CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: EEOC Issues Updated Guidance Regarding COVID-19 Employment Issues

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The Equal Employment Opportunity Commission (EEOC) has provided additional guidance on the intersection of the Americans with Disabilities Act (ADA) and the COVID-19 crisis. The EEOC will continue to update its on-line resources periodically, as the pandemic crisis continues to evolve. In addition, employers should continue to follow updated guidance from the Centers for Disease Control and Prevention (CDC) and state and local health departments. For guidance regarding specific questions relating to your company's workforce, consult your legal counsel.

You can access our previous publication on the March 2020 EEOC and CDC guidance on this topic by accessing this link.

Q&As Based on the EEOC's Updated Guidance

Question: Can employers ask all employees physically entering the workplace during the COVID-19 pandemic whether they have the virus or symptoms associated with the virus?

Answer: Yes. Employers also may ask employees who are physically entering the workplace if they have been tested for COVID-19 to determine whether the employees pose a health or safety threat to the workplace. In contrast, employees who are teleworking and do not pose a physical threat, should not generally be asked such questions.

Question: Can employers exclude an employee from the workplace if the employee refuses to answer questions related to their exposure to COVID-19?

Answer: Yes. Employers may exclude employees who refuse to answer questions about whether they have COVID-19, have been exposed to COVID-9, have been tested for COVID-19, or have symptoms associated with COVID-19. In addition, employers *can exclude* employees from the workplace if they refuse to have their temperatures taken. But, be sure to communicate to all employees that their medical information will be kept confidential in the workplace, and document their refusal to cooperate.

Question: Can employers single out employees for COVID-19 related questions?

Answer: Yes. If a particular employee exhibits symptoms associated with COVID-19, such as a persistent, hacking cough, it would be reasonable for an employer to ask about potential exposure to determine whether the employee poses as health or safety risk to the workplace. Take care to be diligent about documenting the symptoms that triggered the individual inquiry and ensure that the

symptoms are consistent with the latest guidance on evolving symptoms associated with COVID-19 from the CDC, public health authorities, reputable medical sources, and the EEOC's own examples. Updated symptoms beyond fever, cough, sore throat, shortness of breath, and chills now include a loss of smell or taste, and gastrointestinal problems, such as nausea, diarrhea, and vomiting.

Question: Can employers ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?

Answer: No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. Instead, ask whether an employee has had contact with *anyone* who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease.

Question: What information can an employer disclose about an employee who has symptoms of COVID-19 or has a positive diagnosis?

Answer: The ADA requires employers keep medical information confidential, even if it is not disability related. A supervisor, co-worker, or staffing agency, who learns about an employee's positive diagnosis, or COVID-19 symptoms, can and should disclose this information to the employer. But, employers are not permitted to disclose the name and medical condition of an affected employee, except on a very strict "need to know" basis. An employer should designate an authorized individual to receive this confidential information. This designee should interview the affected worker to confirm a diagnosis and obtain a list of employees with whom the affected employee had workplace contact. The employer should then notify employees of potential exposure to COVID-19, and take other actions consistent with guidance from the CDC and public health authorities.

Similarly, if an employer knows that an employee is teleworking because of COVID-19 symptoms or a diagnosis, the employer can communicate to the workforce, for business continuity purposes, that the employee is teleworking. The employer should not, however, disclose that the reason is COVID-19. The CDC also advises employers to maintain the confidentiality of people with confirmed COVID-19.

Question: Can employers store an employee's COVID-19 information in their existing medical file?

Answer: Yes. Employers do not need to create a separate file to store medical information related to COVID-19. But, employers should continue to store all medical information separate from personnel files. Employers are permitted to maintain a log of daily temperature checks, but must also keep this information confidential.

Question: How do employers who are working remotely and are receiving COVID-19 medical information about employees comply with the requirement of storing medical information in a separate file?

Answer: Employers who are working remotely should make every effort to safeguard medical information to the greatest extent possible until they can properly store it. Documentation must not be stored electronically where other people would be able to access it, and employee names should be coded or otherwise concealed to ensure confidentiality.

Question: Is COVID-19 a disability?

Answer: At this time, it is unclear whether COVID-19 is or could be a disability under the ADA.

Question: Do employers have to provide accommodations, such as leave or telework, to employees who say they are at higher risk of complications from COVID-19, but who do not have a disability?

Answer: No. Employers are not required to accommodate employees who are not disabled. However, if an employer verifies that an employee has a disability and determines that an accommodation may be required because the disability puts the individual at higher risk of complications, or exacerbates their current condition, than an accommodation that does not pose an undue hardship should be discussed as part of the interactive process.

Similarly, if an employee who is not disabled is asking to telework because they have a family member at home who is disabled and would be at high risk of complications, an employer is not required to accommodate the employee.

Question: Can employers require employees to physically return to work after the COVID-19 crisis has ended, even if they provided telework as an accommodation?

Answer: Yes. If an employer is permitting telework because of COVID-19 and chooses to excuse an employee from performing one or more essential functions, the employer can later deny an employee's request to continue telework as a reasonable accommodation after the crisis has ended. The ADA does not require an employer to eliminate an essential function as an accommodation for an individual with a disability. Even if an employer temporarily excused performance of one or more essential functions during the COVID-19 crisis to enable employees to telework, it does not mean that the employer has permanently changed a job's essential functions, or that telework is a feasible accommodation and does not pose an undue hardship.

Question: If a disabled employee had a telework request denied *prior* to the COVID-19 pandemic, but the employer subsequently permitted the employee to telework during the crisis, does the employer have to keep the telework arrangement for that employee post-crisis?

Answer: No. If the employer had previously denied the telework request because it posed an undue hardship or required the employer to eliminate an essential job function, the employee should return to the workplace. However, if the employee was able to perform all of their job functions remotely and doing so did not pose an undue hardship to the employer, a telework arrangement should be examined as part of the interactive process if the employee renews the telework request post-crisis. If there is an alternative reasonable accommodation that effectively addresses the disability-related limitation, the employer may choose the alternative accommodation.

Question: Do employers have to provide additional accommodations to disabled employees who were already receiving one prior to the crisis?

Answer: Disabled employees may be entitled to additional or altered accommodations, absent any undue hardship. Employers should be flexible and creative in finding low-cost solutions to accommodate employees in the workplace, such as designating one-way aisles, using plexi-glass as a barrier, or other accommodations that reduce the chances of exposure. Employers also may have to provide additional or changed accommodations to disabled employees who are teleworking. As

with all requests for accommodations, employers should discuss with the employee how the accommodation would assist in enabling them to keep working and explore alternative effective accommodations. Employers are certainly entitled to request medical documentation if needed, although obtaining updated medical information may be delayed due to the crisis.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

