Updated Guidance from the EEOC Regarding COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws

Labor and Employment Alert **| May 14, 2020**

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The U.S. Equal Employment Opportunity Commission (EEOC) enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Genetic Information Nondiscrimination Act (collectively, the EEO laws). These EEO laws continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the Centers for Disease Control and Prevention (CDC) or state/local public health authorities about steps employers should take regarding COVID-19, a link to which can be found here.

The EEOC provided written guidance in 2009 during the spread of H1N1 virus, which it updated and re-issued on March 19, 2020, to incorporate issues regarding the COVID-19 pandemic.

Just last week, on May 7, 2020, the EEOC posted a short Q&A document, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." A summary of that revised guidance and question and answer document can be found below:

- In order to protect the rest of its workforce during the COVID-19 pandemic, employers may ask an employee who calls in sick if they are experiencing COVID-19 symptoms, including but not limited to fever, chills, cough, shortness of breath, sore throat, loss of smell or taste, as well as gastrointestinal problems. Employers are also permitted to measure an employee's body temperature. However, employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA, separately from the employee's personnel file.
- The ADA permits employers to require that employees stay home if they have symptoms of the COVID-19. In fact, the CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace.
- When an employee returns to work, the ADA permits employers to require a note from a medical professional certifying fitness for duty.
- An employer may administer a COVID-19 test before permitting an employee to enter the workplace as long as the test is "job related and consistent with business necessity."
- An employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19, and a temporary staffing agency or a contractor that places an employee in an employer's workplace may notify the employer if it learns the employee has COVID-19.
- An employer that is hiring may screen applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.

- An employer may withdraw a job offer when it needs an applicant to start immediately but the individual has COVID-19 or symptoms of it.
- An employer **may not** postpone the start date or withdraw a job offer because applicant is 65 years old or older, or pregnant, both of which place them at higher risk from COVID-19. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.
- If a job may only be performed at the workplace, an employer is required to offer reasonable accommodations to individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19. For employees with preexisting physical disabilities, the accommodation could come in the form of reduced contact with others by designating one-way aisles, using Plexiglas, tables, or other barriers to ensure minimum distances between customers and/or coworkers, temporary job restructuring of marginal job duties, temporary transfers to a different position or modifying a work schedule or shift assignment. Employees with preexisting mental disabilities, for example, an anxiety disorder, obsessive-compulsive disorder or post-traumatic stress disorder, are also entitled to reasonable accommodations, absent undue hardship.
- An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he/she uses in the workplace.
- 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. Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources. But, the sudden loss of some or all of an employer's income stream because of this pandemic is now a relevant consideration.

The revised EEOC guidance clarifies that the ADA prohibits employers from creating a blanket bar for employees seeking to return to the workplace solely because the employee's age or medical conditions may place them at greater risk of becoming severely ill if they become infected with COVID-19. The EEOC guidance requires that employers conduct an analysis to determine if an at-risk worker's own health is imperiled by having them return, and to determine if there is a reasonable accommodation that can mitigate the risk. If an employer concludes that a return to work poses a direct threat to an employee, and that there is no way to provide a reasonable accommodation that doesn't pose an undue hardship on the employer, then barring the employee from returning to the workplace does not run afoul of the EEOC guidelines.

Many state governments do not require employers to undertake this type of analysis and actually recommend that employers keep high-risk employees away from the workplace unless it cannot be avoided.

There are many issues that employers are struggling with right now as they begin to plan to bring some employees back to the workplace. As always, not just with the COVID-19 pandemic, employers must continue to take a consistent approach with policies and procedures as they apply to employees. If employees are singled out in how policies and procedures are implemented and/or applied then it could lead to claims of discrimination and/or unequal treatment under the EEO laws. For the most up-to-date guidance on returning to the workplace, please view our comprehensive Return to Work: Guidance for Workplace Reopening publication.

Employers should also remember that guidance from the EEOC and public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

If you have questions or would like more information, please contact Scott H. Casher (cashers@whiteandwilliams.com; 914.487.7343) or another member of the Labor and Employment Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.