

LABOR AND EMPLOYMENT

ALERT

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New EEOC Guidance for Returning to Work in a Covid-19 World – Accommodating “At-Risk” Employees

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The Equal Employment Opportunity Commission (“EEOC”) has issued new guidance to employers on accommodations for employees who have underlying health conditions and who therefore may be at higher risk for contracting Covid-19. The guidance, released on May 5 and 7, expands upon EEOC’s technical assistance bulletin titled “What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”¹ The latest guidance, issued in a question-and-answer format, addresses two situations: (1) an “at-risk” employee who requests an accommodation and (2) an at-risk employee who does not request an accommodation.

BACKGROUND

The EEOC has primary enforcement authority of the Americans with Disabilities Act (“ADA”). Under the ADA, an employer must provide “reasonable accommodations” to an employee with a disability. Generally, an employee must request an accommodation, which triggers the employer’s obligation to engage in an “interactive process” with the employee on the reasonableness of the requested accommodation. An employer may decline to provide an accommodation only where the accommodation would cause significant difficulty or expense to the employer. The law also permits an employer to take action where an employee’s health condition poses a “direct threat” to the employee or to the employee’s co-workers that

cannot be eliminated or reduced by an accommodation.

THE NEW GUIDANCE

In its most recent guidance, the EEOC provides advice for handling a request for accommodation by an employee at higher risk for severe illness from Covid-19. The Centers for Disease Control and Prevention (“CDC”) has reported that individuals having chronic lung disease, asthma, obesity, diabetes, kidney disease, liver disease, and compromised immune systems are at a higher risk for severe illness from Covid-19.² In a non-Covid-19 environment, an employee with one of these conditions may not need any special accommodation in the workplace.

An at-risk employee seeking an accommodation must follow the procedures that any employee seeking an accommodation must follow. If an employee needs an accommodation because of a condition that places her/him at a higher risk for severe illness from Covid-19, the employee must inform the employer that she/he has a medical condition that requires a change for her/him to work. The employer may ask questions or seek medical documentation from the employee to confirm that the employee has a disability and to determine whether an accommodation is feasible. Employees may request a reasonable accommodation orally or in writing, but they need not use the term “reasonable accommodation.”

¹ https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term

² <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

The EEOC guidance offers examples of accommodations that may be reasonable: protective clothing, including masks and gloves; placement of protective barriers between employees; rearrangement of work spaces to increase distance between employees; elimination of marginal job duties; modified work schedules; and telework arrangements. Many employers already are considering or have made these modifications for all employees, not only for employees with disabilities. As a result, an employer may be hard-pressed to deny a specific request for an accommodation of the types described in the EEOC guidance.

The guidance also addresses how employers may approach a situation in which the employer knows that an employee is at-risk but the employee makes no request for an accommodation. Under these circumstances, the ADA does not mandate that the employer offer an accommodation. But the ADA does not allow the employer to take any adverse action – such as termination – against the employee unless the employee’s underlying disability poses a “direct threat” to the employee’s health that cannot be eliminated or reduced by a reasonable accommodation.

There may be only very rare situations in which an employer could possibly rely on the “direct threat” rationale to take any adverse action against an employee who has an underlying medical condition but who has not requested any accommodation. The fact that the employee has a higher risk of severe illness from Covid-19, standing alone, is insufficient, according to the EEOC. Further, an employer seeking to invoke drastic action must undertake an individualized assessment “based on a reasonable medical judgment about this employee’s disability,” as the EEOC advises.

EEOC regulations specify that an individualized assessment must include an analysis of the duration of risk, nature and severity of the harm, likelihood of harm, and imminence of harm. Relevant considerations would include the employee’s underlying condition, the employee’s job duties, the severity of the Covid-19 outbreak in the community, and potential exposure to Covid-19 in the workplace. Employers in certain industries – nursing facilities or meat-

processing, for example – may have more flexibility to address a situation unilaterally, such as barring an employee from the worksite. But even those employers are subject to the requirement that they first determine whether reasonable accommodations are available to mitigate the threat.

PRACTICAL TAKEAWAYS

An employer considering an accommodation for a worker in light of Covid-19 – especially for an individual with a “higher risk” – may want to consider taking the following steps.

First, consider reviewing all employee health information and ensure all relevant information is up to date. This opportunity may be used to ensure that all employees are conforming to existing or new security protocols in response to the pandemic. Furthermore, it may allow employees to request an accommodation with proper documentation. Identifying, memorializing, and consistently utilizing a specific protocol will be key to this process.

Second, review the company’s procedures (and revise if necessary) to ensure that discussions with employees about medical conditions and accommodations are fully documented and maintained as confidential employee records separate from the personnel file.

Third, as the determination of what constitutes a reasonable accommodation and an undue burden may change based upon the number of employees requesting accommodations, companies may consider performing an internal analysis to determine at what point certain accommodations may cumulatively become an undue burden.

Fourth, consider preparing and implementing a comprehensive return-to-work policy that can include actions such as: preparing the physical workspaces consistent with guidelines issued by the CDC, state and local directives, and other laws (e.g., the Occupational Safety and Health Administration); training employees in social distancing, sanitation, and the use of personal protective equipment; creating a reporting structure for Covid-19 concerns; and creating a team or task force to monitor and address the health and safety efficacy of the return-to-work plan.

When in doubt about how to proceed, a business facing these issues may want to consult with outside counsel to take an approach that is reasonable, ensures the protection of the business, and can provide documentation for compliance with EEOC guidance.



This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's Covid-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

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* See: www.schnader.com/jakarta