




UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

SEP 16 2016

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: BETH F. COBERT
ACTING DIRECTOR 

Subject: Human Resources Flexibilities and Authorities for Federal Employees
Affected by the Zika Virus

The World Health Organization has declared the Zika virus to be a “public health emergency of international concern” (www.who.int/mediacentre/news/statements/2016/emergency-committee-zika-microcephaly/en/). President Obama has emphasized that “We all have to remain vigilant when it comes to combating the spread of diseases like Zika.” (www.whitehouse.gov/zika) The Zika virus is spread primarily through the bites of infected mosquitoes—the same types of mosquitoes that spread other viruses like dengue and chikungunya. While most people have mild or no symptoms from a Zika infection, the Centers for Disease Control and Prevention (CDC) has established a link between Zika infection during pregnancy and serious birth defects and other poor pregnancy outcomes. We also know that there can be other serious neurological disorders for some people who are infected with Zika.

As the Zika virus spreads into certain parts of the United States, we must remember that our Federal workforce is our most valuable resource and take steps to minimize the impact of the Zika virus on our employees while continuing to ensure continuity of operations. Agencies are strongly encouraged to utilize all available human resources flexibilities, along with providing workplace accommodations, if appropriate, to support employees who have a significant risk of a severe outcome due to contracting the Zika virus—for example, female employees who are pregnant.

The U.S. Office of Personnel Management (OPM) has convened a working group of agency representatives that will meet regularly to discuss the developing situation and support OPM efforts to provide agencies and employees with current information and guidance related to the Zika virus. As a first step, this interagency working group was involved in the drafting of this memorandum. The interagency working group will continue to monitor developments related to the Zika virus and support OPM in issuing additional guidance as necessary. OPM will also communicate with the Chief Human Capital Officers and national labor unions concerning the impact of the Zika virus on the Federal workforce.

This memorandum has three attachments providing information and/or guidance from OPM, the Equal Employment Opportunity Commission (EEOC), and the Occupational Safety and Health Administration (OSHA). They present current guidance on protecting workers from occupational exposure to the Zika virus and remind the Federal community of the various human resources flexibilities and authorities that may be available to help affected Federal employees. The attachments are as follows:

Attachment 1 – OPM Guidance on Workplace Flexibilities and Authorities for Dealing with the Zika Virus

This attachment provides information regarding the various workplace flexibilities and authorities available to assist Federal employees affected by the Zika virus, including leave and telework.

Attachment 2 – EEOC: The EEO Laws for Employees Affected by the Zika Virus

This resource document discusses workplace issues that may arise under the laws the EEOC enforces, particularly in situations where pregnant employees ask for accommodations to avoid exposure to the virus or employees ask for accommodations related to symptoms of the virus.

Attachment 3 – OSHA Zika Job Hazard Analysis for Federal Agencies

This attachment provides a template to help Federal agencies develop job hazard analyses and hazard control strategies to protect their workers from occupational exposure to the Zika virus.

While no Zika vaccine currently exists, there are several ways for Federal employees to protect themselves from mosquito bites, including using insect repellents with Environmental Protection Agency-registered active ingredients, wearing long-sleeved shirts and long pants, and removing sources of standing water whenever possible. For more prevention tips and the latest updates on Zika, please visit the CDC's website at www.cdc.gov/zika/, OSHA's website at www.osha.gov/zika/, and the National Institute for Occupational Safety and Health's (NIOSH) website at www.cdc.gov/niosh/zika/.

Finally, OPM would like to remind agencies considering work-related travel to Zika-affected areas to use appropriate flexibility to accomplish the necessary work using alternate means, such as teleconferencing, whenever possible. Supervisors should carefully consider requests from employees who wish to opt out of this travel, and/or solicit qualified volunteers if travel is necessary. For more information, please see OPM's memorandum (CPM 2016-04) at <https://www.chcoc.gov/content/notification-cdc-travel-alert-regarding-zika-virus>.

Additional Information

Agency headquarters-level human resources offices may contact OPM at pay-leave-policy@opm.gov. Agency field offices should contact their appropriate headquarters-level agency human resources office. Individual employees should contact their agency human resources office.

