CONSIDERATIONS RELATED TO COVID-19 UNDER OTHER FEDERAL LAWS: AMERICANS WITH DISABILITIES ACT, FEDERAL DISCRIMINATION LAWS, AND TRADITIONAL FAMILY MEDICAL LEAVE ACT

This summary provides a general overview to assist counties with flagging issues under various federal statutes, including the following:

- Americans with Disabilities Act;
- Title VII;
- Age Discrimination in Employment Act; and
- Family and Medical Leave Act.

AMERICANS WITH DISABILITIES ACT

DISABILITY?

1. Is being infected with COVID-19 considered to be a "disability" under the ADA?

While the ADA generally does not consider a condition such as the seasonal flu as a "disability" based on its nature of being of limited duration, given how serious a COVID-19 infection can be in resulting in disabling complications or effects that substantially limit or impair an individual's major activities, there is a possibility that a COVID-19 infection may be considered a disability depending on how the virus affects the particular individual. The ADA defines a disability as being a "physical or mental impairment that substantially limits one or more major life activities". As a result, whether a COVID-19 infection is considered to be a disability under the ADA will be dependent on the length, severity, and physical effects of a COVID-19 infection on a particular individual, and whether as a result of a COVID-19 infection, the individual suffers a physical or mental impairment that substantially limits one or more major activities.

PERMISSIBLE PUBLIC HEALTH PRECAUTIONS

2. Does the ADA prevent employers from establishing and enforcing guidelines in the workplace to protect against the impact and spread of the virus?

No, not generally. While the ADA rules continue to apply during the COVID-19 pandemic, the ADA does not interfere with, or prevent employers, from following guidelines and suggestions by the CDC and other governments agencies or authorities to reduce the risk of significant harm in the workplace as a result of the current pandemic. Importantly, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons, unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with

reasonable accommodation). The EEOC has published helpful guidance on ADA considerations for employers in the context of COVID-19, entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act". The EEOC has also published an additional "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws" document, which provides EEOC guidance including answers to frequently asked questions in the context of ADA considerations and other equal employment opportunity law considerations with regard to the COVID-19 pandemic. The current COVID-19 virus meets the ADA's direct threat standard because a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.

3. What are some types of measures an employer may take that would be ADA-compliant to reduce the risk of significant harm in the workplace during the current pandemic?

The EEOC has provided guidance that the following types of measures would be permissible for employers without running afoul of the ADA:

- **Employer may send employees home if they display influenza-like symptoms during the current pandemic**. The EEOC has explained that this would not be a disability-related action because the illness would be serious enough to pose a "direct threat".

- **Employer may ask employees who report feeling ill at work or who call in sick questions about their particular symptoms**. The EEOC guidance explains that employers can ask about symptoms (i.e., fever, chills, sore throat, cough, shortness of breath, etc.) for the purpose of determining if the employee has or may have the COVID-19 virus. As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. Of course, the employer would still be required to maintain all information obtained from the employee as a confidential medical record per ADA compliance requirements.

- **Employer may take an employee's temperature.** While taking an employee's temperature is generally considered a "medical examination" under the ADA, given the severity of the current pandemic, an employer would be allowed to measure an employee's temperature so long as it was kept confidential like other medical records. The EEOC also notes that employers should be aware that not all people who have COVID-19 will have a fever.

- **Employer may ask questions about exposure to the COVID-19 pandemic of an employee returning to work following travel.** EEOC guidance provides that an employer may seek information needed to permit an employee's return to work during the pandemic after visiting specified locations.

- **Employer may screen for COVID-19 symptoms after making a conditional job offer**. The EEOC explains that post-conditional job offer screening for COVID-19 symptoms is permissible as long as that is done in a non-discriminatory manner for all entering employees for the same type of job.

