On April 17, 2020, the Equal Employment Opportunity Commission (“EEOC”) once again updated its technical assistance for employers, titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”
Previously, the EEOC (i) on March 17, 2020, issued initial guidance on COVID-19 in a series of Frequently Asked Questions (“FAQs”) (discussed here) (ii) on March 19, updated its publication titled “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act,” to address issues specifically concerning COVID-19 (discussed here) and (iii) on April 9, updated its COVID-19 guidance to add FAQs focusing primarily on employers’ reasonable accommodation obligations under the ADA (discussed here).

In this latest update (“Guidance”), the EEOC’s attention remains fixed mostly on the ADA (and to a lesser extent on Title VII of the Civil Rights Act of 1964 (“Title VII”)). The focus, however, is on “Return to Work” issues, which many employers are increasingly beginning to contemplate. The Guidance also provides additional guidance regarding reasonable accommodation and undue hardship in the era of COVID-19.

A newly added “Return to Work” section includes the following FAQs:

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace. Similarly, the CDC recently posted information on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

Note: The Guidance continues to discuss screening employees in terms of inquiries regarding symptoms and temperature-taking, and does not specifically address any other kind of screening, such as COVID-19 or antibody testing, which are being contemplated by some employers. The Guidance acknowledges, however, that employers are permitted to “exclude employees with a medical condition that would pose a direct threat to health or safety,” and suggests that an employer’s actions generally will be compliant with the ADA if the actions are consistent with the protocols and advice provided by the CDC and other public health agencies. The Guidance, therefore, leaves the door open for employer use of new screening procedures which may become available, but only if they are accepted by
appropriate authorities. As such, employers should beware of solicitations touting unapproved screening methodologies.

**G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?**

An employer may require employees to wear **protective gear** (for example, masks and gloves) and observe **infection control practices** (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer’s business under the ADA or Title VII.

**Note:** The Guidance, while making some suggestions as to potential reasonable accommodations, basically confirms that – as with any other circumstance – the employer must address accommodation requests on a case-by-case basis to determine if a workable accommodation can be provided to the employee without causing undue hardship on the operation of the employer’s business. Notably, recent **interim guidance** issued by the New York Department of Health, in light of the requirement for essential businesses to provide face coverings to certain employees, similarly provides:

Employees who are unable to wear face coverings and are susceptible to COVID-19 based on the “Matilda’s Law” criteria (i.e., individuals who are 70 years of age or older, individuals with compromised immune systems, and individuals with underlying illnesses) should consult with their employer to consider **reasonable accommodations**, including but not limited to different PPE, alternate work location, or alternate work assignment with fewer interactions with the public. Employers should work with their employees to see if they can be accommodated to ensure the employee can continue to deliver essential services in the safest manner possible.

Further, the Guidance adds FAQs to the “Reasonable Accommodation” section and addresses the interactive process and permitted inquiries by employers, temporary accommodations, and denials of accommodation.

**D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability?**

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a “disability” as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).
D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee’s disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the “interactive process” (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process – and devise end dates for the accommodation - to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

Note: The reference to disabilities exacerbated by the pandemic in the above response links to FAQ D.2, which addresses reasonable accommodations for employees with preexisting mental health conditions.

D.8. May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?

Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Employers may begin the
“interactive process” – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an “undue hardship,” which means “significant difficulty or expense.” In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant difficulty” during the COVID-19 pandemic?

An employer may consider whether current circumstances create “significant difficulty” in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses “significant expense” during the COVID-19 pandemic?

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer’s overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time – when considering 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). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

In sum, the Guidance confirms that employers may ask questions, request documentation and engage in approved testing (currently, for example, temperature taking) to confirm an employee’s ability to safely return to work. In addition, it reiterates employers’ obligation to engage in the interactive process as to requested accommodations and provides examples of accommodations that employers should consider, including temporary accommodations and reevaluating
accommodations, if and when circumstances change. And, on a welcome note to employers, the Guidance acknowledges that employers may be unable to grant certain requested accommodations because of undue hardship, including because of business conditions.

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