TRANSCRIPT OF MARCH 27, 2020 OUTREACH WEBINAR

CAROL MIASKOFF: Hello. Thank you for joining us for this "Ask the EEOC" webinar exclusively addressing the EEO laws in the time of the COVID-19 pandemic. This webinar was recorded on March 27, 2020.

First let me introduce the presenters today. Starting from the left of the slide, I am Carol Miaskoff, Associate Legal Counsel of the EEOC. To my right on the slide is Sharon Rennert, Senior Attorney Advisor for ADA and GINA. And on the right is Jeanne Goldberg, Acting Assistant Legal Counsel for the ADA and GINA.

In this extraordinary time, the laws enforced by the EEOC -- Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act -- continue to apply. As EEOC Chair Janet Dhillon said yesterday in a public statement about national origin discrimination, in these challenging times: "our collective efforts to create respectful workplaces for all of our nation's workers . . . will enable us to emerge from this crisis stronger and more united."

Our starting point today is that the laws enforced by the EEOC do not hinder employers from following the COVID-19 guidance from the Centers for Disease Control and Prevention (the CDC) and from state or local public health authorities. This is a theme of the EEOC's recently updated publication, Pandemic Preparedness and the ADA, which was updated to encompass the COVID-19 pandemic. The EEOC also recently posted a technical assistance document in its "What You Should Know" series about the ADA and COVID-19.

We are not going to repeat what is in these documents. The links are on this slide, and they are posted alongside this webinar recording on our website. But if you haven't already read them, we do encourage you to do so. You may also wish to periodically check these two documents for additional updates.

In this webinar, we will answer questions submitted by members of the public about how to follow public health directives and comply with the EEO laws. Thank you for the almost 500 questions you submitted. Some individuals posted highly technical legal questions. Others asked more practical questions. We have chosen the most common ones to respond to in today's webinar. We do acknowledge, however, that at this time we cannot provide definitive answers to certain ADA questions that we will mention today. The EEOC staff is continuing to study these questions to try to get you answers.

A few caveats before we begin:

All of our ADA answers are based on the public health situation with COVID-19 as of March 27, 2020. In the future, when we all hope COVID-19 does not pose the risks that it does today, some of the ADA answers we are giving you [now] may . . . change. Employers should continue to keep up with the most current guidance from CDC and state or local public health authorities on how to maintain workplace safety.

Finally, we are only addressing COVID-19 as it impacts the laws enforced by the EEOC. Many questions were submitted about wage and hour issues, the FLSA, the FMLA, OSHA, unemployment compensation, and the new Families First Coronavirus Response Act. If you have questions about these laws, please contact the U.S. Department of Labor, whose website is www.dol.gov. Employers should also be sure to check with state or local, state or local laws that may impact how they must deal with COVID-19.

Finally, everything we discussed today also applies to federal agencies covered by the EEO laws, including Section 501 of the Rehabilitation Act. Now, let's get started. I will hand it over first to Sharon Rennert. Sharon?

SHARON RENNERT: Thank you, Carol. We're going to start by addressing questions that involve disability-related inquiries and medical examinations. Our first question: EEOC has explained in its updated 2020 EEOC Pandemic publication that at the present time, the COVID-19 pandemic permits an employer to take the temperature of employees who are coming into the workplace. Is there anything else an employer could do at the current time to determine if employees physically coming into the workplace have COVID-19 or symptoms associated with the disease? At the time of this recording, again March 27th, employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to health or safety. For those employees who are teleworking, however, they are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask these questions.

Next question: What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature, or refuses to answer questions about whether he has COVID-19, or symptoms associated with COVID-19, or has been tested for COVID-19?

Under the circumstances existing, again, today, March 27th, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19, as well as the ability to bar this employee's presence if he refuses to have his temperature taken. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. As we will discuss shortly, the ADA prohibits such broad disclosures.

Question 3: May a manager ask only one employee -- as opposed to asking all employees -- questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken? If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee. For example, if an employer notices that an employee has a persistent, hacking cough, it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19. The reason these types of questions are permissible now is because this type of cough is one of the symptoms associated with COVID-19. On the other hand, if an employer notices that an employee seems distracted, then that would be an insufficient basis to ask whether the employee has COVID-19.

Question 4: May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? From a public health perspective, only asking an employee about his contact with family members unnecessarily limits the possible extent of an employee's potential exposure to COVID-19. A better question from a public health and workforce management perspective is whether an individual has had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease. From EEOC's perspective, this general question is more sound. The Genetic Information Nondiscrimination Act -- GINA for short -- prohibits employers from asking employees medical questions about family members. To address our next subject area, I will turn it over to my colleague, Jeanne Goldberg.

