



COVID-19 Update: ADA and Other EEO Laws

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Preventive Law for Employers

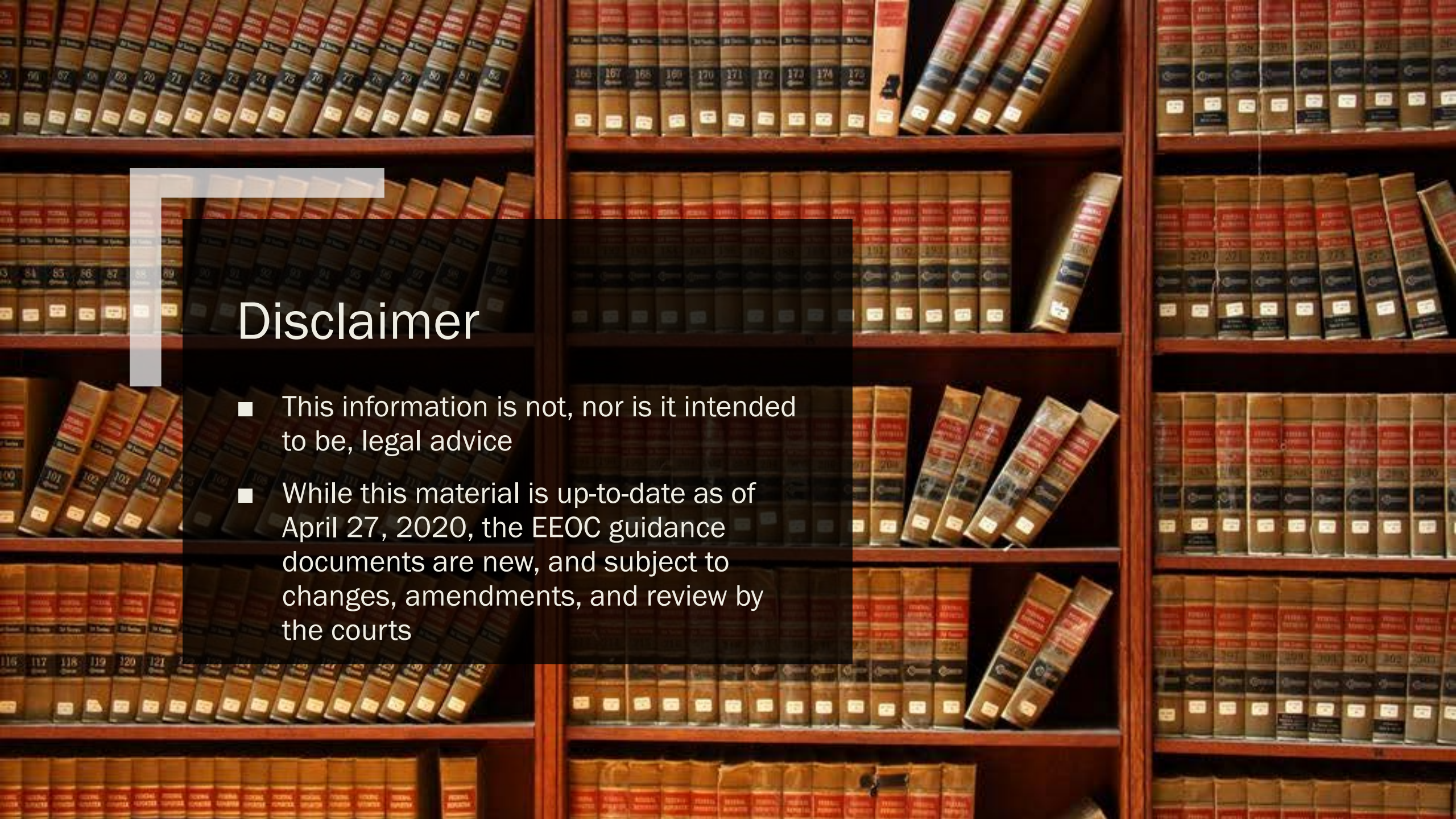
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- Ann F. Kiernan, Esq. focuses on preventive law for employers, including review of corporate policies, advice on compliance with state and federal requirements, counseling on disciplinary and/or termination decisions, and training on managing within the law, corporate compliance, and preventing harassment.
- This information is not, nor is it intended to be, legal advice.



