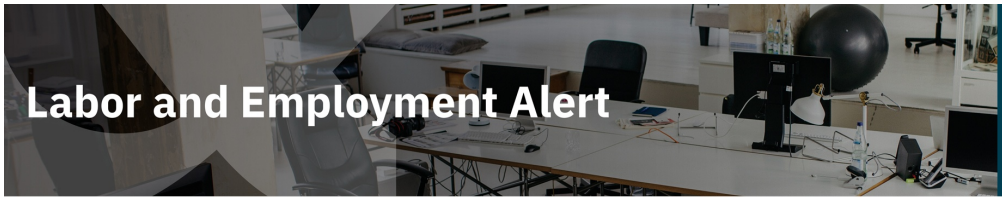

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One Size Doesn't Fit All: New EEOC Guidance Cautions Employers to Take an Individualized Approach in Returning 'At-Risk' Employees to Work in the Wake of COVID-19

May 27, 2020

by Andrés Jiménez-Franck and Melinda Kaufmann

As the country begins a phased reopening of businesses, federal, state, and local agencies continue to issue updated information about returning to work during the COVID-19 pandemic. On May 5 and May 7, 2020, the Equal Employment Opportunity Commission ("EEOC") updated an FAQ list with new guidance reminding employers about the individualized assessment they must make under the Americans with Disabilities Act ("ADA") when an employee's disability may pose a direct threat to the employee's health as they return to the post-COVID-19 workplace. (Our discussions of the prior installments of the EEOC's guidance for employers concerning their continuing obligations under and ADA and Title VII to the Civil Rights Act of 1964 ("Title VII") can be accessed here and here.)

As we have previously discussed, it is critical for employers to implement adequate policies and protocols to keep employees safe in the workplace both for the employees' welfare and to reduce employers' potential exposure to liability as employees return to work. In addition to reaffirming the general importance of return to work policies, the EEOC's guidance reminds employers that such policies may require modifications or exceptions for certain employees requiring reasonable accommodations. Employers should refamiliarize themselves with their obligations to engage in the interactive process when an employee requests a reasonable accommodation. Requests for accommodation typically arise under the ADA (based on a disability) or under Title VII (based on a religious belief or practice).

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The EEOC's guidance references infection control protocols and policies governing employee use of personal protective equipment ("PPE") as examples of workplace rules that may require modifications or exceptions. For instance, an employee with a skin condition or severe allergy may request non-latex gloves, while a wheelchair-bound employee may require alternative protective clothing (such as a gown). Further, an employee may require modifications to PPE to accommodate religious garb.

If an employee requests an accommodation, the employer should discuss the request with the employee and provide the modification if it is feasible. If the requested accommodation is not practical, the employer should work with the employee to find a mutually satisfactory alternative. Of course, an employer is not required to provide the requested accommodation if it would impose an "undue hardship" on the employer's business, which generally means "significant difficulty or expense." Importantly, the EEOC also recognizes that some accommodations that would not normally constitute undue hardship to the employer may now be characterized as such based on the unique and unprecedented COVID-19 situation. For more guidance on how undue hardship considerations have changed during the pandemic please see our recent blog post here.

But what about employees who are known to be at high risk – can an employer proactively take action to protect them?

High Risk Employees Who Don't Request a Reasonable Accommodation

The CDC has identified a number of medical conditions and other factors that can create a "higher risk for severe illness" if those individuals contract COVID-19. According to the CDC's guidance, older adults and people who have serious underlying medical conditions fall into this high-risk category.

Employers must remember that they generally cannot unilaterally prevent these employees from returning to work, even out of concern for the employee's wellbeing. An employer who believes that an employee is at high risk based on these factors may not discriminate against the employee on the basis of a disability or perceived disability. The ADA generally prohibits employers from excluding employees from work solely because a disability places them at a higher risk for severe illness if they contract COVID-19. Only when the employee's disability poses a direct threat to his or her own health, which cannot be eliminated or reduced by a reasonable accommodation, may an employer prohibit the employee from returning to work.

Individual Assessment of the Direct Threat to the Employee's Health Posed by Their Disability

If an employer believes that an employee's disability may pose a direct threat to his or her health, the employer must undertake an individualized assessment of the employee's disability before making any decisions about returning the employee to work with or without an accommodation. The direct threat requirement is a high standard, as it requires the employer to demonstrate that the employee has a disability

that poses a "significant risk of substantial harm" to his or her own health.

The individualized assessment must be based on reasonable medical judgment using the most current medical knowledge and/or the best available objective evidence. This means that an employer cannot conclude that a direct threat exists just because an employee has one of the medical conditions identified by the CDC, or another disability that the employer believes may place the employee at higher risk. In making these evaluations, employers must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. The EEOC guidance also suggests that employers should consider an employee's health and job duties, as well as the likelihood that the employee actually will be exposed to the virus at the worksite. The employer may initiate an interactive process with the employee.

Employers must carefully consider potential accommodations that will eliminate or reduce the risk posed by an employee's disability enabling him or her to return to work safely. Employers should be flexible in considering different types of accommodations, including telework or reassignment to a safer workspace or position. The EEOC has identified examples of accommodations that, absent undue hardship, may reduce a direct threat to an employee's health, including: erecting barriers between employees, increasing space between coworkers, or temporarily modifying work schedules. Employers may also consider providing leave as a reasonable accommodation to employees for whom the direct threat of harm cannot be reduced at the workplace, if it does not create an undue hardship on the employer. Of course, there is no "one size fits all" reasonable accommodation for all employees. Employers should be creative and flexible when developing accommodations to meet business and safety needs.

If the facts demonstrate that the employee's disability poses a significant risk of substantial harm to himself or herself which cannot be reduced or eliminated by a reasonable accommodation, the employer may prevent the employee from returning to work. Such a decision, however, should only be made in the limited situation where no reasonable accommodation is available that will allow the employee to perform the essential functions of his or her position without a direct threat to his own health.

Employers must be mindful of these obligations as they begin returning employees to work. While your organization may be acting with employees' best interests in mind, failing to comply with these requirements, even accidentally, could result in significant liability for discrimination under the ADA. The lawyers at Pullman & Comley are dedicated to assisting employers in ensuring compliance with these and other COVID-19 related requirements, and we have policy templates and other useful resources available.

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Please contact any of our Labor and Employment Law attorneys if you have any questions.