Over the course of the past three months, the EEOC and Department of Labor have published a plethora of responses and updates to frequently asked COVID-19 questions. Topics have ranged from paid leave requirements under the Families First Coronavirus Response Act and permissible actions under the ADA to wage and hour issues stemming from changes in employee work hours and locations and COVID-19 as a recordable illness. Now the EEOC has once again updated its technical assistance guidance for employers. This set of updates addresses return-to-work issues related to age and pregnancy, accommodation obligations with respect to employees with household members who may be at higher risk of severe illness due to COVID-19, and pandemic-related harassment directed at persons who are Asian or of Asian national origin.

With respect to returning to work for pregnant employees and employees age 65 or older, the EEOC’s updated guidance states that the Age Discrimination in
Employment Act (ADEA) and Title VII prohibit covered employers from \textit{involuntarily} excluding workers from the workplace based on their age or pregnancy, even where the exclusion is based on “benevolent reasons such as protecting the employee due to higher risk of severe illness due to COVID-19.”

However, according to the EEOC, the ADEA does not prevent employers from providing more flexibility in terms of teleworking, leave, and other alternative arrangements to workers age 65 and older in order to address COVID-19-related risks, even if such flexibility means that workers aged 40 through 64 are treated less favorably in comparison. Moreover, under the Americans with Disabilities Act and Pregnancy Discrimination Act, both older and pregnant employees may have medical conditions that entitle them to workplace accommodations such as telework, modified schedules, or leave based on a disability or, in the case of pregnancy, to the extent such accommodations are provided to other employees who are similar in their ability or inability to work.

In contrast to the accommodation obligations applicable to pregnant workers or those with disabling medical conditions, the EEOC’s updated guidance explicitly states that employees are NOT entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. Rather, the EEOC notes that the ADA’s prohibition against discrimination based on association with an individual with a disability only protects employees from different treatment or harassment based on that association.

Consequently, although employers are free to allow teleworking or alternative work arrangements in order to address a variety of individual circumstances related to COVID-19, they are not required to do so outside of the disability or pregnancy context. Employers who choose to offer more flexibility and alternative work arrangements that go beyond what is required by law may send a general notice to all employees notifying them that the employer is willing to consider requests for accommodations on a case-by-case basis; however, they must be careful not to engage in prohibited discrimination when granting or denying such requests. This includes, for instance, allowing more favorable treatment for female employees (e.g., extended telework or additional leave) based on gender stereotypes about which employees have the primary responsibility for child care.

Finally, the EEOC also addressed the possibility of pandemic-related harassment against employees who are or are perceived to be Asian, noting that employers “should be alert to demeaning, derogatory, or hostile remarks,” including those “about the coronavirus or its origins.” The EEOC recommended that employers take steps now to ensure that managers are able to recognize and promptly respond to any instances of harassment against employees from any source (including other employees or contractors, customers, clients, and visitors). According to the EEOC, among other things, employers may want to send a reminder to their workers about Title VII’s prohibitions on harassment, the employer’s procedures for reporting harassment to management, and the disciplinary actions, including termination that may result from harassing conduct. The EEOC also noted that employers should treat any harassment that occurs electronically (e.g., via email or phone from or to an employee who is working remotely) in the same manner as harassment that occurs
As workplaces continue to reopen, requests for extensions of remote working arrangements, paid leave, and other COVID-19-related modifications are likely to become more common. Consequently, employers with questions regarding these matters should consult with experienced employment counsel prior to making decisions regarding such requests.

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