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May an employer require the use of a contact tracing app?

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Starting in late April, businesses around the United States began 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.

Worse yet, many have warned that there may be a second wave of COVID-19 cases in late fall of this year.

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).

Whether employers can legally require employees to use a contact tracing app is a complicated question, which potentially implicates several relevant areas of the law, including data privacy laws.

Several organizations are working on digital contact tracing systems, including Apple and Google, which announced in early April that they were partnering on a COVID-19 "contact tracing technology."[1] As the CDC has explained, these digital contact tracing tools "can add value to traditional contact tracing efforts."[2]

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 for a specified period of time 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, the Apple – Google technology and an MIT-led project called "PACT," will not collect any location data.[3]

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.[4]

According to one estimate, to be effective, an app needs roughly 50 to 70 percent of a population to participate.[5]

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.[6]

Here, our focus is limited to the United Sates and, specifically, the Americans with Disabilities Act (the ADA), which "regulates employers' disability-related inquiries and medical examinations from all applicants and employees." *See* EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (*EEOC Pandemic Guidance*) ¶ II (Mar. 21, 2020 ed.).

To analyze this question under the ADA, we will:

(1) describe the basics of contact tracing technology;

(2) 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

(3) 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.

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."[7]

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. The digital contact tracing technologies currently in development are intended to supplement the traditional methods.

The general summary of these digital technologies presented here is based on reports about the MIT-led PACT project and the Apple – Google technology.[8]

When a user installs an app that uses contact tracing technology, the app will begin broadcasting, via Bluetooth technology, anonymous "chirps" or "beacons" from the phone. The beacons

are basically strings of random numbers, and they change frequently, possibly every 10 to 20 minutes.

If two phones running an app come in close enough contact for a long enough period of time (*e.g.*, for at least 10 minutes), then the two phones exchange beacons. The app on each phone keeps a running list on the user's phone of the beacons that it broadcasts and that it receives.

These lists stay on each user's phone, except that, when a user tests positive for COVID-19 and the user consents, the user may upload the list of beacons (which remain anonymous) that the user's phone recently broadcast to a collected list of COVID-19 positive beacons.

In response to the COVID-19 pandemic, the EEOC published documents that provide helpful guidance on what an employer may and may not do in the context of the COVID-19 pandemic.

Periodically, the app on each user's phone checks the list of beacons that it received against the collected list of COVID-19 positive beacons. 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 beacons are anonymized to prevent anyone from connecting a key to an individual.

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. 42 U.S.C. § 12112(a), (d).[9]

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." *Id.* § 12112(d)(4).[10]

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," 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.'" *See EEOC Pandemic Guidance* ¶ III.B.16; *id.* II.B (quoting 29 C.F.R. § 1630.2(r)).

In response to the COVID-19 pandemic, in addition to updating the *EEOC Pandemic Guidance,* the EEOC also published updated technical assistance questions and answers titled *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).

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." *EEOC Pandemic Guidance* II.B. This is significant because the "direct threat" determination generally is a nuanced question that involves some judgment. *See generally* 29 C.F.R. § 1630.2(r) (defining "direct threat"). 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. *See EEOC Pandemic Guidance* ¶ II.A.2. 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," *EEOC COVID-19 Technical Assistance* ¶ A.6, and "employers may measure employees' body temperature" even though doing so generally qualifies as a "medical examination," *EEOC Pandemic Guidance* ¶ III.B.7.

Second, relying on "current CDC guidance on COVID-19," the *EEOC Pandemic Guidance* states that an employer may prevent an employee from coming into a workplace if the employee tests positive for COVID-19 or the employee has COVID-19 symptoms. *EEOC Pandemic Guidance* ¶ III.B.5.

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." *Id.* ¶ III.B.8.

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. *Id.*

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. *Id.* ¶ III.C.20.

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." *Id.*

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. *EEOC COVID-19 Technical Assistance* ¶ B.3.

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.

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.[11]

We break this analysis into three parts:

(1) the app's broadcasting and receiving beacons;

(2) exposure alerts and testing; and

(3) the user's uploading their beacons to a central list after testing positive for COVID-19.[12] (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. *See generally NLRB v. Katz,* 369 U.S. 736 (1962).)