Attachments

cc: Chief Human Capital Officers
Human Resources Directors

OPM Guidance on Workplace Flexibilities and Authorities for Dealing with the Zika Virus

The U.S. Office of Personnel Management (OPM) reminds agencies that a wide range of human resources (HR) policies and flexibilities are available to assist employees and agencies in dealing with the Zika virus. This attachment provides information regarding the leave and other workplace flexibilities and authorities available for these purposes. Agencies are expected to implement policies consistent with laws, regulations, collective bargaining responsibilities and OPM guidance. This guidance is focused on employees who have a significant risk of a severe outcome due to contracting the Zika virus, including women who are pregnant or trying to get pregnant and their sex partners. In making decisions to utilize workplace flexibilities, agencies may consider the level of risk of transmission in a given geographic area, based on guidance provided by the Centers for Disease Control and Prevention (CDC) (<http://www.cdc.gov/zika/geo/active-countries.html>, www.cdc.gov/zika/intheus/maps-zika-us.html, and <http://www.cdc.gov/zika/vector/range.html>). Geographic areas where the Zika virus is known to have been spread via mosquito clearly present the highest risk.

I. Leave and Other Paid Time Off

The Federal Government offers numerous leave and workplace flexibilities to assist employees who are affected by the Zika virus. Under current law and regulations, employees may use sick leave, annual leave, advanced annual and/or sick leave, Family and Medical Leave Act (FMLA) leave, leave without pay, donated leave under the Voluntary Leave Transfer and Leave Bank Programs, and other paid time off such as compensatory time off and credit hours under flexible work schedules (FWS).

Sick Leave. An employee is entitled to use an unlimited amount of accrued sick leave when he or she is unable to perform his or her duties due to physical or mental illness or is receiving medical examination or treatment. An employee must be symptomatic (ill) due to the Zika virus to use his or her accrued sick leave. An employee **cannot** use accrued sick leave simply due to exposure to the Zika virus, since sick leave usage by persons exposed to a communicable disease is limited to cases where exposure requires quarantine or confinement, as directed by health care authorities (e.g., CDC). Sick Leave for Personal Needs fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/personal-sick-leave/>)

Sick Leave for General Family Care and Bereavement. An employee is entitled to use a total of up to 104 hours (13 days) of sick leave each leave year to provide care for a family member who is ill or receiving medical examination or treatment or to make arrangements necessitated by the death of a family member or attend the funeral of a family member. An employee's family member must be symptomatic (ill) due to the Zika virus to use his or her accrued sick leave for general family care. An employee **cannot** use accrued sick leave simply due to a family member's exposure to the Zika virus, since sick leave usage is limited to cases where a family member's exposure to a communicable disease requires quarantine or confinement, as directed by health care authorities (e.g., CDC). The amount of sick leave permitted for family care and

bereavement purposes is proportionally adjusted for part-time employees and employees with uncommon tours of duty in accordance with the average number of hours of work in the employee's regularly scheduled administrative workweek.

Sick Leave for Family Care or Bereavement Purposes fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-for-family-care-or-bereavement-purposes/>)

Sick Leave To Care for a Family Member with a Serious Health Condition. An employee is entitled to use up to 12 weeks (480 hours) of sick leave each leave year to care for a family member with a serious health condition. If an employee has already used 13 days of sick leave for general family care and bereavement purposes (discussed above), the 13 days must be subtracted from the 12 weeks. If an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care purposes. An employee is entitled to no more than a combined total of 12 weeks of sick leave each leave year for all family care purposes. An employee's family member must be symptomatic (ill) due to the Zika virus to use his or her accrued sick leave to care for a family member with a serious health condition. An employee **cannot** use accrued sick leave simply due to a family member's exposure to the Zika virus, since sick leave usage is limited to cases where a family member's exposure to a communicable disease requires quarantine or confinement, as directed by health care authorities (e.g., CDC). The amount of sick leave permitted for family care and bereavement purposes is proportionally adjusted for part-time employees and employees with uncommon tours of duty in accordance with the average number of hours of work in the employee's regularly scheduled administrative workweek. Sick Leave to Care for a Family Member with a Serious Health Condition fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-to-care-for-a-family-member-with-a-serious-health-condition/>)

