COVID-19 Employment Law Update: Employer Rights and Responsibilities Following Additional Guidance from the EEOC on the ADA, ADEA and Title VII

Client Alert

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The Equal Employment Opportunity Commission (EEOC) has explicitly determined COVID-19 to be a direct threat to the workplace, as noted in our March 24, 2020 Client Alert. On March 27, 2020, the EEOC issued additional guidance on the ADA and other federal anti-discrimination laws as applied to the pandemic.

Because COVID-19 is now considered a direct threat, employers are afforded greater latitude in the invasiveness of their medical inquiries and examinations of employees, and in their ability to exclude employees from the workplace under the Americans with Disabilities Act (ADA). If an individual with a disability poses a direct threat to the workplace despite reasonable accommodation, they are not protected by the ADA's nondiscrimination provisions. Additionally, the laws enforced by the EEOC (e.g., ADA, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, etc.) do not interfere with or prevent employers from following the guidance of the Centers for Disease Control (CDC) or other public health authorities.

Employer Rights and Responsibilities Under the ADA

Pursuant to the EEOC's new guidance, employers still may not terminate an employee because they are diagnosed with, or have symptoms of, COVID-19. Despite this prohibition, the EEOC has greenlit some employer action to prevent the spread of the disease within the workplace that does not run afoul of existing employment discrimination laws.

Additional Guidance on Medical Inquiries and Examinations:

Employers may ask all employees entering the workplace if they have COVID-19, its symptoms, or if they have been tested for COVID-19. Employers may exclude employees from the workplace if they have COVID-19 because their presence would pose a direct threat. An employee that refuses to answer the employer's questions or submit to a physical examination may also be barred from the workplace.

The EEOC encourages employers to ask why the employee is refusing to answer questions about their medical status before barring them from the workplace, as some employees may be reluctant to share their medical information out of fear that it may be inadvertently disclosed within the workplace. Employers should therefore reassure employees that their personal medical information will remain confidential. Conversely, employers may not ask teleworking employees these questions because they are not physically present in the workplace and therefore are not a direct threat.

Employers may not single out employees for medical inquiries or examinations. If an employer wishes to ask only one - or a few select employees - about exposure to COVID-19, the ADA requires that employer to have a reasonable belief based upon objective evidence that that particular employee might have the disease.

To avoid running afoul of the Genetic Information Nondiscrimination Act (GINA) employers should not ask employees whether they have a family member that has COVID-19, as GINA prohibits employers from asking medical questions about family members. Instead, employers should ask employees whether they have been in contact with anyone diagnosed with, or displaying symptoms of, COVID-19.

Additional Guidance on the ADA's Confidentiality Requirements:

The ADA requires all employers to keep medical information confidential, even if that medical information does not concern a disability. Information revealing that an employee has symptoms of, or is diagnosed with, COVID-19 is obviously medical information and therefore must be kept confidential. Therefore, the EEOC specifically advises that employers maintain the confidentiality of employees with confirmed COVID-19. To accomplish this, employers should limit the number of individuals that must know the identity of the infected employee. Thus, the EEOC recommends that employers designate a representative tasked with interviewing infected employees to identify any individuals that may have had contact with that infected employee.

The employer should then take appropriate steps to notify those individuals without disclosing the infected employee's name. All individuals designated as needing to know the identity of the infected employee should be specifically instructed not to disclose that individual's name. Although coworkers at a smaller employer may be able to find out the identity of the infected employee on their own, this does not excuse an employer's responsibility to keep the identity of the infected employee confidential. However, the employer may notify public health authorities if it learns that an employee has COVID-19.

To avoid inadvertent disclosure of confidential employee medical information, employers should also plan what supervisors and managers must do if an employee reports a coworker with COVID-19 or its symptoms. Supervisors on notice of an infected employee should immediately contact the appropriate management officials and discuss next steps. Supervisors should also advise the reporting employee not to disclose the infected employee's medical status to anyone else.

Certain circumstances may require an employer to put individuals on notice of an employee's status resulting from their absence from the workplace due to COVID-19, however disclosure of the employee's medical information is completely unnecessary. If an employee is teleworking or on leave because they have symptoms of, or are diagnosed with, COVID-19, the employer may inform individuals that need to contact the employee that the individual is teleworking or on leave without disclosing why. Importantly, the same would be true for an

employee diagnosed with any medical condition.

Finally, the ADA requirement that medical information be kept confidential includes the requirement that this information be stored separately from regular personnel files. If a manager/supervisor receives medical information involving COVID-19 - or any other medical information - while teleworking, and can follow the employer's existing confidentiality protocols, this is permissible. If teleworking prevents adherence to the employer's preexisting protocols, the supervisor must ensure the confidentiality of the information to the greatest extent possible until it can be properly stored. This means that paper notepads, laptops, or other devices should not be left where others can see them. Similarly, documentation should not be stored electronically where others could have access to it. A manager may also use initials or some other code to ensure the confidentiality of an employee's name.

Requests for Accommodation, the Interactive Process, and Reasonable Accommodations:

An employee that requests an accommodation because of a disability that puts them at higher risk of contracting COVID-19 may be requesting a reasonable accommodation. The CDC has identified several medical conditions, including chronic lung disease and chronic heart disease, as potentially putting individuals at higher risk. It is also conceivable that an employee may request certain accommodations because a preexisting disability might be exacerbated by the COVID-19 virus. As with any request for a reasonable accommodation, the employer should engage in the interactive process. Consequently, an employer should not outright refuse the request as it may trigger the employer's responsibility to engage in the interactive process.