JEANNE GOLDBERG: Thank you, Sharon. Our next set of questions deals with the confidentiality of medical information. Question 5: Suppose a manager learns and confirms that an employee has CO-VID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? The ADA of course requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, here, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee -- unnamed -- has symptoms of COVID-19, or a diagnosis, or is it the identity of that employee? The answer is that exactly who in the organization needs to know the identity of the employee will really depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

Certainly, a designated representative of the employer may interview the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee. However, this does not require disclosing the employee's name. For small employers, of course, co-workers might be able to figure out who the employee is, but employers are still in that situation prohibited from confirming or revealing the employee's identity. Also remember that all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. And in fact, employers may want to plan what supervisors and managers should do if this situation arises and determine in advance who will be responsible for receiving information and taking next steps.

Turning to question 6: an employee who must report to the workplace knows that a co-worker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the co-worker's symptoms to a supervisor? The answer is no ADA confidentiality does not prevent this employee from communicating to his supervisor about a co-worker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a co-worker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps, as we talked about in discussing question 5.

Turning to the next question: An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? Yes, of course. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure of this information without saying why the employee is teleworking is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then of course too an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

Turning to question 8: Employers may be concerned that telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19 may not provide sufficient information to allow people to know if they should take further steps to protect themselves or others. Therefore, can employers tell the workforce the name of the employee with COVID-19? Again, no. The ADA does not permit such a broad disclosure of the medical condition of a specific employee. More importantly, this broad disclosure is not recommended by the CDC. The CDC specifically advises employers to maintain confidentiality of people with confirmed COVID-19.

Question 9: Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can see them.

Similarly, documentation must not be stored electronically where others would have access. And in fact, a manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

Question 10: Does the ADA permit employers to notify public health authorities if the employer learns an employee has COVID-19? The answer is yes. The ADA permits this notification to public health authorities because, as the EEOC explained in its updated Pandemic publication, COVID-19 at this time poses a direct threat both to individuals with the disease and those with they come into contact. By direct threat, the ADA means that an individual's medical condition -- in this case, COVID-19 -- poses a significant risk of substantial harm to himself or others. The appendix to the ADA regulations, which are also available on eeoc.gov, clearly recognizes that the ADA does not preempt state, county, or local laws that are designed to protect the public health from a direct threat like that posed by COVID-19 at the time we are, conducting this webinar on March 27, 2020. Carol, I'll now turn it over to you.

CAROL MIASKOFF: Thank you, Jeanne. I am now going to address some issues involving COVID-19 and the other statutes enforced by the EEOC.

First, question 11: May an employer exclude from the workplace an employee who is 65 years old or older and who does not have COVID-19, or symptoms associated with this disease, solely because the CDC has identified this age group as being at a higher risk of severe illness if they contract COVID-19? The answer is no. The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave. One way to show that an action was based on age would be if the employer did not take similar actions against comparable workers who are under the age of 40.

The next question, question 12, is related: the EEO laws require an employer to grant a request to telework from an employee who is 65 years old or older because the CDC says older people are more likely to experience severe symptoms if they get COVID-19? The answer, again, is no. The Age Discrimination in Employment Act does not itself have an accommodation provision like the Americans with Disabilities Act. However, if an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers differently based on their age.

The next question, question 13, concerns pregnancy. The CDC list of people who are at higher risk for severe illness if they contract COVID-19 includes a recommendation to monitor women who are pregnant. Based on the CDC recommendation, the question is may an employer decide to lay off or place on furlough a woman who is pregnant but does not have COVID-19, or even any symptoms associated with the disease? The answer, you won't be surprised, is no. Pregnant employees are protected under Title VII of the Civil Rights Act. Employment actions based on pregnancy are employment actions based on sex, so decisions about layoffs or furloughs should not be based on pregnancy.

Question 14, again related, also concerning pregnancy: Do the EEO laws require an employer to grant a request to telework from an employee who is pregnant in light of the CDC advice. The answer: Title VII as amended by the Pregnancy Discrimination Act states that "women affected by pregnancy shall be treated the same for all employment related purposes as other persons not so affected but similar in their ability or inability to work." Therefore, a pregnant worker should not be denied a needed adjustment that the employer provides to other employees for other reasons but who are similar in their ability or inability to work. In addition, note that pregnancy-related medical conditions sometimes can be ADA disabilities, and if that is the case, they may trigger ADA accommodation rights. However, I do want to emphasize that pregnancy itself is not an ADA disability.

Question 15: The EEOC received a number of questions about possible discrimination involving national origin. For example, may an employer single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19? And may an employer tolerate a hostile work environment based on an employee's national origin because others link it to transmission of COVID-19? The answer is no. Title VII of the Civil Rights Act prohibits all employment discrimination based on national origin. It does not matter if it is linked to the current COVID-19 pandemic. Employer may wish to remind workers in these difficult times about policies on workplace harassment, and emphasize the broad nature of the prohibition against harassment -- meaning that policies include a prohibition on any harassment based on national origin, among other bases, even if the harassment is linked to fear about the virus. I'm now going to turn it over to Sharon to continue.

SHARON RENNERT: Thank you. We're going to return to the ADA now, and the question raised by a lot of people involving the definition of disability. As I said, many of you asked is COVID-19 a disability under the ADA? Here is what the EEOC can say now. This is a very new virus and while medical experts are learning more about it, there is still much that is unknown.