Annual Leave. An employee may use any or all accrued annual leave for personal needs, such as rest and relaxation, vacations, medical needs, personal business or emergencies, or to provide care for a healthy or sick family member. An employee has a right to take annual leave, subject to the right of the supervisor to schedule the time at which annual leave may be taken. OPM encourages agencies to be flexible in granting annual leave to employees who wish to be absent for reasons related to the Zika virus. Annual Leave fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/>)

Advanced Annual and/or Sick Leave. An agency may advance annual leave in an amount not to exceed the amount the employee would accrue during the remainder of the leave year. An agency may advance a maximum of up to 30 days (240 hours) of sick leave, subject to limitations, to be used for the same reasons it grants sick leave. An employee may request advanced annual and/or sick leave irrespective of existing leave balances. OPM encourages agencies to be flexible in granting advanced annual leave and/or advanced sick leave to employees who wish to be absent for reasons related to the Zika virus. Advanced Annual Leave fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/advanced-annual-leave/>)

Advanced Sick Leave fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/advanced-sick-leave/>)

Family and Medical Leave. An employee may invoke his or her entitlement to **unpaid** leave under the Family and Medical Leave Act of 1993 (FMLA) in appropriate circumstances. Under the FMLA, an employee is entitled to a total of up to 12 workweeks of leave without pay for a serious health condition that prevents an employee from performing his or her duties or to care for a spouse, son or daughter, or parent with a serious health condition. An employee may substitute his or her accrued annual and/or sick leave for unpaid leave in accordance with current laws and regulations governing the use of annual and sick leave. An employee or family member who contracts the Zika virus and becomes ill may have a qualifying serious health condition; however, mere exposure to the Zika virus does not qualify as a serious health condition. Family and Medical Leave fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/family-and-medical-leave/>)

Leave Without Pay. If an employee has exhausted his or her available annual or sick leave and other forms of paid time off, he or she may request leave without pay (LWOP). LWOP is a temporary nonpay status and absence from duty that, in most cases, is granted at the employee's request. In most instances, granting LWOP is a matter of supervisory discretion and may be limited by agency internal policy. While FMLA leave is limited to specific purposes, LWOP may be granted for any reason approved by the agency. OPM encourages agencies to be flexible in granting LWOP to employees who wish to be absent from work for reasons related to the Zika virus. In situations where the LWOP is taken for a purpose that would qualify under FMLA, granting LWOP without requiring the employee to invoke FMLA will preserve the employee's entitlement to 12 weeks of FMLA leave. An extended period of LWOP may have an effect on an employee's benefits including health benefits, retirement benefits, and life insurance. Leave Without Pay fact sheet: (<http://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/leave-without-pay>)

Effect of Extended Leave Without Pay (or Other Nonpay Status) on Federal Benefits and Programs fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/effect-of-extended-leave-without-pay-lwop-or-other-nonpay-status-on-federal-benefits-and-programs/>)

Donated Leave. If an employee has a personal or family medical emergency related to the Zika virus and is absent (or expected to be absent) from duty without available paid leave for at least 24 work hours, he or she may qualify to receive donated annual leave under the Voluntary Leave Transfer Program (VLTP) or Voluntary Leave Bank Program (VLBP).

- **Voluntary Leave Transfer Program** – The VLTP allows an employee to donate annual leave to assist another employee who has a personal or family medical emergency and who has **exhausted his or her own available paid leave**. All agencies must establish a VLTP. Voluntary Leave Transfer Program fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-transfer-program/>)
- **Voluntary Leave Bank Program** – The VLBP allows an employee who is a member of the agency's voluntary leave bank to receive donated annual leave from the leave bank if the employee experiences a personal or family medical emergency and has **exhausted his or her own available paid leave**. An agency is not required to establish a VLBP.

Voluntary Leave Bank Program fact sheet: (<https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-bank-program/>)

Other Paid Time Off. An employee may use earned compensatory time off, compensatory time off for travel, and/or credit hours to be absent from work, including for reasons related to the Zika virus. OPM encourages agencies to be flexible in granting these types of time off to employees who wish to be absent for reasons related to the Zika virus.

