

Employment Law Update: EEOC Issues Updated Guidance on Accommodating High Risk Employees Under ADA Regulations During COVID-19 Pandemic

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As we have previously advised, employers may be required to accommodate employees with certain medical conditions that the Centers for Disease Control (CDC) has identified as carrying a higher risk of contracting COVID-19, and/or whose symptoms may be exacerbated by the virus and potentially put individuals at higher risk. Those medical conditions include chronic lung disease and chronic heart disease.

On May 5, 2020, the Equal Employment Opportunity Commission (EEOC) issued updated guidance to assist employers in determining whether and how to accommodate employees with medical conditions that place them at increased risk of severe illness due to the COVID-19 pandemic. This updated guidance is particularly important as businesses begin reopening and employees return to work.

Regulations under the Americans with Disabilities Act (ADA) require an employee (or their doctor) to inform the employer of any required changes or alterations to the established employment arrangement due to a medical condition – here, the underlying condition creating the elevated COVID-19 risk. It is important to note that the request may be in writing or verbal and need not use the term “reasonable accommodation” or mention the ADA. The employee or doctor should also communicate that the medical condition necessitates a change to meet a medical need.

Employers should subsequently engage in the interactive process, during which it may make appropriate inquiries and seek documentation to confirm the existence of a disability and determine whether it can be

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reasonably accommodated without undue hardship to the employer. The EEOC's guidance to employers for determining whether a request presents an undue hardship was covered in our **April 7** and **April 23** Client Alerts.

Employers aware of an employee with a medical condition that places them at significant risk of developing COVID-19 may not unilaterally exclude that employee from the workplace. Under the ADA, such an extreme measure is not allowed unless the employee's disability poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation. The EEOC's guidance to employers for assessing a "direct threat" to the workplace was also covered in our April 23 Alert.

The ADA direct threat standard is high and requires the employer to show that the employee has a disability that poses a "significant risk of substantial harm" to their own health under **29 C.F.R. section 1630.2(r)**. Employers cannot make a direct threat determination solely because the CDC has identified the employee's underlying condition as placing them at increased risk. Instead, an employer's direct threat determination must follow an individualized assessment based on a reasonable medical judgment about an employee's disability using the most up-to-date medical knowledge and/or the best available objective evidence.

Factors an employer should consider include:

- The duration of the risk;
- The nature and severity of the pandemic in a particular area and the employee's own health (i.e., whether the employee is effectively managing the disability);
- The employee's particular job duties;
- The likelihood that an individual will be exposed to the virus at the worksite; and
- The measures employers may already be taking to protect all workers including, for instance, mandatory social distancing.

Employers that properly conclude that an employee's medical condition poses a direct threat to their own health still may not exclude the employee from the workplace unless there is no other way to provide a reasonable accommodation absent an undue hardship. Instead, ADA regulations require an employer to engage in the interactive process and consider whether there are reasonable accommodations that would eliminate or reduce the risk and allow the employee to safely return to the workplace and continue performing their essential job functions.

If an employer is unable to accommodate the employee within their normal course of employment then alternative accommodations should be considered, including for example:

- Providing telework opportunities;
- Granting medical leave;

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- Providing additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace;
- Reassignment to a job in a safer area of the workplace;
- Elimination or substitution of marginal functions of a job;
- Temporary modification of work schedules to decrease contact with coworkers and/or the public;
- Erecting barriers that provide separation between an employee with a disability and coworkers/the public; and/or
- Otherwise artificially creating space between an employee with a disability and others.

The preceding list is not exhaustive and the EEOC encourages employers to be as flexible as possible when coming up with accommodations for employees with disabilities that place them at increased risk of self-harm during the pandemic. Identifying an effective accommodation will depend upon such things as an employee's job duties, the location and design of the workplace, and the level of exposure to the general public. An employer can only exclude an employee from the workplace after it has gone through all the above steps and concluded that the employee poses a significant risk of self-harm – based on object facts beyond a mere diagnosis – that cannot be reduced or eliminated by reasonable accommodation.

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