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EEOC Provides Updated Guidance on Return-to-Work Issues Addressing Accommodations For Employees With COVID-19 Vulnerabilities (US)

By Daniel Pasternak on May 5, 2020

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As employers begin the process of reopening their businesses, they are likely to confront situations where some employees express a reluctance to return to the workplace due to particular vulnerabilities and concerns about potential COVID-19 exposure. As part of its reopening plan, every employer should be implementing social distancing and workplace hygiene procedures to mitigate the risk of infection. However, some employees may have particular, individual medical conditions that place them at a higher

risk if infected, and thus may require additional safeguards. On May 5, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) updated its informal coronavirus guidance to address this issue, with three new Q&As addressing accommodation of persons at greater risk for severe illness due to COVID-19.

First, the EEOC clarified that, as in any non-COVID-19 related scenario, it is the employee's obligation to inform his/her employer of the need for an accommodation due to medical condition, either in conversation or in writing. The employer may then ask questions or seek medical documentation to assess whether the employee has a disability under the Americans with Disabilities Act (ADA) and if that disability can be reasonably accommodated.

Second, the EEOC explained that an employer cannot bar an employee from the workplace even if it already knows that an employee has a medical condition that puts him/her at a higher risk for severe illness if he/she gets COVID-19 (for example, due to a prior disability accommodation request for the condition).

Although an employer can bar employees with COVID-19 symptoms because they present a direct threat to

coworkers, the analysis is different when dealing with a “direct threat to self.” That requires an individualized assessment of the employee’s particular medical condition – including the duration of the risk, nature and severity of the potential harm, likelihood the harm will occur, and imminence of the potential harm, as well as whether the employee can, notwithstanding the risk, perform the essential functions of the job without threatening his/her health, with or without accommodation. On this last point, the EEOC further explained that an employee’s medical condition is not considered a direct threat to themselves if the employer can reduce or eliminate the threat through a reasonable accommodation. Those accommodations could include adjustments to the workplace, such as relocating or reassigning the employee, or other options, such as leave or telework, particularly if the employer has granted telework permission to similarly situated employees without disabilities. Finally, the EEOC also clarified that any direct threat individualized assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence, both about the disability and transmission of COVID-19.

Last, the EEOC provided some examples of accommodations that, assuming they do not present an undue hardship, may eliminate or sufficiently reduce a direct threat to an employee who is particularly vulnerable to COVID-19 due to a medical condition. Those examples include providing additional or enhanced personal protective equipment (PPE), placing physical barriers to separate the vulnerable employee from coworkers or the public, eliminating, reducing, or substituting less critical, non-essential job functions that create more risk of exposure, modifying work schedules, or moving employee workstations.

It is a near certainty that almost every employer will confront this sort of situation – an employee reluctant to return to work due to a particular medical condition (COPD, asthma, congestive heart disease, cancer, etc.) – as operations resume. The EEOC’s guidance makes plain that employers will need to address these situations on a case-by-case basis. It also confirms that employers will need to be creative and nimble as they address them to provide as much opportunity as possible for vulnerable employees to continue to work.



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