- **Compensatory Time Off** – Compensatory time off is earned time off with pay in lieu of overtime pay for overtime work. Compensatory Time Off fact sheet: (<http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/compensatory-time-off/>)
- **Compensatory Time Off for Travel** – Compensatory time off for travel is earned time off with pay for time spent in a travel status away from the employee’s official duty station when such time is not otherwise compensable. Compensatory Time Off for Travel fact sheet: (<http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/compensatory-time-off-for-travel/>)
- **Credit Hours** – Credit hours are hours an employee elects to work, with supervisory approval, in excess of the employee’s basic work requirement under a **flexible work schedule that provides for credit hours**. Credit Hours fact sheet: (<http://www.opm.gov/policy-data-oversight/pay-leave/work-schedules/fact-sheets/credit-hours-under-a-flexible-work-schedule/>)

II. **Telework**

The Federal Government uses telework to allow Federal employees to complete their work at an approved alternative worksite when that work does not require onsite presence for performance. The Telework Enhancement Act of 2010 (the Act) defines “telework” or “teleworking” as a work flexibility arrangement under which an employee performs the duties and responsibilities of his or her position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work. Over the past few years, telework has become a critical tool during emergency situations.

OPM has strongly encouraged agencies to maintain a viable telework-ready workforce. This requires determining eligibility for employees to telework, encouraging employees to enter into written telework agreements, communicating expectations before an emergency situation occurs, and practicing and testing equipment and procedures regularly throughout the year, not just teleworking during emergencies that may occur infrequently. Telework arrangements may require collective bargaining obligations for employees represented by labor organizations. Agencies also need to implement and maintain a robust information technology system with the necessary infrastructure to accommodate widespread remote usage of agency systems as well as the accompanying technical support personnel to resolve remote connectivity issues.

Agencies should maximize their telework capacity by entering into telework agreements with as many telework-eligible employees as possible and by conducting exercises to test employees’

ability to access agency networks from home. Managers should ensure that there are effective processes in place for communicating efficiently with employees who are teleworking. For additional information on telework, please see www.telework.gov.

OPM encourages agencies to be as flexible as possible in approving telework for employees who wish to work at home or an approved alternative worksite for reasons related to the Zika virus.



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).

OSHA Zika Job Hazard Analysis Template for Federal Agencies

Updated: September 9, 2016

Instructions: Update the language marked by [brackets and grey highlighting] to reflect your own agency operations, activities, and policies. You should provide specific examples of work activities/tasks that fall into the pre-defined hazard categories. In some instances, you may need to make edits to the recommended controls for the various levels of Zika hazards (i.e., if certain controls are not feasible for your specific operations).

This template is intended to help Federal agencies develop their own job hazard analyses and hazard control strategies to protect their workers from occupational exposure to Zika virus. The template is designed to apply to operations and activities in Centers for Disease Control and Prevention (CDC)-defined Zika transmission areas (i.e., areas with local transmission of Zika virus through mosquito vectors); see: www.cdc.gov/zika/geo/index.html. The document does not apply to areas with only travel-associated Zika cases or cases resulting only from bloodborne exposure (e.g., in laboratories and healthcare facilities) or sexual transmission. This template is not intended to provide specific instructions for complying with Occupational Safety and Health Administration (OSHA) standards or Office of Personnel Management (OPM) policies or to cover every situation in which workers may be exposed to Zika virus.

The Occupational Safety and Health Act of 1970, Executive Order 12196 and 29 CFR 1960 require the heads of Federal agencies to furnish to employees places and conditions of employment that are free from job safety and health hazards. Your agency Designated Agency Safety and Health Official (DASHO) or his/her designee should perform hazard analyses and implement control measures to protect workers from recognized hazards.

Federal agencies should train workers about their risk of exposure to Zika virus, methods to protect themselves from exposure, health effects associated with Zika infection, and to seek medical evaluation if they develop symptoms of Zika or have other Zika-related concerns. Information about which individuals should be tested for Zika virus infection is available at: <http://www.cdc.gov/zika/hc-providers/testing-for-zikavirus.html>.

Interim guidance from OSHA and the National Institute for Occupational Safety and Health (NIOSH), available at www.osha.gov/zika, provides additional information about protecting workers from occupational exposure to Zika virus.

