BURR ALERT

EEOC Issues Updates Return to Work Guidance

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The Equal Employment Opportunity Commission ("EEOC") has periodically updated its Technical Assistance Publication to provide employers with federal employment law guidance during the coronavirus ("COVID-19") outbreak. As employers call employees back to work, they should be prepared for employee questions and concerns regarding COVID-19.

This week, the EEOC provided guidance on a topic many employers may face as operations resume – what about those employees with certain underlying conditions that could make COVID-19 illness even more dangerous? Early this week, the EEOC updated the Technical Assistance Publication to address several questions regarding what employers may or should consider for employees with certain conditions identified by the CDC.

It is likely that employees with "high risk" conditions may ask employers about reasonable accommodations. However, an employer may already be aware that an employee has such a condition. Although the employer does not have to provide a reasonable accommodation for an employee who does not request it, employers may understandably worry for employees with underlying conditions identified by the CDC as increasing the employee's risk for severe COVID-19 illness. The EEOC is clear that an employer may not exclude from the workplace or take any adverse action against an employee merely because she has a disability identified by the CDC as potentially putting the employee at higher COVID-19 risk. However, the employer may exclude the employee from the workplace if the employee's disability poses a "direct threat" to her health that cannot be eliminated or reduced by reasonable accommodation.

The EEOC reminds employers that the "direct threat" requirement is a high standard, and to use it as an affirmative defense an employer must show that the employee has a disability that poses a "significant risk of substantial harm" to her own health. Notably, the EEOC's guidance states that the employee's disability does not pose a direct threat simply because it is listed on the CDC's high risk list. Instead, the direct threat determination must be made after an individualized assessment. The assessment must be made based on a reasonable medical judgment about the particular employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA requires the employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.

Applied to COVID-19, the EEOC suggests that analysis of the ADA's listed factors may require the employer to consider the severity of the COVID-19 outbreak in a particular area. The analysis may directly consider the employee's own health (such as whether the employee's disability is well-controlled). Interestingly, the EEOC suggests that the employer should consider the likelihood that an employee will be exposed to COVID-19 at the worksite. The employer should consider its own preventative workplace measures, such as masks or social distancing. Presumably, this would include an analysis of preventative measures employers may be required to take under state or local law as stay-at-home orders are lifted.

However, even if the employer determines that the employee's disability poses a direct threat, the employer still cannot exclude the employee or take adverse action unless there is no reasonable accommodation, absent undue hardship, that the employer can make. Employers must consider reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to work but that still allow the employee to perform the essential functions of the job. The guidance provides several examples of potential reasonable accommodations, including additional or enhanced protective equipment; enhanced protective measures like separation barriers; elimination or substitution of certain marginal functions (but not essential functions); and temporary schedule modifications.

The EEOC guidance states that employers must consider accommodations like working from home, providing leave, or reassigning the employee. The employer can only exclude an employee from the workplace if, after going through the steps listed above, the employee poses a significant risk of substantial harm to herself that cannot be reduced or eliminated by reasonable accommodation.

Naturally, employers will want to know when they must make the assessments described above. The employee (or third party, like the employee's physician) must notify the employer that she needs an accommodation for a reason related to a medical condition (here, the underlying condition). Employees do not have to make reasonable accommodation requests in writing. The EEOC guidance suggests that the employee or her physician should communicate that the employee has a medical condition that necessitates a change to meet a medical need. When the employer receives the employee's request, the employer may ask questions or seek medical documentation to help decide whether the employee has a disability and if there is a reasonable accommodation.

While employers should closely monitor the EEOC's guidance, employers should also check for updated guidance from the CDC. This week, news outlets released draft guidance from the CDC for businesses and workplaces during reopening. While the guidance has not been officially adopted, the guidance document provides draft best practices for employers with "vulnerable workers." While the draft guidance reminds employers to comply with ADA and ADEA regulations, it encourages employers to consider offering "vulnerable workers" (defined to include individuals over age 65 and those with underlying medical conditions) with duties that minimize their contact with customers and other employees "if agreed to by the worker." If adopted, this guidance suggests that employers should play a more active role in identifying vulnerable employees. The CDC's guidance for employers is important not just for workplace health and safety but also in EEO law compliance. Throughout the COVID-19 outbreak, the EEOC has maintained the position that, while EEO laws such as the ADA and ADEA are still in place, the laws do not prevent employers from complying with CDC guidance. Should the CDC publish guidance for employers suggesting proactive measures for vulnerable employees, it is foreseeable that the EEOC's Technical Assistance guidance could be amended to address the CDC's recommended measures.

The EEOC has routinely updated the Technical Assistance guidance, and we will monitor it for additional information as more employees go back to work. For questions about EEO compliance during COVID-19, please contact the Burr & Forman attorney with whom you regularly work.

Stay up to date by monitoring the latest COVID-19 resources on our CORONAVIRUS RESOURCE CENTER.

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