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EEOC Issues Updated "Capstone" Guidance on COVID-19 After Declaration of End of Public Health Emergency

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On May 15, 2023, the Equal Employment Opportunity Commission ("EEOC") released updates to its "technical assistance" on COVID-19-related discrimination concerns in the workplace. The updated guidelines come in response to President Biden recently signing legislation that ended the COVID-19 National Emergency.

EEOC Chair Charlotte A. Burrows called this installment of "the capstone to our comprehensive resources of questions and answers on COVID-19 and the anti-discrimination laws enforced by the EEOC," signaling this is the last foreseeable update for the technical assistance. The EEOC's guidance was last revised on July 12, 2022.

Guidance on COVID-19 Reasonable Accommodations

The updated guidance adds a Q & A that clarifies that the end of the COVID-19 Public Health Emergency does **not** mean that employers can automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances pursuant to the Americans with Disabilities Act ("ADA"). Instead, an employer may evaluate accommodations granted during the public health emergency and, in consultation with the employee, assess whether there continues to be a need for reasonable accommodation based on individualized circumstances.

Reasonable Accommodations for Employees with "Long COVID"

For employees with "Long COVID," the updated guidance includes examples of potential reasonable accommodations, including a quiet workspace, use of noise cancelling devices, and uninterrupted worktime to address brain fog; alternative lighting and reducing glare to address headaches; rest breaks to address joint pain or shortness of breath; a flexible schedule or telework to address fatigue; and removal of "marginal functions" that involve physical exertion to address shortness of breath.

The updated guidance also emphasizes that information about an employee having "Long COVID" must be treated as confidential in the same manner as other employee health information under the ADA.

Additionally, the updated guidance emphasizes that the ADA's three-part definition of disability – whereby a person can be classified as an individual with a disability if they have (1) an "actual disability" which substantially limits a major life activity like walking or talking, (2) a "record" of an "actual disability", or (3) they are "regarded as an individual with a disability" meaning the individual was subject to an adverse action because of their impairment –applies to "Long COVID" as well as COVID-19. To that end, the guidance has been updated throughout to expand references to COVID-19 as a disability to also include "Long COVID."

CDC Requirements Satisfy the "Business Necessity" Standard

Throughout the updated guidance, the EEOC revised language to emphasize that employers should comply with CDC requirements regarding COVID-19 as such requirements evolve. For example, the updated guidance recommends that employers check the CDC's most recent guidance to see what symptoms the agency identifies as commonly associated with COVID-19. The guidance also states that following the CDC's most up-to-date recommendations on COVID-19 protocols related to medical examinations and screenings of employees will satisfy the ADA "business necessity" standard for making disability-related inquiries or conducting medical exams of employees.

Expanded Guidance on COVID Screening

The EEOC continues to maintain that screening all applicants for COVID-19 is permissible, and states that "[i]t is also permissible to screen a subset of applicants pre-offer if they fall into a specific category of individuals (including employees and others) that are subject to COVID-19 screening." The guidance provides the example that if those "entering a particular building on campus must undergo COVID-19 screening, an employer … may subject an applicant entering this building to the same screening, even though such screening is not routinely done when entering other buildings."

Pandemic-Related Harassment

The updated guidance reiterates that protections against COVID-related discrimination on the basis of disability, religion, national origin, or other protected categories remain in effect and suggests that employers may want to provide illustrations of pandemic-related harassment for supervisors, managers, and all other employees to help them understand what conduct related to COVID-19 may violate anti-discrimination laws. The guidance provides examples including that a supervisor or coworker might violate the ADA by harassing an employee with a disability-related need to wear a mask, or might violate Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination.

The EEOC's capstone guidance update makes clear that while COVID-19 is no longer a "public health emergency," employers continue to have obligations under the ADA and other federal anti-discrimination laws related to the impact of the virus on the workplace. Additionally, as we recently reported, certain COVID-related regulations and obligations may also continue to exist for employers at the state and local levels.

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