For information about workplace flexibilities available to assist Federal employees affected by the Zika virus, please see Attachment 1 of the OPM memorandum. For information about reasonable accommodations for Federal employees affected by the Zika virus, please see Attachment 2 of the OPM memorandum.

[Agency]	Zika Job Hazard Analysis
	[Office location, if specific]
<p>Applies to: Operations and activities in CDC-defined Zika transmission areas (i.e., areas with local transmission of Zika virus through mosquito vectors). The document does <u>not</u> apply to areas with only travel-associated Zika cases or cases resulting only from bloodborne exposure (e.g., in laboratories and healthcare facilities) or sexual transmission.</p>	
<p>Brief Description: Analysis and risk reduction for all tasks associated with agency operations and activities in areas designated by the CDC or other lead health agency as Zika-affected areas.</p> <p>Field activities potentially expose employees to contracting the disease through the bites of infected mosquitoes. Zika may cause a range of symptoms, from mild, transient effects (e.g., fever, rash, joint pain, red/pink eyes, muscle pain, headache) to more serious health outcomes (e.g., neurological disorders) in an infected individual. Infections in pregnant women are also associated with significant birth defects, including microcephaly and other neurocognitive problems. Zika can be transmitted between sexual partners, and, as a result, infected workers may infect their susceptible partner(s).</p>	
<p>Date analysis completed: [date]</p>	
<p><input type="checkbox"/> NEW <input type="checkbox"/> REVISED</p>	
<p>Approved by: [signature/date]</p>	
<p>Additional notes: Consult the CDC web site for the latest information on Zika transmission areas in the U.S.: www.cdc.gov/zika/intheus/maps-zika-us.html.</p>	
<p>[As of (date), mosquitoes carrying Zika virus have caused/are causing human infections in the following areas: (Insert current list of CDC-defined Zika transmission areas.)]</p> <p>Use zip codes as a screening tool to identify addresses that may fall within the defined Zika transmission area, and use judgment in assignment of work. Where appropriate, use remote communication tools to prevent unnecessary entry and exposure of employees in defined Zika transmission areas.</p> <p>For more information, consult the OSHA/NIOSH interim guidance at: www.osha.gov/zika</p>	
Potential Hazard Description	Controls to Eliminate/Reduce Exposure
<p>Operations and activities in areas outside of CDC-defined Zika transmission areas.</p> <p>[Examples of agency-specific work tasks or jobs that fall into this category]</p>	<p>No special precautions required however application of mosquito repellent containing EPA-registered active ingredients with demonstrated repellency, such as 30% DEET¹, or at least 20% Picaridin, or Oil of Lemon eucalyptus (OLE), or para-methane-diol (PMD) is recommended for outdoor activities.</p>

<p>Operations and activities inside of CDC-defined Zika transmission areas, but where outdoor exposure is limited, such as leaving a vehicle and entering directly into an indoor, air conditioned workplace.ⁱⁱ</p> <p>[Examples of agency-specific work tasks or jobs that fall into this category]</p>	<p>Ensure facilities have screens on windows that may be opened. Keep doors closed, or ensure open doorways also have screens (e.g., screen doors).</p> <p>Application of mosquito repellent containing EPA-registered active ingredients with demonstrated repellency, such as 30% DEET, or at least 20% Picaridin, or Oil of Lemon eucalyptus (OLE), or para-methane-diol (PMD) is required. Wearing lightweight, long sleeve shirts, long pants, socks and boots treated with permethrin is recommended.</p>
<p>Outdoor operations and activities inside of CDC-defined Zika transmission areas, but in open areas where the work activity does not disturb mosquitoes or where mosquito populations are not especially dense.</p> <p>[Examples of agency-specific work tasks or jobs that fall into this category]</p>	<p>Special precautions required: Wear lightweight, long sleeve shirts, long pants, socks and boots treated with permethrin. Application of mosquito repellent containing EPA-registered active ingredients with demonstrated repellency, such as 30% DEETⁱ, or at least 20% Picaridin, or Oil of Lemon eucalyptus (OLE), or para-methane-diol (PMD) is required.</p>
<p>Outdoor operations and activities in areas inside of CDC-defined Zika transmission areas where exposure to mosquitoes is expected (e.g., during brush clearing in damp areas, observing mosquito habitat destruction or other mosquito control operations, or landscaping activities in damp or wet areas).</p> <p>[Examples of agency-specific work tasks or jobs that fall into this category]</p>	<p>Special precautions required: Wear lightweight long sleeve shirts, long pants, socks and boots treated with permethrin. Apply mosquito repellent containing EPA-registered active ingredients with demonstrated repellency, such as 30% DEETⁱ, or at least 20% Picaridin, or Oil of Lemon eucalyptus (OLE), or para-methane-diol (PMD), to all exposed skin. Wear mosquito screening over or attached to a hat (or hardhat, if required by work activities) to protect neck and face.</p>
<p>Outdoor operations and activities in areas inside of CDC-defined Zika transmission areas around or involving conduct or observation of mosquito control processes involving wide-area (or area) application of pesticides.</p> <p>[Examples of agency-specific work tasks or jobs that fall into this category]</p>	<p>Special precautions required: Wear lightweight long sleeve shirts, long pants, socks and boots treated with permethrin. Apply mosquito repellent containing EPA-registered active ingredients with demonstrated repellency, such as 30% DEETⁱ, or at least 20% Picaridin, or Oil of Lemon eucalyptus (OLE), or para-methane-diol (PMD) to all exposed skin. Wear mosquito screening over or attached to a hat (or hardhat, if required by work activities) to protect neck and face.</p> <p>If possible, observe mosquito control operations from a distance to limit or eliminate exposure to pesticides.</p>

