Re-opening amid COVID-19: Managing Higher Risk Employees

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As employers plan to re-open for business or ramp up to full operations, it is critical to prepare for return to work concerns expressed by employees who have been identified by the U.S. Centers for Disease Control and Prevention (CDC) or local safer-at-home orders as high risk.

Godfrey & Kahn recently surveyed our readers to gain a better understanding of the questions employers have about re-opening their businesses or ramping up operations. The following are answers to several questions submitted related to managing higher risk employees during this process:

Who are the workers that are considered “higher risk” for severe illness from COVID-19?

There are at least three resources you should monitor to answer this question:

1. The CDC
2. State and/or local health departments
3. Any applicable safer at home or other similar directives in your state or locality

Because the 2019 novel coronavirus (COVID-19) is a new disease, limited information exists regarding its risk factors. However, based on information currently available, the CDC has determined that the following populations might be...
at higher risk for developing more serious complications from COVID-19:

1. People 65 years and older
2. People of any age who have serious underlying medical conditions, particularly if not well controlled, including chronic lung disease, moderate to severe asthma, serious heart conditions, immunocompromised, severe obesity, diabetes, chronic kidney disease undergoing dialysis and liver disease

The State of Wisconsin Department of Health Services (DHS) defines the high-risk population of workers consistent with the CDC. However, Wisconsin's extended Safer-At-Home order goes further, suggesting (but not requiring) that workers “over age 60, including those who are medically vulnerable . . . continue to shelter in place.” This same guidance is also reflected in the Governor Evers’ Badger Bounce Back plan.

During this pandemic, can employers ask employees who do not have any COVID-19 symptoms to disclose if they have “higher risk” medical conditions?

Employers who are covered by the federal Americans with Disabilities Act (ADA) (as amended) and/or comparable state laws must carefully monitor agency guidance, which is evolving due to the unique circumstances posed by the COVID-19 pandemic. Just this week guidance from the EEOC was published, taken down and republished today with additional clarifications.

The answer to the question is generally, no. The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of current employees, except under limited circumstances. One of those exceptions is when a pandemic becomes severe or serious according to local, state or federal health officials, in which case ADA-covered employers may have sufficient objective information to reasonably conclude that employees may face a “direct threat” if they contract COVID-19.

In March, the Equal Employment Opportunity Commission (EEOC) updated its pandemic guidance to reflect the current world, federal, state and local declarations of the severe and serious COVID-19 pandemic as a direct threat. Thus, so long as the pandemic continues to be a direct threat, employers are allowed to ask employees to disclose if they have a medical condition that has been identified by the CDC as making them higher risk for complications related to the COVID-19 illness. While currently permissible to ask about certain medical conditions, employers are not required to do so. Furthermore, employers should not start making such medical inquiries without carefully considering the business justifications and ramifications. For instance, an employer should be prepared to engage in the interactive process and provide reasonable accommodations to employees that disclose a medical condition and voice concern about returning to the office.

Employers must also be vigilant in monitoring agency guidance for ongoing developments, particularly as the number of COVID-19 cases begins to decline. It is anticipated that, as the spread of the virus begins to wane, the EEOC and other agencies may conclude that a direct threat no longer exists and that further
disability-related inquiries are no longer permissible.

Is there an employer obligation to allow higher risk employees to stay at home as a reasonable accommodation under state and federal disability laws?

Possibly. Most state safer-at-home orders (including Wisconsin’s) encourage employers to allow employees to telework as a means of continuing business operations while in the safety of their home. In its pandemic guidance, the EEOC recognizes that telework is an effective infection-control strategy, and that employees with disabilities that put them at higher risk for complications from COVID-19 may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

The State of Wisconsin’s Department of Workforce Development (DWD) tracks the federal guidance and goes one step further, stating that employers can “require” employees to remain home and telework. However, under general employment law principles, mandatory telework policies are only permissible to the extent that they are based on non-discriminatory characteristics (e.g., all employees working at a particular facility or within a particular job title). Unless and until more specific guidance is provided by the EEOC, there is significant risk in requiring only high-risk individuals to telework while others are asked to work on-site.

Telework may not be feasible for certain jobs, and the same ADA principles apply during the pandemic. If a job cannot be performed remotely, a request for telework may be denied. For example, in retail sales, the retail associate must be present in the store to perform point of purchase duties and service customers onsite at the employer’s store. Likewise, in the case of manufacturing, an employee may only be able to perform his or her machining duties onsite in the manufacturing facility. Any employer that concludes telework cannot be provided as an accommodation should carefully document its decision-making process and the factors supporting that decision.

What if I have an employee over the age of 60 with no underlying medical condition who requests to continue to telework from home or simply requests to stay home and not report for work because of fear of getting COVID-19?

With no underlying medical condition that may constitute a disability, there is no requirement under the ADA to accommodate the employee’s continued telework. However, if continued telework is feasible for the business and the employee is interested, there are a number of good reasons to continue the arrangement at least until the pandemic subsides, including employee safety, reduction of transmission and morale.

For those employees over the age of 60 who do not have the ability to telework, but also do not want to report to work because of fear of getting COVID-19, employers should evaluate whether the employee qualifies for some other paid or unpaid leave under applicable federal or state leave laws, or the employer’s general employee
policies. For example, such employees may be eligible for paid Families First Coronavirus Response Act (FFCRA) leave if certain state or local safer at home orders require individuals of a certain age to stay at home for a period of time.

If paid FFCRA leave is unavailable, such employees may still be eligible for a leave of absence under the employer’s general leave of absence policy applicable to all employees, which could be paid or unpaid, depending on the employer’s policy. Employers are strongly encouraged to consult legal counsel before terminating an employee who refuses to return to work due to COVID-19 to evaluate the legal risks posed by such termination, including under the Occupational Safety and Health Administration’s (OSHA’s) anti-retaliation provisions.

On the flipside, some employers may be reluctant to allow employees over the age of 60 to return to work because they've been identified as higher risk, even when those employees have expressed a desire to return. While this may be well-intentioned, as noted above, excluding individuals based solely on their age, without a medical directive to quarantine, poses substantial risk under age discrimination laws.

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