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EEOC Issues ADA and Title VII Guidance for Employers on COVID-19

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Note: This post has been updated to reflect supplemental guidance issued by the U.S. Equal Opportunity Employment Commission ("EEOC") on June 17, 2020 and September 8, 2020.

The EEOC guidance assists employers with navigating the COVID-19 outbreak and implementing best practices related to a return to work by addressing issues such as screening and testing, reasonable accommodations, maintaining confidentiality of an employee's medical information, and COVID-19 related discrimination and harassment. The EEOC recently updated the guidance to include additional information broadly related to screening and testing procedures, including what constitutes permissible inquiries by an employer, maintaining employee confidentiality surrounding an employee's symptoms or positive COVID-19 test, and an employer's obligations during the interactive process.

Employee Medical Information, Screening and Testing, and Requirements under the ADA

- Employers may screen employees who enter the workplace, including that they may ask all employees who will be physically entering the workplace if they have COVID-19, if they have symptoms associated with COVID-19, or if they have been tested for COVID-19.
- Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on symptoms associated with the virus. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. This information may guide employers with respect to choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace.
- Under the existing circumstances, the Americans with Disabilities Act ("ADA") allows an employer to bar an employee from physical presence in the workplace if the employee refuses to have his or her temperature taken or refuses to answer questions about whether he or she has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19.
- If an employer chooses to test employees, they may wish to consider incidences of false-positives or false-negatives associated with testing. A positive test reveals that an individual

most likely has a current infection and may be able to transmit the virus to others, but a negative test result means that the individual did not have detectable levels of COVID-19 infection at the time of testing. Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that employees, including those who have tested negative, observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19. We discussed return to work testing considerations here.

- If an employer wishes to ask *only* a particular employee to answer screening questions, to have his or her temperature taken or to undergo other screening or testing methods, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have COVID-19. So, it is important for employers to consider what objective evidence supports their belief that the individual in question has COVID-19 before taking these actions with respect to a particular employee.
- If an employee entering the workplace requests an alternative method of screening due to a medical condition, the employer should treat this request as a reasonable accommodation under the law. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability, ascertain the nature of the employee's specific limitations, and request supporting medical documentation. Similarly, if an employee requests an alternative method of screening as a religious accommodation, the employer should determine if an accommodation is available under Title VII.
- The Genetic Information Nondiscrimination Act ("GINA") prohibits employers from asking employees medical questions about their family members, but it does not prohibit an employer from asking employees whether they have come in contact with someone diagnosed with COVID-19.
- Questions about where an employee has traveled are not disability-related inquires. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was for personal reasons.
- If an employee has not reported to work, an employer may ask why. An inquiry related to why an employee has been absent from work is not a disability-related question.
- An employer *may not* exclude an employee from the workplace solely because the employee has a medical condition that puts the employee at a higher risk for severe illness due to COVID-19. Under the ADA, an employer can only take such an action if the employee's disability poses a "direct threat" to his or her health that cannot be eliminated or reduced with a reasonable accommodation, or to the health and safety of others in the workplace. The guidance notes that the "direct threat" requirement is a high standard to meet, and the employer must show that the employee has a disability that poses a "significant risk of substantial harm" to his or her own health. An employer would be required to make an assessment, beyond the employee having a medical condition on the CDC list, that includes 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. Even if the employer can show the employee is a "direct threat" to his or her own health, the employer still cannot exclude the employee unless, after engaging in the interactive process with the employee and considering all options (e.g. telework, leave, reassignment), there is still no effective reasonable accommodation.
- Unlike diagnostic tests, which test for an active infection and which are permissible, employers may *not* require antibody testing before an employee may re-enter the workplace.

Under the ADA, antibody testing is considered a medical examination and the testing currently does not meet the ADA's standard of being "job related and consistent with business necessity."

- If an employer requires all employees to have a daily temperature check before entering the workplace, the employer may keep a log of the results as long as the information is stored in a manner that maintains confidentiality (see above). However, employers should be aware of other applicable state laws that may be more restrictive – for example, employers in New York State *may not* maintain employee temperature data.
- While there is no general requirement for employers to report cases of COVID-19 among its workforce, an employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19. Similarly, a temporary staffing agency or a contractor that places an employee in an employer's workplace may notify the employer if it learns the employee has COVID-19 because the employer may need to determine if the employee had contact with anyone in the workplace. However, employers should also take note of applicable state laws. For example, New York State employers should report immediately to state and local health authorities any positive COVID-19 cases involving employees at their workplace. Similarly, in California, employers should report positive COVID-19 tests to the local health department.
- An employer may tell staff that a particular employee is teleworking. If staff need to know how to contact that employee, and that employee is not present in the workplace, then employers are permitted to disclose that the employee is teleworking without disclosing the reason. Also, if the employee was on leave rather than teleworking because of COVID-19 or symptoms associated with the virus, or for any other medical condition, an employer cannot disclose the reason for the leave, just the fact that employee is on leave.
- The ADA does not prevent an employee from communicating to his or her supervisor about a co-worker's COVID-19 symptoms. The supervisor should contact appropriate management officials to report this information and discuss next steps.
- If a supervisor receives an employee's medical information, whether it is related to COVID-19 or not, the ADA requires that the information be kept confidential. This requirement does not prevent a supervisor from notifying the appropriate employer's officials so that they can take actions consistent with guidance from the CDC and other public health authorities. But, the employer should make every effort to limit the number of people who know the employee's name. Further, an employer may conduct contact tracing interviews (e.g., requesting a list of those individuals whom the employee may have had contact with, so that the employer can then notify those individuals of potential exposure without revealing the employee's identity).
- The ADA requires that medical information be stored separate and away from other personnel files and employee information. A supervisor who receives an employee's medical information while teleworking should follow normal company procedures to store this information. If supervisors cannot follow the procedures for whatever reason, they should make every effort to safeguard the information from disclosure (e.g., by not leaving a laptop open or accessible to others; not leaving notepads with information around the home, etc.). Medical documents should not be stored electronically where other employees can access them.

