EEOC UPDATES GUIDANCE ON RECALLING EMPLOYEES

Hodgson Russ Labor & Employment Alert
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As the economy reopens, employers are facing difficult questions concerning how to recall employees to the workplace safely and how to handle concerns from employees who may be particularly vulnerable to COVID-19. On June 17, 2020, the Equal Employment Opportunity Commission ("EEOC") issued return to work guidance concerning the use of antibody tests. On June 11, 2020, the EEOC issued guidance concerning the reentry of employees who may be at higher risk of severe illness from COVID-19 based upon age or pregnancy, or who live with a family members at higher risk of severe illness from COVID-19 due to an underlying medical condition. The guidance titled *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (the "Guidance") is accessible here.

Antibody Tests
The Americans with Disabilities Act ("ADA") prohibits employers from requiring employees to undergo antibody testing before permitting them to re-enter the workplace. Antibody testing seeks to determine whether an individual has previously had COVID-19 by examining whether anti-SARS-CoV2 antibodies are present in the bloodstream. The EEOC's guidance prohibiting mandatory antibody testing before workplace reentry is based upon the recommendation of the Centers for Disease Control and Prevention ("CDC"). The Guidance specifically notes that while employers may not require employees re-entering the workforce to undergo antibody testing, employers may require viral testing. In contrast to antibody testing that seeks to determine whether an individual has previously had COVID-19 based upon the presence of anti-SARS-CoV2 antibodies in the bloodstream, viral tests check samples from an individual's respiratory system (such as swabs of the inside of the nose) to tell if an individual is currently infected with SARS-CoV-2, the virus that causes COVID-19. The CDCs guidance concerning antibody testing is available here while its guidance concerning viral testing is available here.

Age
The CDC encourages employers to offer maximum flexibility to employees age 65 and older because they are at higher risk for a severe case of COVID-19 if they contract the virus. The EEOC advises that while employers are not required to offer more flexible working arrangements to employees based upon age, offering more flexibility to employees age 65 and older does not violate the Age Discrimination in Employment Act ("ADEA"), even if it results in younger workers ages 40-64 being

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treated less favorably based on age in comparison. The EEOC's Guidance confirms that involuntarily excluding any individual from the workplace based upon age is a violation of the ADEA even if it is done for a benevolent reason such as protecting an employee who is at higher risk for a severe case of COVID-19 due to age. Lastly, like employees of all ages, employees age 65 and older may have medical conditions that bring them under the protection of the ADA and may seek an accommodation based upon disability, rather than age.

Pregnancy

The CDC reports that there is currently no data showing that COVID-19 affects pregnant people differently than others, but that pregnant people are at greater risk of getting sick from other respiratory viruses than people who are not pregnant. Both the ADA and the Pregnancy Discrimination Act ("PDA") may require an employer to provide accommodations to an employee based upon pregnancy. First, while pregnancy itself is not a disability under the ADA, pregnancy-related medical conditions may be disabilities subject to the ADA. Second, the PDA requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. Therefore, employers must evaluate requests for reasonable accommodations made by employees with a pregnancy-related medical condition under the usual ADA rules and engage in the interactive process with these employees. Lastly, the Guidance confirms that involuntarily excluding any individual from the workplace based upon pregnancy is a violation of Title VII of the Civil Rights Act even when such a decision is motivated by benevolent concern for the employee's health.

Family Members

The ADA does not require an employer to provide accommodations to an employee based solely upon the employee's concern that the employee may expose a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. While such an accommodation is not required, an employer is free to provide such an accommodation so long as the policy is applied amongst its workforce in a nondiscriminatory manner.

Takeaway

Employers may not require employees to undergo antibody testing before permitting them to re-enter the workplace; however, employers may require viral testing that seeks to determine whether an employee currently has an active case of COVID-19.

Employers may not involuntarily exclude from the workplace employees it believes are at greater risk of severe illness from COVID-19. Such exclusion likely violates federal employment discrimination laws regardless of whether the employer's belief is accurate or whether the employer's motivation is benevolent.

Instead, employers should work with their counsel to design a plan that recalls workers based upon the needs of the business and addresses the reasonable concerns of employees hesitant to return to the workplace. For example, prior to recalling employees, employers may notify ***all employees***: (1) of the person responsible for handling requests for accommodation should an employee wish to seek one, (2) of all CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, and (3) that the employer is willing to consider on a case-by-case basis any requests from employees for accommodations. Upon receiving a request for an accommodation, employers should engage in the interactive process and evaluate the request under the usual ADA framework. Employers who are not required by law to provide an accommodation may still do so voluntarily so long as they are careful to apply the policy in a nondiscriminatory manner.

Please contact Michael Zahler (518.433.2429), Lura Bechtel (416.595.2693), or Charlie Kaplan (646.218.7513) if you would like assistance or have questions about the impact of federal employment discrimination laws on your reopening plan.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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