COVID-19: EEOC Provides Additional Guidance on High-Risk Workers

In our May 19, 2020 alert, Plan Now for Bringing Back Your Workforce – Part IV, we detailed the EEOC's guidance on high-risk employees (i.e. employees with medical conditions that render them particularly vulnerable to complications from COVID-19). We explained that, while employers must engage high-risk employees who do not wish to return to work in an interactive dialogue and consider reasonable accommodations — including potentially a leave of absence — employers may not exclude high-risk employees who wish to return to work, at least unless they can establish that the employee’s disability poses a direct threat to their health.

This alert focuses on new guidance the EEOC issued last week, concerning employer invitations to request flexibility or accommodation in the workplace, as well as relevant legal considerations when employees request or require such flexibility because of age, caregiver/family responsibilities, or pregnancy.

1. Inviting Requests for Flexibility or Accommodation

Employers concerned about protecting high-risk employees might be motivated to engage proactively in an interactive process to determine how best to reduce the threat to the employee's health. As we explained in our May 19 alert, absent a request for accommodation or specific, individualized information, lawfully obtained, about an employee’s health that would justify triggering that process,
initiating a discussion with an employee about their medical conditions would likely run afoul of the Americans with Disabilities Act (ADA).

But what if, rather than approaching employees suspected of being high-risk, the employer instead communicated with all employees, educating them about the reasonable accommodation process and inviting them to request flexibility in work arrangements if needed for a disability? According to the EEOC’s new guidance, such a communication is not only lawful, it’s a best practice.

The EEOC suggests that, before their workforce returns, employers inform all employees about their willingness to provide reasonable accommodations to individuals with medical conditions that place them at higher risk of serious illness if they contract COVID-19. Such a communication might list all of the medical conditions identified by the CDC as placing people at higher risk, and should identify the individual(s) whom employees should contact to request workplace accommodations because they have one of these or similar medical conditions.

Alternatively, employers might publish a broad statement that they are open to considering requests for flexibility or accommodation on an individualized basis, including requests that are not related to a disability. If an employer chooses the broad statement route, EEOC advises that they specify whether employees must contact different individuals depending on the basis for their request. For example, employers might ask employees to direct requests for accommodation based on medical conditions to one individual or office, and ask employees to direct requests for accommodation based on age or child care responsibilities to another.

Rather than assume that employees are willing or able to access the company’s ADA/reasonable accommodation policy, now is a perfect time to re-educate the workforce about the policy and process for requesting accommodations in connection with a disability. While flexibility, even when not required by law, will no doubt help employers retain employees and garner goodwill, not every business can make such a broad commitment. For those companies that can consider non-medical requests for accommodation on a case-by-case basis, a broader statement along the lines suggested by the EEOC makes great sense as a means of reassuring the workforce and keeping them informed.

2. Protecting Workers Age 65 and Older

In its recent guidance, the EEOC reminds us that the Age Discrimination in Employment Act (ADEA) prohibits discrimination against individuals age 40 or older. As a result, the EEOC asserts, a covered employer that involuntarily excludes an employee from the workplace because the employee is over 65 and therefore at greater risk for serious complications if they contract COVID-19, will run afoul of the ADEA. This is true even if the employer’s motives are benevolent—to protect the employee.

Unlike the ADA, the ADEA does not define the term “discrimination” to include failing to make reasonable accommodations. Thus, there is no legal obligation to provide reasonable accommodations for older workers who do not have underlying health conditions that constitute disabilities under the ADA. The EEOC notes that employers are free to provide flexibility to workers age 65 or older, even though they
are not legally obligated to do so; and that a younger employee (i.e. one between 40 and 64) will not have grounds for an age discrimination complaint under the ADEA, even if they have been denied the same flexibility based on age.

3. Sex-Neutral Accommodation of Caregiving/Family Responsibilities

With schools and many child care facilities now closed for more than 12 weeks, employees may have exhausted any child care-related leave available to them under the Families First Coronavirus Relief Act (FFCRA). As summer camps cancel and other summer child care arrangements fall through, the demands on working parents’ and other caregivers’ time will continue, even after remote learning wraps up.

Just as employers are not legally obligated to accommodate workers age 65 or older because they are at higher risk due solely to their age, employers are not legally obligated to accommodate an employee’s inability to work in the office for reasons related to child care, other than as required under the FFCRA if applicable. Employers that can accommodate child care-related restrictions through telework, intermittent leave, or leave for child-care related reasons, should nonetheless strongly consider doing so in order to retain and build goodwill with its workforce.

In its new guidance, the EEOC emphasizes that any flexibility offered to caregivers must be offered equally to male and female employees. Employers that provide females more favorable treatment or flexibility based on assumptions about traditional caretaking responsibilities are inviting sex discrimination claims.

4. Accommodating Pregnant Employees

Because sex discrimination includes discrimination based on pregnancy, employers cannot involuntarily exclude pregnant employees from the workplace, even if their motivation is to protect those workers. In its recent guidance, the EEOC discusses whether pregnant employees are entitled to reasonable accommodation and notes two things: First, to the extent that a pregnancy-related medical condition constitutes a disability, a pregnant employee may be entitled to reasonable accommodation under the ADA. Second, even if a pregnant employee does not have a disability, the employer is required to provide a pregnant employee with the same flexibility it affords other employees who are similarly restricted in their ability to work for reasons unrelated to pregnancy.

A pregnant employee who is afraid of exposure to COVID-19, or who is advised by a health care provider to avoid the workplace due to heightened risk attendant to even an uncomplicated pregnancy, does not require accommodation due to a pregnancy-related medical condition and therefore will not qualify for reasonable accommodation under the ADA. To the extent that the employer has extended flexibility (e.g. teleworking, schedule changes, altered work assignments, leaves of absence) to other workers, however, it must provide the same opportunities to pregnant workers similarly restricted in their ability to work.

The EEOC’s new guidance highlights the need for employers to assess employee requests for flexibility or accommodation on a case-by-case basis. In addition to
ascertaining relevant legal obligations, employers should consider the practical and business-related implications of extending or denying flexibility where accommodation is not legally required.

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