

EEOC & DFEH COVID-19 Guidelines

Updated June 11, 2020

COVID-19 Resources for Employers

Accommodations: <https://askjan.org/topics/COVID-19.cfm>

General guidance re: COVID-19: www.eeoc.gov/coronavirus;
<https://www.dfeh.ca.gov/covid-19-resources-and-guidance/>;
<https://www.labor.ca.gov/coronavirus2019/>

Determining Infectious Employees: Disability Related Inquiries and Medical Exams

Common Issues	EEOC	DFEH
Can employers take the temperature of employees physically entering the workspace?	<p>Yes, the employer can also ask questions about COVID-19 associated symptoms. The EEOC recommends following CDC guidelines. The CDC recommends screening workers for symptoms and administering temperature tests before allowing them to enter the workplace.</p> <p>(EEOC. (2020). <i>The COVID-19 Pandemic and Antidiscrimination Laws</i>. [Webinar] https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar; CDC. (2020). Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19). https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html)</p>	<p>Yes, the employer can also ask questions about COVID-19 associated symptoms. The DFEH recommends following CDC guidelines. The CDC recommends screening workers for symptoms and administering temperature tests before allowing them to enter the workplace.</p> <p>(DFEH. <i>Employment Information on COVID-19 FAQ</i>. https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf) (CDC COVID-19 Guidelines)</p>
Can employers take the temperature of telecommuting employees or ask them about COVID-19 associated symptoms?	<p>No, employers can only take these measures towards employees physically entering a workplace since a physically present employee with coronavirus presents a direct threat to co-workers while a telecommuting employee does not.</p> <p>(EEOC COVID-19 Webinar, Question 1)</p>	<p>No, employers can only take these measures towards employees physically entering a workplace since a physically present employee with coronavirus presents a direct threat to co-workers while a telecommuting employee does not.</p> <p>(DFEH COVID-19 FAQ)</p>

Can an employer bar an employee from entering a workplace for refusing to answer questions about COVID-19 associated symptoms?	Yes , employers should follow CDC guidelines and send any employees with COVID-19 associated symptoms home. (EEOC. (2020). <i>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws</i> . https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws) (CDC COVID-19 Guidelines)	Yes , employers should follow CDC guidelines and send any employees with COVID-19 associated symptoms home. (DFEH COVID-19 FAQ) (CDC COVID-19 Guidelines)
Can an employer ask only one employee, as opposed to asking all employees, about COVID-19 associated symptoms or take their temperature?	Yes , as long as the questions are related to COVID-19 associated symptoms and the employer has a reasonable belief based on objective evidence that the employee might have COVID. (EEOC COVID-19 Webinar, Question 3)	The DFEH does not specifically address this issue.
Can an employer ask an employee physically coming into the workplace if they have family members with COVID-19 associated symptoms?	No , the Genetic Information Nondiscrimination Act of 2008 (GINA) forbids employers asking medical questions about family members of employees. The EEOC recommends asking more general questions such as “have you had contact with any people with COVID-19 associated symptoms?” (EEOC COVID-19 Webinar, Question 4)	The DFEH does not specifically address this issue.
May an employer require its employees to wear personal protective equipment (PPE) during the pandemic?	Yes , employers may require employees to wear PPE and observe infection control practices such as social distancing. (EEOC, What You Should Know About COVID-19, G.2.)	Yes , employers may require employees to wear PPE and observe infection control practices such as social distancing. (DFEH COVID-19 FAQ)
May an employer administer a test to detect the presence of COVID-19 before permitting employees to enter the workplace?	Yes , an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. (EEOC, What You Should Know About COVID-19, A.6.)	The DFEH does not specifically address this issue.

