

Labor and Employment Complex Commercial Litigation

May an Employer Require Its Employees to Use a Contact Tracing App?



By: [Stephen R. Brown](#), [Michael F. Linden](#), [Emma J. Sullivan](#) and [Joseph J. Torres](#)

Businesses around the United States are beginning to reopen and more and more will reopen in the coming months. There is, however, no vaccine for the novel coronavirus and such a vaccine may not be available for more than a year.^[1] Worse yet, many have warned that there may be a “second wave of COVID-19 cases in late fall” of this year.^[2] One strategy to help prevent the spread of the coronavirus absent a vaccine is called “contact tracing”—identifying people who have been exposed to an individual who tested positive and advising them on steps to take (e.g., monitoring for symptoms, self-quarantining, or testing).^[3] Contact tracing with “systems [that] rely on digital surveillance” has, according to the New York Times, “helped Asian countries like South Korea and Singapore contain the spread of the virus.”^[4]

Several organizations are working on contact tracing systems, including Apple and Google, which announced earlier in April that they were partnering on a COVID-19 “contact tracing technology” that they plan to roll out starting in May 2020.^[5] While there are differences in the various technologies in development, the basic idea is that a user will receive an alert if the user’s phone has been within a specified range of a phone belonging to someone who tested positive for COVID-19. While contact “tracing” implies that an app (and therefore the app developer or, potentially, government authorities) will be tracking the location of every user of the app, at least two of the systems being developed, including the Apple–Google technology, will not collect any location data.^[6]

One challenge with contact tracing technologies so far has been a low participation rate—for example, in Singapore, less than 20% of the population opted into a tracing app called TraceTogether.^[7] According to one estimate, to be effective, an app needs roughly 50 to 70 percent of a population to participate.^[8]

One possible way to increase participation is by having employers’ require their employees to use a contact tracing app. Whether employers can legally require this of their employees is a complicated question, which potentially implicates several relevant areas of the law, including data privacy laws. Here, our focus is limited to the United States and, specifically, the Americans with Disabilities Act (the ADA), which “regulates employers’ disability-related inquiries and medical examinations from all applicants and employees.”^[9] To analyze this question under the ADA, we will: (i) describe the basics of contact tracing technology; (ii) briefly summarize guidance from the Equal Employment Opportunity Commission (EEOC) on the scope of permissible employer inquiries and employer-required medical testing in the context of the coronavirus pandemic; and (iii) analyze whether, consistent with the EEOC’s guidance, it would be permissible under the ADA for employers to require employees to use a contact tracing app.

I. Contact Tracing Technologies

The “old-school, labor-intensive” method of contact tracing involves hiring a lot of people to conduct “one-on-one telephone interviews of newly diagnosed patients and their contacts.”^[10] There are

limitations to this traditional method—for example, an individual who tests positive may not know or may not remember who they came in contact with.^[11] The digital contact tracing technologies currently in development are intended to supplement the traditional methods. This summary of these digital technologies is based on reports about an MIT-led project called “PACT” and the Apple–Google technology.^[12]

When a user installs an app that uses contact tracing technology,^[13] the app will begin broadcasting, via Bluetooth technology, anonymous “chirps” or “keys” from the phone.^[14] These keys change frequently, possibly every few minutes.^[15] If two phones running an app come in close enough contact for a long enough period of time (e.g., within six feet for 10 minutes), then the two phones exchange keys.^[16] The app on each phone keeps a running list on the user’s phone of the keys that it broadcasts and that it receives.^[17] The lists stay on each user’s phone, and the list of keys that the user broadcast only leaves the user’s phone if the user consents.^[18] Specifically, when a user tests positive for COVID-19,^[19] the user can choose to upload to a central server a list of the anonymous keys that the user’s phone sent out over some time period, such as the last two weeks.^[20] Periodically, the app on each user’s phone checks the list of keys that it received against the central list of COVID-19 positive keys (which still are anonymous and only are uploaded if the individual who tested positive affirmatively decides to do so).^[21] If there is a match, then the user will receive an exposure alert saying that the user may have come in contact with someone who tested positive.

