Proskauer

EEOC and OSHA Issue New COVID-19 Guidance

Law and the Workplace Blog on **June 15, 2020**

As the nation continues to move toward reopening, the EEOC and the Occupational Safety and Health Administration ("OSHA") issued additional guidance for employers to consider as they plan employees' return to the workplace. These updates supplement earlier guidance issued by both agencies, which we discuss in our previous posts.

EEOC Guidance

On June 11, 2020, the EEOC issued additional, revised technical assistance to employers, addressing necessary considerations for employers that have employees returning to the workplace who are at higher risk for more severe illness due to COVID-19. Specifically, the guidance explains that the Age Discrimination in Employment Act (ADEA) would prohibit a covered employer from "involuntarily excluding an individual from the workplace based on [their] being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19." The EEOC goes on to explain that unlike the Americans with Disabilities Act (ADA), the ADEA does not include a right to reasonable accommodation for older employees due to age. Nevertheless, employers are free to provide flexibility to older workers as the ADEA does not prohibit this, even if it results in employees younger than 65 being treated less favorably based on age.

In advance of having some or all employees return to the workplace, the EEOC explains that employers can make information available in advance to all employees about who to contact (if they wish) to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. According to the guidance, an employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions. Alternatively, an employer may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

The EEOC's updated guidance also addresses the following subjects:

- **Accommodation to Avoid Exposing Family Members.** The guidance confirms that employees are not entitled to an accommodation under the ADA in order to avoid exposing a family member who is at a higher risk of severe illness from COVID-19 due to an underlying medical condition. While the ADA prohibits discrimination based on association with an individual with a disability, this protection is limited to disparate treatment or harassment and does not require the employer to accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom they are associated. While employers are free to provide accommodation if it chooses to do so, the guidance cautions against engaging in disparate treatment as a result of offering additional flexibilities.
- **Accommodation Based on Pregnancy.** The EEOC makes clear that employers cannot exclude an employee from the workplace involuntarily due to pregnancy, even if motivated by benevolent concern, or otherwise single out employees on the basis pregnancy for adverse employment actions, including involuntary leave, layoff or furlough. Of course, pregnant employees may be entitled to certain job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. The guidance reminds employers to consider such requests under the usual ADA rules.

- **Requests for Alternative Method of Screening.** If an employee entering the worksite requests an alternative method of screening due to a medical condition or religion, an employer should treat this as a request for reasonable accommodation and proceed as it would for any other request for accommodation under the ADA or Title VII, as applicable. If the requested change is easy to provide and inexpensive, the EEOC suggests the employer voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.
- **Pandemic-Related Harassment.** The EEOC has stated that managers should be alert to "demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins." Further, all employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, inviting anyone who experiences or observes harassment to report it to management, and reminding employees that harassment can result in disciplinary action, up to and including termination

The guidance also makes clear that harassment may occur using electronic communication tools (e.g., emails, calls, or platforms or video or chat communication and collaboration) – regardless of whether employees are in the workplace, teleworking or on leave – and also in person between employees at the worksite. If an employer learns that an employee who is teleworking is engaging in harassment, the employer should take the same actions it would take if the employee was in the workplace.

If an employer provides telework, modified schedules or other benefits to employees with children due to school closures or distance learning, the employer must ensure they are not treating employees differently based on sex or other protected characteristics (e.g., assuming female employees, and not male employees, have caregiving responsibilities).

OSHA Guidance

On June 10, 2020, OSHA released new guidance in the form of an FAQ regarding the use of face masks in the workplace. Importantly, the guidance makes clear that OSHA does not consider cloth or makeshift coverings to be regulated personal protective equipment (PPE), and also outlines the differences between cloth face coverings, surgical masks, and respirators, noting that cloth face coverings "may be commercially produced or improvised (i.e., homemade) garments, scarves, bandanas, or items made from t-shirts or other fabrics."

The FAQs remind employers not to use surgical masks or cloth face coverings when respirators are necessary and if respirators are required, a proper respiratory protection program should be in place. In addition, the FAQs note the need for social distancing measures, even when workers are wearing cloth face coverings, and recommends following the CDC's guidance on washing face coverings.

* * *

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

View original

Related Professionals

- **Arielle E. Kobetz**
  Associate