THE APP'S BROADCASTING AND RECEIVING BEACONS

A contact tracing app's broadcasting and receiving anonymous beacons via Bluetooth should not be considered a disability inquiry or medical examination under the ADA because, in addition to being random and anonymous, the numbers do not reveal any medical information on their own. *See EEOC Pandemic Guidance* ¶¶ II.A.2, II.B.[13]

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,[14] if the technologies work as intended, a contact tracing app will be anonymous, it will not track or trace any individual employee, and the beacons will never be provided to an employer.

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. *See EEOC Pandemic Guidance* III.B.8.

> 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 beacons after testing positive, there may be other, non-ADA privacy concerns and considerations.

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.

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. *See EEOC COVID-19 Technical Assistance* A.6.

Additionally, the employer also likely would be permitted to follow CDC guidelines on the employee's return to work after receiving an exposure alert. *See generally EEOC Pandemic Guidance* at Note About 2020 Updates; *EEOC COVID-19 Technical Assistance* G.1.[15]

THE USER'S UPLOADING BEACONS 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 recently broadcast beacons will be uploaded to the central list of COVID-19 positive beacons.

The CDC has stated that "[i]f an employee is confirmed to have COVID-19," then "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," CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)* (Apr. 9, 2020), and the EEOC has advised that employer may disclose to a public health agency

the name of an employee who tests positive, *EEOC COVID-19 Technical Assistance* ¶ B.3.

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 beacons 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 of 2020.

Notes

[1] Google, *Apple and Google partner on COVID-19 contact tracing technology,* The Keyword (Apr. 10, 2020), https://bit.ly/3e0rrEe.

[2] *See* CDC, Digital Contact Tracing Tools for COVID-19 (Apr. 20, 2020).

In late April, the CDC published preliminary guidance on digital contact tracing, including its "minimum and preferred characteristics of digital contact tracing tools." *See* CDC, Preliminary Criteria for the Evaluation of Digital Contact Tracing Tools for COVID-19 (Apr. 28, 2020). The CDC uses the phrase "proximity tracking" to refer to the "[t]ools that use Bluetooth or GPS technologies to estimate the proximity and duration of an individual's exposure to an infected person." Id.

[3] Google, Exposure Notification Frequently Asked Questions (May 2020 v.1.1), https://bit.ly/2AMANoN ("This system does not collect location data from your device, and does not share the identities of other users to each other, Google or Apple. The user controls all data they want to share, and the decision to share it.... There will be restrictions on the data that apps can collect when using the API, including not being able to request access to location services, and restrictions on how data can be used."); Kylie Foy, Bluetooth signals from your smartphone could automate Covid-19 contact tracing while preserving privacy, MIT News (Apr. 8, 2020).

[4] Alfred Ng, *Tech isn't solution to COVID-19, says Singapore director of contact tracing app,* CNET (Apr. 13, 2020).

[5] Sidney Fussell & Will Knight, *The Apple-Google Contact Tracing Plan Won't Stop Covid Alone, Wired* (Apr. 14, 2020).

[6] States or Congress also may enact new laws relevant to contact tracing. For example, on April 30, 2020, several United States Senators announced plans to introduce the COVID-19 Consumer Data Protect Act. See U.S. Senate Committee on Commerce, Science, & Transportation, Wicker, Thune, Moran, Blackburn Announce Plans to Introduce Data Privacy Bill (Apr. 30, 2020), https://bit.ly/36gyXs6.

[7] Ellen Barry, An Army of Virus Tracers Takes Shape in Massachusetts, N.Y. Times (Apr. 16, 2020).

[8] *See* generally MIT, PACT: Private Automated Contact Tracing (Apr. 8, 2020), https://pact.mit.edu; Foy, supra note 3; Google, COVID-19 Exposure Notification Using Bluetooth Low Energy, https://bit.ly/2XlWCDc (last accessed May 5, 2020); Google, Exposure Notification Frequently Asked Questions, supra note 3.

[9] 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)).

[10] 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." Id. § 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. Id. § 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.

[11] 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.

[12] 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* § III (noting that an employer may have a 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 (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), https://bit.ly/3cRTc1L.

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 WL 1874072, at *6 (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.").

[13] 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 beacons 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.

[14] 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. Super. Ct.). The plaintiff's legal theories were not tested in that case, however, as the parties settled before the court made any substantive decision.

[15] 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.").

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