On March 27, 2020, the EEOC conducted a webinar that answered some of employers’ most frequently asked questions about compliance with public health directives and federal Equal Employment Opportunity Laws during the COVID-19 pandemic.

Although the webinar emphasized the fast-changing nature of this crisis and encouraged employers to continue monitoring the EEOC website for updates, below are some key issues employers should be mindful of when handling COVID-19 issues, as discussed by the EEOC.

- **An employer may take temperatures and ask COVID-19-related questions**

  The Americans with Disabilities Act (ADA) generally prohibits employers from making disability-related inquiries and conducting medical exams. And, in ordinary circumstances, taking temperatures or asking about a specific medical condition would be inadvisable.
However, given the current pandemic, the EEOC is taking the position that in addition to taking the temperature of employees entering the workplace, employers may also ask employees questions such as if they have COVID-19, if they have been tested for COVID-19, or if they have symptoms associated with the disease.

Employers may ask these questions to all employees or to only one employee if the employer has a reasonable belief based on objective evidence that that employee has or might have the disease. Based on an employee’s symptoms and/or answers to these questions, or if an employee refuses cooperation, an employer can bar an employee from physically being present in the workplace.

- **An employer must (continue to) not discriminate**

Although the CDC has identified various individuals as being at higher risk of severe illness if they contract COVID-19, the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act (Title VII) prohibit employers from discriminating based on age and sex. Therefore, in the absence of an ADA-covered disability (see below), in addressing COVID-19, employers should not treat employees differently because an employee is older or pregnant. Any workplace rules or directives should be generally applicable to similarly situated employees.

- **An employer should treat COVID-19 as a disability under the ADA**

Although the EEOC indicated it was too soon to definitively decide whether COVID-19 should be classified as a disability under the ADA, employers are encouraged to take a broad view and use the interactive process to fully discuss any requests for accommodation. Further, if accommodations are requested because an employee’s existing disability puts that employee at greater risk of severe illness if (s)he contracts COVID-19, or because the employee’s disability will be exacerbated by the current situation, the employer should discuss the need for the requested accommodation with the employee, verify the accommodation is necessary, and consider any undue hardship the accommodation would cause the employer. Employers are encouraged to be flexible and creative, and are urged to consider temporary accommodations in light of this pandemic.

The EEOC webinar concluded with a discussion of the implications of COVID-19 as it relates to current ADA accommodations and future accommodation requests.

As many industries and companies have turned to teleworking in response to COVID-19, employers should be mindful of how current arrangements might affect future telework requests as reasonable accommodations.

In other words, how will the fact that employers are now turning to telework in great numbers affect post-COVID-19 requests for teleworking as a disability accommodation?
On this issue, the EEOC gave mixed signals. On the one hand, during the webinar, the agency expressed that removing essential job functions in order to permit working from home during the pandemic does not obligate employers to remove essential job functions in response to future disability accommodation requests.

On the other hand, the EEOC told webinar participants that the period of providing telework because of the COVID-19 pandemic could be viewed as a trial period that demonstrates whether an employee with a disability could indeed satisfactorily perform all essential functions while working remotely. According to the EEOC, the employer should therefore consider any new or renewed requests for accommodations in light of this information.

Disability accommodations are therefore one more area in which COVID-19 has introduced tremendous uncertainty about the future. As always, employers are encouraged to engage employees when making accommodation decisions, evaluate each situation on a case-by-case basis, and consult with legal counsel when facing complex circumstances.

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