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EEOC Updates Pandemic Workplace Guidance

Human Resources & Employment

UPDATE: In its latest update to its pandemic workplace guidance, [the EEOC addresses questions](#) employers will face as businesses reopen and employees return to work. In advance of employees' return, employers are encouraged to provide information to all employees about who to contact in the event they wish to request an accommodation for a disability they may need upon return to the workplace. Such information can also include CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19. Employers may begin the interactive process when they receive the request, even if no date has been announced for employees' return. As always, employers should ensure that those who receive requests for accommodation handle such requests consistent with federal employment nondiscrimination laws.

UPDATE: The EEOC has further updated its guidance to employers dealing with COVID-19 issues in the workplace. The new guidance reiterates that employees must let employers know that they need a reasonable accommodation. While the employee need not use the term "reasonable accommodation," if the employee does not request a change for a reason related to a medical condition, the ADA does not mandate that the employer take action.

The guidance also addresses how to handle situations where employers are concerned about the health of their employees who may be considered "high risk for severe illness" if they get COVID-19. Employers may not bar employees from the workplace solely because of an underlying medical condition. Such an action may not be taken unless the employee's disability poses a "direct threat" to the employee's health that cannot be eliminated or reduced by a reasonable accommodation and is an approach that is used sparingly by most employers. Importantly, the analysis of whether a "direct threat" exists cannot be based solely on the condition being on the CDC's list of medical conditions posing a high risk, but the determination must be an individualized assessment. Even where the individual assessment determines an employee's condition poses a "direct threat," an employer may only exclude the employee from the workplace absent an available reasonable accommodation. Such accommodations, per the EEOC, may include personal protective gear, enhanced protective measures, elimination or substitution of "marginal" functions, or modifications of job schedules. Of course, reasonable accommodations are only required absent undue hardship, but the EEOC encourages employers and employees to be flexible and creative during the pandemic.

The Equal Employment Opportunity Commission (EEOC) has provided additional assistance for employers navigating the impact of COVID-19 in the workplace. The EEOC, which enforces workplace anti-discrimination laws, updated its [technical guidance](#) with advice on handling reasonable accommodation requests and dealing with harassment during the pandemic. In addition, the new guidance adds a section dedicated to assisting employers with employees returning to work.

Responding to Requests for Reasonable Accommodations

Several of the provisions in the updated guidance touch on how employers can and should respond to requests for reasonable accommodations during the pandemic. Employers may still ask questions or request medical documentation in the event an employee requests an accommodation for a medical condition either at home or in the workplace.

While employers should still engage in the "interactive process," the EEOC suggests an employer may choose to forgo the process and simply grant the request. Employers can also choose to put end dates on certain accommodations or provide them on a trial basis. If choosing this option, employers must consider an employee's request for an extension, particularly if current restrictions are extended.

The guidance also provides that the circumstances of the pandemic are relevant to an employer's decision not to provide a reasonable accommodation if it poses an "undue hardship," meaning "significant difficulty or expense." In other words, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. As an example, employers may find it significantly more difficult to provide employees with temporary assignments or remove marginal functions under the current circumstances.

As it relates to the issue of significant expense, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Employers cannot, however, simply reject an accommodation because it costs money. They must still weigh the cost of an accommodation against their current budget, while taking into account constraints created by the pandemic.

Harassment in the Workplace

Employers are encouraged to remind employees during this pandemic that it is against equal employment opportunity laws to harass or otherwise discriminate against coworkers based on a protected category. Now may be a good time to remind and advise supervisors of their roles in watching for, stopping and reporting any harassment or other discrimination. Employers should immediately review any allegations of harassment or discrimination and take appropriate action.

Returning to the Workplace

The guidance also looks forward to the coming weeks and months as government stay-at-home orders and other restrictions are lifted. The Americans With Disabilities Act (ADA) does permit employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity, and employers can exclude employees that would pose a direct threat to health or safety. To determine a direct threat under the current pandemic, employers should refer to guidance from the Centers for Disease Control and Prevention (CDC). Per the EEOC, as long as an employer is implementing screening at the workplace consistent with CDC guidelines, they will be considered to be acting consistent with the ADA.

For some, this may include taking temperatures and asking questions about symptoms of those entering the workplace. For critical infrastructure workers in essential businesses, the CDC has [posted guidance](#) advising additional steps including regular self-monitoring, wearing masks, social distancing, and disinfecting and cleaning workspace. As always, employees who become sick during the workday should be sent home immediately.

Employers may also require employees to wear protective gear and observe infection control practices. In the event this leads to a request for accommodation under the ADA or a religious accommodation under Title VII, employers are advised to engage in the interactive process and provide the accommodation if feasible and not an undue hardship.