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Navigating Disability Accommodations and Discrimination as Your Business Reopens

As states and localities begin to gradually loosen restrictions put in place to prevent the spread of COVID-19, employers have had to assess when and how they will ramp up in-person operations and customer services. One of the biggest challenges employers face is how to return to normal operations while ensuring employee safety amid the ongoing public health crisis, especially for employees with existing medical conditions and disabilities.

The Equal Employment Opportunity Commission (EEOC) has issued developing guidance for employers on common discrimination issues that may arise under Title VII, the Age Discrimination in Employment Act (ADEA), Pregnancy Discrimination Act, and the Americans with Disabilities Act (ADA) as businesses implement return to work plans. The following are a few common issues employers should be prepared to handle as employees return to the workplace.

Addressing Workplace Discrimination and Harassment

The EEOC recently reported an increase in reports of mistreatment and harassment of Asian Americans and individuals of Asian descent in the workplace due to world events related to COVID-19. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race and national origin. The EEOC encourages employers to be mindful of instances of harassment, intimidation, or other forms of discrimination and take prompt action to address such issues. Issues of non-discrimination and inclusion are also of utmost importance in light of the recent public issues of discrimination against African Americans and the Black Lives Matter movement.

As employers reopen the workplace, the EEOC advises that employers "may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action." (See EEOC Guidance, Question E.2.).

Employers should also remember that discrimination and harassment can occur both in the physical and virtual workplace. Employers who have implemented long-term teleworking arrangements should ensure that employees who are working from home have been provided information on how to report discrimination, harassment, and other HR issues while working remotely and that employers promptly respond to such reports.

Discrimination Against "High Risk" Applicants and Employees

According to the CDC, certain individuals may be at a higher risk for becoming severely ill from COVID-19, such as individuals who are 65 years or older, individuals who have underlying medical conditions such as diabetes or heart conditions, and pregnant women, among others. The CDC advises individuals who are at a higher risk for severe illness to take extra precautions to avoid contracting COVID-19.

As employers begin to implement return to work plans, they must remember that characteristics such age, disability, and pregnancy are all protected classes under federal, state, and local anti-discrimination laws. These laws protect both job applicants and current employees against adverse employment actions on the basis of their protected class. It is unlawful for an employer to refuse employment, withdraw a job offer, or postpone an individual's start date simply because the employer is concerned that the employee's age, disability, or pregnancy puts them at a greater risk from COVID-19. (See EEOC Guidance, Question C.5).

Similarly, an employer may not prohibit an employee from returning to work or take any other adverse employment action simply because the employee is considered high risk. Unless the employee displays symptoms of COVID-19 or has a disability that poses a direct threat to themselves or others, an employer may not prohibit that employee from returning to work or require them to work from home indefinitely solely because of the employee's disability, age, or other protected characteristic. For example, it is unlawful for an employer to require all employees above a certain age to continue teleworking while allowing younger employees to physically return to work. Employers are also prohibited from excluding employees from the worksite simply because they have an underlying medical condition that puts them at higher risk. (See EEOC Guidance, Question G.4).

Employers should also be mindful of reemployment decisions. In response to COVID-19, many businesses furloughed or terminated large sections of their workforce. As businesses reopen, they may initially only need to rehire some employees due to lack of demand or social distancing requirements. When making determinations of which employees to call back from furlough, rehire, or increase hours, employers must ensure their rehiring decisions are based on objective and non-discriminatory criteria (such as reemploying individuals with high performance records or individuals who perform critical roles). Employers may not decline to rehire or increase hours of employees due to protected characteristics such as race, age, disability, or pregnancy. When making reemployment decisions, employers should ensure their criteria are job-related and do not have a disproportionately negative affect on employees who fall into certain protected classes.

Disability Accommodations and COVID-19

As we advised in a previous article, businesses may need to make a number of modifications to existing policies and their physical worksite to ensure the safety of all employees. Employees who are at a higher risk due to COVID-19 may need additional accommodations to better protect themselves from COVID-19 exposure. Under the ADA, employers have a duty to provide reasonable accommodations to employees with disabilities. This duty to accommodate applies both to employees who are teleworking and those who are reporting to the worksite. If an employee with a disability requests a change in the workplace because of their own medical condition, the employer should treat that as a request for an accommodation and promptly engage in the "interactive process" with the employee.

For example, an employee with asthma may ask their employer to implement additional safety measures around their work area to reduce their risk. Such measures might include relocating their workspace to a less busy area, temporarily moving the employee to an enclosed office, using plexiglass barriers to ensure minimum distances between the employee and others, or designating one-way walking aisles. Other accommodations could also include temporarily restructuring or eliminating marginal job duties, modifying the employee's work schedule or shift assignment, or allowing the employee to telework.