- **Employer may require employees to wear personal protective equipment (i.e., face masks, gloves, etc.) and adopt infection-control practices (i.e., regular hand-washing, sneezing/coughing etiquette, proper tissue usage/disposal, etc.)**. While such measures may be taken, employers should be mindful that a need for reasonable accommodation under the ADA and/or accommodations implicated by other federal anti-discrimination laws such as Title VII may present themselves with respect to certain employees. For example, there could be ADA implications that may call for accommodation for someone who may need a modified mask based on a disability (e.g., a hearing-impaired person where lip-reading and interpreters may come into play in communicating with that person in the workplace; an employee with a latex allergy in the case of latex gloves being provided by the employer for use, etc.). There could also potentially be a basis for considering a religious accommodation under Title VII in relation to modifications to mask-wearing for an employee wearing religious garb on their face based on their religious affiliation.

- **Employer may inquire about secondary job exposure and demand that an employee cease secondary employment that could present a risk to the primary employer's workplace under the current circumstance of the pandemic.** For example, inquiry may be made of an employee who may work at a restaurant as a secondary job. Based on the current pandemic, employers may determine a need to look more closely at secondary job approvals and policies related to secondary job approval.

- **Employer may require a doctor's note certifying fitness to return to work for employees who have been away from the workplace during the pandemic.** While the circumstance of the current pandemic would justify such a practice, practical considerations regarding health care professionals being extremely busy during the pandemic may require the employer to be flexible in confirming fitness for duty through alternatives means such as reliance on local clinics providing certification that a returning

employee does not have the virus or even certification from the employee with appropriate medical screening.

- **Employer may notify employees who have been exposed to another employee in the workplace with a positive COVID-19 diagnosis.** In this circumstance, the employer should be careful in not revealing the infected employee's name to other employees, should ask the infected employee to identify other employees with whom he or she had close contact over the preceding 14 days, and should be prepared to notify those other employees if those other employees had significant close contact with the infected employee. The CDC has published guidance pertaining to implementation of safety practices for critical infrastructure workers who may have had exposure to a person with a suspected or confirmed COVID-19 diagnosis.

PROHIBITED PUBLIC HEALTH MEASURES

4. What are examples of actions that would not be acceptable under the ADA despite the current pandemic?

- **Employer may not ask an employee who does not have any influenza symptoms to disclose whether they have an underlying medical condition that the CDC has identified as potentially making them particularly susceptible to influenza complications.** In general, an employer may not ask about underlying conditions of an asymptomatic employee because under the "direct threat" analysis under the ADA, the employer must have an objective basis for a reasonable belief that employees will face a direct threat if they become ill. However, if an employer has objective information from public health advisories to reasonably conclude that employees will face a direct threat, then such a disability-related inquiry may be possible.

- **Employer cannot require an employee to get a flu shot**. In particular, any mandated flu vaccination could be contrary to an employee's need for a reasonable accommodation if the employee has an ADA-disability that prevents the taking of a flu vaccine or has sincerely held religious beliefs that prevent the taking of a flu vaccine. Instead of mandating that employees get a flu shot, employers may consider encouraging a flu shot to be mindful of not running afoul of the ADA.

- **Employer cannot require an employee to get a COVID-19 antibody test as a condition of an employee returning to the workplace**. While the EEOC has previously opined that employer-required COVID-19 virus testing may be performed as a condition of an

employee returning to the workplace to confirm that an employee does not currently have the virus, the EEOC has distinguished COVID-19 virus testing from COVID-19 antibody testing designed to detect if a person has had COVID-19 in the past. The EEOC's guidance materials reflect that employer-required COVID-19 antibody testing as a pre-condition for an employee to return to the workplace would amount to an impermissible medical examination under the ADA.

PREGNANT EMPLOYEES

5. Are pregnant employees considered to have an underlying medical condition that puts them at an increased risk of COVID-19 infection such that an employer should consider reasonable accommodations for pregnant workers during the COVID-19 pandemic?

