

## Influenza Pandemic Preparedness and the ADA Part 1

The World Health Organization classifies pandemic influenza into six phases. These classes describe how widely influenza is spreading, but do not describe the severity of the influenza symptoms. The ADA regulates disability-related inquiries and medical examinations of all applicants and employees. An inquiry is “disability-related” if it is likely to elicit information about a disability. A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health.

Inquiries likely to elicit information about a disability and medical exams must be job-related and consistent with business necessity or they are forbidden by the ADA. To meet this standard, an employer must be able to show a reasonable belief, based on objective evidence obtained prior to making a disability-related inquiry or requiring a medical examination regarding an illness or medical condition, that (A) an employee’s ability to perform essential job functions will be impaired; or (B) an employee will pose a “direct threat,” which is “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.” The ADA also requires reasonable accommodations for individuals with disabilities (absent undue hardship) during and after a pandemic, whether or not they pose a “direct threat”.

The regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm. According to the EEOC, “Whether pandemic influenza rises to the level of a direct threat depends on [the severity of] the illness. Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information. The county must show that the “pandemic” meets this four-fold test, including the “nature and severity of the harm” (i.e., who, if anyone, is likely to suffer imminent life-threatening illness and what local proof is there? Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, “not on subjective perceptions . . . [or] irrational fears” about a specific disability or disabilities.

Part 2 will discuss what this means for counties.

For more information, contact CTSI at 303-861-0507.