



EEO LAWS FOR EMPLOYEES AFFECTED BY THE ZIKA VIRUS

Introduction

Zika virus transmission is occurring in many countries and territories throughout the world, including in parts of the United States. The virus is transmitted to people primarily through an infected *Aedes* species mosquito. Mosquitoes become infected when they bite a person already infected with the virus. Infected mosquitoes can then spread the virus to other people through bites. The virus can also be spread through sexual contact and from a pregnant woman to her fetus during pregnancy or around the time of birth.

Many people infected with Zika virus experience no symptoms or only mild symptoms. People very rarely die from Zika. The most common symptoms are fever, joint pain, a rash, and conjunctivitis. Other symptoms may include muscle pain and headache. Zika can cause significant complications, including a congenital condition called “microcephaly” in fetuses and infants, when contracted during pregnancy. Other conditions observed in fetuses and infants infected with the virus before birth include hearing and vision disorders and impaired growth. There have also been increased reports of Guillain-Barre syndrome, a rare nervous system disorder, in areas affected by Zika.¹

This resource document discusses workplace issues that may arise under the laws the Equal Employment Opportunity Commission (EEOC) enforces, particularly in situations where pregnant employees or employees with disabilities ask for accommodations to avoid exposure to the virus or employees ask for accommodations related to symptoms of Zika. Because information about the virus and the areas where it may be transmitted changes, employers who receive requests for accommodations or who otherwise think their employees may be at risk of exposure should consult the most up-to-date resources on the websites of the Centers for Disease Control and Prevention (<https://www.cdc.gov/zika>) and the Occupational Safety and Health Administration (<https://www.osha.gov/zika>).

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) amended Title VII of the Civil Rights Act of 1964 (Title VII) to make clear that discrimination on the basis of pregnancy, childbirth, or related medical conditions is sex discrimination. The PDA not only prohibits discrimination against women who are pregnant, but also prohibits discrimination on the basis of potential pregnancy and past pregnancy. The PDA also requires that

¹ Centers for Disease Control and Prevention, “Zika: The Basics of the Virus and How to Protect Against It,” <https://stacks.cdc.gov/view/cdc/39469> (May 16, 2016).

“women affected by pregnancy, childbirth, or related medical conditions shall be treated the same . . . as other employees not so affected but similar in their ability or inability to work”²

1. What accommodations does an employer have to make for pregnant employees who want to avoid exposure to the Zika virus?

An employer must accommodate someone who is pregnant and working in a job that would subject her to a risk of becoming infected with the Zika virus to the same extent as it accommodates other employees who have work restrictions for reasons unrelated to pregnancy. For example, an employer would have to allow a pregnant employee to take leave, to telework, or to work in a different job temporarily in order to avoid exposure to the Zika virus if the employer allows other employees to take leave, to telework, or to work in another job temporarily due to restrictions unrelated to pregnancy (such as injury or illness).

2. May an employer make accommodations for pregnant employees even if it does not make the same kinds of accommodations for other employees?

Yes. An employer does not violate the EEO laws by providing an employee with an accommodation because she is pregnant that is not provided for other employees. An employer may, for example, provide expedited processing of a pregnant employee’s request for an accommodation to avoid exposure to the Zika virus or automatically grant requested accommodations to pregnant employees who want to avoid exposure to the Zika virus when the employer’s usual practice is to evaluate accommodation requests on a case-by-case basis.

3. May an employer require a pregnant employee to take leave, to telework, to work in a different job, or to accept another accommodation because it is concerned that the employee will be exposed to the Zika virus?

No. In its Enforcement Guidance on Pregnancy Discrimination and Related Issues, the EEOC has said that “[a]n employer’s concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.” EEOC’s conclusion relied to a great extent on *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, in which the Supreme Court stated that, “[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”³

4. May an employer ask employees if they are pregnant or intend to become pregnant to make a decision about whether to assign them to places where they may be exposed to the Zika virus or to make an accommodation for them?

