

EEOC Releases New Guidance to Employers on Returning Employees to Work and ADA Compliance

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Throughout the COVID-19 pandemic, the EEOC has periodically released updates to its Technical Assistance Questions and Answers, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” which Hunton previously posted about [here](#) and [here](#). These questions and answers have provided employers with much needed guidance on the EEOC’s position on how employers can ensure the safety of their employees while at the same time not running afoul of the ADA.

On May 5, 2020, and then again on May 7, 2020, the EEOC updated its Technical Assistance Questions and Answers. These latest updates address the EEOC’s position on whether, and in which circumstances, an employer may prevent an employee from returning to work because the employer knows the employee has a medical condition that will place the employee at a higher risk of severe illness if the employee were to contract COVID-19 (e.g., those with chronic lung disease, asthma, heart disease, or are immunocompromised).

First, the new guidance makes clear that “[i]f 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.” Rather, the employer may only take this action if the employee’s illness poses a “direct threat” to the employee’s health that cannot be reduced or eliminated by a reasonable accommodation. The EEOC notes that this is a high standard, and an employer seeking to exclude an employee based on a direct threat to the employee’s health must 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.”

And even in the event an employer determines an employee’s disability poses a direct threat to the employee’s own health, the employer may still not take an adverse action or exclude the employee on this basis unless, absent undue hardship, the employer cannot provide an employee a reasonable accommodation. The EEOC lists several reasonable accommodations employer’s should consider that may accommodate a medical condition of an employee at a higher risk for severe illness if the

employee contracts COVID-19, such as providing PPE, erecting barriers around the employee's workspace to offer additional protection, modified work hours, and telework.

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