The interactive process refers to the process an employer and employee should use to fully discuss a request for accommodation so that the employer obtains necessary information to make an informed decision. Through the interactive process, an employer may verify that the employee does indeed have a disability, as well as verify the necessity of the requested accommodation because the disability puts the individual at higher risk.

During the COVID-19 pandemic, some requests may require an employer's immediate attention, such as those employees whose disabilities may put them at higher risk of contracting the virus. In these circumstances, employers are encouraged to provide requested accommodations on a temporary basis if feasible (e.g., teleworking for one or two weeks) while the employer discusses the request more fully with the employee or is awaiting medical documentation. This is especially important for employers seeking documents from a healthcare provider to support an employee's request, as many physicians may have difficulty responding quickly. Fortunately, there are other ways to verify the existence of a disability. For instance, the EEOC suggests referring to health insurance records on file or prescriptions that may document the existence of the disability. Given the nature of the COVID-19 pandemic, the EEOC encourages all employers and employees to be as flexible and creative as possible.

Despite the exigencies created by COVID-19, employers may still consider whether a reasonable accommodation would pose an undue hardship. Employers may reject accommodations if at the conclusion of the interactive process, a specific form of an accommodation would result in significant expense and/or difficulties in light of the pandemic.

Employers also do not have to provide reasonable accommodation to an employee that lives in the same household as someone who, due to a disability, is at greater risk of severe illness if they contract COVID-19. The employee only has a right to a reasonable accommodation for their own disability. However, the employer should take care to ensure that it is not treating the employee differently than other employees with a similar need before it responds to the request.

Special ADA Accommodation Considerations for Teleworking Employees:

From a public health perspective, teleworking may be the best possible method of preventing the community spread of COVID-19 in the workplace and beyond. The U.S. Department of Labor's guidance to employers offering telework options to employees was covered in our March 26, 2020 Client Alert. The EEOC has advised that all employers must continue the same accommodations to teleworking employees that were offered in the workplace. Employers are further encouraged to be proactive in discussing any alterations to existing accommodations with teleworking employees in light of the pandemic. Employers may discontinue an existing accommodation if it is unreasonable or creates an undue hardship because of the indefinite timeframe of the COVID-19 crisis. For instance, certain items needed to accommodate an employee may be unavailable due to the pandemic, and employers and employees should be flexible as to what can be done as an accommodation.

Obviously, if there is no disability-related limitation that requires teleworking, the employer does not have to provide telework as an accommodation. Additionally, if there is a disability-related limitation, but the employer can effectively address the need with another form of reasonable accommodation at the workplace, the employer can choose that alternative over teleworking.

The ADA does not preclude the employer from restoring the prior work arrangement once the pandemic has ended. Although teleworking may be the best possible method of preventing the community spread of COVID-19, it may also require an employer to excuse some essential functions of a job. However, the ADA does not require an employer to excuse an employee from performing an essential function of the job during or after the pandemic. Indeed, once the pandemic has ended, employers may go back to evaluating any requests to continue, or to start, an accommodation consistent with ADA law.

Employers, however, should be mindful that the period during which telework was offered in response to COVID-19 could act as a trial period for showing whether the employee was able to perform the essential functions of the job while teleworking. An employer would therefore do well to consider this information before denying the request once the pandemic has ended. Moreover, as with all accommodation requests, the employee and employer should engage in a flexible cooperative interactive process should this issue arise.

Employer Rights and Responsibilities Under the ADEA

The ADEA prohibits employment discrimination against workers aged 40 and over. Consequently, an employer may not exclude from the workplace an employee who is 65 or older and who does not have COVID-19, or symptoms associated with the disease, solely because the CDC has identified this age group as being at higher risk of severe illness if they contract the COVID-19 virus.

Conversely, the ADEA does not require an employer to grant a request to telework from an employee who is 60 or older because the CDC has identified this age range to be significantly more likely to experience severe

symptoms if they contract COVID-19. Unlike the ADA, the ADEA does not have an accommodation provision. However, employers should be careful not to deny these requests, such as telework, if it has granted the same request to comparable younger employees.

Employer Rights and Responsibilities Under Title VII

The Pregnancy Discrimination Act

Under Title VII of the Civil Rights Act, employment actions based on pregnancy are based upon sex. Accordingly, decisions about lay-offs or furloughs should never be based upon pregnancy. On the other hand, although pregnancy-related medical conditions can sometimes be ADA disabilities, pregnancy itself is not an ADA disability. Consequently, federal anti-discrimination laws do not necessarily require an employer to grant a request to telework from an employee who is pregnant because the CDC has indicated that pregnant women are at higher risk if they contract COVID-19. However, where the pregnancy does trigger ADA accommodation rights, an employer should proceed through the interactive process.

National Origin Discrimination/Harassment

Title VII prohibits all employment discrimination and harassment based on national origin whether or not it is linked to the COVID-19 pandemic. Consequently, an employer may not single out employees based on national origin and exclude them from the workplace due to concerns about possible transmission of COVID-19. Additionally, an employer cannot tolerate a hostile work environment based on an employee's national origin or religion because others link that protected category to transmission of the COVID-19 virus.

The EEOC therefore strongly encourages employers to actively remind workers in these difficult times about workplace anti-discrimination/harassment policies, and to emphasize the broad nature of the prohibition against all harassment, including national origin harassment linked to fears about the COVID-19 virus. Employers should also take the time to remind employees that all other applicable rules must still be adhered to, including those referenced in employee/company handbooks and policies, and other applicable laws.

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