CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: The Equal Employment Opportunity Commission (EEOC) Updates Testing Guidance to Prohibit Antibody Testing

JUNE 18, 2020

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In previous guidance, the EEOC permitted employers to administer a test to detect the presence of COVID-19 in their workforce prior to permitting entry into the workplace with the caveat that any employee testing had to be "job related and consistent with business necessity." Following the interim guidance of the Centers for Disease Control and Prevention ("CDC"), the EEOC announced on June 17, that permissible testing does not include antibody testing and violates the Americans with Disabilities Act's requirements.

As a reminder, the burden remains on employer administrators to ensure accurate and reliable tests, and employers must consider the impact of false-positives or false-negatives in testing. As with all medical information, employers must keep any test results strictly confidential and separate from personnel files. Employers are encouraged to check the guidance of the U.S. Food and Drug Administration (FDA) on safe and accurate testing.

The Q&A's below provide an analysis of current and prior EEOC's COVID-19 and ADA guidance:

Question: Can employers use antibody test results in deciding whether employees can return to work?

Answer: No. The CDC's interim guidance states that employers should not use antibody test results to make employment decisions. Antibody tests are considered a medical exam under the ADA and do not currently meet the ADA's "job related and consistent with business necessity" requirements for employee medical exams or inquiries. Although antibody testing is not permitted, employers can continue to administer a viral test to determine whether an individual has an active case of COVID-19.

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-19, 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. Employers should communicate to all employees that their medical information will be kept confidential and document any employee's refusal to cooperate.

Question: Can a request for an alternative screening method be a request for a reasonable accommodation?

Answer: Yes. If the request is due to a medical condition, then it is a request for a reasonable accommodation, and the employer should engage in the interactive process like it would for any other ADA request. Alternatively, an employee may seek an alternative method based on closely-held religious beliefs, or even pregnancy. For all of these requests, employers are encouraged to determine if an accommodation is required, and if the alternative method is easily provided, to make it available to the wider workforce.

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 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: Can employers exclude employees who pose a direct threat to self from the workplace without providing a reasonable accommodation?

Answer: No. Even if a *direct threat to self* is conclusively established, employers can only exclude affected workers if the significant risk of substantial harm cannot be mitigated or eliminated by a reasonable accommodation that does not pose an undue hardship. The *direct threat* requirement is a "high standard" that can only be met after an exhaustive individualized assessment based on "reasonable medical knowledge and/or the best available objective evidence." The assessment must be based on the employee's own disability, such as whether it is well-controlled, rather than the disability in general. The assessment also must include a thorough analysis of several factors, including: 1) the time-period of the risk; 2) the nature and severity of the potential harm to the employee; 3) the probability that the potential harm will occur; and 4) the immediacy of the potential harm.

Question: How can employers mitigate or eliminate a "direct threat to self" for an employee?

Answer: In addition to the potential accommodations discussed above, employers can provide additional or enhanced Personal Protective Equipment (PPE), such as gowns, masks, gloves, individual hand-sanitizer, or other precautions beyond what they are providing to other employees returning to work. The EEOC also suggests erecting "protective" barriers or increasing the space between the affected employee and others.

For all employees returning to work, disabled or not, employers should enforce strict infection control practices. These can include, taking temperatures, requiring employees to take their own temperatures, ensuring that employees return to work only if they are COVID-19 symptom free,

social distancing, handwashing, regularly disinfecting surfaces, requiring PPE, and limiting the number of employees in public spaces, like lunch and conference rooms, or temporarily closing all communal spaces.

Question: How can employers mitigate pandemic-related harassment towards Asian employees?

Answer: Employers should have a written policy that defines and clearly prohibits harassment, including harassment based on national origin and ethnicity. The policy should include confidential methods for employees who witness or experience harassment to promptly report it. The policy needs to be clear that policy violations will result in discipline, including termination of employment. The EEOC reminds employers that, with so many employees teleworking, harassment may occur through electronic communications (including e-mails, calls, Zoom, and other chat communications), and may come from contractors, customers, clients, or with patients and their family members at hospitals, nursing homes, assisted living facilities, and other healthcare providers. Employers may want to consider sending all employees, whether remote or on-site, a copy of their harassment policy and encourage them to immediately report any harassment.

Question: If an employer is aware that an employee has an underlying medical condition that would put them at risk of serious complications from COVID-19 if they return to work, but the employee has not requested a reasonable accommodation, is the employer obligated to act?