Therefore, it is unclear at this time whether COVID-19 is or could be a disability under the ADA. Regardless of whether COVID-19 is or could be a disability, remember that an employer may bar an employee with the disease from entering the workplace at this time because of direct threat. Employers should continue to take actions involving persons with COVID-19, or who may have COVID-19, based on the most current guidance available from the CDC and other public health authorities. Our next topic involves questions related to requests for telework, leave, or other kinds of job modifications in response to the COVID-19 pandemic.

Question 17: What are an employer's ADA obligations when an employee says that he has a disability that puts him at greater risk of severe illness if he contracts COVID-19, and therefore he asks for reasonable accommodation? The CDC has identified a number of medical conditions -- including, for example, chronic lung disease and serious heart conditions -- as potentially putting individuals at higher risk. Therefore, this is clearly a request for reasonable accommodation, meaning it is a request for a change in the workplace due to a medical condition. Because the ADA would not require an accommodation where the employee has no disability, the employer may verify that the employee does have a disability, as well as verifying that the accommodation is needed because the particular disability may put the individual at higher risk. There could also be situations where accommodations are requested because a current disability is exacerbated by the current situation.

Again, the employer can verify the existence of the disability and discuss both why an accommodation is needed and the type of accommodation that would meet the employee's health concerns. In either situation, and as with any requests for reasonable accommodation, an employer may also consider whether a reasonable accommodation would pose an undue hardship, meaning the employer may assess whether a specific form of accommodation would pose significant expense or significant difficulty. Under the current circumstances, for employers seeking documentation from a health care provider to support the employee's request, they should remember that because of the health crisis many doctors may have difficulty responding quickly. There may be other ways to verify the existence of a disability. For example, a health insurance record or a prescription may document the existence of the disability. If the employer is waiting to receive documentation, it may want to provide the accommodation on a temporary basis. This could be particularly critical where the request is for telework or leave from an employee whose disability puts them at higher risk for COVID19 --from COVID-19.

Next question: what are an employer's ADA obligations to provide reasonable accommodation if an employee says that he lives in the same household as someone who due to a disability is a greater risk of severe illness if he contracts COVID-19? The employee only has a right to reasonable accommodation for his own disability. In the situation being raised here, the employee does not have a disability, only a member of his household.

However, the employer should consider if it is treating the employee differently than other employees with a similar need before it responds to the request.

Question 19: What practical consideration should employers and employees keep in mind about the interactive process in the current COVID-19 situation? The interactive process refers to the process an employer and employee should use to fully discuss a request for accommodation so that the employer obtains necessary information to make an informed decision. In the current situation, some requests may need an employer's prompt attention, such as those employees who have disabilities putting them at higher risk. Employers may provide requested accommodations on a temporary basis (for example, one or two weeks) while the employer is discussing the request more fully with the employee or waiting to receive medical documentation. Given the current circumstances, employers and employees should try to be as flexible and creative as possible. There may be accommodations that are not ideal but will meet an employee's needs, at least on a short-term basis. For federal agencies -- and again at the moment I'm only going to speak to federal agencies -- the current COVID-19 crisis constitutes an extenuating circumstance that can justify exceeding the normal timelines they must follow in processing requests for and providing reasonable accommodations. To address additional questions on this topic, I turn it back to Jeanne.

JEANNE GOLDBERG: Thank you, Sharon. We'll turn now to question 20: When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations that it provides to this individual in the workplace? If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace. Also, the undue hardship considerations might be different when evaluating a request for accommodation while teleworking rather than when working in the workplace. In other words, a reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering the circumstance and the place where it is needed, and also the circumstances that necessitated the telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a needed assessment. So as a practical matter, given the circumstances that have led to the need for telework, employers and employees should both be creative and flexible about what can be done where an employee needs a reasonable accommodation for telework at home in these circumstances. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

Turning to question 21: Let's assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. After such public health measures are no longer necessary, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who wishes to continue this arrangement? The answer is of course no.

Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation . . . If there is no disability-related limitation that requires teleworking, then of course the employer does not have to provide telework as an accommodation. Or if there is a disability-related limitation, but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request -- after the COVID-19 crisis has ended -- to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. This is because the ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions during the COVID-19 crisis to enable employees to telework for the purpose of protecting their safety, or otherwise chose to permit telework, does not mean that the employer has permanently changed a job's essential functions, or that telework is a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties after the immediate crisis has passed, or at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

And finally, question 22: Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be

able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for reasonable -- for telework as a reasonable accommodation. Can the employer again refuse the request?

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. But as with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process if this issue does arise. Carol?

CAROL MIASKOFF: Thank you, Jeanne. In closing, we again thank you for your questions, and we are continuing to review them all. Please keep checking the EEOC website for further updates involving COVID-19 and the laws enforced by the EEOC. Let me end where I began: None of the laws enforced by the EEOC interfere with or prevent employers from following the guidance of the Centers for Disease Control and Prevention or other public health authorities. Thank you for your participation in this webinar. Goodbye.