Confidentiality of Medical Information

Common Issues	EEOC	DFEH
If an employer learns that an employee has COVID-19 or associated symptoms, can they report them to public health authorities?	Yes , but the EEOC recommends avoiding specific identifying information, i.e. names, unless specifically requested. Employers should consider creating a list of people who came into contact w/ infected employee without giving the name of the employee. (EEOC COVID-19 Webinar, Question 5)	Yes , but the DFEH recommends avoiding specific identifying information, i.e. names, unless specifically requested. Employers should consider creating a list of people who came into contact w/ infected employee without giving the name of the employee. (DFEH COVID-19 FAQ)
Can an employer inform their employees that another employee has contracted COVID-19 or has associated symptoms?	Yes , but employers should NOT reveal the name of the infected employee to other employees. (EEOC COVID-19 Webinar, Question 5)	Yes , but employers should NOT reveal the name of the infected employee to other employees. (DFEH COVID-19 FAQ)
Can an employer tell their employees that an infected employee is going to begin teleworking?	Yes , but employers should NOT disclose that the employee is teleworking because of their infection status. (EEOC COVID-19 Webinar, Question 7)	Yes , but employers should NOT disclose that the employee is teleworking because of their infection status. (DFEH COVID-19 FAQ)
Can an employer store information it obtains related to COVID-19 (like the results of temperature tests) in an employees already existing personnel file?	No , employers must store medical information about employees separately from their personnel file to limit access to confidential information. Employers can store COVID-19 related information in an already existing medical file. (EEOC, What You Should Know About COVID-19, B.1.)	No , employers must store medical information about employees separately from their personnel file to limit access to confidential information. Employers can store COVID-19 related information in an already existing medical file. (DFEH COVID-19 FAQ)

Hiring and Onboarding

Common Issues	EEOC	DFEH
If an employer is hiring, may it screen applicants for symptoms of COVID-19?	Yes , employers may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. (EEOC, What You Should Know About COVID-19, C.1.)	The DFEH does not specifically address this issue.
May an employer delay the start date of an applicant who has COVID-19 or associated symptoms?	Yes , employers should follow CDC guidelines and prevent any individual with COVID-19 or associated symptoms from entering the workplace. (EEOC, What You Should Know About COVID-19, C.3.) (CDC COVID-19 Guidelines)	Yes , employers should follow CDC guidelines and prevent any individual with COVID-19 or associated symptoms from entering the workplace. (DFEH COVID-19 FAQ) (CDC COVID-19 Guidelines)
May an employer withdraw a job offer if the individual has COVID-19 or associated symptoms?	Yes , if an employer requires the employee to start working immediately and the employee cannot safely enter the workplace, then the employer may withdraw the job offer. (EEOC, What You Should Know About COVID-19, C.4.)	The DFEH does not specifically address this issue.
May an employer postpone the start date or withdraw a job offer because an individual is 65 years or older, pregnant, or falls into another group the CDC has determined to be at high risk?	No , the fact that the individual is a member of a high risk group does not unilaterally justify postponing the start date or withdrawing the job offer. An employer can allow these individuals to start remotely. (EEOC, What You Should Know About COVID-19, C.5.)	The DFEH does not specifically address this issue.

Reasonable Accommodations

Common Issues	EEOC	DFEH
During a pandemic, must an employer continue to provide reasonable accommodations for employees with disabilities that are unrelated to the pandemic?	Yes , an employer's responsibilities to individuals with disabilities continue during a pandemic even if the disability is unrelated to COVID-19. (EEOC COVID-19 Webinar, Introduction)	Yes , an employer's responsibilities to individuals with disabilities continue during a pandemic even if the disability is unrelated to COVID-19. (DFEH COVID-19 FAQ)
Is an employer required to grant a request to telework from an older, and therefore more at risk, employee?	No , there is no requirement to grant teleworking requests or other accommodations for employees who are at greater risk according to the CDC. The EEOC recommends that employers avoid differential treatment. (EEOC COVID-19 Webinar)	The DFEH does not specifically address this issue.
Is an employer required to grant telework leave for pregnant employees?	No , the employer should treat pregnant employees the same as similarly situated employees. Pregnancy is not a disability under the ADA. (EEOC COVID-19 Webinar, Question 14)	The DFEH does not specifically address this issue.
Is COVID-19 considered a disability under the ADA?	Unclear at this time . Whether or not a COVID-19 related illness is a disability is a fact-based determination. Disability is defined by the ADA as "a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment." (EEOC COVID-19 Webinar, Question 16)	Unclear at this time . Whether or not a COVID-19 related illness is a disability is a fact-based determination. Disability is defined by the ADA as "a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment." (DFEH COVID-19 FAQ)
What is considered a reasonable accommodation for an employee who has at risk family members at home?	Only the employee gets accommodations for their own disability . Employers are not required to make accommodations for employees family members. (EEOC COVID-19 Webinar, Question 18)	The DFEH does not specifically address this issue.

