HR Insights

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EEOC Expands COVID-19 Return-to-Work Guidance

On June 11, 2020, the Equal Employment Opportunity Commission (EEOC) issued more guidance concerning COVID-19 and return to work. This article compiles some of the frequently asked questions (FAQs) from the new guidance.

As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements?

Yes. The Americans with Disabilities Act (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, even if no date has been announced for their return. 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 Centers for Disease Control and Prevention (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.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities 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.

Either approach is consistent with the Age Discrimination in Employment Act (ADEA), the ADA and the May 29, 2020 CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief or pregnancy.

What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition?

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. 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 and what specific limitations

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require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

The CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and, therefore, has encouraged employers to offer maximum flexibilities to this group. Do employees ages 65 and over have protections under the federal employment discrimination laws?

The ADEA prohibits employment discrimination against individuals ages 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace 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.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers ages 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers ages 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

If an employer provides telework, modified schedules or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEOC-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy?

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on 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.

Is there a right to accommodation based on pregnancy during the pandemic?

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically 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. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.