

Working from Home and Preparing to Return to Work: A Summary of Recent EEOC Guidance for Employers During the Pandemic

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Client Advisory

April 24, 2020 by Melissa J. Erwin

As employers continue to grapple with challenges caused by the Coronavirus (COVID-19) pandemic and ensuing stay-at-home orders and social distancing mandates, the Equal Opportunity Employment Commission (EEOC) on April 17, 2020 and April 23, 2020 updated its guidance for employers.^[1] The first update provides guidance on requests for reasonable accommodations under the Americans with Disabilities Act (ADA) during the COVID-19 pandemic. The second update provides guidance for employers when stay-at-home orders are lifted and employees begin returning to the workplace.

Requests for Reasonable Accommodations

The first area of updated guidance deals with employers' obligations to provide reasonable accommodations, regardless of whether the requesting employee is working from home or in the workplace. During the COVID-19 pandemic employers may still engage in the interactive process required by the ADA and ask questions or request medical documentation where the requesting employee's condition is not obvious or already known to determine whether the employee's condition is a "disability" (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment) as defined by the ADA that necessitates an accommodation, either the one the employee requested or any other one. A request for a reasonable accommodation from a teleworking employee should be handled through the same type of interactive process the employer would use to handle a request from an employee in the workplace. Questions an employer may ask as part of the interactive process include:

1. How the employee's disability creates a limitation;
2. How the requested accommodation will effectively address the limitation;
3. Whether another form of accommodation could effectively address the limitation;
4. How the proposed accommodation will enable the employee to continue performing the "essential functions" of the employee's position.

However, if there is an urgent need to provide an accommodation quickly or the employer has limited time to engage in the interactive process during the pandemic, the employer may forgo or shorten the interactive process and simply grant the request temporarily. Employers should consider that the need for accommodations may change when stay-at-home orders are lifted and may consider placing an end date on temporary accommodations granted to employees who are currently teleworking, for example, when the employee returns to the workplace. Employers can similarly provide an accommodation on a temporary basis, with an end date, while awaiting receipt of medical documentation.

Employees granted temporary accommodations may request extensions, which the employer must consider, particularly in the event stay-at-home orders are extended or new government restrictions imposed.

Employers may deny requests for a particular accommodation if it poses an “undue hardship” (defined as “significant difficulty or expense”) due to circumstances created by the COVID-19 pandemic. Examples cited by the EEOC include that it may be “significantly more difficult” to conduct a needs assessment or to acquire certain items needed for a requested accommodation, and that delivery may be delayed, particularly to employees who are teleworking during the pandemic. The EEOC also noted that it may be “significantly more difficult” during the pandemic to provide employees with temporary assignments, to remove marginal functions and to readily hire temporary employees for specialized positions. If a particular requested accommodation poses an undue hardship, the EEOC’s guidance directs the employer and employee to work together to determine whether there is an acceptable alternative.

The EEOC’s guidance recognizes that the COVID-19 pandemic has had, and will continue to have, a significant financial impact on employers, noting that the “sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration,” as is “the amount of discretionary funds available at this time,” in consideration of other expenses, and “whether there is an expected date that current restrictions on an employer’s operations will be lifted (or new restrictions will be added or substituted).” While these considerations do not mean that employers can reject out of hand any request for an accommodation that costs the employer money, the employer must weigh the cost of the requested accommodation against its budget and take into account the constraints caused by the pandemic. Employers should also explore whether lower cost or no-cost accommodations are available.

Returning to Work

The EEOC also provided guidance on the steps employers can take now and when their workplaces re-open to ensure compliance with the ADA both in terms of providing reasonable accommodations and screening employees entering the workplace for the COVID-19. The guidance expressly permits employers to ask employees with disabilities to request accommodations now that they believe they will need when the stay-at-home orders are lifted and workplaces re-open.

The guidance also clarifies the steps employers can take, consistent with the ADA, to screen employees for the presence of the COVID-19 virus before entering the workplace. The ADA permits employers to make disability-related inquiries and conduct medical exams if they are job-related and consistent with business necessity. This standard is met where the inquiries and medical exams are needed to exclude employees with a medical condition that would pose a direct threat to health or safety. A direct threat is determined based on the best available objective medical evidence, such as guidance from CDC or other public health authorities. Thus, employers may implement any screening, such as testing employees for the presence of the COVID-19 virus before they enter the workplace, taking an employee’s temperature and asking questions about symptoms or requiring self-reporting, as long as the screening is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

The EEOC guidance cautions employers to ensure that any tests for the presence of the COVID-19 virus are accurate and reliable and suggests that employers review guidance from the U.S. Food and Drug Administration on what may or may not be safe and accurate testing, as well as guidance from the CDC and other public health authorities. Of course, employers must take care not to engage in any disparate treatment of employees based on protected characteristics in decisions related to testing or screening and exclusion from the workplace. The EEOC guidance also provides that, while employers may require employees to wear protective equipment such as masks and gloves, and to observe infection control practices such as hand washing and social distancing, employers must provide reasonable accommodations under the ADA (for example, non-latex gloves or gowns designed for persons who use wheelchairs) or a religious accommodation under Title VII (such as equipment modified for religious clothing), if the accommodation or modification (or an alternative) is feasible and not an undue hardship on the operation of the employer’s business consistent with the ADA or Title VII.

Conclusion

The EEOC's guidance makes plain that the requirements of the ADA are still in effect even as the COVID-19 pandemic has forced many employers to shift their employees to teleworking. However, the EEOC has taken into consideration the difficulties the pandemic is causing employers and provided ways for employers to ensure that they remain in compliance while stay-at-home orders remain in effect and to prepare for the lifting of those orders and transition of employees back to the workplace. 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 responses to requests for reasonable accommodations and plans for re-opening their workplace.

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For more information concerning the matters discussed in this publication, please contact the author **Melissa J. Erwin** (212-238-8622, erwin@clm.com), or your regular Carter Ledyard attorney.

[1] See https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

*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.*