Disclaimer

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- While this material is up-to-date as of April 27, 2020, the EEOC guidance documents are new, and subject to changes, amendments, and review by the courts

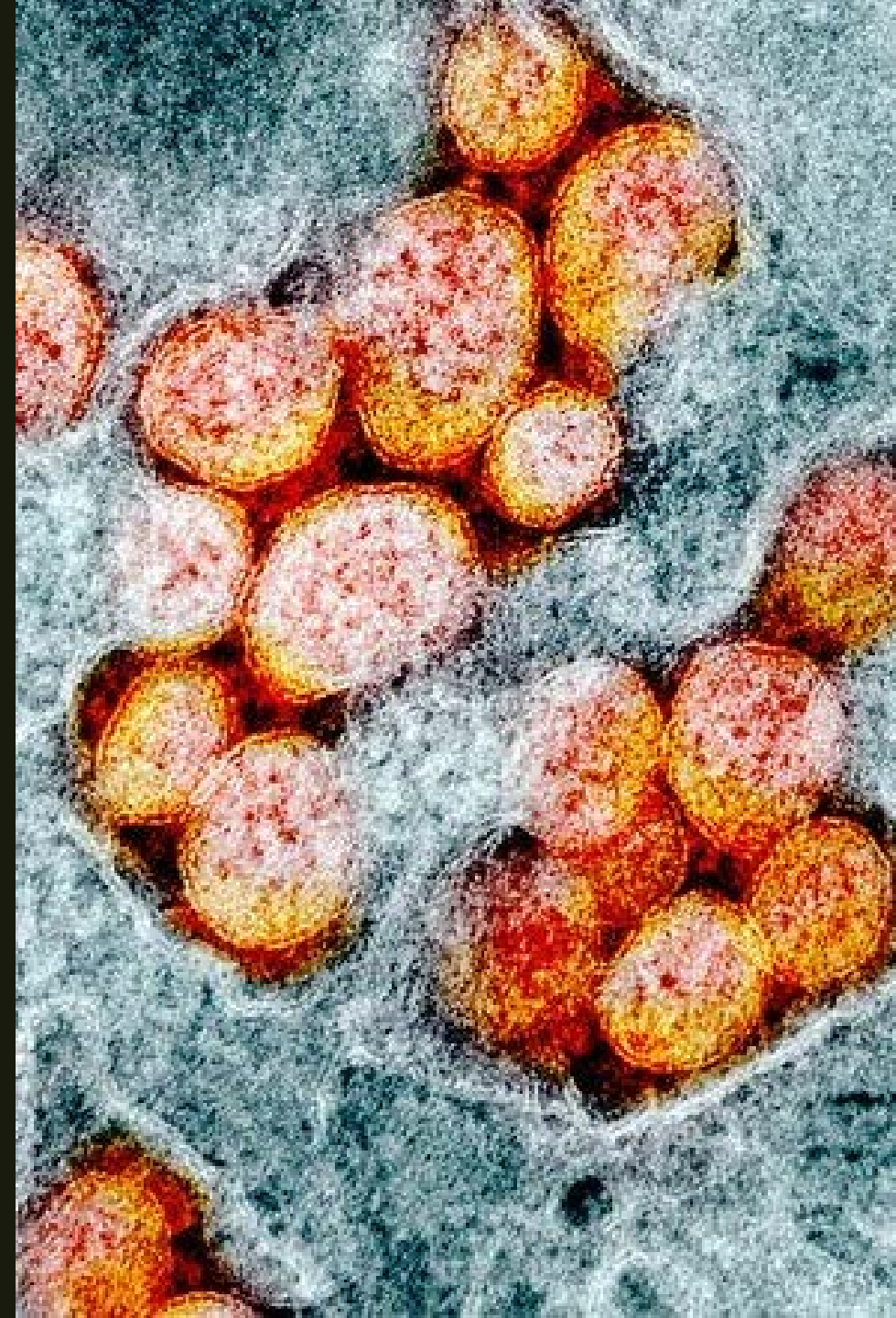


COVID-19 AND
THE ADA



COVID-19

- COVID-19 is a respiratory disease caused by SARS-CoV-2, a novel coronavirus
- It is spread from person to person through small droplets from the nose or mouth when an infected person coughs or exhales
- Other people then catch COVID-19 by breathing in the droplets or by touching objects or surfaces with droplets, then touching their eyes, nose or mouth





**World Health
Organization**

WHO Declares COVID-19 A Pandemic

- Pandemic: A global epidemic with self-sustaining lines of infection in multiple countries and continents
- WHO announced on 3/11/2020 that the world is in Pandemic Phase 6 (the highest phase) indicates that there is sustained human-to-human transmission worldwide

