

Employment Law Update: EEOC Issues New Guidance on Accommodation Requests; Expands "Undue Hardship" Definition; Provides Guidance for Employers on Employees Returning to Work

Client Alert

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By: [Joel Clymer](#)

On April 17, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated guidance for employers navigating the complex issues presented by COVID-19 in the workplace.

The updated guidance consists of substantive responses to 10 different inquiries regarding employer conduct focused on addressing the pandemic in the workplace. The topics covered include workplace accommodation requests and undue hardship determinations under the ADA, as well as various recommendations to employers as workplaces begin to reopen.

Additional Guidance on Accommodation Requests

The EEOC reiterated an employer's responsibility to provide reasonable accommodation to employees either at home or in the workplace. These responsibilities were previously covered in Client Alerts published on [March 24, 2020](#) and [April 7, 2020](#).

The EEOC's new guidance further expands on an employer's obligation to engage in the interactive process and highlights an employer's right to ask questions and seek documentation necessary to confirm the existence of a disability if it is not obvious or is completely unknown. Furthermore, employers are allowed to ask questions about why an accommodation is needed, including:

- How the disability creates a limitation
- How the requested accommodation will effectively address the limitation
- Whether another form of accommodation could effectively address the issue
- How a proposed accommodation will enable the employee to continue performing the "essential functions" of their position (i.e., the fundamental job duties)

Employers may also forgo or shorten the interactive process and simply grant accommodation requests given the extraordinary circumstances presented by the COVID-19 pandemic. Indeed, the partial or full lifting of government restrictions and/or changing circumstances based on public health directives may require a more flexible approach to an employer's existing accommodations process. One possible solution that employers may consider is devising end dates for short-term accommodations offered.

Employers can also offer accommodations on an interim or trial basis with an end date while awaiting the receipt of medical documentation. This approach is best for employees seeking accommodations for pre-existing disabilities that put them at higher risk of exposure or that are exacerbated by the pandemic. However, employers should be mindful when devising end dates that changing circumstances during the pandemic may require an extension, where appropriate. Consequently, any employee requests for an extension must be considered.

Expanded Definition of "Undue Hardship"

The EEOC provided new guidance on how to determine when an accommodation presents an undue hardship. Specifically, an accommodation presents an undue hardship when it creates a significant difficulty or results in a significant expense to the employer. "Significant difficulties" consist of one or more purely logistical obstacles to implementation of an accommodation. For example, it may be significantly more difficult during the pandemic to conduct a needs assessment or to acquire certain items as delivery may be impacted, particularly for employees who may be teleworking. Additionally, it may be significantly more difficult to provide employees with temporary assignments, remove marginal functions, or readily hire temporary workers for specialized positions. Employers are encouraged to engage in a robust interactive process to ensure that no other alternative accommodations can be provided before rejecting a request due to significant difficulty.

A requested accommodation may create an undue hardship for an employer due to "significant expense" if cost prohibitive. While the expenses associated with most accommodations have traditionally resulted in minimal expense to employers, the extraordinary circumstances presented by the pandemic may significantly impact an employer's ability to shoulder those financial burdens. Employers may therefore consider "the sudden loss of some or all of [its] income stream because of the pandemic" when considering a request for accommodation. However, employers are precluded from outright rejecting accommodation requests on this basis and must still enter into the interactive process in good faith. An employer may reject the accommodation due to significant expense only after weighing the potential financial burdens the accommodation presents against current budgets, especially since there may be no-cost or very low-cost accommodations available to an employee in some cases.

EEOC Guidance to Employers for Employees Returning to Work

The EEOC provided new guidance to employers for employees returning to work once government stay-at-home orders and other restrictions are modified or lifted. Specifically, employers may make medical inquiries and conduct medical examinations if job-related and consistent with business necessity. A medical inquiry/examination is consistent with the ADA if "it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety."

The EEOC reminds employers that they should continue to look to the CDC and other public health authorities when determining whether the virus continues to pose a "direct threat." As long as an employer's screening procedures remain consistent with advice from the CDC and other public health authorities for that type of workplace at that time, the employer should not run afoul of the ADA.

Examples of recommended employer screening procedures were covered in our previously referenced Client Alerts. Employers should also remain mindful of the CDC and OSHA's recent guidance concerning the return of critical infrastructure workers to the workplace. This guidance was also addressed in our [April 15 Client Alert](#).

Although employers can require returning employees to wear Personal Protective Equipment (PPE), they are encouraged to also consider associated accommodation requests. Possible requests include, without limitation:


- Non-latex gloves
- Modified face masks for interpreters or others that communicate with an employee who uses lip reading
- Specialized gowns for individuals using wheelchairs

Returning to Work - Title VII Accommodations and Employer Cautions

Employers should also consider religious accommodations under Title VII, such as modified equipment to accommodate religious garb. Employers and employees are encouraged to discuss each request and provide modifications or alternatives if feasible and barring undue hardship on the operation of the employer's business under the ADA or Title VII.

Employers are cautioned to remain ever vigilant to avoid harassment and discrimination connected to the pandemic as employees return to work. Employers should specifically remind returning employees about its active anti-discrimination policy and that discrimination and harassment against coworkers based on race, national origin, color, sex, religion, age (over 40), disability, or genetic information will not be tolerated. Employers are further advised to remind supervisors and managers of their respective roles in watching for, stopping, and reporting violations of the policy. Finally, employers should remind all staff that allegations of discrimination/harassment will be taken seriously, thoroughly investigated, and that substantiated incidents will result in appropriate action - up to and including termination.

Related Attorneys



Joel Clymer
Partner
732.476.2514
Email