

Returning to Work: An Updated Summary of Recent EEOC Guidance for Employers During the Pandemic

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Client Advisory

As employers across the country move toward re-opening offices amongst ongoing challenges caused by the Coronavirus (COVID-19) pandemic, the Equal Opportunity Employment Commission (EEOC) on June 11 and June 17 updated its guidance for employers.^[1] These updates supplement earlier guidance issued by the EEOC (discussed in our April 24, 2020 Client Advisory, *Working from Home and Preparing to Return to Work: A Summary of Recent EEOC Guidance for Employers During the Pandemic*, available [here](#)). The most recent guidance addresses employees age 65 and older, requests for accommodations under the Americans with Disabilities Act (ADA) to avoid exposing family members, pandemic-related harassment, requests for accommodations based on pregnancy, requests for alternative health screening methods, antibody testing, and discrimination considerations relating to caregivers/family responsibilities.

Involuntary Exclusion of Workers Age 65 and Older

While employers may wish to shield their employees who are age 65 or older from the higher risk of severe illness if they contract the COVID-19 virus (as identified by the Centers for Disease Control), employers are prohibited by the Age Discrimination in Employment Act (ADEA) from excluding employees who wish to return to the workplace based solely on age. The EEOC's updated guidance explains that employers are barred from "involuntarily excluding" an employee from the workplace based on the employee 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." Employers are nonetheless free to provide flexibility to employees who are 65 and older without violating the ADEA, "even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison." The updated guidance also notes that, to the extent employees age 65 and older have a medical condition that brings them under the protection of the ADA, the employee may request an accommodation due to their qualifying disability.

Accommodation Based on Pregnancy

The EEOC guidance is clear that, like employees age 65 and older, employers cannot involuntarily exclude pregnant employees even if the employer's motivation in doing so is "benevolent concern." Similarly, "benevolent concern" does not permit employers to single out pregnant employees for adverse employment actions such as involuntary leave, layoff or furlough. Pregnant employees may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent an employer provides such modifications for other non-pregnant employees who are similarly situated in their ability or inability to work. To the extent a pregnant employee requests an accommodation due to a pregnancy-related medical condition, employers should continue to consider such requests pursuant to ADA rules.

ADA Accommodation to Avoid Exposing Family Members

The EEOC also clarified that employees are not entitled to an accommodation under the ADA to avoid exposing a family member or other person the employee is associated with who is at a higher risk of severe illness from COVID-19 due to an underlying medical condition.

Although the ADA prohibits discrimination against an employee based on the employee's association with an individual with a disability, the prohibition is limited to disparate treatment or harassment of the employee. The ADA does not require an employer to provide an accommodation to an employee without a disability based on the disability-related needs of the employee's family member or other person with whom the employee is associated. Using the example of teleworking, the guidance confirms that an employee without a disability is not entitled to telework as an accommodation to protect the employee's family member with a disability from potential COVID-19 exposure, although "of course, an employer is free to provide such flexibilities if it chooses to do so." However, an employer who chooses to offer flexibilities, such as teleworking, beyond what the law requires should be careful not to engage in disparate treatment of employees on the basis of any protected EEO characteristics with respect to those flexibilities.

Caregivers / Family Responsibilities

The guidance cautions employers to be aware of sex discrimination considerations when providing teleworking, modified schedules, or any other benefits to employees with school-age children due to school closures and distance learning during the pandemic. Employers may provide any flexibilities they see fit, as long as they don't treat employees differently based on sex (i.e., providing more flexibility to female employees than male employees based on the assumption that female employees have more caregiver responsibilities), or other EEO protected characteristics. Note that leave may be available under the expanded family and medical leave benefits provided by the Families First Coronavirus Response Act for employees who need to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.

Pandemic-Related Harassment

The EEOC addressed how employers should respond to pandemic-related harassment, specifically harassment against employees perceived to be of Asian national origin, including about the coronavirus or its origin, by teleworking employees. Employers and managers "should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins." The guidance stresses that harassment may occur using electronic communication tools, such as emails, calls, or platforms for video conferencing, "regardless of whether employees are in the workplace, teleworking, or on leave – and also in person between employees at the worksite." The EEOC urges employers to ensure that managers know how to recognize harassment, understand their legal obligations, and are instructed "to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination." Employers may consider sending a reminder to all employees reminding them that harassment is prohibited and will not be tolerated and inviting anyone who experiences or witnesses harassment to report it to management. Employers may also remind employees that harassment may result in disciplinary action, up to and including termination of employment.

Requests for Alternative Screening Method

The guidance clarifies that a request by an employee entering the workplace for an alternative method of screening due to an underlying medical condition is a request for an accommodation under the ADA. The employer should proceed as it would in response to any other request for an accommodation under the ADA. Additionally, if the requested alternative method is easy and inexpensive, an employer may choose to voluntarily make it available to any employee who asks, without going through the interactive process. Similarly, if an employee requests an alternative screening method as a religious accommodation, employers should proceed as they would in response to any other request for an accommodation under Title VII of the Civil Rights Act.

Antibody Testing

The EEOC also clarified that because a test for COVID-19 antibodies constitutes a medical examination under the ADA, and because the CDC's guidance states that antibody test results "should not be used to make decisions about returning persons to the workplace," antibody testing

does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees at this time. Thus, requiring current employees to undergo antibody testing before allowing them to return to the workplace is a violation of the ADA. However, the EEOC noted that it will continue to follow the CDC's recommendations and "could update this discussion" in response to those recommendations.

Conclusion

The updated guidance makes plain that the EEOC continues to take into consideration the difficulties the pandemic is causing for employers as they begin to transition some employees back to the workplace as safely as possible, while allowing other employees to continue to work remotely for various reasons. Given the evolving guidance from the EEOC, CDC and other public health agencies, employers are encouraged to consult legal counsel to assist in assessing their plans for re-opening their workplace and responses to employee requests for accommodations or flexibility.

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[1] See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of Jeffery S. Boxer (212-238-8626, boxer@clm.com), Judith A. Lockhart (212-238-8603, lockhart@clm.com), Bryan J. Hall (212-238-8894, hall@clm.com), Alexander G. Malyshev (212-238-8618, malyshev@clm.com), Melissa J. Erwin (212-238-8622, erwin@clm.com) and Leonardo Trivigno (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.

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