² 42 U.S.C. § 2000e(k). In June 2015, EEOC issued comprehensive guidance on pregnancy discrimination. See Enforcement Guidance on Pregnancy Discrimination and Related Issues, https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (June 25, 2016). EEOC also has recently issued two question-and-answer documents to assist pregnant employees who request accommodations under the PDA and the ADA (for pregnancy-related impairments that constitute disabilities) and to assist health care providers who may be asked to provide information concerning a request for a pregnancy-related accommodation. See Legal Rights for Pregnant Workers Under Federal Law, https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm (June 14, 2016), and Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work, https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm (June 14, 2016).

³ 499 U.S. 187, 206 (1991)

Rather than asking employees whether they are pregnant or intend to become pregnant, an employer should inform *all employees* assigned to, or who may be assigned to, a particular location where they could contract the Zika virus of the possible risks and the measures the employer will take to reduce them. Employees who are pregnant or intend to become pregnant can then decide whether to request an accommodation. Other employees may wish to request accommodations as well if they are made aware of the risks associated with the Zika virus, such as the sexual partners of women who are pregnant or intend to become pregnant.

The Americans with Disabilities Act and the Rehabilitation Act

Title I of the Americans with Disabilities Act (ADA)⁴ prohibits private and state and local government employers with 15 or more employees from discriminating on the basis of disability against individuals who are qualified to do their jobs. The ADA also requires that qualified applicants and employees receive “reasonable accommodations” for known limitations related to disabilities, absent undue hardship (i.e., significant difficulty or expense).⁵ Certain ADA provisions applicable to individuals with and without disabilities limit the ability of employers to ask applicants and employees disability-related questions and require that employers keep any medical information they have about employees confidential, with limited exceptions.⁶ Section 501 of the Rehabilitation Act (Section 501),⁷ applies the same standards to federal agencies. The EEOC has issued regulations and accompanying interpretive guidance that explain the obligations of employers under the ADA and Section 501.⁸

Disability

5. Is someone who has contracted the Zika virus considered to be an individual with a disability?

The ADA and Rehabilitation Act define “disability” as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.⁹ The definition of the term “disability” is broad, and EEOC’s regulations favor expansive coverage of the law’s protections. An impairment does not have to prevent or severely or significantly restrict performance of a major life activity in order to be considered substantially limiting. Thus, someone with the Zika virus may have a disability if he or she is substantially limited in performing activities such as caring for self, or if major bodily functions, like immune system functions, are affected. Even if no major life activities are substantially limited, someone will be regarded as having a disability if an employer takes some prohibited action—such as firing the employee, forcing the employee to take leave, or limiting the employee’s duties—because the employee has the Zika virus. Taking an action based on an impairment that is both transitory (lasting or expected to last for six months or less) *and* minor, however, does not amount to regarding someone as having a disability.

If an employee has a disability as the result of infection with the Zika virus, an employer cannot take a negative action against the employee on that basis unless the virus made the employee unable to do his or her job, the virus posed a direct threat (i.e., a significant risk of substantial harm) to the employee or others in the workplace,¹⁰ or some other federal law required the employer’s action.¹¹ However, because the symptoms of

⁴ 42 U.S.C. § 12112 et seq.

⁵ 42 U.S.C. § 12112(b)(5).

⁶ 42 U.S.C. § 12112(d).

⁷ 29 U.S.C. § 791.

⁸ 29 C.F.R. Part 1630.

⁹ See 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(g)—(l).

¹⁰ See 29 C.F.R. § 1630.2(r).

Zika are often mild and the virus cannot be transmitted through casual contact in the workplace, an employer will probably not be able to justify excluding an employee with the virus from the workplace or limiting his or her duties.

Reasonable Accommodation

6. Can an employee with the Zika virus get a reasonable accommodation?

Yes, if the virus substantially limits one or more of the employee's major life activities. Possible accommodations may include leave, telework, or temporary reassignment to another job if the employer has one. Additionally, although removing one or more of a job's essential functions (i.e., fundamental duties) is not required as a reasonable accommodation, an employer may choose to do this as a temporary measure.