While there are many details to be worked out, the organizations working on these technologies have emphasized that the technologies will not track a user’s location and the keys are anonymized to prevent anyone from connecting a key to an individual.^[22]

II. Inquiries and Medical Testing of Employees Under the ADA

In general, the ADA prohibits an employer from making a disability-related inquiry to an employee or requiring an employee to submit to a medical examination except in certain circumstances.^[23] An employer may make a disability-related inquiry to an employee or require an employee to take a medical examination only if such inquiry or examination “is shown to be job-related and consistent with business necessity.”^[24] An inquiry or medical examination for a current employee generally will meet this threshold if the “employee will pose a direct threat due to a medical condition,”^[25] with “direct threat” defined as “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.”^[26]

In response to the COVID-19 pandemic, the EEOC recently published updated guidance titled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (the EEOC Pandemic Guidance)^[27] and updated technical assistance questions and answers titled *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (the EEOC COVID-19 Technical Assistance).^[28] Although these publications do not expressly address whether an employer may require an employee to use a contact tracing app, the documents provide helpful guidance on what an employer may and may not do in the context of the COVID-19 pandemic.

First, the EEOC Pandemic Guidance states that, “[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”^[29] This is significant because the “direct threat” determination generally is a nuanced question that involves some judgment.^[30] This also is significant because, as noted above, when a medical condition will pose a direct threat to the health and safety of the individual or others, an employer is permitted to make disability-related inquiries and to require an employee to submit to a medical examination.^[31] For example, the EEOC has expressly stated that “an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus,”^[32] and “employers may measure employees’ body temperature” even though doing so generally qualifies as a “medical examination.”^[33]

Second, relying on “current CDC guidance on COVID-19,” the EEOC Pandemic Guidance states that an employer may prevent an employee from coming in to a workplace if the employee tests positive for COVID-19 or the employee has COVID-19 symptoms.^[34]

Third, with respect to employee travel (even for personal reasons), the EEOC Pandemic Guidance states that an employer may ask about exposure to COVID-19 even if the employee has no symptoms because such questions are not “disability-related inquiries.”^[35] The employer also “may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee’s return to the workplace” after returning from travel.^[36] And an employer may require employees who have been away from the workplace during a pandemic to provide a doctor’s note or some other form of certification that the employee is fit to return to work.^[37] As the EEOC explained, “during and immediately after a pandemic outbreak,” healthcare professionals may be too busy to provide such documentation; “[t]herefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.”^[38]

Finally, while an employer must keep employee medical information confidential, the EEOC has stated that an employer may disclose to “a public health agency” the name of an employee who has tested positive for COVID-19.^[39]

It is likely that, as conditions in the United States relating to COVID-19 continue to develop, the EEOC will provide further guidance. Those considering ADA issues should continue to monitor the EEOC website for such further guidance.

III. Is It Permissible for Employers to Require Employees to Use a Contact Tracing App Under the ADA?

As explained below, subject to some caveats, it likely is permissible under the ADA for an employer to require its employees to use a contact tracing app. Because this issue involves some nuanced questions, specific guidance from the EEOC would be valuable, and companies should consult with their legal counsel prior to rolling out a requirement for employees to use a contact tracing app.^[40]

We break this analysis into three parts: (1) the app’s broadcasting and receiving keys; (2) exposure alerts and testing; and (3) the user’s uploading their keys to a central list after testing positive for COVID-19.^[41] (Additionally, although we do not address the question here, with respect to unionized employees, an employer’s requiring employees to use a contact tracing app may be a change in the terms or conditions of employment such that the employer would have an obligation to bargain with the union regarding the use of the app.^[42])

1. The App’s Broadcasting and Receiving Keys. A contact-tracing app’s broadcasting and receiving anonymous keys via Bluetooth should not be considered a disability inquiry or medical examination under the ADA.^[43] The numbers, on their own, are random, anonymous, and do not reveal any medical information.^[44] The numbers also are not transmitted to an employer; rather, the numbers do not leave a user’s phone unless the user consents. Beyond the ADA, while it is possible that an app that was not anonymous or that did use GPS to track an employee would run afoul of some other body of law,^[45] if the technologies work as intended, a contact tracing app will be anonymous, it will not track or trace any individual employee, and the keys will never be provided to an employer.
2. Exposure Alerts and Testing. An employer should be able to ask an employee to disclose if the employee has received an exposure alert from a contact tracing app. As the EEOC has stated, when an employee returns from travel (even travel for personal reasons), the employer may ask about exposure even if the employee has no symptoms because such questions are not

disability-related inquiries.^[46] Similarly, an employer should be permitted to request similar exposure-related information from an employee by asking about exposure alerts from a contact tracing app, even if that exposure occurred when the employee was out of the office (note also that because a contact tracing app does not track location data, the employee receiving the alert would not know if the exposure occurred at or away from work).