If an employee requests medical leave because of COVID-19, can an employer ask for documentation and what kind of certification from a health care professional is appropriate?	Yes , employers may ask for medical documentation to determine whether the employer has a disability as defined by the ADA. The EEOC recommends employers to be flexible with documentation due to the difficulty employees' face getting medical services during the pandemic. (EEOC COVID-19 Webinar, Question 17)	Yes , employers may ask for medical documentation to determine whether the employer has a disability as defined by the ADA. The DFEH recommends employers to be flexible with documentation due to the difficulty employees' face getting medical services during the pandemic. (DFEH COVID-19 FAQ)
Are employees who are not eligible for FMLA or CFRA leave still entitled to accommodation if they cannot come to work because of COVID-19 related illness?	Unclear at this time , COVID-19 has not been determined as a disability or not by the EEOC. Whether or not a COVID-19 related illness is a disability is a fact-based determination. If it is considered a disability, employers (of 5 or more employees) must provide reasonable accommodations such as telework unless it imposes an undue hardship on the employer. (EEOC, What You Should Know About COVID-19, D.)	Unclear at this time , COVID-19 has not been determined as a disability or not by the EEOC or DFEH. Whether or not a COVID-19 related illness is a disability is a fact-based determination. If it is considered a disability, employers (of 5 or more employees) must provide reasonable accommodations such as telework unless it imposes an undue hardship on the employer. (DFEH COVID-19 FAQ)
Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?	Yes , employers do not have to provide a particular accommodation if it poses an undue hardship during the pandemic, even if the accommodation wouldn't have posed an undue hardship prior to the pandemic. (EEOC, What You Should Know About COVID-19, D.1.)	Yes , employers do not have to provide a particular accommodation if it poses an undue hardship during the pandemic, even if the accommodation wouldn't have posed an undue hardship prior to the pandemic. (DFEH COVID-19 FAQ)
Do the ADA and the Rehabilitation Act apply to employees or applicants who are classified as "essential workers" by the CDC?	Yes , these CDC designations do not eliminate coverage under the ADA, the Rehabilitation Act, or any other equal employment opportunity law. (EEOC, What You Should Know About COVID-19, D.12.)	The DFEH does not specifically address this issue.

Pandemic-Related Harassment and Discrimination Due to National Origin, Race, or Other Protected Characteristics

Common Issues	EEOC	DFEH
Can an employer lay off/furlough a pregnant employee with no COVID-19 associated symptoms because they are at higher risk?	No , employers must treat pregnant employees the same as similarly situated employees. (EEOC COVID-19 Webinar, Question 14)	The DFEH does not specifically address this issue.
Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace?	Yes , employers should remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. (EEOC, What You Should Know About COVID-19, E.2.)	Yes , employer should remind all employees that it is unlawful under FEHA and other California anti-discrimination laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, gender, gender identity/expression, marital status, veteran status, religion, age (40 or over), disability, or genetic information. (DFEH COVID-19 FAQ)
Can an employer exclude employee aged 65 or older without symptoms because they are at higher risk according to the CDC?	No , taking an adverse employment action because of an employee's age is in violation of the Age Discrimination in Employment Act. (EEOC COVID-19 Webinar, Question 11)	No , taking an adverse employment action because of an employee's age is in violation of the Fair Employment and Housing Act (FEHA). (DFEH COVID-19 FAQ)
If an employer learns that a teleworking employee is sending harassing emails to another teleworking employee does the employer have a legal duty to intervene?	Yes , employers have a legal obligation to stop harassment even if the harassment isn't occurring in the physical workplace. Employers should immediately review any allegations of harassment and take the appropriate action to ensure the harassment stops. (EEOC, What You Should Know About COVID-19, E.4.)	Yes , employers have a legal obligation to stop harassment even if the harassment isn't occurring in the physical workplace. Employers should immediately review any allegations of harassment and take the appropriate action to ensure the harassment stops. (DFEH COVID-19 FAQ)