While certain pregnancy-related medical conditions sometimes can be ADA disabilities that trigger ADA accommodation rights, pregnancy in and of itself is not considered an ADA disability. According to the CDC, information on COVID-19 in pregnancy is limited and pregnant women are not currently considered at increased risk for severe illness from COVID-19. That being said, the CDC notes that historically, pregnant women have had a higher risk of severe illness when infected with viruses from the same family as COVID-19 and other viral respiratory infections, such as influenza. The CDC has posted guidance consisting of information and precautions during pregnancy in light of the COVID-19 pandemic. Based on the limited information on COVID-19 and pregnancy and there being no indication of an increased risk of COVID-19 infection in pregnant women compared to the average adult according to the CDC's most current information, we do not believe there is a legal requirement for employers to provide an accommodation for a pregnant employee who is not actually suffering from a pregnancy-related medical condition. Of course, if a pregnant employee specifically expresses concern to her employer about her condition and ability to perform the essential functions of her job with or without reasonable accommodation, it would be recommended that the employer address any such expressed concern through participation in the interactive process of the ADA to determine if there exists an effective, reasonable accommodation to allow for the employee to perform the essential functions of the job. Please note that this opinion is based on the most current available information from public health authorities such as the CDC, and employers are encouraged to follow any updated guidance by the CDC and other public health authorities that may come to light concerning any increased risk of COVID-19 as a result of pregnancy.

FEDERAL DISCRIMINATION EMPLOYMENT LAWS

DISCRIMINATION

6. ***Can the employer single out employees based upon characteristics that the employer believes could cause the employee to be more susceptible to COVID-19?***

Employers should be careful to not selectively apply measures and protocols to members of certain protected classes or allow harassment or disparate treatment of employees in light of equal employment opportunity laws prohibiting discrimination based on age, national origin, race, color, gender, and religion.

For example, if an employer singles out employees of Asian-Pacific descent or employees who are older than 60 years of age in mandating certain practices such as temperature screening, wearing of masks, and wearing of gloves in the workplace, instead of implementing such practices for all similarly situated employees, such selective application could potentially result in a claim of discrimination under such statutes as Title VII and/or the Age Discrimination in Employment Act ("ADEA"). Counties should be consistent in their approach to workplace guidelines designed to address COVID-19 concerns so as not to run afoul of the federal anti-discrimination laws applicable to protected classifications, including race, national origin, gender, age, and religion.

TRADITIONAL FAMILY MEDICAL LEAVE ACT

7. ***Could an employee with COVID-19 be eligible for traditional FMLA?***

Yes. If an employee tests positive for COVID-19 and exhausts leave available under the Emergency Paid Sick Leave Act and leave provided under the employer's policies and the employee is not able to return to work at the exhaustion of such leave, the employee may seek traditional FMLA. Under this scenario, the employee's eligibility for FMLA would be determined according to the same rules that are normally applied – i.e., the employee must have a serious medical condition. Importantly, if the employee has already utilized 12 weeks of Emergency Family Medical Leave, the employee will not be entitled to any additional leave under the FMLA.

8. ***What if the employee has exhausted all available leave, but does not have a serious medical condition that qualifies for FMLA?***

At this point, the employer should consider the applicability of the Georgia Department of Labor's Emergency Rule that provides for partial unemployment benefits. This topic is addressed further in a separate guidance document.

CONCLUSION

Given the COVID-19 pandemic and county governments striving to maintain a safe, productive, and healthy workplace under the current circumstances, it is important for county governments to understand the ADA and federal discrimination-related issues that come into play. Given that the actions of county employers in being ADA-compliant during the pandemic are very much dependent on updated guidance and recommendations of the CDC and other public health authorities, county employers should continue to stay up to date on the most current information from public health authorities on maintenance of workplace safety.

As always, you are advised to consult with your County Attorney on any specific questions and applications of the laws as the information contained in this document should not be construed as legal advice. Moreover, the state of the law is changing rapidly as developments in public health recommendations and emergency orders continue to evolve. If you are an ACCG-insured member, you are also welcome to contact Angela Davis through the ACCG Helpline by visiting the ACCG website or by email to adavis@jarrard-davis.com or by phone at Jarrard & Davis, LLP at 678.455.7150.