

EEOC's Guidance About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws

Article

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In new guidance issued on June 17, 2020, the Equal Employment Opportunity Commission (EEOC) adopted the CDC'S position that antibody test results "should not be used to make decisions about returning persons to the workplace" because "an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees." Note that an antibody test is different from a viral test to determine if a person has an active case of COVID-19. The latter tests are permissible under the ADA.

On June 11, 2020, the EEOC updated its "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws" guidance publication. Many of the updated questions and answers address frequent scenarios employers encounter while bringing employees back to the workplace. This publication continues to be a valuable resource for employers to review in making COVID-19 related employment decisions. For guidance regarding older questions, please see DK article "Post COVID-19 Return To Work."

Below are some highlights from the new June 11 guidance:

Accommodations and Risk Factors

The EEOC set forth its best practice guidance for returning employees to the workplace. In advance of having employees return to the workplace, it is best to inform all employees of the impending return and provide the contact information for the individual to whom to direct any requests for flexibility in the workplace, accommodations, or other concerns. The employer may wish to send a notice to all employees including the CDC-listed medical conditions that may place certain employees at a higher risk of contracting the disease. Note that the ADA and Rehabilitation Act allow employers to give employees that contact information to assist employees who may wish to request an accommodation for a disability as they return to the workplace. Depending on the situation, the employer may need to begin the interactive process immediately to determine if and what type of accommodation may be necessary for the employee.

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The guidance makes it clear that employees are not entitled to an accommodation if the request is based on the employee's family concerns. For example, an employee would not be entitled to an accommodation to work remotely in order to avoid exposing a family member that is in the high risk category for contracting COVID-19. An employee without a disability is not entitled to telework as an accommodation to protect a disabled family member from potential COVID-19 exposure. An employer may choose to provide flexibility to an employee based on these considerations, but is not required to do so.

The CDC guidance recognizes that individuals over the age of 65 are at higher risk for developing a severe case of COVID-19. However, employees aged 65 and older do not have their own set of protections under federal employment discrimination laws based solely on health risk factors. The Age Discrimination in Employment Act (ADEA) prohibits discrimination against individuals 40 and older, which would include being excluded from the workforce due to COVID-19 simply because of age.

While employers might be tempted to automatically provide accommodations to employees that might be at higher risk, it is important to provide accommodations only to eligible employees. The employer and employee must work together to determine if the high risk employee has a disability within the meaning of the ADA and/or its state counterpart, the Wisconsin Fair Employment Act. Again, it is appropriate to engage in an interactive process early on.

Sex discrimination

Employers must provide any telework, modified schedules, or other benefits to all employees, regardless of sex. This is especially important as it relates to any employees with school age children who request leave due to school closures and/or unavailable childcare during this pandemic. Employers must avoid any gender-based assumptions relating to employee childcare or school needs.

Employers may not automatically exclude employees from the workplace due to a pregnancy. However, employees might be eligible for accommodations based on pregnancy. Employees may request a reasonable accommodation due to a pregnancy-related medical condition, and employers must follow their usual ADA accommodation procedures. Title VII, as amended by the Pregnancy Discrimination Act, provides that women who are affected by pregnancy, childbirth and other related medical conditions must be provided the same job modifications, including telework, as any other employees who are similar in their ability or inability to work.

Racial Discrimination

The guidance puts employers on notice to be cognizant of any pandemic-related harassment due to race, and makes specific reference to situations involving persons of Chinese or other Asian descent. Employers must ensure its employees are not subjected to discrimination or harassment based on race,

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color, religion, sex, and national origin. Given the concerns and media attention regarding the coronavirus and/or its origins, employers should immediately put a halt to any harassment, including demeaning, derogatory, or hostile remarks directed to employees who are or who are perceived to be of Asian descent, and must properly investigate any harassment complaints.

Employers should also be aware of any potential harassment occurring online via emails. Employees may be frustrated if certain employees are allowed to telework. It is important to remind employees that all anti-harassment policies continue to apply, even if certain members of the workforce are remote.

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