

EEOC Updates COVID-19 Guidance, Addressing Considerations for Returning to Work

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In March 2020, the Equal Employment Opportunity Commission issued an initial guidance to employers answering several commonly asked questions relating to COVID-19 and compliance with the Americans with Disabilities Act. (Our alert describing that guidance can be found [here](#).) Since then, the EEOC has continued to update its guidance, most recently addressing growing questions around employees returning to the workplace.

Testing

The EEOC's guidance provides that employers may administer COVID-19 tests to employees before permitting them to enter the workplace without violating the ADA. Employers also are permitted to take employees' temperatures and ask employees if they are experiencing COVID-19 symptoms, including those more recently identified by the CDC, like loss of smell or taste and gastrointestinal problems, such as nausea, diarrhea, and vomiting. If an employer chooses to maintain records relating to these tests or inquiries, it may do so, but it needs to keep them in a separate, confidential file apart from employee personnel records.

Confidentiality

Per the EEOC, employers should not reveal the identities of employees who have tested positive for COVID-19 to others at the workplace. Rather, the EEOC recommends that, if an employee is diagnosed with COVID-19, the employer maintain the confidentiality of this person's diagnosis, while also informing potentially exposed colleagues about taking safety precautions. (The EEOC guidance does not address circumstances where employees expressly authorize their employers to disclose information concerning their diagnosis to potentially exposed co-workers on a need-to-know basis.)

The EEOC recommends appointing certain managers to be responsible for collecting and relaying this information, to limit the number of people who have access to confidential data.

Accommodations

The EEOC's guidance authorizes employers to ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Under the ADA, a reasonable accommodation must be provided unless it poses an undue hardship on the employer. The EEOC has stated that the circumstances of the current pandemic will be weighed in assessing whether a requested accommodation poses an undue hardship, meaning that an accommodation that the EEOC may have deemed feasible or affordable prior to the COVID-19 pandemic may not be viewed in the same manner now.

The EEOC has also cautioned that employees with underlying medical conditions who did not need a workplace accommodation prior to the pandemic may be entitled to one now. Employers should engage in the interactive process with employees to determine what accommodations are reasonable in the circumstances. The EEOC's proposed examples include: enhanced personal protective gear; erecting physical, protective barriers in or around the workspace; eliminating an employees' incidental, non-essential job duties; and temporary modifications of work schedules.

Moreover, the EEOC has stated that what is considered a reasonable accommodation today may be different than before. The EEOC provides an example of an employee who requested to work from home as an accommodation prior to the pandemic and was denied that request, because the employer determined the essential functions of the job could not be performed at home. If this same employee

teleworked during the pandemic, and renews the request to continue working from home when the office reopens, the EEOC has advised that this temporary period of teleworking may be evidence that the request is now reasonable on a going forward basis.

Finally, the EEOC has confirmed that an employer cannot, on its own, exclude from the workplace an employee who has a disability that places him or her at higher risk if he or she contract COVID-19 unless the employee being at work poses a “direct threat” to the employee’s health and no reasonable accommodation can be provided that would minimize the threat. The EEOC further warned that the standard for establishing a “direct threat” is high and cautioned employers against unilaterally excluding employees from work absent unique circumstances.

You can find the complete list of the EEOC’s question and answers [here](#). As always, we will continue to advise on future developments. If you need further assistance in handling requests for accommodations 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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