EEOC Offers Updated Guidance on Employer ADA Responsibilities During the Pandemic

By P.K. Runkles-Pearson
April 14, 2020

On April 9, the EEOC substantially expanded its guidance on complying with disability discrimination laws during the COVID-19 pandemic. The guidance is a helpful reminder that while disability laws have not changed, they may apply in atypical ways during this unusual time.

Employers may inquire about employees' health—and take certain employment actions—as necessary to protect the workplace.
Many employers take care to avoid medical questions whenever possible. But the ADA has always allowed employers to ask medical questions that are "job related and consistent with business necessity." The EEOC's guidance confirms that during this pandemic, certain questions about COVID-19 meet that standard and are necessary to protect workplace health. For example, employers may routinely ask whether employees have symptoms of COVID-19 (as described by the CDC and other reliable public health resources) and conduct temperature checks to determine whether an employee has a fever. Employers may also ask those questions of job applicants after extending a conditional job offer. Employers should not interpret the EEOC's stamp of approval as a license to ask any and all questions, however. As always, employers should make sure that any inquiries are necessary and directly related to workplace safety.

Employers may be justifiably reluctant to take negative employment actions against employees based on their health condition. But the EEOC's guidance confirms that employers not only may ask employees to stay home because they have symptoms of COVID-19, but they also may delay the start dates of new employees or withdraw job offers for new hires if workers are unavailable due to illness and the employers need workers immediately. Despite this guidance, employers should be careful that such actions are tied directly to an employee's inability to safely fulfill the needs of the business—and are not reactionary responses to the employee's health condition.

Certain disclosures about employees' health are permitted, but be cautious.
Responsible employers generally take precautions to keep employee health information confidential. But the EEOC's guidance confirms that employers may share the names of infected employees with public health officials, and that employers that lease employees may share the names of infected employees with the leasing company. Though the EEOC does not offer other examples, it is likely that this guidance would support employers in making other disclosures that are necessary to trace and curb the spread of COVID-19.

Employers should continue to engage in the interactive process with employees seeking accommodations.
Finally, the EEOC's guidance addresses reasonable accommodations related to COVID-19. In this area, the advice is refreshingly familiar. As the workplace changes, the needs of employees with disabilities may change—for example, because telecommuting presents new challenges, because in-person work creates an elevated risk of exposure, or for other reasons. Employers should continue to engage with employees who require reasonable accommodations, even as the workplace changes. As always, employers should be flexible and creative in granting accommodations that will allow employees to perform essential job functions. Those accommodations

may include barriers (such as plexiglass or furniture) to protect employees from close contact, schedule changes, temporary restructuring of marginal duties, or accommodations to support telecommuting.

Notably, the EEOC suggests that employers consider "temporary transfers to another position" as a possible accommodation. This accommodation should be a last resort, since it can create the false impression that an employee has been permanently transferred or that it is not an undue hardship for the employer to offer alternative duties. If mishandled, this accommodation can make it difficult to establish that the duties of the original position are "essential." Employers that must make this accommodation should clearly specify that any such transfer is temporary and specify the date when the employee will be expected to return to the original position.

As always, employers should evaluate each case carefully because the specific facts may lead to very different conclusions in different ADA cases. Attorneys remain useful thought partners for evaluating those facts and weighing the options in each situation.

For more information about ongoing developments related to COVID-19, visit Miller Nash Graham & Dunn's resource library.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.

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