



As we enter week 2 of Phase 2, we share some new guidance to support and assist you in your efforts to bring employees back to the workplace and keep them safe. This past week the Equal Employment Opportunity Commission (EEOC) updated its technical assistance guidance regarding the interplay between COVID-19 and the Americans with Disabilities Act (ADA), the Rehabilitation Act, and EEO laws. The guidance addresses reasonable accommodations, COVID-19 related harassment issues, flexible work arrangements and family/caregiver responsibilities. In addition, OSHA issued some FAQs on face coverings in the workplace. We have also outlined DESE's newly released requirements for Emergency Educator Licenses.

***In This Issue:***

<b>Subject</b>	<b>Page</b>
<b>A. Updated Guidance from the EEOC</b>	1
1. Updated Guidance from the EEOC Regarding Reasonable Accommodations, COVID-19 Related Harassment Issues, Flexible Work Arrangements and Family/Caregiver Responsibilities	1
<b>B. OSHA Issues FAQs on Face Coverings in the Workplace</b>	4
<b>C. School Updates</b>	5
1. DESE Outlines Requirements for Newly Available Emergency Educator Licenses	
<b>D. COVID-19 Postings on NMP Website</b>	6

**A. Updated Guidance from the EEOC**

1. Updated Guidance from the EEOC Regarding Reasonable Accommodations, COVID-19 Related Harassment Issues, Flexible Work Arrangements and Family/Caregiver Responsibilities

On June 11, 2020, the Equal Employment Opportunity Commission (EEOC) updated its technical assistance guidance regarding the interplay between COVID-19 and the Americans with Disabilities Act (ADA), the Rehabilitation Act, and EEO laws. The guidance and resulting Q&A addresses several questions submitted to the EEOC by employers and employment counsel. The highlights of the updated guidance can be found below.

***Are employers required to provide an accommodation under the ADA to an employee in order to avoid exposing the employee's family member who may be at higher risk of severe illness from COVID-19?***

No. As stated in the June 8 Advisor and reaffirmed in the latest guidance from the EEOC, the ADA does not require that an employer accommodate an employee without a disability based on the disability or disability related needs of a family member or other individual with whom the

employee is associated. For example, an employee would not be entitled to telework as a reasonable accommodation to protect a family member who has an underlying health condition and is at higher risk of severe illness from COVID-19. The EEOC allows employers to provide flexible working arrangements if they choose, but in its most recent updates the EEOC cautions against engaging in disparate treatment based on protected characteristics when offering such arrangements. Contact your NMP attorney if you are concerned about or have questions about associational discrimination.

***As employees return to work, how should employers handle or invite employees to request flexible work arrangements?***

Employers may make information available in advance to all employees who may need to request an accommodation based on a disability once the employee returns to the workplace. The information should include instructions on who to contact if the employee wishes to request an accommodation. It is not necessary for the employee to have a scheduled date to return to the workplace before requesting an accommodation. Employers may begin the interactive process based on requests received in advance. Employers may also include in the notice all of the medical conditions, as identified by the CDC, that may place employees at higher risk for serious illness from COVID-19 and that the employer will consider requests for accommodations on a case-by-case basis for employees with such conditions.

***What about accommodations for screening employees entering the workplace?***

The EEOC states that employers who receive requests for alternative screening methods from employees entering the worksite due to a medical condition should be treated as accommodation requests in the same manner as any other request for a reasonable accommodation under the ADA. If the requested change is inexpensive and easy to implement, the employer may voluntarily make it available to any employee upon request without proceeding through the interactive process.

Employers may ask the employee for information to establish that the employee's condition is a disability (if not obvious or already known) and to determine what specific limitations may require an accommodation. As is normally done, employers may request medical information to support the request and then determine whether the accommodation can be provided without undue hardship.

***What, if any, considerations exist regarding potential sex discrimination claims when offering flexible working arrangements?***

As stated above, the EEOC reminds employers to take care when offering flexible work arrangements including when based on caregiver/family responsibilities as a result of COVID-19 related school and childcare closures. Employers may allow telework, modified schedules, and other flexible working arrangements provided they do not treat employees differently based on sex or other protected characteristics.

For example, female employees may not be treated more favorable than male employees when providing flexible working arrangements because of gender-based assumptions about caretaking responsibilities.

***What protections exist for employees who are age 65 and older under the federal employment discrimination laws?***

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. As such, the ADEA prohibits employers from involuntarily excluding an individual from the workplace based on their age, even if the employer is acting to protect the employee based on the higher risk of severe illness from COVID-19. The ADEA does not require accommodations based on an employee's age, unlike the disability accommodations under the ADA. The EEOC points out that employers may voluntarily provide accommodations to employees age 65 and older even if it results in younger workers (ages 40-64) being treated less favorably in comparison.

According to prior EEOC and CDC guidance, employees who are age 65 and older are at increased risk of severe illness from COVID-19 and may request reasonable accommodations for this reason. Massachusetts' reopening plans include specific instructions to accommodate employees who are at high risk pursuant to the CDC guidance, which includes individuals 65 years of age and older. Employers cannot make such an accommodation without the employee's consent.

***Can employers involuntarily exclude pregnant employees from the workplace due to COVID-19 related reasons?***

No. Employers may not involuntarily exclude a pregnant employee from the workplace, even when motivated by benevolent reasons such as, concerns for the employee's safety, as disparate treatment based on pregnancy constitutes unlawful sex discrimination under Title VII of the Civil Rights Act.

The updated guidance also states that pregnant employees with pregnancy-related medical conditions may be entitled to accommodations under the ADA, even though pregnancy itself is not considered a disability, and that pregnant employees may be entitled to the same job modifications or flexibility that is afforded to other employees who are similarly unable to work.