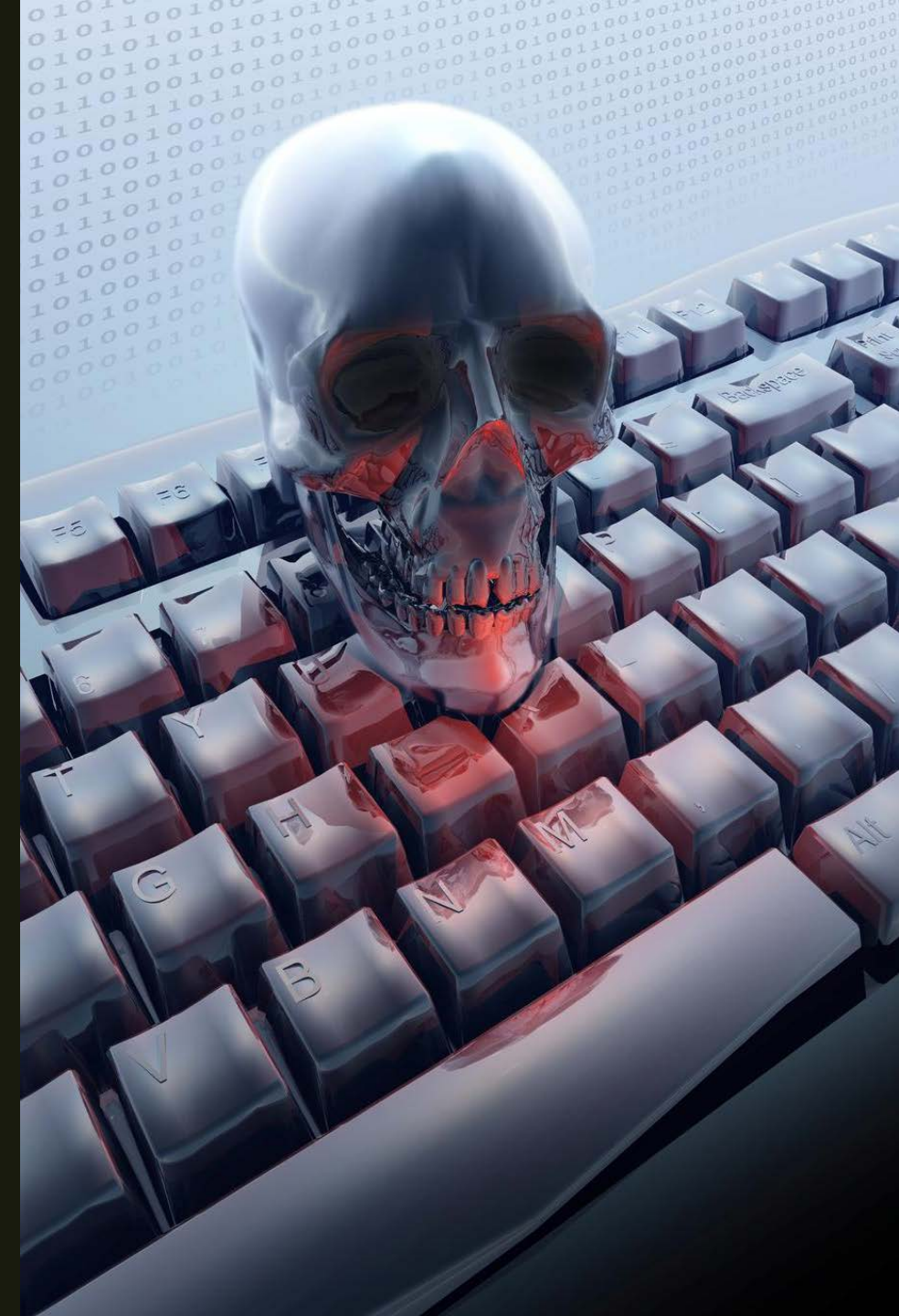


Is COVID-19 A Disability?

- 3/27/2020 EEOC Webinar:
- “This is a very new virus and while medical experts are learning more about it, there is still much that is unknown.”
- “Therefore, it is unclear at this time whether COVID-19 is or could be a disability under the ADA.”

COVID-19 is a Direct Threat under the ADA

- EEOC Pandemic Guidance:
- A significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time.



What Can You Ask Employees?

Are you experiencing symptoms of COVID-19 (fever, cough, shortness of breath, loss of taste or smell)?

- *Keep confidential, BUT you should inform employees of their possible exposure to the virus*
- *You can send symptomatic employees home*
- *Contact your local health department if one of your employees has been diagnosed with COVID-19*

Have you traveled out of the US?

- *If “yes,” you can send employee home to self-quarantine for 14 days*

Can You Take Employees' Temperatures?

