

EEOC Guidance on Managing COVID-19 in the Workplace

(as of May 13, 2020)

- On March 27, 2020, the EEOC released a [webinar](#) addressing frequently asked employer questions regarding federal antidiscrimination laws
- Key takeaways from the Webinar are summarized herein

EEOC Guidance

- *All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus*
- Before relying on the information in this PowerPoint, please review EEOC.gov for any updates
 - Per the EEOC, “[e]mployers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.”

Permissible Employer Conduct in COVID-19 Workplace

- Balancing health/safety concerns with privacy rights
- Employers may ask all employees who physically report to the workplace if they:
 - Have COVID-19 or have tested positive for COVID-19;
 - Are experiencing symptoms associated with COVID-19; or
 - Permissible to take employee's temperatures upon entry
 - EEOC suggests using CDC's list of symptoms typically associated with COVID-19 (e.g., fever, chills, cough, shortness of breath, loss of taste or smell, sore throat, GI issues, etc.), which is updated regularly
 - Have been in contact with someone who has COVID-19 symptoms.
- Employers can send home employees with COVID-19 symptoms

Permissible Employer Conduct in COVID-19 Workplace

- May (and should) ask employees prior to return to work date whether they need a reasonable accommodation based upon a medical condition when they return
- However, cannot *require* employees to disclose underlying conditions or new condition occurring as a result of COVID-19, including mental health conditions exacerbated by COVID-19

If someone tests positive or has associated symptoms...

- Manager/supervisors may disclose to an employer official so employer can take action consistent with CDC guidelines
- As a general rule, employers should make “every effort” to keep employee’s identity confidential and to limit the number of people who know the employee’s identity
- Employers may require medical clearance return to work note but should be flexible with type of documentation accepted (e.g., emails, insurance/pharmacy records, etc.)

Teleworking Guidelines from the EEOC

- Employers who implement teleworking to slow the spread of COVID-19 cannot ask employees who are working remotely whether they have COVID-19, have been tested, or have related symptoms.
- Employers are not required to automatically grant teleworking as a reasonable accommodation to employees with a disability who wish to continue this arrangement after the crisis passes, particularly where the temporary teleworking arrangement excused an employee from performing all of the essential functions of the job.
- After crisis passes, employers should use information learned during teleworking period for new requests for reasonable accommodations (related or unrelated).

Remote Work Requests

- Employers should not select certain protected groups (*i.e.*, older population, pregnant women, disabled, etc.) to stay home.
- On the other hand, employers are not necessarily required to grant requests to telework simply because employee is elderly, pregnant, or has a disability.
- However, employees who are at greater risk of becoming severely ill if virus is contracted may be granted a reasonable accommodation that includes teleworking.
 - Engage in the interactive process

COVID-19-Related Accommodation Requests

- Per EEOC as of 3/27/20, “unclear” at this time whether having COVID-19 itself is considered a “disability” under the ADA.
- Employees with complications from COVID-19 or who have a disability & may be at greater risk of severe illness if they contract COVID-19 (e.g., chronic lung disease, asthma, serious heart condition, compromised immune systems, severe obesity, chronic kidney or liver disease, diabetes, etc.) may request a reasonable accommodation, which may include a leave of absence or remote work.

COVID-19-Related Accommodation Requests

- Where an employee has either: i) tested positive or ii) has an underlying condition that puts him/her at greater risk of serious illness, HR should treat as reasonable accommodation request & engage in interactive process with employee:
 - Per EEOC, interactive process should be as “flexible and creative” as possible
 - May request medical documentation to confirm employee has a disability (if disability isn’t obvious or already known) and the need for the accommodation
 - Should grant *temporary* accommodations while waiting for medical or other information from the employee

COVID-19-Related Accommodation Requests

- Employer may ask for medical documentation relating to:
 - How the disability creates workplace limitations;
 - How accommodation could effectively address the issue;
 - Whether another form of accommodation could effectively address the issue;
 - How the proposed accommodation will enable the employee to continue performing the essential functions of the position.

COVID-19-Related Accommodation Requests

- Examples of reasonable accommodations to consider for “high risk” employees include :
 - Telework/remote work;
 - Tasks which allow employees to be 6 feet away from others;
 - Sanitation and hygiene protocols for all employees;
 - One-way aisles;
 - Plexiglass barriers;
 - Temporary transfers;
 - Schedule modifications;
 - Restructured job duties.

Accommodations to Care for Family Member

- Employers are not obligated under the ADA to grant reasonable accommodations (i.e., teleworking) to employees who have a family member at greater risk of severe illness due to age, pregnancy, or a disability provided the employer implements its own policies equally.
- While not legally required under the ADA, employers are nonetheless encouraged to be flexible and should engage in interactive process to determine whether any accommodation can be made.
- Be aware that *leave* requests to care for family members may, however, be required under FMLA and/or NY PFL
 - (see slides 14 & 15).

Leave to Care for Child/Family Member

- Not required under ADA to provide leave for employees who take off from work to care for healthy children, or to care for dependents who have been dismissed from school or childcare
 - Note - the paid sick leave and expanded family and medical leave provisions of federal Families First Coronavirus Response Act do not apply to the RF

COVID-19 & FMLA

- Whether family & medical leave is appropriate for employee depends on whether employee or family member's complications from COVID-19 or underlying medical condition qualify as a "serious injury or illness" under FMLA
 - Should send FMLA paperwork upon request
 - Follow usual process in terms of designation, rights & responsibilities notice, grant, denial, etc.
- Leave taken by an employee with no underlying medical condition for the purpose of avoiding exposure is not protected under the FMLA

NY Paid Leave for COVID-19

- NY Paid Family Leave can be used to care for a family member who has contracted COVID-19, which qualifies as a serious health condition.
 - *Compare* – EEOC's position that it is "unclear" whether COVID itself is a "disability"
- Paid Family Leave may also be used to care for a family member with a "serious health condition"
 - May apply to situations where employee requests leave to care for high-risk family member who does not have COVID but is more susceptible due to underlying health conditions

Age-Based Requests

- Do not send FMLA or ADA accommodation paperwork unless employee says he/she has an underlying health concern

Fear-Based Requests

- No requirement to provide leave or other accommodations for employees who are generally fearful to come to work
 - Request medical documentation only if individual discloses or suggests he/she has underlying medical condition or mental health issues (*e.g.*, anxiety)
- Speak to employee to understand concerns, provide opportunity to ask questions, communicate steps organization is taking to mitigate risks, etc.

Best Practices to Manage Remote Workforce

- Must set clear guidelines
 - Temporary accommodations to be reassessed
 - Set date for reassessment
 - Set clear expectations in terms of:
 - Job responsibilities/essential functions
 - Hours of work – particularly important with non-exempt employees; timesheets critical
 - Work product
 - Communication
 - If employee's status changes to part-time, make formal change, reissue WTPA notices, etc.

Disclaimers

- Accommodation and leave requests should be analyzed on case-by-case basis
- Campuses should be following SUNY guidance on return to work rules
- Guidance from state and federal agencies are changing constantly; always check for updated guidance before relying on this information (current as of 5/13/20)