Return to Work

Common Issues	EEOC	DFEH
Can an employer require a doctor's note certifying a previously infected employees' fitness for duty before they can return to work?	Yes , but the EEOC advises that employers should be flexible with these requirements since doctor's offices are often extremely busy or closed. The CDC recommends that employers should not require a COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. (EEOC, What You Should Know About COVID-19, A.5.) (CDC COVID-19 Guidelines)	Yes , but the EEOC advises that employers should be flexible with these requirements since doctor's offices are often extremely busy or closed. The CDC recommends that employers should not require a COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work. (DFEH COVID-19 FAQ) (CDC COVID-19 Guidelines)
Should an employer consider an employee's request for an alternative method of screening due to a medical condition as a request for a reasonable accommodation?	Yes , employers are allowed to screen workers for COVID-19 associated symptoms before entering the workplace but an employee's request for an alternative method of screening due to a medical condition should be considered a request for a reasonable accommodation. (EEOC, What You Should Know About COVID-19, G.7.)	The DFEH does not specifically address this issue.

COVID-19 Do's and Don'ts:

A General Guide on What Actions an Employer Should Take During a Pandemic

KEY

BOLD = EEOC & DFEH recommendation

UNDERLINED = EEOC recommendation

Determining Infectious Employees: Disability Related Inquiries and Medical Exams

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> Send employees home if they display COVID-19 symptoms Encourage employees to telework from home if possible Follow the most recent guidelines from state, local, and federal public health authorities about COVID-19 associated symptoms <p>Source: EEOC. (2020). <i>The COVID-19 Pandemic and Antidiscrimination Laws</i>. [Webinar] https://www.youtube.com/watch?v=X50G7l41NKg; DFEH. <i>Employment Information on COVID-19 FAQ</i>. https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf; EEOC. (2020). <i>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws</i>. https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws</p>	<ul style="list-style-type: none"> Disclose the identity of employees who are exhibiting symptoms or have contracted the coronavirus UNLESS specifically asked to by public health authorities <u>Ask questions about COVID-19 associated symptoms or administer temperature tests to telecommuting employees</u> <u>Ask employees questions about symptoms NOT associated with COVID-19</u> <p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ)</p>	<ul style="list-style-type: none"> Taking the temperature of employees before they physically enter the workplace Barring an employee entry to the workplace if they refuse to answer questions about COVID-19 associated symptoms Asking employees entering workplace if they have come into contact with anyone experiencing COVID-19 associated symptoms <p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

Confidentiality of Medical Information

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> Keep information about employee's symptoms confidential Inform employees in a workplace when another employee contracts COVID-19 or exhibits associated symptoms <u>Keep information about employee's symptoms and medical exams in a medical file separate from the employee's personnel file</u> 	<ul style="list-style-type: none"> Give the name of any employee who exhibits COVID-19 associated symptoms to other employees <u>Tell other employees that an employee is starting to telecommute because of exhibiting COVID-19 associated symptoms</u> <u>Disclose the identity of employees who are exhibiting symptoms or have contracted the coronavirus UNLESS specifically asked to by public health authorities</u> <u>Store information from medical tests and employee reports of COVID-19 associated symptoms in the employees personnel file</u> 	<ul style="list-style-type: none"> Reporting any employees with COVID-19 associated symptoms to public health authorities <u>Ask employees entering workplace if they have come into contact with anyone experiencing COVID-19 associated symptoms instead of asking them if any of their family member's have exhibited symptoms</u> <u>Providing a list of who an infected employee came into contact with recently instead of disclosing their identity when reporting to public health authorities</u>
<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

