EEOC Nixes Antibody Testing, Addresses Other Return to Work Issues

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June 18, 2020

As businesses across the country move toward re-opening in the midst of the COVID-19 pandemic, the Equal Employment Opportunity Commission ("EEOC") continues to provide updates to its guidance to employers relating to COVID-19 and its interplay with federal anti-discrimination laws. This week, the EEOC published several key updates, addressing whether employers can require employees to undergo antibody testing and other questions about returning employees to work. (For a full summary of the EEOC's earlier guidance, please visit our prior alerts here and here.)

In its most recent update, the EEOC has advised that employers may not require employees to take an antibody test before returning to work. The EEOC explained that antibody tests constitute a medical examination. Under the Americans with Disabilities Act ("ADA"), employers can only conduct medical examinations of current employees if doing so meets the statute's "job related and consistent with business necessity" standard. At this time, the EEOC has said requiring antibody tests does not meet this standard, based on the CDC's recommendations that such tests not be relied on for making return-to-work decisions.

While antibody tests are not permitted, the EEOC continues to state that employers may administer COVID-19 testing (*i.e.* to determine if the employee has the virus) to employees before permitting them to return to work. Employers may also require employees to take their temperatures or self-evaluate for other COVID-19-related symptoms before coming to work.

The EEOC also issued further guidance on issues related to workplace accommodations. On the question of how employers can solicit employee accommodation requests, the EEOC has said that employers may, but do not have to, provide employees with information about who to contact to make accommodation requests in advance of their return to work. The key here is that any such solicitation must go to all employees.

Further, the EEOC addressed accommodation questions related to age and pregnancy. The EEOC explained that although people over 65 are at higher risk for a severe case of COVID-19, the Age Discrimination in Employment Act ("ADEA"), unlike the ADA, does not provide a right to accommodation. This means employers are not required to permit workers to stay at home, for example, based solely on their being over 65. Nevertheless, the EEOC is encouraging employers to be flexible, explaining that the ADEA does not prohibit accommodations, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

For pregnant employees, the EEOC has stated that employers may not exclude pregnant employees involuntarily from the workplace. If pregnant employees request an accommodation, employers should consider whether this may be required under the ADA (if the request is associated with a pregnancy-related disability) and whether it is providing similar accommodations to other non-pregnant employees. Further, there may be state laws, as in Massachusetts, specifically creating a pregnancy-related right to accommodation.

For more details, you can find the EEOC's complete guidance here. If you need further assistance in handling return to work or other disability-related questions, please contact us.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Portal or contact your Foley Hoag attorney.

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