Answer: No. Under these circumstances, the ADA does not require employers to be proactive in taking any action, and cautions against taking adverse actions based on their knowledge of an employee's pre-existing medical condition. In addition, employers trying to be proactive in protecting their workers from COVID-19 complications could expose themselves to "perceived as disabled" claims by affected workers. Similarly, involuntarily excluding pregnant workers from the workplace because of their temporary medical condition is tantamount to sex discrimination.

Employers also should avoid treating women who have school-aged children and request the opportunity to telework, or other flexible work options, differently than men who ask for the same accommodations to their work schedules. Either sex can be the primary caretaker of children in their household. Employers are free to provide flexibility to their workforce if it is applied consistently and is not given more favorably based on a protected characteristic, such as gender or race.

Question: Do employers have to permit pregnant workers who are not disabled to telework?

Answer: No. But, pregnant employees who do not have a pregnancy-related disability are entitled to the same job modifications (including teleworking, modified schedules or assignments, and leave) provided to other similarly situated employees. Pregnant workers who have a pregnancy related medical condition that is impacting their ability to perform their work may be entitled to a reasonable accommodation and should have their request considered just like other disabled employees who make similar requests.

Question: Are employees who are 65 or older entitled to special accommodations due to their age?

Answer: No. However, older workers who have a medical condition that may qualify as a disability can request a reasonable accommodation based on their medical condition, rather than their age, and employers should engage in the interactive process like they would for any other similarly situated worker. In addition, the EEOC guidance specifically states that employers are not prohibited

from providing, “flexibility to workers age 65 and older…even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.”

Question: How can employees who have an underlying medical condition that places them at higher risk for severe illness from COVID-19 communicate a need for a reasonable accommodation?

Answer: Employees or their doctors can communicate, “in conversation or in writing,” that they need a change or reasonable accommodation related to an underlying medical condition. Employees are not required to use the magic words “reasonable accommodation,” or even reference the ADA, to trigger the interactive process. Nevertheless, employers can ask questions and request medical documentation to determine if the employee has a disability that the employer could accommodate.

Absent an undue hardship, an accommodation could include the elimination or substitution of a marginal job function, a temporary modification of a work schedule, leave, telework, reassignment to a different job that permits telework, and reassignment to a different location that may be safer for the employee. Employers should ensure that they are following consistent practices in permitting all similarly-situated employees to telework, and not denying the same flexibility to workers who ask to telework as a reasonable accommodation.

Currently, the CDC has determined that people 65 years and older and people with certain underlying medical conditions, such as asthma, serious heart conditions, diabetes, obesity, liver and chronic kidney disease, and those who are immunocompromised, are at a higher risk for severe illness from COVID-19.

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.

Questions: 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, as discussed above, if an employer verifies that the employee has an underlying medical condition that puts the individual at higher risk of complications, or exacerbates their current condition, an accommodation that does not pose an undue hardship should be discussed as part of the interactive process.

Similarly, if a non-disabled employee 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. Employers who choose to nevertheless provide flexibility to non-disabled workers must provide the same treatment for all workers on an equal basis.

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.

As noted above, employers should ensure that they are following consistent practices in permitting all similarly-situated employees to telework and not denying the same flexibility to workers who ask to telework as a reasonable 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.

Question: Can employers ask employees if they will need future accommodations when they return to the workplace?

Answer: Yes. In assessing whether employees will need accommodations in order to return to work post a COVID-9 absence or workplace closure, employers can inquire now about any future accommodations and commence the "interactive process." The EEOC suggests that employers focus the discussion on whether the impairment is a disability and the reasons that an accommodation is needed.

Question: Is the COVID-19 pandemic relevant in assessing whether a requested accommodation poses an undue hardship?

Answer: Yes. An undue hardship is a *significant difficulty or expense*. Employers whose overall budgets, income streams, discretionary spending, and resources have been adversely impacted by the crisis

may find that an accommodation that previously would not have posed an undue hardship now poses a significant expense. Employers should weigh the cost of an accommodation against current financial constraints, such as increased operating expenses due to new requirements for re-opening or restrictions on operations, and consider creative solutions, including no-cost or very low-cost accommodations.

Employers can also consider whether current circumstances create *significant difficulty* in acquiring or providing certain accommodations, considering the particular job and workplace. The EEOC has cited the following examples of significant difficulty in providing accommodations caused by the pandemic: 1) conducting a needs assessment; 2) acquiring certain items, and delivering them to employees who may be teleworking; 3) providing employees with temporary assignments; 4) removing marginal functions; and 5) hiring temporary workers for specialized positions.

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), state and local health departments, and the FDA for testing information. For guidance relating to your company's workforce specific questions, consult your legal counsel.

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.