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EEOC Updates Return-to-Work Guidelines Amid COVID-19

The Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing federal workplace anti-discrimination laws, has been continually updating its guidance and Frequently Asked Questions (FAQs) in response to the COVID-19 pandemic.

As workplaces prepare to reopen (to varying degrees) amid the phasing-out of "safer-at-home" orders and easing social distancing restrictions, EEOC guidance has weighed-in on several "Return to Work" issues, including how to accommodate workers who have underlying medical conditions that place them at higher risk of severe illness from COVID-19.

One key takeaway from the recent guidance is that the Americans with Disabilities Act (ADA) does not allow employers to exclude employees from the workplace simply because they have an underlying medical condition that the Centers for Disease Control and Prevention (CDC) says might pose a higher risk of severe illness from COVID-19 (unless the employee's disability poses a "direct threat" to his health, which, as explained below, is a high standard to meet). Notably, the EEOC retracted and revised its earlier guidance in this area, and the updated guidance is below.

Below are FAQs most recently published by the EEOC. These are provided with the caveat that the EEOC is just one among many authorities and thus employers should remain cognizant of additional federal, state, and local laws, regulations, and guidance relevant to returning to work amid COVID-19.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee – or a third party, such as an employee's doctor – must let the employer know that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

In sum, the EEOC's ongoing guidance underscores the theme that EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic but should not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities. Importantly, **employers should remain aware that guidance from public health authorities is likely to change as the pandemic evolves and should thus continue to follow the most current information on maintaining workplace safety, which may include consulting an attorney.**

The EEOC's most up-to-date FAQs

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