

MPCC Roundtable
February 23, 2021 TPO Update



*These updates are a small sample of important topics and information we provide and discuss with our members in helping manage to FFCRA and everything HR. For questions about this week's topic or information about TPO Membership and the products and services we provide, please contact Michaelle Stanford, PHR-ca, M.A. at michaelles@tpohr.com. **TPO Note:** As a reminder, these updates are for informational purposes only. For unique situations to your business, consult with your Human Resource provider or employment expert.*

**ITS 2021...
COVID-19: A CONTINUUM OF TESTING &
VACCINATION CONSIDERATIONS +
EXPANDED CALIFORNIA FAMILY RIGHTS ACT (CFRA) TO 5+ EMPLOYERS**

Although this update provides important information regarding COVID-19 Testing and Vaccinations, Employers are advised to visit the US Equal Employment Opportunity Commission's website regarding management of employee situations concerning COVID-19, **"What You Should Know Above Covid-19 and the ADA, the Rehabilitation Act and Other EEO Laws"**. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#exclude>

COVID-19 Testing & Exclusion From Work

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? (9/8/20; adapted from 3/27/20 Webinar Question 1)

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19 and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a [current list of symptoms](#).

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? (9/8/20; adapted from 3/27/20 Webinar Question 2)

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation

with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

If you become aware of an employee who has become sick or exposed to COVID-19 the Department of Labor (DOL) advises to offer testing during working hours at no cost to the employee.
<https://www.dir.ca.gov/covid/employer/covid-symptoms.html>

COVID-19 Vaccinations

K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? (12/16/20)

The ADA allows an employer to have a [qualification standard](#) that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to 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.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

D.1. If a job may only be performed at the workplace, are there [reasonable accommodations](#) for individuals with disabilities, absent [undue hardship](#), that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)

There may be reasonable accommodations that [could offer protection to an individual whose disability puts him at greater risk from COVID-19](#) and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per [CDC guidance](#) or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different

position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

TPO Note: Under ADA, an employer can have a workplace policy that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." If a vaccination requirement screens out a worker with a disability, however, the employer must show that unvaccinated employees would pose a "direct threat" due to 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." EEOC states employers should evaluate four factors to determine whether a direct threat exists:

- The duration of the risk.
- The nature and severity of the potential harm.
- The likelihood that the potential harm will occur.
- The imminence of the potential harm.

As a reminder, employers who require hourly employees to get tested or get vaccinated, should do so during work hours and pay them for their time and associated cost. Keep in mind, restrictions on when individuals are able to obtain a vaccine as well as available supplies also pose challenges in establishing mandatory requirements.

Rather than implementing mandates that could lead to difficult decisions, employers may wish to focus on steps they can take to encourage and incentivize employees to get vaccinated. For example:

- Develop education campaigns.
- Direct employees to informational resources educating them on the effects and possible side effects.
- Cover any costs associated with getting the vaccine.
- Provide paid time off.

If the employer decides to mandate vaccinations, it is important that they have a written policy which includes dealing with general objections that do not require reasonable accommodation.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#exclude>

EXPANDED CALIFORNIA FAMILY RIGHTS ACT (CFRA) TO 5+ EMPLOYERS

Effective January 1, 2021, the Expanded California Family Rights Act (CFRA) applies to all employers meaning big changes for employers 5+, 20-49 and 50+! Employer Handbook and leave policies must be updated to provide required unpaid leave. Specifically, CFRA provides up to 12 weeks unpaid protect leave:

- Care for one's own serious health condition.
- Care for the serious health condition of a family member.
- Bond with a child; or,
- Exigencies created by military service.

MPCC and TPO are partnering in scheduling a webinar event in March for MPCC Members on this important topic. Please watch for coming details!