

The EEOC's Latest Guidance on COVID-19 and the Americans with Disabilities Act

On June 11, 2020, the U.S. Equal Employment Opportunity Commission published its latest update to its bulletin, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." That publication and others that provide guidance from the EEOC related to COVID-19 are collected at www.eeoc.gov/coronavirus.

The update provides additional guidance including answers to common questions employers may encounter and broadly falls into six categories as follows: reasonable accommodations, pandemic related harassment, return to work issues, age, caregivers and pregnancy.

Reasonable Accommodation

In terms of the ADA's "reasonable accommodation" requirement, the guidance makes clear that an employee is not entitled to an ADA accommodation in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19. Although the ADA prohibits discrimination based on association with an individual with a disability, it does not require an employer to accommodate an employee, who does not have a disability, based on the disability-related needs of a family member or other associated person.

Harassment

The new guidance warns that employers should be alert to pandemic-related harassment due to national origin, race or other protected characteristics and posits that "[e]mployers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management."

Return to Work

There is also advice about best practices for inviting employees to request flexibility in work arrangements as employers begin to re-open workplaces. In doing so, the EEOC specifically references the May 29, 2020 CDC guidance that emphasizes the importance of employers

providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

In addition, the EEOC provided direction for employers confronted with an employee who requests an alternative method of screening due to a medical condition, and recommends that the employer handle such a request in the same manner as any other request for accommodation under the ADA or the Rehabilitation Act. If the employee's disability is not obvious or already known, an employer may ask the employee for information, including medical documentation, in order to establish that the employee has a disability so that it can fashion an appropriate accommodation. The Commission goes on to note that alternative screening methods may be requested as a religious accommodation, in which case the employer should determine if the accommodation is available under Title VII.

Age

With respect to "older" workers, the Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. But, as a result of the pandemic, the CDC has warned that individuals age 65 and over are at higher risk for a severe case of COVID-19 and has encouraged employers to offer maximum flexibilities to these workers. Even so, the ADEA prohibits a covered employer from involuntarily excluding an individual from the workplace based on their age - even if the employer is acting for benevolent reasons. Employers are permitted to provide flexibility to workers age 65 and older even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. As was always the case, if an employee age 65 or older has a disability, whether or not it is related to his or her age, the employee may request a reasonable accommodation.

Caregivers

The guidance reminds employers to avoid sex based discrimination by providing work flexibility in terms of telework or modified schedules to those with children to both male and female employees, thus avoiding improper gender-based assumptions about caretaking responsibilities.

Pregnancy

The last topic is related to how to properly treat pregnant employees. Similar to its recommendations related to workers age 65 and older, the EEOC admonishes that employers

may not involuntarily exclude an employee from the workplace due to pregnancy, even if doing so for benevolent reasons. Title VII's prohibition on sex discrimination includes discrimination based on pregnancy. But a pregnant employee may have a pregnancy-related medical condition that qualifies as a disability under the ADA and if so, may request for a reasonable accommodation. Otherwise, under the Pregnancy Discrimination Act, women affected by pregnancy, childbirth, and related medical conditions must be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work.

As workplaces begin to re-open, we expect that the EEOC will continue to update its guidance in order to help employers and employees navigate the new circumstances presented by the global pandemic.

Doris T. Bobadilla, Director

Licensed in Louisiana, Mississippi, Florida and Texas

Email: dbobadilla@gallowaylawfirm.com

Wendell Hall, Attorney

Licensed in Louisiana and California

Email: whall@gallowaylawfirm.com