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Guidance For Employers On Employee Return To Work Post COVID-19

The U.S. Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 guidance to assist employers as they prepare to have employees return to work.

May 13, 2020

As the COVID-19 pandemic begins to slow in some areas of the country, several states have allowed businesses to reopen while other states are beginning to plan for such reopening. The EEOC issued additional guidance for employers preparing to reopen the workplace that addresses questions employers may have about their employees returning to work. The guidance includes information on screening protocols, protective gear, accommodations, and harassment in the time of COVID-19 and provides practical tips to avoid running afoul of the Americans with Disabilities Act (the “ADA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”).

Can I screen employees before they return to work?

Employers may screen employees for COVID-19 when entering the workplace provided such screening is consistent with the ADA. Screening is acceptable as long as the screening is implemented consistent with advice from the Centers for Disease Control and Prevention (“CDC”) and public health authorities for the employer’s type of workplace at that time. As of May 13, 2020, appropriate screening may include taking employees’ temperatures, asking questions about symptoms, and/or requiring self-reporting of symptoms. Employers should regularly review symptoms for COVID-19 listed by reputable sources such as the CDC, as the list of symptoms may change.

Can I test employees for COVID-19 before they return to work?

Employers may administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. Employers should ensure that the tests are accurate and reliable consistent with ADA standards. Employers can look to the CDC, U.S. Food and Drug Administration, or other public health authorities for guidance on what is considered safe and accurate testing.

There is currently no guidance from the EEOC specifically addressing the use of anti-body testing. As anti-body testing becomes more readily available, additional guidance on this issue may be released.

Can I require employees to provide a doctor’s note certifying fitness for duty?

Employers can require employees to provide a doctor’s note certifying fitness for duty before permitting their return to work. However, the EEOC’s guidance noted that the increased need for health care providers to handle pandemic related emergencies may make it difficult for employees to obtain such certification and encouraged employers to be flexible and consider adopting a form that employees may have stamped or signed or allow for e-mail certifications.

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Employers must maintain all information about employee illness, including doctor's notes and screening and testing information for COVID-19, as a confidential medical record in compliance with the ADA. This means that all medical information must be stored separately from the employee's personnel file. Employers should further be careful not to engage in unlawful disparate treatment based on protected characteristics when making decisions related to screening and certifying fitness for duty. Additionally, while screening, testing, and requesting such a note do not run afoul of the ADA, employers should review applicable state and local laws to ensure that such a practice is permissible.

Can I require employees to wear protective gear in the workplace?

The EEOC guidance provides that employers may require employees to wear protective gear such as masks and gloves, and to observe infection control practices, such as regular handwashing and social distancing protocols. Employers should review state and local law, which may require employers to provide employees with protective gear at no cost to the employees. For example, employers in New York must provide essential workers with face coverings.

The EEOC guidance instructs employers to continue to work with employees who may require an accommodation due to a disability under the ADA, or a religious accommodation under Title VII, to provide a modification or alternative, if possible. Accommodations may include alternative protective gear such as non-latex gloves, modified facemasks, gowns designed for individuals in wheelchairs, or modified equipment to accommodate religious garb.

Employers must continue to engage in the interactive process when an accommodation is requested. An employee or third party (such as the employee's doctor) must inform the employer that the employee requires an accommodation for a reason related to a medical condition. Individuals may request accommodations in conversation or in writing, and while not required to state they are seeking a reasonable accommodation, the request should state they have a medical condition that necessitates an accommodation. The interactive process may include asking questions or requesting medical documentation to determine whether an employee's disability necessitates an accommodation.

Accommodations are not reasonable if they cause an undue hardship on the employer. This continues to be the case through the COVID-19 pandemic. The EEOC guidance notes that the circumstances of the pandemic may alter what amounts to an undue hardship for an employer. For example, prior to the COVID-19 pandemic, most accommodations did not pose a "significant expense" in light of an employer's resources. However, the sudden loss of some or all of an employer's income stream due to the pandemic is a relevant consideration.

As a practice note, employers should carefully review requests to work from home especially where employer's operations have been maintained during the COVID-19 pandemic with employees working from home. In such cases, it may be more difficult to deny an employee the ability to work from home as a reasonable accommodation than it had previously.

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Can I prevent an employee from returning to work if I know they are “higher risk for severe illness”?

If an employee does not request a reasonable accommodation, the ADA does not mandate that an employer take action. The EEOC guidance additionally provides that a concerned employer may not exclude an employee or take any adverse action solely because the employee has a disability that the CDC identifies as potentially placing the employee at “higher risk for severe illness” if the employee contracts COVID-19. An employer may however take action if the employee’s disability poses a “direct threat” to their health that cannot be eliminated or reduced by a reasonable accommodation. For there to be a direct threat to the employee’s illness, the employee must have a disability that poses a “significant risk of substantial harm” to their own health under 29 CFR § 1630.2(r).

The ADA states that determinations of “significant risk of substantial harm” must be made on a case by case basis. Factors that may be considered to make this determination include (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

EEOC guidance provides that employers should also consider the severity of the pandemic in the particular

area, the current state of employee’s health, the employee’s job duties, and the likelihood that an individual will be exposed to the virus at the worksite during a determination of a direct threat. If a direct threat is determined by the employer, the employer may only exclude the employee from the workplace if there is also no way to provide a reasonable accommodation absent undue hardship that would reduce or eliminate the significant risk of substantial harm to the employee.

How can I combat workplace harassment as a result of the pandemic?

To reduce and address workplace harassment that may arise as a result of the pandemic, the EEOC guidance provides that employers should remind all employees upon return to work that it is against the federal Equal Employment Opportunity laws to harass or otherwise discriminate based on disability, race, national origin, color, sex, religion, age, disability, or genetic information. Employers may also wish to remind supervisors and managers of their roles and obligations in watching for, stopping, and reporting any harassment or other discrimination.

The updated EEOC guidance can be accessed here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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