BCLP. Client Intelligent

BCLPatWork.com

U.S. COVID-19: RETURNING HIGH RISK EMPLOYEES TO THE WORKPLACE: BEST INTENTIONS COULD BE BAD NEWS FOR EMPLOYERS

May 12, 2020

Employers preparing to reopen their places of business have many logistical considerations, including compliance with state and local health orders relating to face coverings, temperature and wellness screenings, and other measures designed to help keep employees healthy and safe during the COVID-19 pandemic. Last week, the U.S. Equal Employment Opportunity Commission ("EEOC") updated its own "Return to Work" guidance by adding Q&A guidance on how employers should handle a "high risk" employee, i.e., an employee with an existing and known disability that may make the employee more susceptible to severe illness from COVID-19. The guidance is a helpful reminder to employers that even actions taken with the best of intentions may not comply with legal obligations and restrictions. Below are three important questions for employers to consider in light of the EEOC's updated guidance.

HOW DOES THE INTERACTIVE PROCESS APPLY TO COVID-RELATED REQUESTS FOR ACCOMMODATION?

Under the Americans with Disabilities Act (the "ADA"), employers are obligated to consider requests from a disabled employee for reasonable accommodations to the employee's work environment that would permit him or her to perform the essential functions of the job. While the EEOC's earlier guidance addressed the nuts and bolts of the "interactive process" during the pandemic generally (including the timeframe in which employers should respond to requests for accommodation and what qualifies as an "undue hardship" during the pandemic), many employers were left questioning how the outbreak of COVID-19 would impact their obligations if an employee requests an accommodation because he or she has an underlying medical condition that may put him or her at higher risk for severe illness from COVID-19. The EEOC has now clarified that, for the most part, it is business as usual. An employee seeking an accommodation – regardless of the type of disability for which the accommodation is sought – still must inform the employer that he or she needs a change for a reason related to a medical condition. After receiving the request, the employer must engage in the interactive process by asking questions and/or seeking medical documentation to

help determine whether the individual has a disability and whether there is a reasonable accommodation, barring undue hardship, that can be provided.

MAY AN EMPLOYER BAN AN EMPLOYEE FROM THE WORKPLACE FOR THEIR OWN PROTECTION BECAUSE THE EMPLOYEE HAS AN UNDERLYING HEALTH CONDITION?

The ADA's interactive process requires the participation of both the employer and the employee, but it is usually the employee who activates the process by making a request for accommodation. But what can an employer do if it is already aware that an employee has an underlying medical condition which, according to guidance from the Centers for Disease Control and Prevention ("CDC"), might place the employee at "higher risk for severe illness" if the employee contracts COVID-19, but the employee has not requested an accommodation **related to COVID-19**? Even though an employer is not "mandated" to take any action if the employee does not request an accommodation and instead seeks to return to the workplace along with all of his or her co-workers, can the employer, out of concern for the employee's health, affirmatively bar the employee from returning to work?

Generally, the answer is "No." When the EEOC initially released guidance on this topic, many readers misinterpreted the guidance to **allow** concerned employers to prohibit employees with underlying medical conditions to return to work. The EEOC therefore retracted the original guidance, and replaced it with the current guidance which clarifies: "If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA **does not allow** the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at 'higher risk for severe illness' if he gets COVID-19." (emphasis added).

Instead, an employer can only prohibit such an employee from returning to work if the employer can show both that the employee's disability poses a "direct threat" to the employee's health, *and* that this direct threat cannot be eliminated or reduced to an acceptable level by a reasonable accommodation.

Under the ADA, an employee's disability or health condition poses a direct threat if it poses a "significant risk of substantial harm" to his or her own health. *See* 29 C.F.R. 1630.2(r).As the EEOC notes in its revised guidance, this is a fact-specific, difficult standard for employers to meet. An employer **cannot** decide that a condition poses a direct threat to the employee based solely on the condition being on the CDC's list. Instead, an employer must make an individualized assessment based on a reasonable medical judgment about **this employee's** disability – not the disability generally – using the most current medical knowledge. According to the EEOC, in conducting this assessment, an employer should consider:

- the duration of the risk (i.e., whether the condition or disability is permanent or temporary);

- the nature and severity of the potential harm to the employee or others in the workplace;
- the likelihood that the potential harm will occur;
- the imminence of the potential harm;
- the severity of the COVID-19 pandemic in a particular area (i.e., a condition may pose a direct threat in a COVID "hot spot," but not in a location where community spread is minimal);
- the employee's own health (i.e., whether the employee's disability is well-controlled);
- the employee's particular job duties, and whether those job duties create a greater likelihood that the employee will be exposed to COVID-19 at the worksite; and
- any measures that an employer may be taking in general to protect all workers, such as mandatory social distancing.

Even if an employer determines that an employee's disability poses a direct threat to his or her own health, however, the employer still **cannot** exclude the employee from the workplace unless there is no way to provide a reasonable accommodation, without undue hardship, that would permit the employee to perform the essential functions of the job while reducing or eliminating the risk to that employee. In other words, once an employer concludes that the employee's underlying condition is a "direct threat" to the employee in light of COVID-19, the employer must next consider how, if at all, the employer can make the workplace safe for the employee to return while still permitting performance of the employee's essential functions.

If there are no accommodations that permit this, then an employer must consider accommodations such as telework, leave, or even reassignment to an open position that would permit telework or work in a safer work environment. The EEOC's guidance emphasizes that an employer may **only** bar an employee from the workplace if, after going through all of these steps, the employer still reasonably concludes that the employee poses a significant risk of substantial harm to himself or herself that cannot be reduced to an acceptable level or eliminated by any reasonable accommodation.

WHAT ARE REASONABLE ACCOMMODATIONS THAT MAY REDUCE AN EMPLOYEE'S "DIRECT THREAT" TO HIMSELF OR HERSELF?

The EEOC proposed a lengthy list of potential accommodations that an employer may consider to eliminate or mitigate the risks for an employee with an underlying health condition which makes him or her particularly vulnerable to COVID-19. Potential accommodations include:

- Providing additional or enhanced protective equipment, such as gowns, masks, gloves, or other gear beyond what the employer may generally provide to other employees;[1]

- Erecting physical barrier(s) that provide separation between an employee with a disability and co-workers or members of the public;
- Providing an employee with a disability additional physical space between the employee and co-workers (e.g., a temporary assignment to an office, or work station removed from other employees);
- Eliminating particular "marginal" job functions that increase risks to an employee with a disability;[2]
- Temporary modification of work schedules (e.g., a change in shift to decrease contact with coworkers and/or members of the public when on duty or commuting); or
- Moving the location of where an employee performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

Identifying an effective accommodation depends on many factors, and the list above is not exhaustive. Employers should work closely with an impacted employee, engage in the interactive process in good faith, and as the EEOC recommends, "be creative and flexible" in these considerations. Employers with particularly challenging disability and accommodation issues should consult with legal counsel.

The COVID-19 pandemic and its impact on the workplace is rapidly evolving. Employers should regularly consult with legal counsel, the EEOC's guidance, the CDC's website, and state and local health departments to ensure they have the most up-to-date information and guidance.

---

[1] As a reminder, if an employer requires employees to wear personal protective equipment ("PPE"), the employer must comply with applicable regulations from the Occupational Health and Safety Administration as to such PPE.

[2] The EEOC Guidance makes clear that eliminating **essential** job functions for a particular position would not be a reasonable accommodation.

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

Patrick DePoy

Chicago

patrick.depoy@bclplaw.com
+1 312 602 5040

Lily J. Kurland

Washington

lily.kurland@bclplaw.com
+1 202 508 6106