Hiring and Onboarding

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> Prevent a newly hired employee from entering the workplace if they exhibit COVID-19 associated symptoms 	<ul style="list-style-type: none"> <u>Treat applicants and employees in the same type of job differently when screening for COVID-19 associated symptoms.</u> <u>Postpone the start date or withdraw a job offer because an applicant is 65 years or older, pregnant, or a member of a group identified as high risk by the CDC</u> 	<ul style="list-style-type: none"> Discussing temporary teleworking arrangements with applicants who exhibit COVID-19 associated symptoms and need to start working immediately <u>Screening applicants for symptoms associated with COVID-19 after making a conditional job offer</u> <u>Taking an applicant's temperature as part of a post-offer, pre-employment medical exam</u> <u>Withdrawing a job offer or postponing the start date for applicants that exhibit COVID-19 associated symptoms and need to start working immediately</u>
<p>Source: (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

Reasonable Accommodations

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> Continue to provide reasonable accommodations for disabled employees during the pandemic Provide any accommodation to a disabled employee that does not impose an undue hardship Make fact-specific determinations of whether an employee's COVID-19 related illness qualifies as a disability <u>Engage in the interactive process if an employee requests accommodations due to a disability</u> <u>Determine if circumstances stemming from the pandemic affect the undue hardship that is imposed due to a requested accommodation</u> 	<ul style="list-style-type: none"> <u>Give differential treatment to pregnant or 65 years or older employees when making accommodation determinations</u> <u>Exclude employees designated by the CDC as "essential workers" from reasonable accommodations</u> <u>Stop engaging in the interactive process when an employee tells you they have a disability during the pandemic</u> 	<ul style="list-style-type: none"> Being flexible with medical documentation requirements for disability accommodations Granting temporary accommodations while employees obtain medical documentation of their disability <u>Asking employees if they will need reasonable accommodations in the future when they are permitted to return to the work place</u> <u>Whether an employee's request for an alternative method of screening for COVID-19 associated symptoms before entering the workplace is a reasonable accommodation</u>
<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC COVID-19 Webinar); (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

Pandemic-Related Harassment and Discrimination Due to National Origin, Race, or Other Protected Characteristics

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> • Inform employees that discrimination and harassment based on race, national origin, color, sex, religion, age (40 or older), disability, or genetic information is still unlawful during the pandemic • <u>Advise supervisors of their role in watching for, stopping, and reporting harassment or other discrimination they witness or become aware of</u> • <u>Immediately review any allegations of harassment or discrimination and take appropriate action</u> 	<ul style="list-style-type: none"> • Treat harassment by teleworking employees any differently than harassment taking place in a physical workplace • <u>Lay off or furlough employees who are member of a protected class solely because they are more at risk during the pandemic</u> • <u>Give differential treatment to pregnant employees because they are considered at high risk according to the CDC</u> 	<ul style="list-style-type: none"> • Implementing educational training for employees on harassment and discrimination during a pandemic
<p>Source: (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC, What You Should Know About COVID-19); (EEOC COVID-19 Webinar)</p>	<p>Source: (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

Return to Work

DO...	DON'T...	CONSIDER...
<ul style="list-style-type: none"> Consider <u>reasonable accommodations for returning employees who are required to wear PPE due to disability or religious belief</u> Consult resources such as (https://askjan.org/topics/COVID-19.cfm) when <u>discussing or evaluating accommodation requests</u> 	<ul style="list-style-type: none"> Refuse to provide <u>reasonable religious and disability related accommodations to returning employees required to wear PPE</u> 	<ul style="list-style-type: none"> Requiring medical documentation from returning employees certifying that they no longer test positive for COVID-19 or exhibit any associated symptoms. Requiring <u>returning employees to wear personal protective gear (PPE) and engage in infection control practices</u>
<p>Source: (EEOC, What You Should Know About COVID-19)</p>	<p>Source: (EEOC, What You Should Know About COVID-19); (EEOC COVID-19 Webinar)</p>	<p>Source: (DFEH COVID-19 FAQ); (EEOC, What You Should Know About COVID-19)</p>

IMPORTANT REMINDER:

The ADA and other EEO laws still apply during the pandemic BUT do not hinder employers from following state, local, and federal public health authorities' guidelines!

CDC Guidelines: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Ca/OSHA Guidelines: <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>