Generally, measuring an employee's body temperature is a medical examination

However, 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

Employers may maintain a log, but all information must be kept confidential

Employers should be aware that some people with COVID-19 do not have a fever or any other symptoms

Can You Test Employees for COVID-19?

- Yes. EEOC says that an employer may choose to administer COVID-19 testing to employees before they enter the workplace
- Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable.
 - *Employers can review guidance from the FDA, CDC, or other public health authorities about what may or may not be considered safe and accurate testing*
 - *Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test.*

More on Testing

- Remember that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.



- Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

What if an Employee Refuses to Cooperate?

- Employee who refuse testing or temperature checks or to answer COVID-19 questions can be barred from the workplace
- If an employee refuses to cooperate, EEOC recommends that the employer provide reassurance that disclosure of personal medical information in the workplace is prohibited by the ADA



Personal Protective Gear

- Employees can be required to wear protective gear (masks, gloves, gowns) and observe infection control practices (regular hand washing, disinfection, and social distancing protocols)
- If an employee with a disability needs a related reasonable accommodation(e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs)employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship

COVID-19 Confidentiality

Rather than say “someone in the office has the coronavirus”, can employers tell the workforce the name of the employee, so they can better protect themselves?

No! The ADA does not permit such a broad disclosure of the medical condition of a specific employee. The CDC specifically advises employers to maintain confidentiality of people with confirmed COVID-19

EEOC acknowledged during the webinar that, particularly for small employers, coworkers might be able to figure out who the employee is. Employers are still prohibited from confirming or revealing the employee’s identity

Telework and Reasonable Accommodations

- If an employer allows or requires work from home during the COVID-19 crisis, does this mean telework must always be as a reasonable accommodation after the crisis is over?
- EEOC says no.
- “To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request – after the COVID-19 crisis has ended – to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.”



Telework and Reasonable Accommodation

- “The fact that an employer temporarily excused performance of one or more essential functions during the COVID-19 crisis to enable employees to telework for the purpose of protecting their safety, or otherwise chose to permit telework, does not mean that the employer has permanently changed a job's essential functions, or that telework is a feasible accommodation, or that it does not pose an undue hardship.”



OTHER EEO LAWS

EEOC Enforcement

- EEOC also enforces:
 - *Title VII of the Civil Rights Act (prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy)*
 - *Age Discrimination in Employment Act (prohibits discrimination based on age 40 or older)*
 - *Genetic Information Nondiscrimination Act*



COVID-19 and Title VII

- Fear of the COVID-19 pandemic has led to discrimination and harassment against people because of
 - *National origin*
 - *Race*
 - *Age*
 - *Pregnancy*
 - *Genetic information (family medical history)*



EEOC Q&A

- May an employer exclude Chinese or Italian employees from the workplace due to concerns about possible transmission of COVID-19?
- No. A pandemic is not an excuse for discrimination based on national origin
- However, if an employee returns from international travel, employers may follow the advice of the CDC and require the employee to stay home for 14 days after returning
 - *3/21/20 Pandemic Preparedness In The Workplace And The Americans With Disabilities Act*

- May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?
- No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer
- However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date
 - *4/17/20 Technical Assistance Questions and Answers C.5*

EEOC Q&A

EEOC Q&A

- Do the EEO laws require an employer to grant a request to telework from an employee who is 65 years old or older because the CDC says older people are more likely to experience severe symptoms if they get COVID-19?
- No. The Age Discrimination in Employment Act does not have an accommodation provision like the ADA
- However, if an employer is allowing other comparable workers to work from home, it should make sure it is not treating workers differently based on their age
- *EEOC Webinar 3/27/20*



EEOC Q&A

- Since pregnant women are at higher risk from COVID-19, does an employer have to grant a pregnant worker's request to work from home?
- Maybe. A normal pregnancy is not a disability requiring reasonable accommodation
- However, certain pregnancy-related impairments may create disabilities
- If an employer is allowing other comparable workers to telework, it should make sure it is not treating pregnant workers differently
 - *EEOC Webinar 3/27/20*

EEOC Q&A

- **May an employer ask employees whether they have family members who have COVID-19 or its symptoms?**
- EEOC says that a better question from a public health and workforce management perspective is whether a worker has had contact with anyone diagnosed with COVID-19, or who may have its symptoms
- GINA prohibits employers from asking employees medical questions about family members.
 - *EEOC Webinar 3/27/20*

Resources

- All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus
- Job Accommodation Network COVID-19 Accommodation and Compliance Resources:
<https://askjan.org/topics/COVID-19.cfm>

