

The EEOC Issues Yet More Guidance on the ADA Accommodations and COVID-19

Working Together

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As the country starts discussing the possibility of businesses reopening, the EEOC has, again, updated its guidance on COVID-19 and the Americans with Disabilities Act (“ADA”). This third installment focuses heavily on accommodation of employees in the time of COVID-19 and is an extension to the agency’s prior Q&A (EEOC Q&A.) Our discussions of the prior installments of EEOC’s guidance can be accessed [here](#) and [here](#).

[Medical Inquiries Can Still Be Made as Part of the Interactive Process](#)

The EEOC makes it clear that employers have the right to ask questions and/or request medical documentation to determine whether an employee is disabled, and if so, whether that disability necessitates an accommodation to allow the employee to perform the essential functions of his/her job. Questions that may be asked include, but are not limited to: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether another form of accommodation could effectively address the issues; and (4) how a proposed accommodation will enable the employee to continue to perform the essential functions of his/her position.

Temporary Accommodations Are Permissible

Given the ever-changing landscape of employment due to COVID-19, the EEOC suggests that employers may want to forgo a lengthier interactive process and provide temporary accommodations where feasible. The EEOC makes it clear that an employer offering a short-term accommodation to address a specific situation may put an end date on the accommodation. The employer could choose a specific date through which it will provide the accommodation (such as, for example, May 30th) or a specific occurrence (such as when employees may return to the workplace based on changes in government restrictions). An employer could also agree to provide an accommodation on a short-term temporary basis while awaiting pertinent medical information, given the difficulty some employees may have getting appointments with their doctors or having

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their doctors fill out medical information forms at this time.

It is advised that if you are choosing to provide a temporary accommodation, you document in writing to the employee that it is temporary and the reason why it is temporary. If the employer believes that providing the accommodation long-term would become an undue hardship, this also should be specified in writing along with the notification that the accommodation is intended to be temporary.

Can the Current Pandemic Result in an Undue Hardship for Providing an Accommodation That Might Need to Be Provided in Different Circumstances?

An employer does not have to provide a requested accommodation if it would be an “undue hardship” to the employer, which generally means “significant difficulty or expense.” Some accommodations that would not constitute undue hardships in “normal times” may pose undue hardships at the moment due to the unique situation we are in currently.

For example, determining whether a proposed accommodation would present a “significant difficulty” may require looking at whether the requested item can readily be acquired at this time. If an employee is working from home, installing a requested piece of equipment may be difficult or impossible due to government regulations or a change in rules at the business that would usually do the installation. It may be much more difficult, or even impossible, to have a needs assessment performed for an employee who is working at home during the pandemic. Additionally, due to layoffs it may be more difficult or even impossible to reassign marginal functions or provide temporary reassignments as accommodations. If a requested accommodation poses an undue hardship unique to the current situation, the employer and employee should explore whether there is another temporary accommodation that could be provided.

What Is Considered “Significant Expense” in Light of the Pandemic?

Before the pandemic, the general view of the EEOC was that it was only the rare accommodation that posed a significant expense when compared to the employer’s overall budget and resources. In an enlightened move, however, the EEOC has recognized that many employers have recently lost some or all their revenue streams and may have significantly less discretionary income available than before the pandemic. The EEOC recognizes that the loss of the revenue stream is a relevant consideration, as is the amount of discretionary funds available to the employer at the time the accommodation is requested. While recognizing that an employer cannot say no to an accommodation simply because there is a cost associated with it, the employer may “weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.” This gives employers much more discretion to deny a requested accommodation due to a hefty price tag. Even when denying a pricey accommodation, however, employers should take care to document the reasons for the denial and to continue discussions as to whether there are less costly alternative accommodations that could be offered.

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Employers May Proactively Hold ADA Interactive Meetings to Discuss Requested Accommodations for When Stay-at-Home Orders Are Lifted

Employers may hold interactive meetings with employees who are currently working from home and who request accommodations for when their workplaces reopen. This may include requesting medical information needed to assess the accommodation requests.

Medical Testing and Infection Control Once Businesses Reopen

As COVID-19 is still a threat, employers may continue to take employees' temperatures and continue to ask employees questions about symptoms, and/or require employees to self-report illness. This information must still be maintained in confidential medical files as previously discussed.

An employer may require its employees to wear protective gear (for example masks and gloves) and observe infection control procedures (such as regular handwashing, wearing face coverings and social distancing protocols.) Where an employee's disability requires a reasonable accommodation to those protocols, this should be provided unless it results in an undue hardship. For example, an employee who is allergic to latex may need latex-free gloves. An employer who has a deaf employee who lip-reads may need to provide modified masks. An employee in a wheelchair may need a modified gown if employees are required to wear gowns for safety.

If you have any questions regarding accommodations or any other labor and employment issues, please contact one of the attorneys in our Labor and Employment group.

Posted in COVID-19

Tags: Americans with Disabilities Act (ADA), COVID and the Workplace, Equal Employment Opportunity Commission (EEOC)