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Navigating Disability Accommodations and Discrimination in the Age of COVID-19

As state and local restrictions put in place to combat the COVID-19 public health crisis continue to evolve, employers have had to assess when and how they will resume in-person operations and services. One of the biggest challenges employers in local governments face is how to return employees to the workplace while addressing safety concerns, 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 employers 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."

Continued on next page

Continued from front page

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 local governments begin to implement employee return to work plans, they must remember that characteristics such as 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.

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.

Employers should also be mindful of reemployment decisions. In response to COVID-19, many employers furloughed or terminated large sections of their workforce due to budget constraints and changes in services. As local governments resume in-person operations, 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

Employers 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 and Wisconsin Fair Employment Act (WFEA), 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 his or her 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 the employer to implement additional safety measures around the work area to reduce risk. Such measures might include relocating the employee's 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 the employee to safely perform the essential functions of his or her 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.

Face Masks and Disability Accommodations

Several local governments have recently implemented orders that require most individuals to wear a cloth face covering while indoors. Some employers have also implemented voluntary policies requiring their employees to wear a face covering while in shared workspaces. Employees with certain medical conditions and disabilities may be exempt from employer policies requiring a face covering. If an employee informs the employer that the employee is unable to wear a face covering due to a medical condition or disability, the employer should interpret this as a request for a reasonable accommodation under the ADA and WFEA. As part of the interactive process, the employer may require the employee to provide information and documentation from a medical provider that the employee has a medical condition that prevents the employee from wearing a facial covering.

If it is determined that the employee is unable to wear a facial covering due to a medical condition or disability, the employer and employee should take steps to find a reasonable accommodation that allows the employee to perform the job while promoting public safety. Such accommodations could include teleworking, temporarily moving the employee to an enclosed office, schedule modifications, adjustments to job duties, a temporary leave of absence under the ADA/WFEA or the Families First Coronavirus Response Act (FFCRA), or other workplace changes.

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 the employee is high risk due to age, medical condition, pregnancy, or living 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 his or her schedule?

The ADA and WFEA only requires employers to provide reasonable accommodations to employees who themselves have disabilities. If employees request 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 their request.

Employers can be flexible by creating voluntarily telework policies and granting other employee requests when possible. Employers are not, however, *required* to 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

Continued on page 5

Wisconsin Court of Appeals Holds Municipalities Do Not Get a Second Chance at Conditional Use Permit Denial

On June 17, 2020, the Wisconsin Court of Appeals, District II upheld a conditional use permit (CUP) for a sport shooting range in the City of Delafield, *Hartland Sportsmen's Club, Inc. v. City of Delafield*, 2019AP740. The court's decision was the latest development in Hartland Sportsmen's Club's (HSC) request for a CUP, from the City of Delafield (City or Delafield), to continue operating a shooting range. In the previous case *HSC I*, the Court of Appeals found that the City could not show a factual basis for its denial of HSC's CUP, so the court reversed the denial for being arbitrary and capricious. *See Hartland Sportsmen's Club, Inc. v. City of Delafield (HSC I)*, No. 2016AP666 (WI App Aug. 30, 2017), *review denied*, 2018 WI 20, 389 Wis. 2d 106, 909 N.W.2d 175.

After that ruling, HSC did not request, nor did the court remand, the case to the municipality for further proceedings. However, rather than issuing the CUP, Delafield instead reconsidered the permit by holding new hearings, issuing new findings and ultimately again denying the permit. HSC then brought a new action for a writ of mandamus, arguing that the prior court rulings in *HSC I* required the City to issue the CUP based on HSC's previous application. The Court of Appeals sided with HSC, finding that the ruling in *HSC I* reversed the City's denial for being arbitrary and capricious, thus requiring the City to issue the CUP.

The court stated that the purpose of certiorari judicial review of municipal and administrative decisions, such as the denial of a CUP, is to ensure procedural due process. After review, a certiorari court has three options – affirm, reverse, or remand for further proceedings consistent with the court's decision. The court noted that remand to the municipality or administrative tribunal for further hearings is appropriate only when the defect in the proceedings is one that can be cured. However, supplementation of the record by the government decision maker with new evidence or to assert new grounds is not permitted. Outright reversal is appropriate when due process violations cannot be cured on remand, which includes cases in which the evidence failed to support the government's decision.

The court found that the outright reversal of the City's denial in *HSC I* was appropriate because the violation of due process would not be cured by remanding for further proceedings on the permit. In *HSC I*, the court found that the City could not show a factual basis for its denial of the CUP, and invalidated the denial for being arbitrary and capricious. Municipalities do not have the authority to revisit a previously denied permit when a court has invalidated the denial on a factual basis.

For municipalities, this case shows that it is crucial to get these permit decisions right the first time by ensuring that any denial is supported by a factual basis. If not, municipalities will not get a second chance when a court reverses a denial for being arbitrary and capricious.

This case should also serve as a reminder for municipalities to update their CUP processes to comply with the relatively recent changes to CUP requirements[1]. As discussed above, after *a certiorari* judicial review, municipalities will not be able to supplement the record with new hearings and further fact finding because of due process concerns. This inability to supplement the record means that municipalities will effectively forego their opportunity to decide CUPs if their CUP processes do not comply with the changes to CUP requirements—especially the requirement for "substantial evidence" in the record to support denial.

– Eric Hagen

[1]Wisconsin Act 67, effective Nov. 28, 2017, made important changes to municipal land use powers, which impacted the conditional use permit authority of all local governments, including cities and villages.

Continued from page 3

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 perform 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 WFEA 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." The EEOC defines an undue hardship to mean a "significant difficulty 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 our article on COVID-19 testing and workplace sick policies for more information and guidance at https://www.boardmanclark.com/publications/hr-heads-up/managing-employees-return-to-the-workplace-during-the-covid-19-pandemic.

Conclusion

The new disability accommodation and discrimination issues created by COVID-19 should be a focus of every local government when returning employees to the workplace. Employers 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 employer's specific needs and circumstances. Employers should continue to consult with legal counsel as they resume in-person operations to ensure continued compliance with local, state, and federal law.

– Brenna McLaughlin

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