Reasonable Accommodations Relating to COVID-19

- Employers may invite employees to request reasonable accommodations before returning to the workplace, even if there is no set date to return to work. The ADA and the Rehabilitation Act permit employers to make information available in advance to all employees about who to contact – if they wish – to request accommodation for a disability that they may need upon

return to the workplace. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

- Alternatively, an employer may send a general notice to all employees who are designated to return to the workplace, noting that the employer is willing to consider requests for accommodation or flexibility on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.
- Both approaches are consistent with the Age Discrimination in Employment Act ("ADEA"), ADA, and guidance from the CDC. However, it is important that the individual receiving the accommodation requests, in either approach, is able to handle them consistently with applicable federal, state, and local discrimination laws. If an employee chooses not to request an accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.
- Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace reopens. Employers should not postpone making a decision on an accommodation that will not be needed until an employee returns to the workplace (after teleworking ends), but rather should begin discussing the request now in an effort to acquire the information needed to make a decision. However, an employer may prioritize requests for accommodations that are needed while teleworking.
- If a job may only be performed at the workplace, there may be reasonable accommodations for individuals with disabilities who are at a higher risk from COVID-19 that allow them to perform the job. Accommodations for workers who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance; or other accommodations that reduce chances of exposure. Temporary restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform the essential functions of the job while reducing exposure to COVID-19.
- In order for an employee to request a change in a reasonable accommodation because he or she has an underlying condition that puts the employee at a higher risk for severe illness as a result of COVID-19, the employee must inform the employer, either directly or through a third party representative (such as a doctor), that he or she requires a reasonable accommodation for the underlying condition. The employee or representative should communicate to the employer that the employee has an underlying condition that necessitates a change to meet a medical need. An employee or representative may request a reasonable accommodation in conversation or in writing, but using the term "reasonable accommodation" in this communication is not required. As discussed below, an employer may ask follow up questions or request medical documentation.
- Employers should treat accommodation requests from employees with preexisting mental health conditions the same as they would with any accommodation request – for example, by asking questions to determine whether the condition is a disability, discussing how the requested accommodation would assist the employee, exploring alternative accommodations that may meet the employee's needs, and requesting medical documentation if needed.
- The guidance clarifies that in light of the pandemic, some employers may choose to forgo or

shorten the exchange of information between an employer and an employee known as the "interactive process" in order to grant an accommodation request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process – and devise end dates for the accommodation – to suit changing circumstances based on public health directives.

- While employers may require doctors' notes certifying their fitness for duty before returning to work, as a practical matter, doctors and other health care professionals may be too busy during the pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches, such as requesting an employee's prescription, may be necessary.
- Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (e.g., either a specific date such as December 31, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people in workplaces). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a preexisting disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.
- An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.
- An employer may assess "significant difficulty" in acquiring or providing certain accommodations by considering the facts of the particular job and workplace. For example, it may be significantly more difficult during this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation, such as finding another role, poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems, such as adjusting an employee's work schedule or taking intermittent leave.
- The sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration in determining whether a reasonable accommodation may cause a "significant expense." Also relevant is the amount of discretionary funds available at this time – when considering other expenses – and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation with costs attached; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or low-cost accommodations available.
- Accommodations that may eliminate or reduce a direct threat to the employee can include, for example: enhanced protective gowns, masks, gloves, erecting a barrier to provide separation between the employee with a disability and coworkers or the public, eliminating marginal (non-essential) tasks from the employee's job duties, temporary modification of an employee's work schedule, or moving the employee's work location. While the guidance offers these examples, an effective accommodation will depend on the employee's workplace and job

duties. The employer and employee should discuss ideas that may work for them.

- If an employer grants telework to employees with the purpose of slowing down/stopping COVID-19 after the public health measures are no longer necessary, the employer is not obligated to automatically grant telework as a reasonable accommodation to every employee with a disability who wishes to continue this arrangement. Anytime an employee requests a reasonable accommodation, the employer has the right to understand and evaluate the disability related limitation and make a determination on the request. After the pandemic, a request to telework does not have to be granted if working at the worksite is an essential function of the job in normal circumstances (i.e. not during a pandemic). The ADA never requires an employer to limit the essential functions of a position, and just because an employer did this during the pandemic does not mean an employer has to permanently change the essential functions of a position, and is not an admission that telework is a feasible accommodation or that telework does not place an undue hardship on the employer.
- An employer that provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, should not treat employees differently based on sex or other EEO-protected characteristics.
- An employer may not exclude an employee from the workplace involuntarily due to pregnancy . Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough. The ADA provides protection for pregnancy-related medical conditions – if an employee makes a request for a reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules. Further, the Pregnancy Discrimination Act requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work.
- Similarly, because the ADEA prohibits employment discrimination against individuals age 40 and older, employers may not involuntarily exclude an individual from the workplace or taking similar action based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19. While the ADEA does not include a right to reasonable accommodation for older workers due to age, employers may consider providing flexibility to workers age 65 and older. However, employers should proceed cautiously since other applicable laws, including state and local laws, may protect employees more broadly and prohibit employers from treating employees differently based on age, even if some employees may be considered higher risk because of their age.

Conclusion

This is a challenging time and events on the ground are changing rapidly. EEOC guidance and interpretation of what is permissible under the ADA and Title VII is evolving and may continue to change as circumstances develop. For now, employers should ensure that their policies and practices are in line with the EEOC's guidance, as noted above. We will update this post accordingly.

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