

## Coronavirus and the Workplace

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### Part II: Non-discrimination

March 3, 2020

The increasing fear around COVID-19, which was first detected in China, can lead to stigmatizing Chinese or other Asian individuals. However, according to the CDC, just being Chinese or Asian does not increase the chance of contracting or spreading COVID-19. Treating an employee adversely because of his or her race or national origin solely out of fear of pandemic virus implicates the non-discrimination obligation imposed on employers by Title VII of the Civil Rights Act (Title VII) and the Elliott-Larsen Civil Rights Act (ELCRA.)

Title VII prohibits employment discrimination on the basis of race and national origin, for example, discrimination against Chinese or individuals of Asian descent. The duty to not discriminate is also imposed on Michigan employers by the ELCRA.

Employers should take measures to ensure a workplace free of discrimination against and stigma toward certain protected classes, such as:

- Maintaining privacy and confidentiality for those seeking health care and those suspected of COVID-19 infection.
- Providing training for employees to communicate the fact that viruses do not target specific racial or ethnic groups and how COVID-19 actually spread.
- Reminding employees of and strictly enforcing workplace policies that prohibit discrimination and harassment.
- Encouraging employees to speak out against or report negative, bullying, and stereotyping behaviors.

### Disability

Title I of the Americans with Disabilities Act (ADA), applicable to employers with 15 or more employees, protects qualified employees with disabilities. While temporary, non-chronic impairments of short duration and little or no long term or permanent impact, such as influenza, are generally not disabilities recognized by the ADA, the complete clinical picture of COVID-19 has not been fully understood. COVID-19 and the illnesses caused by it may potentially constitute an actual disability under the law. Additionally, because of the mass fear around COVID-19, there is a risk that one carrying the virus might be deemed as having an impairment, thereby making a case for a "regarded as" disability claim. Ultimately, employers should be aware of the obligations imposed by the ADA in preparing and responding to a potential pandemic.

In response to the 2009 H1N1 pandemic, the EEOC issued a technical assistance document on Pandemic Preparedness in the Workplace and the American with Disabilities Act. This guidance is instructive for employers preparing for and responding to the potential COVID-19 pandemic in a manner that complies with the ADA. As the EEOC guidance notes, the ADA is relevant to pandemic preparation and response in the following ways:

1. The ADA regulates employers' inquiries and examinations into employees' disabilities, physical or mental impairments, or health.

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2. The ADA prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat.
3. The ADA requires employers to make reasonable accommodations for individuals with disabilities.

Following are some examples of what employers can and cannot do in preparing for and responding to an influenza pandemic such as COVID-19:

- Before a pandemic:
  - Employers may not ask health-related questions to anticipate potential absenteeism.
  - Employers may make inquiries that are not disability-related (e.g., if public transportation was no longer available because of a pandemic, would the employee be able to get to work).
  - Employers may also provide employees with a survey that lists all the reasons, both health and non-health related, that would cause the employees to be absent from work in a pandemic, and ask the employees to answer a single “Yes” or “No” if they could not be able to come to work for any of those reasons.
- During a pandemic:
  - Employers may send employees home if they display influenza-like symptoms.
  - Employers may ask employees who report feeling ill at work or who call in sick if they are experiencing influenza-like symptoms.
  - Employers may ask questions about exposure to pandemic influenza while traveling.
  - Employers may not ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications.
  - Employers may encourage employees to telework as an infection-control strategy.
  - Employers may require employees to adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal.
  - Employers may require employees to wear personal protective equipment.
  - An employer may not discontinue providing reasonable accommodations with employees with known disabilities unrelated to pandemic, barring undue hardship.
- After a pandemic: Employers may require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work.

Employers should be reminded that the ADA always requires employers to keep employees' medical and health-related information and records confidential and separate from the employees' personnel files. Employees' symptoms of or diagnosis with the pandemic virus cannot be shared with coworkers or customers.

Michigan employers with at least one employee must also comply with the Michigan Persons with Disabilities and Civil Rights Act (PWDCRA). The obligations imposed on employers by the PWDCRA are similar to those imposed by the ADA.

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This is the second of a four-part series. Please find parts 1, 3 and 4 here:

**Part I: Safety**

**Part III: Leave**

**Part IV: Pay**

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*