ⁱ Choose a repellent that provides protection for the amount of time that you will be outdoors. In general, the more active ingredient (higher concentration) a repellent contains, the longer it will protect against mosquito bites. For example, the more DEET a repellent contains, the longer time it can protect you from mosquito bites, with protection times ranging from 1 hour (4.75% DEET) to 5 hours (23.8% DEET). Studies suggest that concentrations of DEET above approximately 50% do not offer a marked increase in protection time against mosquitoes; DEET efficacy tends to plateau at a concentration of approximately 50%. Repellents containing DEET are widely available through various vendors, including GSA Advantage![®] at: www.gsaadvantage.gov/.

ⁱⁱ *Aedes aegypti* and *A. albopictus* are aggressive daytime biters, but they can also bite at night. These mosquitoes may be found in both indoor and outdoor environments.

NRCExecSec Resource

From: AllAgencyHeads <ALLAGENCYHEADS@LISTSERV.OPM.GOV> on behalf of OPMExecSec <OPMExecSec@OPM.GOV>
Sent: Monday, September 19, 2016 4:21 PM
To: ALLAGENCYHEADS@LISTSERV.OPM.GOV
Subject: [External_Sender] OPM Memo Attached: Human Resources Flexibilities and Authorities for Federal Employees Affected by the Zika Virus
Attachments: Human Resources Flexibilities and Authorities for Federal Employees Affe....pdf; Attachment 1 - OPM Guidance on Workplace Flexibilities and Authorities for Dealing with the Zika Virus.pdf; Attachment 2 - EEO LAWS FOR EMPLOYEES AFFECTED BY THE ZIKA VIRUS - EEOC.pdf; Attachment 3 - OSHA Zika Job Hazard Analysis Template (9-9-16) v02.docx

Good afternoon:

Attached is an OPM memorandum regarding Human Resources Flexibilities and Authorities for Federal Employees Affected by the Zika Virus and three attachments* from OPM, EEOC and OSHA. Per your convenience, OSHA's Zika Job Hazard Analysis Template is attached in Word so agencies can populate the gray fields within the template

This information was transmitted to your CHCOs and HR Directors on Friday, September 16.

For the benefit of visually-impaired readers, a 508-compliant version of this memorandum is posted online at: <https://www.chcoc.gov/content/human-resources-flexibilities-and-authorities-federal-employees-affected-zika-virus>.

If you have any follow-up questions, please email pay-leave-policy@opm.gov.

Thank you.

Jozetta R. Robinson

Director, Office of the Executive Secretariat
U.S. Office of Personnel Management
1900 E. Street, NW, Room 5450A
Washington, DC 20415
Phone: 202-606-8004 / Fax: 202-606-2573
Email: jozetta.robinson@opm.gov