Whether an employee's requested accommodation is "reasonable" or not depends both on the employee's and employer's specific circumstances. When an employee requests an accommodation, the employer must individually examine the employee's request and work with the employee, and often the employee's physician, to determine what solution(s) will allow the employee to safely perform the job. Employees are not necessarily entitled to the accommodation of their choice. Instead, when possible, employers must provide the employee an accommodation that will allow them to safely perform the essential functions of their job while reducing the risk of exposure to the employee. The EEOC encourages flexibility on both the employer's and employee's behalf to finding an effective solution.

Can "High Risk" Employees Be Required to Return to Work?

A common question facing employers is whether or not "high risk" employees can be required to physically return to work. If an employee requests a continued telework arrangement because they are high risk due to their age, medical condition, pregnancy, or live with someone who is high risk or is at high risk of being exposed to COVID-19 (such as a healthcare worker), is the employer required to allow the employee to continue working remotely or otherwise modify their schedule?

The ADA only requires employers to provide reasonable accommodations to employees who themselves have disabilities. If an employee requests telework or a modified schedule because they are worried about physically returning to work due to their age or because they live with someone at high risk, but they themselves do not have a disability that puts them at risk, the employer is not required to grant the employee's request.

Employers can be flexible by creating voluntarily telework policies and granting other employee requests when possible. Employers are not, however, required allow all employees to work remotely or change their schedules. Both the CDC and EEOC encourage employers to adopt flexible workplace policies to mitigate the spread of COVID-19 in the workplace and promote employee safety. When creating such policies, those policies should be based on objective, job-related criteria. Voluntarily teleworking policies or other schedule modifications should not have a disproportionately negative affect on protected groups of employees and should treat employees with comparable circumstances similarly.

If an employee requests a teleworking arrangement as an accommodation for the employee's own disability, the employer will have to consider that request on an individualized basis, looking at the specific facts and circumstances. As stated above, employees are entitled only to a reasonable accommodation, not necessarily their preferred accommodation. If the employer can provide accommodations that will allow the employee to safely performs their job duties at the worksite, that may be a reasonable alternative to teleworking. Employers should rely on the interactive process and seek guidance from the employee's treating physician about what accommodations are necessary in light of the employee's medical condition. Depending on the employee's specific circumstances and what accommodations the employer is able to provide, continued telework may or may not be a reasonable accommodation that must be granted. Employers should note that the Wisconsin Fair Employment Act is generally more favorable to employees than the ADA when considering accommodations for employees who have disclosed disabilities.

Additionally, the EEOC has reiterated that the ADA does not require the employer to provide an otherwise reasonable accommodation if it poses an "undue hardship." (See EEOC guidance, Questions D.9-11). The EEOC defines an undue hardship to mean a "significant difficultly or expense." Due to the economic fallout created by COVID-19, an accommodation that may not have posed an undue hardship prior to the pandemic may pose one now. The EEOC advises that while prior to COVID-19 most accommodations did not create an undue hardship, employers "must weigh the cost of an accommodation against its current

budget while taking into account constraints created by this pandemic." For example, it may be more difficult for employers to acquire certain items or deliver equipment to remote workers. Or it may be significantly more difficult to remove certain job functions or allow an employee to work remotely if the employer's workforce is already at reduced capacity.

If a particular accommodation poses an undue hardship, employers and employees should work together to determine whether an alternative exists that could meet the employee's needs. If an employer is unsure about a particular accommodation request or feels it may be an undue hardship, they should consult with legal counsel prior to denying the accommodation request to ensure the interactive process has been fully utilized and no other reasonable alternatives exist.

Can Employers Require Employees Who Display COVID-19 Symptoms to Stay Home?

The EEOC advised that the ADA allows employers to test for COVID-19 in the workplace and allows employers to require employees to stay home if they have symptoms of COVID-19. (See EEOC Guidance, Section A). See our article on COVID-19 testing and workplace sick policies for more information and guidance.

Conclusion

The new disability accommodation and discrimination issues created by COVID-19 should be a focus of every employer's return-to-work plan. Businesses must keep in mind that characteristics such as age, disability, and pregnancy are all protected classes and that their reopening policies must not intentionally discriminate against or have an unintended negative affect on employees of any protected class. Navigating accommodation requests and creating non-discriminatory policies require an individualized approach to each company's specific business needs. Employers should continue to consult with legal counsel throughout their reopening process to ensure continued compliance with local, state, and federal law.

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