If an employee does receive an exposure alert from a contact tracing app, because COVID-19 meets the “direct threat” threshold, an employer may also be permitted to require an employee to get tested for COVID-19.^[47] Additionally, the employer also likely would be permitted to follow CDC guidelines on the employee’s return to work after receiving an exposure alert.^[48]

3. The User’s Uploading Keys to a Central List After Testing Positive. When a user of a contact tracing app tests positive for COVID-19, if the user affirmatively consents, the user’s keys for some established time period (e.g., the past 14 days) will be uploaded to the central list of COVID-19 positive keys. The CDC has stated that “[i]f an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act,”^[49] and the EEOC has advised that employer may disclose to a public health agency the name of an employee who tests positive.^[50] A contact tracing app, however, would—while maintaining the anonymity of the employee who tested positive—alert not just the coworkers who came in contact with the employee but also others in the broader community who were using the app and who came in contact with the employee. While there does not appear to be anything in the ADA that would prevent an employer from requiring the employee to upload their list of keys after testing positive, there may be other, non-ADA privacy concerns and considerations that counsel in favor of making this decision a voluntary one for each employee to make.

Before concluding, we acknowledge that an employer-required approach for a contact tracing app is not perfect. Not everyone has a job and not everyone has a smartphone. Even those individuals with a smartphone may not always carry it around with them when in public and employers may not want smartphones within the workplace, for security, safety or other reasons. Notwithstanding these and other limitations, increasing participation would make contact tracing apps more effective. And if the apps are effective, then it may be possible to avoid, or at least limit the scope of, drastic containment measures if there is a second wave of the coronavirus in the fall or winter.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

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^[1] An optimistic estimate is that a vaccine will be ready in 12 to 18 months. See Robert Kuznia, *The timetable for a coronavirus vaccine is 18 months. Experts say that's risky*, CNN (Apr. 1, 2020).

^[2] Kashmira Gander, *CDC Director Says There May Be Another Coronavirus Wave In Late Fall And A 'Substantial Portion Of Americans' Will Be Susceptible*, Newsweek (Apr. 1, 2020) (noting that “[t]he head of the U.S. Centers for Disease Control and Prevention (CDC) has warned the country may be hit by a second wave of COVID-19 cases in late fall”).

^[3] Ellen Barry, *An Army of Virus Tracers Takes Shape in Massachusetts*, N.Y. Times (Apr. 16, 2020); Massachusetts Institute of Technology (MIT), *The PACT Protocol Specification* (Apr. 8, 2020), <https://pact.mit.edu/wp-content/uploads/2020/04/The-PACT-protocol-specification-ver-0.1.pdf>.

[4] *Id.*

[5] Google, *Apple and Google partner on COVID-19 contact tracing technology*, The Keyword (Apr. 10, 2020) (“First, in May, both companies will release APIs that enable interoperability between Android and iOS devices using apps from public health authorities. These official apps will be available for users to download via their respective app stores.”), <https://blog.google/inside-google/company-announcements/apple-and-google-partner-covid-19-contact-tracing-technology/>

[6] Google, *Privacy-safe contact tracing using Bluetooth Low Energy*, https://blog.google/documents/57/Overview_of_COVID-19_Contact_Tracing_Using_BLE.pdf. As others have pointed out, while it is true that the Apple–Google technology does not use location data, a public health authority running an app based on the technology could request that the user affirmatively agree to provide location data. Andy Greenberg, *Does Covid-19 Contact Tracing Pose a Privacy Risk? Your Questions, Answered*, Wired (Apr. 17, 2020) (“That doesn’t mean some apps using Google and Apple’s API won’t ask for location data anyway. Health care organizations may miss the point of a system that avoids using GPS, or simply want the extra data to help better track infections. Google and Apple point out that if a location-tracing app wants to use GPS, it will need to first ask permission from the user, just as any app does.”).