7. May an employer request documentation from an employee who asks for reasonable accommodations for limitations related to the Zika virus?

Yes. Where a disability and the need for an accommodation are not obvious, an employer may obtain reasonable documentation showing that the employee has a disability and needs an accommodation. The EEOC has issued guidance on reasonable accommodation that explains the kind of documentation an employer may get.¹²

Inquiries and Medical Examinations

8. May an employer ask employees whether they have the Zika virus or test them to see if they have contracted it?

The ADA and Rehabilitation Act prohibit employers from asking disability-related questions of employees (which would include questions about whether they have the Zika virus) or requiring employees to take medical examinations unless they are job-related and consistent with business necessity. Generally, this means that an employer has a reasonable belief, based on objective evidence, that a particular employee (1) will be unable to do his or her job because of a medical condition; or (2) will pose a direct threat due to a medical condition.¹³ Because most people who contract the virus experience no symptoms or only mild symptoms and person-to-person transmission (e.g., through direct contact with infectious blood or body fluids) is unlikely to occur in most workplaces, most employers will not be able to justify asking employees if they have the Zika virus or testing them.

9. May an employer ask employees whether they have recently traveled to areas where the Zika virus is present?

Yes. Asking employees whether they have traveled to parts of the world where the Zika virus is present is not a disability-related question and so is permitted under the ADA and Section 501. Employers may not, however, single out only employees of a particular race or national origin for such inquiries or make such inquiries only of women. Moreover, an employer will violate Title VII if it treats employees less favorably

¹¹ See 29 C.F.R. § 1630.15(e).

¹² See Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, <https://www.eeoc.gov/policy/docs/accommodation.html> at Q&A 6-8 (October 20, 2002).

¹³ See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, <https://www.eeoc.gov/policy/docs/guidance-inquiries.html> at Q&A 5 (July 27, 2000).

on the basis of race, national origin, or sex because they have traveled to areas where the Zika virus is present, and may violate the ADA if it regards anyone who has traveled to areas where the Zika virus is present as having a disability.

10. May an employer tell co-workers that an employee has the Zika virus?

No. The ADA requires employers to keep all medical information about employees confidential, subject to narrow exceptions. Disclosures are allowed to managers and supervisors if an employee needs a reasonable accommodation or work restrictions, to first aid and safety personnel if someone may require emergency treatment, and to government officials investigating compliance with the ADA or Section 501 of the Rehabilitation Act. Disclosures are also allowed for workers' compensation and insurance purposes. None of these exceptions, however, allow disclosing the fact that an employee has contracted the Zika virus to his or her co-workers.

Retaliation Prohibited

11. Are employees who are pregnant or intend to become pregnant who ask for accommodations to avoid exposure to the Zika virus or employees who request accommodations under the ADA or Section 501 protected from retaliation?

Yes. Title VII, the ADA, and Section 501 all have provisions that prohibit retaliation against employees who engage in protected activity, including requesting a reasonable accommodation, opposing unlawful conduct by an employer, or participating in the EEO process. Employers are prohibited from taking any materially adverse action in retaliation for protected activity. Materially adverse action is any action that, in the circumstances, might well dissuade a reasonable person from engaging in protected activity. This includes actions such as denial of promotion, denial of benefits, demotion, suspension, or discharge. Other types of adverse actions include work-related threats, reprimands, warnings, negative or lower evaluations, and transfers to less desirable work or work locations. The ADA and Section 501 also prohibit actions that would constitute interference with an individual's rights (including the right to request a reasonable accommodation), coercion, threats, and intimidation.¹⁴

¹⁴ The EEOC recently issued comprehensive guidance on retaliation and related issues. See EEOC Enforcement Guidance on Retaliation and Related Issues, <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm> (August 26, 2016).