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Reopening Your Workplace: EEOC Provides Updated COVID-19 Guidance

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Earlier this month, the U.S. Equal Employment Opportunity Commission ("EEOC") updated its guidance with respect to COVID-19 and the workplace. In doing so, the EEOC once again emphasized that the Americans with Disabilities Act ("ADA") "do[es] not interfere with or prevent employers from following guidelines made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19." This alert will highlight a few important aspects of the guidance as it relates to your business and its potential reopening.

Disability-Related Inquiries, Testing, and Medical Exams

If employees call in sick: The EEOC's position is that under the ADA, which covers employers with 15 or more employees, employers may ask employees if they are experiencing symptoms of COVID-19 (e.g., fever, chills, cough, shortness of breath, or sore throat). Employers with fewer than 15 employees may also ask these questions. Employers should continue to monitor the Centers for Disease Control and Prevention's ("CDC") website for updated guidance on developing symptoms associated with COVID-19. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems.

When screening employees before entering the workplace: Employers may take an employee's temperature before entering the workplace to determine whether he or she may be infected with COVID-19. Generally, measuring an employee's body temperature is a medical examination; however, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and have issued related precautions, employers may now measure employees' body temperatures before entering the workplace. Employers, however, should be aware that some people with COVID-19 do not necessarily have a fever.

Employers may also administer COVID-19 diagnostic tests to employees prior to entering the workplace or ask employees to self-test outside of the workplace. Generally, the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, the EEOC has stated that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer "accurate and reliable" COVID-19 tests to employees before they enter the workplace to determine if they have the virus. Employers should refer to the Food and Drug Administration ("FDA") and CDC guidance for the most accurate and reliable tests.

Confidentiality of Medical Information

What employers may do with the test results: Employers must keep all medical information about an employee (e.g., information about an illness, temperature results, or test results) separate and confidential from an employee's personnel file. According to the EEOC guidance, employers may disclose the names of employees who test positive for the virus to public health agencies.[1] The EEOC's updated guidance also states that contractors and temporary staffing agencies may disclose the identity of an employee with COVID-19 if they placed that individual in an employer's workplace.

Hiring and Onboarding

After a conditional job offer: Employers may screen job applicants for COVID-19 symptoms. Additionally, employers may delay the start date for applicants with COVID-19 symptoms, or they may withdraw their offers entirely if time is of the essence. Employers may not delay the start date or withdraw an offer solely because applicants are pregnant or are 65 years of age or older ("high risk").

Reasonable Accommodations

Some employees may be unable to return to work for a variety of reasons, including their actual (or perceived) vulnerability to COVID-19.

Employees who already receive a reasonable accommodation: may be entitled to additional or alternative reasonable accommodations because of COVID-19. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he or she uses in the actual workplace.

Employers may also need to engage in a dialogue with employees who may be at higher risk for more severe illnesses due to COVID-19: The CDC has issued guidance concerning those who are at higher risk for severe illness from COVID-19, including "older adults [65 years and older] and people of any age who have serious underlying medical conditions [such as chronic lung disease, asthma, heart conditions, immune deficiencies, cancer, HIV or AIDS, severe obesity, diabetes, kidney disease, and liver disease]."

As with any accommodation request, an employee who is at high risk need not use the words "reasonable accommodation" or "Americans with Disabilities Act (ADA)." If an employee requests an accommodation, the EEOC notes that the employer may engage in the interactive process and discuss: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether a different accommodation could effectively address the issue; (4) how a proposed accommodation will enable the employee to continue performing the essential functions of his or her position; and (5) medical documentation, if necessary.

Ultimately, after engaging in the interactive process with the employee, a requested accommodation may be appropriate and reasonable if it allows the employee to perform his or her essential job functions and does not impose an undue hardship on the employer. Employers should remember that the ADA requires "an" accommodation, but not necessarily "the" accommodation requested by the employee. The EEOC also notes in the guidance that a reasonable accommodation that did not impose an "undue hardship" prior to the pandemic might impose an undue hardship during and after the pandemic. An undue hardship is defined as a "significant difficulty or expense." "Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense

when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted)."

The EEOC also advised that employers may proactively inquire whether employees with disabilities will require accommodations upon a return to work after stay-at-home orders and governmental shutdowns are lifted. Employers are encouraged not to postpone discussing workplace accommodations, even those accommodations that may only become necessary once an employee is no longer working remotely.

Return to Work

An employer knows that an employee is at higher risk for more severe illness due to COVID-19, but that employee has not requested a reasonable accommodation: Under these facts, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee from the workplace – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. The ADA does not permit the employer to take any adverse action, unless the employee's disability poses a "direct threat" to his or her health that cannot be eliminated or reduced by reasonable accommodation.

The "direct threat" standard requires that the disability pose a "significant risk of substantial harm" to the employee's health. This must be an individualized assessment, based on reasonable, objective, and current medical judgment about the employee's condition and cannot depend upon the condition being on the CDC's list. In determining whether an employee poses a "direct threat," the ADA requires that employers consider the duration of risk, the nature and severity of the potential harm, and the imminence of the potential harm.

"The ADA direct threat requirement is a high standard," the guidance states. If an employer finds that the employee's disability poses a direct threat to his or her health, the employer cannot exclude the employee from the workplace unless there is no way to provide a reasonable accommodation. Employers must engage in the interactive process and consider accommodations such as telework, leave, or reassignment (perhaps to a different job, in a place where it may be safer for the employee to work or that permits telework). Additional examples of reasonable accommodations that may, absent undue hardship, eliminate a direct threat to an employee include: additional or enhanced protective gowns, masks, gloves, or other gear, erecting a barrier that provides separation between employees with disabilities and the public or their co-workers, the elimination of marginal job functions, temporary modification of work schedules, and temporary re-location. The EEOC also encourages employers and employees "to be creative and flexible" when evaluating accommodation issues during the COVID-19 pandemic. An employee may only be excluded from the workplace if the employer concludes that the employee poses a significant risk of substantial harm to himself and no reasonable workplace accommodation exists.

For more information on the EEOC guidance, the steps that your business can take to prepare for reopening, or any other employment related issue, please contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com, or James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnote

[1] Upon notice that an employee tests positive for COVID-19, state law, guidance, or executive order may require an employer to report the individual's name to public health authorities.

Practices

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