BCLP. Client Intelligent

RetailLawBCLP

US COVID-19: RISKY BUSINESS – NAVIGATING WORKPLACE ISSUES INVOLVING HIGH RISK EMPLOYEES

Aug 06, 2020

As states across the country see spikes in COVID-19 cases, employers continue to wrestle with how to handle "high risk" employees, i.e., employees who are at an increased risk for severe illness from COVID-19. Guidance from a variety of agencies on the topic, including the Equal Employment Opportunity Commission ("EEOC"), the Centers for Disease Control and Prevention ("CDC"), and the Occupational Safety and Health Administration ("OSHA"), has been published in waves, leaving many to wonder how this guidance may or may not continue to be relevant.

Below are six important areas of the law to consider when navigating this evolving landscape. As a reminder, each individual employee's circumstances are unique, so while employers should have a consistent procedure in place for triaging high risk employees' presence in the workplace, employers should also be prepared to develop individualized solutions based on an employee's specific needs.

1. The Americans with Disabilities Act ("ADA"): Employees with certain underlying health conditions may qualify as "high risk" and thus be entitled to a reasonable accommodation under the ADA. While accommodations may include a leave of absence or telework arrangement, other possible accommodations include permitting the employee more frequent hygiene breaks, excusing the employee from attending group meetings/gatherings, and reconfiguring the employee's workspace. It is important that employers not act unilaterally with respect to implementing accommodations. Instead, the interactive dialogue process should be used early on to identify what, if any, accommodations an employee may need and/or receive. As a reminder, employers' ADA accommodation obligations do not extend to situations in which an employee's family member (rather than the employee him or herself) is high risk.

2. The Age Discrimination in Employment Act ("ADEA"): Regardless of any underlying medical condition, older employees may also qualify as "high risk." Notably, while the CDC has identified "older" employees as those aged 65 and older, the World Health Organization and some experts have identified those aged 60 and older as being "high risk." Regardless of which age cutoff an employer uses, unlike obligations under the ADA, employers are not required to provide older workers with an accommodation. However, the EEOC has made clear that employers are *permitted* to provide flexibility to older high risk employees, even if such flexibility results in

younger workers ages 40-64 being treated less favorably based on age in comparison. As with accommodations under the ADA, employers should not act unilaterally in providing this flexibility; in other words, employers should not involuntarily exclude older workers from the workplace on the grounds that they are at high risk of serious illness from COVID-19. Instead, older workers should be permitted to voluntarily participate in any flexibility offered.

3. The Family and Medical Leave Act ("FMLA"): If an employee is incapacitated as a result of a serious health condition, which may include complications from COVID-19, he or she may be eligible for FMLA leave. However, if an employee is not incapacitated, and instead requests leave in order to avoid potential exposure to COVID-19, he or she is likely not entitled to FMLA leave.

4. The Families First Coronavirus Response Act ("FFCRA"): The FFCRA provides eligible employees with paid and unpaid leave for certain COVID-19 related absences. With respect to high risk individuals, if an employee is advised by his or her health care provider to self-quarantine due to being high risk or if an employee must care for someone else who has been advised to self-quarantine due to being high risk, the employee may be entitled to up to 80 hours of paid sick leave under the FFCRA.

5. Occupational Safety and Health Act / National Labor Relations Act: Both of these laws provide anti-retaliation protections for employees who raise certain concerns about their working conditions. As such, it is important to remember that a high risk employee who expresses concern about returning to work, safety measures, and/or other COVID-19 related matters, may be engaging in protected activity and cannot be retaliated against for doing so.

6. State and Local Laws: In addition to state and local anti-discrimination laws, employers should also familiarize themselves with applicable state and local leave laws (including paid sick leave laws) and reopening orders. These laws or orders may require employers to provide high risk employees with certain amounts of leave or other accommodations, as well as to develop and distribute COVID-19 response plans, which may address risks for high risk employees. Especially with respect to state and local reopening orders, this guidance is continuing to evolve on an almost daily basis. As such, continuous monitoring of these orders should be incorporated into employers' reopening plans.

Regardless of legal obligations, the best way to manage any employees' – and in particular, high risk employees' – return to work is to maintain clear and open lines of communication. Employers should be prepared to explain to employees the steps they have taken to reduce the risk of COVID-19 exposure in the workplace and educate employees on key COVID-19 related matters, including CDC/OSHA guidance, COVID-19 symptoms, and relevant employer policies.

MEET THE TEAM

Lily J. Kurland

Washington

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

Christy E. Phanthavong

Chicago

christy.phanthavong@bclplaw.com
+1 312 602 5185
