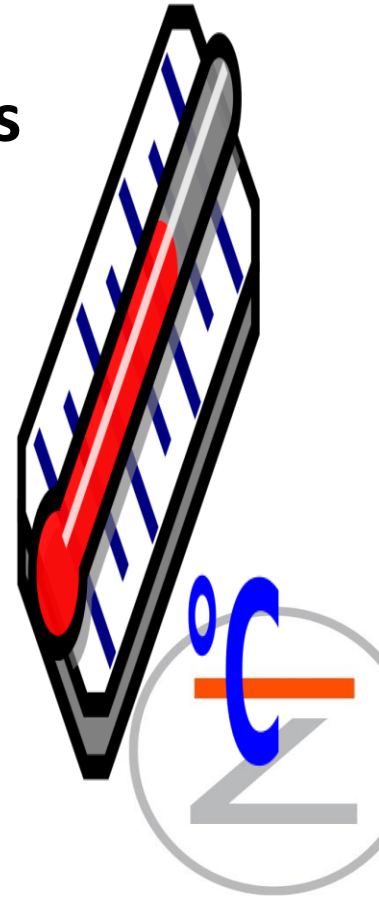
Before a Pandemic:

- Can't ask about immune systems
- Can ask if employee is high risk under CDC guidelines
- Can plan
 - Contamination/cleaning
 - Workforce planning
 - Consider potential accommodations
 - work from home
 - leave as an accommodation



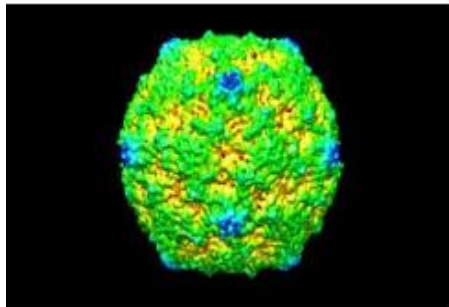
EEOC Guidance – Disability Related Inquiries

- **During a Pandemic:**
 - Can send employees home with symptoms
 - Can ask about symptoms
 - Can take temperature
 - Can ask questions about exposure after travel
 - Can't ask employee who does not have symptoms about other conditions, unless public health officials determine so



EEOC Guidance – ADA Disability Related Inquiries

- **During a Pandemic:**
 - Can require employees to wash hands
 - Can ask for a return to work not infected
 - But, CDC is recommending against this



FMLA Guidance

Is C19 a “serious medical condition”?

An illness, injury, impairment or physical or mental condition that involves either

- inpatient care OR
- continuing treatment by a health care provider

Q. If an employer requires that an employee stay home, should this be paid or unpaid?

Q. Would this be FMLA leave? Depends if it meets the Emergency FML.



FMLA Considerations

Q. Could an employee refuse to come to work because of fear of contracting the virus?

Yes- if reasonable or compromised health condition

Q. Would this raise the question of work-at-home as an ADA accommodation?

Possibly – Depends if valid disability

Q. Could an employer mandate that an employee wear protective gear, such as a face mask or latex gloves? Is this a problem under the ADA?

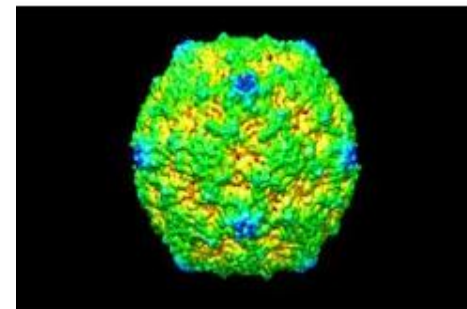
No - unless job related or preventive measure



FMLA Questions

Question: Does the FMLA cover an employee who has contracted COVID-19 or takes leave to care for a family member who has contracted COVID-19?

Answer: Yes – if qualified under the new provisions under the EFMLEA, Emergency Family Leave

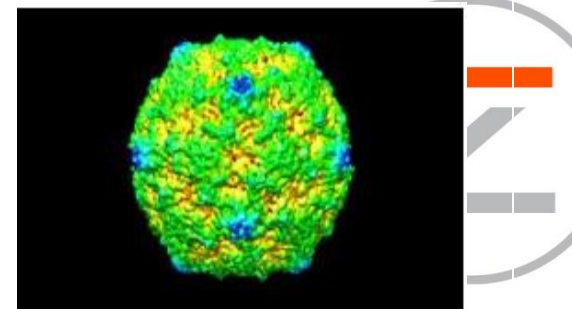


FMLA Questions

Question:

Does the Family Medical Leave Act (“FMLA”) cover an employee that stays home from work as a precautionary measure to avoid contracting COVID-19?

Answer: NO



FMLA Checklist - Attendance

Completed? Y N		Attendance
		Notify employees about absences relating to quarantine for potential COVID-19 exposure, contracting the disease or caring for a spouse or minor child in the same household that has contacted COVID-19
		Inform employees policies in instances where the schools in their geographic area are closed due to COVID-19
		Promptly address any leave/accommodation employee requests
		Advise employees about PTO and vacation and how those policies will interact with COVID-19 related absences



FMLA Checklist – Managing Illness

Completed? Y N		Managing Illness
		Instruct employees to stay home if ill, especially if experiencing flu-like symptoms (fever, and any other symptoms, for at least 24 hours)
		Recommend frequent and thorough hand washing, and regular use of hand sanitizer
		Advise employees to cough/sneeze into a tissue, or if unavailable, into your elbow/shoulder, and not toward others; avoid others if ill
		Avoid touching eyes, nose, and mouth with unwashed hands, and also any shared tools or areas until hands are cleansed; limit touching items in common areas only as necessary
		Educate employees that facemasks are not necessary to avoid contamination
		Inform employees they will be sent home if they arrive at work sick or develop symptoms as the workday progress

Overtime Laws - FLSA Guidance

1. Does the FLSA require an employer to pay a *non-exempt* employee if the employee is sent home due to illness/symptoms consistent with COVID-19 and performs no additional work for the rest of the day or week?

NO

BUT Check applicable union contracts local ordinances and policies



Overtime Laws - FLSA Guidance

2. Does the law require the employer to pay a *non-exempt* employee if the employer closes due to the COVID-19 outbreak, and the employee performs no additional work for the rest of the day or week? NO

3. Does the law require the employer to pay an *exempt* employee if the employee is sent home due to illness/symptoms consistent with COVID-19? YES



Overtime Laws - FLSA Guidance

4. Does the law require the employer to pay an *exempt* employee if the employee is sent home due to illness/symptoms consistent with COVID-19?

YES

5. Does the law require the employer to pay an *exempt* employee if the employer closes due to the COVID-19 outbreak?

YES



Overtime Laws - FLSA Guidance

6. Does the law require the employer to pay *any employee* who is under government-imposed quarantine and cannot work?

NO

7. Can the employer legally *send employees home* if they are ill or appear to have symptoms associated with COVID-19?

YES



Overtime Laws - FLSA Guidance

8. Can the employer *legally ask employees* who report feeling ill or who call in sick whether they are experiencing symptoms consistent with COVID-19?

YES



EEOC/CDC Guidance – Putting It All Together

- **Have a plan**
 - Compare to emergency or strike plan
- **Make sure the plan is consistent with EEOC guidelines and CDC recommendations**
- **Use CDC Risk Assessment as a guide in decision making**



Thank You and Good Luck!

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