Referring to these apps as something other than “tracing” apps—e.g., referring to the apps as “contact-warning” apps—may help to dispel the notion that the apps are tracking a user’s every move. For the purpose of this article, we will continue to use “contact tracing” because that is the conventional language.

[7] Alfred Ng, *Tech isn’t solution to COVID-19, says Singapore director of contact tracing app*, CNET (Apr. 13, 2020) (“In the weeks since Singapore released its contact tracing app, the government has seen technology’s shortcomings for tracking COVID-19. Despite the government’s public campaign to the country to download the app, only about one in six people in Singapore have actually done it, Singapore’s national development minister Lawrence Wong said on April 1.”).

[8] Sidney Fussell & Will Knight, *The Apple-Google Contact Tracing Plan Won’t Stop Covid Alone*, Wired (Apr. 14, 2020) (“To be effective, contact tracing apps need roughly 50 percent to 70 percent of a population to use them, according to an analysis by researchers at the open-source contact-tracing project, Covid-Watch. Otherwise, symptomatic people wouldn’t know where they contracted the virus and asymptomatic people would continue spreading it unknowingly.”).

[9] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (EEOC Pandemic Guidance)* ¶¶ 11 (Mar. 21, 2020 ed.).

[10] Barry, *supra* note 3.

[11] MIT, *PACT Protocol Specification*, *supra* note 3.

[12] See generally MIT, *PACT: Private Automated Contact Tracing*, <https://pact.mit.edu>; Kylie Foy, *Bluetooth signals from your smartphone could automate Covid-19 contact tracing while preserving privacy*, MIT News (Apr. 8, 2020); Google, *Apple and Google Partner*, *supra* note 5.

[13] Apple and Google are not developing an “app”; rather, they are creating a tools that will be available for app developers to create contact tracing apps. Russell Brandom, *Answering the 12 Biggest Questions About Apple and Google’s New Coronavirus Tracking Project*, The Verge (Apr. 11, 2020). The public health authorities would have access to the technology offered by Apple and Google and those public health authorities would develop the contact tracing apps. Google, *Apple and Google Partner*, *supra* note 5 (“These official apps will be available for users to download via their respective app stores.”); Zack Whittaker & Darrell Etherington, *Q&A: Apple and Google discuss their coronavirus tracing efforts*, TechCrunch (Apr. 13, 2020) (“The companies said only public health authorities will be allowed access to the contact tracing API.”).

[14] MIT, *PACT Protocol Specification*, *supra* note 3 (“Each person’s smartphone emits anonymous,

random ‘chirps’ on a more-or-less continuous basis.”); Google, *Overview of COVID-19 Contact Tracing*, *supra* note 6.

[15] MIT, *PACT Protocol Specification*, *supra* note 3 (“These chirps are not linkable to the device or its owner, and are changed (‘rotated’) frequently (on the order of minutes) so that they cannot be used to track the device.”); Whittaker & Etherington, *Q&A*, *supra* note 13 (“[T]he user’s randomized identifiers change every 15 minutes to prevent tracking . . .”).

[16] Greenberg, *Does Covid-19 Contact Tracing Pose a Privacy Risk?*, *supra* note 6 (“At the same time, they’ll constantly monitor the phones around them, recording the codes of any other phones they encounter within a certain amount of range and time—say, within six feet for 10 minutes. (Both numbers are ‘tunable’ based on new data about how Covid-19 infections are occurring.)”).

[17] MIT, *PACT Protocol Specification*, *supra* note 3 (“Each device keeps track of the chirps it transmits, as well as of the chirps it receives.”).

[18] *Id.* (“If a user is diagnosed positive, he is given an unused permission number, which authorizes him to upload his chirp logs (more precisely, the seeds that generated those chirps) to the “exposure database.”); Google, *Privacy-safe contact tracing*, *supra* note 6 (“List of people you’ve been in contact with never leaves your phone.”); *id.* (“With Bob’s consent, his phone uploads the last 14 days of keys for his broadcast beacons to the cloud.”).

