

## MEMORANDUM

**TO: MARIE KRUPINSKI, PRESIDENT, KUAFF**

**FROM: KEVIN P. MCGOVERN, METS SCHIRO & MCGOVERN**

**DATE: SEPTEMBER 1, 2020**

**RE: COVID-19 FAQ'S**

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At its Executive Board meeting of August 28, 2020, and with the approval of the full Board, you directed my office to put together a list of Frequently Asked Questions ("FAQ'S) that may arise as adjunct faculty return to campus for the Fall semester, in the midst of the ongoing pandemic. The purpose of the FAQ is to provide adjunct faculty with ready access in an easy to digest format which addresses legal issues likely to arise in the coming weeks and months.

**1. Can Kean University require me to report whether I am experiencing symptoms of Covid-19?**

Yes. According to EECO guidance, last updated on June 17, 2020, employers covered by the Americans with Disabilities Act (ADA) may inquire whether employees are experiencing symptoms of Covid-19. These symptoms include fever, chills, shortness of breath, or sore throat. The list of symptoms associated with the virus may change or expand as more information becomes known about its effects. Such information, once provided, must be treated by Kean University as confidential in accordance with the provisions of the ADA.

**2. Can Kean University require me to undergo a temperature check as a condition of being on campus?**

Yes. Because the Center for Disease Control (CDC) and State and local health authorities have acknowledged that Covid-19 is spread through interpersonal contact, employers are permitted to direct employees to submit to a temperature check as part of its precautionary measures.

**3. Can Kean University direct me to leave the workplace in the event I show symptoms of Covid-19 and if so, do I get paid for the time that I am out of work?**

According to CDC guidance, employees showing symptoms of Covid-19 should refrain from attending the workplace. Based on that guidance, Kean University has the right to direct employees who show symptoms of Covid-19 to leave work. In the event that the employee is showing symptoms of Covid-19 and seeks testing, the employee is entitled to up to 80 hours of paid leave under the Families First Coronavirus Response Act (FFCRA) while awaiting a diagnosis. The FFCRA expires on December 31, 2020, so adjunct faculty directed by the University to remain home during the Fall 2020 semester may seek to be paid for time absent from work while awaiting a test result, in accordance with the FFCRA.

**4. Can Kean University require me to take a Covid-19 test to see if I have the virus?**

Yes. The ADA permits an employer to send an employee for medical testing where the test is “job related and consistent with business necessity.” The EEOC has determined that testing for Covid-19 satisfies this standard. Therefore, Kean University may require employees to seek testing for Covid-19 where the employee has shown symptoms, or as a condition of returning to the workplace. Consistent with ADA standards, the University is required to ensure that the tests are accurate and reliable.

**5. Can Kean University require me to take a Covid-19 antibody test to see if I ever had the virus?**

No. Like the test for Covid-19, the antibody test is deemed to be a medical examination under the ADA. However, unlike the test for Covid-19, the antibody test does not satisfy the standard of being “job related and consistent with business necessity.” Therefore, Kean University cannot require adjunct faculty to submit to a Covid-19 antibody test as a condition of teaching.

**6. I have an underlying medical condition which puts me at greater risk if I get sick with the virus. Can Kean still force me to come to work?**

The ADA requires employers to provide “reasonable accommodations” to employees who have a qualifying disability so that the employee can perform the duties of his/her position. The employer must engage in an “interactive process” with the employee to identify the nature of the accommodation. Whether the parties can agree on an accommodation will depend on the adjunct’s specific assignment and Kean’s operational need. An employer is not required to grant a requested accommodation if doing so will create an “undue hardship” on the employer. As long as Kean engages in the interactive process in good faith, it is not a violation of the ADA to refuse to permit all assigned classes to be taught online, rather than in person. See Wood v. Board of Supervisors, 2017 WL 600095 (M.D. La. 2017).

**7. I have an underlying mental health condition that makes it more difficult to deal with the stress caused by the virus and its associated risks. Am I able to work from home?**

The legal principles under the ADA which apply to medical conditions also apply to diagnosed mental health conditions. The EEOC guidance recognizes that individuals diagnosed with certain pre-existing mental health conditions, such as panic attacks, post-traumatic stress disorder, obsessive-compulsive disorder, or anxiety disorder may have a more difficult time dealing with the stress associated with the pandemic. Therefore, Kean is required to engage in the same interactive process in order to determine whether a reasonable accommodation is available to permit the adjunct to teach. However, as with physical conditions, as long as the University engages in the interactive process in good faith, it cannot be compelled to permit all assigned classes to be taught remotely. See Brittan-Powell v. Coppin State University, 2020 W.L. 1809192 (D. Maryland, 2020).

**8. If I ask for a reasonable accommodation, do I have to produce medical documentation to the University?**

Yes. If the disability is not evident or already known, Kean University has a right to request and review medical documentation which supports the employee's request for a reasonable accommodation. To qualify as a "disability" under the ADA, the condition must be one that substantially limits a major life activity or has a history of substantially limiting such activity. The adjunct should be prepared to address (a) how the disability creates the limitation, (b) how the requested accommodation will address the limitation, (c) whether another accommodation would address the limitation, and (d) whether the employee will be able to perform the essential functions of his/her position if the accommodation is granted.

**9. I do not have an underlying medical or mental health condition, but I reside with a family member who is at greater risk of the virus. Am I entitled under the ADA to seek a reasonable accommodation on that basis?**

No. The ADA does not require employers to offer or make reasonable accommodations to those employees who do not have a disability as that term is defined by the statute. Current EEOC guidance specifically provides that "an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential Covid-19 exposure." Therefore, residing with a family member who is at greater risk for the disease cannot be relied upon to seek a reasonable accommodation under the ADA, nor would the employer have to engage in the interactive process on that basis. However, as a practical matter, employees may seek an accommodation for this reason, even knowing that the employer is not required to grant the request as a matter of law. In the event the University is willing to entertain the request, it is suggested that supporting documents be provided if requested.

**10. What happens if I go back to work, but I conclude that the changes made by Kean are not enough to keep me or my students safe from the virus?**

According to its “Return to Campus” plan, Kean University intends to offer some in-person instruction starting on September 22, 2020 and lasting through the Thanksgiving recess. During in-person instruction, faculty and staff will be required to wear face coverings or face masks and remain socially distanced. It remains to be seen whether these measures are effective at containing or preventing the spread of Covid-19. Article XVII.B of the contract governing the employment of adjunct faculty provides that “Whenever an employee observes a condition which he or she feels represents a violation of safety and health rules and regulations or which is an unreasonable hazard to persons or property, the employee shall report such observation which shall be promptly investigated. Where a hazard exists which endangers the employee, he or she shall not be required to work where that condition exists.” Based on that language, an adjunct faculty member has an obligation to report circumstances which create an “unreasonable hazard” to the employee or others on campus. The employee also has a right to refuse to work in such an area while the hazard is present. Should an adjunct wish to invoke this right, he/she should notify the union.

**11. Am I able to file a grievance against Kean if I believe that management has not done enough to keep me and my students safe?**

No. While Kean is obligated by Article XVII of the contract to maintain a safe working environment, that part of the contract is not subject to the grievance procedure. However, the union has a right to negotiate over specific safety concerns, such as providing necessary safety equipment, and about Kean’s general obligation to provide a safe and healthy work environment. See State of New Jersey, 11 NJPER ¶16162 (1985).