***What about allegations of harassment for employees who are teleworking?***

Employers should take the same actions to address harassing behavior as if the employees are present in the workplace. Harassment can occur through emails, calls, video or chat communications. Employers should emphasize and make sure that employees know that the same standards of behavior are expected when working remotely. Additionally, employers should make sure that employees know what the process is for reporting harassment, including any changes made in light of so many employees operating remotely.

## **B. OSHA Issues FAQs on Face Coverings in the Workplace**

On June 10, the Occupational Safety and Health Administration (OSHA) published FAQs addressing the use of face coverings, surgical masks, and respirators in the workplace to educate both employers and employees as employees begin to return to the workplace.

### ***What is the difference between cloth face coverings, surgical masks, and respirators?***

Cloth face coverings may be either commercially produced or improvised (scarves, bandanas, etc.). OSHA emphasizes that cloth coverings are not considered personal protective equipment (PPE) as they will not protect the wearer against airborne transmission of COVID-19 but are intended to contain an individual's potentially infectious respiratory droplets.

Surgical masks are typically considered medical devices, which are cleared by the FDA, used to protect an individual from potentially infectious droplets and are considered PPE when used for that purpose. Where surgical masks are used to prevent the spread of COVID-19 rather than protect employees against potentially infectious respiratory droplets OSHA's PPE standards do not require employers to provide them to their employees.

OSHA explains that respirators are "used to protect employees from inhaling small particles, including airborne transmissible or aerosolized infectious agents," and must be used in accordance with OSHA's Respiratory Protection Standard, found at 29 C.F.R. 1910.134.

### ***Will employers be required to provide cloth face coverings to their employees?***

The OSHA guidance provides that cloth face coverings are not considered PPE to be used for protection against for occupational hazards and as such employers are not required to provide them under OSHA's PPE standards. However, OSHA's General Duty Clause requires each employer to provide a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm. Employers may elect to use face cloth coverings as a means of preventing spread of COVID-19 where the risk cannot be controlled by other safety control measures, including social distancing.

NOTE: the Commonwealth of Massachusetts COVID-19 Mandatory Workplace Safety Measures currently require employers to provide face coverings or masks to employees.

### ***Should workers wear face coverings while at work?***

OSHA generally recommends that employers encourage employees to wear face coverings at work as this measure helps prevent asymptomatic carriers of COVID-19 from transmitting the virus to others. However, the guidance provides employers have the discretion to determine whether to allow employees to wear cloth face coverings in the workplace based on the specific circumstances present at each work site.

The OSHA guidance clarifies that cloth face coverings are not a substitute for social distancing measures and employers may not use face coverings or surgical masks for occupations that require respirators.

The Division of Labor Standards Workplace Specific Safety Standards requires employees to wear face coverings inside office spaces when social distancing of six (6) feet is not possible and may require wearing face coverings and masks in other sectors and industries as well.

NOTE: Employers should consult the Commonwealth of Massachusetts COVID-19 Mandatory Workplace Safety Measures for their industry to ensure compliance with local, industry specific standards and requirements regarding wearing face coverings or masks at work.

### **C. School Updates**

#### **1. DESE Outlines Requirements for Newly Available Emergency Educator Licenses**

The Department of Elementary and Secondary Education (DESE) published additional guidance regarding emergency educator licenses, which were recently created as part of Chapter 92 of the Acts of 2020, signed into law earlier this month by Governor Baker. The emergency licenses are intended to assist teaching candidates who were negatively impacted by the disruptions from the COVID-19 emergency. DESE issued an overview of the minimum requirements for academic, administrator, and vocational emergency licenses, most of which require a bachelor's degree and a showing of "sound moral character." Administrator emergency licenses contain an additional requirement of at least three years' experience in a supervisory, teaching, or administrative position at a school.

The Licensure Office will accept applications for emergency licenses for up to 180 days after the end of the state of emergency declaration, but not beyond June 30, 2021. DESE also issued FAQs regarding the emergency licenses, some of which are highlighted below.

#### ***Is it possible to apply for more than one emergency license?***

Yes, it is possible to apply for multiple emergency licenses provided that the applicant does not currently hold a Temporary, Provisional (Preliminary for Vocational), Initial or Professional License.

#### ***Can educators with an Initial license apply for an emergency license in another subject or grade?***

No. According to DESE, the purpose of the emergency license is to allow individuals who were not already serving as a teacher, administrator, or professional support personnel to obtain appropriate licenses to enter those professions in light of the COVID-19 related disruptions. DESE explains that school districts may seek a waiver for employment for individuals who are teaching out of field.

#### ***Will I be able to get a job with an emergency license?***

Yes. However, DESE clarifies that obtaining an emergency license only makes an individual eligible for employment in the subject area of the emergency license, and does not guarantee an

individual a job in a Massachusetts school. School districts retain the authority to make hiring and placement decisions.

#### **D. COVID-19 Postings on NMP Website**

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website ([www.nmplabor.com](http://www.nmplabor.com)). The following is a list of the new materials added since our last Advisor:

- EEOC Update: The Latest COVID-19 Guidance (June 11, 2020)

If you have any questions or would like to discuss the above in more detail, please contact:

**Leo Peloquin**

lpeloquin@nmplabor.com

**Melissa Murray**

mmurray@nmplabor.com

**Brett Sabbag**

bsabbag@nmplabor.com



<https://nmplabor.com/covid-19-resources/>

**Tim Norris**

tnorris@nmplabor.com

**Philip Collins**

pcollins@nmplabor.com

**Antoine Fares**

afares@nmplabor.com