[19] Whittaker & Etherington, *Q&A*, *supra* note 13 (“The companies said they’re working with different public health organizations to confirm diagnoses, like public health authorities, to do the validation.”).

[20] Google, *Privacy-safe contact tracing*, *supra* note 6; Foy, *Bluetooth signals from your smartphone could automate Covid-19 contact tracing*, *supra* note 12 (“If a person tests positive, they can upload the list of chirps their phone has put out in the past 14 days to a database.”).

[21] Google, *Privacy-safe contact tracing*, *supra* note 6 (“Alice’s phone periodically downloads the broadcast beacon keys of everyone who has tested positive for COVID-19 in her region. A match is found with the Bob’s anonymous identifier beacons.”); Foy, *Bluetooth signals from your smartphone could automate Covid-19 contact tracing*, *supra* note 12 (“Other people can then scan the database to see if any of those chirps match the ones picked up by their phones. If there’s a match, a notification will inform that person that they may have been exposed to the virus, and will include information from public health authorities on next steps to take.”).

[22] Foy, *Bluetooth signals from your smartphone could automate Covid-19 contact tracing*, *supra* note 12 (“‘We’re not tracking location, not using GPS, not attaching your personal ID or phone number to any of these random numbers your phone is emitting,’ says Daniel Weitzner, a principal research scientist in the MIT Computer Science and Artificial Intelligence Laboratory (CSAIL) and co-principal investigator of this effort.”); Whittaker & Etherington, *Q&A*, *supra* note 13; Greenberg, *Does Covid-19 Contact Tracing Pose a Privacy Risk?*, *supra* note 6 (“The system is Bluetooth-only, fully opt-in, collects no location data from users, and no data at all from anyone without a positive Covid-19 diagnosis. Apple and Google chose perhaps the most privacy-friendly of the many different schemes that could allow automated smartphone contact tracing.”).

[23] 42 U.S.C. § 12112(a), (d). Generally speaking, HIPAA does not apply in the employer–employee context. See 45 C.F.R. § 160.103 (definition of “protected health information”). Nonetheless, “[a]ll information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential.” See EEOC Pandemic Guidance ¶ II.B.2 (citing 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b)).

[24] 42 U.S.C. § 12112(d)(4). The types of inquiries and examinations that are permitted depends on whether the individual is a prospective employee or a current employee. 42 U.S.C. § 12112(d)(2)–(4). In general, before an employer had made an offer of employment, the employer cannot “conduct a medical examination or make inquiries of a job applicant.” 42 U.S.C. § 12112(d)(2)(A). After the employer has made an offer of employment, the employer generally may require the prospective

employee, before starting work, to take a medical examination as long as the employer requires all prospective employees in the same job category to take such an exam. 42 U.S.C. § 12112(d)(3). Specific to prospective employees after a conditional offer of employment, the EEOC has stated that “[a]n employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.” EEOC ¶ Pandemic Guidance III.B.16.

[25] *Id.* ¶ II. A.2.

[26] *Id.* ¶ II.B (quoting 29 C.F.R. § 1630.2(r)).

[27] *Id.*, Note About 2020 Updates (“This technical assistance document provides information about Titles I and V of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act and pandemic planning in the workplace. This document was originally issued in 2009, during the spread of H1N1 virus, and has been re-issued on March 19, 2020, to incorporate updates regarding the COVID-19 pandemic.”).

[28] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (EEOC COVID-19 Technical Assistance)* (Apr. 23, 2020).

[29] EEOC Pandemic Guidance ¶ II.B.

[30] The regulations defining “direct threat” state that, “[i]n determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.” 29 C.F.R. § 1630.2(r).

[31] EEOC Pandemic Guidance ¶ II.A.2.

[32] EEOC COVID-19 Technical Assistance ¶ A.6.

[33] EEOC Pandemic Guidance ¶ III.B.7.

[34] *Id.* F¶ III.B.5.

[35] This question and answer is significant enough that it is worth quoting in full:

8. When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.

Id. ¶ III.B.8 (emphasis removed).

