



EEOC Releases ADA Guidance for Restaurants and Other Food Service Employers

By Bill Kelly, Scott Hetrick and Ben Rodgers

Here is a quandary: a restaurant's sous chef contracts Hepatitis A. The Food and Drug Administration (FDA)'s "Food Code" requires the restaurant to remove the chef from her position. But the Americans with Disabilities Act (ADA) may also require that the restaurant accommodate her during the period of her illness. *What does this mean to the food service industry? And how can an employer reconcile the apparent contradictions between the prohibitions in the Food Code and the employee protections in the ADA?*



When a person is disabled by one of the diseases caused by a Big 4 Pathogen, the food service employer must consider the ADA in addition to the Food Code.

The Equal Employment Opportunity Commission (EEOC) recently issued written guidance on how to observe both the ADA and the Food Code. This Alert highlights what the EEOC had to say about the interaction between the FDA's Food Code and the ADA. While the EEOC guidance is not law, it provides employers guidance on how the Commission will interpret the law and handle charges.

What are the Big 4 Pathogens?

The FDA's Food Code seeks to protect the public from diseases transmissible through food. The Food Code identifies "Big 4 Pathogens," infectious diseases

communicable through unsafe food-handling identified by the Centers for Disease Control and Prevention (CDC), as follows:

- *Salmonella* Typhi
- *Shigella* spp.
- Shiga toxin-producing *Escherichia coli*
- Hepatitis A virus

What Must An Employee Report?

The Food Code establishes a reporting regime for food-handling employees. Food service employees should be instructed that, under the Food Code, an employee must promptly report to the employer that the employee:

- is diagnosed with an illness due to one of the Big 4 Pathogens;
- has any symptoms relating to intestinal illness, including diarrhea, fever, vomiting, jaundice, sore throat, boils or infected wounds;
- has had a past illness due to one of the Big 4 Pathogens; or
- meets one of the specific high-risk conditions for becoming ill because of one of the Big 4 Pathogens.

What Can I Ask About?

The employer may ask medical questions of a particular employee who handles food so long as the employer has concrete reasons for linking the employee's medical condition to workplace safety or job performance. For example, if an employer becomes aware of an employee's illness, the employer may generally ask whether that employee has been diagnosed with one of the Big 4 Pathogen diseases without violating the ADA.

What About Employee Confidentiality?

Here is one of the tricky parts: the ADA requires that medical information remain confidential, whereas the Food Code encourages employers to notify other exposed employees of any risk of exposure. Thus, when an employee reports a symptom or condition, the ADA generally prohibits the employer from disclosing the name or health records of the employee who may have caused the exposure to a food-related disease. But pursuant to the Food Code, and without disclosing the employee's name, the employer may (and should) notify other employees that they may have been exposed, and encourage those employees to be tested.

For job applicants, specific rules apply. The ADA prohibits an employer from asking an applicant during a job interview about health issues or diseases transmissible through food. Only after making a conditional job offer may food service employers ask questions about symptoms and diseases transmissible through food, possibly require a medical examination and – under certain circumstances – revoke the conditional job offer.

What should I do With an Employee With A Big 4 Pathogen?

Diseases resulting from the Big 4 Pathogens usually have temporary or minor effects. So these diseases often do not meet the legal test of "disability" under the ADA. In other words, most people who have these

diseases are not disabled under the ADA. If an employee does not have an ADA disability, the food service employer may follow the Food Code's guidance on restrictions and exclusions without considering the ADA. But when a person is disabled by one of the diseases caused by a Big 4 Pathogen, the food service employer must consider the ADA in addition to the Food Code.



When a person is disabled by a Big 4 pathogen, the employer must consider the ADA in addition to the Food code.

If the employee meets the definition of "disabled" under the ADA, then the employer has to make a "reasonable accommodation" for the diagnosed employee that does not involve contact with food or food handling duties. On the other hand, the employer can exclude the employee from the food establishment entirely if the employer determines:

- there is no reasonable accommodation that would eliminate the risk of transmitting the disease while also allowing the employee to work, or
- proposed accommodations would pose an undue hardship on the business.

How Long Do I Have to Accommodate the Employee?

Although the ADA does not require employees to provide an indefinite leave of absence, the employer must hold open the disabled employee's job if she has been excluded from the food establishment due to the requirements of the Food Code unless or until such time as leaving that position unfilled poses an undue hardship. Once the risk of transmitting the disease through food no longer exists, the employer must return the employee to the full duties of her original position or to a vacant equivalent position for which the employee is qualified.

So, How Should the Restaurant Handle the Sous Chef with Hepatitis A?

The answer is, alas, it depends. While the Food Code would require the chef to be removed temporar-

ily from her position, the restaurant must also consider whether the condition qualifies as a "disability" under the ADA before replacing or terminating that employee. If the condition is a disability, then the restaurant must consider whether it can make a reasonable accommodation for her that does not involve food service or undue risk of contaminating persons in food service. Further, the restaurant should consider notifying other employees of the risk of exposure, without disclosing the names or extra medical details relating to any employee.

Food service employers can rely on the EEOC's new guidance on this subject. But resolving questions under the ADA involves a case-by-case analysis of the individual facts, using the best available medical information concerning the employee and a working knowledge of employment law. Employers would be wise to seek legal advice when such questions arise.

ADAMS AND REESE LLP represents employers in all aspects of employee relations, including defending claims arising under state and federal labor and employment laws; assisting employers in drafting and seeking enforcement of employment contracts, policies and handbooks; and providing ongoing advice, counsel and training to clients regarding employment issues. This Alert merely provides information about recent legal developments and is not to be considered legal advice or a legal opinion. Such can only be given after careful consideration of the facts unique to any situation. Legal counsel should always be consulted for further clarification or investigation of the employer's particular circumstances.

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