[36] *Id.* ¶ III.B.8.

[37] *Id.* ¶ III.C.20.

[38] *Id.*

[39] EEOC COVID-19 Technical Assistance ¶ B.3 (“[Question:] May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? (4/9/20) [Answer:] Yes.”).

[40] Similarly, relevant government authorities (e.g., the CDC) should provide guidance on what an employer should do when an employee discloses to the employer that the employee has received an exposure alert on a contact tracing app.

[41] While the focus of this article is on the ADA, as an antecedent question, it should not be unlawful for an employer to require an employee to download a smartphone app, even if the smartphone is the employee’s personal phone. In general, employers are allowed to establish conditions of employment that should reasonably include the types of disclosures discussed in this article. *But see infra* note 42 & accompanying text (discussing an employer’s duty to bargain with a union). There are, however, state laws that prevent an employer from demanding access to an employee’s personal online accounts. As noted by the National Conference of State Legislatures (the NCSL), “[s]tate lawmakers began introducing legislation beginning in 2012 to prevent employers from requesting passwords to personal Internet accounts to get or keep a job.” See NCSL, *State Social Media Privacy Laws* (May 22, 2019), available at <https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-username-and-passwords.aspx>. An employer requiring an employee to download an app that does not track the employee’s location is fundamentally different than an employer seeking access to an employee’s social media accounts. In Illinois for example, the Right to Privacy in the Workplace Act makes it unlawful for an employer to request an employee “to provide a user name and password or any password or other related account information in order to gain access to the employee’s . . . personal online account or to demand access . . . to an employee’s . . . personal online account.” See 820 ILCS 55/10(b)(1)(A). A survey of each state’s laws is beyond the scope of this article, but such laws should be considered by an employer before requiring employees to download an app.

There also may be wage and hour issues that arise out of requiring employees to use their phone for such purposes, particularly when the usage extends to “off hours.” For example, under some state laws, an employer may be required to reimburse an employee for the employee’s using a contact tracing app on the employee’s personal smartphone. See *Krauss v. Wal-Mart, Inc.*, No. 2:19-cv-00838-JAM-DB, 2020 U.S. Dist. LEXIS 66535, at *18–19 (E.D. Cal. Apr. 14, 2020); 820 ILCS 115/9.5(a) (“An employer shall reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer.”).

[42] See generally *NLRB v. Katz*, 369 U.S. 736 (1962).

[43] In general, a disability-related inquiry “is a question (or a series of questions) that is likely to elicit information about a disability,” and a medical examination is “a procedure or test that seeks information about an individual’s physical or mental impairments or health.” See EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* ¶¶ B.1–2 (July 26, 2000). Even if broadcasting and receiving anonymous keys could be considered part of a series of questions to elicit information about a disability, because COVID-19 meets the “direct threat” threshold, such questions likely would be permissible under the ADA.

[44] See EEOC Pandemic Guidance ¶¶ II.A.2, II.B.

[45] For example, a 2015 lawsuit in California alleged that an employer violated California law and committed tortious invasion of privacy and wrongful termination in violation of public policy when it terminated an employee who refused to be tracked 24/7 with a GPS app on her phone. See *Arias v. Intermex Wire Transfer, LLC*, No. S-1500-CV-284763-SPC (Cal. Sup. Ct. May 5, 2015). The plaintiff’s legal theories were not tested in that case, however, as the parties settled before the court made any substantive decision.

[46] EEOC Pandemic Guidance ¶ III.B.8.

[47] EEOC COVID-19 Technical Assistance ¶ A.6.

[48] See EEOC Pandemic Guidance, Note About 2020 Updates (“Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public.”); EEOC COVID-19 Technical Assistance ¶ G.1 (stating, in the context of a question regarding employees returning to work after stay-at-home orders are lifted, that “employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time”).

The CDC has provided guidance on these issues and likely will continue to update its guidance as conditions change. See CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (Apr. 9, 2020) (“Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.”); CDC, *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19* (Apr. 20, 2020) (“To ensure continuity of operations of essential functions, CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.”).

[49] CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (Apr. 9, 2020) (“If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).”).

[50] EEOC COVID-19 Technical Assistance ¶ B.3.



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